Disinterment Under NAGPRA: Justice for Native American Boarding School Children

DONALIE BLACK*

ABSTRACT

The legacy of the Federal Indian Boarding School system in the United States is a profound human rights violation. Native American children were stripped of their culture, forcibly assimilated, and ultimately buried far from their communities. Tribes today have faced hardship in their pursuit to reclaim these remains. This Note argues that the Native American Graves Protection and Repatriation Act (NAGPRA) should apply to the disinterment of remains from boarding school cemeteries. A proper textual and historical interpretation of NAGPRA demonstrates that boarding school burial sites qualify as "holdings or collections" and therefore, NAGPRA provides a viable legal mechanism for repatriation. This interpretation aligns with legislative intent, the canons of Indian statutory construction, and recent regulatory reforms expanding Tribal authority. Recognizing disinterment repatriation under NAGPRA is essential to restore dignity and cultural integrity to Tribal communities.

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I. INTRODUCTION

Mary Kinninook, a member of the Tlingit Raven clan, was nine years old when she traveled over 3,000 miles from her home in Alaska to the Carlisle Indian Industrial School in Pennsylvania,[1] where school officials were encouraged to "[k]ill the Indian in [her] and save the man."[2] Carlisle Indian Industrial School was one of the first and most well-known boarding schools for Native American children;[3] the Carlisle school's "success" led several other boarding schools to open.[4] The school was founded in 1879 by R. H. Pratt, who aspired to forcefully assimilate Native Americans by stripping Native children of their lifestyles, cultures, and communities.[5]

For Kinninook and hundreds of others, the boarding school conditions were fatal. The children's schooling included manual labor, punishment for failure to assimilate, unforgiving conditions, and frequent fatal illness.[6] Kinninook died

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[1] Card from Student Information Card Series, (n.d.) (on file with Nat'l Archives, NARA, RG 75, Entry 1329, Box 4), *reprinted by* CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/sites/default/files/docs-cemetery/Cemetery_Docs_KINNINOOK_0.pdf [https://perma.cc/9SUT-XQRP; Jenna Kunze, *Army to Begin Returning the 'Unknowns' at Carlisle Indian Industrial School*, NATIVE NEWS ONLINE (Oct. 2, 2021), https://nativenewsonline.net/sovereignty/army-to-begin-returning-the-unknowns-at-carlisle-indian-industrial-school [https://perma.cc/5BLZ-DKDA]. *See* David Wilma, *Stolen Totem Pole Unveiled in Seattle's Pioneer Square on October 18, 1899*, HISTORY LINK (Jan. 1, 2000), https://www.historylink.org/File/2076 [https://perma.cc/KU37-9YCC] (tying surname Kinninook to the Tlingit Raven Clan). Mary is likely the English name she was assigned by school administrators as part of the assimilation process. *See The Carlisle Indian Industrial School: Assimilation with Education after the Indian Wars (Teaching with Historic Places)*, NAT'L PARK SERV., https://www.nps.gov/articles/the-carlisle-indian-industrial-school-assimilation-with-education-after-the-indian-wars-teaching-with-historic-places.htm [hereinafter *Assimilation with Education*] [https://perma.cc/KXG9-EB2F]; Clarise Larson, *Boarding School Sharing Event Highlights Family's Fight to Bring Their Loved One Home*, JUNEAU EMPIRE (Aug. 5, 2022), https://www.juneauempire.com/news/carlisle-industrial-indian-school-sharing-event-highlights-familys-fight-to-bring-their-loved-one-home/ [https://perma.cc/VDX8-YNTP].

[2] Captain R.H. Pratt, *The Advantages of Mingling Indians with Whites*, in PROCEEDINGS OF THE NAT'L CONF. OF CHARITIES AND CORR. AT THE NINETEENTH ANN. SESSION HELD IN DENVER, COL., JUNE 23–29, 1892, 45, 46 (Isabel C. Barrows ed., 1892).

[3] Andrea Smith, *Boarding School Abuses, Human Rights, and Reparations*, 31 SOC. JUST. 89, 89 (2004); *Winnebago Repatriation Request to Carlisle Boarding School (Winnebago v. Department of Army)*, NATIVE AM. RTS. FUND, https://narf.org/cases/winnebago-carlisle-nagpra/ [hereinafter *Winnebago Repatriation Request*] [https://perma.cc/Q3BT-9W6P].

[4] *See* Smith, *supra* note 3, at 89 (citation omitted).

[5] *Id.* at 89–90; Pratt, *supra* note 2, at 52–59.

[6] *See* Smith, *supra* note 3, at 90; *Assimilation with Education*, *supra* note 1; David H. Dejong, *"Unless They Are Kept Alive": Federal Indian Schools and Student Health, 1878-1918*, 31 AM. INDIAN Q. 256, 256–58 (2007); *Complaint About Food*, by Andrew Goforth (Oct. 25, 1914) (on file with Nat'l Archives, NARA, RG 75, CCF Entry 121, #125938-1914-

from tuberculosis on December 28, 1908.[7] She was fourteen years old.[8] Kinninook was buried in the Carlisle Cemetery after a local Protestant minister performed a Christian funeral service.[9] She was buried without a gravestone; her remains today rest under one of several gravestones in the Carlisle Cemetery marked "Unknown."[10] Her story illustrates the broader legal issue at the heart of this Note: whether the Native American Graves Protection and Repatriation Act ("NAGPRA") can be used to repatriate the remains of Indian Boarding School children to their lineal descendants and Tribal communities.[11]

Had Kinninook died in her Tlingit village, her death would have been handled much differently. It is Tlingit custom to honor the dead through a potlach, an important occasion of many ceremonies and rituals, including a

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Carlisle-820) *reprinted by* CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/sites/default/files/docs-documents/NARA_RG75_CCF_b028_f11_125938.pdf [https://perma.cc/45KE-NZKM]; Anonymous Complaint Against Guardhouse Conditions and Medical Care (Sept. 28, 1911) (on file with Nat'l Archives, NARA, RG 75, CCF Entry 121, #83567-1911-Carlisle-154) *reprinted by* CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/sites/default/files/docs-documents/NARA_RG75_CCF_b006_f21_83567_0.pdf [https://perma.cc/UBW6-DJS4] (discussing how student Two Moons was placed in a cell where he "contracted pneumonia and was neglected till almost dead.").

[7] Friedman, Moses, Carlisle, to Commissioner of Indian Affairs, Washington, D.C., December 29, 1908 (Dec. 29, 1908) (on file with Nat'l Archives, NARA, Entry 121, Central Classified Files of the Bureau of Indian Affairs (1907-1939), Carlisle, Box 22, Item 10760), *reprinted by* CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/sites/default/files/docs-cemetery/Cemetery_Docs_KINNINOOK_0.pdf [https://perma.cc/2BE2-MYWT].

[8] *See id.*

[9] *See id.*; BRYAN NEWLAND, U.S. DEP'T. OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REP. 53 (2022) (describing systematic identity-alteration methodologies in Federal Indian boarding schools, which included forbidding children from exercising their religions and compelling them to adopt Christianity).

[10] Kunze, *supra* note 1.

[11] *See* 25 U.S.C. 32 §§ 3001–13. Repatriation generally refers to the return of remains, art, and cultural objects to their country of origin. *See* Carol A. Roehrenbeck, *Repatriation of Cultural Property–Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*, 38 INT'L J. LEGAL INFO. 185, 186 (2010). Restitution is another term used in this Note, which refers to the act of "'restoring or giving back something to its proper owner.'" *Id.* at 186–87. These terms are used interchangeably in this Note, with the term repatriation used more heavily because it is the language used in the NAGPRA statute. However, this Note aims for and finds that the NAGPRA statute itself embodies characteristics understood under the term restitution. Victoria E. Gibbon, *Restitution Versus Repatriation: Terminology and Concepts Matter*, AM. J. BIOLOGICAL ANTHROPOLOGY, Nov. 2023, at 3 ("Restitutionary work is more than a transactional process of return. It is time-consuming, emotional, often painful, enriching acts of restoration and transitional justice . . . . [R]estitutionary work enables forms of acknowledgement, reconciliation, reconnection, and forms of closure, but most importantly, pathways to new futures.").

ceremonial handling of the remains.[12] Kinninook's living relatives are advocating for what many Native American communities and families hope for: the disinterment and restitution of her remains for a proper burial.[13]

A recent Department of the Interior study identified that 408 Federal Indian boarding schools like Carlisle existed between 1819 and 1969 in the United States.[14] Initial figures show that just 19 of those schools accounted for over 500 Native American children's deaths; the death toll is expected to increase as the investigation continues.[15] The conditions at Carlisle Indian Industrial School were not unique; "[r]ampant physical, sexual, and emotional abuse; disease; malnourishment; overcrowding; and lack of health care in Indian boarding schools are well-documented."[16] The central mission of the Federal Indian boarding school system was cultural erasure.[17] They accomplished this by forcing "systematic militarized and identity-alteration methodologies" on children.[18]

The devastation of this abuse and cultural erasure for Tribal communities and families has had intergenerational consequences with lasting negative impacts on these communities today.[19] Native American Tribes and distant relatives have attempted to seek justice and redress from boarding school abuse in the form of disinterment and restitution of the school children's buried remains.[20] However, these efforts have been largely unsuccessful: met with resistance, slow processes, unattainable requirements, and institutional mistakes.[21]

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[12] Sergei Kan, *The 19th-Century Tlingit Potlach: A New Perspective*, 13 AM. ETHNOLOGIST 191, 195–97 (1986); Barbara Waterbury, *Tlingit Potlaches*, HAINES SHELDON MUSEUM (1987), https://www.sheldonmuseum.org/vignette/tlingit-potlatches/ [https://perma.cc/ER5C-J7Q2].

[13] Kunze, *supra* note 1.

[14] NEWLAND, *supra* note 9, at 6. A preliminary investigation found that at least 53 of those schools include burial sites. *Id.* at 8.

[15] *Id.* at 9.

[16] *Id.* at 56.

[17] *See id.* at 51.

[18] *Id.*

[19] *See* NATIVE AM. RTS. FUND, TRIGGER POINTS: CURRENT STATE OF RESEARCH ON HISTORY, IMPACTS, AND HEALING RELATED TO THE UNITED STATES' INDIAN INDUSTRIAL/BOARDING SCHOOL POLICY 39 (2019), https://www.narf.org/nill/documents/trigger-points.pdf [hereinafter *Trigger Points*] [https://perma.cc/SZL8-EM92] (last visited Nov. 24, 2024).

[20] *Carlisle Repatriation*, THE NATIONAL NATIVE AMERICAN BOARDING SCHOOL HEALING COALITION, https://boardingschoolhealing.org/advocacy/carlisle-repatriation/ (last visited Nov. 24, 2024).

[21] *See* Charles P. Pierce, *The U.S. Is Standing in the Way of Repatriating the Bodies of Native Kids Who Died at the Carlisle School*, ESQUIRE (Sept. 3, 2024), https://www.esquire.com/news-politics/politics/a62044883/native-repatriation-army/ (last visited Nov. 24, 2024); *Winnebago Repatriation Request*, *supra* note 3; Michael Rubinkam, *Army's Plan to Repatriate Remains of Native American Boy to South Carolina Tribe Upended by Wrong Bones*, WLTX NEWS19 (June 3, 2022),

Successful mechanisms have allowed Native American communities to repatriate remains and cultural property in other contexts. The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) was created to prevent grave looting and facilitate cooperation between Tribes and federal agencies and museums to encourage the return of human remains, funerary objects, and cultural patrimony to the Tribes based on a history of discrimination and erasure.[22] For instance, NAGPRA was used in 1996 to repatriate several culturally significant artifacts from the Norris L. Bull Collection at the University of Connecticut back to the Mohegan Tribe.[23] However, since NAGPRA was passed, institutions have been evading repatriation efforts by exploiting legal loopholes.[24] For example, some museums have overused the excuse that they cannot determine cultural affiliation or need to do more research, thus avoiding repatriation.[25]

It seems that NAGPRA would also provide the ability for Tribal Nations to reclaim the culturally affiliated remains from boarding school burial grounds, but Tribes have faced pushback against restitution.[26] NAGPRA requires, at the Tribe's request, the repatriation of remains from any institution that receives federal funds to the Tribe of closest relation.[27] The Carlisle Cemetery, which currently resides on U.S. Army land, falls under the jurisdiction of NAGPRA.[28] Yet, the U.S. Army insists that NAGPRA does not apply and insists on its own repatriation process, which is far less successful and is controlled by the Army

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https://www.wltx.com/article/news/history/army-disinterred-remains-do-not-match-native-american-boy/101-95349d3e-4a6b-4054-9147-2d11395b22ea [https://perma.cc/MTW7-Z822].

[22] *See* 25 U.S.C. §§ 3001–13; 43 C.F.R. Part 10; S. REP. NO. 101-473, at 4 (1990).

[23] Nicholas F. Bellantoni, *Working Together: Case Study*, INDIANA UNIV. BLOOMINGTON, https://www.learningnagpra.indiana.edu/case-studies/cs-working-together.html [https://perma.cc/W59V-LJEQ] (explaining that the reason for the smooth transfer of artifacts was based on the "trust relationship that had developed over the years" between the parties).

[24] *See* Mary Hudetz, *New Federal Rules Aim to Speed Repatriations of Native Remains and Burial Items,* PROPUBLICA (Dec. 8, 2023), https://www.propublica.org/article/interior-department-revamps-repatriation-rules-native-remains-nagpra [https://perma.cc/GW2N-NV84]; Jenna Kunze, *In Good Faith: The Repatriation of a Massive Collection of Native Ancestors and Artifacts by the FBI May Be a Model for NAGPRA's Future*, NATIVE NEWS ONLINE (Feb. 18, 2023), https://nativenewsonline.net/sovereignty/it-was-surreal [https://perma.cc/VKK4-86ST] (explaining how many institutions are still "'dragging their feet and using way too many excuses'" regarding repatriation compliance with NAGPRA).

[25] *See* Hudetz, *supra* note 24; Kunze, *supra* note 24.

[26] *Winnebago Repatriation Request*, *supra* note 3.

[27] *See* 25 U.S.C. §§ 3001–13; 43 C.F.R. Part 10; *Native American Graves Protection and Repatriation Act: Compliance*, NAT'L PARK SERV., https://www.nps.gov/subjects/nagpra/compliance.htm [hereinafter *Compliance*] [https://perma.cc/A4X4-ZYHX].

[28] *Winnebago Repatriation Request*, *supra* note 3; NEWLAND, *supra* note 9, at 6, 8, 85.

without input from Native American communities.[29] For the U.S. Army and all federally funded institutions controlling boarding school burial sites, the question of whether NAGPRA applies to the disinterment and repatriation of the remains of boarding school children significantly alters the potential ability to restore justice to Tribal communities.

In response to the history of abuse of Native American children within U.S. boarding schools, Native Americans should be provided redress under the judicial system. This Note argues that a proper textual interpretation of NAGPRA requires the disinterment of Native American human remains at the request of the Tribe with the closest cultural affiliation to correct the history of discrimination and to allow for future handling of remains that align with the cultural and religious practices of the Tribe. Part II outlines the current protections that Tribes hold under NAGPRA, including the recent 2024 regulations, which expanded rights and bolstered transparency and control for Tribal communities. Part III highlights the issues Native American Tribes currently face with the disinterment of buried remains and why redress under NAGPRA is necessary. Part IV proposes that a correct interpretation of NAGPRA includes the disinterment of Native American remains, which would allow courts to grant relief in cases involving disinterment and repatriation from burial sites. Alternatively, Part V suggests a legislative amendment to NAGPRA to explicitly allow Native Tribes to request the repatriation of buried remains.

II. NAGPRA PROTECTIONS

NAGPRA was created with the intent to rectify the history of discrimination against Tribal communities through increased protections and the possibility of repatriation.[30] The human rights focus of NAGPRA has been bolstered by regulations in 2024, which increased Tribal authority and control and enhanced communication requirements for institutions.[31] Outlining NAGPRA legislation and regulations demonstrates that this carefully considered and respect-focused statute should be used to rectify the Federal Indian boarding school injustice.

A. *Purpose of NAGPRA*

NAGPRA has two main functions.[32] First, it serves to facilitate the agreements between institutions and lineal descendants and/or Tribal

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[29] *See Winnebago Repatriation Request*, *supra* note 3; *Carlisle Barracks Main Post Cemetery*, OFF. OF ARMY CEMETERIES, https://armycemeteries.army.mil/Cemeteries/Carlisle-Barracks-Main-Post-Cemetery [https://perma.cc/3WLD-Z3CG].

[30] *See infra* Part II.A.

[31] *See infra* Part II.B.

[32] H.R. REP. NO. 101-877 at 8 (1990); Kickapoo Traditional Tribe of Texas v. Chacon, 46 F. Supp. 2d 644, 649 (W.D. Tex. 1999). For more information about the legislative history of the enactment of NAGPRA, see *NAGPRA Timeline*, https://arcg.is/qe0Lq0

communities regarding the repatriation of human remains and objects in institutional holdings or collections.[33] Second, NAGPRA functions to regulate the excavation of human remains and cultural patrimony on federal land.[34]

Advocates for Native Americans have consistently noted that historically, descendant and Tribal community rights to ancestral remains and cultural patrimony have been ignored and discounted in favor of institutional desires.[35] NAGPRA was passed with a primary focus on respect for the human rights of Native Americans.[36] Its enactment represented an acknowledgment of a history of discrimination and insensitive practices and a commitment to redress.[37]

Today, NAGPRA is essential for Native American communities to reclaim sacred objects and ancestral remains from federally funded institutions.[38] NAGPRA calls for the expeditious return of ancestral remains and cultural patrimony to lineal descendants and Tribal communities upon request.[39] Any institution or agency that receives federal funds and has possession or control of a holding or collection with Native American remains or objects is within the reach of NAGPRA.[40] To comply, they must create an inventory and summary of remains and objects, consult with lineal descendants and/or Tribes involved, evaluate repatriation requests or claims for disposition, and give notice prior to disposition or repatriation.[41] Under NAGPRA, ownership passes to the lineal descendants of the ancestral remains, or if none can be ascertained, to the Tribal community with the closest cultural affiliation or demonstrated relationship to the object or remains.[42]

[https://perma.cc/6WXS-UKDM]. NAGPRA was proposed by Senator Daniel Inouye of Hawaii following efforts by Senator John Melcher of Montana to create legislative protection for Native Americans. *Id.*

[33] H.R. REP. NO. 101-877 at 9; Chacon, 46 F. Supp. 2d at 649.

[34] H.R. REP. NO. 101-877 at 8–9; Chacon, 46 F. Supp. 2d at 649.

[35] *See* S.R. REP. NO. 101-473 at 2–3; *Reclaiming Identity: The Repatriation of Native Remains and Culture*, FRIENDS COMM. ON NAT'L LEG. (Sept. 14, 2020), https://www.fcnl.org/updates/2016-09/reclaiming-identity-repatriation-native-remains-and-culture [https://perma.cc/E57L-SQ8E].

[36] H.R. REP. NO. at 101-877 at 10; S. REP. NO.101-473 at 2 (1990) (Noting a finding "that the process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony should be governed by respect for Native human rights.").

[37] *See* S. REP. NO.101-473 at 3.

[38] Hudetz, *supra* note 24; 43 C.F.R. § 10.1(b)(1).

[39] 25 U.S.C. § 3005.

[40] 43 C.F.R. § 10.1(b)(1).

[41] *Compliance, supra* note 27.

[42] 25 U.S.C. § 3002(2)(A)–(C). Ownership goes to the closest lineal descendent first, and if there is none, then to the Tribe whose land the object or remains were discovered on, the Tribe who has closest cultural affiliation, or if cultural affiliation cannot be ascertained, the Tribe that aboriginally occupied the area, or the Tribe that has the strongest demonstrated relationship. *Id.*

In addition, NAGPRA regulates the excavation of human remains and cultural patrimony, including controlling ownership of excavations and protecting against looting and other improper disturbances.[43] The primary reason for including grave protections in NAGPRA was because of illegal excavations and looting at Native American burial sites.[44] However, paths remain to excavate sites properly under NAGPRA with the consent of the Tribe or a proper Archaeological Resources Protection Act (ARPA) permit.[45]

B. *Increased Tribal Communication and Authority*

While the goals and promises of NAGPRA in 1990 were admirable, institutional hesitancy and legal loopholes mean that today, the problem of repatriation is far from resolved.[46] As of January 2023, more than 30 years after NAGRPA was passed, many of the United States' largest museums and universities had made less than half of the human remains in their collections available for repatriation.[47] However, in 2024, the Department of the Interior revised regulations to improve the implementation of NAGPRA and address some of the Act's long-standing problems.[48] The revised regulations streamline the repatriation process, increase transparency and reporting, strengthen deadlines, and expand authority and control of lineal descendants and Tribes.[49]

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[43] 25 U.S.C. § 3002. *See also*, H.R. REP. NO. 101-877 at 30 (1990) (discussing the committee's desire to stem looting and other distrubances to Native American remains); S. REP. NO. 101-473 at 3 (1990).

[44] S. REP. NO. 101-473 at 3.

[45] 25 U.S.C. § 3002(c); 43 C.F.R. § 10.6.

[46] Hudetz, *supra* note 24. *See also,* Logan Jaffe, Mary Hudetz, Ash Ngu & Graham Lee Brewer, *America's Biggest Museums Fail to Return Native American Human Remains,* PROPUBLICA (Jan. 11, 2023), https://www.propublica.org/article/repatriation-nagpra-museums-human-remains [https://perma.cc/NHR2-TPNS] (discussing that many institutions continue to hold Native American remains and other objects despite the passage of NAGPRA).

[47] Jaffe, Hudetz, Ngu & Brewer, *supra* note 46. For example, Harvard University had only made 39% of the remains in their collection available for repatriation by 2023, meaning the remains of 6,100 Native Americans were not made available. *Id.* In January 2025, this figure was updated: Harvard had made 49% of Native American remains in its collection available for return—an increase, but still under half. Ash Ngu & Andrea Suozzo, *Harvard University - NAGPRA Database*, PROPUBLICA (Jan. 6, 2025), https://projects.propublica.org/repatriation-nagpra-database/institution/harvard-university/ [https://perma.cc/UYG4-VHQ7].

[48] *Interior Department Announces Final Rule for Implementation of the Native American Graves Protection and Repatriation Act*, U.S. DEP'T. OF THE INTERIOR (Dec. 6, 2023), https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves [hereinafter *Interior Department Announces Final Rule*] [https://perma.cc/7KCD-3PKP].

[49] *See id.*; *NAGRPA – 2024 Revamped Rule Strengthens Process for Museums and Universities to Heal Prior Inequities and Rebuild Tribal Relationships*, TAFT (Feb. 09, 2024), https://www.taftlaw.com/news-events/law-bulletins/nagpra-2024-revamped-rule-

The stated purpose of the revision was to improve enforcement and promote healing.[50]

Proponents of the revisions are hopeful that the new deadlines and streamlined processes will aid the efficiency of repatriation progress.[51] This is not only important from a logistical perspective but from an emotional one as well; restitution has been "frustrating, confusing, and often painful" for Native American Tribes and descendants.[52]

Since the Act was passed in 1990, a key element of NAGPRA was to "consult with Indian Tribes to the fullest extent possible regarding the right of possession and treatment of remains and objects."[53] Congress was striving to promote dialogue and understanding between Tribal communities and institutions.[54] The 2024 regulations sought to bolster that goal and increase the frequency of those communications.[55] In particular, the regulations strengthened reporting rules to increase transparency and community awareness of holdings or collections.[56] The regulations also focused significantly on providing more authority to Tribal representatives in repatriation negotiations.[57] For example, the 2024 regulations specify that deference should be given to the Traditional Knowledge of Tribal communities and lineal descendants.[58] These well-deliberated and beneficial regulations should be utilized whenever possible to rectify the history of discrimination against Native Americans, including to rectify the Indian boarding school tragedy.

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[50] *Interior Department Announces Final Rule, supra* note 48.

[51] *See* Hudetz, supra note 24; *Interior Department Announces Final Rule, supra* note 48.

[52] Ellie S. Klibaner-Schiff & Jade Lozada, *The Painful Progress of Native American Repatriation*, HARVARD CRIMSON (Mar. 2, 2024), https://www.thecrimson.com/article/2024/3/2/nagpra-scrut/ [https://perma.cc/R23S-K5JG].

[53] S. REP. NO. 101-473, at 2 (1990).

[54] *Native American Graves Protection and Repatriation Act: Facilitating Respectful Return*, NAT'L PARK SERV., https://www.nps.gov/subjects/nagpra/index.htm [hereinafter *Facilitating Respectful Return*] [https://perma.cc/CJD5-DQPD].

[55] *See generally*, 43 C.F.R. § 10 (outlining requirements for institutions to consult with Tribal communities).

[56] *Interior Department Announces Final Rule, supra* note 48; 43 C.F.R. § 10.5. Another way the regulations increased communications was by requiring informed consent before museums or research institutions were allowed to study or display any remains or cultural items. 43 C.F.R. § 10.1(d)(3).

[57] *Interior Department Announces Final Rule, supra* note 48 (The regulations include "critical steps to strengthen the authority and role of Indigenous communities in the repatriation process.").

[58] 43 C.F.R. § 10.1(a)(3).

III. CURRENT ISSUE WITH REPATRIATION

The history of the Indian boarding schools is tragic; Tribal communities faced cultural erasure and forced assimilation through the abuse of children at these institutions.[59] Regrettably, courts have thus far ruled that NAGPRA cannot be used to rectify this human rights violation.[60] Instead, courts have left it up to institutional landowners to decide whether to provide repatriation and, thus, symbolic emotional healing and redress for Tribal communities.[61] This is an insufficient response to this devastating history and requires a new solution.

A. *History of Tragedy within Indian Boarding Schools*

The Native American children at Indian boarding schools were oftentimes buried directly on school grounds, their bodies separated from their communities and heritage forever.[62] In the 19th century, many Native American children, including politically prominent children, like the sons of Chiefs, were enticed or forced to leave their Tribe and join U.S.-funded boarding schools.[63] These children were stripped of their culture and heritage, forced to assimilate, and faced severe abuse.[64] The conditions, abuse, and communication of diseases led to frequent deaths of Native American children.[65] The historical injustice of these boarding schools underscores the urgency of applying NAGPRA's repatriation requirements to boarding school cemeteries.

The historical abuse and erasure of Native American communities inflicted generational trauma that still shapes the realities of Native American communities.[66] The loss of culture, community, parenting knowledge, and role models is a direct result of the systematic erasure, separation, and death in the Indian boarding school system.[67] On a psychological level, the rise of anxiety, suicide, abuse, and neglect in Native American communities has also been tied to the intergenerational trauma of separating families through Indian boarding schools.[68] Scholars and advocates urge that these families have faced a human

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[59] *See infra* Part III.A.

[60] *See infra* Part III.B.

[61] *See infra* Part III.B.

[62] NEWLAND, *supra* note 9, at 8.

[63] Dejong, *supra* note 6, at 258–59, 268.

[64] Smith, *supra* note 3, at 90–91.

[65] *Id.* at 91.

[66] *Trigger Points, supra* note 19, at 39 ("These impacts are intensely personal. Our families and friends in our Tribal communities have discussed with us the intergenerational impacts of loss of parenting knowledge and abuse on their own health and well-being. They note the rise of anxiety and of child abuse, directly attributing both to their and their parents' experiences in the schools.").

[67] *Id.* at 39, 43, 57.

[68] *Id.* ("For example, research shows that the trauma of being separated from one's family and forced to disassociate from one's culture, as well as experiences of abuse and

rights violation and that reparations must be framed as such.[69] The symbolic return of the children's remains through repatriation efforts is what many families and Tribes desire as a means of acknowledging the wrongs of the past and promoting healing.[70]

B. *Current Judicial Interpretations*

Unfortunately, Courts have held that the repatriation of interred remains is not covered under NAGPRA.[71] As a result, landowners of property that contains Native American grave sites maintain discretionary control over the repatriation processes.[72] This discretion means that Native Tribes are subject to institutional rules, which are oftentimes stricter than NAGPRA; for example, Army regulations for the Carlisle Cemetery require a living relative for disinterment.[73] Finding a direct living relative is especially hard in boarding school cases because many students died as children, often leaving no lineage.[74] NAGPRA, on the other hand, does not require living relatives and will allow repatriation to Tribes with cultural affiliation to the ancestral remains.[75]

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neglect while in school, may result in increased psychological distress. Psychological distress is an umbrella term that includes conditions like post traumatic stress disorder (PTSD), anxiety, and depression. This, in turn, can increase alcohol and illicit substance use and abuse among survivors, as well as suicidal ideation and attempts. Psychological distress, substance abuse, and suicidality can transfer to younger generations.").

[69] *See, e.g.*, Smith, *supra* note 3, at 98; Abbey Koenning-Rutherford, *US Truth and Healing Commission on Indigenous Boarding Schools is Long Overdue,* HUMAN RTS. WATCH (March 18, 2024), https://www.hrw.org/news/2024/03/18/us-truth-and-healing-commission-indigenous-boarding-schools-long-overdue [https://perma.cc/LL6G-WRLT].

[70] *See* Makenzie Huber, *'They Are Important to Us': Remains of Sisseton Wahpeton Children Returning Home*, PENN CAPITAL-STAR (Sept. 21, 2023), https://penncapital-star.com/civil-rights-social-justice/they-are-important-to-us-remains-of-sisseton-wahpeton-children-returning-home/ [https://perma.cc/6GD7-C2RJ].

[71] Winnebago Tribe of Nebraska v. Dep't of the Army, No. 24-cv-78, 2024 U.S. Dist. LEXIS 149253, at *9 (E.D. Va. Aug. 20, 2024).

[72] *See Disinterments - National Cemetery Administration,* U.S. DEP'T. VETERANS AFFS., https://www.cem.va.gov/disinterment.asp [https://perma.cc/N3T9-PJX5] (last visited Oct. 17, 2025); *Tribes Lead Process to Bring Children Home from Carlisle*, NATIVE AM. RTS. FUND (Oct. 11, 2023), https://narf.org/swo-repatriation-carlisle-cemetery/ [https://perma.cc/LA32-L2ZS].

[73] *Disinterment Affidavit Forms*, OFF. OF ARMY NAT'L CEMETERIES (Jun. 2019), https://armycemeteries.army.mil/Portals/1/Disinterment%20Affidavit%20Forms%20%28June%202019%29.pdf [https://perma.cc/GT3E-84D2]; U.S. DEP'T OF THE ARMY, ARMY REG. 210-190, POST CEMETERIES 6 (Feb. 16, 2005).

[74] *Winnebago Repatriation Request, supra* note 3; Huber, *supra* note 70 (noting that in a case of successful repatriation, it took several years to find the closest living relative to children who died in the 1870's and obtain the necessary notarized statements affirming the relatives don't object to the disinterment).

[75] 25 U.S.C. § 3002(a)(2).

Relatives and communities seeking the disinterment of boarding school children also do not currently have the benefits of the communication-focused efforts of NAGPRA.[76] The lands controlling the Native American graves do not follow NAGPRA rules pertaining to disclosure, consent, or consultation.[77] For example, at the Carlisle Cemetery, while the Office of Army Cemeteries has created logistical obstacles for Tribal communities to disinter remains, they themselves disinterred more than 180 graves to build a new parking lot without obtaining any consent in 1927.[78] In addition, institutions controlling these cemeteries have not given any authority to Tribes nor have they given deference to their knowledge as required by § 10.1(a)(3) of the 2024 regulations.[79] Instead, the current discretionary process of disinterment and repatriation is characterized by long periods of waiting and a lack of communication.[80]

The institutions that insist they are not subject to NAGPRA nonetheless maintain that they are committed to repatriation and saddened when they are unable to do so.[81] However, advocates for community repatriation suggest that their policies are a "'false front'" that has created "resentment," "division and questioning," and "growing frustration."[82]

IV. USING NAGPRA FOR DISINTERMENT

The human rights violation against Native American Tribes through the forced assimilation and abuse of Native American children at Indian boarding schools requires redress. The best way to rectify this injustice under our judicial system is by properly interpreting NAGPRA to include the disinterment and restitution of Indian boarding school children's remains at the request of culturally related Tribes or lineal descendants. A close reading of the text of NAGPRA necessitates this interpretation. Reading the statute this way will furthermore allow NAGPRA to effectuate the intent of the legislature by restoring dignity and respect to Native American communities. Therefore, courts should interpret NAGPRA to include the repatriation of these remains.

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[76] *See Interior Department Announces Final Rule, supra* note 48.

[77] *Compliance, supra* note 27. *See, e.g.*, 43 C.F.R. § 10.10(d)(5)(ii).

[78] Huber, *supra* note 70; *Carlisle Repatriation, supra* note 20; Marry Annette Pember, *Obscure Government Agency at Center of Carlisle Repatriation Dispute*, UNDERSCORE NATIVE NEWS (Aug. 29 2024), https://www.underscore.news/justice/obscure-government-agency-at-center-of-carlisle-repatriation-dispute/.

[79] 43 C.F.R. § 10.1(a)(3).

[80] *See* Huber, *supra* note 70.

[81] Matt Klinedinst, *Office of Army Cemeteries releases the findings from its disinterment of Carlisle Indian School students*, FOX43 (Oct. 2, 2024), https://www.fox43.com/article/news/local/office-of-army-cemeteries-releases-the-findings-from-its-disinterment-of-carlisle-indian-school-students-cumberland-county/521-0a52b4ab-881b-4410-a147-abeb790b2fad [https://perma.cc/H9AL-QKF6]. In this repatriation effort, the repatriation request was approved but could not be honored because the graves were evidently incorrectly marked, and the wrong remains were disinterred. *Id.*

[82] Huber, *supra* note 70.

A. *Proper Interpretation of the NAGPRA Text*

A proper reading of the text of NAGPRA includes boarding school cemeteries in its repatriation requirements. If a federal agency or museum has identified human remains "pursuant to section 3003" of NAGPRA, then, "upon the request of a known lineal descendant of the Native American or of the Tribe," the agency or museum "shall expeditiously return such remains."[83] Further, NAGPRA requires that "[e]ach Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and . . . identify the geographical and cultural affiliation of such item."[84]

Federal agencies that possess or control burial grounds containing Native American human remains fall under the requirements of NAGPRA. The primary consideration in this analysis is whether a burial site is considered a "holding or collection" under NAGPRA. The NAGPRA regulations define a holding or collection as "an accumulation of one or more objects, items or human remains for any temporary or permanent purpose, including: academic interest; accession; catalog; comparison; conservation; education; examination; exhibition; forensic purposes; interpretation; preservation; public benefit; research; scientific interest; or study."[85] Stating that a holding or collection could be an accumulation of objects "for any temporary or permanent purpose" means that a permanent burial site for human remains falls within the designation to be considered a holding or collection.[86] The list of possible purposes within the definition in no way undermines this interpretation; the addition of the word "including" indicates that the list is not exhaustive.[87] Thus, a permanent burial site should be construed as a holding or collection under NAGPRA.

One Court declined to use the definition outlined in the regulations to determine whether human remains in a cemetery could be construed as a holding or collection under NAGPRA.[88] In *Winnebago Tribe of Nebraska v. Dep't of Army*, the Court determined that when words are not defined by the statute, they must be construed by their ordinary or natural meaning.[89] The Court then

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[83] 25 U.S.C. § 3005(a)(1).

[84] 25 U.S.C. § 3003(a).

[85] 43 C.F.R. § 10.2.

[86] *See id.*

[87] *See include*, BLACK'S LAW DICTIONARY (11th ed. 2019). *Black's Law Dictionary* defines "include" as "to contain as a part of something" and states that "[t]he participle *including* typically indicates a partial list." *Id.*

[88] Winnebago Tribe, 2024 LEXIS 149253 at *9.

[89] *Id.* at *7 (citing Smith v. United States, 508 U.S. 223, 228 (1993)).

determined that neither the meaning of the term "collection" nor "holding" "applies naturally to graves in a cemetery."[90]

This was an improper interpretation. The Native American remains found at burial sites can be naturally described as part of a holding. A holding is defined in relevant part by *Black's Law Dictionary* as "[l]egally owned property, [especially] land or securities."[91] At first glance, this definition may appear to exclude human remains. Traditionally, in the United States, human remains have not been classified as property under the law.[92] Instead, human remains are generally considered quasi-property.[93] Nevertheless, Native American remains are a notable exception to this rule.[94] Under NAGPRA, Native American human remains are considered property owned by lineal descendants and Tribal governments.[95] Courts have acknowledged the property status of Native American remains. For example, in *White v. Univ. of California*, the Court determined that "NAGPRA extends rights of 'ownership' and 'control' over human remains" and analogized the NAGPRA dispute "to an ordinary property dispute."[96] Therefore, under NAGPRA, Native human remains are legally classified as the property of lineal descendants or Tribes. The property

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[90] *Id.* at *7. It is appropriate to define the terms collection and holding separately; according to the Rule Against Surplusage, two "different words in the same statute cannot have the same meaning." Chris Micheli, *Canon of Statutory Construction – Rule Against Surplusage*, CALIFORNIA GLOBE (Oct. 24, 2022), https://californiaglobe.com/articles/canon-of-statutory-construction-rule-against-surplusage/ [https://perma.cc/DE56-Z3MA]. Accordingly, the definition of holding or collection within the regulation is not a stopping point because these terms must have distinct meanings. *Id.* As demonstrated in the rest of this Part, the distinct definition of holding is the relevant term for this textual interpretation.

[91] *Holding*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[92] Alida B. Soileau*, Quasi-Property No More: "Human Heritage" as a New Legal Status for the Dead,* 74 S. CAROLINA L. REV. 111, 122 (2022).

[93] *Id.* Quasi-property is "an American common law conception composed of limited interests that mimic some of the functions of property, but does not formally qualify as property." Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, 72 HASTINGS L.J. 291, 295 (2020).

[94] Alix Rogers, *Owning Geronimo but Not Elmer McCurdy: The Unique Property Status of Native American Remains*, 60 B.C. L. REV. 2347, 2393–94 (2019).

[95] *Id.* at 2374–75; *see also* 25 U.S.C. § 3002(a) (describing the ownership control of Native American remains and objects). On the surface, it may seem commodifying or disrespectful that Native American remains are classified as property while other human remains are not. Rogers, *supra* note 94, at 2352 ("Contrasted with non-property status for other human remains, we might condemn the property status of Native American remains as continued evidence of dehumanization and commercialization."). However, as Professor Rogers explains, "[NAGPRA] was designed to ensure *equal treatment* of Native American remains," not to perpetuate injustice. *Id.* (emphasis original) (citation omitted). While seemingly this property status insinuates legal inferiority, it actually facilitates greater authority, control, and protection to living Native American relatives and Native American communities. *See id.* at 2376.

[96] White v. Univ. of California, C 12-01978 RS, 2012 WL 12335354, at *9 (N.D. Cal. Oct. 9, 2012), *aff'd*, 765 F.3d 1010 (9th Cir. 2014).

of the remains at burial sites, then, should be classified as holdings under the text of the statute.

The classification of buried human remains as a holding, furthermore, is natural when read in the context of NAGPRA and other statutes regarding Native American issues. The classification of Native American remains as property should be understood in the context of other legislation. NAGPRA was not the first time the legislature classified Native American remains differently than other human remains.[97] It was in 1906 with the American Antiquities Act (AAA) that Native American remains were first classified as property.[98] This legislation classified Native American remains found on federal lands as federal property.[99] The longstanding history of classifying Native American remains as property tends to show that the classification of remains as a holding in NAGPRA was intentional. NAGPRA, when understood in context of the AAA, demonstrates that the legislature intended to maintain the property status of Native American remains and shift the ownership of these remains to lineal and Tribal descendants as a cultural item.[100]

In addition, the canons of Indian treaty and statutory construction require that NAGPRA be interpreted to the benefit of Indian communities. In *Montana v. Blackfeet Tribe of Indians*, the U.S. Supreme Court outlined the rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[101] This canon, the Indian ambiguity canon, applies "to all statutes enacted for the benefit or regulation of Indians."[102] NAGPRA was clearly enacted for the benefit of Indian communities.[103] Although I believe the interpretation of NAGPRA is clear, the existence of an adverse holding suggests the definition of "holding or collection" and whether the repatriation of boarding school children's remains from burial sites falls within NAGPRA's scope could be viewed as ambiguous.[104] Under the Indian ambiguity canon, any ambiguous issues regarding the applicability of NAGPRA must be "construed liberally" in favor of the Native American communities

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[97] Rogers, *supra* note 94, at 2376; 16 U.S.C. § 433, *repealed by* Pub. L. 113-287, § 7, 128 Stat. 3272 (2014).

[98] Rogers, *supra* note 94, at 2376.

[99] *Id.* The purpose of the American Antiquities Act was to give the federal government additional authority to discourage criminal looting and protect and preserve archeological sites. *Antiquities Act of 1906*, NAT'L PARK SERV., https://www.nps.gov/subjects/archeology/antiquities-act.htm [https://perma.cc/BT8W-LRC3].

[100] Rogers, *supra* note 94, at 2375.

[101] Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

[102] Alex Tallchief Skibine, *Textualism and the Indian Statutory Construtction*, J. L. REFORM (Aug. 2022), https://mjlr.org/journal/textualism-and-the-indian-canons-of-statutory-construction/ [https://perma.cc/43PE-G3UT] (advocating for the use of the ambiguity canon and finding the Indian canons are rooted in the Constitution).

[103] *See supra* Part II.A.

[104] Winnebago Tribe, 2024 LEXIS 149253, *9.

requesting repatriation.[105] Accordingly, the language within NAGPRA should be interpreted to include these burial sites.

Under a proper interpretation of the text of NAGPRA, the Indian boarding school children's remains should be classified as holdings. Every federal agency that possesses or controls a burial site containing these Native American children's remains is responsible for repatriation under NAGPRA.

B. *Legislative Intent and Justice through Repatriation*

Repatriation of the remains of boarding school children was within the intent of the legislature and is the best answer in terms of justice and fairness. The intent of NAGPRA was to facilitate the repatriation of remains to allow Native American communities the chance for proper burial;[106] repatriation of Indian boarding school children's remains will facilitate exactly that. NAGPRA was passed with two main purposes: "to protect Native American burial sites" and "to set up a process by which federal agencies and museums holding Native American remains and cultural artifacts will inventory those items and work with Tribes to repatriate them."[107] The legislative history makes it clear that NAGPRA was written on a foundational belief that "human remains must at all times be treated with dignity and respect."[108] In addition, the history emphasizes that Native American Tribes strongly desire the repatriation of human remains for reburial or proper disposition in accordance with the customs and traditions of the Tribes.[109]

The repatriation of Native American boarding school children fits straightforwardly into the purpose of NAGPRA. The human remains at these burial sites are Native Americans, and for many, records trace their ancestry to lineal descendants or Tribal communities.[110] They were buried not in accordance with their Tribal traditions and culture, but according to Christian custom as part of the systematic identity-alteration methodology.[111] The existence of these boarding schools and the connected cemeteries is the consequence of theories centered on cultural erasure and disrespect for Native

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[105] *See* Skibine, *supra* note 102.

[106] *See supra* Part II.A.

[107] Kickapoo Traditional Tribe of Texas v. Chacon, 46 F. Supp. 2d 644, 649 (W.D. Tex. 1999).

[108] S. REP. NO. 101-473 at 4 (1990).

[109] *Id.* at 1 ("Indian Tribes around the country called for the repatriation of those human remains that could be identified as associated with a specific Tribe or region for their permanent disposition in accordance with tribal customs and traditions, and for the proper burial elsewhere of those remains of Native Americans that could not be so identified."). Tribal witnesses also testified "that the return of human remains to Indian tribes has been a most frustrating issue to Native Americans." *Id.* at 3.

[110] *See, e.g.*, Card from Student Infromation Card Series, *supra* note 1; Kunze, *supra* note 1.

[111] *See* NEWLAND, *supra* note 9, at 53.

American communities and culture.[112] Subsequent treatment of the cemeteries, such as the disinterment of remains to build a parking lot, demonstrates a continued lack of respect for the remains.[113] Native American descendants and communities have vocally advocated for the repatriation of these remains for a proper burial.[114] The repatriation of Native American human remains back to their communities for proper burial was a clear intention of the legislature when they passed NAGPRA, and should be honored accordingly.[115] Failure of the courts to include the Indian boarding school burial sites within the meaning of NAGPRA undermines the legislature's intention.

The tragic history of the Indian boarding schools warrants the rectifying capabilities of restitution under NAGPRA. The boarding schools were places of rampant abuse and systematic cultural erasure.[116] The impact of boarding school trauma remains a present-day challenge for many Tribal communities.[117] The boarding school burials are unique in that they deliberately excluded the wishes of the Native American family members and communities.[118] The disinterment and repatriation of these remains is necessary to provide a proper burial that aligns with the cultural traditions and practices of the related Native American communities at their request. This restitution would act to partially redress the past harm from this tragic history. Providing respectful return under NAGPRA is the best way to restore justice to Native American communities.

In conclusion, under a proper interpretation of the text of NAGPRA, Native American remains should be classified as holdings. Therefore, every federal agency or museum that possesses or controls a burial site containing Native American human remains should be responsible for repatriation under NAGPRA. This solution provides the best actualization of the intended purpose of NAGPRA in this context. The legislature intended to provide protection for repatriation to restore dignity and respect to Native American communities as a means of redressing historical wrongs.[119] Interpreting NAGPRA to include Indian boarding school burial sites is within the intention of the legislature and begins to rectify the tragic history of forced cultural erasure through the abuse of Native American children.

V. CLARIFYING NAGPRA

In the alternative, Congress should take upon the responsibility of clarifying NAGPRA to create an explicit disinterment provision. The Department of the Interior's investigatory report supports the strengthening of NAGPRA to ensure

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[112] *See* Smith*, supra* note 3, at 89.
[113] Pember, *supra* note 70; *Carlisle Repatriation, supra* note 20.
[114] *See, e.g.*, Kunze, *supra* note 1.
[115] *See supra* Part II.A.
[116] Smith, *supra* note 3, at 90–91.
[117] *Trigger Points, supra* note 19, at 39.
[118] *See* Kunze, *supra* note 1; NEWLAND, *supra* note 9, at 53.
[119] *See supra* Part II.A.

that the reburial of Indian boarding school children is possible.[120] By incorporating an explicit disinterment provision, the legislature will ensure that Native American Tribes and lineal descendants will be able to repatriate the Native American remains on federal lands according to the regulations of NAGPRA. It will provide the Native American descendants and Tribes with the additional authority and protections set out in the updated regulations, which will allow for repatriation that is efficient and the product of productive communication.[121] If the courts continue to allow federal agencies to evade NAGPRA by aligning with improper interpretations of the statutory and regulatory language, a new provision is necessary.

VI. CONCLUSION

The legacy of the Federal Indian boarding school system remains a profound injustice, with its historical trauma deeply impacting Tribal communities today. The disinterment and restitution of Native American remains from these schools, including Carlisle, is essential, not only for the healing of Tribal communities but also as a legal means of acknowledging the cultural and human rights violations of the past. Current interpretations of NAGPRA by the court system have proven insufficient in addressing the repatriation of remains from burial sites. Rectifying this issue through judicial interpretation or legislative clarification is necessary to ensure that NAGPRA serves its intended purpose of restoring dignity and respect to Native American communities. The pursuit of justice through the disinterment and repatriation of these remains is not merely a legal obligation but a moral one.

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[120] NEWLAND, *supra* note 9, at 98 ("Support action to direct Federal agencies that control cemeteries to allow the reburial of remains of Indian children and funerary objects repatriated pursuant to NAGPRA, and consistent with specific Tribal practices."). The Federal Indian Boarding School Initiative Report acknowledges that the Department of the Interior and the federal government at large played a significant role in the forced assimilation of Native Tribes. *Id.* at 95. The report recommendations include continuing a full investigation into the Federal Indian boarding school system, identifying attendees of the schools, documenting the experiences of survivors, engaging other federal agencies to help the initiative, and supporting Congressional action. *Id.* at 95–99.

[121] *See supra* Part II.B.