Sacred and Profane: How Looters, Pothunters, and the Illicit Artifact Market Trammel Native American Cultural Identity

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Sacred and Profane: How Looters, Pothunters, and the Illicit Artifact Market Trammel Native American Cultural Identity
I. Introduction

Ray Winnie was a *hataali* singer,¹ a spiritual leader of the Navajo (Diné) in Arizona.² As a part of hallowed Navajo ceremonies, many dating back centuries, Mr. Winnie adorned himself in Yei B’Chei.³ Though Yei B’Chei appear to non-Navajos to be merely beautiful, decorative masks, they represent much more to the Navajo people. Yei B’Chei are sacred symbols of the Navajo culture and religion; they are living and breathing gods.⁴ During his twenty-five year tenure as a *hataali*, Mr. Winnie accumulated and curated several Yei B’Chei as Navajo *hataali* had since time immemorial; they were passed on to him from an elder singer so that the solemn chants may continue.⁵ Unfortunately, when Mr. Winnie died in 1991, “he left no provisions for the disposition of his Yei B’Chei, and no family or clan member requested them.”⁶

Richard Corrow, an Arizona art and antiquities dealer, approached Fannie Winnie, the eighty-one-year-old widow of Mr. Winnie, with a proposal to purchase the Yei B’Chei and entrust them to a young *hataali* in Utah to keep them sacred.⁷ Mrs. Winnie reluctantly agreed and sold the items to Corrow. But Corrow never intended to keep the Yei B’Chei sacred or in the hands of the Navajo; he instead attempted to sell them to an

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¹ While the Navajo have no formal priesthood, the *hataali* conduct specialized religious ceremonies and chants. 10 HANDBOOK OF NORTH AMERICAN INDIANS 537 (Alfonso Ortiz, ed., 1983) [hereinafter HANDBOOK OF NORTH AMERICAN INDIANS].
⁴ See generally HANDBOOK OF NORTH AMERICAN INDIANS, supra note 1, at 546.
⁵ Corrow, 110 F.3d at 798.
⁶ Id.
⁷ Id.
undercover National Park Service ranger for $70,000. Corrow was arrested and subsequently convicted in federal court under the Native American Graves Protection and Repatriation Act (NAGPRA). To Corrow, Mr. Winnie’s Yei B’Chei were works of art which Corrow could sell and make a substantial profit while the Navajo held them as inalienable communal property, infused with their own breath and soul.

The Yei B’Chei sought by Corrow represent a category of objects termed cultural property by anthropologists. However, the phrase cultural property is admittedly difficult to define. The combination of the two words cultural and property creates a term that is “beyond the reach of ordinary notions of ownership, theft, and restitution.” The United States is unique among nations in regards to its cultural property in that the majority of such property is privately owned and that the federal government imposes no restrictions on the export of American cultural items. To one, an object that is cultural property may be merely a trinket, antiquity, or work of art to display and sell while people like the Navajo, view the same object as a sacred item central to and owned by the tribe as a whole.

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8 Id. at 799. Ranger James Tanner posed as a wealthy Chicago surgeon interested in Native American art and artifacts. Id.
11 ETHICS, supra note 10, at 63-64 (stating that “[i]f you are caught with property that does not belong to you, then you are a thief. If you are caught with cultural property . . . no-one is quite sure what you are”) (emphasis in original).
12 ETHICS, supra note 10, at 117-18. The author illustrates that “no laws would prevent Mount Vernon from becoming an amusement park in the middle of Tokyo.” Id. at 118. For a historical overview of the American attitude toward Native American cultural property, see generally Suzianne D. Painter-Thorne, Comment, Contested Objects, Contested Meanings: Native American Grave Protection Laws and the Interpretation of Culture, 35 U.C. DAVIS L. REV. 1261, 1265-72 (2002).
The market for Native American items is extensive, and often times illicit. Native Americans watch their sacred cultural property, objects that are seen as living and breathing entities, looted from archaeological sites, stolen from reservations, and illicitly purchased. In response, the federal government and some state legislatures enacted laws aimed at protecting archaeological sites, unmarked human burials, and the cultural property of Native Americans. Despite numerous state and federal laws, however, the black market for Native American artifacts and cultural property continues to thrive.

The first section of this paper delineates the structure and coverage of the Archaeological Resources Protection Act (ARPA). The second section describes the Native American Graves Protection and Repatriation Act (NAGPRA) and how the Act affects individuals. The third section explores different statutes that individual states have enacted to expand scope of the protection of federal laws regarding cultural property to state-owned public lands and even on to private property. The paper concludes with recommendations for the individual states to consider in an effort to better protect cultural property from looters and from the illicit artifact market.

II. The Archaeological Resources Protection Act (ARPA)

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13 The author acknowledges that “Native American,” “American Indian,” and “Indian” are all terms that refer to the descendants of the indigenous inhabitants of the Americas. While the members of this group prefer the term “Native American,” the statutes and cases in this paper use both “Native American” and “Indian,” and the author will do likewise.

14 See generally Nightline: Thieves of Time, supra note 3 (noting that “[t]he conservative estimate has about 100,000 Indian artifacts being traded on the black market here and oversees. . . . [M]aterial . . . can sell for a few thousand dollars to several hundred thousand dollars”). See also Richard Lacayo, A Place to Bring the Tribe: The Guiding Vision at a Major New Museum Is Entirely Native American, TIME, Sept. 20, 2004, at 68 (describing a collector’s “voracious” habits for purchasing Native American artifacts, 2,000 of which were subsequently deemed sacred and “improperly seized”).

15 ETHICS, supra note 10, at 257.

16 ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS, 45 (2000) (noting that the black market persists because non-Indians fail to recognize Native American archaeological sites, burials, and cultural property as sacred).


A. Structure and Coverage

Congress responded to the wholesale looting of Native American cultural property with the 1979 Archaeological Resources Protection Act (ARPA).\(^\text{19}\)

The purpose of [the] Act is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between government authorities, the professional archaeological community, and private individuals having collections of archaeological resources. . . .\(^\text{20}\)

ARPA “prohibits the excavation or removal of archaeological resources from federal lands or ‘Indian lands’ unless done in accordance with a permit.”\(^\text{21}\) Further, ARPA forbids any interstate or international trafficking in archaeological resources obtained in violation of itself or any federal, state, or local law.\(^\text{22}\) Individuals who violate the criminal prohibitions of ARPA face a penalty of up to a $10,000 fine or imprisonment for less than one year or both for the first violation and, for subsequent violations, up to a $100,000 fine or imprisonment for less than five years or both.\(^\text{23}\) In addition, Congress allows the federal land manager to levy civil penalties on individuals who willfully or negligently violate any regulation or permit issued pursuant to ARPA.\(^\text{24}\)

ARPA extends protection to items the Act terms archaeological resources. ARPA defines archaeological resources as “any material remains of past human life or activities which are of archaeological interest” provided that the archaeological resource is at least

\(^{19}\) 16 U.S.C. § 470aa (2010) (recognizing that “existing Federal laws do not provide adequate protection to prevent the loss and destruction of . . . archaeological resources and sites resulting from uncontrolled excavations and pillage”).


\(^{22}\) 16 U.S.C. §§ 470ee(b)-(c) (2010).


100 years old.\textsuperscript{25} Material remains include any “physical evidence of human habitation, occupation, use, or activity”\textsuperscript{26} from tools and other artifacts to art and petroglyphs to the location of the site itself. Such material remains are of archaeological interest if they provide “scientific or humanistic understanding of past human behavior [and] cultural adaptation.”\textsuperscript{27} ARPA protection also envelops marked and unmarked human burials and human remains.\textsuperscript{28}

ARPA provisions are limited in geographical reach to public lands and Indian lands. Public land includes any land “owned and administered by the United States” or lands to which the United States holds fee title.\textsuperscript{29} National monuments, national forests, national parks, national wildlife refuges, and Bureau of Land Management land fall under the definition of public land.\textsuperscript{30} Indian land refers to lands owned either by Indian tribes or by individual Indians so long as the federal government either holds the land in trust or has imposed restrictions against alienation upon the land.\textsuperscript{31}

B. Site Protection

Thus, ARPA seeks to protect archaeological resources vis-à-vis a two-pronged approach, both of which invoke the criminal sanctions. The first prong protects archaeological sites from looting, defacement, damage, and unauthorized excavations.\textsuperscript{32} Any person desiring to conduct an archaeological excavation on public or Indian land

\textsuperscript{26} 43 C.F.R. § 7.3(a)(2) (2010).
\textsuperscript{27} 43 C.F.R. § 7.3(a)(1) (2010).
\textsuperscript{28} Handbook of Federal Indian Law, supra note 21, at 1248; 43 C.F.R. § 7.3(3) (2010).
\textsuperscript{29} 16 U.S.C. § 470bb(3) (2010); 43 C.F.R. § 7.3(d) (2010).
\textsuperscript{30} Id.
\textsuperscript{31} 16. U.S.C. § 470bb(4) (2010); 43 C.F.R. § 7.3(d)(3) (2010) (exempting “subsurface interests not owned or controlled by an Indian tribe or Indian individual” from coverage).
must apply for a permit with the federal land manager. The federal land manager considers whether the applicant is sufficiently qualified to engage in the excavation, whether the activity is “undertaken for the purpose of furthering archaeological knowledge in the public interest,” and whether the excavation activity is “inconsistent with any management plan applicable to the public lands concerned.” Further, ARPA stipulates that any archaeological resources excavated or removed pursuant to a permit from the federal land manager remains the property of the United States.

Interestingly, ARPA provides an exemption for Indian tribes and individual Indians who excavate archaeological resources on their own Indian lands so long as the excavation complies with tribal law or regulations. In addition, individuals working under the direction of the federal land manager enjoy an exemption from ARPA’s permit requirement for the unintentional excavation of archaeological resources. This exemption protects unwary people performing activities such as construction, land leveling, mining, or dam building on public or Indian lands.

When prosecuting an individual for a violation of ARPA’s site protection prong, the government need not prove that the individual actually knew he was on public or Indian land when he excavated or removed archaeological resources from a site. The Court of Appeals for the Tenth Circuit recognized that the public land element of ARPA

33 Id.
38 See, e.g., United States v. Quarrell, 310 F.3d 664 (10th Cir. 2002). James and Michael Quarrell were apprehended by Forest Service agents while they were in the act of vandalizing and looting a Mimbres-Mogollon pueblo site in New Mexico’s Gila National Forest. Id. at 668-69. See also Kent Black, The Case of the Purloined Pots: In the Deserts of the Southwest, Pothunters are Stealing a Priceless Heritage of Ancient Native American Art, SMITHSONIAN, Sept. 1, 2001, at 34 (describing the Quarrells’ crime, arrest, and trial).
is merely a jurisdictional element and that knowledge does not “extend to the ‘located on public lands or Indian lands’ element of the statute.”  

The court found that “extending the mens rea requirement to the ‘located on public lands’ element would frustrate the purpose of the Act.” However, the court did acknowledge that the Quarrells could have injected as an affirmative defense at trial that they had a good faith belief that they were on private, rather than public, land.

Although the government need not prove that the defendant was on public land, the Court of Appeals for the Ninth Circuit recognizes that, in an ARPA prosecution, the government must prove a mens rea element with respect to whether the defendant knew that he was removing an archaeological resource. In *Lynch*, the defendant challenged the trial court’s holding that the federal indictment “did not require proof that the defendant knew that a human skull he picked up and took home was an ‘archaeological resource.’” The court agreed with the defendant and held that “[a] prosecution for knowingly violating a statute enacted to criminalize removal of archaeological resources

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39 *Id.* at 674. *C.f.* United States v. Feola, 420 U.S. 671 (1975) (sustaining a conviction for assaulting a federal officer and holding that the government need not prove whether the defendants knew the men they assaulted were federal agents); United States v. Speir, 564 F.2d 934 (10th Cir. 1977) (sustaining a conviction for theft of federal property and holding that the government need not prove whether the defendants knew that Christmas trees stolen from a national forest were federal government property).

40 *Id.* at 671. The court reasoned that a knowledge element based on ownership of the site would require the government to expressly identify archaeological sites. The court acknowledged that identifying important sites on federal land with warning signs would “draw the attention of potential looters.” *Id.* Further, Congress permits the federal land manager to prohibit the disclosure of the location of important archaeological sites on public lands. 16 U.S.C. § 470hh(a)(2) (2010).

41 *Id.* at 675. The court noted that the Quarrells failed to offer such a defense at trial. *But see* United States v. Smyer, 596 F.2d 939 (10th Cir. 1979) (holding that, in an Antiquities Act prosecution, the trial court correctly allowed the defendants to assert an affirmative defense based on their belief that they were on private land).

42 *See* United States v. Lynch, 233 F.3d 1139 (9th Cir. 2000).

43 *Id.* at 1140. Defendant Ian Lynch discovered a human skull while he was deer hunting on an inhabited Alaskan island. Lynch had no reason to know that the skull was located on a burial ground or that the skull was ancient. *Id.* In fact, the antiquity of the skull was not determined until much later after a lengthy investigation by the United States Forest Service when a fragment of the skull was radiocarbon dated. *Id.*
must follow at least minimal traditional mens rea principles in order to give meaning to ‘knowingly.’”44

C. Prohibition Against Trafficking

The second prong of ARPA prohibits individuals from trafficking in archaeological resources obtained in violation of any federal, state, or local law.45 Trafficking concerns to the sale, purchase, exchange, transportation, or reception of archaeological resources.46 The ARPA trafficking prohibition applies to any intrastate, interstate, and foreign commerce.47

A violation of ARPA itself or of any federal law concerning archaeological resources triggers the trafficking prohibition. Any artifact obtained in violation of ARPA’s site protection prong that enters the stream of commerce invokes the criminal sanctions of ARPA’s trafficking prong. Other federal laws pertaining to archaeological resources, upon violation of which the trafficking prong would apply, include The Antiquities Act,48 the National Historic Preservation Act (NHPA),49 and NAGPRA.50

Additionally, the ARPA trafficking prong applies to archaeological resources obtained in violation of any state or local law.51 Virtually all states have statutes that protect archaeological sites on public land and unmarked human burials.52 Further, the ARPA trafficking penalties envelop archaeological resources obtained on private land in

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44 Id. at 1143.
45 16 U.S.C. §§ 470ee(b)-(c) (2010); 43 C.F.R. § 7.4(b) (2010).
47 HANDBOOK OF FEDERAL INDIAN LAW, supra note 21, at 1247; 16 U.S.C. § 470ee(c) (2010).
52 See infra Part IV.
violation of state or local laws.\textsuperscript{53} The state and local laws are not limited to archaeological-specific laws but apply to any statute under which the “excavation, removal, sale, purchase, exchange, transportation, or receipt” of an archaeological resource would be illegal.\textsuperscript{54}

In \textit{United States v. Gerber}, the federal prosecutor relied on Indiana’s criminal trespass and conversion laws to invoke ARPA’s trafficking penalties.\textsuperscript{55} The defendant Arthur Gerber\textsuperscript{56} purchased and subsequently excavated himself rare pieces of Hopewell cultural property, all of which were associated with a burial and were obtained on private land without the permission of the landowner.\textsuperscript{57} Gerber argued that the ARPA trafficking prong did not apply to items obtained on private lands.\textsuperscript{58} However, Judge Posner, writing for a unanimous Court of Appeals for the Seventh Circuit, held that the trafficking prong was “not limited to objects removed from federal and Indian lands.”\textsuperscript{59}

Interestingly, the court also held that ARPA’s trafficking prong must be limited to “cases in which the violation of state law is related to the protection of archaeological

\textsuperscript{53} See, e.g. United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993).
\textsuperscript{54} 16 U.S.C. § 470ee(c) (2010).
\textsuperscript{55} See generally Gerber, 999 F.2d at 1114-16.
\textsuperscript{56} See generally Tom Uhlenbrock, \textit{Artifact Collectors Confer with Indians}, \textit{The St. Louis Post-Dispatch}, Mar. 6, 1989, at 18B. Gerber told the \textit{POST-DISPATCH} in 1989 that he dislikes that Native American artifact collectors are deemed looters because the word implies theft. He believes that he and other collectors are preservationists. \textit{Id.} See also Harvey Arden, \textit{Indian Burial Grounds: Who Owns the Past?}, \textit{National Geographic Magazine}, March 1989, at 376 (identifying Gerber as one of the most well-known artifact dealers in the Midwest).
\textsuperscript{57} \textit{Id.} at 1114. A workman moving earth discovered the artifacts in an unmarked Hopewell burial mound and sold them to Gerber at a relic show. Gerber then returned to the burial mound with the workman and, along with a slew of other trespassers who had learned of the discovery, looted hundreds of rare and archaeologically significant items from the burial. The items included musical instruments and ceremonial tools made from cold-hammered copper and silver and well-preserved leather. Gerber was eventually caught looting the burial by a security guard employed by the landowner. \textit{Id.} For a narrative about Gerber’s criminal looting, see Constance M. Callahan, \textit{Warp and Weft: Weaving a Blanket of Protection for Cultural Resources on Private Property}, 23 \textit{EnvTL. L.} 1323, 1333-38 (1993).
\textsuperscript{58} \textit{Id.} at 1115 (arguing that 16 U.S.C. § 470ee(c) applies only to objects obtained in violation of state or local laws on federal or Indian land).
\textsuperscript{59} \textit{Id.} at 1116.
sites or objects.” The court refused, however, to hold that the state law must be solely limited to the protection of archaeological sites or resources. In analyzing Indiana’s criminal trespass and conversion statutes, the court determined that the state laws were not so unrelated to the protection of buried archaeological resources that ARPA would not apply. After Gerber’s federal conviction, Indiana enacted a law expressly protecting archaeological sites and resources on private land.

D. Weaknesses

Despite ARPA’s extensive coverage and teeth, Native Americans, archaeologists, and artifact dealers criticize the Act’s weaknesses. One of the biggest obstacles to ARPA is the attitude of people who generally ignore and condone the looting of archaeological sites. The public indifference toward the pillaging of archaeological resources creates an environment where laws like ARPA are “honored more in the breach than the observance.” “Defendants who had been caught in the act of looting on public lands” are “acquitted by juries who were not convinced that looting was a crime.”

Critics also argue that disinterested judges, underfunded federal agencies, and a “lack of archaeological expertise on the part of law enforcement officials” weaken ARPA’s

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60 Id. (recognizing that “[a] broader interpretation would carry the Act far beyond the objectives of its framers and create pitfalls for the unwary”).
61 Id.
62 Gerber, 999 F.2d at 1116-17. The court reasoned that the laws which “comprehensively protect[] the owner of land from unauthorized incursions, spoliations, and theft” extend their scope of coverage to buried objects and that requiring a separate law pertaining exclusively to buried antiquities would be redundant. Id.
63 See generally id. at 1117; IND. CODE § 14-21-1-25.5 (2009).
64 See, e.g. ETHICS, supra note 10, at 233-35; See also Ralph W. Johnson & Sharon I. Haensly, Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act, 24 ARIZ. ST. L.J. 151 (1992) (noting ARPA suffers from jurisdictional limits and a potentially problematic definition of “archaeological resources”).
65 ETHICS, supra note 10, at 235.
66 Nightline: Thieves of Time, supra note 3.
67 ETHICS, supra note 10, at 233.
effectiveness. Collectors and dealers of Native American artifacts, on the other hand, argue that ARPA is too far-reaching and should not apply to activity on private lands.

Another weakness of ARPA is that individuals charged under the Act may argue that its definition of what constitutes an archaeological resource is vague. Specifically, the term “of archaeological interest” pertaining to an archaeological resource causes the federal government to lose ARPA prosecutions as agencies scramble to adequately define the term. That the archaeological resource must be over 100 years old is an additional roadblock to ARPA prosecutions. Individuals may freely loot and desecrate Native American graves and archaeological sites less than 100 years old because such sites are beyond ARPA’s definition of an archaeological resource.

Additionally, cultural property obtained in violation of ARPA becomes the property of the United States government if the artifacts are obtained on federal land. The Act expressly states that the archaeological resources “remain the property of the United States . . . and will be preserved by a suitable university, museum . . . or educational institution.” Native American tribes were denied ownership of their

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68 Id.
69 See, e.g. United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993).
70 See generally Callahan, supra note 57, at 1328.
72 See Kristine Olson Rogers, Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandalts, 2 J. ENVTL. L. & LITIG. 47, 70 (1987) (arguing that during early ARPA prosecutions, government agencies were “not cooperating to enforce the law, rather they were working on defining its terms”).
73 See Michael J. Bushbaum, Beyond ARPA: Filling the Gaps in Federal and State Cultural Resource Protection Laws, 23 ENVTL. L. 1353, 1354-55 (1993). Individuals excavated and looted the 60-year-old grave of a Native American rancher on federal land. They removed his skull and several grave goods. Because the gravesite was less than 100 years old, prosecutors could not invoke ARPA. Id. (internal citations omitted).
74 However, other federal statutes like The Antiquities Act or NAGPRA may apply. See generally 16 U.S.C. § 433 (2010); 25 U.S.C. § 3001-3013 (2010).
75 Johnson & Haensly, supra note 64, at 155 (citing 16 U.S.C. § 470cc(b)(3) (2010)).
ancestors’ remains and their cultural property. However, the Act allows Native American tribes to retain ownership over any archaeological resources excavated or otherwise obtained on Indian lands.

III. The Native American Graves Protection and Repatriation Act (NAGPRA)

Congress attempted to buttress the weaknesses of ARPA in 1990 through the passage of the Native American Graves Protection and Repatriation Act (NAGPRA). Congress enacted NAGPRA to “establish[] rights of Indian tribes, Native Hawaiian organizations, and their lineal descendants” to the repatriation of “certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.” NAGPRA further prohibits the unauthorized excavation and removal of such objects from federal or tribal land and forbids the trafficking of any item obtained in violation of NAGPRA.

NAGPRA consists of two prongs aimed at “resolv[ing] years of debate between tribes, archaeologists, and museums.” The first prong establishes a procedure for the repatriation of Native American human remains and cultural property to affiliated tribes from federally funded agencies and museums. The repatriation prong provides an inventory procedure for federally funded agencies and museums containing Native American human remains and cultural property whereby Native American tribes may

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80 HANDBOOK OF FEDERAL INDIAN LAW, supra note 21, at 1233.
81 43 C.F.R. § 10.1(a) (2010).
84 Johnson & Haensly, supra note 64, at 151.
request the repatriation of specific items and allows the tribes to pursue civil remedies against organizations and museums that fail to comply.\footnote{25 U.S.C. § 3007 (2010); 43 C.F.R. § 10.12 (2010). The repatriation provisions are beyond the scope of this paper. For an in-depth analysis of NAGPRA’s repatriation prong, see generally HANDBOOK OF FEDERAL INDIAN LAW, supra note 21, at 1239-40.}

NAGPRA’s second prong protects Native American cultural resources, archaeological sites, and burials from impermissible excavations and looting.\footnote{See generally HANDBOOK OF FEDERAL INDIAN LAW, supra note 21 at 1241.} This prong also affirms ARPA’s permit requirement for excavation of archaeological sites on federal and tribal land.\footnote{43 C.F.R. § 10.3(b)(1) (2010).} Similarly to ARPA, NAGPRA contains a provision against the trafficking of human remains and cultural property obtained in violation of itself.\footnote{18 U.S.C. § 1170 (2010).}

Described as the teeth of NAGPRA, 18 U.S.C. § 1170 imposes a fine or imprisonment for less than one year or both for the first offense and imprisonment for up to five years for each subsequent offense.\footnote{Id.}

A. Human Remains and Funerary Objects

NAGPRA’s protection prong applies to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. Human remains\footnote{Human remains are beyond the scope of this paper. For further information about NAGPRA and human remains, see generally HANDBOOK OF FEDERAL INDIAN LAW, supra note 21, at 1233-46; DAVID HURST THOMAS, SKULL WARS (2000); Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004).} include “the physical remains of the body of a person of Native American ancestry.”\footnote{43 C.F.R. § 10.2(d)(1) (2010).} The Act covers bones, teeth, and skin from archaeological sites, marked graves, and unmarked burials. However, the Act exempts items like hair which may have been shed naturally or converted by the Native American into a tool.\footnote{Id.}
Funerary objects include both associated and unassociated funerary items.\textsuperscript{95} Associated funerary items are objects that are reasonably believed to have been placed with a Native American human burial as part of a death rite or ceremony.\textsuperscript{96} NAGPRA defines unassociated funerary items nearly the same as associated funerary items with the exception that unassociated items do not relate to a known set of human remains in the custody of a federally funded museum or association.\textsuperscript{97} In NAGPRA criminal prosecutions, the federal attorney must prove by a preponderance of the evidence that associated and unassociated funerary items were either affiliated with a known Native American burial or grave or affiliated with known human remains.\textsuperscript{98}

Objects found in context with human remains or found during the excavation of a known human burial meet the definition of funerary items. Examples of funerary items include not only rare and elaborate materials like cold-hammered copper axe heads, silver ear spools, inlaid bear teeth, and silver musical instruments,\textsuperscript{99} but also utilitarian items like pottery, cookware, muskets, and European trade goods.\textsuperscript{100} Further, funerary objects include items like an urn or ossuary “made exclusively for burial purposes or to contain human remains.”\textsuperscript{101} Items like pottery sherds reasonably believed to have been ceremoniously arranged on a grave also meet the definition of funerary objects.\textsuperscript{102}

\textsuperscript{98} 43 C.F.R. § 10.2(d)(2) (2010).
\textsuperscript{99} See, e.g. United States v. Gerber, 999 F.2d 1112, 1114 (7th Cir. 1993) (describing a stunning assortment of rare Hopewell grave goods looted from a burial mound).
\textsuperscript{100} See, e.g. Charrier v. Bell, 496 So. 2d 601, 602-03 (La. Ct. App. 1986) (describing objects looted from over 150 burial sites in a Colonial-era Tunica Indian village).
\textsuperscript{101} 43 C.F.R. § 10.2(d)(2)(i) (2010).
\textsuperscript{102} See Notice of Intent to Repatriate Cultural Items, San Diego Museum of Man, San Diego, CA, 73 Fed. Reg. 59653 (Oct. 9, 2008). The National Park Service determined that 24 pottery sherds in the museum’s collection were placed on O’odham Indian graves as part of a “pottery sacrifice” ritual and therefore meet the definition of unassociated funerary items. \textit{Id}.
Individuals obtain Native American funerary objects either by digging and looting burials or by purchasing the items from dealers and collectors. Prior to the enactment of NAGPRA and state grave protection laws, individuals raided Native American graves for cultural property as a weekend hobby. Because the pothunters and looters believe the Native American funerary items they unearthed to be abandoned property, they claim the artifacts as their own. Grave goods are also uncovered as the result of earth moving activities associated with construction, agriculture, and road building. Once removed from burials, funerary objects freely enter the expansive, and sometimes illicit, Native American artifact market.

B. Sacred Objects and Cultural Patrimony

In addition to funerary objects, NAGPRA’s protection prong encompasses sacred objects and objects of cultural patrimony. Sacred objects include “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.” While many utilitarian objects like pottery or stone tools may be “imbued with sacredness in the eyes of an individual,” the NAGPRA definition of sacred is construed narrowly to include

103 See Nightline: Thieves of Time, supra note 3; John Dipko, Tribal Artifacts Slow to be Repatriated, GREEN BAY PRESS-GAZETTE, Nov. 4, 2003, at 1A.
104 See infra Part IV.
105 See Nightline: Thieves of Time, supra note 3 (describing “pothunting” as “the kind of thing an American family might do with the kids over a weekend”); Dipko, supra note 103, at 1A (describing grave looting as a Sunday-afternoon hobby). See GULLIFORD, supra note 16, at 45 (stating that this “finders keepers” philosophy existed due to a “lack of understanding of Indian cultures [and] Indian spirituality”)(internal citations omitted). See also Uhlenbrock, supra note 56, at 18B (quoting a prominent artifact collector as stating “[w]ho owns our past is who finds our past”).
106 Dipko, supra note 103, at 1A. See also United States v. Gerber, 999 F.2d 1112, 1114 (7th Cir. 1993) (road construction crews disturbed a 2,500 year-old Hopewell burial mound). See GULLIFORD, supra note 16, at 45 (noting that the market for funerary objects is “booming because many non-Indians simply do not consider Native American burials sacred”).
only objects “which have religious significance or function in the continued observance or renewal” of a traditional religious rite or ceremony.\textsuperscript{111}

Items meeting the statutory definition of sacred include Navajo Yei B’Chei used by hataali singers like Ray Winnie\textsuperscript{112} in almost thirty ancient religious chant rituals.\textsuperscript{113} Some rituals involve impersonating Navajo gods, and may not be practiced without the Yei B’Chei masks.\textsuperscript{114} Also meeting the NAGPRA definition of sacred are three buffalo hide shields discovered by an individual on federal land.\textsuperscript{115} The shields, which were previously missing for 140 years before being returned to a Navajo hataali, are essential to the continuation of an ancient Navajo ritual known as Protectionway.\textsuperscript{116}

Items of cultural patrimony include objects “having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself.”\textsuperscript{117} Cultural patrimony items belong to the tribe as communal property and, therefore, cannot be alienated by any individual tribal member.\textsuperscript{118} The items must have been “considered inalienable by such Native American group at the time the object was separated from

\begin{flushleft}
\textsuperscript{111} 43 C.F.R. § 10.2(d)(3) (2010).
\textsuperscript{112} See supra Part I.
\textsuperscript{113} See generally HANDBOOK OF NORTH AMERICAN INDIANS, supra note 1, at 539-57.
\textsuperscript{114} Id.
\textsuperscript{115} See Christopher Smart, In Good Hands: Artifacts Used in Traditional Sacred Ceremonies are Returned to an Elderly Medicine Man in Tucson, Ariz., THE SALT LAKE TRIBUNE, Aug. 18, 2003, at D2. The shields were hidden in the 1860’s by two fugitive hataali in a rock shelter at Utah’s Boulder Mountain to protect them from the United States Army. An artifact hunter found the shields buried in the rock shelter in 1926, and the National Park Service obtained possession of the shields in 1953. The Navajos requested repatriation of the shields under NAGPRA in 1999, and, in 2003, the shields were finally returned to an elderly hataali who is believed to be one of the last surviving religious leaders trained to chant the Protectionway. Id.
\textsuperscript{116} Id.
\textsuperscript{118} See id. See also 43 C.F.R. § 10.2(d)(4) (2010) (stating that objects of cultural patrimony “may not be alienated, appropriated, or conveyed by any individual tribal or organization member”).
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such group.”\textsuperscript{119} The statutory definition necessarily excludes items owned and freely alienable by individual Native Americans.

The Code of Federal Regulations identifies Zuni War Gods and Iroquois wampum belts as objects of cultural patrimony.\textsuperscript{120} Items of cultural patrimony like the \textit{ki i la au}, an elaborately carved wooden spear rest featuring the image of a guardian spirit sacred to Native Hawaiians, are sacred symbols of cultural identity considered foundational to the tribal community.\textsuperscript{121} Even seemingly utilitarian or ornate items may be deemed cultural patrimony if they are of significant cultural importance to a Native American tribe.\textsuperscript{122} Objects of cultural patrimony may also necessarily overlap with items that meet the statutory definition of sacred objects such as Navajo Yei B’Chei,\textsuperscript{123} Hopi prayer robes,\textsuperscript{124} and Pueblo prayer bundles.\textsuperscript{125}

\textbf{C. Weaknesses}

Despite the fact that NAGPRA has been heralded as an historic and landmark Act\textsuperscript{126} and “one of the most significant pieces of human rights legislation since the Bill of Rights,”\textsuperscript{127} the Act’s proponents fear that judicial disinterest may not adequately deter
individuals from obtaining and trafficking in protected items. In September of 2002, Santa Fe Native American artifact dealer Joshua Baer plead guilty in federal district court to three counts of violating NAGPRA for selling a headdress, a war bonnet, a buffalo hide shield, and a Santo Domingo corn goddess. During sentencing, federal Judge John Conway, while acknowledging that Baer’s behavior was “despicable,” stated that he would not give Baer any prison time even though he faced a maximum incarceration penalty of two years in addition to thousands of dollars in fines. Judge Conway admitted that he was not fond of NAGPRA and “sentenc[ed] Baer to a mere 100 hours of community service and $675 court fees.” Similar judicial sentencing decisions would reduce the deterrent effect of NAGPRA’s protection prong.

On the other hand, individual collectors and dealers of Native American artifacts argue that NAGPRA is unconstitutionally vague. Richard Corrow, the first individual convicted under NAGPRA for illegally obtaining and attempting to sell objects of cultural patrimony, argued on appeal that the statutory definition of cultural property is too vague to enforce. He asserted that the uncertain definition “trap[s] the unwary in its multitude of meanings and creat[es] easy prey for the untrammeled discretion of law

129 Id. See also Geoff Grammer, Artifact Dealer Pleads Guilty to Illegal Trading, SANTA FE NEW MEXICAN, Sept. 11, 2002, at A1 (noting that the items have ongoing historical, traditional, and cultural importance). One reporter, who labeled Baer a “respected Santa Fe artifact dealer,” called Baer’s prosecution “the most alarming private-sector application of NAGPRA so far.” Vincent, supra note 9.
130 See Romero, supra note 128, at F4.
132 Vincent, supra note 9 (quoting Judge Conway as stating “This is not my favorite statute, so I’m not going to put [Baer] in jail”).
133 Romero, supra note 128, at F4.
134 See, e.g. Mark Smith, Cultural Divide, THE HOUSTON CHRONICLE, Feb. 22, 1998, at A1; Vincent, supra note 9; Painter-Thorne, supra note 12, at 1289; Corrow, 119 F.3d at 798; Tidwell, 191 F.3d at 978.
135 See supra Part I.
136 Corrow, 119 F.3d at 799.
enforcement.” The Court of Appeals for the Tenth Circuit disagreed, and found that Corrow was far from unwary about the cultural significance of the Yei B’Chei. The court held that the government adequately proved, and that Corrow knew or should have known, that the objects were cultural patrimony “having ongoing . . . cultural importance to the [Navajo] [which] could not be bought and sold absent criminal consequences.”

Two years later, artifact dealer Rodney Tidwell also challenged his NAGPRA conviction for selling Hopi priest robes and masks by claiming the cultural patrimony definition was unconstitutionally vague. Several Hopi religious leaders testified for the prosecution, stating that the vestments were priceless objects that “belonged to the whole tribe, and . . . are not for the marketplace.” Tidwell countered that “because tribal law regarding cultural patrimony is not written, it was impossible for him to have fair notice of his wrongful conduct.” The Court of Appeals for the Ninth Circuit disagreed, and compared Tidwell’s case with Corrow. The court held that Tidwell had sufficient understanding of NAGPRA and cultural patrimony as a dealer of Native American art to put him on notice that he was prohibited from selling the Hopi items.

While ethnocentric collectors and artifact dealers would believe that NAGPRA “encourages Indians to assert claims based on myths, rituals, oral traditions, and other

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137 Id. Corrow specifically argued that the requirement that an object of cultural patrimony could not be owned or alienated by an individual was an unintelligible standard to meet. Id. at 801.
138 Id. at 803 (noting that Corrow’s experience as a Native American art and artifact dealer and his familiarity with Navajo cultural practices raised his awareness about the inalienability of the masks).
139 Id. at 804.
140 See generally United States v. Tidwell, 191 F.3d 976 (9th Cir. 1999). See also Tim Molloy, Art Dealer Sentenced to 33 Months, ALBUQUERQUE JOURNAL, Mar. 18, 1998, at C1 (noting that the Hopi believe the items are “filled with the ‘living breath’ of the creator”).
141 Molloy, supra note 140, at C1.
142 Tidwell, 191 F.3d at 980. Tidwell urged the court to hold two elements of the definition of cultural patrimony, “inalienability” and “ongoing historical, traditional, or cultural importance[,]” unconstitutionally vague. Id.
143 Id.
144 Id. The court also noted that Tidwell “had been previously convicted under the NAGPRA and was aware of its statutory prohibition.” Id.
tribal practices not normally recognized by the scientific community,” the law must necessarily incorporate the Native American cultural definition to “determine whether an object is sacred or cultural patrimony.” Only individual tribes may be aware of the significance, or lack thereof, of a particular item and are therefore the best able to say whether an item is sacred or cultural patrimony. Further, as the courts in both Corrow and Tidwell have held, NAGPRA would not apply to an unsuspecting person who innocently purchased a prohibited item. The scienter element in the statute “requires the government to establish that the defendant ‘knowingly’ traded in cultural items in violation of the NAGPRA.”

IV. State and Local Laws

In addition to federal laws like ARPA and NAGPRA, every state code contains statutes to protect Native American cultural property to some extent. A majority of state statutes mirror the geographical restrictions of federal laws like ARPA and NAGPRA in that their protection extends only to state-owned lands. However, state

145 Vincent, supra note 9. See also THOMAS, supra note 92, at 100-01 (noting that even professional archaeologists “cannot attach to oral traditions any historical value whatsoever under any conditions whatsoever”) (internal quotations omitted).
146 Painter-Thorne, supra note 12, at 1289. In the view of Native Americans, “tribal traditions derive from a spiritual base that cannot be challenged from a scientific perspective.” They further question why “the burden of proof [is] placed on Indians to defend their beliefs and practices when similar burdens are not placed on other religions.” THOMAS, supra note 92, at 233.
147 Id.
148 See United States v. Corrow, 119 F.3d 796, 803 (10th Cir. 1997); Tidwell, 191 F.3d at 980. C.f. United States v. Lynch, 233 F.3d 1139 (9th Cir. 2000)(defining the general intent element of ARPA as requiring the government to prove that the defendant knew or had reason to know that he was removing an archaeological resource as defined by the statute).
150 See United States v. Gerber, 999 F.2d 1112, 1117 (7th Cir. 1993). See generally Callahan, supra note 57, at 1323.
151 See Callahan, supra note 57, at 1324 (recognizing that several state archaeological protection laws resemble federal statutes like ARPA and NAGPRA). But see 25 U.S.C. § 3005 (2010) (stating that NAGPRA applies to human remains, funerary items, sacred items, and items of cultural patrimony that subsequently find their way into the possession of a federally-funded museum or agency).
statutes differ dramatically in how they protect sites and to what cultural property items
the laws apply. For example, some states, like Missouri, merely invest state administrative
agencies with the authority to create and enforce regulations effectuating the protection of
archaeological sites and resources. In contrast, few states, like Alabama, extend
blanket coverage over all archaeological resources located within the state. Most states
also require that individuals seeking to excavate an archaeological site on public land
obtain a permit from the state historic preservation officer while Oregon requires
individuals to secure a permit to excavate sites on private land.

A. Unmarked Human Burial Laws

Despite the wide array of protection states grant to archaeological sites and
resources, state protection has only recently extended to Native American burials.
Publicized incidents such as the plundering of the Hopewell burial mound by Arthur
Gerber emphasized the pressing need for unmarked Native American graves
protection. Another incident that captured the attention of the nation occurred in 1987
on a farm in rural western Kentucky. The owner of Slack Farm, in exchange for ten
thousand dollars, allowed ten men to pillage his fields for Native American artifacts.

152 See, e.g. MO. REV. STAT. § 253.408 (2010) (designating the state Department of Natural Resources as
the agency vested with the regulation of historic and archaeological sites, including Native American sites).
See also IND. CODE § 14-20-1-7 (2010) (designating the state Division of Museums and Historic Sites as
the agency to develop and administer such regulations). But see MO. REV. STAT. § 194.400 et seq. (2009)
(providing statutory, rather than administrative, grave protection by criminalizing the desecration of any
unmarked Native American burial, even those located on private land).
153 See ALA. CODE §§ 41-3-1 to 6 (2010).
154 See TENN. CODE ANN. § 11-6-105 (2010).
156 See supra Part II.
157 See Uhlenbrock, supra note 56, at 18B.
158 See Callahan, supra note 57, at 1329-30. See also Uhlenbrock, supra note 56, at 18B. The men leased
Slack Farm for two months and dug over 450 pits in search of artifacts. State police officers were
The men desecrated the graves of over one thousand Native Americans but neither the landowner nor the looters suffered any criminal sanctions, as Kentucky had not yet passed unmarked burial protection legislation.\textsuperscript{159}

A majority of state legislatures and agencies, recognizing that incidents like Gerber and Slack Farm are more common than isolated, have taken an aggressive stance against the excavation and desecration of Native American burials in recent years.\textsuperscript{160} Though NAGPRA protects Native American burials on federal and tribal lands from looting, diggers and pothunters still freely ransack Native American graves on privately owned land absent any state prohibitions. With the advent of NAGPRA, state legislatures amended their archaeological protection statutes to encompass unmarked burials on state and private land.\textsuperscript{161}

For example, Missouri law prohibits the desecration, excavation, and looting of unmarked human burials.\textsuperscript{162} Missouri’s burial protection statutes apply to private land and waters as well as state-owned land and waterways, including the beds of navigable streams.\textsuperscript{163} Any person violating the unmarked burial law commits a Class D felony and faces a fine of up to $5,000 \textsuperscript{164} or imprisonment for up to four years or both.\textsuperscript{165} The statute protects people like farmers or construction workers who unintentionally uncover human remains.

\begin{footnotesize}
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\item \textsuperscript{159} See Callahan, \textit{supra} note 57, at 1329-30. The following year, the Kentucky legislature responded by making grave desecration a felony. Uhlenbrock, \textit{supra} note 56, at 18B.
\item \textsuperscript{160} See \textit{Trope & Echo-Hawk, supra} note 126, at 52 (recognizing that thirty-four states have recently enacted unmarked grave protection laws).
\item \textsuperscript{161} See, e.g. \textit{Or. Rev. Stat.} § 358.920 (2007).
\item \textsuperscript{162} \textit{Mo. Rev. Stat.} § 194.406 (2009).
\item \textsuperscript{163} \textit{Mo. Rev. Stat.} § 194.405 (2009).
\item \textsuperscript{164} See \textit{Mo. Rev. Stat.} § 560.011 (2009).
\item \textsuperscript{165} See \textit{Mo. Rev. Stat.} § 558.011(1)(4) (2009).
\end{itemize}
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remains or disturb an unmarked burial in that criminal liability only attaches to people who know or have reason to know that a burial is being disturbed.\textsuperscript{166} 

If skeletal remains are discovered, Missouri law requires the Department of Natural Resources to consult with descendants, if kinship may be proved, or with members of a group sharing “ethnic affinity” with the remains to determine disposition.\textsuperscript{167} The seven-member state Unmarked Human Burial Consultation Committee determines whether the remains should be repatriated or reintered.\textsuperscript{168} The Department of Natural Resources may delay reinterment for the purpose of scientific study for up to one year if no lineal descendant is found and may extend the time for further analysis at the discretion of the state historic preservation officer.\textsuperscript{169} 

One weakness of Missouri’s unmarked burial law is that it only prohibits the removal of human skeletal remains from burials. The law is silent as to funerary objects, sacred objects, or objects of cultural patrimony that may be unearthed during the looting of a Native American burial. Pillagers are free to remove cultural property from burials on private land and claim such artifacts for themselves. Further, because the law requires that a person know or have reason to know that he is disturbing an unmarked burial, looters may allege that they were simply looking for artifacts and were unaware of the possibility of uncovering human remains. In order to plug this gaping hole in its unmarked burial law, Missouri and similarly situated states should incorporate

\textsuperscript{166} \textit{Mo. Rev. Stat.} § 194.406 (2009). Such persons who unintentionally encounter human remains must cease all activity within a 50-mile radius of the area of discovery and notify either local law enforcement or the Department of Natural Resources. \textit{Id.}\textsuperscript{167} \textit{See Mo. Rev. Stat.} § 194.408 (2009).\textsuperscript{168} \textit{Mo. Rev. Stat.} § 194.409 (2009). The Unmarked Human Burial Consultation Committee consists of the state historic preservation officer, two professional archaeologists or physical anthropologists, two members of a federally recognized Native American tribe, and two members of the public at large. \textit{Id.}\textsuperscript{169} \textit{Mo. Rev. Stat.} § 194.408 (2009).
NAGPRA-like protection to funerary objects, sacred objects, and objects of cultural patrimony associated with Native American graves.

B. The Tunica Treasure

While the vast majority of state laws apply only to archaeological sites and cultural property on public lands, with the exception of state unmarked human burial laws, a few states shroud private land within a sphere of protection. In *Charrier v. Bell*, the Louisiana Court of Appeals affirmed the trial court’s denial of ownership of Native American cultural property obtained from private land to the individual who excavated the artifacts. Leonard Charrier, a self-described “amateur archaeologist,” obtained consent from who he thought was a landowner to search for a Colonial-era Tunica Indian village.

Charrier used a metal detector to determine the location of burial sites within the village and, for three years, he excavated approximately 150 graves and recovered over 200,000 artifacts weighing nearly two and one-half tons. He attempted to sell the artifacts to the Peabody Museum of Harvard University, but the curators questioned the

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170 See supra Part IV, at 21.
172 *Charrier*, 496 So. 2d at 602.
173 *Id.* Charrier actually obtained permission from the caretaker of the property, whom he thought was the owner. Charrier became aware of his mistake after initially discovering ancient burial plots, but continued to excavate the site. *Id.* at 602-03.
174 See generally Sarah Sue Goldsmith, *Preserving the Past: The Tunica Treasure*, THE ADVOCATE May 19, 1996, at 17. The Tunica-Biloxi have occupied the Louisiana and Mississippi region continuously from their first encounter with Europeans in 1541. The Tunica abandoned their village at Trudeau Plantation prior to settling on reservation land in 1803. *Id.* The Louisiana Court of Appeals determined that the Tunica resided at Trudeau until about 1764. *Charrier*, 496 So. 2d at 604.
175 *Charrier*, 496 So. 2d at 602-03. The artifacts included European tools and trade items made of iron, copper, silver, and ceramics as well as personal adornments and Tunica native pottery. *Id.* See also Goldsmith, *supra* note 174, at 17 (indicating that the Tunica had a friendly and expansive trading network with the Spanish, French, and Americans).
ownership of the items and refused to purchase them.176 Unable to sell his excavated hoard, Charrier filed suit against the actual landowners to quiet title, and the state intervened on behalf of the landowners.177 The Tunica-Biloxi Indians received federal tribal recognition in 1981 and soon intervened in the lawsuit as well by claiming ownership of the artifacts and seeking repatriation.178

Charrier argued that the relationship between the modern-day Tunica-Biloxi Indians and the occupants of the ancient village at Trudeau is too tenuous to entitle them to the excavated cultural property.179 He also claimed that the ancestors of the Tunica who occupied the ancient village abandoned the artifacts when they placed them in the graves of the deceased and left the area and that he, as the finder, is the rightful owner.180 The court disagreed, however, and found that “[d]espite the fact that the Tunicas have not produced a perfect ‘chain of title’ back to those buried at Trudeau Plantation,” the current tribe sufficiently proved that they are the descendants of the occupants of the ancient village.181 The court declared the Tunica-Biloxi tribe the owners of the cultural property excavated by Charrier, and the state eventually repatriated the artifacts to the tribe.182

While Louisiana ultimately allowed the Tunicas to possess the cultural property looted by Charrier, the state lacked statutory authority to prosecute him. No state law existed at the time to prohibit Charrier’s looting of the Tunica graves.183 The Louisiana

176 Id. at 603. Charrier originally told the Museum that he found the artifacts in a cave, but the curators later learned that Charrier excavated them from Trudeau without the permission of the owners.
177 Id.
178 Id. The state chose to “subordinate[] its claim of title or trust status over the artifacts in favor of the Tunicas.” Id.
179 Id. at 604.
180 Charrier, 496 So. 2d at 604.
181 Id. at 604.
182 Goldsmith, supra note 174, at 17.
Court of Appeals decided Charrier before Congress enacted NAGPRA. However, NAGPRA would not have applied to Charrier’s looting of the Tunica graves because private individuals, rather than the federal government, owned Trudeau Plantation.

C. Oregon Extends Protection To Private Property

Oregon also extends the protection of its laws to Native American cultural property on private land. An Oregon law prevents an individual from knowingly and intentionally tampering with or excavating an archaeological site or from removing any cultural property over seventy-five years old from private property without a permit.

The law exempts from liability people who “unintentionally discover[] an archaeological object . . . exposed by the forces of nature and retains the object for personal use” or an artifact collected from the surface of private land so long as the finder obtained the object “without the use of any tool.” However, the finder may not retain the naturally exposed or surface collected artifact if it meets any of the NAGPRA classifications of human remains, funerary objects, sacred objects, or objects of cultural patrimony.

Persons desiring to excavate and remove artifacts on private land, even their own land, must obtain a permit in accordance with section 390.235 of the Oregon Revised Statutes. If the person wishes to excavate and remove object from a Native American cairn or burial on private land, then that person must obtain, in addition to a permit from

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184 See generally OR. REV. STAT. § 358.920 (2007); See also OR. ADMIN. R. 736-051-0090 (2010).
185 OR. ADMIN. R. 736-051-0090(1) (2010). Landowners may argue that the Oregon law amounts to an uncompensated taking in violation of the Fifth Amendment of the United States Constitution. The takings issue is beyond the scope of this paper. However, it is worth noting that the Indiana Supreme Court held that a state regulation prohibiting the strip mining of coal on private land containing archaeological sites does not amount to a taking. See Department of Natural Resources v. Indiana Coal Council, 542 N.E.2d 1000 (Ind. 1989), cert. denied, 493 U.S. 1078 (1990).
188 OR. ADMIN. R. 736-051-0090(1)(b) (2010).
the state, written permission from the state police and the closest Native American
tribe. Any person violating the permit requirement commits a Class B Misdemeanor and faces a punishment of imprisonment for up to six months or a fine not exceeding $2,500 or both.

Oregon’s archaeological protection law seems to strike a balance between the state and Native American tribal interest in protecting cultural property and burials and the hobbyists’ interests in hunting and collecting arrowheads and other relics. Prior to enacting the current law, the Oregon legislature recognized the inefficiency of the preceding laws in protecting archaeological sites and Native American burials from looting and desecration. Both Native American tribes and archaeology associations urged the legislature to plug the gaps in the old statutes to better protect cultural property. In contrast, relic hunters protested the expansion of state protection onto private land. Recreational artifact collectors feel that the current law goes too far and infringes upon private property interests.

190 OR. REV. STAT. § 97.750 (2007) (indicating that the requesting party must also be a professional archaeologist and that any human remains or cultural property removed as a result of the permitted excavation must be “reinterred at the archaeologist’s expense under the supervision of the Indian tribe”).
194 See Katherine S. Somervell, Comment, Oregon’s Senate Bill 61: Balancing Protection and Privatization of Cultural Resources, 25 ENVTL. L. 463, 467 (1995). The legislature also sought to “conform state law to the federal requirements of [NAGPRA].” Id.
195 See Somervell, supra note 194, at 479-81. Representatives from six Native American tribes expressed their support for the new law prior to its enactment during committee hearings before the Oregon Senate.
196 Id. Surface hunters testified before the Senate committee that their hobby saved many archaeological resources from natural damage or destruction. Id. at 480-81.
197 See, e.g. Sanne Specht, Treasure Hunt: Digging for Trouble, MAIL TRIBUNE (Nov. 18, 2007), available at http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20071118/NEWS/711180323. Bottle collectors argue that law criminalizes their hobby of digging antique glass bottles from trash dumps and outhouses on private land. They acknowledge that Native American graves deserve the utmost respect and protection, but that the law casts too wide of a net of protection. Id.
The Oregon law should effectively balance the state and tribal interests in protecting and preserving cultural property with the hobbyists’ interests in continuing their recreational activities. Individuals may still dig for relics on private land, if they wish, without financial burden because the state-issued permit is free.\textsuperscript{198} Further, the law sufficiently protects individuals who unintentionally unearth archaeological materials. Finally, because the Oregon law forbids private ownership of NAGPRA-covered items found on private lands, the Native American tribes need not fear that individuals would display the bones and sacred objects of their ancestors on mantelpieces and in curio cabinets.

\textbf{D. Isolated Finds in Florida}

Like other states, Florida enacted laws protecting both archaeological sites and artifacts on public lands\textsuperscript{199} and unmarked human burials.\textsuperscript{200} The Florida legislature, however, foresaw the inevitable actions of artifact hunters and allowed the Division of Historical Resources the discretion to implement a program whereby people may legally collect isolated artifacts from Florida rivers and streams.\textsuperscript{201} In response, the Division created the Isolated Finds Program (IFP) in 1996, which provided that people collecting artifacts from Florida streams were allowed to keep their finds so long as the finders report descriptions of the recovered artifacts to the Division.\textsuperscript{202} Interestingly, the IFP

\begin{footnotesize}
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  \item \textsuperscript{198} See id.
  \item \textsuperscript{199} See generally FLA. STAT. § 267.13 (2009).
  \item \textsuperscript{200} See generally FLA. STAT. § 872.05 (2009).
  \item \textsuperscript{201} FLA. STAT. § 267.115(9) (2009).
  \item \textsuperscript{202} Florida Division of Historical Resources, Isolated Finds, http://flheritage.com/archaeology/underwater/finds/ (last visited Mar. 12, 2010) [hereinafter Isolated Finds].
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contained no provisions for the inadvertent discovery of unassociated funerary objects, sacred objects, or cultural patrimony.\textsuperscript{203}

The Division discontinued the IFP after only nine years, largely due to noncompliance by artifact collectors.\textsuperscript{204} The Division received input from hobbyists, Native American tribes, archaeologists, state land management officials, and law enforcement prior to abandoning the IFP.\textsuperscript{205} The public feedback confirmed the Division’s suspicion that many hobbyists neglected to participate in the program. In fact, during the nine year tenure of the IFP, a mere 150 individuals generated all of the reports.\textsuperscript{206} Divers and artifact collectors bemoaned the decision to cancel the program and argued that their collection activities under the IFP differed from the wholesale looting of archaeological sites.\textsuperscript{207}

Following the repeal of the IFP, any artifacts discovered in Florida rivers and streams once again belong to the state.\textsuperscript{208} The Division maintains that the state should protect and conserve archaeological resources on state lands.\textsuperscript{209} The IFP failed to advance Florida’s interest in preserving archaeological resources because it allowed individuals to possess and own cultural property obtained from public lands. Artifacts recovered under the IFP could easily enter the stream of interstate and international commerce and thereby become alienated from Florida forever. Florida’s current policy seems to align with the

\textsuperscript{203} The Division may have omitted such provisions due to the isolated nature of artifacts found in rivers and streams, which are typically found out of archaeological context.  
\textsuperscript{204} See Isolated Finds, supra note 202 (noting that only 1,115 reports had been generated in nine years).  
\textsuperscript{205} Id. The Division also held a series of public meetings.  
\textsuperscript{206} Id. (noting that seven of the individuals contributed over half of the reports).  
\textsuperscript{207} See, e.g. Dan DeWitt, Should Finders Be Keepers?, ST. PETERSBURG TIMES, Oct. 13, 2006, at E1. Hobby collectors protest that professional archaeologists demonize their vocation as looting even though the isolated artifacts in the streams are not associated with any archaeological site. Id.  
\textsuperscript{208} See generally FLA. STAT. § 267.13 (2009). See also DeWitt, supra note 207, at 1E (noting that the state owns the riverbeds of streams on public lands).  
\textsuperscript{209} DeWitt, supra note 207, at 1E.
provisions of ARPA, whereby cultural property on state land belongs to the state and individuals who remove artifacts face criminal charges.\textsuperscript{210}

Unfortunately, Native Americans enjoy no right to their cultural property under state law. The Florida statute does not afford Native American tribes a right to the repatriation of any funerary objects, sacred objects, or objects of cultural patrimony. Tribes may only secure the repatriation of such objects from federal or tribal land in Florida under NAGPRA. Artifact collectors are also free to gather, possess, and sell cultural property obtained on private land.

IV. Conclusion

Federal laws like ARPA and NAGPRA, when aggregated, contain sufficient prohibitions against individuals who seek to obtain cultural property on federal and Indian lands. But the ultimate protection of Native American graves and cultural property necessarily involves state legislatures. The vast majority of archaeological sites in the United States are located on private land and are protected solely by the ethics, or lack thereof, of landowners.\textsuperscript{211}

To adequately protect cultural property, states should expand unmarked human burial protection to private land and prohibit the removal of any objects from graves. In addition, states should consider the need for statutes similar to Oregon’s law protecting all archaeological sites on private land. At minimum, states should also prohibit the excavation, removal, and trafficking of funerary objects, sacred objects, and objects of cultural patrimony from public and private lands and initiate procedures for the repatriation of such objects to the proper affiliated Native American tribes. Regulations

\textsuperscript{210} \textsc{Fla. Stat.} §§ 267.13(1)(a)-(c) (2009).

\textsuperscript{211} See Callahan, \textit{supra} note 57, at 1324.
should also allow the surface collection of artifacts on private land as long as the artifacts are not sacred or cultural patrimony and can be retrieved without the use of tools.

The states should also regulate the trafficking of artifacts and cultural property obtained in violation of archaeological protection laws. States will undoubtedly face difficulty in this arena as the market for Native American artifacts continues to expand both nationally and internationally. Admittedly, few states have been able to implement a workable standard regarding the buying and selling of Native American artifacts.\(^{212}\) Such a regulation may require that dealers selling Native American artifacts accompany them with certificates indicating their provenience and affirming that they were obtained in compliance with state and federal law.

States should also implement permit procedures to allow individuals to excavate archaeological sites on private land so long as the sites do not contain human burials. Permits may be issued for a fee, and the resulting revenue should be earmarked for the preservation of archaeological resources. Both the professional archaeological community and Native American tribes should be consulted as part of the permit process.

No state law, no matter how protective and free from loopholes, will be effective without the support of the general public. States should increase public education and awareness about Native American cultural property and burials through their historic preservation offices and local archaeological societies. Incidents of looting like Gerber and Slack Farm should be publicized so that the public can see the irreparable destruction of cultural resources that occurs on an all-too-frequent basis. In addition, public education will increase judicial awareness to the desecration and looting of Native American

\(^{212}\) _But see_ OR. REV. STAT. § 358.915 (2007) (allowing the sale of artifacts provided that the seller includes a certificate of origin indicating where the artifact was obtained and that it was obtained in compliance with the laws).
cultural property so that people like Joshua Baer are not given a mere slap on the wrist when they traffic in sacred objects. Finally, Native American tribes should be involved in the education process so that non-Indians may perceive their unique cultural views about certain artifacts and sites.

Until states act to expand upon the protection of federal laws by enacting their own statutes, Native American cultural property will remain under the tenuous safekeeping of the individual collector’s conscience. The desire of an individual to turn a handsome profit or to place a stunning artifact on a shelf in a curio cabinet all too often overrides his respecting of sacred cultural beliefs. To the pothunter, the Sunday-afternoon digger, and the collector, the items they relentlessly seek under a “finders-keepers” mentality are merely relics made by a long-forgotten and long-conquered people. To the Native Americans, however, the loss of irreplaceable cultural property to looting is yet another scalping in the centuries-old battle for cultural identity and preservation.