The Changing Face of History: The Law and Writing America’s Past

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ABSTRACT

Archaeological and anthropological research, excavation and artifact management practices, laws, and guidelines have changed over the last several decades to become more culturally sensitive to indigenous peoples. United States lawmakers have tried to respond to both Native Americans and the historical community and have passed legislation to protect the interests of all concerned. However, there is still controversy over methods used, what is or isn’t sacred, where materials should be stored and how, and who “owns” artifacts. Although history is subjective, the deconstruction and reconstruction of it in order to produce an account of the past may or may not be impeded by current legislation.

Introduction

This paper presents the research answer to the following question. Does legislation impact the writing of history, and if it does, how did it arrive at this point? How do we write history?

Many of us do not think about how our history is written. We just assume that historians use records such as diaries, church records, journals, government documents or library archives. But, there is other evidence that is used that has a great impact on reconstructing the past – human remains, implements, structures and artifacts.

In 1990 the United States congress passed the Native American Graves Protection and Repatriation Act (NAGPRA¹). This Act was in response to an outpour of concern from the Native American communities around the country. “[NAGPRA] is not about religion verses science . . . [it] is about recognition of our common humanity” (Hirst²). The indigenous people of the United States were concerned with the treatment

¹ NAGPRA - “a Federal law passed in 1990. NAGPRA provides a process for museums and Federal agencies to return certain Native American cultural items -- human remains, funerary objects, sacred objects, and objects of cultural patrimony - to lineal descendants, culturally affiliated Indian tribes.” See government links.

² Hirst, Kris K., “Repatriation Movement Revisited.” http://archaeology.about.com/cs/ethics/a/russell2_p.htm
of their ancestors’ remains and sacred objects, which had been housed for decades in museums, institutions, and other public and private collections. Other concerns were the robbing of graves to sell objects and remains; the desecration of Native American ancestors through the handling of remains and testing; and the return of remains for burial; and restoration of other items that tribes felt should not be in the hands of non-Native people. On the other side is the scientific community, and while many scientists are sympathetic, “many [anthropologists and museum directors] believe that Indians will not know how to take care of items that are returned to them” (Mihesuah, 98).

The Native American people’s concerns were genuine and sincere, and the U.S. government was earnest in its efforts to address the rights and wishes of the tribes. However, from the time of conception, NAGPRA has suffered much criticism from Native Americans, archaeologists/historians, and various other groups and individuals. The controversy seems to be ongoing and ever changing.

Method of Research
For this paper, I first looked at archival sources. I was interested in what historians were saying about the changes in legislation, and whether or not they thought these changes might impact the writing of history on the North American continent, primarily in the United States. Also, I felt that it was important to look at court cases and changing social attitudes that initiated guidelines for the academic community.

Next, I interviewed professionals who work in archaeological fields and are familiar with current laws. Their professional and personal opinions gave insight to the controversy surrounding the legislation.

Interviews were then conducted at the professionals’ offices and an excavation site. The “on site” experiences were important because they helped me to explore several aspects: methodology, documentation, curation and storage of artifacts for later analysis.

The Beginning of Controversy
The act (NAGPRA) was originally intended to give “some protection for [Native American] burial sites on tribal and federal lands” and “ensure that . . . human remains and sacred objects . . . are returned to appropriate tribes, descendants or . . . organizations” (Stockes3). However, it was not made clear by legislators as to what their interpretation was of “sacred” or tribal. In the documentary “The Primal Mind,” (Highwater, 1984) the Native American producers give an overview of what is sacred to

Native Americans. For non-Native Americans this perspective may be hard to understand, because for Native Americans, virtually everything is sacred.

Some authors and Native Americans, like Vine Deloria Jr. and Devon Mihesuah, assert that archaeologists and historians acted as though they “owned” whatever they found and because of their understanding of history and science archaeologists and historians had “become the curators – in fact, owners – of heritage” (Mihesuah, 8). The American Anthropological Association (AAA) addresses several of the issues concerning Native Americans and Indigenous People in its code of ethics. Even though the academic and professional community addressed issues of ethics, there were still those outside the professional community who continued to collect remains and artifacts for private collections and sales. “The temples, mounds, cemeteries, villages, and campsites of all past human populations . . . have been subjected to looters since time immemorial. In addition to being the principal targets of treasure hunters, archaeological sites have provided . . . building materials for local residents” (Mihesuah, 60). Moreover, much of what is found, by “looters” is sold to private collectors and knowledge is lost. “The uncontrolled digging of sites destroys most of the scientific information there in” (Mihesuah, 62).

**Social and Political influences**

During the civil rights movements of the late 1960s and early 1970s, Native American people began to assert their opinions concerning their rights and sovereignty. “Like other Americans, urban and reservation Indians participated in the awareness and activism of the 1960’s. Proud of their heritage and determined to protect their political, cultural, and land rights, Indian people across the nation organized, demonstrated, and protested”4 (O’Brien, 86-7).

In response, the U. S. government and various private foundations launched several studies. The studies and findings by the federal government stretched from 1961 through 1978. The United States Congress passed laws and legislation to address several complaints that Native Americans had regarding treaties and civil rights they felt were being compromised or violated. Several laws were passed that helped to empower

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4 The American Indian Movement (AIM) was organized in 1968 by Clyde Bellecourt to address issues that concerned Native Americans in both urban areas and on reservations. They “staged demonstrations, take overs, and sit-ins protesting the destruction of tribal culture and government, the loss of tribal lands and resources, and the denial of Indian civil rights.” (O’Brien)
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... tribes. Some of those laws include the Indian Civil Rights Act of 19685, the Indian Self – Determination Act of 19756, and The Indian Religious Freedoms Act of 19787 - and “[i]n 1989, Congress passed a law requiring the Smithsonian Institute to return most of its skeletal remains and grave goods to Indian communities”(Calloway, 503).

Prior to laws passed to protect Native Americans’ rights, there were laws in place that did give some protection to historical places and archaeological sites. They included the American Antiquities Act of 1906, the Historical Sites Act of 1935, the National Historic Preservation Act of 1966 and the Archaeological Resources Protection Act of 1979. Although these pieces of legislation protected the history of America those “Indian bones and objects found on federal land [became] the property of the United States” (Calloway, 502).

Native Americans began to take an active role in legislation that affected many aspects of their daily lives. One woman, who many agree, that made a large contribution, was Maria Pearson8. Some say that she was the fundamental force behind the initiation of NAGPRA legislation. “Mrs. Pearson [was] the founding rock upon which the repatriation movement began; or rather the willow that would not break” (Hirst9).

Maria Pearson’s Story

“In 1971, Mrs. Pearson, a member of the Yankton Sioux people, was living in a small town in southwest Iowa, and married to an Iowa Department of Transportation engineer. One day her husband came home from work to tell her some disturbing news... the [DOT] had uncovered a cemetery which contained both white and Indian burials. The white individuals were reinterred; the remains of the single Native American individual were boxed up and taken to the Office of the State Archaeologist... Mrs. Pearson protest[ed] the differential treatment of the dead, and a struggle

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5 Indian Civil Rights Act provided protection for “civil rights of individuals from unjust actions by tribal governments, its overriding purpose was to promote Indian self-government and self-determination.” (O’Brien,201)
6 Indian Self – Determination Act was “specifically designed to protect and enhance tribal existence.” (O’Brien, 266)
7 The Indian Religious Freedoms Act was enacted in order for First Nations People to be allowed to practice their spirituality and conduct ceremonies without penalty of fines or imprisonment.
8 Maria Pearson, b. 1932 – d. 2003. Two time nominee for the Nobel Peace Prize.
over who had control over American Indian remains in the state of Iowa ensued.” (Hirst10).

After six years of court battles, Iowa passed the Iowa Reburial Law in 1976, the first legislation in the U.S. to protect Native American burials. Later Mrs. Pearson, through her persistence and determination, along with other Native Americans and archaeologists, worked to form the first draft of NAGPRA.

The way in which legislation may be impacting the writing of history is not a question that is being addressed. Instead the major concern appears to be a legal battle over whether or not researchers should be allowed to continue to use modern technology to test artifacts and human remains.

The largest legal battles have been over ancient remains and whether or not the United States government is enforcing NAGPRA in the spirit it was intended. In November of 2001, there were disputes over the Kennewick Man, the Spirit Cave Man “and at least a half a dozen others” (Stockes11). Even though some of the remains were found with artifacts that included mats, sandals or other items and the historical knowledge of the Native American tribes, “the Bureau of Land Management came to the conclusion the remains [in one case] could not be culturally affiliated” (Stockes13).

In another case in July of 2002, the Zuni people fought to stop mining plans at the Zuni Salt Lake, because “the mine [would] also destroy ancient trails and sacred burial mounds” (Shively14). Then in September of 2002 a judge determined that scientists could continue research on the Kennewick Man. “It took . . . 73 pages to say the views of eight anthropologists trump the Native American Graves Protection and Repatriation Act” (Harjo15).

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10 see Hirst 11.
12 Historical knowledge of Native Americans is in reference to oral histories of tribes and bands.
The Yankton Sioux Tribe was in a “battle to save burial sites from construction” (Melmer16) in 2003. They charged the Corps of Engineers “with violations of NAGPRA over remains that were unearthed, removed and eventually returned” (Melmer17). That same year there were other “complaints about how the Corps of Engineers manages cultural aspects of the [Missouri] river and [that] the tribes have asked for years for written guidelines on the proper protocol for cultural and funerary discoveries” (Melmer18). Other complaints of non-compliance, since the passing of NAGPRA, have included a wide variety of things. The concerns such as a human scalp, that was being auctioned on e-bay in 2003, supposed artifacts that a group at Yale, called the “bonesman,” may or may not have in their basement, and a construction site in downtown Minneapolis, Minnesota, which reportedly is on top of a burial mound.

In 2004, after a presentation in Santa Fe, journalist Suzan Shown Harjo, was approached by a gentleman who asked what her position was on Kennewick Man. After hearing her reply he declared “Then it’s war! It’s still WAR” (Harjo19).

Many anthropologists have mixed feelings about NAGPRA, because data could be lost.

“[E]ven were it true that bones once examined need never be studied again, the demand that be reburied conflicts with the general rule that scientists and other scholars must preserve data. If research data are subject to destruction, then there can be no guarantee of honest reporting; nor would there be any basis on which to challenge honest but possibly erroneous conclusions. Reburying bones and artifacts is the equivalent of a historian’s burning documents after he has perused them. Thus, repatriation is not merely an inconvenience but makes it impossible for scientists to carry out a genuinely scientific study of American Indian prehistory.” (Meighan, ASE)

The archaeological community has a variety of different schools of thought on NAGPRA. It does not seem to matter how culturally sensitive an individual can be, their professional outlook may be in conflict with their personal views, based on their own experiences and the experiences of colleagues. The argument is not always about human remains. In some

17 see footnote 18.
18 See foot note 18
instances the problematic areas are in part due to procedures, methodology and artifact cataloging or handling. But, some feel that “Despite all the turmoil NAGPRA has caused, scientists and Indians alike agree that the law has started to bring them together . . . [and] [F]or those . . . doing excavations, [they will] have to be a lot more responsible collecting information and sharing it with the people [they are] studying” (Morell, 199).

With all of these questions and concerns about what belongs to whom and the legal implications, when do professionals stop and ask themselves how this may or may not affect the way we write the history of the United States?

**Interviews**

The original research question of how legislation impacts the writing of history could not fully be answered from archival research alone. Interviews became necessary to help assess how professional archaeologists/anthropologists and Native American Historical Preservation Officers viewed laws that regulate their work, and include their opinions related to applied research and the writing of history.

At a “dig-site,” in northern Minnesota, the opportunity to speak with and observe professional archaeologists, students and volunteers was very insightful. Each person had an opinion and different perspective on NAGPRA, but only one professional responded with a “Yes, it sure does,” when asked if the legislation of NAGPRA affected or could affect the writing of history. Even though this gentleman does not give interviews, he relayed an incident that made his point.

Sometime ago a Native American burial mound had been found at a construction site in a suburb of Milwaukee, Wisconsin. When human remains were discovered, the archaeologists contacted the proper agencies. Shortly afterward a group of Native Americans wanted to claim the remains and some artifacts for reburial. This posed a slight problem. Even though the archaeologists were still able to finish the excavation, document and catalog findings, they were not allowed to examine the artifacts to establish which tribal people they had been or how old the site and remains were. The group that had claimed them did not rebury them until about six years later. During that six-year period, the artifacts and remains were stored in the trunk of a car, and were damaged. Eventually, the remains and artifacts found their way to the Menomonee people, who did rebury the ancestors\(^{20}\). It was uncertain though, for the scientists involved, whether the human remains were Menomonee Tribal people.

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\(^{20}\) Ancestors is a term of respect in relation to human remains and funeral items by Native Americans, in order for those remains and items to retain dignity.
A great deal of potential information was lost because the repatriation had occurred prior to analysis. Through scientific analysis anthropologists may have identified the human remains and objects and connected them to a specific tribe or band. This could have had an impact on how professionals and the general public understand the history of that region and the life ways of those people, and how that history may have been written differently as a result.

However, another archaeologist, at the same site, felt that no matter what could be found or would be found could not change the historical record. In his opinion, the “record” is unchangeable because it deals with specific periods of time and the geographical, biological and meteorological data that is used to classify them. Therefore, he felt that excavation or findings would not affect the writing of history, because history had already been determined to a certain extent and that NAGPRA would not hinder the historical record or writing of history.

There were several students at the site who were not sure about what some of the particulars of NAGPRA were, other than that it could stop an investigation. One young woman said she “hate[d] NAGPRA,” but did not disclose exactly why. Other students were not shy about their knowledge of the act, which in their own opinion was somewhat limited. They knew the basic theme was to return any sacred objects, funerary items and human remains, but many had not actually read the article in its entirety or any or all of the addenda that have been attached.

Another archaeologist at the site was David Woodward, a lecturer and instructor at the University of Minnesota, Duluth. He relayed an incident that had occurred a few years ago at an excavation site in a national forest area, near a Native American reservation.

There was a group of archaeologists excavating a site that had human remains and other sacred objects. The nearby Native American community used the NAGPRA legislation to not only repatriate the objects but to conduct the excavation and investigation themselves. Unfortunately the people who were hired to excavate had no prior training or knowledge. Later the Tribe complained that some or many of the items were not mapped and documented properly, mishandled, or not properly identified and an array of many other issues. Because the site and investigation had been originally conducted by a group of government archaeologists, the tribe blamed them for the poor management of the site and artifacts.

Mr. Woodward explained that for the Native Americans to take over the dig-site helped to create jobs for tribal members and it got them actively involved in the process of investigating their past. However, it also created a problem later because of the lack of training and understanding of site management. If the tribal members had understood excavation methods...
(e.g. how to plot a unit\textsuperscript{21}, and catalog items for assession and curation later), they could have avoided the misunderstandings that later followed. He felt that it was very unfortunate that there had not been a way for the archaeologists and Native Americans, in this instance, to be able to work together more efficiently in order to preserve the site and the artifacts. In his opinion, it was a matter of education and that both parties could have learned a great deal from one another. Mr. Woodward implied, that he felt when pieces of the past are lost it would not affect the historical record, but could however, affect the recording of micro histories. He made it clear that he is an anthropologist, and that he must look at investigating from a “scientist’s point of view,” while still taking into consideration the beliefs and values of the present day cultures and ways in which his work may affect them.

At the Mille Lacs Band of Ojibwe Reservation, in northeastern Minnesota, Elise Aune has one desk for her responsibilities as the Tribal Archaeologist, and another for her work as the Tribal NAGPRA Coordinator. She has worked in both areas for many years and had the honor and pleasure of knowing and working with Maria Pearson. Her work has taken her all over the United States to consult about, identify, and repatriate cultural items and human remains. On her desks sit law books (that are well worn and book-marked), maps and field notes. She has helped to create guidelines for legislation, written grants, and made guide lines for museums to help educate curators on what are considered sacred items and how to identify them. Because of her work, Elise feels that in many cases it is just a matter of educating people and helping them understand how important repatriation is to the survival of Native American culture.

In more than one instance, though, problems have occurred due to a lack of professional courtesy. Not because she or the archaeologist at one site or another were not professional, but because of a lack of cultural understanding, the hopeful significance of a find, and in one or more cases due to conflicting schedules and inability to contact one another.

For Ms. Aune, like many other Native Americans, it is not a matter of preserving history, but of the cultural connection to the past and allowing the spirit of her ancestors and her people to heal and rest. She commented that “You can’t be angry about what other people have done in the past, you have to let that go. And, you can’t worry about what other people are doing - they probably just don’t understand your culture. You can’t hold that against them, but it is our responsibility to educate them, and help them to understand why all of this [repatriation] is so important.”

\textsuperscript{21} Unit – a one meter square broken down into four quadrants, and then into centimeters for mapping of materials.
Another Anishinaabe Elder I was able to speak with was Edith Leoso. She is the Historic Preservation Officer for the Bad River Band of Ojibwe, in Odanah, Wisconsin. Recently she wrote a grant for her tribe to receive funds for NAGPRA in order to repatriate items and, to build the historical center and cultural museum the tribe is planning.

One of her concerns, as with Ms. Aune, is that some museum curators have no idea what the cultural and spiritual significance of some articles are, and that some of the articles that are on display should not be. Ms. Leoso has been working with the museum on Madeline Island, Wisconsin, to help them identify artifacts. Some of the items eventually will be repatriated, while some items may remain in the collection.

She explained that some items are only identifiable by people who are members of the societies that use them. Tragically, she has found items that were in use for ceremonies or other purposes that most likely were taken during those ceremonies and possibly by force, while others may have been part of burials. For Native American people, this causes spiritual pain, not only for the artifact and the individual, but also for the people as a whole. For the Anishinaabe People all things are sacred, and when non-Native Americans acquire cultural items, that they have no understanding about, it causes spiritual unrest within the entire nation. Most all things have a spirit and are sacred, Ms. Leoso explained, and that “Repatriation is about the spirit being home and at peace – it is only the creator that can take you.” When items are returned many will have a ceremony performed for their spirit and will be allowed to rest because their work is finished.

As for history being lost, Ms Leoso did not believe that it was possible. The Anishinaabe People pass down their history from generation to generation “verbatim,” as has always been their tradition. But, more importantly, they want to restore health and balance to their people and that is only possible through repatriation, education, and mutual understanding and respect with museums, institutions and other agencies and professionals.

While interviewing Dr. Susan Mulholland, the principal investigator for the Duluth Archaeology Center, LLC, she too felt that it was a matter of education – for both non-Native Americans and Native Americans alike.

For Dr. Mulholland, the Native American Graves Protection and Repatriation Act was a piece of legislation that gave hope to opening up dialog between Native American communities and the scientific community. Although NAGPRA has been instrumental in helping the two begin communicating and educating one another, it has also been the springboard for some scientists and Native Americans alike to interpret the law in a manner that may be from an extreme viewpoint. Most professional archaeologists and tribal officials, Dr Mulholland pointed out, are of a
“moderate” mind set, as are the Native American communities with whom she has worked. And, most professionals try to consult with one another and museum curators to build better relationships and share knowledge.

When asked if NAGPRA may possibly impede research and the writing of history, she felt that in some cases that it might. She commented that without “proper attention and analysis we can lose history.” In the case of ancient human remains so much can be learned from analysis. But, without the opportunity to examine these rare finds, a great deal of data could be lost, and we would not have new clues that may help determine where people came from, what they ate, and hopefully when culture began. She mentioned the “Kennewick Man,” and that the site where he was found had been buried “under two million pounds of dirt” (Adler, Newsweek 52) by the United States government in response to concerns from the Native American community. For many scientists this was an unfortunate conclusion to what may have been a site that could have shed more information about ancient man.

**Findings and Conclusion**

Does current legislation impede the writing of history? For some it is not an important question, but for others it is a question for thought. The question is like history itself – subjective. It depends on personal perspective, knowledge and viewpoint. An individual’s cultural, economic, social and educational background plays a role in how they think about history, whether it is the history of a current society or that of an ancient people.

Current legislation is giving Native Americans the right to ask for human remains and cultural objects to be returned and some protection to burial and gravesites. It also provides for consultation between archaeologists and tribal officers along with dialog and explanation of cultural values. However, it has not stopped looting, black markets and antiquities trafficking.

There are those that feel if you are not “with” them, you are against them. Depending on the person, their attitude may come across as prejudice because of education, credentials or ethnicity.

For the most part, it seems that there is still a cultural barrier. The definitions used by one group do not carry the same connotations as they do for other groups or individuals. This may be due to the way words, actions and meanings associated with certain aspects of a culture are not always interpreted in the same way.

So, how does this affect the way history is written? Data can be lost that may give insight on how we reconstruct history when artifacts are reburied. Because new technologies could provide new clues, when re-evaluating findings, that could change our perspective on the past. But, it is
not necessarily the laws that are causing the changing attitudes of Americans, it is our ability to reach out to try and understand one another better and respect the differences that make us all unique.
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Interviews

Elise Aune, Mille Lacs Band of Ojibwe. Tribal NAGPRA Officer. Tribal Archaeologist.

David Woodward, Anthropology Department, University of Minnesota – Duluth.

Edith S. Leoso, Bad River Historic Preservation Officer.

Dr. Susan C. Mulholland, Ph.D. Duluth Archaeology Center, L.L.C.

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Videos
