Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony

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Rennard Strickland*

You whites assumed we were savages. You didn’t understand our prayers. You didn’t try to understand. When we sang our praises to the sun or moon or wind, you said we were worshipping idols. Without understanding, you condemned us as lost souls just because our form of worship was different from yours.

We saw the Great Spirit’s work in almost everything: sun, moon, trees, wind, and mountains. Sometimes we approached him through these things. Was that so bad? I think we have a true belief in the supreme being, a stronger faith than that of most of the whites who have called us pagans.

... Indians living close to nature and nature's ruler are not living in darkness.

— Walking Buffalo (1871-1967)

1. INTRODUCTION

During the House debate on the Native American Graves Protection and Repatriation Act (“NAGPRA”), Congresswoman Patsy Mink of

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Hawaii stated quite simply the basis of what has become our national policy: "Preserving native American and Hawaiian culture is in the interest of all Americans, for these unique cultures are a part of the history and heritage of our Nation." The Act is important because it represents the new American consensus about sacred objects and cultural patrimony, a consensus not only of members of the Congress and of Native peoples, but also of very diverse groups of scientists, museum trustees, and art collectors. That consensus is: The sacred culture of Native American and Native Hawaiians is a living heritage. This culture is a vital part of the ongoing lifeways of the United States, and as such, must be respected, protected, and treated as a living spiritual entity—not as a remnant museum specimen.

The primary purpose of this essay is to facilitate an understanding of Native American approaches to sacred objects and cultural patrimony, while suggesting an appropriate tribal context in which to reach decisions consistent with the intended purpose of NAGPRA. The heart of this analysis is a review of the many ways in which Native Americans perceive the relationship of religion, culture, and art. The thesis is that Native Americans, through their own codes of law and Indian tribal courts, are the best prepared decision-makers to evaluate factual issues under NAGPRA. Therefore, Indian tribes have an obligation to adopt and enforce their own Native arts, religion, and cultural codes. By enacting such legislation, most factual and interpretative issues can be resolved at a tribal level, which will provide a historical and cultural record that can serve as the basis for potential action by NAGPRA’s Review Committee and the courts.

II. THE NEW NATIONAL POLICY OF UNDERSTANDING, PRESERVING, AND SAFEGUARDING THE HERITAGE OF INDIAN PEOPLES AND NATIVE HAWAIANS

The enactment of NAGPRA brought to an end almost five hundred years of conflict about culture. The debate about European and Native
American lifeways began with such questions as whether or not the original inhabitants of the Americas were a human or a sub-human species. Columbus was, after all, on a mission from Spain's Catholic majesties, and the question of whether the Native people possessed a soul was crucial to true salvation. The debate continued in ecclesiastical and governmental circles and resulted in such absurd federal policies as "renaming" Indians; outlawing "heathenish practices," including medicine men, dances, and traditional burials; and such tragic episodes as removal and allotments of tribal lands designed to convert Indians into dirt farmers.  

Similarly, the collections of human remains gathered for the cranial studies at the Smithsonian are but one example of a relatively recent variant on the human or sub-human debate. Certainly, the ironic desire to "Americanize the American Indian" reflects this ethnocentric concept of the "civilized" European versus the "savage" Native American. In 1990, newly enacted policies on religious or sacred objects and patrimonial resources signaled a dramatic recognition of the vitality of Native peoples and mandated an effort to understand the Indian's own worldview.

Throughout much of American history, the question for Indian tribes has not been one of cultural understanding and interpretation, but one of actual physical survival. Starvation, massacre, plague, and military ambush dominated much of historic tribal life. Assaults on religion and culture were equally relentless, but less immediately threatening. The magnitude of this historic holocaust was summarized by Russell Thornton:

[T]he European expansion throughout North America during the sixteenth, seventeenth, and eighteenth centuries produced a demographic collapse of American Indians, primarily because of disease, warfare and destruction of Indian ways of life. The removal and relocation of Indians also contributed to the collapse . . . . The collapse was so severe by 1800 that the total United States Indian
population had been reduced to 600,000 from 5+ million in three
centuries. Meanwhile, the non-Indian population of the United
States had increased to over 5 million.9

The nineteenth century was even more devastating in terms of Native
survival. Thornton recognized that “the already decimated American
Indian population . . . declined . . . from about 600,000 in 1800 to a
mere 250,000 between 1890 and 1900.”10 Yet, during this same time
period, the non-Indian population blossomed from a mere five million
in 1800 to more than seventy-five million in 1900. Is it any wonder
that the Creek Chief Pleasant Porter called the Indian a people “on
the road to disappearance”?11

Although NAGPRA officially draws this tribal culturecide to an end,
the task of implementing the new policy, particularly with regard to
sacred objects and cultural patrimony, will require much cross-cultural
understanding. Fortunately, the consensus nature of NAGPRA, and
the compromise on the part of all interested parties, suggests a willing-
ness to recognize the cultural differences between Natives and non-
Natives, and within the Native community itself. This is, indeed, the
great challenge of implementing NAGPRA. Native peoples have elo-
quently made the case that compelled the adoption of the Native
American Graves Protection and Repatriation Act. This “hugely im-
portant legislation,” as described by Senator Daniel Moynihan, was
thought of by its advocates as human rights legislation.12 Indeed, Congress
man Morris Udall argued that NAGPRA “addresses our ci-vility,
and our common decency.”13 He concluded: “In the larger scope
of history, this is a small thing. In the smaller scope of conscience, it
may be the biggest thing we have ever done.”14

9. RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY
SINCE 1492, at 90, 133 (1987); see also Rennard Strickland, Genocide-at-Law: An Historic and
10. THORNTON, supra note 9, at 133.
11. See generally ANGIE DEBO, THE ROAD TO DISAPPEARANCE (1967) (the Pleasant Porter
quotation provided the title for Debo’s definitive history of the Creeks).
dimension of the issue was a central focus in the REPORT OF THE PANEL FOR A NATIONAL DIALOGUE
ON MUSEUM/NA TIVE AMERICAN RELATIONS (Feb. 28, 1990) (reprinted in appendix).
14. For an overview of the long established debate, and the scholarly as well as popular
literature see AMERICAN INDIAN SACRED OBJECTS, SKELETAL REMAINS, REPATRIATION AND REBURIAL:
A RESOURCE LIST (Rayna Green comp., 1989). For the treatment of these same issues in the
broader context of international law see PROTECTION OF CULTURAL PROPERTY AND ARCHAEOLOGICAL
RESOURCES: A COMPREHENSIVE BIBLIOGRAPHY OF LAW-RELATED MATERIALS (Frank G. Houdek
comp., 1988) [hereinafter PROTECTION OF CULTURAL PROPERTY]. For studies of the issue prior to
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The spotlight of conscience and the duty of advocacy has now shifted from Congress, museums, collectors, and the scientific community back to Native peoples and the Indian community. The human rights of Alaska Natives, Indian peoples, and Native Hawaiians are now, under the terms of NAGPRA, back in their own hands. The passage of the legislation, even in the compromised and modified consensus form, brought an end to a long, bitter debate and was a great victory. With victory comes responsibility, and that responsibility is to construct a system of law within the structure of Native tribal governments, courts, and legislative powers that will help all citizens fulfill the mandate of NAGPRA. It would, indeed, be a tragedy if the Native community failed in its task. NAGPRA is not self-actuating, but mandates Native group action if its purposes are to be fulfilled.

An important threshold consideration, indeed the basis for NAGPRA itself, is the recognition that Native Americans and Hawaiians—tribes, bands, and villages—are legal, living cultures with vital ongoing lifeways rooted in a rich traditional heritage. Courts have long recognized that governments of the original American inhabitants remain active governmental entities possessing legal sovereignty. They have been continually recognized by the United States as participants in ongoing government-to-government relationships. For example, federally-recognized Indian groups possess the power to enact their own laws and operate their own court systems. Within the scope of these rights, and under their own laws, Indian peoples continue to practice lifeways and cultures whose heritage runs back to ages before Columbus. This is the


fundamental legal basis upon which the Native American Graves Protection and Repatriation Act builds. NAGPRA recognizes that Native peoples are not themselves museum objects of dead cultures or even isolated remnants of quaint lost tribes; they are members of ongoing governmental, social, economic, religious, and political units. Native peoples are free under the law to define themselves and their lifeways, including their own legal system's definition of what is a sacred object, what is cultural patrimony, what property may be transferred by individuals, and what property can be alienated or placed in trust only by the entire tribal group.

NAGPRA's language is quite clear about the role of Native legal concepts, particularly in the definition of "sacred objects," "cultural patrimony," and "rights of possession." "Sacred objects" includes specific ceremonial objects that are needed by traditional Native American religious leaders for the purpose of traditional Native American religions by their present-day adherents. "Cultural patrimony" includes objects that have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, which cannot be alienated, appropriated, or conveyed, regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization. Moreover, objects of cultural patrimony must have been considered inalienable by such Native American group at the time the object was separated from such group.

The question of ownership or "right of possession" is also cast in terms of Native American legal culture, a tribe's own concept of property, and authority of alienation. Right of possession is defined in NAGPRA as:

[P]ossession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object, or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would . . . result in a Fifth Amendment taking . . .

16. 25 U.S.C.A. § 3001(3)(C), (D), (13).
17. Id. § 3001(3)(C).
18. Id. § 3001(3)(D).
19. Id.
20. Id. § 3001(13).
21. Id.
Thus, the interpretation and enforcement of NAGPRA as it relates to sacred objects, objects of cultural patrimony, and unassociated funerary objects requires an understanding of the nature of traditional Native American life and lifeways, as well as the operation of traditional law and tribal courts among Native peoples. NAGPRA has placed the primary task of factual determination in the Native culture itself. This is consistent with the underlying principles of American jurisprudence because the Native American is, in fact, the only source of accurate and meaningful interpretation of the traditional aspects of Native culture. Furthermore, existing Indian tribal courts provide an effective mechanism through which these legal determinations can most accurately be adjudicated.

III. THE DIFFICULT TASK OF UNDERSTANDING NATIVE LIFEWAYS AND WORLD-VIEWS IN ART, RELIGION, SACRED OBJECTS, AND CULTURAL PATRIMONY

Neill H. Alford, Jr., the distinguished American authority on trusts, describes many of the differences in cultural attitudes as those of "apple societies" and "orange societies." In apple societies: law, religion, art, economics, and all other aspects of society are a part of a single whole, an integrated oneness. In orange societies: law, religion, art, and economics are each a segment; life is fragmented into separate sections or compartments. An apple society does not make the same kinds of rigid distinctions between art and religion that orange societies believe to be absolutes. It is often difficult for these two societies to understand each other because their fundamental approaches to life are at opposite ends of the scale of perception. In terms of judicial systems, the Anglo-American common law represents, in Alford's analysis, the classic case of law in an orange culture; Native Americans and their legal systems are apple societies in an almost pure form. And yet, as Alford has noted, there are points at which differing societal paths may lead to the same ultimate destination.

Native Americans see the world holistically, that is, as an organic or unified whole, whose parts are totally interdependent and whose reality

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22. For a discussion of Alford's orange and apple societies as applied to traditional Native American tribal legal systems see Rennard Strickland, Wolf Warriors and Turtle Kings: Native American Law Before the Blue Coats, in SAVAGE SINNERS AND REDSKINNED REDEEMERS (forthcoming 1993).
23. See id.
24. See id.
is greater than the sum of those parts.\textsuperscript{25} Traditional European thought classified all things as living or dead, scaling them progressively from the lowly beast to the virtuous archangel. American Indian thought conceives of all worlds—natural and supernatural, ancestral and contemporary—and their inhabitants as simultaneous, coequal, and balanced. Where Europeans saw contradiction, the American Indian saw compatibility and, thereby, evaded the shackling of the imagination in Western traps of dialectical opposition.

Understanding the sacredness of the art objects of a holistic people requires a holistic view. Certain underlying principles, such as holistic integration of life within art, are held in common among Native Americans. Tribal groups have a distinctive approach to style, composition, and symbolic content. The organizing principles of Puebloan thought, for example, are sacredness and fertility. Hence, the Puebloan aesthetic distinction between secular and sacred arts, and between secular concerns with fertility and ceremonial preoccupation with symbolic fertility. Northwest coast societies, however, use art as a language of social power, creating images that connote aristocratic prerogatives. The Kwakiutl and Haida, for example, are as concerned with the display of economic power as the Puebloans are with the issue of sacredness.

Objects made by American Indians, whose systems of values and aesthetics are foreign to non-Indians, are nonetheless consistent and sophisticated. These works provide a multi-faceted window through which to glimpse and better understand the religion and lifeways of the societies that made them and continue, in most instances, to make them. In doing so, we journey into a world where an object’s definition depends on its context, not on an arbitrarily ascribed function. For example, a beaded leather pipe bag might be seen as an element of costume or as an indicator of its owner’s wealth, but during religious events it becomes a sacred housing of the pipe.

Immutable definitions are rare in Native America. Where Westerners classify quantitatively, American Indians evaluate qualitatively; where Western thinking tends toward all-or-nothing absolutism, American Indian thought turns on relative status. Western oppositional thinking,

\textsuperscript{25} See, e.g., Rennard Strickland, \textit{Beyond the Ethnic Umbrella}, in \textit{Magic Images: Contemporary Native American Art} (1981) (providing a comprehensive Indian art bibliographic essay); \textit{The Arts of the North American Indian: Native Traditions in Evolution} (Edwin Wade ed., 1986) (analyzing the relationship between Indian life and art, as well as analyzing crucial issues in an historical perspective). Readers are reminded that this analysis does not purport to represent the viewpoint of the Native American traditional religious leaders, but is intended to illustrate the interrelationship between art and religion and the vast diversity among and within Native groups.
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with its north/south, day/night, good/evil, sacred/secular concepts, contrasts markedly with the accumulative integrative perception of Native Americans. To the Hopi, for example, the fine tuning of sensory reality is explained by Enevoqa and Nananivoqa, or directions between directions, "going all directions," or colors between colors. This is not the same as the concept of "northeast" or "magenta," but is an infinitely incremental accounting of qualities that tend more or less towards dominant expressions.

As the non-Indian attempts to understand the Indian, it is crucial to remember that to live in pre-Columbian Indian America was to live in a time of magic. It was a time when ordinary men sought visions, and from their visions sprang potent knowledge, sacred objects, prayers, and songs that were the crystallization of power. Seeing the universe through the eyes of a contemporary Native American is to see it as a complex whole of natural forces and spiritual beings—animal, human, and supernatural—woven together in a delicate, intricate, and indivisible web. Man moves back and forth from the mundane world to the world of the spirit. Man is not frozen in a single body and a limited lifetime. Performing the Katcina26 dances of the Hopi, he becomes a supernatural being; singing the Pima deer song, he is transformed into the deer, his ears gathering the sounds of the forest. As America approaches the twenty-first century, an Indian spirit, far older than Columbian explorers, still lives.

Today, Native American patrimonial, ceremonial, and religious objects are central to tribal power and purpose. Power is an ancient and universal concept. In games, in war, in social and economic struggles, man is obsessed with power in comparative force. Which animal is strongest? Which man is wisest? Will the moon devour the sun? Will the gods destroy the unbeliever? How can one acquire these powers? Power means survival to Native Americans. Perceiving relative degrees of strength is central to the Native Americans' sense of self, of security, and of preparation for defense. Objects of power thus become both sacred and crucial. Indeed, objects of power are the essence of tribal patrimony; without them there may be no people.

One of the dramatic perceptual differences between Native Americans and Western Europeans lies in their differing definitions of power. With the waning of religious sensitivities in the West, power became predominantly a secular commodity that resides in social, economic,

26. Katcina is the appropriate spelling in certain Pueblo cultures for the elemental forces who are represented in ceremonies by masked dancers.
and political privilege. To the American Indian, power is a metaphysical reality that permeates the cosmos. All beings, animate or inanimate, possess power in the form of either patent or latent energy, as well as potential consciousness. Powers, whether defined by the Lakota term 'Wakan', the Maricopa term Gwistama-tc, or the Comanche term Puha, are interchangeable with the concept of sacred or spiritual medicine. True power for the Native American arises from the individual's relation to the supernatural. The strength of that bond results in social, economic, and political mobility. The Native American religious experience is highly personal and inseparably entwined with the world of secular concerns. Therefore, although sacred objects may appear to be peculiarly personal, they also may be highly religious and influence the fate of the entire group.

Methods for acquiring power, and the visible expression of power, vary from tribe to tribe. Physical manifestation might occur in the form of magic implements, fetishes, medicine bundles, charms, songs, dances, and rituals. Sacred power, or medicine, was obtained through spirit visitations during visions, supernatural gifts, ceremonial transfer, or inheritance. American Indian thought revolves around a reverence for nature, but at the core is a cautious respect for a capricious, animate universe vibrant with obtainable power that is often contained within sacred objects.

Traditional Native Americans see themselves as delicate particles balanced against a multitude of forces—gods, spirits, supernaturals, shape-changers, shamans, witches, raven-mockers, and prophets. Historically, cosmologies differed from tribe-to-tribe, but basic beliefs were constant. Central to all tribes was the perception of an organic cosmos precariously balanced. The significance of supernatural power to American Indian thought is demonstrated by thousands of physical manifestations expressed in art. For example, the gracefully designed—yet awesomely powerful—chief speaker's staff of the Northwest Coast Nootka and Tlingit Tribes. Similarly, the call for power radiates from what non-Indians would define as costume: a superbly crafted raven-frontlet adorned with a six-foot ermine skin trailer created in the nineteenth century by Bella Coola.

Western classification systems are out of touch with the American Indian world-view. Indeed, even the terms art, art work, sacred, and secular, as non-Indians use them, embody concepts foreign to Native American societies. Among many Indian peoples, all man-made objects are grouped together and referred to as that-which-has-been-made. The distinction between aesthetic objects, sacred objects, functional objects, public objects, and commercial objects simply does not exist. In a holistic society, there are no such lines.
Many non-Indians have a problem in the cultural translation of Native works. A non-Indian viewer of a Hopi figure, a Tlingit mask, or a Shoshone-painted hide translates the object into the familiar framework of his own culture. In doing so he confronts the same distortion as the English-speaking reader of a translated Cherokee love-song. The song, translated into English, has its syntax transposed, verb tenses approximated, and inflections altered. No longer a linguistic reflection of its maker, the song becomes a carnival mirror, distorting the delicate thought patterns of its creator’s culture. The non-Indian’s perception of Native American objects requires a similar translation. The visual arts, and the verbal arts, demand a holistic context. It is simply not possible to judge the meaning of a sacred object from a viewpoint and value structure outside the culture itself.

Native American art moves along a scale that embraces both the decorative object and the icon, and all that lies between. It reaches from the secular arts of basket design, pottery-making, and weaving through the semi-sacred and sacred visionary arts, such as warrior shields, to the Zuni war gods and Katcina masks that are the body of the gods. Indian artistic metaphor stretches from casual similarity or likeness between objects to transubstantiation, a phenomenon among Native Americans compatible with the Christian doctrine of transformation of bread and wine to the body and blood of Christ. At one end of the continuum are whimsical Pueblo ceramics shaped like opera singers or circus animals. At the opposite end are the true icons: the great arrow bundle of the Cheyenne, the taimi of the Kiowa, and the Katcina masks, which are not godlike, but truly embody the great force of the spirit; they are lifeforms, to be fed, cared for, respected, and invoked. The power cannot ebb from these objects, for power and object are one.

In between the iconic and the secular are vision songs and sacred images, which, though not icons, are sacred objects that can conduct power for the reverent, if all rituals are observed and all conditions met. In this category are emblems, such as the mystic buffalo painted on the warrior’s shield, that stand for powers received in a personal vision. For example, the Zuni fetishes are small carved animals that can give to the hunter the power of the animal. Images such as Zuni fetishes and the Plains warrior’s shield fall between metaphor as simile and metaphor as transubstantiation. They are part metaphor and part pure sacred power. The raven rattle of the Kwakiutl defines the role of metaphor in American Indian sacred art. The raven rattle when used in the tribal dance was not an Audubon-like representation of a bird; it was the bird and the bird’s power, so much so that in the ceremony it must be carried upside down to keep it from flying away.
The idea of object as metaphor is illuminating when applied to American Indian arts, but the concept is essentially non-Indian. To members of holistic societies such analysis would seem unnecessary. For them, there is a profound association between all living beings that goes beyond compared characteristics. The idea of metaphor is particularly difficult when applied to the icons of Indian society. These figures are not symbols or embodiments, but authentic spiritual entities.

The sacred integrative relationships among art objects, prayers, and rituals help to explain the American Indian sacred spiritual consciousness behind them. The complex and sophisticated world-view of Native holistic society is vividly illustrated in the creative life of a nineteenth century Sioux visionary and warrior called Lone Man. Lone Man tells of his experience concerning the acquisition of sacred charms, ceremonial regalia, and the composition of the accompanying song:

One day when I was on the warpath I sat down to rest . . . . I fell asleep, and while I slept I had a dream. My face was toward the west, and I heard thunder in that direction. There was a sound of hoofs, and I saw nine riders coming toward me in a cloud, each man on a horse of a different color . . . . One of them spoke to me, and said they had appointed me to make the first attack on the enemy. He said the man to be attacked was painted red and was standing in the water, and he said that if I could conquer that man I would gain something which would be useful to me all the rest of my life . . . .

. . . In my dread I found the enemy.

Before the riders in the cloud went away they gave me a charm (wo’tahe), which I always carried. If I were in great danger and escaped alive I attributed it to the charm and sang a song in its honor. The song relates to the swallow whose flying precedes a thunderstorm. When I sang the song of my charm I fastened the skin of a swallow on my head. This bird is so closely related to the thunderbird that the thunderbird is honored by its use. The action of the swallow is very agile. The greatest aid to a warrior is a good horse, and what a warrior desires most for his horse is that it may be as swift as the swallow in dodging the enemy or in direct fight. For this reason my song is in honor of the swallow as well as of my charm.28

Lone Man’s account of going from vision to song to sacred object to ritual demonstrates the integration of the American Indian religious

27. See Frances Densmore, Teton Sioux Music, 61 BUREAU AM. ETHNOLOGY BULL. 159-61 (1918).
28. Id.
perception and objectification of holy powers. From Lone Man's vision came an insight into his relation to the supernatural; from the supernatural came gifts: a prayer, a song, and a protective object. Each element is linked to the other. The initial vision gives rise to the opening prayer of recognition, which in turn gives rise to the commemorative power song, graphically preserved in the form of a medicine charm. The Swallow headdress, which Lone Man himself created, is made as a part of the sacred circle of power. Lone Man began to elaborate on his initial vision. Lone Man presents the charms and his vision in the Heyo 'kaka' ga: a public performance expressing his own vision and gratitude for the richness of his sacred vision. It is, in turn, presented in the full context of ceremonial regalia and song. Thus, the cycle continues, and the ritual objects are joined as one.

In Native American culture even the most seemingly mundane and utilitarian object may have deeply religious significance. The ordinary object may be sacred in origin and purpose. For example, the concept of container may be unexpectedly profound in American Indian traditions. While contemporary Americans think of boxes, envelopes, sandwich bags, suitcases, and other nondescript objects as containers, in American Indian thought the concept often has sacred metaphorical power: man, world, and cosmos are all compatibly significant receptacles. To the Zuni, Hopi, and other Pueblo peoples, sacred medicine jars, like the subterranean ceremonial retreats called kivas, were viewed as effective microcosms of the physical world. Fetish pots and prayer meal bowls were intricately embellished with symbols such as rain clouds, snow marks, lightening, and prey animals, and were occasionally smeared with blood and encrusted with cornmeal and ground turquoise to heighten their vitality. Fetishes of horn, bone, stone, feathers, shell, evergreen boughs, and coral, fashioned in the forms of both game and prey beasts, were either attached to the exterior of a jar or placed atop a mound of cornmeal and ground stone at the center of the vessel. Through a hole in the side of the container, the protective creatures were ceremonially fed. The stability of this miniature realm was thought to induce, by imitation, the same condition in greater reality.

Kivas, with their mythic wall murals, became cosmological vessels wherein past, present, and future osmotically combined, revitalized the ceremonial cycle that harmonized the world. Though details differ, this belief in architectural structures or religiously symbolic containers as cosmological entities is relatively widespread in native North America. Even the painted tipi suggests it is a sacred container; its figurative motifs proclaimed both the secular and spiritual achievements of its owner. It alluded to the power bundles associated with a unique psyche housed within a living shrine.
Transformation, in which the Native American changes into another being or experiences an altered state of consciousness, is central to the concept of the mask. This transformation is illustrated by the Kwakiutl songs that initiate the ceremonial season and sanction an individual's right to assume supernatural prerogatives. One Kwakiutl dancer in the Winter Ceremonial wears a vividly painted crest mask with flame-colored cedar bark strips streaming around the shoulders. The carved eyes, ears, cheeks, and nose are all human, but where one expects a human mouth, there erupts the massive, stout beak of a bird. The mouth seems to speak as the man's lips open, becoming part of the spirit's beak. The dancer's movements mesmerize. He soars and wings the audience back to a mythical time, to an alternative reality when animals spoke and supernaturals befriended man. As the dance continues, the mask wearer and the portrayed creature become one in the eyes of the audience. The transformation is complete. The supernatural power came and put its power into the mask and into the one "who had been made supernatural by ... supernatural power." The Kwakiutl song described the transubstantiation:

I may bring the supernatural power ... Now this is done; now you have wiped off your sickness, and you have wiped off your quarrels; now you have wiped off your troubles .... Now the supernatural power ... has come to our friends. Now it has changed all our minds.

... I have come to tell, you, world ....

Masks frequently appear during times of ritual passage: those socially-recognized transitions in an individual's life. Masked beings dramatize passages such as childbirth, the initiation of an adolescent into adulthood, or the ascendance of a man or woman into religion or political authority. In the final passage of the separation of death, masks once again function, whether in the form of the bleached raw cotton burial masks of the Hopi or as an engraved pre-Columbian shell gorget mask from Virginia. Masked beings also personify cosmic laws, properties, and moral principles. Sacred clowns among Puebloans, Northwest Coast tribes, and certain Eastern Woodland groups were the embodiment of pre-social chaos, just as masked whippers among the Zuni and Hopi were the enforcers of law.

The power of masks is revealed in the fine line separating their use as servants from their fearful potential to usurp man's free will. That

30. Id. at 243-46.
the supernatural power emanating from the mask may overpower the wearer is a recurrent threat. Historic accounts frequently mention deathlike trances that occurred to impersonators during mask rituals. Fears were expressed that if improperly treated, the mask could take the wearer's life. As do many Woodland masks, the Katcina masks of Puebloans require constant attention. This includes feeding and grooming, as well as respectful continence during handling lest they choke a wearer during a ceremonial. Other masks are secular objects, created for sale or use in social performances or, as with Northwest Coast items, during a public display of heredity crests and privileges. The most powerful masks, such as the Pueblo Katcina, Navajo Yeis, and medicine-pouched Iroquois false faces, remain sacred objects to present-day Native cultures.

IV. IMPLEMENTING THE NATIVE OBLIGATION THROUGH TRIBAL COURTS AND ENACTMENT OF INDIAN REPATRIATION AND CULTURAL CODES

NAGPRA has made traditional Native Americans' conceptions the controlling national standard; therefore, it is imperative that traditional Indian lifeways and attitudes be understood. The central task under NAGPRA will be the interpretation and meaning of a tribe's own cultural and legal standards. Furthermore, NAGPRA requires that requests for repatriation come from the Native community; thus, NAGPRA's provisions do not become effective without Indian initiative. Indeed, the Indian concept of property and the right to transfer title to property is a crucial ingredient of the law. Academicians, museum directors, art dealers, collectors, and all concerned with Native arts are compelled by NAGPRA to follow its definition of an object's historic Native creators, not the categorization of commercial art consumers or museum educators, no matter how well-motivated the non-Indian collector might be.

The Native community acting under NAGPRA has a compelling duty and a tremendous responsibility. The tribe is the only unit with the ability to obtain the historical facts and interpret their cultural meanings relating to the return of sacred objects, objects of cultural patrimony, and unassociated funerary objects. The two crucial questions under NAGPRA are: 1) is the item one that meets NAGPRA's definition of "sacred object," "cultural patrimony," or "unassociated funerary object," and 2) could the transfer of possession of the object occur under tribal law at the time of transfer. These are questions that the

Review Committee and the courts will be compelled to address if a conflict occurs and litigation ensues. Furthermore, these are questions that the tribe must be prepared to answer before seeking repatriation of sacred objects and cultural patrimony under NAGPRA.

At the present time, tribal legislatures and courts possess the legal rights to undertake the task, but few are prepared to address these questions. This essay proposes that Native groups adopt a Code system to create such a mechanism. The system must draw upon traditional religious leaders and tribal custodians of history. Whatever system is adopted, it must be meticulously fair and recognize that the intended purpose of NAGPRA is to return only those crucial objects of religious and patrimonial significance—not all arts and crafts produced by the tribe. Currently, the Center for the Study of American Indian Law and Policy of the University of Oklahoma is in the process of drafting such a model tribal code.

The question of ownership of sacred objects and cultural patrimony has long been an issue of international art law. Under both traditional English and American common law and jurisprudential concepts of Native peoples, sacred and patrimonial objects of a culture are most commonly held in trust. They cannot be items of commerce for sale,
purchase, or trade in the manner of secular goods. Thus, under either English common law or Native Indian law, a trust is created on the part of all who come into possession of such objects—on the part of the Native American who might hold such an object for use in a sacred ceremony or by a museum that displays the object as part of an educational exhibition. Neither can possess a marketable title that authorizes anything more than this basic trust.

It is not possible, as a matter of law, for individuals or museums to acquire valid title to a sacred object or an object of tribal cultural patrimony. Furthermore, no individual in Indian society can be authorized to transfer a valid title. Ownership of such objects rests with the tribal group or religious sect or visionaries’ followers. Clans, moites, families, beloved women, shamans, priests, and others are entrusted with the objects in their tribal trust capacities—not in their capacities as individuals.

Although legal theories relating to trust, ownership, and use of sacred objects and objects of cultural patrimony may be the same in Indian and non-Indian law, the classification of the objects themselves may be a point of serious misunderstanding and potential litigation. To a segmented or orange culture, such as the United States, objects may seem to serve only one purpose, but in a culturally unified or apple society objects serve multiple functions. Therefore, a single object may have both a sacred and a secular component.

V. CONCLUSION

In the introductory epigram, Walking Buffalo complained that the white man “didn’t [try to] understand our prayers.” In 1990, with the enactment of the Native American Graves Protection and Repatriation Act, the United States made understanding and preserving Native ways the official national policy. Nonetheless, the task of appreciating and, indeed, protecting the traditional religion of others—the sacred objects and objects of cultural patrimony—is not easy. The burden of implementing NAGPRA rests primarily with Native peoples who through their use of sovereign powers in courts and codes can ensure, as Congresswoman Mink argued, that these unique cultures remain forever “a part of the history and heritage of our nation.”


34. MacEwan, supra note 1, at 181.