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The Social Context of Legislating N.A.G.P.R.A.

THE SOCIAL CONTEXT OF LEGISLATING N.A.G.P.R.A.

By

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Abstract

The Native American Graves Protection and Repatriation Act is a groundbreaking piece of legislation. However, the law was sharply contested prior to its passage in 1990. An examination of how professional academic societies, museum institutions, federal institutions, Native American groups, and individuals interacted during the late 1980s and 1990s reveals several rhetorical strategies that were used to sway opinions of other actors in negotiating the language of the law. This research contributes to awareness of the anthropological and archaeological communities vis-à-vis repatriation legislation, especially concerning if, or how, attitudes towards repatriation legislation change over time.

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Chapter 1

Introduction

On November 16, 1990, President George H.W. Bush signed his name to Public Law 101-601, creating the Native American Graves Protection and Repatriation Act. Hailed as a watershed moment for Native American rights, NAGPRA, as the act is popularly known, was the culmination of years of work by Native American individuals, tribes, organizations, academics, professional organizations, and the museum community. While the Act has provisions for the excavation of Native American sites and the protection of sacred and burial places, the most highly contested section of NAGPRA is repatriation, which is the focus here. Repatriation, or the return of human remains and artifacts, involves a multitude of stakeholders and interests. NAGPRA mandates that all federally funded institutions must follow certain guidelines to inventory, make public, and review requests to repatriation collections of Native American human remains and artifacts. This requires the involvement of museum and university trustees and staff, professional anthropologist, archaeologists, and federally recognized Native American tribes. In the drafting and negotiating processes that occurred before the final draft of the bill, all of these stakeholders vied to represent their best interests through meetings, resolutions, coalitions, congressional testimonies and hearings, and in the news media and in the public eye.

The creation of NAGPRA is embedded within an historical and social context that must be explored to understand the reasons and timing of the legislation, as well as the motivations of the various stakeholders who negotiated over the bill. The broad context

of the acknowledgement of Native American rights, the history of museum collection practices, developments within academia inform the specific actions of individuals and events that catalyzed the creation and passage of NAGPRA. Discourse about repatriation from various points of view has converged over the process of drafting the law, as can be seen in joint statements to Congress, reports in news media, and works from within academia and the museum community. The prevailing inertia of many of the professional anthropological and archaeological organizations and museums has been partially alleviated, as widely held fears concerning loss of collections has not come to pass.

In my thesis, I examine how professional academic societies, museum institutions, federal institutions, Native American groups, and individuals interacted during the late 1980s and 1990s. I focus particularly on the rhetorical strategies that were used to sway opinions of other actors in negotiating the language of the law. This research contributes to awareness of the anthropological and archaeological communities vis-à-vis repatriation legislation, especially concerning if, or how, attitudes towards repatriation legislation change over time. My analysis of the interrelationships of NAGPRA and archaeology reveals that archaeology can be conceived as “culture” in the cultural anthropological sense of culture as a contested process of meaning making and that this process is ongoing.

Chapter 2

A Short Legal Background: Laws and Human Remains in the United States

It is useful to begin with an overview of the laws treating human remains and the dead in the United States. Anthropologically, law is a subject of interest because “it is not separate from culture but is an integral part of culture” (Delaney, 2001, p. 489). Law draws up categories, such as “body,” “nature,” and “property.” It matters where the lines of each category are drawn, as well as how they are applied to people and the material world. A large and legitimate grievance in the discourse surrounding repatriation is the inequality faced by Native Americans. In terms of the court decisions and statutes that regulate the dead body, historical discrimination against minority and disempowered populations has manifested itself despite the idealized profession of equality under the rule of law.

This discrimination extends to the treatment of human remains, which have been the subjects of legislation over the last two hundred and thirty years: distinct laws and regulations at the federal and state levels largely stem from the English Common Law tradition. In particular, American rulings and laws concerning human remains have focused on the rights and wishes of survivors such as the next-of-kin, and the degree to which this groups is politically marginalized or empowered is reflected in the application of law. An historical analysis of court rulings and statutes over the disposition of human remains reveals continuity in American society regarding the role of the next-of-kin, as seen through changes in the legislation and the disposition of archaeological resources. These laws and practices contrast with treatment of some Native American remains, as state-sponsored and privately-funded collecting resulted in differential treatment.

Arguments for NAGRA that center on the rectification of historic wrongdoing hinge on the discrepancy between the law and its application to more powerful groups in American society and its application to subalterns.

Across all human cultures, argue scholars of human rights advocating on human remains issues, there are general levels of respect accorded to the remains of deceased humans (Hubert & Fforde 2002; Moore 1987). However, it is important to remember that the “treatment of the dead is a cultural entity and the ‘proper’ treatment at any given place and time is culturally determined” (Goldstein & Kintigh 1990:586). In the United States, jurisprudence concerning human remains reflects the importance of specific rituals for the dead, and was initially based on English, Enlightenment, and Protestant ideas concerning death and the body.

American law is in part based on the English Common Law tradition. Most reviews of American law and dead bodies begin their analysis with the pre-Reformation era in England, when “the Church and the ecclesiastic courts exercised jurisdiction over matters involving dead bodies” (Meyers 1990:183; *Columbia Law Review* 1905; Van de Kamp 1990). In the seventeenth century, burial of dead bodies were *in nullius bonis*, or beyond human property interest, due to the fact that interment belonged to the category *res religiosae*, or things inherently sacred. This put the buried body firmly out of the hand of the general law of property and into the hands of the English ecclesiastical courts (J. F. H. 1926; Meyers 1990; Van de Kamp 1990). After the Reformation, during the seventeenth century, the secular courts began to take jurisdiction over matters previously subject to the ecclesiastical courts. However, the notion that a corpse was *res nullius* was continued, and, indeed, the American common law tradition upholds that the next of kin

have only “a right of possession *for the purpose of burial*” (Meyers 1990:183, emphasis added). Early American courts upheld the principle that no property interests exist in human remains: the person taking charge of the body merely held it in trust for those with an interest in the body, i.e. family and friends.

However, American courts departed from the English Common Law in finding “quasi-property rights” in dead bodies in 1872, in *Pierce v. Proprietors of Swan Point Cemetery* (*Harvard Law Review*, 1896:51). Importantly, this quasi-property right is extinguished upon burial or cremation of the body (Swain & Marusyk, 1990, p. 12). In a second contemporary case, *Larson v. Chase*, the surviving spouse was deemed to have a right of possession of the corpse of his or her spouse, “in the same condition as when death occurred, for the purpose of giving it proper care and burial” (*Harvard Law Review*, 1896, p. 52). Exceptions are made for autopsies deemed necessary by the state (Meyers, 1990, p. 184). Seventy years later, courts also ruled in *State v. Bradbury* (1939) that the disposal of a body by the next of kin in a manner deemed *contra bonos mores* (against common decency), was a common law misdemeanor based on the “subsequent effect of the act upon the community” (*Harvard Law Review*, 1940, p. 1048). Through the expansion of common law jurisdiction the courts prosecuted Bradbury for a misdemeanor that would otherwise have broken no laws – it was simply shocking to the community. While American courts expanded the rights that can be claimed in a dead body, adding the idea of quasi-property rights, an emphasis remains upon the “duties” of next-of-kin and a sense of community propriety in the treatment of remains.

Once a body is buried or cremated, however, next-of-kin no longer hold any rights in the body. In fact, the state then “exercises a protective function over [the body]

against unauthorized removal” (Meyers, 1990, p. 186), and unauthorized removal can be punished in criminal courts (Meyers, 1990, p. 186; Sappol, 2002; Van de Kamp, 1990). In fact, “no known English or American decision or statute appears ever to have recognized title in anyone to interred or disinterred human remains” (Van de Kamp, 1990). American laws regarding dead bodies are in part based on assumptions of value, invested in both goods and morals, shared by the entire community. Kin have “rights” or “quasi-property rights” or “sacred duties” in the eyes of the community, and this is what is written into law.

In sum, it has been the opinion of American courts that the next-of-kin have a “sacred duty” to bury or otherwise dispose of the body of kin in a manner acceptable to the moral standards of the community. Additionally, the next-of-kin have a quasi-property right to an undamaged body, and hold the body in trust until the act of burial or cremation. After burial, it is the state that protects bodies from unlawful removal. In court and in everyday language, it is respect for the actions and wishes of survivors and the approbation of the community that guides American legal interpretation surrounding dead bodies. These points are illuminating when considering the disposition of human remains categorized as archaeological resources and the history of discrimination evident in the practice of collection the remains of Native Americans, which manages to violate all the principles enumerated above.

Van de Kamp (1990) writes, “The proposition appears universally to be accepted that human interments are fundamentally inviolate” in American jurisprudence, and “disinterment and disposition of human remains is governed strictly by statute.” However, many statutes named allow ownership in Native American human remains, and

“the legal protections—which most Americans take for granted—have failed to protect the graves and the dead of Native people” (Trobe & Echo-Hawk, 2000, p.125). It has long been established that the next-of-kin can recover damages for “any outrage, indecency, or injury were caused to the body of the deceased” and that the damages stem from “emotional interests connected with the dignity of the disposition of the body and... peace of mind [of the next of kin]” (Meyers, 1990, p. 184). Yet this protection has not always been extended towards Native Americans.

The beginning of the twentieth century saw the creation of laws that began a legislated century-long federal “ownership” of Native human remains. In 1906 the Antiquities Act was passed, with the immediate purpose of protecting archaeological sites on public land in the form of parks and national monuments. However, the Antiquities Act ushered in an era of viewing archaeological finds the property of the federal government. The act specifies that “archaeological resources,” including human remains, should be turned over to state and federal museums (Socbeson, 1990, p. 2). However, the common law rules applying to burial grounds undermine the basis for granting excavated human remains to museums. Under regular common law of property, there exists a doctrine of abandonment that allows landowners the rights to objects and resources on their property. However, because bodies are *res nulliae*, and no one can have property interest in a body, abandonment cannot apply to burial grounds and even when the identity of a burial ground is forgotten or lost, for “the obligation continues not to desecrate the graves or dishonor the dead” (Moore, 1987, p. 5). Even if remains are discovered on public land, or in federal parks or monuments, the original treaties drawn between the United States and Native American tribes covering these lands do not grant

any right to bodies to the government; no treaty expressly grants rights to bodies, and the general interpretation of treaties is that they are “a grant of rights *from* Indian tribes to the United States; not as a grant *to* tribes. Rights not expressly granted are reserved” (Moore, 1987, p. 6, emphasis in original). The right of the United States government to exhume, or exhume and store or display indefinitely, Native American human remains is thus contestable.

Not until the latter half of the twentieth century did bills pass that affected the Antiquities Act. In 1960, the Reservoir Salvage Act, which allows for archaeological excavations of lands prior to the construction of dams, continued the presumption of federal ownership of human remains begun with the Antiquities Act of 1906. The language of the National Historic Preservation Act of 1966 seemed to slightly ameliorate the practices of the previous sixty years, but Moore (1987) writes that it “results in little real substantive change in terms of protecting burial sites” (p. 3). The presumption of federal ownership continued with the Archaeological Resources Protection Act [ARPA] of 1979, which at least provided a mechanism for tribes to consult with archaeologists before excavations begin, and a permitting system for land under the control of tribes or individuals.

Nine years later, the inviolability of Native burial grounds was tested decisively in court: in 1986, the case *Charrier v. Bell* was heard by the Louisiana Court of Appeals. The Tunica Biloxi Tribe claimed rightful ownership of material excavated from private land, and the Court of Appeals ruled against the private landowner, for the “common law doctrine of abandonment did not apply to burial materials” (Moore, 1987, p. 5). This ruling occurred in the same year that Senator John Melcher introduced S. 2952, the first

bill to address Native concerns about the disposition of human remains classified as archaeological resources (Sockbeson, 1990, p. 3). The bill began a four-year-long process of creating a federal-level piece of legislation to address human remains, culminating in the Native American Graves Protection and Repatriation Act, 1990.

Chapter 3

NAGPRA in Brief

Outline of Public Law 101-601

Before considering the multifaceted process of the creation of NAGPRA, it is important to understand the major provisions of the legislation. The final bill, signed into law November 1990, was the attempt of Congress to reconcile four major areas of federal law: civil rights, Indian law, property law, and administrative law.

The act has fifteen sections, and is only ten pages long. It defines key terms (Sections 1 and 2), such as: burial site; cultural affiliation; cultural items including associated funerary objects, unassociated funerary objects, sacred objects, and cultural patrimony; federal agents and federal lands; Indian tribe; museum; Native American; Native Hawaiian; right of possession; tribal lands (U.S. Congress 1990). The choice of language in the terms themselves and the definitions were contested elements in the drafts of the bill. The third section, "Ownership", ownership or control of cultural items (including human remains) is vested in lineal descendants, tribes on whose land the objects were found, tribes with cultural affiliation proved with "the preponderance of the evidence", tribes who previously occupied the land on which the objects were found, and in the case of unclaimed cultural items a reviews committee of Native Americans and the scientific and museum communities is established to determine disposal. This section also covers the intentional excavation of Native American human remains, which must be undertaken in accordance with the Archaeological Resources Protection Act of 1979 and with the consult (federal lands) or consent (tribal lands) of appropriate Native American

tribes. If human remains or cultural items are inadvertently discovered, then the Secretary of the Interior must be notified and cease any development activity until notified by the Secretary or appropriate Native American tribes.

Section four covers illegal trafficking, and bolsters the extant law by amendment with fines and possible imprisonment for knowingly selling, purchasing, using for profit, or transporting for sale or profit any Native American cultural items without right of possession or in violation of NAGPRA.

Section five outlines the inventory requirement for federal agencies and museum holding human remains and associated funerary objects. Originally scheduled to be completed in five years, most institutions were given extensions in order to adequately meet the requirements. While this inventory process requires determining cultural affiliation of all Native American collections in federally funded institutions, it is not license for “the initiation of new scientific studies” (U.S. Congress 1990, p. 3053). Six months after inventory completion, the culturally affiliated tribes must be notified in writing and the inventory must be published to the Federal Register. Indian Tribes are also allowed access to records kept by museums about the acquisition of the objects. Section six outlines a similar process of summary for unassociated funerary objects, sacred objects, and objects of cultural patrimony.

Section seven treats repatriation. After establishing cultural affiliation, institutions “shall expeditiously return” cultural items to requesting tribes, and human remains and associated funerary objects to lineal descendants or tribes. If the objects or remains are part of an “indispensable” scientific study “of major benefit to the United States” then they are to be returned 90 days after the study finishes. Native Americans can also prove

that institutions do not have the right of possession and thus repatriate items or remains. Institutions must share knowledge with tribes during the process. This section also relieves museums from liability for claims that they breached “fiduciary duty, public trust, or violations of state laws” (p. 3055).

Section eight establishes the review committee. The committee, of Native Americans, scientists, and museum personnel, monitors and reviews disputed claims. Sections nine through fifteen outline civil penalties for museum non-compliance, grants for assisting tribes and museums, states the unique relationship between the U.S. and Indian tribes, and outlines regulations, authorization of appropriations, and enforcement.

Significance of Provisions

NAGPRA is an extension of several of the provisions of the National Museum of the American Indian Act [NMAIA] of 1989. This act created a new arm of the Smithsonian, the National Museum of the American Indian, out of collections acquired from the Heye Foundation’s Museum of the American Indian in New York City. The NMAIA includes a requirement for the Smithsonian to repatriate human remains and cultural items using a similar formula to that later used in NAGPRA, which extended the requirement to all institutions receiving federal funding—about 700 across the United States (Fine-Dare, 2002:119)—although some have said that “most” of the 8,000 museums across the United States will be affected (Thornton 1998:399). The NMAIA addresses Native American human remains and funerary objects in the Smithsonian’s collection and outlines a process of inventory, notification, and repatriation, setting the precedent for NAGPRA (Trope and Echo-Hawk, 2000:137). The NMAIA, in turn, was the product of preceding bills, all at the state level, which treat repatriation and the

protection of burial sites: the two most commonly cited as inspirations for federal legislation are the Kansas repatriation law and that of Nebraska (Trope and Echo-Hawk 2000:134).

NAGPRA is broadly seen, through inclusion of Natives at many levels in the process of repatriation and consultation, as well as the fact of a repatriation bill in itself, to be a partial rectification of wrongs, both historical and current. Trope and Echo-Hawk, both lawyers for the Native American Rights Fund, and who were instrumental in the crafting of the NAGPRA law, hold that the legislative intent of NAGPRA is human rights: in a parallel to Civil Rights legislation, NAGPRA is based on a doctrine of trust insofar as Congress' dealings with Indian affairs "are to be liberally construed for Indian benefit" (2000:140). Watkins (2000:50) echoes Trope and Echo-Hawk, citing NAGPRA as primarily human rights law as well as important for the deterrence of amateur pothunters and private collectors.

Aside from repatriation, NAGPRA is also significant for its recognition of the communal property of Native American tribes, a notion that runs contrary to most property law yet is a well-established tradition of many indigenous groups. As McKeown remarks of repatriation and the recognition of communal property: "Neither idea is very new, both reflecting the guarantee of equal protection under the law imagined by America's founding fathers and codified in the Constitution of the United States" (2002:128). Henry Sockbeson, another staff lawyer at NARF, wrote just after the passage of NAGPRA that it "represents a major federal shift away from viewing Native American human remains as 'archaeological resources' or 'federal property' alone" (1990:2).

Overall, NAGPRA is a means of reconciling four major areas of law: civil rights legislation, Native American law, property law, and administrative law. Congress recognized the differential treatment to which Native Americans were subject, recognized tribal sovereignty, clarified the “unique status of the dead” and recognized the failure to recognize communal property, and directed the Department of the Interior to implement the mandate and regulations of due process (McKeown 2002:108-109). The first three of these areas have been the subjects of historical neglect.

The historical context of Native American law is crucial for its understanding. Native American law is “perhaps the most historically dependent of all areas of constitutional interpretation” for it “grows from, and is merged into, the historical experience” (Strickland 1998:254). If NAGPRA represents a major federal shift, and if equal protection under the law is now only being guaranteed, an introduction to the historical discrimination experienced by Native Americans is warranted.

Chapter 4

Historical Context

Native Americans and Federal Indian Law

The U.S. treatment of Native Americans in court and in Congress breaks down into five historical periods, with NAGPRA falling into the fifth and current period.

Following Strickland (1998), these five periods are:

1. Formative or Treaty Era, 1789-1871
2. Period of Assimilation and Allotment, 1871-1928
3. Time of Reorganization and Re-establishment, 1928-1942
4. Termination Movement, 1943-1961
5. Era of Self-Determination and Tribal Revitalization, 1961-Present

Many authors (Fine-Dare 2002; Bieder 2000; Hinsley 2000; Watkins 2000) treat the discriminatory practices leveled at Native Americans over the centuries since European contact, so only a brief overview will be addressed here.

The first of Strickland's eras, from the late eighteenth through most of the nineteenth centuries, was marked by a distinctive philosophical view of Native Americans that has informed federal policy and public opinion to this day. Based on the rationality principles of the Enlightenment, with thinkers such as Thomas Jefferson and Count Buffon witnessing and unfavorably judging Native American versus European culture, representations of Native Americans "articulated social agendas" such as the political ordering of European above non-European (Bieder 2000:19-22; Fine-Dare 2002:20). The study of "Man" in the nineteenth century centered on scientific principles

with the categorizing of the body (across cultures) as a specimen subject to the medical gaze and a fascination with measuring. Samuel Morton's *Crania Americana* and the popular pseudo-science of phrenology drove an evaluation of Native Americans as inferior (Bieder 2000:23).

A Spencerian vein in archaeology and museum collecting informed many of the practices of the nineteenth and early twentieth centuries toward Native Americans. Belief in unilinear evolution of societies also led white Americans to characterize Native American societies "as static cultures at a relatively primitive stage of development compared with European civilization" (Ferguson 1996:64), and that they would perish in competition with European-American culture. The prevalent belief that the Indians were dying out, called the "Myth of the Vanishing Indian", spurred the rapid and rampant collection of human remains and artifacts across the United States (Weaver 1997:14; Ferguson 1996:64). Museums engaged in "wars" to out-collect one another. A corollary of this rush to preserve a dying race was the unethical and often illegal acquisition of remains and objects. While many items were purchased, unscrupulous activity did occur. In the literature treating this period, one frequently quoted incident is that of Franz Boas himself despairing of the "unpleasantness" of grave-robbing in the face of his utmost belief that someone had to do it (Fine-Dare 2002:41).

A larger context of empire building and Manifest Destiny informs the practices of archaeologists of this period (Watkins 2000:5), who, with the dehistoricization, commodification, and objectification of Native Americans and Native American culture engaged in a museum process which "constructed a meaning of Indian demise within the teleology of Manifest Destiny" (Fine-Dare 2002:13, 21). Complicit in the collecting

practices was the federal government itself, as the Army Medical Corps during the late 1800s actively collected skulls and artifacts from battlefields and massacres of Indians for shipment to museums (Fine-Dare 2002: 32; Harjo 2006). Additionally, the Indian Office was engaged in activities to “civilize” the tribes, basically enacting assimilationist regulations. These ran the gamut from education policies stifling traditional language and culture to intermarriage with whites (Bieder 2000:31). The end of the “Indian Wars” in the 1890s marked an upswing in public interest in Native American culture: the World’s Columbian Exposition of 1893 was complete with live displays of Native American miniature villages and families inhabiting them, showcasing “traditional” life. Strickland’s “Treaty Era” came to a close and the period of assimilation and allotment began.

Federal legislation began to affect Native American and archaeology in more direct ways with the turn of the century. The Federal Antiquities Act of 1906 decreased looting and increased the federal government’s ability to seize objects as archaeological resources and demarcate places as national sites (Fine-Dare 2002; Moore 1987). The act established a principle that cultural resources are important to the cultural history of the United States and thus need to be protected (Watkins 2000:38); however, this continued the focus on Native Americans as a dying race and on archaeological material. Native Americans gained citizenship in 1924 with the Indian Citizenship Act. The third of Strickland’s periods saw Collier’s Indian Reorganization Act of 1934, which prevented states from impinging on tribes’ treaty rights. By the 1950s, however, Congress led the termination policy efforts to dismantle reservations and put an end to federal aid programs; by 1968, termination was undermined (Fine-Dare 2002:65-68).

The 1960s saw a surge of Native American activism, paralleling the Civil Rights Movement. The “Red Power” movement brought issues of discrimination against Native Americans into national consciousness, and links between the historic preservation movement and Native American were established in the following decade (Watkins 2000:7). The National Indian Youth Council staged protests such as the Alcatraz Island occupation, the Longest Walk march protest contributed to the formation of the group American Indians Against Desecration, and the Native American Rights Fund was established in 1970 to provide legal assistance to Native Americans (Fine-Dare 2002). This fifth era also saw the rise of prominent pan-Indian movements’ concern for protection of sacred places, burial grounds, and reburial of Native American remains. The American Indian Religious Freedom Act of 1978 [AIRFA] was seminal, although Watkins (2000) writes that the act had no “teeth”, and the Archaeological Resources Protection Act of 1979 [ARPA] also had provisions for requesting consultations from tribes on whose land excavations were made. 1979 saw, for the first time, Native American status equal to that of state and local government agencies relative to the control of cultural resources (Watkins 2000:43). However, Moore (1987) still sees, in the 1979 act, “very little” meaningful change for Native people (3). Eleven years later, NMAIA and then NAGPRA marked watershed moments in the growing movement for reburial and repatriation on the federal level. Some states had already passed repatriation legislation before 1990, but the national movement is significant for it recognizes a broad concern over these issues.

Changes in Archaeology and Social Theory

As Native American law underwent significant changes over the past two centuries, the disciplines of anthropology and archaeology have done so as well, unsurprisingly given the fair amount of legislative changes concerning both the academy and Native Americans. Early archaeology, writes Ferguson (1996:64) was mostly a colonialist endeavor meant to aid in the domination of Native American populations by Europeans: indigenous people were denigrated and accused of being incapable of civilized life. The nascent discipline of American archaeology led to the formation of a myth of the “epic potential of America”—the construction of a meta-narrative of American democracy—based on the prehistory of Native Americans (Hinsley 2002:38-41). The phrenological obsession of the 1800s gave way to Boasian anthropological thought, a shift to the development of chronological techniques in archaeology and a growing separation between ethnology and archaeology (Bieder 2002; Ferguson 1996:65). Processual archaeology, developed in the 1960s and 1970s, focused on the changes within Native American societies and ecological variables and recognized Native American cultures as just “as creative as European cultures,” while still focusing on universal terms that had little meaning for individual tribes (Ferguson 1996:65). Ferguson also sees the development of Cultural Resource Management [CRM] from the 1970s onward as a significant change within archaeology, although not within the academy: CRM increases knowledge of Native American archaeology at development sites but also commodifies archaeology by “removing archaeology from the realm of universities into the commercial area of contracts and private consulting companies” (66). Watkins (2000) sees American archaeology today divided into two: “anthropological archaeology” (a better term would be “academic archaeology”) which is research-oriented in academia,

and “compliance archaeology” which is business and government based and focuses on compliance with regulations (21). While CRM has continued from the 1970s onward, processual archaeology (“academic archaeology”) has been challenged by, appropriately enough, post-processual archaeology (also “academic archaeology”). The post-processual school accepts pluralism in archaeology and recognizes that archaeology is neither value-neutral nor possessing of a transcendental objectivity (Thomas 2000:242). Archaeology, as the study of the past, “is a social and political practice intimately bound to the context in which it is conducted” (Leone and Preucel 1992:115). This can be seen as a general trend toward greater self-reflexivity in the field, and within the United States it is in part due to criticism by Native Americans (Ferguson 1996:70). Critical theory, as applied to archaeology by Leone and Preucel (1992:117), emphasizes that knowledge production must be understood in its social context, as it is “rarely, if ever, apolitical.” The debates surrounding reburial and repatriation dramatically emphasize the political nature of archaeology.

The trajectory of American archaeology as seen in its colonialist, processual, CRM, and post-processual incarnations, is encompassed by a paradigmatic shift in social theory. Boggs (2002) sees this shift occurring in the liberal polity—the “intellectual and public life in the West” from “liberal” social theory to “culture” social theory. Liberal theory is grounded in the Enlightenment project that embodies the principle of physical science as social ideology and social form. It defines itself as grounded in “scientific” understandings of human nature and economic law stemming from Hobbes and Locke and the social contract based on individual reason and needs (Boggs 2002:601). Culture theory, on the other hand, “grounds the diversity of human life worlds in natural human

sociality and symbolic faculties,” using a Geertzian understanding of culture that “decenters the Western experience as one among others” and rejects the claim of universality of liberal theory (601-602). This evolution began in late 20th-century scientific thought, ironically enough (Boggs 2002:607). Other than offering a general framework for changes within the discipline of archaeology, Boggs’ thoughts are important for the interactions between changing paradigms of social theory and the law as it relates to Native Americans. Boggs’ central thesis is that the incommensurability of liberal theory and culture theory is demonstrated by the lag time of change in law and economic policy (social practice) when compared to change in social theory, and that “events in the arenas of U.S. Indian law and policy are ordered and illumined when viewed as public arena clashes between liberal and cultural theory” (603). Laws such as NAGPRA are “broadly informed” by cultural theory and serve the function of introducing this perspective into administrative and legal decision-making, but are nevertheless interpreted and defined by extant liberalist institutions (Boggs 2002:603).

McKeown notes this general backward-looking tendency in law as well, as the interpretation of legislation like NAGPRA is guided by established cannons (2002:109). The incommensurability noted by Boggs is remarked upon, albeit in different language, at the time of NAGPRA’s passage (Goldstein and Kintigh 1990; Leone and Preucel 1992; Meighan 1992) and within the recent literature (Hubert and Fforde 2002; Thomas 2000; Zimmerman 1996, 2002) that treats repatriation and its reception among various stakeholders, such as Native Americans and museums or academic institutions. A caveat must be mentioned, however, as the shift between the two competing paradigms presented by Boggs is not straightforward or clear-cut: every group, whether treating the

law or archaeology or Natives, has heterogeneous elements that make classifications such as “museums” or “Native Americans” too broad and over-general.

If NAGPRA is a locus of contention in the process of a paradigm shift, then in the social context of its formulation bears closer scrutiny.

Chapter 5

Getting to NAGPRA

How did NAGPRA come about? A variety of actors, both institutional and individual, played a critical role in the development of federal repatriation law. In the writings, interviews, and statements made by the various actors and stakeholders in the process of negotiating federal repatriation law, the emphases are not always analogous, which is understandable given the fact that personal experience shapes one's point of view. Archaeologists speak most knowledgeably about archaeologists, and etc. A more or less chronological account follows, organized by general type of stakeholder, into five major groups: tribal cases of reburial brought up under early federal or state laws, pan-Native American activity, individual professionals, professional organizations including universities and museums, and finally Congress. These groups allow a convenient organization of chronology, but there is considerable interaction and overlap of goals among them. In general, individual cases by tribes drove the formation of state laws that informed the pan-Native American activities. Native groups, along with several key institutions and academics, took a pro-active stance while professional organizations and museums acted primarily in reaction to demands for repatriation.

Early Rumblings

A broad goal of Native American leaders, articulated in the 1960s, was to earn respect from the dominant segments of society. Manifesting in AIRFA, this goal also ushered in the first explicitly articulated reburial and repatriation initiatives backed by the force of law as protection for reservation land, sacred places, and burial places grew into

a demand for repatriation. Before the passage of the American Indian Religious Freedom Act in 1978, there was a concerted effort by Native Americans for the protection of sacred places and burial places involving state and federal governments. In 1967 Cheyenne leaders met at Bear Butte, a sacred site, and agreed to form a coalition of Native American leaders to generally seek “respect in general society,” including the recovery of sacred objects from museums, protection for sacred places like Bear Butte, and began meeting on a semi-regular basis across the country (Harjo 2006). One of the multifarious goals of the coalition—which went by several names—was the establishment of the explicit right of freedom of religion for Native Americans. The coalition, with the help of NARF, and eventually President Carter, was able to get AIRFA signed into law in an edited form—“more of a policy statement with certain requirements”—than as substantive law as it was originally envisioned by Native American activists (Harjo 2006). Unfazed, the coalition continued its work on the implementation of AIRFA, which was considered the same work as sacred places protection and reburial. The passage of AIRFA represented an acknowledgment of the history of discrimination against Native Americans practicing their religions as well as a symbol of the extension of constitutional protections (Echo-Hawk and Echo-Hawk 1991:63). AIRFA set the scene for more strident and successful reburial requests.

Tribal Requests and State Laws

The seeds of the legislation of reburial and repatriation on a national level are from individual tribes’ reburial requests and state responses from the 1960s until the mid-1980s. A specific focus on reburial occurred at the 1971 panel discussion at the Second Convention of Indian Scholars in Aspen, at which issues such as the display of human

remains in cultural institutions were discussed and a call was made for a moratorium on excavations of burials (Fine-Dare 2002:76). A few significant long-term efforts by Native American tribes to regain cultural objects made repatriation particularly topical, such as the repatriation of wampum to the Six Nations after 100 years of requests, finally honored in 1970, and the repatriation of Ahayu:da war gods to the Zuni (Fine-Dare 2002:91-94; Watkins 2000:47). Ahayu:da were located around the country in various museums and private collections, and many of the repatriation requests made in 1978 were honored in the 1980s, pre-NAGPRA (Ferguson, Anyon, and Ladd 2000:240). In the mid-1980s, a Pawnee burial site called the Salina Pit was the focus of the Pawnee Tribe's attempts to end public exhibition of human remains and rebury them (Echo-Hawk and Echo-Hawk 1991; Brower and Putnam 1989). A one-year-long study of the illegitimate acquisition of goods, undertaken during the Carter Administration also contributed to bringing repatriation into the public's eye (Trope and Echo-Hawk 2002:128).

Several states began to pass laws as a result of tribes' insistence on reburial and repatriation. Most notable are laws in California, Nebraska, and Iowa. In California, one of the "most sweeping and severe" burial laws was enacted (Fine-Dare 2002:98), while Kansas' Unmarked Burial Sites Preservation Act, applying to both public and private lands, and Nebraska's Protection Act are noted for forming the basis of the ideas enumerated in NAGPRA (Fine-Dare 2002:100-101, 117). Native American tribes also began operating their own CRM and preservation archaeology projects (Ferguson 1996:69). The Pueblo of Zuni, for instance, is an exemplar of a tribal archaeological program that worked to alleviate conflict between the tribe's interests and those of outsiders (Watkins 2000:11).

Individual Archaeologists

Not only was the public apprised of the situation and state law changed, tribal struggles for control over human remains also had impacts upon archaeologists collaborating with or studying the tribes. T. J. Ferguson, an anthropologist working for the Zuni Archaeology Program and Larry Zimmerman, an anthropologist at the University of South Dakota, for example, were both significantly affected by their cooperative work with the Zuni and the Crow Creek Sioux, respectively. Zimmerman in particular was very vocal about his beliefs in the importance of repatriation during the 1980s, and his advocacy activities in the World Archaeological Congress [WAC] and the SAA (Zimmerman 1986, 1987, 1989, 1996, 1997, 2002). Occupying the opposite side of the spectrum of archaeologists' opinions on repatriation is Clement Meighan, who, above his outspoken criticism of repatriation in SAA publications (1992) and books (2002) also helped form the American Committee for the Preservation of Archaeological Collections [ACPAC], which protests the repatriation of unnamed individuals.

Pan-Indian Activism

Suzan Shown Harjo, a Native American activist and writer, sees the beginnings of organized pan-Native American efforts to discuss and act upon reburial issues in the late 1960s. Harjo, one of the members of the unnamed sacred places/reburial/AIRFA coalition from its inception, recalls that the term "repatriation" was not in general use until the late 1970s when Native Americans, including herself, began seriously meeting with government officials (2006). She traces the use of the term "repatriation" to the repatriation of those killed in action on foreign soil, noting that the effort extended to soldiers should provide an analogy to the desire of many Native American tribes to

rebury their own dead, some of whom were killed in violent interactions with American soldiers (Molotsky 1989; Harjo 2006). An explicit goal of the coalition was to enact federal-level repatriation law in order to regularize the patchy state laws and standardize irregular enforcement.

Vine Deloria, Jr., a Native American academic and critic, brought the repatriation issue into the mainstream with the publication of *Custer Died for Your Sins: An Indian Manifesto* in 1969. Followed by other works exploring the relationship between archaeology, the academy, and Native Americans, *Custer Died for Your Sins* was the initial open challenge to anthropology, a “scathing attack” that challenged the “validity of anthropological intent, method, and product” (Zimmerman 1997:92). The book was published for a wide audience, not specialists, and the chapter deriding anthropologists was even published slightly before the book, in *Playboy* (Deloria 1969a). Zimmerman sees Deloria’s work as part of a larger critique of social or cultural anthropology that led to reexamination and a the publication of an ethics guide by the American Anthropological Association [AAA] in 1976 which stated professional responsibilities toward living subjects but which did not affect archaeology per se (1997:92). The rise of more militant organizations, such as the American Indian Movement (responsible for the takeovers of Alcatraz and Wounded Knee) and American Indians Against Desecration, as well as the more moderate National Congress of the American Indian and the Native American Rights Fund, all in the late 1960s and early 1970s, began to focus attention upon reburial concerns (Riding In 2002:110; Zimmerman 1997:92). The NCAI, endorsed by Deloria in 1969, and NARF, founded in 1970, are seen by James Riding In (2002) as taking a more “conciliatory” stance in the 1980s and comprised mostly of law and

political professionals (111). NCAI and NARF, in particular, were jointly involved in several activist projects, and there was a high degree of networking between the organizations as well as between individuals such as Harjo and Walter Echo-Hawk and key political players in the Smithsonian and in Congress.

Harjo, as a Washington insider having served with the Carter Administration, had political ties to both congressmen and, as the executive director of the NCAI in the 1980s and the original sacred places/reburial/AIRFA coalition, to Native American leaders around the nation. She helped mobilized newspaper editorial campaigns and was interviewed for a PBS special, and along with Walter Echo-Hawk, the legal aid of NARF and political consultants, prepared lawsuits on human rights premises against institutions, primarily the Smithsonian, that were unresponsive to requests for repatriation (Harjo 2006, 2007). Changes in the administration of the Smithsonian and the threat of pending lawsuits spurred, according to Harjo, meetings with the Secretary that in the end resulted in the NMAIA and, with the backing of sympathetic Senators such as Daniel Inouye and John McCain, NAGPRA.

Institutions and Professional Organizations

Early repatriation efforts were not confined to the activities of Native American interest groups. The Society for Professional Archaeologists [SOPA], an offshoot of the SAA (and now the Registry of Professional Archaeologists) embraced Native American input into their codes of ethics, followed by the World Archaeological Congress [WAC]. Significantly, WAC held a meeting in Vermillion, South Dakota in 1989 at the University of South Dakota that included Native Americans as well as archaeologists. Organized by Larry J. Zimmerman, the WAC outlined an ethical statements and policy guideline called

the Vermillion Accord (Zimmerman 1996, 1997). Seen by some as a more extreme approach than that of SOPA, the WAC code of ethics also was the beginning of a shift of power to what is called "covenantal archaeology" (Marshall 1989; Zimmerman 1996). Covenantal archaeology involves a relationship of trust between archaeology and Native Americans with a benefit accruing to those being studied (Zimmerman 2002:301). Six defining principles of the Accord explicitly include the "need to respect the wishes of the dead and the local community" and concurrently, the "need to respect the scientific research value of human remains" (Marshall 1989:1186).

Zimmerman, influential at the WAC meeting, developed ties with Jan Hammil of American Indians Against Desecration, a group that worked toward reburial and repatriation (Zimmerman 1987). Zimmerman and Hammil took the WAC code of ethics and a message of cooperation to the Society for American Archaeology meetings in 1982 following the Vermillion Accord, where they were met with well-disguised but deep-seated ambivalence and antagonism (Zimmerman 1987, 1989). However, despite the initially cold reception by archaeologists at the SAA meetings, Zimmerman sees the covenantal archaeology embraced at WAC as a pivotal recognition within the discipline that changes were underway. The Vermilion Accord was also a source that directly informed Congress that negotiations were possible between Native Americans and archaeologist, effectively putting "intense pressure" on the American scientific community to come to terms with federal repatriation legislation (Zimmerman 2002:93).

Clement Meighan, a voice of opposition against widespread repatriation, founded the ACPAC based on the fear that once repatriation was underway, there would be no

stopping point and all research collections would be decimated (Marshall 1989:1186; Meighan 1992, 2000).

The American Anthropological Association [AAA] was not immediately embroiled in the repatriation debate, as the professional organization is not focused only upon archaeology. However, a committee was created in 1970 that drafted a statement of professional responsibility that was adopted by the AAA membership that year as the Principles of Professional Responsibility (American Anthropological Association 1998; Watkins 2000:25). The Principles embraced the idea that the primary responsibility of any anthropologist is to his or her subjects: this means that a study, archaeological or ethnographic, that causes harm to the subject must ethically be discontinued. In 1990 the AAA voted revisions, but did not include a specific treatment of ethic for anthropology of indigenous groups (Marshall 1989:1186; Watkins 2000:27). Nevertheless, the central tenet laid out in 1970 of primary responsibility to the anthropologist's subject provided a basis for some of the arguments for professional codes of ethics to include references to Native Americans, or at least to the populations affected by archaeological study (Zimmerman 1989).

The Society for American Archaeology, however, met early requests for repatriation and reburial with recalcitrance. Between 1983 and 1985, Marshall believes that the SAA had a distinctively anti-repatriation stance, which was moderated in 1985 to encompass a case-by-case stance toward repatriation, with the acceptance of reburial primarily for those remains that could be proved to be the predecessors of living lineal descendants (1989:1186). This position was widely touted in the media and by members of the organization, with requests for all human remains considered, for the most part,

The Smithsonian, with a repository of about 18,500 Native American remains, was a highly symbolic institution in the repatriation issue. Unresponsive to demands for repatriation and even requests for meetings, the Smithsonian presented a bulwark of anti-repatriation sentiment. Curators such as Douglas Ubelaker, Doug Owsley, and Donald Ortner were particularly vocal in newspaper and magazine coverage of the issue, framed as an intense debate by the media (Barringer 1989; Browne 1986, 1990; New York Times 1989; Robbins 1988). For years, argues Marshall (1989), the Smithsonian was “the most visible holdout against the movement” (1184). By 1989, however, the Smithsonian underwent a “reversal” in their policy and began repatriations (Deloria 1989:2).

Congress and Federal Legislation

Over 26 different bills were introduced on Capitol Hill in a four-year period that attempted to forge a compromise with Native Americans demanding the right to rebury human remains, the federal government, and professional and academic interests in the study of Native American remains currently in the possession of museums across the country.

Senator John Melcher introduced S. 2952 to create a forum for the resolution of disputes over human remains and Native American artifacts in the possession of museums and universities, marking a shift in federal legislative intent (Sockbeson, 1990, p. 3). S. 2952 was dismissed early in the process due to lack of support. But the Melcher Bill was followed by the introduction of legislation from Representative Udall and Senators Inouye and McCain over the next four years, which garnered bipartisan support in both houses. Senator Inouye, in particular, was noted in the press for his sponsorship of “Bones Bills” (Spotted Elk 1989). Suzan Shown Harjo (2006) remembers meeting with

Sen. Inouye in his office in Washington D.C. overlooking the Mall, while the Senator pointed out the gap between Smithsonian buildings in which he wanted to build a museum of the American Indian.

Out of the twenty-six proposed bills, two laws were created: the NMAIA in 1989 and NAGPRA in 1990. By 1990, the language of the bill had been hammered out in the Senate Select Committee on Indian Affairs and in the House Committee on House and Insular Affairs. Testimonies were presented by Paul Bender of the National Dialogue on Museum/Native American Relations; Thomas Livesay, Edward Able, and Raymond Thompson of the AAM; Keith Kintigh of the SAA; Lynne Goldstein as an interested individual; Walter Echo-Hawk and Henry Sockbeson from NARF; Edward Lone Fight from the Fort Berthold Tribal Council I North Dakota; Norbert S. Hill, Jr. from the American Indian Science and Engineering Society; Jerry Flute and Jack F. Trope from the Association on American Indian Affairs; and Martin E. Sullivan of the Heard Museum.

All in all, Congress was not “acting unilaterally... passage of the bill was supported by national organizations representing museums, archaeologists, physical anthropologists, cultural anthropologists, preservationists, Indian tribes, civil libertarians and eighteen religious denominations” (McKeown 2002:108). Letters cosigned by the AAIA, NCAI, NARF, and SAA were sent to Representative Morris Udall, Chair of the House Committee on Interior and Insular Affairs, and President Bush endorsing the final draft (Society for American Archaeology 1990). The AAM sent a separate letter to the same effect (Ibid.). The only major dissenting voice heard by 1990 was the Department of the Interior (Deloria 1989:2; McKeown 2002:108).

In the end, when H.R. 5237 came up for a vote in the House, it passed unanimously; in the Senate, a voice count was taken, indicating that the vote was not a close one, and it carried in favor of the bill (KcKeown 2002:108). President Bush signed the bill into law November 16, 1990.

Working Together

These five main groups of actors, individual tribal/state repatriation, individual archaeologists and museum professionals, pan-Native American organizations, professional organizations, and the U.S. Congress, all informed the actions of the other groups. Individuals crossed group boundaries, and individuals within the groups were catalysts for group- or organizational-wide changes. Individual instances of tribes working with specific archaeological activity and repatriation efforts, such as Zuni or the Crow Creek site, became example cases either for Native Americans as repatriation victories or for archaeologists as examples of beneficial cooperation. They also raised the issue of repatriation and burial site protection in individual states and were the impetus for state laws on repatriation. The state laws and negative examples from museums and historical societies informed the participants in pan-Native American activity that focused on repatriation and burial site protection on a federal level. Congress came to be involved through the influence of particular representatives and senators. Professional archaeological and anthropological organizations, while largely conservative and slow to change, eventually moderated their policy and ethics statements once federal repatriation was seriously considered in Congress; some, however, embrace repatriation, while others decried it. Public sentiment was reported to fall on what was categorized as the Native American "side", which had concomitant effects of raising support in Congress.

While deeper-seated changes were afoot, such as who has legitimacy to create knowledge about the past, and perhaps as well human rights and an end to differential treatment, pre-NAGPRA repatriation discourse deeply involved the comparatively small number of professional archaeologists and anthropologists, museums, and spokespeople for Native American tribes and individuals. This is demonstrated in the interconnectedness of the efforts for and against repatriation.

Chapter 6

Motivation and Discourse

While much has been written about NAGPRA and its influences in retrospect, the debates over repatriation between the groups of actors enumerated above prior to NAGPRA and immediately after it became law are important as a means of tracking the process of negotiation and to a certain extent the changes made within the discourse of the archaeological discipline and museum practices. Publications and statements made by individuals in newsprint, magazines, books, peer-reviewed journals, and before Congress illuminate a gradual process of acceptance of repatriation that is nevertheless still controversial, especially in terms of implementation. Opinions and debates are framed within several major categories of argument, discussed below. Major sources for this discussion include twenty years of New York Times articles, editorials, and letters-to-the-editor, from 1980 to 1999; SAA materials recently made public on the SAAweb (www.saa.org) concerning the organization's lobbying efforts, ethical statements, and letters of endorsement, dating back to 1983; a general review of scholarly literature; and both unpublished and published Congressional Committee hearings and testimonial statements.

Neither proponents of repatriation nor opponents of repatriation were homogeneous, nor were they as polarized or incommensurate as media made them appear. However, there are certain trends that are apparent and rhetorical strategies are generally split between "progressive" and "conservative" views.

Personal and Impersonal

One rhetorical trend is the emphasis on personal experience, which contrasts with a trend toward a more universalistic position that removes the individual from the picture. These rhetorical strategies map onto Boggs' framework of a paradigmatic shift from liberal theory to culture theory.

Many of the arguments from Native Americans, Native American groups, and academics seen by others as linked to Native American causes use a strategy in the arguments for repatriation and for federal legislation that relies on an introduction of personal background. This background informs their position on repatriation, usually motivating them to seek wider acceptance of repatriation.

For example, Suzan Shown Harjo, who was executive director of the NCAI during the 1980s and who was highly involved with repatriation legislation efforts with Walter Echo-Hawk and Senator Daniel Inouye, as well as being a Heye Foundation trustee, frequently frames her involvement with repatriation in terms of her personal background. In an interview May 2006, she spoke extensively of the influence certain museums had upon her in visits to collections which informed her decision to become involved with repatriation efforts and the sacred places/repatriation/AIRFA coalition. A trip to the Museum of the American Indian in New York in 1965 which she describes as "a terrible place" at the time, "filled with things that should not have been there," including burial garments that her mother believe she had made for her own grandfather (Harjo 2006). She also had relatives killed at the Sand Creek Massacre in 1864, from whom crania were amassed by the Army Medical Corps and eventually stored at the Smithsonian, a fact that she discovered on the eve of negotiations with the Secretary of the Smithsonian over the language of NMAIA and which influenced her to take a harder

line in negotiations (Harjo 2006). She also mentions in her 2006 interview that educating Smithsonian officials about the personal feelings she held helped her negotiations.

Robert McCormick Adams, the new Secretary of the Smithsonian in the mid-190s, collaborated with Harjo and other museum leaders such as Thomas Livesay of the Heard Museum over the language of NMAIA, which was expanded upon in NAGPRA. Harjo recalls that Adams, for most of the negotiations, balked at the NCAI preferred language of repatriation that covered tribal affiliation, not just the remains of lineal descendants. However, when she brought it to Adams' attention that her relatives killed in the Sand Creek Massacre were curated at the Smithsonian, Adams was more amenable to more inclusive changes in the language of the bill (Harjo 2006).

Larry Zimmerman presents another example of a professional archaeologist who was influenced by personal experience. His involvement with the Crow Creek Massacre site of Sioux in the early 1980s led him to form ties with the AIAD and a pro-federal-repatriation stance. He directly credits his involvement with WAC and the SAA to his positive experiences cooperating with Native Americans on excavations (Zimmerman 1986, 1987, 1989).

Language to a similar effect is also apparent in many arguments for repatriation in the news that utilize ancestors or family. Walter Echo-Hawk, for example, is quoted in an interview by People Magazine about the Pawnee remains in the Salina Burial Pit referring to a need to rebury the remains, his "ancestors" (Brower and Putnam 1989:43). This article also interviews Tom Witty, an archaeologist employed by Kansas State, who, with cooperation with Echo-Hawk, had a "change of heart" after his initial "appalled" reaction to requests to rebury archaeological evidence (Brower and Putnam 1989:44).

Suzan Shown Harjo also uses a similar rhetorical strategy in interviews with news reporters: she questions what readers would do if their own grandfathers were on display (Lewis 1986) as well as remarks that her own forefathers were killed in a massacre and their skulls collected (Molotsky 1989). Before the passage of the NMAIA, the NCAI and the Native American coalition on sacred places/repatriation also waged a media campaign in which hundreds of editorial letters were sent to hometown newspapers of Congressmen urging federal repatriation legislation. Over 500 papers carried the editorials, and PBS also aired a program that was shown around the country (Harjo 2007).

Additionally, in an article seven years after the passage of NAGPRA, the same style of argumentation is used by Melissa Fawcett of the Mohegan Tribe: she remembers that as a girl she knew of grave robbing and the theft of sacred objects, including that of her direct ancestors, and “wondered how we could get them back” (Weizel 1998). These arguments are based on arousing a sense of moral outrage, as those who hear of the desecration of family members’ graves are implicitly, and in some cases explicitly (Lewis 1986; Spotted Elk 1989), asked to imagine themselves in the same position. As Harjo remarks, “Everyone could understand that something was wrong” when they heard the number of specimens in the Smithsonian’s collection and that the Smithsonian was reluctant to return any of them (Harjo 2007). The moral outrage that Clara Spotted Elk, staff member for Representative Melcher, attributes to Melcher when he learned of the number of Native American remains housed in the Smithsonian speaks to the power the argument can have (Preston 1989:68).

The general public, Congressmen, and members of the professional archaeology and museum communities were the targets of arguments made for repatriation that included personal anecdotes about relatives. Similarly, professionals influenced by their own participation with Native Americans seeking repatriation also formed arguments for repatriation for their profession using their personal experiences.

A contrasting rhetorical strategy is that of distinctly impersonal argumentation. Many of the opponents of federal repatriation legislation used language that emphasized more abstract ideas such as “knowledge”, “science”, and “professional responsibility” that are not grounded in emotional individual accounts. As can be imagined, this type of language is more often found in statements of museums and professional or academic organizations. Some have commented that the values expressed in these arguments were not as persuasive to the general public due to a general distaste for academia as elitist (Preston 1989:70).

During the 1980s, as repatriation legislation loomed in Congress, the coverage of the topic in the media included this global-oriented language through interviews with key academics and museum professionals. For instance, an editorial by Force (1985) of the Heye Foundation in New York City (which later sent much of its Native American collections to the NMAI) remarks on the purpose of museums to hold their collections “in trust” for the public good. Ortner and Ubelaker, both of the Smithsonian, are quoted in the news as opposing repatriation due to responsibilities to study and care for collections in the “interest of the Indians as well as the scientists” (Browne 1986) for it is a “safeguarding a collection that belongs to all peoples” (Lewis 1986). Douglas Ubelaker took a solid anti-repatriation stance for unnamed remains, commenting that with

repatriation, “they’re going to destroy them, along with their scientific value” (Robbins 1988). A 1990 article, just prior to the creation of NAGPRA as law, reported that “many Indian leaders” wanted remains and artifacts back “regardless of the loss to science” (Browne 1990). Ubelaker is quoted in the same article, saying that science with “inevitably” be the “loser” (Ibid). Similarly, Clement Meighan, a professor of anthropology at UCLA, remarked after NAGPRA in 1990 that repatriation will destroy all the significant collections and he says, consequently, “you’ve just wiped out the total history of the Indians in North America” (Mydans 1990). These interviews express the idea that science as a way of knowing, as well as the history that science reveals, is of paramount importance.

In 1990 committee hearings in the Senate and the House of Representatives over the bills that became NAGPRA, there is a tendency for the emphasis on ideals grounded in the impersonal. The AAM statement before the Senate Select Committee called for the recognition of the nature of scientific study and emphasized that “all research is important and all research is beneficial” (Able N. d.). Native American interests are cast as narrow interests in comparison to the “broader” scientific and public interest (Kintigh N. d.). The Director of the Heard Museum, although generally pro-repatriation, evokes the general thrust of most of these global arguments, at least from the museum community perspective: museums are fiduciary institutions “incorporated to act in trust for the public benefit” (Sullivan N. d.). It is the nature of the public benefit that is contested in the hearings. Lynne Goldstein, in her testimony before the House Committee on Interior and Insular Affairs, remarks, “the heritage of this country is too important and too fragile to leave to proposals that may not be carefully considered by all parties”

(Goldstein N. d.). As above, ideals of heritage, science, and knowledge are prominently emphasized alongside the endorsements of case-by-case repatriation (not federal legislation) and the limiting of repatriation to named remains and stolen objects.

Post-NAGPRA, peer-reviewed articles also evinced similar global arguments. Meighan, for example, insists in *The Public Historian* that “the public interest in sacrificed to special interest groups” because of the loss and destruction of remains and objects allowed through NAGPRA (1992:40). As Klesert and Powell (1993) note, a culturally embedded concept informs this discourse, for it is based upon an “appeal to science as necessary for the discovery of ‘truth’” and that science outweighs cultural costs or objections (349). Personal appeals to morality or decency find their counterpoint in global, impersonal arguments for the general public trust and the advancement of science, from the New York Times to Congress to the pages of scholarly journals.

Rights and Constitutionality

Rights and freedoms are also the focus of much of the discourse surrounding federal repatriation legislation. Religious freedom, academic freedom, human rights, and the rights of scientists were four major categories used to frame opinions and moral judgments about repatriation.

“Religious freedom” was a rallying point for much of the pre-NAGPRA “progressive” discourse. After AIRFA legislated freedom of religious specifically for Native Americans, religious freedom was used as a negative example: arguments for repatriation were couched in language that endorsed repatriation as the rectification of violations of the freedom of religion. However, the argument was easily construed in the press as a confrontation between religion and science, a topic that has continually

fascinated reporters, the public, and legislators in a variety of settings, from headscarves in schools to intelligent design. Freedom of religion was neither frequently mentioned in Congressional testimonies nor in academic journals when pro-repatriation stances were expressed, and it is not explicitly part of ethics statements, although museums and professional organizations do make broad use of the term “respect”, which can include respect of religious beliefs.

Similarly, “academic freedom” is not often used to critique repatriation in more recent publications on the topic, although the bogeyman of book-burning was frequently raised in newspapers pre-NAGPRA. The phrase was not mentioned in congressional hearings in 1990, and has not been a recent subject in peer-reviewed literature, except as an example of miscast suspicions before NAGPRA was implemented. For example, Joyce writes that accusations that repatriation curtailed academic freedom are misplaced, as academic freedom means freedom to think and express ideas, not to act (i.e. curate human remains or perform research upon them) (2002:99). It seems that this vein of discourse proved, for the most part, ineffectual, and so has been dropped from the majority of publication on the topic.

Human rights were almost universally mentioned by Native Americans and pro-repatriation individuals and groups. While arguments about personal ties to remains or objects curated by museums and the Smithsonian were generally absent from the testimonies presented before Congress, human rights were specifically mentioned. Human rights were also brought up a significant portion of the time in the context of personal narratives as well in news sources and interviews, although the language was less formal and the term “human rights” was not always used. However, the general sense

in many of these accounts, specifically in newspapers, is that fundamental decencies universal to all people were denied to Native Americans. The idea of inequality before the law and the rectification of discrimination are two ideas linked to human rights that were also frequently used. In academic debates over NAGPRA in scholarly journals, and between members of the professional societies in journals, the idea of the violation of human rights is used to oppose more conservative stances for narrower, less inclusive repatriation policies. Arguments for broad, inclusive repatriation legislation were well-grounded in legal precedent provided by human rights law, which was presented in Congress (Echo-Hawk, N. d.; Sockebeson N. d.). Much of the retrospective literature treating NAGPRA, published a decade or more after the law passed, cites NAGPRA as a mostly successful rectification of human rights violations. The changes in museum policies and professional organization ethical statements have come to incorporate human rights language, generally implicit, in an example of Zimmerman's observation of syncretism over NAGPRA. As NAGPRA seems to have successfully been cast in public opinion as human rights law, then the maintenance of an anti-NAGPRA stance connotes anti-human rights as well.

Arguments for the right of scientists—and archaeologists as well—to examine human remains and the rights or responsibilities of museums to curate human remains and culturally significant objects were frequently made in the 1980s and early 1990s, but taper off as NAGPRA is successfully implemented and repatriations are made to tribes. While there are still strong elements of insistence upon the importance of research, especially concerning Kennewick Man, post-NAGPRA reporting emphasizes a sense of loss *combined with* avowals of the importance of respect to the subjects studied/curated

and the idea that the fields of archaeology and museum studies are in fact benefited by more responsible relationships with Native American tribes. It would be foolish to consider the amended opinions, post-NAGPRA, as merely sour grapes; rather, the fear of complete loss of collections and research subjects was proven to be mostly unfounded and a gradual “sea-change” occurred in the opinion toward repatriation (Sabloff 2007). Joyce, an anthropologist herself, sees this as a change from an emphasis on rights to an emphasis on responsibility (2002:102). Many museums include in their charters language to the effect that they are public trusts. While this fiduciary responsibility was held at first to be in opposition to repatriation (or at least, those running museums cast it as such), public trust has been re-interpreted to encompass the Native American population (Weisz and Adams 2000). Additionally, some museums have seen benefits from the higher degree of involvement with Native Americans as the institutions work toward becoming “living institutions”, as past director of the Heard Museum, Martin Sullivan, puts it (Blumenthal 1999; Sabloff 2007).

Zimmerman describes changing attitudes towards repatriation as a “classic syncretism” in which archaeologists and Native Americans are brought into partnerships with archaeologists (1997). In an examination of several strains of the discourse surrounding the inception of NAGPRA, it seems that the personalization of repatriation and the idea of repatriation as human rights legislation are the two most significant factors in this process, not only among professional archaeologists but in the eyes of lawmakers and the public as well. Boggs, in his treatment of what he views as a “paradigm shift”, relegates NAGPRA to an endnote example, but the changes in attitude

and in law reflect his statement that there is a shift underway “not *away from* but *within* science” (2002:600).

Chapter 7

Conclusion

Some have argued that archaeology as an academic discipline can be seen as a “culture.” If so, I would posit that in the last three decades, archaeology-as-culture has dramatically exemplified the cultural anthropological definition of culture as a contested process of meaning making. NAGPRA, most spectacularly in its provisions for the repatriation of unknown individuals to “culturally affiliated” tribes and the repatriation of unassociated, sacred, and cultural patrimony objects, as the federal law NAGPRA represents a frozen moment in the process of making meaning.

Discourse surrounding the conception and the drafting of the law, from a variety of sources, shows a general change. An acceptance of the argument that NAGPRA and repatriation are human rights efforts comes to dominate post-NAGPRA, while discourse about religious freedom, academic freedom, and the rights of scientists are downplayed. Important to this change are personal examples demonstrating what can be described as human rights violations, or at least violations of basic decency.

However, while the process by which the law was conceived and drafted may be considered a compromise or negotiation between interested stakeholders, the Act is exactly that: a legal document. In defining such terms as “Native American”, “human remains”, “sacred objects”, and the actors involved, federally recognized tribes and federally funded institutions, NAGPRA defines boundaries upon the material world that are subject to the interpretation of the American legal system and its courts based on past precedent. There is no compromise or negotiation *of* the law, only the creation of the law.

Nevertheless, amendment processes since NAGPRA's passage offer new opportunities to redefine or renegotiate these boundaries.

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