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# THE NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT: A NECESSARY BUT COSTLY MEASURE

Tina F. Brown

*The Native American Grave Protection and Repatriation Act has had an immense impact on American Anthropology. NAGPRA protects Native American skeletal remains and burial goods by ordering those held for research or display returned, and by restricting future excavations. In the course of its enactment, it has divided anthropologists on the basis of moral convictions and research priorities. Its history is long, and its future is uncertain.*

**In** 1990, a federal law was enacted that would change the relationship between the government, museums, academia, and Native Americans forever. The Native American Grave Protection and Repatriation Act (NAGPRA) makes the excavation and sale of Native American skeletal remains and burial goods illegal without proper permission, and forces all federally funded institutions to repatriate remains and burial goods to the descendants or tribe of origin if the descendants/tribe so wishes. Although ethically and morally necessary and more than legally justified, it has had a reverberating impact on academic research.

Several social trends and later government policies allowed and even encouraged the excavation and collecting of Native American skeletal remains and burial goods. The most powerful of these was the philosophy of Social Darwinism, popular throughout Europe and the United States, which began in the early 1800s and lasted a century. Social

Darwinists believed that certain populations, or races, were less evolved and inferior to others causing them to be naturally selected against (through epidemics and domination). However, until the early 1800s there was no definitive way of demarcating racial boundaries. It was then that Paul Broca, a French anatomist, publicized the notion that brain size (measured by the volume of the cranium) determined intelligence. By the 1850s cranium measurement became accepted as the most accurate way to demarcate racial boundaries. This led to the establishment of "craniology" and "phrenology" as scientific fields of study based on the assumption that each race had a "national skull" type which indicated racial intelligence, behavior and personality patterns (Senate Select Committee on Indian Affairs 1990). However, since there is some variation of cranial size and shape within each population, craniology/phrenology requires numerous crania for an adequate sample size in order to conduct valid statistical research.

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As a result of the phrenology movement and the establishment of museums, augmented by the Euro-American settler's fear of Indians and greed for their land, gathering Native American skulls became a cottage industry at frontier military posts. Looters included amateur archaeologists, farmers, journalists, country doctors, clerics, and even boy scouts (Senate Select Committee on Indian Affairs 1990). Among the first anthropologists to profit from collecting Native American skeletal remains was Franz Boas. While living among the Northwest Coast Indians, he corresponded, "Yesterday I wrote to the museum in Washington asking whether they would consider buying skulls this winter for \$600.00; if they will, I shall collect assiduously." (Senate Select Committee on Indian Affairs 1990:313). At this time, Boas was paying two local brothers \$20 for each full skeleton and \$5 for each skull they stole for him.

In spite of the fact that Euro-Americans were well-aware of the importance of the dead to Native Americans, the federal government encouraged mortuary collecting. The government policy which had perhaps the greatest impact on this effort began on September 1, 1868, when the Surgeon General issued an order to all Army medical officers requesting the collection of as many Indian bones as possible, especially crania, for research and display at the Army Medical Museum. In addition to Native American grave sites, recent battlefields were plundered for remains as well. Bone collecting was considered a dangerous task; and there were numerous reports of Indians hiding

and guarding their dead. The surgeon at Fort Harker, Kansas, described his skull-collecting problems, noting "the Indians lurked about their dead and watched them so closely." (Svingen 1992).

At its peak, the phrenology movement in the United States was led by Samuel G. Morton. Throughout his career, Morton made wide-spread requests for crania to use in his research. In 1839, Morton wrote *Crania America* which ranked five racial categories based on cranial size differences (indicating intelligence). His results ranked Caucasians with the largest brain size and highest intelligence, followed by Mongoloids, American Indians, Malay, and lastly, Africans having the smallest brains and least intelligence (Senate Select Committee on Indian Affairs 1990). Such things as sex, body size, age at death, nutrition, occupation, cause of death, and conditions after death - all now known to affect brain size - were not considered.

Morton's data and conclusions were far-reaching. For many years after, the Bureau of Indian Affairs used Morton's classification system to determine the tribal affiliation and status of individual Native Americans (a necessary measure to qualify for education and health aid programs). And much later, politicians, scholars and laymen used Morton's research to argue for the extinction and enslavement of certain races.

It was this genre of philosophy that fueled the Eugenics movement and, ultimately, gave rise to the Nazi party and World War II. After which, bone collection fell out of favor until the 1960s when the

fields of archaeology and physical anthropology began new approaches in research methodology (Senate Select Committee on Indian Affairs 1990).

Archaeologists are able to infer many aspects of past cultures, such as social/family structure, occupations, industries, funerary customs, and clues about belief systems through the excavation of graves and observation of the arrangement and decoration of the bodies and the items buried with them. For example, excavations of burial mounds left by ancient Southeastern tribes have yielded young children who were elaborately decorated and buried with high status items allowing the archaeologist to infer that tribe members had ascribed statuses.

Physical anthropologists use skeletal remains to determine several otherwise-unobtainable aspects of health and genetic issues of both past and contemporary cultures. With the quantitative information generated from bones, usually via dimensional measurements and element-levels, physical anthropologists can determine diet, pathologies, biological relationships, and functional adaptations. The following are examples of such research:

By measuring the stable carbon and nitrogen isotope ratios in the bone collagen of skeletons excavated from Gulf Coast Florida burial mounds, D.L.Hutchinson and L.Norr found that maize was not an important part of the diet until after European contact -- a previously debated point between cultural anthropologists and historians (Larsen and Milner 1994:14)

C.S.Larsen and C.B.Ruff found that, in the Native Americans of Spanish Florida, incidence of osteoarthritis and spondylolysis (a separation of the

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neural arc from the lumbar vertebrae) increased dramatically in late-contact indicating a significant increase in physical demands after contact with the Spanish (Larsen and Milner 1994:21)

Skeletal analysis of Omaha bones (along with soil and artifact analyses) searching for traces of lead found abnormally high concentrations. This allowed Reinhard and Ghazi to infer that lead ingestion was occurring in the population, not just simple digenesis (Reinhard and Ghazi 1989:183)

Genetic evidence from the skeletal remains of three Pueblo populations, the Hawikuh, Pueblo Bonito and Puye, shows that they are closely related (i.e., there were no significant racial differences) (Corrucini, Niswander, Workman, et al. 1974:9)

In New England, the large number of youth buried and the commonality of lesions on the spine, ribs, and hips are evidence of a tuberculosis epidemic (Larsen and Milner 1994:42)

Although much can be learned from the analysis of skeletal remains and accompanying burial goods, many Native Americans feel any sort of mortuary disturbance has extremely negative consequences for all involved. Traditionally they believe grave tampering causes the dead's soul to wander aimlessly - never to be at peace - causing physical and spiritual sickness among their living descendants and tribes, and even among those who disturbed their graves. And, equally as strongly, they argue that allowing Native American skeletal disinterment for research while legally forbidding that of Euro-American skeletal remains reflects a desperate inequality and disregard for Indian humanity. They feel proper reburial is not just the only way to appease the spirits, but also the only way to assert their basic human rights.

On the other hand, there is a minority of Native American groups who do not want their ancestors skeletal remains and burial offerings returned. These are mostly Christianized and Mormonized Native Americans who view the items as pagan; and others, such as the Zunis, who feel the bones have been "tainted" while in Anglo-hands (Peerman 1990).

The first documented request for repatriation occurred nearly a century ago when a young Inuit man asked for the bones of his father from the American Museum of Natural History. At the request of Franz Boas on behalf of the museum, Robert Peary, an Arctic expeditionist, brought back six Inuit men. Within months, four died and one returned, leaving one young boy, named Mimik, orphaned. As not to upset Mimik, the museum set up a mock burial for the Inuits (one being his father). In actuality the museum processed, analyzed, and later displayed the Inuit bones. When Mimik got older and discovered what had truly happened, he petitioned several times to get the bones of his father back so that he could return to the Arctic and give his father a proper burial. Each time, he was denied (Senate Select Committee on Indian Affairs 1990).

Much has happened in the twentieth century to increase ethnic awareness and rights. In response to indigenous outcries, anthropology has begun to change. The first step toward an accord occurred in 1985, when the World Archaeology Congress (WAC) met to discuss indigenous peoples' view of the past. Four years later the WAC went a step further by holding an intercongress

called "Archaeological Ethics and the Treatment of the Dead" in which the "Vermillion Accord on Human Remains" was drafted. It included several clauses outlining both indigenous and archaeological concerns:

that mortal remains be treated with respect regardless of race, religion, nationality, custom and tradition;

that respect for the wishes of the dead and their local communities/relatives be maintained;

that respect for the scientific research value of mortal remains be maintained;

that agreement on disposition be negotiated;

that both ethnic and scientific concerns are legitimate and to be respected (Zimmerman 1992)

Soon after, the landmark case *Nebraska State Historical Society v Pawnee Tribe of Oklahoma* (indigenous to Nebraska prior to 1875) set federal standards for repatriation issues. The dispute formally began in 1988 when Lawrence Goodfox, Jr. asked Nebraska courts for the repatriation of the remains and burial offerings of deceased Pawnee individuals held by the Nebraska State Historical Society (NSHS). Robert M. Peregoy, a part-time appellate court judge of the Confederated Salish and Kootenai tribes and a senior staff attorney of the Native

American Rights Fund, followed the case closely. According to him Pawnee motivation lay in their belief that the disturbance of their ancestor's graves had caused adverse spiritual and physical consequences, as well as emotional distress, to living descendants (Peregoy 1992).

In return the NSHS insinuated that the Pawnee had ceased practice of those mortuary beliefs, that burial offerings "are not religious objects like crucifixes, rosaries and Bibles" (Peregoy 1992:142), and that the Pawnee intended to sell both the remains and the burial offerings on the antiquity market. Further, James Hanson, the executive director of the NSHS, stated, "a bone is like a book... and I don't believe in burning books." (Peregoy 1992:141).

Although the NSHS waged a "carefully orchestrated grass-roots campaign of misinformation, sensationalism, half truths and outright lies" the Pawnee request was strongly supported by common laws, constitutional and federal laws, and federal Indian law (Peregoy 1992:142).

Common law on skeletal remains states that there is no property interest or ownership right to a dead body. This is not affected by ownership of grave land. Therefore, as Peregoy concluded, the NSHS could not have any ownership over Pawnee skeletal remains. Common laws on funerary objects states that all disinterred funerary objects are the property of the person(s) who furnished the grave or their known descendants; therefore the NSHS had no property rights to these either.

Nebraska statutory law makes it a misdemeanor to dig up, disinter, remove or carry away "any human body or the remains thereof" from "its place of deposit or burial" (Peregoy 1992:144). Only next of kin or the county attorney can apply for a permit from the Bureau of Vital Statistics to disinter. Since a tribal government represents all living members, and so all living descendants, they are considered "next of kin"; and only they have the right to disinter their ancestor's graves.

The dispute raises questions of race, religion and property implicating the constitutional rights of the First and Fourteenth Amendments. The First Amendment Free Exercise Clause protects the freedom of religion and is violated when state actions interfere with religious mortuary practices (Peregoy 1992). The Fourteenth Amendment forbids invidious discrimination based on race, and prohibits the state from taking property in violation of due process of law. According to Peregoy, the Nebraska State Historical Society's actions clearly violate both of these Amendments. According to Federal Indian Law, any rights not ceded by a tribe to the U.S. government in a treaty, is implied to be reserved by that tribe. The Pawnee treaty never mentioned religious/mortuary practices, nor did any treaty with any other tribe. Furthermore, the Supremacy Clause prohibits states from enacting/enforcing any statute or regulation that conflicts with treaties; therefore the actions of the NSHS prohibiting repatriation are null and void under superseding Federal Treaty Law (Peregoy 1992).

Due to these logistics, any agency seeking to withhold Indian remains holds the burden of proof to show the proper legal authority to disinter and control the disposition of the dead. Since the NSHS failed to provide any such proof, the courts ruled in favor of the Pawnee tribe. However, the NSHS continued to disregard legislation by passing its own secret bill against repatriation (which was later ruled void), by repeatedly refusing to disclose many disputed records, and by threatening confiscation by the National Parks Service under the Antiquities Act of 1906 (which was later ruled inapplicable) (Peregoy 1992). The Pawnee's views continued to prevail in each legislative branch; and the first repatriation resulted on September 10, 1990.

As a consequence the "Unmarked Human Burial Sites and Skeletal Remains Protection Act" was enacted in Nebraska in 1989, which protects all unmarked human burial sites by requiring notification of their discovery to tribes and compliance with their wishes. It also requires all museums to return all identifiable skeletal remains and burial offerings to the Indian tribes that request them for reburial.

The historic Nebraska Act became a model for similar laws in other states and for two federal laws: the Native American Grave Protection and Repatriation Act (NAGPRA), and the National Museum of the American Indian Act. The purpose of the latter is to consolidate cultural materials from the Heye Museum, the largest private collection, with the Smithsonian collection into the National Museum of the American Indian. More importantly, the new

museum is to be headed by Native American officials and operated in accordance with repatriation mandates.

The purpose of NAGPRA is "to provide for the protection of Indian graves and burial grounds, and for other purposes" (Senate Select Committee on Indian Affairs 1990:1). It makes the sale, use for profit, or transport of Native American skeletal remains unlawful without the consent of the descendants or tribe. It states that all Native American skeletal remains or ceremonial objects must be disposed of according to the descendant/tribe's wishes (although descendants/tribes still hold the right to relinquish ownership).

NAGPRA mandates that all federally funded museums and agencies must complete an inventory of all Native American skeletal remains and ceremonial objects, including their tribal identification, by the end of two years. These museums/agencies are to notify tribes of their holdings by the end of three years. Within one year after receiving these records, the museum/agency was to be notified by the tribe of what they want returned and how and when they wanted the mortuary materials delivered.

All Native American skeletal remains and ceremonial objects fall under these required guidelines unless they were acquired with legitimate Native American consent, or unless determined indispensable toward the completion of a specific scientific study that would significantly benefit the United States. But even the latter must be returned within 90 days after tribal requests (Senate Select Committee on Indian Affairs 1990).

To the concern of Native Americans, NAGPRA shifts the burden of proof of descendency from the museum/agency to Native Americans. As this is an expensive and cumbersome task, some tribes, such as the Confederated Salish and Kootenai Tribes of the Flathead Nation, fear it will prevent or at least prolong repatriation (Senate Select Committee on Indian Affairs 1990). Several tribes are also concerned about the specific wording of the Act. For instance, the Confederated Salish and Kootenai Tribes of the Flathead Nation want those words that indicate ownership to be changed to "in the possession and control of", as ownership is contrary to their values (Senate Select Committee on Indian Affairs 1990:551). Many also feel the provisions allowing for further scientific study must be clarified, and have expressed concern over who will make such a decision.

Thus far, funding has been and is the primary obstacle of implementing NAGPRA. The Congressional Budget Office estimated the total cost of nationwide repatriation at 50 million dollars (Senate Select Committee on Indian Affairs 1992). Museums, such as the National Museum of the American Indian, and other agencies need funds to produce inventories, contact tribes, and to deal with existing collections and excavations in accordance with the new law. Native American communities need money to become familiar with their new rights and the repatriation process, and, in some cases, to prove descendency. According to the American Indian Ritual Object Repatriation Foundation, "unless adequate federal funding is appropriated

for NAGPRA it will be impossible for museums and tribes to comply with the law" (Senate Select Committee on Indian Affairs 1992:206). In 1993, only 2.3 million dollars of the budget was appointed to NAGPRA, while in 1994 only 3 million was so directed. The financial future of NAGPRA is looking equally as grim with the pending Republican budget cuts. Out of these federal funds, the National Parks Service decides which tribes actually receive them; some tribes have received no money at all (Smith 1995).

Other implementation problems include the continued sale of American Indian sacred materials on the antiquities market, and incidences of private buyers purposely destroying Native American burial goods in order to avoid NAGPRA (Senate Select Committee on Indian Affairs 1992).

Anthropologists have had a mixed response to NAGPRA. There are many who oppose repatriation for the sake of science. To them, "notions such as the dead causing problems for the living are seen as religious fundamentalism, with no place at all in the realm of science." (Zimmerman 1992:39). Anti-repatriationists such as Meighan feel that the legal backing drawn upon to protect Indian religious freedom is unrealistic since, first, no other group in the U.S. is given the same specific protection; second, most Indians no longer hold the traditional mortuary beliefs that oppose disinterment; and third, Native American's knowledge of their ancestors derive from the science they seek to destroy (Meighan 1994).



Of utmost concern to most anti-repatriationists is the possible reburial of prehistoric skeletal remains. In 1992, a 10,675 year old skull excavated from a gravel pit near Buhla, Idaho, was reburied on the Shoshone-Bannock reservation after only three days of study (Emspak 1995). In 1991, 237 prehistoric Indian skeletons were reburied in Lewistown, Illinois (Eckert 1991). And in 1994, the controversy of reburial v scientific study arose again over two 3,000 - 4,000 year old Washoe skeletons in Nevada (Anderson 1994).

The strongest argument against repatriation concerns past and future research. All agree that once the material is gone, it will no longer be available for restudy or for future studies using new techniques. For example, only recently have scientists discovered how to extract antibodies and genetic material from ancient bones, making it possible to trace the evolution of specific diseases (Meighan 1994). However, most Native Americans, and some scientists, argue that the information generated from the analysis of skeletal remains has no application, and so, is non-beneficial. After searching the medical literature in the National Library of Medicine, Emery A. Johnson, M.D., M.P.H., published that his search "did not reveal any significant publication relating to the utilization of Native American skeletal remains to prevention, diagnosis, or treatment of disease" (Senate Select Committee on Indian Affairs 1990).

One response of anti-repatriationists is to argue that it is their duty to preserve the past. According to Clement Meighan, emeritus professor of

anthropology at UCLA and head of the American Committee for the Preservation of Archaeological Collections, "If the archaeology is not done, the ancient people remain without a history" (Meighan 1994:66). However, according to many Native Americans, this insinuates not only that Indians are unable to preserve their own history, but that, in the words of Vine DeLoria, "the only real Indians were dead ones" (Zimmerman 1992:40). Indeed, many Native Americans fear that archaeological history will replace traditional history, eroding their culture further than has already been done.

Opponents of repatriation, many of whom are archaeologists and physical anthropologists, accuse cultural anthropologists of siding with Native Americans just to keep good relations so they can continue cultural research. However, some feel that NAGPRA will eventually have a negative effect upon cultural anthropology as well. Lynn Goldstein, a mortuary archaeologist at the University of Wisconsin, Milwaukee, predicts that, "They'll ask next for field notes, tapes and photographs, and they'll insist that you have their permission before you publish" (Morell 1994:21). Recently, to the consternation of academia, the Hopi Tribe has asked museums to declare a moratorium on the study of any archival material pertaining to the Hopi people, feeling their request is a logical extension of NAGPRA protections.

On the other hand, there are many anthropologists who support NAGPRA. They work in many anthropology sub-disciplines, including cultural and applied

anthropology, as well as archaeology. They understand the importance of repatriation to Native Americans and have compromised considerably to be in accordance with NAGPRA. Foremost, they have given up the right to keep Native American bones; they also have ended the use of destructive research techniques and the excavation of burials (except when the proper permission is granted). In return, "funds [may] become available, where no money has been available before, for study of collections long sitting on shelves" (Zimmerman 1992:49). Without such a compromise anthropologists risk losing *all* access to Native American materials and knowledge.

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