

“COLONIZING” THE DEAD: FORMER COLONIAL NATIONS’ TREATMENT  
OF INDIGENOUS PEOPLES’ HUMAN REMAINS

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## I. INTRODUCTION

In many Western countries, museum displays of the dead are viewed as acceptable educational methods. For example, Iceland prominently displays an *in-situ* Viking skeleton in the entryway to its National Museum,<sup>1</sup> the English Heritage museum at Avebury, near Stonehenge, displays the excavated skeleton of a traveling barber who was crushed to death under a

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<sup>1</sup>PORKELL GRIMMSON, NATIONAL MUSEUM OF ICELAND: SUMMARY GUIDE TO THE EXHIBITION ROOM (Reykjavik, Iceland: National Museum of Iceland, 1984).

falling monolith,<sup>2</sup> and exhibited at the archaeological site of Pompeii are the skeletons and plaster casts of that town's inhabitants in their final moments following the eruption of Mount Vesuvius in A.D. 76.<sup>3</sup>

This tradition of the display of human skeletal remains moved with Europeans' colonial expansions into the New World, Africa, and the Pacific region and, in so doing, expanded from the collection and display of the ancestors of those colonizers to that of the colonized.<sup>4</sup> In addition to the collection of remains for display, indigenous human remains from these colonized countries began to be collected for scientific and pseudoscientific analysis.<sup>5</sup> In many situations, this collection and display clashed with indigenous perspectives, traditions, and belief systems and the remains' collection under often dubious circumstances added insult to injury from the indigenous perspective.<sup>6</sup>

The debate regarding the collection, retention, and study of such remains is not one-sided. While many indigenous groups oppose the use of their ancestors' remains in this manner, not all do.<sup>7</sup> Most of those that do oppose such treatment base their opposition on religious grounds,<sup>8</sup> thus pitting indigenous religion against scientific study in a complex tangle of fundamental constitutional rights and research interests.<sup>9</sup> To be sure, though many of the indigenous remains that are now the subject of such rancor were

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<sup>2</sup>CAROLINE MALONE, *THE PREHISTORIC MONUMENTS OF AVEBURY 16* (Swindon, UK: English Heritage Publications, 1994).

<sup>3</sup>SALVATORE C. NAPPO, *POMPEII: A GUIDE TO THE ANCIENT CITY 102* (New York, NY: Barnes & Noble Books, 1998).

<sup>4</sup>Ciraj Rassool, *Re-storing the Skeletons of Empire: Return, Reburial and Rehumanisation in Southern Africa*, 41(3) *J. S. AFR. STUDIES* 653, 7 (2015). *See generally* CHRISTINE QUIGLEY, *SKULLS AND SKELETONS: HUMAN BONE COLLECTIONS AND ACCUMULATIONS 119* (Jefferson, NC: McFarland & Company, 2008).

<sup>5</sup>*See generally* DAVID HURST THOMAS, *SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY 40* (New York, NY: Basic Books, 2000); Rassool, *supra* note 4, at 7.

<sup>6</sup>CHIP COLWELL, *PLUNDERED SKULLS AND STOLEN SPIRITS: INSIDE THE FIGHT TO RECLAIM NATIVE AMERICA'S CULTURE*, 173 (Chicago, IL: Univ. of Chicago Press, 2017); ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES* (Boston, MA: Beacon Press, 2015).

<sup>7</sup>COLWELL, *supra* note 6; Peter N. Meihana & Cecil R. Bradley, *Repatriation, Reconciliation and the Inversion of Patriarchy*, 127(3) *J. OF THE POLYNESIAN SOC'Y* 307, 311 (2018).

<sup>8</sup>THOMAS, *supra* note 5, at 219.

<sup>9</sup>COLWELL, *supra* note 6, at 77.

acquired under questionable ethical circumstances,<sup>10</sup> their use today is important. There is no doubt that nineteenth century researchers used many indigenous human remains to advance racist and eugenic theories and policies.<sup>11</sup> This is, indeed, a shameful part of the legacy of anthropology, biology, and archaeology. However, these collections historically also were used to develop skeletal analysis methodologies that are used to identify the victims of violent crime in forensic cases<sup>12</sup> and that most sacred of duties, the identification of war dead.<sup>13</sup> These remains continue to serve this scientific purpose today.<sup>14</sup> Thus, untangling the rights and interests of the indigenous community from those of the scientific community is no simple task.

During the 1970s and 1980s, indigenous voices on several continents began a backlash against these displays and study of the remains of their ancestors,<sup>15</sup> essentially arguing that the remains were stolen from their final resting places without consent and that their continued treatment as scientific and educational items threatened the health of the living and balance in the universe.<sup>16</sup> In Australia and the United States, these voices gained attention and resulted in the passage of national legislation in the late 1980s and early 1990s.<sup>17</sup> Other indigenous peoples' voices were not well heard and, on the eve of the fifteenth anniversary of the United States legislation in the early

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<sup>10</sup>THOMAS, *supra* note 5, at 119–20; Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA. L. REV. 149, 175–76 (2003) [hereinafter *Time for a Change?*]; Ryan M. Seidemann, *Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries*, 64 LA. L. REV. 545, 556–57 (2004) [hereinafter *Bones of Contention*].

<sup>11</sup>STEPHEN JAY GOULD, *MISMEASURE OF MAN* (New York, NY: W.W. Norton & Co., rev. and expanded ed. 1981); THOMAS, *supra* note 5, at 40; Katharina Schramm, *Casts, Bones and DNA: Interrogating the Relationship Between Science and Postcolonial Indigeneity in Contemporary South Africa*, 39(2) ANTHROPOLOGY S. AFR., 131 (2016); Heather Robertson, *Decolonizing Bioarchaeology: An Autoethnographic Reflection*, 9(2) NEW PROPOSALS: J. MARXISM AND INTERDISCIPLINARY INQUIRY 19, 9 (2018).

<sup>12</sup>COLWELL, *supra* note 6.

<sup>13</sup>*See generally* TOM COTTON, *SACRED DUTY: A SOLDIER'S TOUR AT ARLINGTON NATIONAL CEMETERY 8* (New York, NY: Harper Collins, 2019).

<sup>14</sup>COLWELL, *supra* note 6, at 237; *Time for a Change?*, *supra* note 10, at 175.

<sup>15</sup>TIMOTHY MCKEOWN, *IN THE SMALLER SCOPE OF CONSCIENCE: THE STRUGGLE FOR NATIONAL REPATRIATION LEGISLATION, 1986-1990*, 31–35 (Tucson, AZ: Univ. of Arizona Press, 2012); *Bones of Contention*, *supra* note 10, at 547.

<sup>16</sup>COLWELL, *supra* note 6, at 237.

<sup>17</sup>*Bones of Contention*, *supra* note 10, at 570.

2000s, little headway had been made in the regulation of such materials in places such as Canada, South Africa, and New Zealand.<sup>18</sup>

In 2004, Seidemann undertook a comparative analysis of the laws of the United States, Canada, Australia, New Zealand, and South Africa to divine, in a comparative sense, how each of these formerly colonial countries treated the human remains of their respective lands' indigenous inhabitants.<sup>19</sup> This research was largely spurred by the then-ongoing legal challenge over Kennewick Man, a 9,000-year-old skeleton recovered from the banks of the Columbia River in Washington state.<sup>20</sup> The ensuing legal battle for control of those skeletal remains lasted from 1996 until 2004 and opened old wounds between indigenous Americans and the scientific community that had largely begun to settle following implementation of the Native American Graves Protection and Repatriation Act in 1990.

In the wake of the Kennewick Man dispute, United States law was altered and the standards for dealing with the remains of the colonized changed, providing additional agency to Native Americans that had not existed prior to the case.<sup>21</sup> These changes were not reflected in the original research on this topic. This research examines the changes that have occurred at the national level in the United States and also reexamines the other original four countries—South Africa, Australia, New Zealand, and Canada—to determine whether indigenous peoples in these other four nations have been empowered in the fifteen years succeeding the original research on this topic.

## II. HUMAN SKELETAL REMAINS RESEARCH: THE PROS AND CONS

Human skeletal remains have been the subject of anthropological study since the dawn of the field in the mid-nineteenth century.<sup>22</sup> Among the curated human remains that have been the subject of such studies, at least in the United States, the majority of such remains are from those of indigenous peoples.<sup>23</sup> The scientific uses of these remains largely can be divided into two categories: general human history and medical/forensic applications.<sup>24</sup>

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<sup>18</sup> See generally *id.* at 588.

<sup>19</sup> *Id.* at 549.

<sup>20</sup> *Bonnichsen v. United States*, 367 F.3d 864, 868–69 (9th Cir. 2004).

<sup>21</sup> See 43 C.F.R. § 10.14 (2019), *et seq.*

<sup>22</sup> THOMAS, *supra* note 5, at xxxi.

<sup>23</sup> See generally THOMAS, *supra* note 5, xxxi; MCKEOWN, *supra* note 15, at xii.

<sup>24</sup> *Bones of Contention*, *supra* note 10, at 550.

Generally, human skeletal remains have been used to interpret the lifeways of past peoples.<sup>25</sup> More broadly, skeletal remains offer a glimpse into human morphological variation across time and between groups. The general consensus in academia regarding these types of studies, especially on ancient skeletal material is that "bones . . . offer a picture of time in our collective history."<sup>26</sup> Turner has characterized these studies thusly: "all humans are members of a single species, and ancient skeletons are the remnants of unduplicable evolutionary events which all living and future peoples have the right to know about and understand."<sup>27</sup>

The study of human skeletal remains can provide insights into population movement and migration as well as the specific genetic composition of individual populations.<sup>28</sup> Additionally, skeletal studies provide insights into pathological conditions and their interaction with humankind.<sup>29</sup> Such studies allow for the interpretation of the interactions of humankind with various diseases and have applications to both the study of past peoples and the investigation of crime-related modern human remains. Examinations of dentition and skeletal remains have led to the reconstruction of prehistoric diets and health patterns,<sup>30</sup> a necessity to understanding the complexities of past cultures.

The study of ancient human remains also contributes to contemporary medical fields. One example of such contemporary uses of remains for medical research is that reported by Swanston, et al.,<sup>31</sup> in which the evolution of the *H. pylori* bacterium was examined on a genetic level from recovered samples associated with ancient human remains discovered in Canada.

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<sup>25</sup> CLARK SPENCER LARSEN, *BIOARCHAEOLOGY: INTERPRETING BEHAVIOR FROM THE HUMAN SKELETON 2* (2d ed. 2015).

<sup>26</sup> Peter R. Afrasiabi, *Property Rights in Ancient Human Skeletal Remains*, 70 S. CAL. L. REV. 805, 808 (1997).

<sup>27</sup> Christy G. Turner, II, *What is Lost With Skeletal Reburial? I. Adaptation*, 7(1) QUARTERLY REV. OF ARCHAEOLOGY 1, 1 (1986).

<sup>28</sup> E.g., G. HAUSER & G.F. DE STEFANO, *EPIGENETIC VARIANTS OF THE HUMAN SKULL* (1989).

<sup>29</sup> ARTHUR C. AUFDERHEIDE, *THE CAMBRIDGE ENCYCLOPEDIA OF HUMAN PALEOPATHOLOGY* (2011); JANE E. BUIKSTRA, *ORTNER'S IDENTIFICATION OF PATHOLOGICAL CONDITIONS IN HUMAN SKELETAL REMAINS* (3d ed. 2019).

<sup>30</sup> LARSEN, *supra* note 25, at 3.

<sup>31</sup> Treena Swanston, Monique Haakensen, Harry Deneer, & Ernest G. Walker, *The Characterization of Helicobacter Pylori DNA Associated with Ancient Human Remains Recovered from a Canadian Glacier*, 6(2) PLOS One e16864 (2011).

Perhaps an even more common use for human skeletal studies is in their forensic applications.<sup>32</sup> Many of the techniques presently in use in the identifications of war dead, victims of mass disasters, and the victims of crimes were and continue to be developed on prehistoric human remains. One example of this is a recent sexing method for skeletal remains<sup>33</sup> that was initially devised and tested on a six-thousand-year-old Native American archaeological sample<sup>34</sup> and has since been developed into a forensic identification method<sup>35</sup> and applied to the identification of American war dead from Southeast Asia.<sup>36</sup> Additionally, nondestructive studies are currently being used to identify relationships between diet and dental pathologies.<sup>37</sup> Finally, comparative skeletal collections around the world were and continue to be “used in educating medical scientists concerning bone biology and human variation.”<sup>38</sup>

The curation of human skeletal remains over long periods of time has several benefits. The primary benefit is the possibility that new technology will be developed that will allow for more information to be gleaned from the remains. Perhaps most significant in this regard is the advent of DNA analysis that, with recent research, is allowing for the affiliation of unprovenanced, curated human skeletal remains with their closest living relatives, thus helping to accomplish repatriation goals.<sup>39</sup> Similar analyses

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<sup>32</sup>WILLIAM M. BASS, HUMAN OSTEOLOGY: A LABORATORY AND FIELD MANUAL (5th ed. 2005).

<sup>33</sup>Ryan M. Seidemann, Christopher M. Stojanowski, & Glen H. Doran, *The Use of the Supero-Inferior Femoral Neck Diameter as a Sex Assessor*, 107 AM. J. PHYSICAL ANTHROPOLOGY 305, 311 (1998).

<sup>34</sup>Ryan M. Seidemann, *Sex Assessment of the Human Femur Neck in Prehistoric Populations* (unpublished manuscript, on file with the author, 1994).

<sup>35</sup>Christopher M. Stojanowski & Ryan M. Seidemann, *A Reevaluation of the Sex Prediction Accuracy of the Minimum Supero-Inferior Femoral Neck Diameter for Modern Individuals*, 44(6) J. FORENSIC SCI. 1215, 1215 (1999).

<sup>36</sup>E-mail from Franklin Damann, Anthropologist, United States Central Identification Laboratory, to Ryan M. Seidemann (May 4, 2001, 18:32:24 CDT) (on file with author).

<sup>37</sup>Ericka L. Seidemann, Christine L. Halling, Ryan M. Seidemann, & Glen H. Doran, *Palatine Torus Expression at the Windover Site (8BR246), Florida*, 71(1) THE FLA. ANTHROPOLOGIST 15 (2019).

<sup>38</sup>Jane E. Buikstra, *Reburial: How We All Lose*, 17 SOC’Y. FOR CAL. ARCHAEOLOGY NEWSL. 2, 3 (1983).

<sup>39</sup>Joanne L. Wright, Sally Wasef, Tim H. Heupink, Michael C. Westaway, Simon Rasmussen, Colin Pardoe, Gudju Gudju Fourmile, Michael Young, Trich Johnson, Joan Slade, Roy Kennedy, Patsy Winch, Mary Pappin, Sr., Tapij Wales, William “Badger” Bates, Sharnie Hamilton, Neville Whyman, Sheila van Holst Pellekaan, Peter J. McAllister, Paul S.C. Taçon, Darren Curnoe,

have been reported using chemical analyses of human remains for repatriation purposes.<sup>40</sup> Additionally, as was recently demonstrated in a reanalysis of a Florida skeletal sample, the ability to reexamine prior research often leads to a refinement of previous scholars’ interpretations.<sup>41</sup> In this case, an original analysis of the individuals from the Calico Hill site in Jefferson County, Florida, identified malignant tumors in the two crania.<sup>42</sup> However, the more recent examination determined that the tumors were actually root damage, a fact that drastically changed the paleopathological status of the sample.<sup>43</sup>

Indigenous groups often object to such scientific analysis and permanent curation of the remains of their ancestors.<sup>44</sup> The general consensus of indigenous communities with respect to the researching of skeletal remains for the purpose of understanding past and current cultures is that they do not need to know such things. Indigenous activist Vine Deloria has commented that such studies “continue[ ] to become more irrelevant to the needs of people,” a position that many people might disagree with, but one to which descendant communities are entitled.<sup>45</sup> Such a perspective is acute when considering such collections and studies through the religious lens of many indigenous groups around the world.<sup>46</sup> Many indigenous religions contain concepts of creation that describe how their people came to their current locations, how they have interacted within and without their groups from the

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Ruiqiang Li, Craig Millar, Sankar Subramanian, Eske Willerslev, Anna-Sapfo Malaspinas, Martin Skjora, & David M. Lambert, *Ancient Nuclear Genomes Enable Repatriation of Indigenous Human Remains*, *SCI. ADVANCES*, 4:eau5064 (2018).

<sup>40</sup>Shaun Adams, Ranier Grün, David McGahan, Jian-Xin Zhao, Yuexing Feng, Ai Nguyen, Malte Willmes, Michael Quaresimin, Brett Lobsey, Mark Collard, Michael C. Westaway, *A Strontium Isoscape of North-East Australia for Human Provenance and Repatriation*, 34 *GEOARCHAEOLOGY* 231 (2019).

<sup>41</sup>Rachel K. Smith, *Analysis of Skeletal Material from Calico Hill, Florida: A Question of Paleopathology vs. Taphonomy*, 55(2) *THE FLA. ANTHROPOLOGIST* 59 (2002).

<sup>42</sup>Dan Morse, R.C. Dailey, & Jennings Bunn, *Prehistoric Multiple Myeloma*, 50 *BULL. OF THE N.Y. ACAD. OF MED.* 447, 451 (1974).

<sup>43</sup>Smith, *supra* note 41, at 63.

<sup>44</sup>COLWELL, *supra* note 6.

<sup>45</sup>VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 97 (Norman 1988) (1969).

<sup>46</sup>Russell Taylor, *Archaeology and Indigenous Australia* 12 (paper presented at the Fourth World Archaeological Congress 4, University of Cape Town, South Africa, 1999); Rebecca Brown, *Repatriation and Heritage Ownership: Implications for the Land Manager* 6–7 (unpublished thesis, School of Natural and Rural Systems Management, Univ. of Queensland, Gatton College, 2002).

dawn of time, and why they have acted in this way.<sup>47</sup> Under such a belief system, Western science divining contradictory or even supportive evidence is of no consequence. Indeed, many indigenous groups regard Western science but another of the world's religions, with no greater claim to legitimacy than their own.<sup>48</sup>

In addition to the general distrust of Western science's methods and questions among indigenous groups, many of these groups have begun to compile their own histories derived from oral histories.<sup>49</sup> The compilation of these histories "[O]ften means disputing the scientific version – not necessarily because it is wrong but because it does not contribute to the version of history which the indigenous communities wish to affirm."<sup>50</sup>

"We do not believe in digging up our own people, nor do we believe in digging up other people. When we bury our dead, we use sacred ceremonies, we do certain sacred rituals . . . It is one of our [religious] laws that we leave our dead alone."<sup>51</sup> This religious argument has proven to be the most powerful policy argument in support of the return of indigenous skeletal remains.<sup>52</sup> Freedom of religion has represented the basis for much of the legislation dealing with repatriation in the United States and in several other nations.<sup>53</sup> In addition to the religious concerns of indigenous groups with respect to the disposition of the remains of their ancestors, the control of these remains has become a component in maintaining group identity. "Possession of material remains can empower such groups, giving them tangible links to their cultural roots and their history."<sup>54</sup> Despite the religious and cultural importance and treatment of these remains by indigenous groups, much of the legislation in the countries examined herein deals with human remains in terms of property rights.

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<sup>47</sup> See, e.g., Meihana & Bradley, *supra* note 7, at 316.

<sup>48</sup> José Ignacio Rivera, *The Reburial of Our Ancestors: A Moral, Ethical, and Constitutional Dilemma for California*, 3(6) NEWS FROM NATIVE CAL. 12, 12 (1989).

<sup>49</sup> THOMAS, *supra* note 5, at 253.

<sup>50</sup> D. Gareth Jones & Robyn J. Harris, *Archaeological Human Remains: Scientific, Cultural, and Ethical Considerations*, 39 CURRENT ANTHROPOLOGY, 253, 260 (1998).

<sup>51</sup> See generally Perspectives from Lakota Spiritual Men and Elders (Jan Hammil & Larry J. Zimmerman, eds.) (1983) (Forty-first Plains Conference, Rapid City, SD) (on file with the author).

<sup>52</sup> MCKEOWN, *supra* note 15, at 5–6.

<sup>53</sup> Vine Deloria, Jr., *Secularism, Civil Religion, and the Religious Freedom of American Indians*, in REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS?, 169 (Devon A. Mihesuah ed., 2000).

<sup>54</sup> Brown, *supra* note 46, at 11; see also COLWELL, *supra* note 6.



### III. THE UNITED STATES AND HUMAN REMAINS LAW, 2004-2019

The controlling national law covering indigenous human remains in the United States is the Native American Graves Protection and Repatriation Act (“NAGPRA”).<sup>55</sup> This law, passed by the United States Congress in 1990, is seen by many as it was described by Senator John McCain during hearings on the law:

legislation [that] effectively balances the interest of Native Americans in the rightful and respectful return of their ancestors with the interests of our Nation’s museums in maintaining our rich cultural heritage, the heritage of all American peoples. Above all, . . . this legislation establishes a process that provides the dignity and respect that our Nation’s first citizens deserve.<sup>56</sup>

NAGPRA serves several purposes: it provides Native Americans a means of reclaiming affiliated human remains housed in the nation’s museum and university collections;<sup>57</sup> it protects Native American burial sites from disturbance or destruction when they are inadvertently discovered;<sup>58</sup> it restricts, to some degree, the amount of scientific research that can be accomplished on collections;<sup>59</sup> it requires an inventory to be made available to Native American groups of all skeletal remains and associated funerary objects curated by federally funded museums and universities;<sup>60</sup> and it restricts the illegal trafficking of Native American remains and funerary objects for profit.<sup>61</sup>

Under NAGPRA, all federally funded institutions were required to create an inventory of all “Native American human remains and associated funerary objects” under their control by November 16, 1995.<sup>62</sup> If, pursuant to the inventory, a modern lineal descendant group could be identified and such a group requested the return of the remains, the request must be granted.<sup>63</sup>

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<sup>55</sup> 25 U.S.C. § 3001, *et seq.* (2018).

<sup>56</sup> 136 Cong. Rec. S17173-02 (daily ed. Oct. 26, 1990) (statement of Sen. McCain).

<sup>57</sup> 25 U.S.C. § 3005 (2018).

<sup>58</sup> 25 U.S.C. § 3002(d)(1) (2018).

<sup>59</sup> 25 U.S.C. § 3005(b) (2018).

<sup>60</sup> 25 U.S.C. § 3003(a) (2018).

<sup>61</sup> 18 U.S.C. § 1170 (2018).

<sup>62</sup> 25 U.S.C. § 3003(a) (2018).

<sup>63</sup> 25 U.S.C. § 3005(a)(1) (2018).

Under the language of the law passed in 1990, requests for such returns could be honored only when made by “affiliated” Native American groups.<sup>64</sup> A group could demonstrate that it is affiliated with human remains represented by past peoples by demonstrating, “[B]y a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion”<sup>65</sup> that there is “[A] relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.”<sup>66</sup> The complexity of this standard of proof resulted in the massive litigious dispute over who had the right to control the remains of Kennewick Man.<sup>67</sup> The outcome of the Kennewick Man decision led, in turn, to the National Park Service’s passage of regulations purportedly explicating the definition of “affiliated” and providing for additional jurisdiction of NAGPRA over “unaffiliated” remains.<sup>68</sup>

In the past fifteen years, NAGPRA, the statute, has not been altered in any way. However, following more than twenty years of often tense and difficult negotiations among indigenous communities, scientists, and museum professionals, the National Park Service (“NPS”), in 2013, published regulations pursuant to NAGPRA covering culturally unaffiliated human remains.<sup>69</sup> Critical analyses of these regulations have been published elsewhere and will not be repeated here.<sup>70</sup> However, as a retrospective of the changes to the law in the United States, a brief review of the regulations is warranted here.

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<sup>64</sup> 25 U.S.C. § 3005 (2018).

<sup>65</sup> 25 U.S.C. § 3005(a)(4) (2018).

<sup>66</sup> 25 U.S.C. § 3001(2) (2018).

<sup>67</sup> See generally *Time for a Change?*, *supra* note 10; *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

<sup>68</sup> See generally Seidemann, *Altered Meanings: The Department of the Interior’s Rewriting of the Native American Graves Protection and Repatriation Act to Regulate Culturally Unidentifiable Human Remains*, 28 TEMP. J. SCI. TECH & ENVTL. L. 1 (2009).

<sup>69</sup> Native American Graves Protection and Repatriation Act Regulations, 78 Fed. Reg. 27078 (May 9, 2013) (to be codified at 43 C.F.R. pt. 10).

<sup>70</sup> See e.g., Rebecca Tsosie, *NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework*, 44 ARIZ. ST. L.J. 809 (2012) (although this source predates the promulgation of the final NAGPRA regulations noted here, it is a good example of the critical analysis of the earlier drafts of these regulations that appeared in the literature prior to their promulgation); See also, Seidemann, *supra* note 68, at 1.

The regulations refer to three categories of culturally unidentifiable human remains. The regulations also contain new directives for the documentation of culturally unidentifiable human remains. These regulations state, in essence, that, pursuant to consultation with interested Native American groups under 43 C.F.R. § 10.9(c) and 43 C.F.R. § 10.14, scientific analyses of such remains may be conducted in an effort to advance conclusions regarding the cultural affiliation of the remains.<sup>71</sup>

The regulations contain a statement that the disposition of culturally unidentifiable human remains equates to giving these remains to Native American groups.<sup>72</sup> Although such a statement provides indigenous groups with agency not heretofore held, it may not be a correct or appropriate interpretation of NAGPRA. With this statement, NPS has defined the term “disposition” to mean “repatriation.” Such a correlation does not exist in the law. This definition places in indigenous hands alone control over culturally unidentifiable human remains, giving such groups the ability to decide whether such remains—potentially those of peoples unrelated to them—should be repatriated according to an unrelated group’s mortuary practices or should be kept in museum collections. While providing such agency is a laudable goal, it places the new regulations at a constitutional risk. There is little legal support for the NPS’s drafting of the culturally unidentifiable remains regulations as they currently exist.<sup>73</sup> If a collection with as much significance as that of Kennewick Man is sought to be repatriated pursuant to these new regulations, there is a substantial certainty that one of the legal challenges to such a repatriation would be that the regulations on which the repatriation is based are unconstitutionally broader than the congressional grant of authority to NPS under NAGPRA.

Further, as was shown in the recent case of *White v. University of California*, such approaches to handling human remains often eliminate the scientific voices in the debate.<sup>74</sup> In *White*, faculty members in the University of California system filed suit to forestall the repatriation of culturally unidentifiable human remains from a roughly 9,000-10,000-year-old site excavated decades earlier on property owned by the University of California System. One of the major complaints of the faculty was that the university and indigenous peoples had coordinated the repatriation without meaningful

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<sup>71</sup> See 43 C.F.R. § 10.11 (2014).

<sup>72</sup> See 43 C.F.R. § 10.2(g) (2014).

<sup>73</sup> See generally Seidemann, *supra* note 68, at 1.

<sup>74</sup> *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014).

input from the scientific community.<sup>75</sup> At a minimum, Dr. White asked for a stay of repatriation in order for some scientific analysis of this ancient collection of human remains to occur.<sup>76</sup> The courts denied these requests on grounds that the claimant Native American tribes were necessary parties to the litigation but possessed sovereign immunity, thus meaning that the plaintiffs' litigation could not proceed.<sup>77</sup> The practical problem of this outcome is that the repatriation process was allowed to proceed without any meaningful analysis under NAGPRA regarding the faculty members' claims that the disputed human remains were not subject to the repatriation provisions of NAGPRA. Such an outcome undermines the intent of NAGPRA which was ironically acknowledged by the district court,<sup>78</sup> which was to ease tensions between the indigenous and scientific communities. A finding that a dispute cannot be resolved pursuant to the law enacted to resolve such disputes establishes a procedurally defunct scenario and one that does not further the ends of justice.<sup>79</sup> Because the new regulations establish an institution-indigenous group collaboration without the inclusion of input from the scientific community, situations such as those in *White* could occur more frequently, upsetting the delicate science-indigenous community balance that was struck with the passage of NAGPRA in 1990. Thus, while the past 15 years have seen significant developments in the law of indigenous human remains treatment in the United States, it is, as-yet, unclear whether these developments have been for the better. There is no doubt that indigenous groups have been given more agency in the United States over the past 15 years, but that agency may come at the cost of removing agency from the scientific community or putting at risk the viability of the very laws on which that agency is based.

#### IV. SOUTH AFRICA AND HUMAN REMAINS LAW, 2004-2019

Shortly prior to the publication of the previous review of colonial laws on which this research is based, South Africa passed, in 1999, the National

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<sup>75</sup> *White v. Univ. of Cal.*, No. C 12-01978 RS, 2012 WL 12335354, at \*2-3 (N.D. Cal. Oct. 9, 2012), *aff'd*, 765 F.3d 1010 (9th Cir. 2014).

<sup>76</sup> *Id.* at \*1.

<sup>77</sup> *Id.* at \*1-2.

<sup>78</sup> *Id.* at \*2.

<sup>79</sup> In this regard, it may be more appropriate for Congress to authorize a limited waiver of tribal sovereign immunity in NAGPRA disputes so that these cases may at least be able to proceed to the merits of such disputes.

Heritage Resources Act (“NHRA”). This enactment wrought a substantial change on existing law in the country which, theretofore, contained spotty and indirect protections for human remains.<sup>80</sup> Even with the enactment of this law, there is no specific law that targets protections of indigenous peoples’ remains as opposed to simply applying blanket protections to all human remains and burial sites. Moreover, the law that does exist is not human rights legislation as is NAGPRA in the United States. Rather, South Africa’s law is historic preservation legislation aimed at heritage protection rather than at empowering indigenous groups.<sup>81</sup> Thus, the agency provided to Native Americans through NAGPRA is not directly present for indigenous South Africans.<sup>82</sup>

NHRA section 35(2) reserves all archaeological resources as state property and, if culturally significant, they are to be administered by heritage resource authorities.<sup>83</sup> This is certainly broader than the United States law, which is limited to federal property only. Not only does the NHRA apply to archaeological resources yet to be excavated, but, section 35(7)(a) also requires resources held by those other than museums or universities who did not obtain the resources pursuant to NHRA, NMA, or similar provincial legislation, to register a list of the items with a governmental heritage resources authority.<sup>84</sup> This provision reaches deeply into the private realm, presumably to identify the whereabouts of years’ worth of looted materials.

However, unlike the agency given to indigenous peoples in the United States by NAGPRA’s reach into museum and university collections, the NHRA exempts such institutions—usually the primary holders of human remains and items of cultural patrimony.<sup>85</sup> Deacon and Deacon, commenting broadly on the lack of indigenous agency in the NHRA, point out that, “[t]he descendants of the indigenous people . . . have no particular legal claim to [heritage objects and sites] and have an equal status regarding the protection of this heritage with any other interested party.”<sup>86</sup> Thus, while protections exist in South Africa, they do not empower the indigenous population in the protection of their heritage, but rather reduce remains to objects to be dealt

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<sup>80</sup> *Bones of Contention*, *supra* note 10, at 562–63.

<sup>81</sup> H.J. DEACON & JEANETTE DEACON, *HUMAN BEGINNINGS IN SOUTH AFRICA: UNCOVERING THE SECRETS OF THE STONE AGE, 196–97* (1999).

<sup>82</sup> Rassool, *supra* note 4, at 653.

<sup>83</sup> National Heritage Resources Act 25 of 1999 § 35(2).

<sup>84</sup> National Heritage Resources Act 25 of 1999 § 35(7)(a).

<sup>85</sup> *See id.*

<sup>86</sup> DEACON & DEACON, *supra* note 81, at 196–97.

with under property rights regimes. Although this lack of indigenous control (beyond anyone else's control) is present in the disposition of existing collections, as will be demonstrated, indigenous groups are not so powerless as to the protection of remains discovered *in situ*. Further, as several recent authors have noted, political pressure has been brought to bear in recent years by the South African indigenous community to enhance their agency with regard to human remains repatriation.<sup>87</sup>

More specific to the topic of this study are the contents of NHRA section 36: the rules for burial grounds and graves. This section vests the national government with the authority to protect and conserve any burial grounds and graves not covered by another authority.<sup>88</sup> Such grave spaces are, through NHRA section 36(3), protected from destruction, damage, alteration, exhumation, removal, or disturbance from above in the form of excavation equipment or metal detection.<sup>89</sup> Such areas can only be disturbed pursuant to a government permit for such work subject to the requirement of reasonable arrangements being in place for exhumation and reburial.<sup>90</sup> More importantly, NHRA section 36(5) mandates that, prior to the issuance of a permit, the government must ensure that the applicant for the permit has:

- (a) made a concerted effort to contact and consult communities and individuals who by tradition have an interest in such grave or burial ground; and
- (b) reached arrangements with such communities and individuals regarding the future of such grave or burial ground.<sup>91</sup>

Although this portion of the NHRA applies broadly to all old graves, its consultation requirements provide indigenous groups a unique amount of agency with regard to the disposition of the remains of their ancestors when those remains are discovered *in situ*. While the NHRA appears to provide more substantial protection than the United States' law with respect to *in situ*

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<sup>87</sup>Rassool, *supra* note 4, at 7. See also Katharina Schramm, *Casts, Bones and DNA: Interrogating the Relationship Between Science and Postcolonial Indigeneity in Contemporary South Africa*, 39(2) ANTHROPOLOGY SOUTHERN AFRICA, 131 (2016); MARTIN LEGASSICK & CIRAJ RASSOOL, *SKELETONS IN THE CUPBOARD: SOUTH AFRICAN MUSEUMS AND THE TRADE IN HUMAN REMAINS 1907-1917*, 2D ED., 1-2 (2015).

<sup>88</sup>National Heritage Resources Act 25 of 1999 § 36.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>*Id.*

remains, the NHRA's provisions concerning the repatriation of remains curated in museums and institutions is substantially weaker than those in its American counterpart. Moreover, unlike with NAGPRA, repatriation is not mandatory under the NHRA, only negotiation for repatriation.

No substantive changes to any human remains-related laws have been made in South Africa since the enactment of the NHRA in 1999. Nonetheless, as is often the case, the law and on-ground realities are distinct animals and the ability of indigenous communities in South Africa to create their own agency for purposes of recent repatriations is an example of this disconnect.

#### V. AUSTRALIA AND HUMAN REMAINS LAW, 2004-2019

In much the same atmosphere as NAGPRA was passed in the United States in 1990, the Australian Parliament passed the Aboriginal and Torres Strait Islander Heritage Protection Act of 1984 ("ATSIHPA").<sup>92</sup> The sentiments of the Australian Aborigines, generally, include a desire for research on Aboriginal remains to cease and for a return of curated collections to the indigenous communities.<sup>93</sup> This long-held assertion for the return of Aboriginal remains has not wavered over the past thirty-five years, resulting in the return of collections of ancient remains.

As is the case in NAGPRA, ATSIHPA has no temporal limit on protections of graves and curated museum collections. Perhaps even more so than with NAGPRA, such a law represents a substantial conflict between indigenous beliefs and science, as the remains of individuals potentially as old as 40,000 years may be subject to repatriation. Such a situation in which claims to remains that are 40,000 years old can be maintained begins to reach into the realm of paleoanthropology, thus putting indigenous claims on a temporal scale equivalent to modern Europeans claiming repatriation rights to Neandertal skeletal material.<sup>94</sup>

Such claims to ancient remains are based largely on Aboriginal religious beliefs that their people have inhabited the continent of Australia since the Dreamtime, and thus have a cultural claim to any human remains, regardless of age. The Aboriginal community is generally unimpressed "by assertions

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<sup>92</sup> *Aboriginal and Torres Strait Islander Commission Amendment Act 1984* (Cth) (Austl.).

<sup>93</sup> S. Webb, *Reburying Australian Skeletons*, 61 *ANTIQUITY* 292 (1987); Shaun Adams et al., *A Strontium Isoscape of North-East Australia for Human Provenance and Repatriation*, 34 *GEOARCHAEOLOGY* 231, 233 (2019).

<sup>94</sup> See generally Tom Higham et al., *The Timing and Spatiotemporal Patterning of Neandertal Disappearance*, 512 *NATURE* 306 (2014).

that ‘some heritage is universal property,’<sup>95</sup> thus rejecting scientific beliefs that ancient remains should be studied as belonging to a broader community of all humanity as part of our common heritage as *Homo sapiens*.<sup>96</sup> Indeed, some Aborigines have referred to such investigations as “[l]earning about the past from a ‘Whitefella perspective.’”<sup>97</sup>

Although never overtly referring to the “protection” and “repatriation” of Aboriginal human remains, ATSIHPA provides a substantial range of protection for such materials from “injury or desecration” throughout the Commonwealth. This protection occurs via several provisions of ATSIHPA, namely: Sections 3(1), 12, 20, and 21.156. Section 12 deals with the protection of “significant Aboriginal objects.”<sup>98</sup> “Significant Aboriginal object” is defined in section 3(1) as “an object (including Aboriginal remains) of particular significance to Aborigines in accordance with Aboriginal tradition.”<sup>99</sup> “Aboriginal remains,” also defined in section 3(1):

means the whole or part of the bodily remains of an Aboriginal, but does not include:

(a) a body or remains of a body:

(i) buried in accordance with the law of a State or Territory;  
or

(ii) buried in land that is, in accordance with Aboriginal tradition, used or recognized as a burial ground . . .<sup>100</sup>

Under section 12, *in situ* or curated Aboriginal remains are eligible for a “declaration” if they are in danger of “injury or desecration.”<sup>101</sup> Such a declaration provides for “the protection and preservation of the object or objects from injury or desecration” and may provide for the delivery of the remains to “an Aboriginal . . . entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition.”<sup>102</sup>

<sup>95</sup> Sandra Bowdler, *Unquiet Slumbers: The Return of the Kow Swamp Burials*, 66 *ANTIQUITY* 103, 104 (1992).

<sup>96</sup> *Id.*

<sup>97</sup> Russell Taylor, *Archaeology and Indigenous Australia*, (1999) (Paper presented at the World Archaeological Congress 4, University of Cape Town, South Africa).

<sup>98</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) § 12 (Austl.).

<sup>99</sup> *Id.* § 3.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* § 12.

<sup>102</sup> *Id.*



In terms of “injury or desecration,” section 3(2)(b) defines such mistreatment of an object as an occasion when “it is used or treated in a manner inconsistent with Aboriginal tradition.”<sup>103</sup>

Section 21X of ATSIHPA specifically and explicitly addresses the repatriation of Aboriginal remains from “a university, museum, or other institution.” This section, much more broad in scope than the United States’ NAGPRA, does not require any showing of cultural affiliation in order to reclaim remains so held. The only restriction is a spatial one. The remains must have been found or have come from the area around the claiming Aboriginal community.<sup>104</sup>

Although the basic structure of ATSIHPA has remained the same since the previous examination of Australian national law, the law was amended in 2005, 2006, and 2016. The 2016 amendments were nonsubstantive penalty changes and edits that merit no analysis.<sup>105</sup> The 2005 amendments are more substantial in nature.<sup>106</sup> Despite the large number of changes to ATSIHPA in 2005, though, none relate to the human remains protections enacted in 1984 and amended in 2006. The 2006 amendments,<sup>107</sup> similarly, were largely technical in nature and did not substantively alter most of the above summary of existing protections. Many of the changes in this year related to correcting inconsistencies between ATSIHPA and the Protection of Movable Cultural Heritage Act 1986 (“PMCHA”). One troubling aspect of the 2006 amendments is that they make the human remains protections in ATSIHPA subservient to existing permits to export cultural items under the 1986 law. In this regard, under PMCHA, an existing permit from the government to export Aboriginal human remains could supersede the protections of such remains under ATSIHPA, thus stripping agency from the indigenous community in such situations. This provision largely resembles the recognition under NAGPRA in the United States that certain private property rights may have vested prior to the law’s enactment.<sup>108</sup> However, based on

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<sup>103</sup> *Id.* § 3.

<sup>104</sup> *Id.*

<sup>105</sup> See generally *Statute Update Act 2016* (Cth) (Austl.) amending *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Austl.).

<sup>106</sup> *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth) (Austl.) amending *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Austl.).

<sup>107</sup> *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 2006* (Cth) (Austl.) amending *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Austl.).

<sup>108</sup> See 25 U.S.C. § 3002 (2018).

analyses of both civil and common law traditions,<sup>109</sup> it is clear that there is no basis upon which to base private property claims to human remains absent express consent from the deceased (which can never be the case in archaeologically-derived samples), meaning that the protection of private property rights in human remains in Australia and the United States are null. Thus, while the message sent by the 2006 amendments is one of minimal disenfranchisement, the practical implications seem to be minimal if existent at all.

## VI. NEW ZEALAND AND HUMAN REMAINS LAW, 2004-2019

The interest by New Zealand's indigenous population, the Maori, in the repatriation of the remains of their ancestors has surfaced much more recently than similar movements in Australia and the United States.<sup>110</sup> In the early to mid-1990s, a "rise in Maori ethnic consciousness" has forced the New Zealand government to reassess its treatment of its indigenous population.<sup>111</sup> Cultural ties of modern Maori people to the remains currently held in museums around the world as well as those potentially unearthed during construction or other excavations are temporally stronger than many of those in the United States and Australia. This is based on the premise that a closer temporal relationship also suggests a closer cultural relationship. The culturally distinct Maori arrived on the islands of what is now known as New Zealand circa A.D. 1300<sup>112</sup> as compared to the culturally unidentifiable (at least in terms of analogues to modern peoples) populations of the United States (circa 14,000 BP)<sup>113</sup> and Australia (circa 50,000 BP).<sup>114</sup> Much of the

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<sup>109</sup> See generally Seidemann, *supra* note 68.

<sup>110</sup> Natacha Gagné & Mélanie Roustan, *French Ambivalence Towards the Concept of 'Indigenous People': Museums and the Māori*, 29(2) ANTHROPOLOGICAL FORUM 95 (2019).

<sup>111</sup> H.J. DE BLIJ & PETER O. MULLER, *GEOGRAPHY: REALMS, REGIONS, AND CONCEPTS*, 525 (John Wiley & Sons, Inc., 1997).

<sup>112</sup> Patrick V. Kirch, *Peopling of the Pacific: A Holistic Anthropological Perspective*, 39 ANNUAL REV. ANTHROPOLOGY 131, 140 (2010).

<sup>113</sup> Ted Goebel, Michael R. Waters, and Dennis H. O'Rourke, *The Late Pleistocene Dispersal of Modern Humans in the Americas*, 319 SCIENCE 1497, 1501 (2008).

<sup>114</sup> Chris Clarkson, Zenobia Jacobs, Ben Marwick, Richard Fullagar, Lynley Wallis, Mike Smith, Richard G. Roberts, Elspeth Hayes, Kelsey Lowe, Xavier Carah, S. Anna Florin, Jessica McNeil, Delyth Cox, Lee J. Arnold, Quan Hua, Jillian Huntley, Helen E.A. Brand, Tiina Manne, Andrew Fairbairn, James Schulmeister, Lindsey Lyle, Makiah Salinas, Mara Page, Kate Connell, Gayoung Park, Kasih Norman, Tessa Murphy & Colin Pardoe, *Human Occupation of Northern Australia by 65,000 Years ago*, 547 NATURE 306, 306 (2017).

recent repatriation activity by the Maori has focused on the return of moko mokai (preserved tattooed human heads) from museums abroad.<sup>115</sup> However, some recent efforts have resulted in the return of skeletal remains to New Zealand.

With respect to the disposition of human remains of Maori affiliation within New Zealand, the situation is somewhat similar to that of South Africa. The law that governs such materials under the earlier research on this topic was the Historic Places Act ("HPA").<sup>116</sup> This law, and its successor, is general historic preservation or heritage protection law like those of South Africa that just happen to apply to human remains as well as archaeological and historic sites. In 2014, the HPA was repealed in favor of the Heritage New Zealand Pouhere Taonga Act 2014 ("HNZPTA").<sup>117</sup> A review of this new law demonstrates that it wholly subsumed, without diminishing, the former HPA. Because the HNZPTA covers more topics than did the HPA, there HPA's incorporation therein rearranged the portions of the HPA originally reviewed for this research. The new citations are used here.

The HNZPTA is more powerful than the United States' federal legislation that protects areas of historic significance because it applies its protections equally to Crown property as well as private property. However, in contrast to United States legislation that protects things regardless of age, the HNZPTA only protects archaeological sites "associated with human activity that occurred before 1900."<sup>118</sup>

*In situ* human remains are protected from destruction, damage, or modification along with and indistinguishable from archaeological sites before archaeological and Maori values of the site can be determined.<sup>119</sup> Where an application for the destruction or alteration of an archaeological site is submitted to the government, either Heritage New Zealand Pouhere Taonga or the Maori Heritage Council has the authority to grant or deny such applications.<sup>120</sup> Such requirements vest substantial agency regarding the protection of *in situ* human remains (as part of archaeological sites) in the Maori, a factor not present in current United States legislation.

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<sup>115</sup>STEPHEN F. CLARKE, REPATRIATION OF HISTORIC HUMAN REMAINS: NEW ZEALAND, June 9, 2015, available at <https://www.loc.gov/law/help/repatriation-human-remains/new-zealand.php>.

<sup>116</sup>Seidemann, *supra* note 68; HARRY ALLEN, PROTECTING HISTORIC PLACES IN NEW ZEALAND 9, 11 (Dept. of Anthropology, Univ. of Auckland, 1998) (reviewing the HPA).

<sup>117</sup>Heritage New Zealand Pouhere Taonga Act § 3.

<sup>118</sup>*Id.* § 43(1).

<sup>119</sup>*Id.* § 42.

<sup>120</sup>*Id.* §§ 22, 48, 49.

Despite the broad reach of the Maori agency in the protection of relevant *in situ* archaeological remains, there is no legislation in New Zealand that provides for the repatriation of human remains or other archaeologically derived materials from any museum to affiliated Maori groups. Oddly, while many historic treaties are known for substantial adverse impacts on indigenous peoples, the 1840 Treaty of Waitangi provides a mechanism by which Maori may assert claims to human remains positively identified to be of Maori.

The Treaty of Waitangi, still partially in force, was signed by the British Crown and various Maori tribes in 1840.<sup>121</sup> The Treaty established British sovereignty over all New Zealand, but retained to the Maori “full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess . . . .”<sup>122</sup> Through various acts, such as the Treaty of Waitangi Act and the Treaty of Waitangi Amendment Act, this treaty remains a significant legal instrument in the protection of Maori property rights today.<sup>123</sup> While human remains may, arguably, fall under the “other properties” portion of the Treaty of Waitangi, a literal translation of the Maori version of the Treaty seems to give stronger support to this notion. The literal translation reads: “The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages, and all their treasures.”<sup>124</sup>

Although there is tacit evidence that museums in New Zealand will respect any Maori request for the return of such material,<sup>125</sup> such decisions should rest in a cooperative decision maker of indigenous peoples and scientific/museum professionals in order to ensure that unilateral control is

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<sup>121</sup> Benjamin A. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35 STAN. J. INT'L L. 49, 55–56 (1999) (noting the origins of the Treaty of Waitangi).

<sup>122</sup> Treaty of Waitangi, Gr. Brit.-Maori Chiefs, art. 2, Feb. 6, 1840.

<sup>123</sup> Personal communication from Dr. Harry Allen, Professor of Anthropology at the University of Auckland (Sept. 19, 2002).

<sup>124</sup> The original Maori reads: “Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga a ratou wenua o ratou kainga me o ratou taonga katoa.” From the Maori original, the term “taonga” or “treasures” “refers to all dimensions of a tribal group’s estate, material and non-material – heirlooms, wahi tapu (sacred places), ancestral lore and whakapapa (genealogies), etc.” Treaty of Waitangi, Gr. Brit.-Maori Chiefs art. 2, Feb. 6, 1840.

<sup>125</sup> Jonathan Milne, *Maori Skulls to Be Returned After Olympics*, THE DOMINION POST (WELLINGTON), Aug. 16, 2000.

not vested in a single institution and in order to ensure equal agency among interested parties. Accordingly, the New Zealand government should incorporate a formal statement of this policy into the HNZPTA out of simple respect for the Maori people as well as to establish legal standards should disputes regarding repatriation requests arise.

## VII. CANADA AND HUMAN REMAINS LAW, 2004-2019

Canada presents a unique legal situation in terms of laws relating to the protection and repatriation of indigenous human skeletal remains. Unlike the other countries reviewed here, there is no national law governing such remains in Canada.<sup>126</sup> Neal Ferris, an archaeologist in Ontario's Ministry of Culture, suggests that this absence of national law:

is in part due to jurisdiction issues (provinces like states, are responsible for heritage off federal lands) . . . partly due to the lack of willingness [of the federal government] to grapple with such a complex issue, and partly due to major research institutions . . . being proactive and developing their own repatriation policies in [t]he absence of legislation.<sup>127</sup>

Part of this void in legislation is also filled by ethical mandates of national professional organizations.<sup>128</sup> This absence of national legislation for the protection of indigenous human skeletal remains has not changed in the past 15 years. In addition to Ferris' comment above, at least one other source explains the lack of national legislation as a deference to the provinces' individual regulations of human remains writ large (i.e., the general cemetery laws of the provinces serve the purpose that laws such as NAGPRA accomplish in the United States).<sup>129</sup> Although this reality may be true, a comprehensive comparison of the individual provinces' cemetery laws is beyond the scope of this research. However, if Ontario's law is any indication of such protections, as with the more expansive laws in the individual states

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<sup>126</sup>Kevin McAleese, *The Reinterment of the Thule Inuit Burials and Associated Artifacts – IdCr-14 Rose Island, Saglek Bay, Labrador*, 22 *ÉTUDES INUIT/INUIT STUDIES* 41, 46 (1998); See Ontario Ministry of Tourism and Culture, *Engaging Aboriginal Communities in Archaeology: A Draft Technical Bulletin for Consultant Archaeologists in Ontario* 9.

<sup>127</sup>Personal communication from Dr. Neal Ferris, Ontario Ministry of Citizenship, Culture, and Recreation (Sept. 24, 2002) (cited in *Bones of Contention*, *supra* note 10, at 575).

<sup>128</sup>McAleese, *supra* note 126, at 46.

<sup>129</sup>See Ontario Ministry of Tourism and Culture, *supra* note 126, at 4.

in the United States,<sup>130</sup> it may very well be that national legislation is simply unnecessary in Canada. Nonetheless, as is also often the case in the United States, state legislatures can be more fickle than Congress, and providing Canada's First Nations with some agency at the national level by way of legislation that can act as a protective backstop in the event that individual provinces change their laws is advisable.

#### VIII. OVERALL REVIEW OF CHANGES

On balance, not much has changed in the past fifteen years with regard to the management or protection of indigenous human remains in the formerly colonial countries reviewed here. Some changes have been made, but most of them had no substantive impact on the protection of such materials or places nor have most of these changes provided additional agency to most indigenous groups.

The United States may be an exception to the agency statement above. While the United States has undertaken substantial regulation drafting in the intervening years, those regulations rest on tenuous statutory and constitutional authority.<sup>131</sup> There is no doubt that the enhanced indigenous agency sought to be created by the regulations under NAGPRA are an effort at making amends for past human rights abuses,<sup>132</sup> but the unilateral implementation of these regulations by the National Park Service over the objections of many in the scientific community threatens to upset the delicate balance struck by Congress, scientists, and indigenous peoples with the passage and implementation of NAGPRA in the 1990s. Surely, such discord has not yet occurred, but neither has a divisive case been presented under the new regulations.

In New Zealand and South Africa, the legal status quo has been largely maintained over the past decade and half. While these nations have laudably provided for archaeological site protection and, in most cases, those protections have a tangential effect of protecting indigenous human remains in *in situ* situations, most of these countries neither provide the agency to the indigenous groups that the United States has done with NAGPRA nor do their provide meaningful mechanisms for indigenous involvement with decisions regarding repatriation of curated remains. Australia is an exception to this

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<sup>130</sup> See Ryan M. Seidemann, *NAGPRA at 20: Expansions of Human Remains Protections – What Have the States Done?* 33(2) MUSEUM ANTHROPOLOGY 199, 199 (2010).

<sup>131</sup> Seidemann, *supra* note 68, at 12.

<sup>132</sup> See generally MCKEOWN, *supra* note 15, at 1986–90.

rule. ATSIHPA provides substantial agency to Aborigines in repatriation negotiations. None of this law has changed in the past fifteen years:

Canada remains a surprising outlier in the nations reviewed here due to its lack of national legislation regarding the protection of indigenous human remains or cemeteries. Certainly, provincial law provides much of the protection available in the other four nations with regard to site preservation. However, national minimum standards are absent and indigenous agency in repatriation decisions is vague at best. The Canadian situation is lamentable for both the scientific and indigenous communities, as neither has a universal set of rules by which to engage on such complex and emotionally charged issues as repatriation.

## IX. CONCLUSION

"Times change. Not only has archaeology become more professional, but . . . indigenous peoples now have much greater presence in archaeological research."<sup>133</sup> Archaeology has ceased to conduct clandestine collecting of human remains for the purpose of creating oppressive race-based theories of population biology. Indigenous peoples, too, are becoming more interested in scientific analyses of the remains of their ancestors as an alternative interpretation of their own past as a people. However, the burials of past peoples continue to be threatened by development and looting on a worldwide scale. Additionally, some measure of restitution for past injustices is still due the indigenous communities by the scientific community with respect to curated remains. Although such restitution should not come in the form of a blanket repatriation of all remains regardless of cultural affiliation, some returns under certain circumstances should occur and enhancing indigenous agency in this area is a meaningful way to ensure that any such returns are accomplished collaboratively and respectfully. Humanity has much to lose in the understanding of our collective past through the mistreatment of remains as well as the reburial of them.

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<sup>133</sup>Russell Taylor, *Archaeology and Indigenous Australia*, 7 (paper presented at the World Archaeological Congress 4, University of Cape Town, South Africa, 1999).