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SMOKE AND MIRRORS: A HISTORY OF NAGPRA
AND THE EVOLVING U.S. VIEW OF THE AMERICAN INDIAN

by

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A THESIS

Presented to the Faculty of
The Graduate College at the University of Nebraska
In Partial Fulfillment of Requirements
For the Degree of Master of Arts

Major: History

Under the Supervision of Professor James Le Sueur

Lincoln, Nebraska

May, 2011

SMOKE AND MIRRORS: A HISTORY OF NAGPRA
AND THE EVOLVING U.S. VIEW OF THE AMERICAN INDIAN

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University of Nebraska, 2011

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While paintings of Native Americans and Europeans exchanging goods and cultural values adorn the walls of museums around the United States, actual Native/non-Native interaction over the past 500 years has been one of illusion, not cooperation. Until recently, legislation “protecting” Native Americans appeared altruistic on the surface, but, instead, served only as a facade for keeping Native artifacts in the hands of scientists and collectors. Even the Native American Graves Protection and Repatriation Act (NAGPRA), the most recent legislative attempt to reconcile the past mistreatment of Native Americans, is riddled with obstacles and optical illusions.

Certainly, NAGPRA demonstrates the most protective legislation to date, reflecting changes in the required treatment of Native Americans and signaling future legislation and policy. It seeks to balance the competing interests involved in artifact collecting and strike a compromise between the importance of scientific study and proper respect for Native American religious practices. A case study from the University of Nebraska- Lincoln (UNL), however, reveals the difficulties with NAGPRA’s implementation and enforcement.

In July 1998, UNL confirmed rumors that in the mid-1960s the anthropology department incinerated Native American remains on its East Campus because UNL

faculty believed that the bones had no scientific value. Preston Holder, chairman of the department, ordered graduate students to burn the bones in the same incinerator used by the veterinary school to dispose of dead animals. Just nine months earlier, UNL had made another humiliating disclosure. In October 1997, a visiting anthropology professor discovered Native American bones hidden in Room 109 of Bessey Hall, which housed the anthropology department's teaching collections. Evidence emerged to suggest a UNL anthropology professor used the bones in BH 109 for unlawful study and in violation of certain repatriation requirements defined in NAGPRA. The reactions of Native Americans, UNL students and administrators, and the general public to these unfortunate episodes represent not only the difficulties of implementing NAGPRA, but also the shifting attitudes toward Native Americans.

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CHAPTER ONE: INTRODUCTION, HISTORIOGRAPHY, AND A NOTE ON MUSEUMS

Introduction

The warm sea breeze gently swept through the town as the distant sound of ocean waves could be heard crashing against the shore. A Pilgrim woman serving a tray of freshly baked bread to the group of Natives¹ sitting on the ground smiled softly at her dinner guests. The Natives, in return, offered a pipe and performed one of their tribal songs as a sign of gratitude. A young Pilgrim girl stood shyly but watchfully by her mother, and even the family's dog joined the festivities.²

While paintings of Native Americans and Europeans exchanging goods and cultural values adorn the walls of museums around the United States, actual Native/non-Native interaction over the past 500 years has been one of illusion, not cooperation. Until recently, legislation “protecting” Native Americans appeared altruistic on the surface, but, instead, served only as a facade for keeping Native artifacts in the hands of scientists and collectors. Even the Native American Graves Protection and Repatriation Act (NAGPRA), the most recent legislative attempt to reconcile the past mistreatment of Native Americans, is riddled with obstacles and optical illusions.

Since the passage of NAGPRA, government and university officials, museum professionals, and the general public have increasingly recognized the long, tragic history

¹ In the discussion of modern Native Americans, I use the terms “Native Americans” and “American Indians” interchangeably. When referring to past treatment and descriptions, however, I chose to use the terms “Indians” and “Natives” to reflect the language used in past centuries.

² Jean Leon Gerome Ferris, *The First Thanksgiving 1621*, ca. 1932, Library of Congress, Washington, DC.

of Native American oppression and exploitation. This history of coercion and misrepresentation reaches back to the sixteenth century when Europeans arrived in the “New World.” To Europeans, Native Americans represented a very different culture—one that was in an “earlier, primitive stage of human development.”³ Europeans perceived Indians as inferior in human evolution because their religious beliefs were the embodiment of pagan rituals and immorality. Thus, Europeans felt that they had a natural right and obligation to colonize the Natives.⁴

The seventeenth century produced figures similar to the classical style of Greek and Roman statues, which had reemerged during the European Renaissance. Artists depicted Indian women as striking and nude, wearing only a headdress and cloak, lying under trees, and surrounded by exotic animals like alligators or parrots. Prints and décor for ceramics and textiles often featured the classical, allegorical images of American Natives. Albert Eckhout, a Dutch artist commissioned to illustrate Indians in Brazil, broke with this trend and produced more realistic representations. His images were extremely unpopular. While Eckhout’s illustrations were fashionable; designers used only the background—his realistic depictions of Brazil’s indigenous people were omitted.⁵

In addition to pictorial representations, affluent Europeans collected and displayed the exotic artifacts of a changing world in a pre-cursor to the modern museum. “Cabinets of curiosities” were especially useful in managing and organizing material unexplained

³ Evan M. Maurer, “Presenting the American Indian: From Europe to America,” in *The Changing Presentation of the American Indian: Museums and Native Cultures*, ed. National Museum of the American Indian (Seattle: University of Washington Press, 2000), 15-16.

⁴ Charles Saumarez Smith, “Museums, Artefacts, and Meanings,” in *The New Museology*, ed. Peter Vergo (London: Reaktion, 1989), 18.

⁵ Maurer, “Presenting the American Indian,” 17.

by the Bible or ancient texts. In this way, curiosity cabinets served as a mechanism to control nature. The best-known collection of the time was a 1633 display by “Ole Worm.” It consisted of “natural” curiosities, polar bears and armadillos, and “artificial” curiosities, such as Inuit hide parkas and weapons.⁶ These compilations made no distinction between any of America’s Indians. Artifacts from South American Natives, showcased alongside those from North and Central America, advanced the notion that every Indian was the same. During the eighteenth century curiosity, cabinets were even used to tutor royal families. In France, instructors taught the royal children about the first inhabitants of French colonies through an assembled “*scientific cabinet*.”⁷

In the nineteenth century, society juxtaposed a superior European culture with an uncivilized, immoral Native lifestyle.⁸ The ubiquitous notion of Indians as a dying race ignited their popularity, and professional archaeologists and treasure-seekers scrambled to preserve tangible representations of these doomed peoples. The disappearance of the “scout, buffalo hunter, and cowboy” accompanied the disintegration of the American Indian and signaled the end of the Old West.⁹ William “Buffalo Bill” Cody offered an opportunity to see these “creatures of nature” before they vanished in his famous “Buffalo Bill’s Wild West and Congress of Rough Riders of the World.” By indulging in Cody’s romantic representations of the American West, audiences could escape their monotonous, bourgeois Victorian lives and “experience vicariously the freedom,

⁶ Maurer, “Presenting the American Indian,” 20.

⁷ Maurer, “Presenting the American Indian,” 20. Emphasis added.

⁸ Christian F. Feest, “European Collecting of American Indian Artefacts and Art,” *Journal of the History of Collections* 5 no. 1 (1993): 8.

⁹ Robert Bieder, “Marketing the American Indian in Europe: Context, Commodification, and Reception,” in *Cultural Transmissions and Receptions: American Mass Culture in Europe*, ed. R. Kroes, R.W. Rydell and D.F.J. Bosscher (Amsterdam: VU University Press, 1993), 18.

mobility, wildness, and violence which Buffalo Bill shared with the Indians while applauding the triumph of European civilisation over ‘savagery.’”¹⁰

Though it is commonly referred to as the Wild West *show*, Cody’s depiction of the American frontier sought authenticity in every aspect. He never described his Wild West as a *show* to avoid confusion with concurrent circuses or spectacles.¹¹ His efforts to remain distinct from other entertainment of the time, such as the Ringling Brothers Circus, implied that only Buffalo Bill’s Wild West could deliver authenticity.¹² But Cody’s performance was an illusion: the *show* actually sensationalized the killing of Native Americans and reinforced frontier stereotypes. Buffalo Bill’s Wild West was undeniably popular, and while many factors leading to its success can be attributed to Cody’s showmanship and attention to detail, society’s obsession with, and its desire to preserve, these “dying” races truly made it a sensation.

Buffalo Bill’s Wild West toured Europe intermittently from 1887 to 1906. During this time, European audiences were spellbound and sought to collect the Native objects they had seen in the show. As the nineteenth century drew to a close, European “archaeologists” and grave robbers unearthed thousands of priceless Native American artifacts and transported them back to Europe. As a result, American anthropologists lobbied for legislation to protect Native American sites for excavation by professional—American—archaeologists. The Antiquities Act of 1906 succeeded in preserving objects

¹⁰ John Sears, “Bierstadt, Buffalo Bill, and the Wild West in Europe,” in *Cultural Transmissions and Receptions: American Mass Culture in Europe*, ed. R. Kroes, R.W. Rydell, and D.F.J. Bosscher (Amsterdam: VU University Press, 1993), 14.

¹¹ Dagmar Wernitznig, *Europe’s Indians, Indians in Europe: European Perceptions and Appropriations of Native American Cultures from Pocahontas to the Present* (New York: University Press of America, Inc., 2007), 73-74.

¹² Sears, “Bierstadt, Buffalo Bill, and the Wild West in Europe,” 6.

and Indian human remains for American scientists associated with museums and universities.

Throughout the twentieth century, American archaeologists continued to unearth and exploit sacred Native American religious burial sites, resulting in the removal of over six hundred thousand Native skeletons.¹³ Finally, in 1989 and 1990, Congress enacted the National Museum of the American Indian Act (NMAI) and NAGPRA, respectively. NMAI and NAGPRA demonstrate the most protective legislation to date, reflect changes in the treatment of Native Americans, and signal future legislation and policy. These two acts seek to balance the competing interests involved in artifact collecting and strike a compromise between the importance of scientific study and the respect for Native American religious practices. A case study from University of Nebraska- Lincoln (UNL), however, reveals the difficulties with NAGPRA's implementation and enforcement.

In July 1998, UNL confirmed rumors that in the mid-1960s the anthropology department incinerated Native American remains on its East Campus because UNL faculty believed that the Native American bones had no scientific value. Preston Holder, chairman of the department, ordered graduate students to burn the bones in the same incinerator used by the veterinary school to dispose of dead animals. Just nine months earlier, UNL had made another humiliating disclosure. In October 1997, a visiting anthropology professor discovered Native American bones hidden in Room 109 of Bessey Hall (BH 109), which housed the anthropology department's teaching collections. Evidence emerged to suggest UNL anthropology professor Karl J. Reinhard used the

¹³ House Committee on Interior and Insular Affairs, Committee on House Administration, and Committee on Public Works and Transportation, *Establishment of the National Museum of the American Indian*, 101st Cong., 1st sess., 150. Statement of Walter Echo-Hawk, Attorney, Native American Rights Fund.

bones in BH 109 for unlawful study and in violation of the repatriation requirements defined in NAGPRA. The reactions of Native Americans, UNL students and administrators, and the general public to these unfortunate episodes represent not only the difficulties of implementing NAGPRA, but also the shifting attitudes toward Native Americans.

Historiography

The five major groups involved in the discussion of Native American artifacts and human remains—Native Americans, the scientific community (including social scientists), museum professionals, attorneys, and historians—each have specific priorities concerning Native American object acquisition and repatriation. The friction between these groups and their priorities is, not surprisingly, quite contentious. In some cases, authors and scholars find that their priorities and ideas overlap, complicating issues further. For example, Walter Echo-Hawk is a prominent Native American attorney, and this author writes as both a J.D. candidate and a historian. Also, many edited collections and conferences on the subject, such as the recent “NAGPRA at 20,”¹⁴ are interdisciplinary.¹⁵

Native Americans do not approach this topic from a unified view. One perspective based on Native American religious beliefs explains that Native Americans

¹⁴ The Beginning: Remembering Our Past. Paper presented at NAGPRA at 20: Conversations about the Past, Present, and Future of NAGPRA, Washington, DC, November 15 and 16, 2010. The conference took place at George Washington University.

¹⁵ *Repatriation Reader: Who Owns American Indian Remains?* ed. Devon A. Mihesuah (Lincoln: University of Nebraska Press, 2000); *The Future of the Past: Archaeologists, Native Americans, and Repatriation*, ed. Tamara L. Bray (New York: Garland Publishing, 2001).

do not *want* the items; they *need* them returned. Most Indian nations have a profound connection to the place where their ancestors are/were buried and a responsibility to honor and care for the dead. Of course, this belief is not universal. The Navajo, for example, fear death and refrain from even speaking about the deceased. On the other hand, the Cherokee, while traveling the Trail of Tears, were only allowed (by U.S. soldiers) to bury their dead every three days. Therefore, they carried the deceased on their backs so that they could perform the proper ceremonies upon burial.

At the core of the opposition to scientific studies on human remains is the deeply held religious belief that peace of both the living and the deceased is inextricably linked to the proper burial of remains. Suzan Shown Harjo, a member of the Cheyenne and Hodulgee tribes, claims, “Repatriation [means] freeing relatives who were prisoners in these museums, getting back their precious things, putting them back.”¹⁶ Alternatively, some tribal members recognize the important benefits of scientific studies prior to reburial. Dennis Hastings, director of the Omaha Tribal Historical Research Project, explains, “There are many other tribes focusing only on reburying the remains of their ancestors. In the long run, they’re going to miss out, they’re going to miss the study of their skeletal remains—and maybe the skeletons have something to say to them.”¹⁷

¹⁶ Suzan Shown Harjo. 2010. *The Beginning: Remembering Our Past*. Paper presented at NAGPRA at 20: Conversations about the Past, Present, and Future of NAGPRA, Washington, DC, November 15, 2010.

¹⁷ Paulette W. Campbell, “Ancestral Bones: Reinterpreting the Past of the Omaha,” in *Humanities* 23:6 (November/December 2002), <http://www.neh.gov/news/humanities/2002-11/ancestralbones.html> (accessed August 31, 2010).

As with Native Americans, the U.S. scientific community does not share a single, homogenous view on the subject.¹⁸ Most scientists believe that if a familial link exists between objects and a specific Native American or Native American tribe, the items or remains should be returned. This reasoning, however, assumes that a clear genetic relationship can be determined. In concept, it is easy to describe an unambiguous line of descent, but not in practice. Dr. Mark Leone, from the Society for American Anthropology, said, “[I]n many cases, it would be scientifically impossible to determine the connection between many remains—particularly including most of those of prehistoric origin—and living Native Americans and Indian tribes.”¹⁹ This difficulty was a major concern for the NMAI’s requirement that the Smithsonian inventory and repatriate human remains within its collection. Speaking at a congressional hearing held on March 9, 1989, Robert McCormick Adams, Secretary of the Smithsonian Institution, stated, “I would stress from the point of view of the Smithsonian, that its collections are valuable scientific material for the study of the past, and we will not willingly and with abandon turn those materials over to people who may not in fact be descendants of the people whose remains we have.”²⁰

¹⁸ David Hurst Thomas, *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity* (New York: Basic Books, 2001); Thomas W. Killion, *Opening Archaeology: Repatriation’s Impact on Contemporary Research and Practice* (Santa Fe: School for Advanced Research Press, 2008); Michael F. Brown, *Who Owns Native Culture?* (Cambridge: Harvard University Press, 2004); Kathleen S. Fine-Dare, *Grave Injustice: The American Indian Repatriation Movement and NAGPRA* (Lincoln: University of Nebraska Press, 2002).

¹⁹ House Committee, *National Museum of the American Indian*, 273. Statement of Dr. Mark Leone, Society for American Archaeology.

²⁰ House Committee, *National Museum of the American Indian*, 17. Statement of Robert McCormick Adams, Secretary, Smithsonian Institution.

Some scientists assert that studies of Native American remains provide them with “information about past population movements and relationships that would have been unattainable by any other means, including oral tradition.”²¹ The study of bones reveals how humans have reacted to various diseases over time and shows correlations between a culture’s diet and health. In addition, this research can aid in the investigations of modern crimes.²² For example, in the mid-1980s, South Dakota authorities identified the remains of a missing person from a local reservation. Authorities matched an x-ray of the remains with one of the tribal members. Both sets showed an unusually shaped scapula (shoulder blade), but officials needed to demonstrate that this was an anatomically unique condition to confirm the identity. Because anthropologists had studied large numbers of American Indian skeletons, they could verify that this condition was rare, even among Native Americans. Thus, the remains were positively identified, and prosecutors used information uncovered during this research to convict the assailant.²³

The perspectives of museum professionals vary as well, but a growing sense of responsibility and respect among individuals in the profession has increased cooperation between museum staff and Native Americans. Part of this can be attributed to the increase in the number of Native Americans working as museum professionals, which allows them to influence displays and provide culturally relevant information to non-

²¹ Senate Committee, *National American Indian Museum Act (Part 1)*, 81. Statement of Robert McCormick Adams, Secretary, Smithsonian Institution.

²² House Committee, *National Museum of the American Indian*, 273. Statement of Dr. Mark Leone, Society for American Archaeology.

²³ Senate Committee, *National American Indian Museum Act (Part 1)*, 84-85. Statement of Robert McCormick Adams, Secretary, Smithsonian Institution.

Native American museum staff.²⁴ Since the passage of NAGPRA, museum professionals who have written about the topic describe successful repatriation projects and tribal consultations.²⁵

Lawyers involved in the discussion focus on the legal application, background, and constitutionality of Native American artifact legislations.²⁶ For example, legal scholars have examined major court cases, such as *Bonnichsen v. United States* (“Kennewick Man” case), and their impact on the First Amendment and other issues of constitutionality. A purely legal-studies approach focuses on case law and competing, technical legal claims. Attorneys typically began their analysis in 1990 with the enactment of NAGPRA, when historical examination of the subject ends.

Although historians have yet to weigh in on the most recent issues surrounding NAGPRA, their contributions to such topics place this controversy within a broader context, telling the stories of collection and acquisition and the events and players involved in the beginnings of the repatriation cause, such as the American Indian

²⁴ Evan M. Maurer, “Presenting the American Indian: From Europe to America,” in *The Changing Presentation of the American Indian*, ed. National Museum of the American Indian (Seattle: University of Washington Press, 2000); W. Richard West, “A New Idea of Ourselves: The Changing Presentation of the American Indian,” in *The Changing Presentation of the American Indian*, ed. National Museum of the American Indian (Seattle: University of Washington Press, 2000).

²⁵ *Implementing the Native American Graves Protection and Repatriation Act*, ed. Roxana Adams (Washington, DC: American Association of Museums, 2001).

²⁶ Walter Echo-Hawk, “Indigenous v. Nonindigenous Rights, Responsibilities, and Relationships,” Lecture at E.N. Thompson Forum on World Issues, Lincoln, Nebraska, April 9, 1997; Roger C. Echo-Hawk and Walter R. Echo-Hawk, *Battlefields and Burial Grounds: The Indian Struggle to Protect Ancestral Graves in the United States* (Minneapolis: Lerner Publications Company, 1994); *Legal Perspectives on Cultural Resources*, ed. Jennifer R. Richman and Marion P. Forsyth (New York: Alta Mira Press, 2004); Patty Gertenblith, “Identity and Cultural Property: The Protection of Cultural Property in the United States,” *Boston University Law Review* 75 (1995): 559-688.

Movement.²⁷ Historians have not yet examined how the implementation of NAGPRA fits into its historical background. The placement of NAGPRA within this context demonstrates a shift towards the more respectful treatment of Native Americans. The complicated relationship between historical and legal analysis is one of cause and effect. Historical factors shape laws, and, laws, in turn, affect the society in which they are enacted.

Museums

Museums gather, preserve, and exhibit artifacts for the benefit of the public yet are beset with controversies concerning political, ethical, and ethnological issues. Even before a museum decides how to construct an exhibit, it faces several consequential decisions such as whether to use its own collection or obtain objects through loan. The availability and transportation of objects and budget constraints also affect these decisions.²⁸

Museums are the sites where theory meets academic interests and seeks public approval.²⁹ At the most basic level, controversies surrounding displays occurs between critics and curators. Some critics assert museums should organize their exhibits to present

²⁷ Paul Smith and Robert Warrior, *Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee* (New York: The New Press, 1996); David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001).

²⁸ Peter Vergo, "Introduction," in *The New Museology* (London: Reaktion, 1989), 2.

²⁹ Michael M. Ames, *Cannibal Tours and Glass Boxes: The Anthropology of Museums* (Vancouver: UBC Press, 1992), 110.

a strictly unbiased, truthful account of history.³⁰ On the other hand, curators “seek a *balanced* display that reflects the diversity of opinions and beliefs about what happened and why... and encourages museum visitors to decide history for themselves.”³¹ A balanced exhibition should invite visitors to consider different points of view and draw conclusions for themselves.

Exhibits can also be classified along a spectrum; at one end are aesthetic exhibitions, and on the other are contextual exhibitions.³² Aesthetic exhibitions let items speak for themselves but tell viewers little about the objects’ historical context, assuming a certain level of educational and social background of their audience.³³ Contextual exhibitions provide ample information about the artifacts but are cluttered with documentation, which prevent the viewer from enjoying objects for their aesthetic value. Sociologist Andrew Barry points out, “The museum is increasingly expected to respond to the public’s demands rather than simply tell the public what it needs to know.”³⁴ Regardless of the presentation of museum artifacts, though, visitors bring different views and backgrounds to a display. Thus, visitors may not understand and interpret the exhibit as a curator intended.³⁵

³⁰ Thomas F. Gieryn, “Balancing Acts: Science, Enola Gay and History Wars at the Smithsonian,” in *The Politics of Display: Museums, Science, Culture*, ed. Sharon Macdonald (New York: Routledge, 1998), 198.

³¹ Gieryn, “Balancing Acts,” 198; Jim Bennett, “Can Science Museums Take History Seriously?” in *The Politics of Display: Museums, Science, Culture*, ed. Sharon Macdonald (New York: Routledge, 1998), 173.

³² Peter Vergo, “The Reticent Object,” in *The New Museology*, ed. Peter Vergo (London: Reaktion, 1989), 48.

³³ Peter Vergo, “The Reticent Object,” 49.

³⁴ Andrew Barry, “On Interactivity: Consumers, Citizens and Culture,” in *The Politics of Display: Museums, Science, Culture*, ed. Sharon Macdonald (New York: Routledge, 1998), 98.

³⁵ Smith, “Museums, Artefacts, and Meanings,” 19.

Cultural presentations reflect cultural definitions. Anthropologist Ira Jacknis asserts, “Anthropological collections are never the direct reflections of Native cultures that they appear to be but are creatively formed by the intellectual and social interests of their curators, directors, and patrons.”³⁶ Museums impose their own cultural constructions on items through their displays. For example, artifacts enclosed in glass casing can only be viewed in the context provided by the surrounding items. The enclosure of the artifacts implies that they are from roughly the same time and worth approximately the same value. Objects displayed in their own room or own case project a greater historical significance.³⁷

Although museums are expected to educate the public and create awareness about the items and cultures presented, one museum curator recounted often being asked by visitors and collectors, “[T]here are no more ‘real’ Indians anymore are there?”³⁸ This may reflect museums’ portrayal of Native Americans as part of the past, rather than as a living, contemporary part of society.³⁹ Native American artifacts placed on pedestals, walls, or in glass cases support the image of Indians as beings who are suspended in time. The artifact is distant and untouchable, as is the culture to which it belongs. The founding director of the National Museum of the American Indian is W. Richard West, a member of the Cheyenne and Arapaho tribes of Oklahoma. West stated that he is “dedicated to a

³⁶ Ira Jacknis, “Patrons, Potters, and Painters: Phoebe Hearst’s Collections from the American Southwest,” in *Collecting Native America, 1870-1960*, ed. Shepard Krech III and Barbara Hail (Washington, DC: Smithsonian Institution Press, 1999), 162.

³⁷ Susan Vogel, “Always True to the Object, in Our Fashion,” in *Grasping the World: The Idea of the Museum*, ed. Donald Preziosi and Claire Farago (Burlington: Ashgate Publishing Limited, 2004), 653-62.

³⁸ Peter H. Welsh, “Repatriation and Cultural Preservation: Potent Objects, Potent Pasts,” *University of Michigan Journal of Law Reform* 25 (1992): 844.

³⁹ Museums are not solely responsible for this misconception. Popular culture, through movies and media, also perpetuates the stereotype of the vanishing culture.

fresh and ... radically different approach to museum exhibitions” and is guided by “the authentic Native voice.”⁴⁰ He explains that instead of being placed on pedestals or in cases, traditional items should project “cultural continuity” by being placed beside contemporary work and including artists’ commentary to express the item’s relevance to current society.⁴¹

A constant interplay exists between power, knowledge, and truth. Sharon Macdonald, a social anthropologist, states, “[P]ower is involved in the construction of truths, and knowledge has implications for power.”⁴² The public has, generally, characterized museums as neutral and objective because of their association with science, but Macdonald explains, “Science displays are never, and never have been, just representations of uncontested facts... They always involve the culturally, socially and politically saturated business of negotiation and value-judgment; and they always have cultural, social and political implications.”⁴³ Museums have the power to control which items are displayed and how, the institutions representing or sponsoring an exhibit, and the target audience.⁴⁴

Recent legislation and an increase in Native American museum staff, according to anthropologist Christina F. Kreps, have “brought about a dramatic shift in power relations

⁴⁰ West, “A New Idea of Ourselves,” 7-8.

⁴¹ West, “A New Idea of Ourselves,” 9.

⁴² Sharon Macdonald, “Exhibitions of Power and Powers of Exhibition: An Introduction to the Politics of Display,” in *The Politics of Display: Museums, Science, Culture*, ed. Sharon Macdonald (New York: Routledge, 1998), 3.

⁴³ Macdonald, “Exhibitions of Power and Powers of Exhibition,” 1.

⁴⁴ Macdonald, “Exhibitions of Power and Powers of Exhibition,” 5; Charles Saumarez Smith, “Museums, Artefacts, and Meanings,” 7-12.

between Native Americans and the museums and scientific communities.”⁴⁵ NAGPRA and NMAI provide Native Americans the opportunity to share with curators the proper spiritual care of their items. For example, some objects are considered to be alive and require air to breath; glass cases and plastic bags are unacceptable because they suffocate the item and disrupt the cycle of life.⁴⁶ In some instances, women are not allowed to come into contact with an object during menstruation or pregnancy.⁴⁷ The Stolo and Nooksack tribes of the Northwestern U.S. and British Columbian regions, respectively, requested that the Burke Museum of Natural History and Culture cover a stone statue named T’xwelátse every night to put him to sleep and wake him up in the morning by removing the sheet.⁴⁸

Museums offer visitors an interpretation of the historical artifacts contained within their exhibits. Before NMAI and NAGPRA, Native Americans were virtually powerless to regain items once stolen or influence the museum displays of their culture. The respectful treatment of items within their possession, however, suggests a new understanding and appreciation by museums. The juxtaposition of nineteenth-century Native/non-Native interactions underscores the important strides taken toward the more humane treatment of Native American remains and artifacts. For this reason, the following chapter traces the nineteenth-century escalation of Native American artifact acquisition and display in museums and world fairs.

⁴⁵ Christina F. Kreps, *Liberating Culture: Cross Cultural Perspectives on Museums, Curation and Heritage Preservation* (New York: Routledge, 2003), 1-3.

⁴⁶ Kreps, *Liberating Culture*, 93. Megon Noble, interview by author, Lincoln, NE, February 4, 2011.

⁴⁷ Kreps, *Liberating Culture*, 95.

⁴⁸ Noble, interview.

CHAPTER TWO
NATIVE AMERICAN RELATIONS AND ARTIFACT ACQUISITION
THROUGHOUT THE NINETEENTH CENTURY

Interactions between Natives and non-Natives increased throughout the nineteenth century as the U.S. expanded westward. Relations during the 1800s took various forms and occurred for different reasons, but taken in the aggregate they all necessitated Native American artifact protection laws by the turn of the century. The most violent exchanges happened on the battlefield. After the U.S. government officially sanctioned the collection of dead bodies from battle grounds in 1864, the Indian Wars became more aggressive and deadly. Other interchanges took place in museums and world fairs. Scientists and event planners coordinated live Native American displays to educate and entertain U.S. audiences. One motivation behind such exhibitions was to contrast the civilized, Western way of life with the primitive, Native existence. Extremely prolific during this time was the notion that Indians were an endangered species on the brink of extinction.

The popularity of Indians stemmed, in part, from the belief that Native Americans were condemned to extinction and “[n]othing could be more romantic and heart-breaking than the resigned stare of a man who knows he is going to die.”⁴⁹ Contributing to this image were the prolific news stories, illustrations, and photographs of Indian Wars in the American West. The constant stream of these accounts led to the idea that the Plains Indian was in decline.

⁴⁹ Daniele Fiorentino, “‘Those Red-Brick Faces’: European Press Reactions to the Indians of Buffalo Bill’s Wild West Show,” in *Indians and Europe: An Interdisciplinary Collection of Essays*, ed. Christian Feest (Lincoln: University of Nebraska Press, 1999), 407.

Although this notion created compassion among many Americans and Europeans, not all viewed Native Americans so sympathetically. One account described the Native American decline as self-imposed. In 1921, Yale College published *An Outline of United States History* to serve as a general informational structure for the basic United States history course.⁵⁰ In the outline, the authors stated that American Indians inhabit fertile lands with an ideal climate and immeasurable natural resources, yet “the Indians are letting this priceless opportunity slip. As the play unfolds, the penalty they pay is practical annihilation.”⁵¹

Science, Patriotism, and Money

Because of the monetary value and scientific prestige associated with the acquisition of Indian remains, in the 1860s, the U.S. Army facilitated the collection and study of Indian remains. Soldiers gathered dead bodies from battlefields and sent them to scientists for analysis. The Native American death toll rose drastically and battles became more violent and deadly during this time. After all, the more bodies that accumulated on the battlefield, the more specimens scientists could dissect and analyze.⁵² The first of these violent attacks occurred in 1864 at Sand Creek. Led by Colonel John M. Chivington—a Methodist preacher from Ohio—soldiers killed and beheaded Cheyenne,

⁵⁰ Ralph Gabriel, Dumas Malone, and Frederick Manning, *Outline of United States History: For Use in the General Course in United States History*; Yale College (New Haven: Yale University Press, 1921).

⁵¹ Gabriel, Malone, and Manning, *Outline of United States History*, 7.

⁵² It should be noted that Euro-Americans were studied and collected as well.

Kiowa, and Arapaho Indians.⁵³ As the last surviving Indian warriors retreated, the battle ended, and the pillaging and decimation began. Troops mutilated the bodies of the dead and wounded, amputating fingers and ears so that jewelry could be removed and “cutting out...female pudenda, to be dried and used as hatbands.”⁵⁴

In 1868, Madison Mills, the U.S. Army Surgeon General, sent an official order to all field officers:

Medical officers in your department understand the importance of collecting for the Army Medical Museum specimens of Indian crania and of Indian weapons and utensils so far as they may be able to procure them. The Surgeon General is anxious that our collection of Indian crania, already quite large, should be made as complete as possible.⁵⁵

Scientists at the Army Medical Museum studied the approximately 4,000 Indian remains collected and later sent them to the Smithsonian Institute where scientists examined and analyzed them. *Crania Americana*, written by Samuel Morton and published in 1839, laid the foundation for the scientific study of American Indians by asserting that skeletons provided irrefutable proof that Indians were primitive.⁵⁶ Morton took measurement of both Euro-American and Indian crania and determined that Indians had smaller brains and internal capacity. Thus, Morton’s work lent support to the mistreatment of Native Americans because scientists could “prove” their inferiority. Another opportunity to cast

⁵³ James Riding In, “Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians,” *Arizona State Law Journal* (Spring 1992): 19.

⁵⁴ Larry McMurty, *Oh What a Slaughter: Massacres in the American West, 1846-1890* (New York: Simon & Schuster, 2005), 105.

⁵⁵ Senate Select Committee on Indian Affairs and Committee on Rules and Administration, *National American Indian Museum Act (Part 1)*, 100th Cong., 1st sess., 1989, 1.

⁵⁶ Samuel Morton, *Crania Americana: A Comparative View of Skulls of Various Aboriginal Nations of North and South America; To which is Prefixed An Essay on the Varieties of the Human Species* (Philadelphia: J. Dobson, 1839).

themselves as racially and socially superior to Indians presented itself through the 1871 *Descent of Man* by Charles Darwin. To many, the importance of natural science and superiority was seen in daily life—and was demonstrated in white supremacy over Native Americans.

World Fairs

As interaction between Europeans and Native Americans increased, indigenous cultures, rather than simply their artifacts, were put on display, appearing in fairs and expositions. World fairs exhibited the first large-scale collections of Indian peoples and artifacts and operated much like museums. These displays celebrated Western society's conquest of savage, uncivilized peoples, "publicly commemorating the victory by putting them on show."⁵⁷ Twelve national fairs occurred in the U.S. between 1876 and 1916, taking place in the cities of Philadelphia, New Orleans, Chicago, Atlanta, Nashville, Omaha, Buffalo, Saint Louis, Seattle, San Francisco, and San Diego. These fairs provided citizens across the country an opportunity to view the spectacle of Native subjugation. In total, nearly one hundred million people attended.

With their emphasis on technological advances and national heritage, world fairs presented a facade of scientific authority and cultural authenticity. According to historian Robert W. Rydell, these fairs "deeply influence[d] the content of many individual and collective beliefs and values."⁵⁸ One such belief was visitors' sense of national identity,

⁵⁷ Penelope Harvey, "Nations on Display: Technology and Culture in Expo '92," in *The Politics of Display: Museums, Science, Culture*, ed. Sharon Macdonald (New York: Routledge, 1998), 156.

⁵⁸ Robert W. Rydell, *All the World's a Fair: Visions of Empire at American International Expositions, 1876-1916* (Chicago: University of Chicago Press, 1984), 3.

which was reinforced at fairs through the demonstrations of white supremacy. Peoples from all classes could enjoy the fairs because the scientific classification of people underscored different *races* of people, which de-emphasized class boundaries within whites.⁵⁹ Fairs illustrated this racial superiority through the juxtaposition of global indigenous populations and American society; scientists and event planners literally separated Indians from other peoples displayed.

The 1893 World's Columbian Exposition in Chicago produced the most extensive and elaborate display that the world had ever seen and "reinforced ideas of racial and material progress on an evolutionary scale and validated notions of Indian primitiveness and white superiority."⁶⁰ In 1901, at the Pan-American Exposition in Buffalo, "evolutionary ideas about race and progress dictated the arrangement of buildings, the selection and placement of sculptural forms, and, above all, the color scheme that gave the exposition the name 'Rainbow City.'"⁶¹ The colors of the different buildings represented the hierarchy of races; buildings were red near the base and faded toward the top into pale yellow and bright ivory.⁶² Audiences viewed these fairs as promoting science, technology, and national pride instead of explicit forms of racism. Although these fairs presented the illusion of unbiased, scientific analysis, they instead unknowingly promoted falsities and the degradation of the American Indian.

⁵⁹ Rydell, *All the World's a Fair*, 3-7.

⁶⁰ Clara Sue Kidwell, "Every Last Dishcloth: The Prodigious Collecting of George Gustav Heye," in *Collecting Native America, 1870-1960*, ed. Shepard Krech III and Barbara Hail (Washington, DC: Smithsonian Institution Press, 1999), 235.

⁶¹ Rydell, *All the World's a Fair*, 127.

⁶² Rydell, *All the World's a Fair*, 136-37.

Franz Boas: Conjuror Extraordinaire

The popularity of world fairs, Indian performances, and “scientific” collecting contributed to the establishment of the field of anthropology as a legitimate discipline. Franz Boas, considered the “father of cultural anthropology,” perfected the usage of deceit and illusion to further his scientific research. Between 1886 and 1890, Boas travelled to British Columbia, Canada to research the area’s indigenous peoples. Although he established close relationships with his subjects, this did not deter him from excavating his friends’ graves. Writing in his diary, he confessed, “It is most unpleasant work to steal bones from a grave, but what is the use, someone has to do it.”⁶³

Another instance demonstrates his disregard for the cultures that he studied. Boas corresponded with Arctic explorer Robert Peary. Upon returning to the United States from Greenland in 1898, Peary brought with him a group of Eskimos from Smith Sound, Greenland. Once they arrived at New York Harbor, Boas coordinated living arrangements for the Eskimos. He met Qisuk and his son Minik, who was only six or seven years old. Sadly, Qisuk died of tuberculosis the following year and was buried during a funeral attended by his son. Later, when Minik was 15 years old, he read that his father’s remains were on display in a museum and that his father’s funeral was a hoax. Boas argued that he had organized the mock funeral to protect Minik from seeing his father’s body desecrated and put on display; Boas was adamant he had done nothing wrong.⁶⁴

⁶³ Riding In, “Without Ethics and Morality,” 22.

⁶⁴ David Hurst Thomas, *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity* (New York: Basic Books, 2000), 77-83.

William Cody: Avid Collector and Master Illusionist

Even as anthropologists relegated Native American remains and artifacts to scientific study, one man sought an entirely different method of preserving and collecting Native Americans. William “Buffalo Bill” Cody had a lifelong passion for adventure and fame. Buffalo Bill’s Wild West emerged from its humble beginnings in an 1883 Fourth of July celebration in Nebraska and became a worldwide phenomenon. Cody’s personal history gave his show credibility and appeal. His service in the United States Army began in February 1864—just months before the Sand Creek Massacre. As a talented scout, he earned recognition and the eventual title of “Chief of Scouts for the Fifth Cavalry.” Throughout his career he never revealed how many Indians he killed, perhaps to maintain popularity and mystery.⁶⁵ Because of Cody’s reputation as a skilled tracker and soldier, Edward Zane Carroll Judson, alias Ned Buntline, published the dime novel “Buffalo Bill, King of the Border Men” in December 1869. Instantly, Cody’s fame skyrocketed. Several years later, in 1872, Cody began his acting career when he traveled to Chicago to play himself in a show called “Scouts of the Prairie.”⁶⁶

In its formative stages, the Wild West consisted of riding, roping, and shooting. Within a few years, Cody’s performance—and his collection of American frontier objects and people—had grown to include “savages in full paint ... participat[ing] in war and scalp dances ... the attack on the [Deadwood] stage coach, the cowboy’s fun in riding bucking broncos and wild steers...the settler’s surprise by savages and the battle and

⁶⁵ Dagmar Wernitznig, *Europe’s Indians, Indians in Europe*, 72.

⁶⁶ Joseph Rosa and Robin May, *Buffalo Bill and His Wild West: A Pictorial Biography* (New York: Alta Mira Press, 2004), 46.

rescue at the log cabin.”⁶⁷ In addition, Annie Oakley and Miss Lillie Smith joined the Wild West cast as sharpshooters. During its 1885 season the Wild West played in over 40 U.S. and Canadian cities.

The opportunity for international success that Cody had waited for arrived in 1887. In celebration of Queen Victoria’s Jubilee, the “Exhibition of the Arts, Industries, Manufactures, Products and Resources of the United States” offered the Wild West six months in England. Cody immediately accepted the offer and departed on March 31, 1887 with his collection of bison, horses, and actors, including 97 Native Americans.

From the moment Cody and his crew stepped off the ship in London, they catered to and performed for the very attentive crowds. The Wild West’s arena and grounds expanded 23 acres with three underground serving stations and a main gallery that was 1,200 feet long.⁶⁸ A village of teepees stood next to the arena. Here, visitors were allowed to explore the camp and observe the Indians’ lifestyle.⁶⁹ After the visitors left, however, the Indians moved back to their actual quarters in the Olympia Theater. These arrangements contrasted starkly with the “traditional” Indian village. Instead of sleeping on the ground inside of teepees, families stayed together, and the mattresses were large and comfortable.⁷⁰

⁶⁷ “Amusements. Buffalo Bill’s Wild West,” *St. Louis Globe-Democrat*, May 10, 1886.

⁶⁸ Rosa and May, *Buffalo Bill and His Wild West*, 94.

⁶⁹ Rita Napier, “Across the Big Water: American Indians’ Perceptions of Europe and Europeans, 1887-1906,” in *Indians and Europe: An Interdisciplinary Collection of Essays*, ed. Christian Feest (Lincoln: University of Nebraska Press, 1999), 384.

⁷⁰ Luther Standing Bear, *My People the Sioux*, ed. E.A. Brininstool (Lincoln: University of Nebraska Press, 1975), 255.

Black Elk, an Indian performer in the show, met with Queen Victoria, whom the Indians called “Grandmother England.”⁷¹ After he performed a traditional dance for the Queen, she said to him, “I am sixty-seven years old. All over the world I have seen all kinds of people; but to-day I have seen the best-looking people I know. If you belonged to me, I would not let them take you around in a show like this.”⁷² Although Queen Victoria attended and promoted Buffalo Bill’s Wild West, this statement suggests that she recognized it as an illusion and degradation of American Indians.

Another dimension of William Cody can be found in his fair and respectful treatment of his Indian performers, a group the U.S. had previously commissioned him to kill. One newspaper noted, “Cody took excellent care of the Indians. He had killed enough of them in the days of the buffalo to know their little ways and how to treat them.”⁷³ Following the Wounded Knee Massacre of 1890, Cody took responsibility for some Indians the U.S. government considered “troublemakers.” These Indians, including Luther Standing Bear, were added to the cast of the Wild West. Luther Standing Bear recorded an account of his time with Cody in *My People, My Sioux*. Although his official title, as announced in the show, was “The Chief Interpreter of the Sioux Nation,” Standing Bear did not always play the part of an Indian; on days when the crowd was small, he could dress and play the role of a cowboy.⁷⁴

To Standing Bear, Buffalo Bill was the Indian’s protector. In his book, Standing Bear records two specific instances of Cody’s care for the Indians. One morning the

⁷¹ John Neihardt, *Black Elk Speaks: Being the Life Story of a Holy Man of the Ogalala Sioux* (New York: William Morrow & Company, 1932), 224.

⁷² Neihardt, *Black Elk Speaks*, 225.

⁷³ “Buffalo Bill’s Indians,” *Daily Picayune*, March 14, 1891.

⁷⁴ Luther Standing Bear, *My People the Sioux*, 254-55.

cooks served breakfast to everyone except the Indians. This was fine with the Indians because they did not like pancakes and would not have eaten them. For dinner, however, the cooks served the Indians the leftover pancakes. Standing Bear left the table and told Cody about the food. Cody immediately went to the dining room manager and explained:

Look here, sir, you are trying to feed my Indians left-over pancakes from the morning meal. I want you to understand, sir, that I will not stand for such treatment. My Indians are the principle feature of this show, and they are the one people I will not allow to be misused or neglected. Hereafter see to it that they get just exactly what they want at meal-time. Do you understand me, sir?⁷⁵

Another occurrence concerned the horses used in the show. Show supervisors gave the unbroken horses to the Indians, who rode them bareback. Once the horse was tame, the cowboys rode it, and a new, wild horse was given to the Indians. Finally, one Indian boy complained that he would not ride an untamed horse in the arena for the performance. Standing Bear approached the cowboys about this concern, but they refused to ride the wild horses, even though they rode with a saddle. By the starting time of the next show, however, the boy had a broken horse to ride. “Although he [Cody] never said anything to me [Standing Bear], I knew he had fixed things to our satisfaction.”⁷⁶ Perhaps these examples demonstrate that Cody’s relationship with the Indians was sincere. But more likely they were merely an illusion designed to further his personal and business interests.

As with the representations at world fairs and early museums, Buffalo Bill’s Wild West reflected society’s increasing emphasis on the importance of racial superiority.⁷⁷

⁷⁵ Luther Standing Bear, *My People the Sioux*, 260-61.

⁷⁶ Luther Standing Bear, *My People the Sioux*, 264.

⁷⁷ R.H. Snape, *Britain & The Empire, 1867-1945: A History for Schools* (New York: Cambridge University Press, 1952), 45.

The show's advertising posters depicted Indians as an obstacle to civilization.⁷⁸ In this sense, Buffalo Bill's literal battle against Indians during the show symbolized the more abstract fight for civilization.⁷⁹ An 1897 newspaper article reported, "The portals of civilization at the far away end of the quadrangle flopped open, and a bunch of warwhooping Indians ... came careering down the plain."⁸⁰

The Wild West also promoted the belief that Indians were on the verge of extinction, portraying them "as noble warriors bent by the adverse destiny which had made them the last representatives of a disappearing race."⁸¹ From the time of its inception to the height of the show's popularity, the Wild West existed on an inverse sliding scale with the existence of the western frontier. As the idea of the frontier faded, the show became more prominent, reaching its peak when the "Old West" was gone, a "moment when historical fact became romantic fiction."⁸²

From the Wild West's advertisement and promotion schemes to its performances, both during and after shows, Buffalo Bill presented his audiences with illusions of the American frontier. Rather than presenting a strictly accurate portrayal of the Indian wars, he displayed his collection of Indian, cowboy, and soldier actors in a fictional, romanticized version of the invasion and slaughter of Native Americans. William Cody was not the only nineteenth-century businessman to exploit Indians for personal gain. Others, such as Franz Boas or the world fair event planners, operated under the auspice of

⁷⁸ Bieder, "Marketing the American Indian in Europe," 20.

⁷⁹ Wernitznig, *Europe's Indians, Indians in Europe*, 72.

⁸⁰ "Buffalo Bill and His Rough Riders Take Boston by Storm—The Exhibition," *Boston Daily Advertiser*, May 25, 1897.

⁸¹ Fiorentino, "Those Red-Brick Faces," 404.

⁸² Sara Quay, *Westward Expansion* (Westport, Connecticut: Greenwood Press, 2002), 198.

scientific study and national pride. As the nineteenth century drew to a close, archaeological sites, battlefields, and sacred burial grounds lay decimated and exposed. The widespread collecting practices of the past 60 years led to the dire need of the artifact protection legislation passed by Congress within the first few years of the twentieth century.

CHAPTER THREE
**“INDIANS DON’T DIG ANTHROS”: THE DEVELOPMENT OF EARLY NATIVE
 AMERICAN ARTIFACT PROTECTION LAWS**

Naturalist and Assistant Secretary of the Smithsonian Institution Spencer F. Baird helped plan the activities of the 1876 Centennial Exhibition in Philadelphia. His strategy was simple: Exhibit as many items as possible. World fairs offered museums and universities a unique opportunity to educate the public through their displays at the fairs and, simultaneously, add to their collection.⁸³ The massive excavations by scientists and treasure-seekers during the nineteenth century produced elaborate and extensive displays in museums and world fairs, but they also destroyed many historically and archeologically significant sites. At the dawn of the twentieth century, U.S. anthropologists were faced with the startling realization that without protective legislation Indian artifacts might permanently disappear.

Preparation for the 1893 Columbian Exposition in Chicago began two years in advance, and employed 100 private parties to collect artifacts because there was no public funding for the event.⁸⁴ Early artifact litigation emerged from this private acquisition. For example, in *Onondaga Nation v. Thacher*, 29 Misc. 428, 430 (Sup. Ct. N.Y. 1899), the defendant purchased six wampum belts from Thomas Webster, an Onondaga Indian. The judge determined that the League that once held the belts had dissolved and “that the nations which composed it had become ... wards of the government.”⁸⁵ Epitomizing the

⁸³ Rydell, *All the World’s a Fair*, 6-7.

⁸⁴ *The Onondaga Nation v. John Boyd Thacher*, 29 Misc. 428, 430 (Sup. Ct. N.Y. 1899).

⁸⁵ *The Onondaga Nation v. John Boyd Thacher*, 435.

notion of the disappearing American Indian, the judge declared, “[T]hese wampums are curiosities and relics of a time and condition and confederation which has ceased to exist.”⁸⁶ Ultimately, the court ruled that the defendant was a good faith purchaser who paid a fair price (\$500) for the belts and was not required to return them.⁸⁷

During the late nineteenth and early twentieth centuries, courts were extremely hostile towards Indian nations. Even after the Fourteenth Amendment granted citizenship to “[a]ll persons born or naturalized in the United States,” courts interpreted this to the exclusion of Native Americans. The courts held that Native Americans could only gain U.S. citizenship through treaties and statutes. Some of these treaties required Indians to conform “their individual behavior to the dominant society’s norms and [to renounce] tribal culture and traditions” in exchange for citizenship, while the General Allotment Act of 1887 granted citizenship to all Indians who received allotments. The U.S. Supreme Court, however, scolded Congress for the “hasty” decision to grant “full rights of citizenship to Indians.” The United States did not legally recognize Native Americans as citizens until passage of the Citizenship Act of 1924.⁸⁸

Given the difficulties experienced in obtaining citizenship, it is not surprising that legislation protecting Native remains and artifacts originally developed to assist U.S. anthropologists. From 1880 to 1920 a heated competition developed between museums and private collectors for the acquisition of Native American artifacts. Archaeological sites were easily accessible by those willing to dig, and there were no prerequisites for excavation. Dr. Walter Hough, who conducted fieldwork in Arizona around the turn of

⁸⁶ The Onondaga Nation v. John Boyd Thacher, 435.

⁸⁷ The Onondaga Nation v. John Boyd Thacher, 430.

⁸⁸ David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 5th ed. (St. Paul: Thomson West, 2005).

the twentieth century, said, “The great hindrance to successful archaeological work in this region...lies in the fact that there is scarcely an ancient dwelling site or cemetery that has not been vandalized by ‘pottery diggers’ for personal gain.”⁸⁹

One specific event represents the end of free archaeological reign over the West. Gustav Erik Adolf Nordenskjold, just twenty-three years old, spent the summer of 1891 exploring the Mesa Verde ruins in Colorado. By summer’s end, he had exhumed massive amounts of prehistoric artifacts from the site and shipped them back to Stockholm, Sweden, where they remain today. The loss of these priceless objects wounded American archaeologists and caused deep resentment towards foreign excavators. Two years later, Nordenskjold published *The Cliff Dwellers of the Mesa Verde*, a book that recounted in great detail his adventurous and lucrative expedition, complete with beautiful illustrations of the artifacts taken from the United States.⁹⁰

The condition of archaeological sites and the loss of artifacts motivated anthropologists and archaeologists to create organizations to lobby for the protection of these sites. As of 1885, the Archaeological Institute of America only had chapters in Boston. Fifteen years later, chapters had spread to Baltimore, New York, Philadelphia, Chicago, Detroit, Minneapolis, Madison, Pittsburg, Cincinnati, Cleveland, and Washington, DC. In addition, the American Anthropological Association, founded on June 30, 1902, served as a crucial force in the passage of the Antiquities Act of 1906.

⁸⁹ Ronald Lee, *The Story of the Antiquities Act*. National Park Service, Department of the Interior, (2001), http://www.nps.gov/archeology/PUBS/LEE/Lee_CH3.htm (accessed December 13, 2008).

⁹⁰ Ronald Lee, *The Story of the Antiquities Act*.

The Missing Link?

Buffalo Bill's Wild West encapsulated the spirit of opportunity and romanticism associated with the American frontier. This notion captured the imagination of the European populations. Even Queen Victoria, a recluse for the previous 26 years, could not resist the enticement of the West. In 1887, a poignant moment of history for Anglo-American relations, the Queen saluted the American flag during a performance of the Wild West. Yet, this Europeans success had an unforeseen consequence for the Indians. The popularity of the romantic fiction portrayed by Cody in his Wild West show fostered a demand for authentic Western artifacts.⁹¹ Perhaps Cody's influence inspired Europeans to collect the final remnants of the disappearing American frontier, resulting in the decimation of Indian artifacts and, in turn, its culture.

Buffalo Bill was neither the first nor the last to showcase live Indians abroad. Captain Samuel Hadlock, Jr. had a traveling display of Eskimos during the 1820s that was very profitable.⁹² He brought to Europe an Eskimo couple and their two children along with a plethora of artifacts, including ten sled dogs, sleds, kayaks, harpoons, bows and arrows, ivory carvings, clothing, stuffed seals, bears, and birds. Within four years, the Eskimos died as did nine of the ten dogs.⁹³ Although he never experienced the fame and

⁹¹ Molly Lee, "Zest of Zeal? Sheldon Jackson and the Commodification of Alaska Native Art" in *Collecting Native America, 1870-1960*, edited by Shepard Krech III and Barbara Hail (Washington, DC: Smithsonian Institution Press, 1999), 29. Lee discusses the popularity of collecting Native relics before their extinction.

⁹² Robin Wright, "The Traveling Exhibition of Captain Samuel Hadlock, Jr.: Eskimos in Europe, 1822-1826," in *Indians and Europe: An Interdisciplinary Collection of Essays*, ed. Christian Feest (Lincoln: University of Nebraska Press, 1999), 215.

⁹³ Wright, "The Traveling Exhibition," 215.

influence of William Cody, Hadlock met royalty and many of the traveling artifacts are still in European museums.⁹⁴

Another early showman was George Catlin, an artist who exhibited his work in Europe during the 1840s. In 1839, he left for Europe with 507 paintings from visits to 48 tribes.⁹⁵ His ultimate goal was the sale of his artwork, so he hired Indians to serve as advertisement and enticement to purchase his paintings.⁹⁶ Catlin's show deliberately deceived Europeans with outrageous and exaggerated Indian performances.⁹⁷ Although his performances were not on the same scale as Cody's, employing only around 15 Indians, Catlin's show sparked the interest of Queen Victoria, and she summoned a command performance of the Ojibwa Indians.⁹⁸ Several years later, Catlin offered her another personal showing, this time with Iowa Indians. Queen Victoria did not invite him for an encore presentation because she felt there was nothing more to see. Offended, Catlin left for France to perform for King Louis-Philippe.⁹⁹

The Wild West show differed from those before it and was unmatched by those that came after. Cody built his reputation touring the United States and Canada but capitalized, politically and financially, on his fame in Europe. One example demonstrates Cody's popularity among all classes of British society. In an unrelated visit in 1885, United States Supreme Court Chief Justice Morrison Remick Waite traveled to England

⁹⁴ Wright, "The Traveling Exhibition," 221.

⁹⁵ Christopher Mulvey, "Among the Sag-A-Noshes: Ojibwa and Iowa Indians with George Catlin in Europe, 1843-1848," in *Indians and Europe: An Interdisciplinary Collection of Essays*, ed. Christian Feest (Lincoln: University of Nebraska Press, 1999), 253.

⁹⁶ Wernitznig, *Europe's Indians, Indians in Europe*, 70.

⁹⁷ House, *Annual Report of the Board of Regents of the Smithsonian*, 51st Cong. 2nd sess., Mis.Doc. 129, pt 2.

⁹⁸ Mulvey, "Among the Sag-A-Noshes," 254.

⁹⁹ Mulyey, "Among the Sag-A-Noshes," 262.

and was neither welcomed nor recognized by anyone.¹⁰⁰ When Buffalo Bill arrived in London aboard the *S.S. Nebraska*, his welcome was strikingly different than what the Chief Justice experienced just two years prior. As Cody's ship sailed into the harbor, it was greeted with a tug flying an American flag and playing the "Star Spangled Banner." Buffalo Bill's Cowboy Band responded with its rendition of "Yankee Doodle." British citizens waited on land waving handkerchiefs and shouting cheers.¹⁰¹ Once ashore, the welcome ceremony began as the Wild West cast paraded through the streets of London.

The appeal of the Wild West crossed social and economic boundaries. Increasing literacy rates across Europe led to the flourishing of dime novels, familiarizing Europeans with the "western" as a literary genre.¹⁰² The stereotypes portrayed in the Wild West show captivated the imagination of European writers like Mayne Reid of England and Karl May of Germany. To many Europeans, the Wild West show was a live performance of the dime novels.

Along with the popularity of dime novels, European travelers also did their part, whether intentionally or not, to promote the West. Journals kept during their time in the United States popularized the Wild West show among the middle class, who wanted to "see and judge" the American West for themselves.¹⁰³ Indeed, the English were so intrigued by the Indians that they even invited them into their homes. Standing Bear

¹⁰⁰ Andrew Carnegie, "Home Rule in America," from the *Scottish Leader*, September 1887, in *The Gospel of Wealth and Other Timely Essays*, ed. Edward C. Kirkland (Cambridge: Belknap Press, 1969), 182.

¹⁰¹ Henry Blackman Sell and Victor Weybright, *Buffalo Bill and the Wild West* (New York: Oxford University Press, 1955), 160.

¹⁰² Rosa and May, *Buffalo Bill and His Wild West*, 146.

¹⁰³ Oscar Winther, "Promoting the American West in England, 1860-1890," *Journal of Economic History* 16 (December 1956): 512.

recalled one woman who arrived at the village with a bag of coins and took the Indians shopping until the bag of money was spent.¹⁰⁴

In 1906, the Buffalo Bill's Wild West returned home from its third, and final, European tour. Cody had capitalized on his American and European travels through his role as a showman and a statesman, earning him fame, influence, and the respect of his performers and audiences. This success had a severe externality, however, as the romantic fiction of the American West caused harm to the most important part of his show—the Indians. Fueled by the popularity of dime novels and the showmanship of Buffalo Bill's Wild West show, the demand for authentic “Western” artifacts hit a fever pitch at the turn of the century, resulting in the destruction and sale of thousands of Indian artifacts.

The Antiquities Act of 1906

The Antiquities Act of 1906 allowed particular sites to be designated as national monuments and also dealt with the imposition of permits and regulations. This law gave discretion to the Secretaries of the Interior, Agriculture, and U.S. Army to issue “permits for the excavation of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity.”¹⁰⁵ In order to qualify for a permit, applicants had to prove that the excavation of the site and study of discovered objects were for educational and preservation purposes. Only certain institutions, such as museums and universities,

¹⁰⁴ Luther Standing Bear, *My People the Sioux*, 259.

¹⁰⁵ *Antiquities Act of 1906*, Public Law 59-209, codified at U.S. Code 16, §§ 431-433 (2008).

qualified for the permits. The Antiquities Act punished violators with a fine of not more than \$500 or not more than 90 days imprisonment or both.¹⁰⁶

The Antiquities Act regulated and placed limits on the uses of excavations. Allowing only qualified archaeologists using the best scientific methods and technology to excavate provides evidence of the widespread desire to professionalize the fields of archaeology and anthropology.¹⁰⁷ Anthropology was becoming a legitimate discipline in colleges and universities, and the Antiquities Act acknowledged that studying remains was a valid, scientific endeavor. This reasoning placed public benefit over individual or commercial interests.¹⁰⁸ Unfortunately, it also pushed Indians into the past as part of America's history rather than a viable part of its current culture.

Some scholars view the Antiquities Act as a “milestone.”¹⁰⁹ Certainly, it was the “first national historic preservation policy for the United States.”¹¹⁰ The Antiquities Act sought to preserve the Indian remains of America's past. While this purpose seems commendable, the Antiquities Act actually saved sites for U.S. archaeologists, instead of

¹⁰⁶ *Antiquities Act of 1906*, § 433.

¹⁰⁷ Francis P. McManamon, “The Foundation for American Public Archaeology: Section 3 of the Antiquities Act of 1906,” in *The Antiquities Act: A Century of American Archaeology, Historic Preservation, And Nature Conservation* ed. David Harmon, Francis P. McManamon, and Dwight T. Pitcaithley (Tucson: University of Arizona Press, 2006), 153.

¹⁰⁸ Francis P. McManamon, “The Foundation for American Public Archaeology,” 153; LauraJane Smith, *Archaeological Theory and the Politics of Cultural Heritage* (New York: Routledge, 2004), 129.

¹⁰⁹ David Harmon, Francis P. McManamon, and Dwight T. Pitcaithley, “Introduction: The Importance of the Antiquities Act,” in *The Antiquities Act: A Century of American Archaeology, Historic Preservation, And Nature Conservation* ed. David Harmon, Francis P. McManamon, and Dwight T. Pitcaithley (Tucson: University of Arizona Press, 2006), 1.

¹¹⁰ Ronald F. Lee, “The Origins of the Antiquities Act,” in *The Antiquities Act: A Century of American Archaeology, Historic Preservation, And Nature Conservation* ed. David Harmon, Francis P. McManamon, and Dwight T. Pitcaithley (Tucson: University of Arizona Press, 2006), 15.

foreign grave robbers, to deplete; it also diverted artifacts into museums and scientific studies rather than allowing them to fall into the private collections of amateur treasure seekers. Thus, in actuality the Antiquities Act did more for archaeology and the study of Native American remains than it did for halting the plundering of sites. One particular example supports this conclusion. When the Antiquities Act passed in 1906, collector George Gustav Heye possessed 30,000 artifacts in his collection.¹¹¹ When he died in 1956, he had over one million items. Even after “protective” legislation, Heye—who had no educational background in history or archaeology—expanded his collection thirty-fold. Heye’s collecting practices demonstrate the illusion of early artifact laws and lay the foundation for more recent, protective Native American legislation, such as NMAI.

The “Collecting Bug”

During the midst of the late nineteenth century scramble to collect the remnants of Indian culture, George Gustav Heye began his lifelong passion for acquiring Native artifacts. Born in 1874 in New York City, he graduated from Columbia College in 1896 with an electrical engineering degree. A job offer as the superintendent of a crew took him to Kingmen, Arizona. While at work one day, he noticed the wife of one of his Indian crewmembers chewing on a piece of deerskin. Upon inquiry, he learned that she gnawed at her husband’s deerskin shirt in order to kill the lice. Heye was fascinated and bought the shirt. Once in his possession, he decided he needed a rattle and moccasins to complete the look. From that point, he claimed he was bitten by the “collecting bug.”¹¹²

¹¹¹ Kidwell, “Every Last Dishcloth,” 238.

¹¹² Kidwell, “Every Last Dishcloth,” 232.

Because of the educational value associated with museums, universities readily partnered with existing museums or, in some cases, created their own in order to be associated with collections of Native artifacts. For example, when Heye desired to expand his collection to include objects from Alaska, he and George B. Gordon, museum director for the University of Pennsylvania, struck a deal in which Heye agreed to finance Gordon's excavation in exchange for duplicates of the artifacts acquired. The relationship—and Heye's financial and archaeological resources—labeled him as a major benefactor of the museum, resulting in his election as President-Chairman of the Committee for the American Section. In 1911, the Committee formally declared that North and South American Natives were vanishing, and it was the duty of the museum to collect artifacts and data from these tribes.¹¹³ Years later George Gustav Heye officially opened his own museum in New York City. Although established in 1916, the museum's opening was delayed until 1922 because the American Geographical Society occupied two floors of the building in order to make nautical charts for use in World War I.

Ultimately, Heye's collection transformed into the "Living Memorial to the American Indian" through a transition into the Smithsonian's National Museum of the American Indian. But the title did not reflect the sentiments that surrounded his collecting practices. A fellow anthropologist described him:

He didn't give a hang about Indians individually, and he never seemed to have heard about their problems in present-day society...George didn't buy Indian stuff in order to study the life of a people, because it never crossed his mind that that's what they were. He bought all those objects solely in order to own them—for what purposes, he never said.¹¹⁴

¹¹³ Kidwell, "Every Last Dishcloth," 238.

¹¹⁴ Kidwell, "Every Last Dishcloth," 233.

Throughout his life, Heye's view seemingly never changed. In 1938 two Hidatsa tribal elders, Foolish Bear and Drags Wolf, contacted Heye and requested the repatriation of the Water Buster, a medicine bundle believed to have the power to bring rain. After negotiations, Heye agreed to return the bundle in exchange for an object of the same value. When the elders traveled to New York, they received pieces of artifacts that Heye claimed comprised the Water Buster; museum records indicate, however, that they did not.¹¹⁵ Regardless of Heye's personal motivation or methods, it is undeniable that he assembled a priceless collection of American Indian artifacts that many have called an international treasure.¹¹⁶

Archaeological Resources Protection Act of 1979

Laws concerning artifact excavation remained stagnant until the Archaeological Resources Protection Act of 1979 (ARPA). Several court cases revealed inefficiencies of the Antiquities Act and prompted the creation of ARPA. In *United States v. Diaz*, 499 F.2d 113, (9th Cir. 1974), the defendant found facemasks in a cave on the San Carlos Indian Reservation in Arizona. It was undisputed that the masks were used by Apache Indians in religious ceremonies and then placed in remote locations as part of their religious purpose. In fact, the religious practices dictated that the masks not be removed from the reservation because they were considered sacred. An anthropology professor at the University of Arizona testified that “‘objects of antiquity’ could include something

¹¹⁵ Kidwell, “Every Last Dishcloth,” 250. The Water Buster was eventually returned to the tribe.

¹¹⁶ Senate Select Committee on Indian Affairs and Committee on Rules and Administration, *National American Indian Museum Act (Part 1)*, 100th Cong., 1st sess., 1989, 90. Statement of Mrs. Wilmot H. Kidd, Chairman, Board of Trustees, Museum of the American Indian Heye Foundation.

that was made just yesterday if related to religious or social traditions of long standing.”¹¹⁷ The Ninth Circuit ruled that there were no legal definitions for the terms “ruin,” “monument,” or “object of antiquity.”¹¹⁸ The court held that the Antiquities Act did not give defendants sufficient notice that the word “antiquity” can reference the sanctity of the object, rather than solely its age. According to the court, the defendants could not have known that the facemasks, which were only three years old, could be considered “objects of antiquity.” Therefore, the Antiquities Act violated the due process clause of the Constitution.¹¹⁹

On a distinguishable set of facts, the Tenth Circuit upheld the Antiquities Act in *United States v. Smyer*, 596 F.2d 939, (10th Cir. 1979). Unlike *Diaz*, the “antiquity” of the artifacts was not in dispute; the artifacts appropriated were 800-900 years old. Rather, defendants argued that they had no notice they were on protected, government land. Evidence, however, showed that tire tracks matching the defendant’s vehicle passed a sign warning that the area was protected under the Antiquities Act. The court distinguished this case from *Diaz* by the age of the artifacts and held that the Antiquities Act provided “a person of ordinary intelligence a reasonable opportunity to know that excavating prehistoric Indian burial grounds and appropriating 800-900 year old artifacts is prohibited.”¹²⁰

Although *Smyer* shows that the Antiquities Act was not without teeth, the *Diaz* case and other events of the 1970s revealed its limitations. For example, in 1971, during reconstruction of Highway 34 in Iowa, workers accidentally unearthed numerous

¹¹⁷ *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974).

¹¹⁸ *United States v. Diaz*, 114.

¹¹⁹ *United States v. Diaz*, 115.

¹²⁰ *United States v. Smyer*, 596 F.2d 939, 941 (10th Cir. 1979).

European graves along with a single Native American grave containing a mother holding her child. The workers reburied the European remains, while scientists kept the remains of the Indian mother and baby for study.¹²¹ This inconsistent treatment of human remains sparked public interest and put pressure on Congress to enact legislation that protected Native American remains.

In 1979 the U.S. Congress passed ARPA, which declared that an “archaeological resource” must be at least 100 years old,¹²² and still required a permit for acquisition and excavation of artifacts.¹²³ ARPA is generally perceived to have achieved its goal of securing “the protection of archaeological resources and sites which are on public lands and Indian lands.”¹²⁴ While ARPA acknowledged existence of a modern Native American culture, it was silent as to the objects already in possession of museums and public institutions, and did not provide any federal power to limit scientific studies. Thus, ARPA suffered from two inadequacies; it contained no retroactive repatriation policy, and it did not limit what may be done with existing artifacts.

¹²¹ Laurajane Smith, *Archaeological Theory*, 28.

¹²² *Archaeological Resources Protection Act of 1979*, codified at U.S. Code 16 § 470 bb.

¹²³ *Archaeological Resources Protection Act of 1979*, § 470 cc.

¹²⁴ *Archaeological Resources Protection Act of 1979*, § 470 (aa). *United States v. Austin* 902 F.2d 743 (9th Cir. 1990); *United States v. Gerber*, 999 F.2d 1112, (7th Cir. 1993).

CHAPTER FOUR
THREE STEPS FORWARD, TWO STEPS BACK: MODERN NATIVE AMERICAN
ARTIFACT PROTECTION LAWS

National Museum of the American Indian Act of 1989

George Gustav Heye had an astounding collection of nearly one million Native American artifacts, containing items as small as pebbles; as large as 40-foot, five-ton totem poles; as old as 9,000 years; and as recent as the present day.¹²⁵ When Heye died in 1956, he left three million dollars to his museum. With his collection at approximately one million artifacts, this provided only a few dollars for each item. By 1989, the artifacts were inadequately displayed and stored due to the lack of funds. The collection needed at least 400,000 square feet for “exhibition, storage, and scholarly research” but the storage building that housed items was only about 82,000 square feet.¹²⁶ The museum’s deficient facilities could display less than one percent of its collection.¹²⁷ When Daniel K. Inouye, a U.S. Senator from Hawaii, visited the museum, he said:

There was a collection of the greatest magnitude, priceless in nature, and because of the lack of funds kept in the condition which obviously would have led to the final deterioration of this collection. In a room about half this size were about 200 buffalo robes. Any one of them would have been the center piece in any museum. They were covered with plastic bags that you find in a dry cleaning shop. And that is not the way you store buffalo

¹²⁵ Senate Select Committee on Indian Affairs and Committee on Rules and Administration, *National American Indian Museum Act (Part 1)*, 100th Cong., 1st sess., 1989, 91. Statement of Mrs. Wilmot H. Kidd, Chairman, Board of Trustees, Museum of the American Indian Heye Foundation.

¹²⁶ *National Museum of the American Indian Act*, Public Law 101-185, codified at 20 U.S. Code 80q (1996), § 2(4).

¹²⁷ Senate Committee, *National American Indian Museum Act (Part 1)*, 96. Statement of Dr. Roland W. Force, President and Director, Museum of the American Indian Heye Foundation; House Committee, *Establishment of the National Museum of the American Indian*, 23. Statement of Vine DeLoria, Member, Board of Trustees, Museum of the American Indian.

robes. And in other rooms, you had Navajo robes by the dozens just folded and stacked, and masks of great sacred value hanging all over the walls.¹²⁸

In addition to these inadequacies, the Heye Foundation facilities were located in a remote part of New York, surrounded by commercial and multi-family zoned areas, which made the museum inaccessible to the public.¹²⁹

The purpose of the National Museum of the American Indian Act (NMAI or Museums Act) was two-fold. First, it moved the nearly one million artifacts of the Heye Foundation collection to the Smithsonian. Second, it required the Smithsonian to inventory and repatriate the items within its collection. Before the Museum Act, there was no national museum dedicated solely to the American Indian. While the Smithsonian Institution sponsored American Indian programs, it did not have a museum dedicated specifically to Native Americans.¹³⁰ In the 1980s, the Heye Foundation needed to transfer improperly stored artifacts to an institution that could sufficiently care for the items, and the Smithsonian realized that it lacked a museum and memorial honoring American Indians as a living culture.

Legislation to preserve the Heye Foundation collection presented an opportunity to remedy the inadequacies of earlier Native American artifact laws. Congress found that joining the Smithsonian and the Heye museum provided “unrivalled capability for exhibition and research;” presented Americans with a chance “to learn of the cultural legacy, historic grandeur, and contemporary culture of Native Americans;” gave Indians

¹²⁸ House Committee, *Establishment of the National Museum of the American Indian*, 100. Statement of Daniel K. Inouye, U.S. Senator.

¹²⁹ Senate Committee, *National American Indian Museum Act (Part 1)*, 95. Statement of Dr. Roland W. Force.

¹³⁰ *National Museum of the American Indian Act*, § 2(2).

“curatorial and other learning opportunities;” and created traveling exhibitions to tour the United States.¹³¹

The National Museum of the American Indian was designed to be “a living memorial to Native Americans and their traditions.”¹³² The purpose of the Act was to “advance the study of Native Americans...collect, preserve, and exhibit Native American objects...[and] provide for Native American research and study programs.”¹³³ In order to accomplish these goals, NMAI gave a Board of Trustees complete control of the collections within the National Museum. This included the ability to: “lend, exchange, [or] sell” any part of the National Museum compilation, borrow or acquire through purchase or donation any items for the Museum, and specify standards for “appropriate purposes” for artifacts in the Museum through “research, evaluation, educations, and method of display.”¹³⁴ With the permission of the Board of Regents, the Trustees could restore, preserve, and maintain the collections in the National Museum and collect funds and determine their appropriation.¹³⁵ The Museum Act established a three-year term for Board of Trustee members. The initial board required seven of the 23 members of the Board of Trustees to be Indians. All subsequent boards, however, stipulated that 12 of the 23 members must be Indians.¹³⁶

The National Museum of the American Indian is composed of three facilities. The National Museum Mall Facility, constructed in the District of Columbia, is located

¹³¹ *National Museum of the American Indian Act*, § 2(2)(A-E).

¹³² *National Museum of the American Indian Act*, § 3(a).

¹³³ *National Museum of the American Indian Act*, § 3(b)(1-3).

¹³⁴ *National Museum of the American Indian Act*, § 5(c)(1-3).

¹³⁵ *National Museum of the American Indian Act*, § 5(d)(1-3).

¹³⁶ *National Museum of the American Indian Act*, § 5(e) and (f).

between the Air and Space Museum and the U.S. Capitol Building.¹³⁷ The George Gustav Heye Center of the National Museum of the American Indian houses the museum. For this building, the Board of Regents was responsible for one-third of the costs, while the city and state of New York each agreed to pay the lesser of either one-third of the total cost or eight million dollars.¹³⁸ The Administrator of General Services allotted 25 million dollars for the renovation and reconstruction of this building.¹³⁹ The Museum Support Center Facility is intended “for the conservation and storage of the collections of the National Museum” and located in Washington, DC.¹⁴⁰

The Museum Act granted priority to Indian organizations in certain agreements concerning lending artifacts, sponsoring and coordinating traveling exhibitions, and providing training or technical assistance.¹⁴¹ Beginning in 1991, the Museum Act also set aside two million dollars for Indian Management Fellowships, which offer a stipend to Indians for training in museum development and management.¹⁴²

The most well known section of the Museum Act is “Inventory, Identification, and Return of Indian Human Remains and Indian Funerary Objects in the Possession of the Smithsonian Institution.”¹⁴³ This section’s mandates affected the Smithsonian more than the Heye Museum because the Smithsonian held around 18,000 skeletal remains, while the Heye Museum possessed only 11. In order to inventory and identify the items within its collection, the Museum Act required that the Secretary of the Smithsonian

¹³⁷ House Committee, *Establishment of the National Museum of the American Indian*, 2.

¹³⁸ *National Museum of the American Indian Act*, § 7(b)(5)(B).

¹³⁹ *National Museum of the American Indian Act*, § 8(b).

¹⁴⁰ *National Museum of the American Indian Act*, § 7(c).

¹⁴¹ *National Museum of the American Indian Act*, § 10(a).

¹⁴² *National Museum of the American Indian Act*, § 10(c).

¹⁴³ *National Museum of the American Indian Act*, § 11.

consult and cooperate with “traditional Indian religious leaders and government officials of Indian tribes.” Scientists and anthropologists opposed this stipulation because it did not mention “the scientific value of these collections” and did not require or even suggest “consultation with the scientific community.”¹⁴⁴ In response to this objection, the Museum Act declared that if a preponderance of evidence ascertained the tribal origin of an object, the Secretary must notify the tribe as soon as possible. If the tribe requested the remains or objects, then the Secretary was required to “expeditiously return such remains.”¹⁴⁵ Congress allowed two million dollars for repatriation expenses: one million for the inventory and identification of artifacts and an additional million for negotiations leading to the return of Indian objects and human remains.¹⁴⁶

Congress amended the NMAI in 1996 to define “inventory” as “a simple, itemized list that, to the extent predictable, identifies, based upon available information held by the Smithsonian Institution, the geographic and cultural affiliation of the remains and objects.”¹⁴⁷ The Smithsonian now had to provide a written summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony as defined by NAGPRA.¹⁴⁸

The “Move Project” began in 1999 and was completed in 2004. In just five years, the Project transported over 800,000 artifacts from Heye’s warehouse in the Bronx, New York to the research and storage facility in Suitland, Maryland. During this process, 217

¹⁴⁴ House Committee, *Establishment of the National Museum of the American Indian*, 273. Statement of Dr. Mark Leone, Society for American Archaeology.

¹⁴⁵ *National Museum of the American Indian Act*, § 11(c).

¹⁴⁶ *National Museum of the American Indian Act*, §§ 11(f) and 14(b).

¹⁴⁷ *National Museum of the American Indian Act Amendments of 1996*, 110 Stat. 3355 § 3(a)(3) (1996).

¹⁴⁸ *National Museum of the American Indian Act Amendments of 1996*, § 11A (a).

artifacts, or 0.03 percent of the items moved, suffered major or minor damage. This number is significantly smaller than the damage that would have been sustained had the objects remained in inadequate storage.

Carpenters, sculptors, artists, archaeologists, teachers, textile artists, managers, and conservators collaborated to achieve the safest, most efficient process by which to transfer the items. Workers crated and packaged artifacts according to a specified system, and applied a pest management treatment. Because of inadequate storage over the previous 50 years, some of the objects required further attention, so workers applied several types of conservation treatments. Temporary Preventative Stabilization includes such methods as the use cyclodecane on ceramics and Teflon tape to bind loose elements and beadwork. Because they are not considered permanent, these were not recorded in the conservation record. Workers applied Minor Stabilization Treatment to items that required more than simple stabilization in order to be transported safely, such as rethreading beadwork and reattaching loose elements. Finally, the condition of some artifacts was too poor for them to be moved with the rest of the items, so they were sent to the Conservation Library, where their treatment was thoroughly documented.¹⁴⁹

Once the Move Project was completed, the Smithsonian needed to identify and repatriate the artifacts. In September 2004, the *Smithsonian* reported that it had restored thousands of artifacts to “their home communities.”¹⁵⁰ More recently, the National Museum of Natural History announced in January 2008 that it would return several

¹⁴⁹ Emily Kaplan et al., “Integrating Preventative Conservation into a Collections Move and Rehousing Project at the National Museum of the American Indian.” *Journal of the American Institute for Conservation* (2005): 217-232.

¹⁵⁰ Thomas Hayden and Robert Lautman, “By the People,” *Smithsonian* (2004): 50-57.

belongings of Sitting Bull. These items included some wool leggings and a lock of hair, which was taken by a U.S. Army doctor after Sitting Bull's death. Bill Billeck, Director of the museum's Repatriation Office, identified the closest living relative of Sitting Bull and stated that he intended to repatriate the objects.¹⁵¹

Native American Graves Protection and Repatriation Act

Before NAGPRA, the law treated Native American graves differently than those of other races. Every state has laws that protect cemeteries and marked graves from vandalism, but until recently, states did not give Native American unmarked graves this same protection. Certain laws require immediate reburial of uncovered Euro-American graves, but Native American bodies were often kept for long-term study.¹⁵² The 1970s mark the beginning of the Indian Reburial Movement. While originally supported only by Native Americans, the movement gained support in the 1980s after mass "excavations" by collectors. In 1987, a burial ground in western Kentucky lost artifacts from over 450 graves because of looting and in 1988, grave robbers stole approximately 1,000 Native Hawaiian remains and funerary objects from a site in Maui.¹⁵³

NAGPRA responds to the Indian Reburial Movement in two ways. First, NAGPRA intended to prevent looting and excavations of sacred sites and burial grounds located on federal or tribal lands by the imposition of sanctions against any person who

¹⁵¹ Jess Blumberg, "Making History," *Smithsonian* (January 2008): 34. Journal online. Available from <http://www.smithsonianmag.com/arts-culture/makinghistory-200801.html> (accessed 27 March 2011).

¹⁵² Robert W. Lannan "Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains," *Harvard Environmental Law Review* 22 no. 2 (1998): 394; Thomas, *Skull Wars*, 214.

¹⁵³ Lannan "Anthropology and Restless Spirits," 395.

“knowingly sells, purchases, uses, for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains.”¹⁵⁴

Second, it requires museums and federal agencies to inventory artifacts and cooperate with Indian tribes to agree on repatriation or other disposition of the items. Thus, NAGPRA deals with two types of Native American objects: (1) items found in the ground after the Act’s passage and (2) those currently in federal institutions and museum collections. The Office of the Secretary of the Interior established NAGPRA regulations under the Code of Federal Regulations, which supplement the provisions in NAGPRA.¹⁵⁵

NAGPRA only applies in certain circumstances to specific items. In the initial discussion of the disposition of qualifying Native American artifacts, the items must be within the control or possession of a federal agency or museum, and only an Indian tribe with legal standing may request repatriation. Only federally recognized Indian tribes, bands, or nations may request artifacts pursuant to NAGPRA.¹⁵⁶ A federal agency is defined as any U.S. “department, agency, or instrumentality” excluding the Smithsonian Institution, which is covered by NMAI.¹⁵⁷ Any state or local government agency or institution of higher learning is considered a museum under NAGPRA because they receive federal funds through grants, loans, contracts, or other means.¹⁵⁸ Federal agencies and museums possess artifacts of which they have physical custody and “a sufficient

¹⁵⁴ Lannan, “Anthropology and Restless Spirits,” 369.

¹⁵⁵ It should be noted that NAGPRA also applies to Native Hawaiians as well.

¹⁵⁶ *Native American Graves Protection and Repatriation Act*, Public Law 101-601, codified at U.S. Code 25 (YEAR) § 3001(7); 43 C.F.R. § 10.2(b)(2).

¹⁵⁷ 43 C.F.R. § 10.2(a)(1).

¹⁵⁸ *Native American Graves Protection and Repatriation Act*, § 3001(8); 43 C.F.R. § 10.2(a)(3)(iii).

legal interest” to treat the objects as part of their collection.¹⁵⁹ Control is defined as a legal interest sufficient to consider the items part of the federal agency’s or museum’s collection.¹⁶⁰ Additionally, the Act does not apply to any items voluntarily given by a group or individual with the authority to do so.¹⁶¹ Even if a federally recognized Indian tribe requests artifacts in the control or possession of a federal institution or museum, the tribe must establish cultural affiliation. NAGPRA defines cultural affiliation as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe...and an identifiable earlier group.”¹⁶² To show cultural affiliation, NAGPRA uses a multi-factor test with no single factor dispositive. Indian tribes and federal institutions use evidence of geography, kinship, biology, archaeology, anthropology, language, folklore, oral tradition, history, or expert opinion.¹⁶³ Native Americans rely largely on traditional knowledge as evidence of their history and cultural affiliation. Traditional knowledge extends beyond oral tradition to include language or geographical features and is passed on through a lifetime of activities.¹⁶⁴ For the first time in history, U.S. legislation affords traditional knowledge equal weight to scientific evidence. The standard for proof of cultural affiliation is a preponderance of the evidence.¹⁶⁵ Additionally, once a tribe satisfies all of the

¹⁵⁹ 43 C.F.R. § 10.2(a)(3)(i).

¹⁶⁰ 43 C.F.R. § 10.2(a)(3)(ii).

¹⁶¹ *Native American Graves Protection and Repatriation Act*, § 3001(13)

¹⁶² *Native American Graves Protection and Repatriation Act*, § 3001(2); 43 C.F.R. § 10.14(c)(1)-(3).

¹⁶³ *Native American Graves Protection and Repatriation Act*, § 3003(d); 43 C.F.R. § 10.14(d) and (e).

¹⁶⁴ Eric Hemenway. 2010. Traditional Knowledge as Evidence. Paper presented at NAGPRA at 20: Conversations about the Past, Present, and Future of NAGPRA, Washington, DC, November 16, 2010.

¹⁶⁵ 43 C.F.R. § 10.14(f).

requirements described above, the federal agency or museum must post a notice of intent to repatriate on the Federal Register 30 days prior to returning the objects.¹⁶⁶ A federal or state institution that repatriates items before the 30-day waiting period is subject to civil penalties.¹⁶⁷

Native American Remains and Artifacts Already in Collections

NAGPRA addresses the ownership and repatriation of “cultural items.” Five categories comprise what may be considered a cultural item. The first two categories are treated similarly under the law and discussed together. The Secretary of the Interior defines “human remains” as the physical remains of a person of Native American ancestry. This definition excludes two categories of remains: those given or donated, and those naturally shed, like hair.¹⁶⁸ Next, “associated funerary objects” deal with items intentionally buried with or near a deceased “as part of the death rite or ceremony of a culture.”¹⁶⁹ The standard of proof for associated funerary objects is a reasonable belief that all items were buried together.

NAGPRA required federal institutions and museums to “inventory” human remains and associated funerary objects, including the geographical and cultural affiliation.¹⁷⁰ As part of the inventory process, NAGPRA mandated consultation between federal agencies and museums and tribes. The museum or federal agency must be

¹⁶⁶ 43 C.F.R. § 10.6(c); 43 C.F.R. § 10(a)(3); 43 C.F.R. § 10.10(b)(2); 43 C.F.R. § 10.11(d)(1); 43 C.F.R. § 10.13(e)(2).

¹⁶⁷ 43 C.F.R. § 10.12(b)(1)(vi).

¹⁶⁸ *Native American Graves Protection and Repatriation Act*, § 3001(3); 43 C.F.R. § 10.1(b)(1); 43 C.F.R. § 10.2(d)(1).

¹⁶⁹ *Native American Graves Protection and Repatriation Act*, § 3001(3)(A) and (B).

¹⁷⁰ The Secretary’s regulations appear at 43 C.F.R. § 10.9.

prepared to show, upon request of the tribe, documentation in the form of records, relevant studies, geographical origin, cultural affiliation, and circumstances of acquisition. NAGPRA does not grant permission for “the initiation of new scientific studies of such remains and associated funerary objects” in order to obtain more detailed information about the objects’ origins.¹⁷¹ Upon completion of the inventory, federal institutions were required to send notification of any culturally affiliated human remains or associated funerary objects to Indian tribes within six months. The notice consisted of the identity and circumstances surrounding the acquisition of Native American human remains and associated funerary objects, as well as their cultural affiliation.

If an Indian tribe or lineal descendent requests the human remains and associated funerary objects, the museum or federal institution “shall expeditiously return such” items, subject to two provisions.¹⁷² In the scientific study exception, if the remains or objects are considered “indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States,” then the scientists receive 90 days to complete their study.¹⁷³ Second, the competing claims exception dictates that when several claimants assert rights to an object, the museum or agency may retain the item until either the parties, the review committee, or the courts reach a resolution.¹⁷⁴

For human remains and funerary objects whose cultural affiliation is not established, subject to scientific study, competing claims, and standard of repatriation, the

¹⁷¹ *Native American Graves Protection and Repatriation Act*, § 3003(b); 43 C.F.R. § 10.9(e)(5)(iii)(A) and (B).

¹⁷² 43 C.F.R. § 10.10(b)(1).

¹⁷³ *Native American Graves Protection and Repatriation Act*, § 3005(a)(1) and (b); 43 C.F.R. § 10.10(c)(1).

¹⁷⁴ *Native American Graves Protection and Repatriation Act*, § 3005(e).

museum must return the items if the tribe “can show cultural affiliation by a preponderance of the evidence.”¹⁷⁵ The “CUI Rule” deals with the disposition of cultural unidentifiable human remains and associated funerary objects.¹⁷⁶ The remains applicable under this rule are Native American but have no identifiable lineal descendant or culturally affiliated tribe. The museum or federal agency holding such remains must consult with the Indian tribe who either lived on the land at the time of the objects’ removal or the tribe who can show aboriginal occupation of the land. If neither of these groups are in existence or are unwilling to accept the remains, “other Indian tribes” or Indian groups that are not federally recognized may receive the remains.¹⁷⁷

The final three categories of Native American artifacts are considered in a similar manner. The third category of cultural items is “unassociated funerary objects,” which are items intentionally buried with or near a deceased “as part of the death rite or ceremony of a culture” but do not have a corresponding body in the federal government’s possession.¹⁷⁸ Thus, the difference between associated and unassociated funerary objects is that the Native American bones of the deceased reasonably believed to have been buried with the funerary objects is in the possession of a federal agency or museum. The standard of proof is a “preponderance of the evidence” that the unassociated funerary objects are “related to specific individuals or families or to known human remains” or that the objects were removed from a specific burial site.¹⁷⁹ The fourth category is “sacred objects.” These are “specific ceremonial objects” needed for modern-day, Native

¹⁷⁵ *Native American Graves Protection and Repatriation Act*, § 3005(a)(4).

¹⁷⁶ 43 C.F.R. § 10.11.

¹⁷⁷ 43 C.F.R. § 10.11(c)(2)(i) and (ii)(A).

¹⁷⁸ *Native American Graves Protection and Repatriation Act*, § 3001(3)(A) and (B).

¹⁷⁹ *Native American Graves Protection and Repatriation Act*, § 3001(3)(B).

American religious practices.¹⁸⁰ Finally, objects of “cultural patrimony” refer to items that contain “ongoing historical, traditional, or cultural importance.”¹⁸¹

For unassociated funerary objects, instead of an inventory, NAGPRA required museums and federal agencies to provide a written summary of the estimated number of objects in the collection, scope of the collection, kinds of objects included, geographical location, and period of acquisition.¹⁸² As with human remains and associated funerary objects, museums must consult with Indian tribes and be prepared to provide information about the objects upon their request.¹⁸³

For unassociated funerary objects, sacred objects, and objects of cultural affiliation whose cultural affiliation is shown, museums “shall expeditiously return” the items subject to three provisions.¹⁸⁴ In addition to the scientific study and competing claims exception, the Indian tribe must meet the standard of proof, which requires a prima facie case that a museum or agency did not have the right to possession (“if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession”).¹⁸⁵

Concerning sacred objects and objects of cultural patrimony, they are subject to the scientific study, competing claims, and standard of repatriation, but must be returned

¹⁸⁰ *Native American Graves Protection and Repatriation Act*, § 3001(3)(C); 43 C.F.R. § 10.1(d)(3).

¹⁸¹ *Native American Graves Protection and Repatriation Act*, § 3001(3)(A)-(D); 43 C.F.R. § 10.1(d)(4).

¹⁸² *Native American Graves Protection and Repatriation Act*, § 3004(a); 43 C.F.R. § 10.8(b).

¹⁸³ *Native American Graves Protection and Repatriation Act*, § 3004(b)(1) and (2); 43 C.F.R. § 10.8(d).

¹⁸⁴ 43 C.F.R. § 10.10(a)(1)(i)-(iv).

¹⁸⁵ *Native American Graves Protection and Repatriation Act*, § 3005(a)(2) and (c); 43 C.F.R. § 10.10(a)(1)(iii).

in one of three circumstances. First, if the person requesting the sacred object is a direct lineal descendent of the person who owned it. Second, if the requesting tribe can prove that the tribe used to possess the object. Finally, if the tribe can show that one of their members used to possess the item, and there are no lineal descendents of the former possessor that did not make a claim for the return of the object.¹⁸⁶

Native American Remains and Artifacts Unearthed After NAGPRA

NAGPRA and the Interior Secretary's regulations provide the priority order for ownership of artifacts found inadvertently or purposely excavated on federal or tribal lands. Secretary regulation § 10.6 mandates that ownership or control of Native American human remains and associated funerary objects be given to a group in a particular order. Where lineal descendants are ascertainable, they are granted first right.¹⁸⁷ For unassociated funerary objects, sacred objects, objects of cultural patrimony or human remains and associated funerary objects whose lineal descendants cannot be ascertained, the artifacts should be returned to the group that fits into one of these following categories: the tribe on whose land the objects were found; the tribe with the "closest cultural affiliation;" or the tribe that originally occupied the land. If a different tribe can show by a "preponderance of the evidence" a stronger cultural affiliation, then that tribe may claim the objects.¹⁸⁸

¹⁸⁶ *Native American Graves Protection and Repatriation Act*, § 3005(a)(5).

¹⁸⁷ *Native American Graves Protection and Repatriation Act*, § 3002(a)(1).

¹⁸⁸ *Native American Graves Protection and Repatriation Act*, § 3002(a)(2)(A)-(C); 43 C.F.R. § 10.6(a) and (b).

Intentional archaeological excavations are subject to the satisfaction of certain elements. First, the diggers must obtain a permit pursuant to ARPA.¹⁸⁹ Archaeologists must also consult with the Indian tribe and provide proof of tribal consultation or consent.¹⁹⁰ In addition, tribal consultation should include an opportunity for face-to-face meetings, the proposed treatment of cultural items unearthed, and the proposed disposition of discovered objects.¹⁹¹ Finally, ownership and right of control must comply with Secretary regulation § 10.6 discussed above.¹⁹² Finders that discover remains and objects inadvertently must notify the Secretary of the Interior in writing. If an activity such as construction, mining, or agriculture unearths the items, then that activity must cease for at least 30 days, in which time those responsible for excavating the items must take reasonable steps to protect the objects and provide notice to the appropriate Indian tribe and the responsible federal agency.¹⁹³

Dispute Resolution and Enforcement

Disputes sometimes arise over the inventory and repatriation process, so the Act advises the use of “informal negotiations.”¹⁹⁴ NAGPRA creates a review committee consisting of seven members. Indian tribes and scientific/museum organizations each nominate three members; these six individuals choose the final member.¹⁹⁵ The review

¹⁸⁹ 43 C.F.R. § 10.3(b)(1).

¹⁹⁰ 43 C.F.R. § 10.3(b)(2) and (3).

¹⁹¹ 43 C.F.R. § 10.5(b)(2).

¹⁹² *Native American Graves Protection and Repatriation Act*, § 3002(c); 43 C.F.R. § 10.3(b)(3).

¹⁹³ *Native American Graves Protection and Repatriation Act*, § 3002(d); 43 C.F.R. § 10.4(b) and (c).

¹⁹⁴ 43 C.F.R. § 10.17(a).

¹⁹⁵ *Native American Graves Protection and Repatriation Act*, § 3006(b).

committee is responsible for the monitoring, reviewing, and implementation of the inventory, identification, and repatriation process.¹⁹⁶ NAGPRA seeks a “fair, objective consideration and assessment of all available relevant information and evidence.”¹⁹⁷

Parties can request that the review committee make decisions concerning “the identity or cultural affiliation” and to whom items should be returned.¹⁹⁸ The review committee’s findings are not binding upon the parties but are admissible in court in an action brought under NAGPRA.¹⁹⁹

Museums and federal agencies that do not comply with NAGPRA are subject to penalty. To determine the amount of the fine, the Secretary takes several factors into consideration: the museum’s annual budget; the archaeological, historical, or commercial value of the item in dispute; damages suffered by the aggrieved party; and the number of violations that occurred.²⁰⁰ If the Secretary proscribes a penalty and the museum refuses to rectify its violation, a fine of up to \$1,000 per day may be added.²⁰¹ Conversely, the Secretary may lower the fine if the violation was not willful, or the institution took mitigating steps to correct its failure to comply.²⁰² If a museum follows the Act and

¹⁹⁶ *Native American Graves Protection and Repatriation Act*, § 3006(a) and (c); 43 C.F.R. § 10.16(a).

¹⁹⁷ *Native American Graves Protection and Repatriation Act*, § 3006(c)(2).

¹⁹⁸ *Native American Graves Protection and Repatriation Act*, § 3006(c)(2) and (3).

¹⁹⁹ *Native American Graves Protection and Repatriation Act*, § 3006(d); 43 C.F.R. § 10.16(b).

²⁰⁰ *Native American Graves Protection and Repatriation Act*, § 3007(b); 43 C.F.R. § 10.12(g)(2)(i)-(iii).

²⁰¹ 43 C.F.R. § 10.12(g)(3).

²⁰² 43 C.F.R. § 10.12(g)(4)(i)-(iv).

repatriates items but later discovers that a more suitable claimant exists, it will not be held liable so long as it returned the item in good faith.²⁰³

The Burke Museum of Natural History and Culture

Founded in 1885, the Burke Museum of Natural History and Culture, located on the University of Washington's Seattle campus, is Washington's oldest museum. In its more recent history, the Burke Museum has had amicable relationships with many of Washington's 37 federally recognized tribes. According to Megon Noble, Assistant Archaeology Collections Manager and NAGPRA Coordinator at the Burke Museum, "Before NAGPRA was passed the [Burke] museum was proactively trying to return remains to tribes."²⁰⁴ In 1998, the Burke Museum revised its permanent exhibits and included a community exhibit called "Pacific Voices." During the exhibit's creation, the Burke curator requested the input of neighboring Pacific communities regarding the most important aspects of the display and what they what they thought visitors should learn from the exhibit.²⁰⁵ Even though the Burke Museum touts a "proactive" and sympathetic view towards Native American artifact repatriation, it took the Stolo nation and Nooksack tribe 15 years of requests and negotiations before museums returned one of their sacred objects.

The Burke Museum and its repatriation of T'xwelátse,²⁰⁶ a 2,000 year-old granite statue, to the Stolo and Nooksack demonstrate the complexities that can arise during NAGPRA's repatriation process. In the 1890s, a farmer discovered T'xwelátse in the

²⁰³ *Native American Graves Protection and Repatriation Act*, § 3005(f).

²⁰⁴ Megon Noble, interview by author, Lincoln, NE, February 4, 2011.

²⁰⁵ Noble, interview.

²⁰⁶ Pronounced: tik'wíl'ät'sũ

Fraser River valley outside Sumas, Washington.²⁰⁷ The Young Naturalists Society of Seattle, Washington acquired the stone figure, displaying him in a dime store museum until 1904, when the Burke Museum acquired him.²⁰⁸

To the Stolo nation, T'xwelátse illustrates a deep cultural tradition. According to their beliefs, he is the tribe's constant reminder to "to live together in a good way."²⁰⁹ The Creator sent transformers, called Xexa:ls, to Earth in order to "make the world right." As Xa:ls [singular form] walked along a riverbank he overheard T'xwelátse and his wife arguing. Xa:ls attempted to restore amicable relations, but the couple continued to fight. To settle the dispute, Xa:ls and T'xwelátse, who was a medicine man, decided on a competition to change one another into different forms. Xa:ls was victorious when he turned T'xwelátse into a stone. Xa:ls told T'xwelátse's wife to take him home and place him at the front door to remind his family of the importance of living together in a good way. The care of T'xwelátse passed from one generation to the next until the 1880s, when conflicts with American settlers caused the Stolo to relocate north, away from their homeland near the U.S. – Canadian border. Because of T'xwelátse's size—four feet tall and 700 pounds—the Stolo had to leave him behind.²¹⁰

T'xwelátse, according to anthropologist Bruce Miller, is "irreplaceable...it is in effect a living being... regarded as inalienable and truly significant feature...that connect[s] [the Stolo] to their mythic past, to their historic past, to their present, and

²⁰⁷ Megon Noble, "T'xwelátse: 'Learning to Live Together in a Good Way'" (lecture, George Washington University, Washington, DC, November 16, 2010).

²⁰⁸ Emmy-Lou Campbell, "The Transformative Power of T'xwelátse: A Collaborative Case Study in Search of New Approaches to Indigenous Cultural Repatriation Processes" (master's thesis, University of Victoria, 2010), 67-68.

²⁰⁹ Campbell, "The Transformative Power of T'xwelátse," 8.

²¹⁰ Campbell, "The Transformative Power of T'xwelátse," 63-64.

ultimately to their future.”²¹¹ T’xwelátse is more than simply an inanimate, historical artifact; he is “a physical and supernatural bridge between the historical and supernatural past and the present.”²¹² His importance to the Stolo tribe can be seen through the patience and persistence exercised by the tribe during their efforts to bring T’xwelátse home.

In 1991, a member of the Stolo tribe saw T’xwelátse at the Burke Museum and declared that he belonged to the Stolo. The following year, the tribe sought repatriation, but Burke Museum denied the request.²¹³ The Stolo nation is not a U.S. federally recognized tribe and, thus, does not have standing under NAGPRA. Thus, in 1997, the Nooksack tribe, which is federally recognized, requested the return of T’xwelátse on behalf of the Stolo as “one item that a family would like to retrieve.”²¹⁴ Upon consideration of the repatriation demand, the Burke Museum evaluated several questions about T’xwelátse and his relationship to the Nooksack tribe. Initially, the museum needed to determine whether T’xwelátse was an “object of cultural patrimony.” Two factors are relevant to this inquiry. First is whether the statue in the Burke was actually T’xwelátse. Second, even if T’xwelátse was in the possession of the Burke, did the Stolo abandon him when they journeyed north in the late 1880s? Finally, cultural affiliation must be established between the Nooksack and T’xwelátse. NAGPRA provided the Stolo and Nooksack with little guidance on form completion and repatriation standards. Thus, they relied heavily on direction from the Burke Museum. It took nearly ten years of letters,

²¹¹ Campbell, “The Transformative Power of T’xwelátse,” 66.

²¹² Campbell, “The Transformative Power of T’xwelátse,” 61.

²¹³ Megon Noble, “T’xwelátse: ‘Learning to Live Together in a Good Way.’”

²¹⁴ Campbell, “The Transformative Power of T’xwelátse,” 6; Megon Noble, “T’xwelátse: ‘Learning to Live Together in a Good Way.’”

negotiations, and countless hours of research, but the Burke finally accepted the Nooksack's repatriation request in March 2006.²¹⁵ Noble explained that the museum and tribes exchanged paper and letters for years with little progress. Once face-to-face meetings began, however, barriers broke down, and trust and transparency developed between the groups.²¹⁶ Museum staff appreciated the sincere need for T'xwelátse's return to the tribes, and the tribes understood the constraints placed upon the museum through their mandated compliance with NAGPRA and Washington's state laws.²¹⁷

In order to establish their cultural affiliation with T'xwelátse, as required by NAGPRA, the Stolo and Nooksack tribes shared detailed oral histories with the Burke Museum. Before this, the Burke knew little about T'xwelátse. In fact, the museum had difficulty classifying him as part of the ethnology or archaeology departments within the museum.²¹⁸ If amicable relations between the Stolo and Burke museum still required fifteen years of negotiations to repatriate a sacred object under NAGPRA, this process becomes even more complicated and time-consuming when the relationship between the museums and Indian tribe is strained. Not all tribes share the Stolo and Nooksack's willingness to share information and work to strengthen ties with museum staff and members of the scientific community. For some tribes, their oral histories and traditions are sacred. For others, a long history of deception and exploitation with anthropologists has led to a mistrust of museums and scientists. For these tribes, they simply refuse to be the object of study.²¹⁹

²¹⁵ Megon Noble, "T'xwelátse: 'Learning to Live Together in a Good Way.'"

²¹⁶ Noble, interview.

²¹⁷ Noble, interview; Campbell, "The Transformative Power of T'xwelátse," 42.

²¹⁸ Campbell, "The Transformative Power of T'xwelátse," 74.

²¹⁹ Campbell, "The Transformative Power of T'xwelátse," 147-50.

The NMAI, passed in 1989, sought to preserve the collection of George Gustav Heye by integrating it into the Smithsonian Institution and establishing the National Museum of the American Indian, a museum dedicated solely to Native Americans, located on the National Mall. Further, NMAI required the Smithsonian to inventory its massive collection and repatriate human remains and sacred objects. The following year, in 1990, NAGPRA responded to the legislative inadequacies of ARPA by requiring all museums and federal institutions to catalog their collections and return to tribes certain human remains and objects. As the repatriation of T'xwelátse demonstrates, however, the implementation of NAGPRA is subject to serious deficiencies.

The case study of UNL also shows the difficulties that can arise when institutions or individuals are unwilling to comply with NAGPRA's provisions. The example of UNL also offers a snapshot of society's views of Native Americans; the responses of UNL administrators, students, and general public paint a picture of an evolving, respectful attitude toward Native Americans.

CHAPTER FIVE
BESSEY HALL ROOM 109:
A CASE STUDY OF THE UNIVERSITY OF NEBRASKA- LINCOLN

In 1997, UNL publicly admitted that Native American bones subject to NAGPRA lay hidden in the university's anthropology department. During the next several years, the UNL controversy dominated newspaper headlines as demonstrations and rumors swirled around the university and, at times, threatened to turn violent—even deadly. Several investigations ensued, one by the Nebraska State Patrol and the other by a university-hired attorney. Based on the conclusions of these reports, neither the Lancaster County Attorney nor the U.S. Attorney filed charges against Karl Reinhard. Individuals in both the academic and Native American communities assert that the investigations' conclusions were suspect and incomplete; these persons maintain the guilt of the professor.

Although these events occurred at UNL in 1997, they still permeate the minds of university students, faculty, staff, and American Indian tribes. UNL's BH 109 discovery provides an illuminating case study of evolving Native/non-Native relations in the post-Civil Rights era. Before the passage of NAGPRA, many scientists and museum professionals valued Native American remains in terms of their contribution of scientific knowledge. As the case study at UNL demonstrates, however, members of scientific and museum communities are beginning to view the collection and examination of Native American bones through the lens of human rights. This shift is the result of legislation, such as NAGPRA, mediating Western science and Native American beliefs. In addition, UNL's experience also demonstrates the value of the new "CUI Rule" added to

NAGPRA in May 2010.²²⁰ Because of the discovery in BH 109, UNL found itself at the leading edge of NAGPRA enforcement and the disposition of “culturally unidentifiable” remains.²²¹ NAGPRA, as passed in 1990, did not require the return of Native American bodies and funerary objects that could not be identified as belonging to a modern-day tribe. The CUI rule, however, requires the repatriation of culturally unidentifiable remains.

The Discovery in Bessey Hall Room 109

The 1997 discovery of Native American human remains in BH 109²²² combined with the 1998 confirmation that the UNL anthropology department incinerated Native American remains caused both severe criticism, for past mistreatment of Indian objects, and immense praise, for UNL’s efforts to ameliorate its past wrongs. Upon the discovery of Native American bones in BH 109, rumors and accusations circulated about who hid them and with what motive. Although numerous stories about the perpetrator(s) exist, this paper focuses on the reactions of UNL professors, officials, students, the general public, the local and national press, and Native Americans. Their responses afford a unique opportunity to explore Native/non-Native relations in the post-Civil Rights era.

The discovery of bones in BH 109 flowed into long-standing and ongoing debates concerning the disposition of Native American remains and associated funerary objects

²²⁰ Secretary of the Interior, *Native American Graves Protection and Repatriation Regulations*, 43 C.F.R 10.11. “CUI Rule” is the term for the regulations, which took effect on May 14, 2010, by the Secretary of the Interior in the implementation of NAGPRA concerning the disposition of culturally unidentifiable human remains.

²²¹ Culturally unidentifiable remains have been determined to be Native American, but they cannot be linked to a single, federally recognized tribe.

²²² Bones were also found other places. But for simplicity, I will refer to the discovery of Native American bones at UNL as “BH 109.”

housed in federal institutions and museums. An examination of the events at UNL demonstrate evolving attitudes towards Native Americans; the importance of the interaction, consultation, and forced dialogue of NAGPRA; and UNL's place at the leading edge of the national repatriation legislation.

Several versions of the story regarding BH 109 exist. One account relates that, in October 1997, Berkley Bailey, a visiting assistant professor for the anthropology department, unwittingly found bones in BH 109. He visited the room because it held the department's teaching collections, and he wanted to examine them in preparation for a physical anthropology class. He described seeing "a skeleton laid out on the table, out in the open...[t]here were also bones that had been dropped on the floor and swept in the corner of the room by a janitor."²²³ Immediately upon the discovery, Bailey reported his findings to Robert Hitchcock, the anthropology department chair, because he thought the remains might be Native American.²²⁴

In another version, an anthropology graduate student and professor found the bones in BH 109 and requested permission from the anthropology department chair to remove them for examination by a forensic anthropologist. Hitchcock was concerned because prior to the student's and professor's request, no one knew the bones existed. Hitchcock reported the bones to UNL officials because he suspected they were "NAGPRA sensitive material that was purposely not reported."²²⁵ If the bones were "purposely not reported," it would be a clear violation of NAGPRA, and UNL could be

²²³ Joe Duggan, "Questions unearthed, answers remain Treatment of Indian remains has UNL buried in controversy," *Lincoln Journal Star*, July 19, 1998.

²²⁴ Duggan, "Questions unearthed," *Lincoln Journal Star*, July 19, 1998.

²²⁵ Robert Hitchcock, interview by author, Lincoln, NE, October 28, 2010.

subject to fines. Hitchcock brought this issue to the attention of anthropology faculty, who voted unanimously to report the discovery and return the remains.²²⁶

The Response of UNL Administration

The administration at UNL took two major actions in response to Hitchcock's report and the announcement of the 1960s incineration of Native American remains. First, UNL hired Robert T. Gritit, an attorney who practiced in Lincoln, to analyze UNL's compliance with NAGPRA and to evaluate the discovery of Native American remains on campus after the 1995 inventory. The discovery of bones in BH 109 suggested that UNL had violated NAGPRA's requirement to document *all* Native American remains within its possession. After his investigation, Gritit concluded that the university's 1995 inventory complied with NAGPRA. In his report, he recounted UNL's inventory process. When NAGPRA passed in 1990, UNL formed a NAGPRA committee to inventory artifacts and provide a list of items for submission. The NAGPRA committee's final report indicated UNL's possession of the remains of 1,818 individuals; 18 boxes of remains came from the anthropology department's teaching collections.²²⁷ The committee could not determine cultural affiliation for many of the remains "because of insufficient information on their excavation or original location and/or their mixed cultural context."²²⁸ Despite the large number of culturally

²²⁶ Hitchcock, interview.

²²⁷ *Report of Robert T. Gritit to Richard R. Wood, Vice President and General Counsel University of Nebraska-Lincoln* (August 14, 1999), 15.

²²⁸ *Report of Robert T. Gritit*, 15.

unidentifiable objects, Tom Myers, UNL NAGPRA Coordinator until July 1998, thought that UNL did “about as good a job as anyone else in the country.”²²⁹

Second, university officials signed the “September 1 Agreement.” Chancellor James Moeser and NAGPRA Coordinator Priscilla Grew met with 17 tribes on September 1, 1998 in the “Conference on Repatriation of Native American Remains.” That same day, university officials and Indian tribes signed a declaration in which the UNL administration promised to repatriate all Native American remains under NAGPRA. The September 1 Agreement called for “the return of Native remains and burial property, including those remains assigned a tentative tribal affiliation.” In addition, it demanded the “examination of all existing records concerning unaffiliated prehistoric and historic human remains and burial property within the next four weeks.”²³⁰ UNL also pledged to create a memorial site on its East Campus to recognize and honor the Native American remains incinerated by UNL in the 1960s.²³¹

Chancellor Moeser knew that these provisions could cause controversy in the scientific community, but he urged the Academic Senate to pass the resolution because it was “the right thing to do.”²³² Some members of the Academic Senate thought the decision was “hasty” and required a more thorough discussion before approval.²³³ One

²²⁹ *Report of Robert T. Gruit*, 10.

²³⁰ University of Nebraska-Lincoln, “UNL Academic Senate Meeting Minutes” East Campus Union, Great Plains Room (September 1, 1998), <http://www.unl.edu/asenate/98sep1mins.htm> (accessed November 23, 2010).

²³¹ UNL Academic Senate Meeting Minutes (September 1, 1998).

²³² UNL Academic Senate Meeting Minutes (September 1, 1998).

²³³ Roysircar Sodowsky, Educational Psychology, “appreciated the motion being made, she felt that the Senate should not make a hasty decision and that she would like to discuss it with the faculty in her department.” Jensen, Psychology, thought “the Senate is moving too rapidly in this decision and that it is not the business of the Senate to give

member thought “serious deleterious effects to archaeological research” could result from the Agreement.²³⁴ Despite these concerns, the motion passed by a vote of 50 to 1.²³⁵ The expediency with which the Agreement passed showed the university’s desire to comply with NAGPRA and mend its relationships with tribes.

NAGPRA Coordinator Priscilla Grew recognized that the discussion of Native American remains would bring to the surface the deep history of the treatment of Native Americans. She noted, “Something that happened 130 years ago becomes today because you have the remains in front of you. It adds an incredible intensity.”²³⁶ At the September 1 meeting, Grew described “tremendous intensity [from Native Americans] directed at [UNL] because of what had happened here.”²³⁷ A major goal of NAGPRA is the confluence of museum staff and scientists together with traditional religious cultural leaders to work together in order to identify and return remains. Repeated meetings with tribes during September 1998 cultivated long, personal relationships between UNL officials and tribal members.²³⁸ These relationships contributed to the success of the September 1 Agreement and continue to serve both Native Americans and UNL officials in the repatriation process.

While NAGPRA required the consultations between UNL officials and Native Americans, it did not obligate UNL to fund any of the meetings; tribes must pay for repatriation costs. To show its determination to reach an agreement and in recognition of

rewards to the administration based on five minutes notice.” UNL Academic Senate Meeting Minutes (September 1, 1998).

²³⁴ Harbison, Chemistry, voiced this concern. UNL Academic Senate Meeting Minutes (September 1, 1998).

²³⁵ UNL Academic Senate Meeting Minutes (September 1, 1998).

²³⁶ Priscilla Grew, interview by author, Lincoln, NE, December 2, 2010.

²³⁷ Grew, interview.

²³⁸ Grew, interview.

the importance of tribal consultations, UNL paid for each tribe's travel expenses and held NAGPRA workshops upon a tribe's request. Neither of these actions was required under NAGPRA. From February 1998 through June 1999, NAGPRA expenses totaled \$194,798; this amount included \$36,556 for Gritit's investigation and report but does not account for staff time devoted to NAGPRA.²³⁹

Approval of the September 1 Agreement was not unanimous; some groups disagreed with the decision of immediate repatriation of unaffiliated Native American remains. The Nebraska Association of Scholars requested that UNL retain the Native American remains in its possession to "defend scholarship and academic freedom." The group questioned whether the 670 culturally unaffiliated remains should be returned. They cited "academic freedom" and stated, "If it doesn't do *tangible* harm to anybody...people don't have the right to intervene."²⁴⁰ This view underscores the importance of the dialogue between scientists and Indians. An awareness of Native American culture provides the knowledge that, in fact, Native Americans do experience tangible harm from the unearthing and mistreatment of their ancestors' remains.

The Response of the Public

Past and present newspaper articles document the various reactions of students, professors, and Native Americans, providing a litmus test of public attitude towards the topic. Newspaper coverage and the public's reaction to the Nebraska State Patrol Report,

²³⁹ Priscilla Grew, *Chronology of NAGPRA Implementation at the University of Nebraska-Lincoln (UNL) Following the Signing of the September 1, 1998 Agreement with the Signatory Tribes*. From February 1998 through June 30, 2001 NAGPRA expenses totaled \$393,896, not including staff time devoted to NAGPRA.

²⁴⁰ Lindsay Young, "Researchers suggest keeping some remains," *Daily Nebraskan*, September 24, 1998.

the Gruit Report, and the Academic Rights and Responsibilities Committee's (ARRC) recommendations evidence shifting perspectives about the mistreatment of Native American remains. These articles, though not always factually accurate, show what information was readily accessible by the public.²⁴¹ In addition, which stories newspapers chose to print, as well as an author's perspective, can be indicative of broader public opinion. The *Daily Nebraskan (DN)*, the UNL student newspaper, published extensive coverage of UNL's desire to comply with NAGPRA, as did the *Lincoln Journal Star (LJS)*, a local Lincoln daily newspaper. National news outlets, including the *Seattle Times*, *Los Angeles Times*, *The National Law Journal*, *Indian Country Today*, and *USA Today* also reported on the story.

Newspaper coverage of the September 1 Agreement and UNL repatriation efforts was generally favorable. The *DN* applauded administrators and those that sought to return the remains to Indian tribes. In contrast, newspapers, such as the *LJS*, *Indian Country Today*, and *Seattle Times*, were not as sympathetic in their reports about Reinhard, the anthropology professor accused of hiding the bones in BH 109. Whether or not Reinhard performed these actions is not the point. The significance is that newspapers reported these actions as unacceptable behavior.

One *LJS* article described Reinhard "manipulating" the jaw of an Omaha Indian child's skull, as if it were talking to the class. He also decorated a mummified ear with a copper ring.²⁴² When allegations of Reinhard's misconduct surfaced, other accusations emerged. On May 28, 1999, the *LJS* published an article reporting that Roger Dale Bjorklund, a convicted murderer, filed a motion for a new trial based on assertions that

²⁴¹ Grew, interview. Grew explained that *DN* articles contained inconsistencies.

²⁴² Duggan, "Questions unearthed," *Lincoln Journal Star*, July 19, 1998.

Reinhard tainted skeletal evidence used in the case.²⁴³ Facts stemming from the article date back to September 22, 1992, the date Candice Harms, a Caucasian freshman at UNL, was murdered. Three months later, Bjorklund confessed to the kidnap, rape, and murder of Harms. He also told police where he buried her remains. Law enforcement officials asked Reinhard, a physical anthropologist, to determine whether the remains could be those of Candice Harms, based on their age, race, and gender. In November 1993, a jury unanimously convicted Bjorklund of first-degree murder.²⁴⁴

The *LJS* article reported that Bjorklund filed a motion for a new trial, based on allegations that Reinhard mishandled Candice Harms' remains and kept them in an unsecured facility—BH 109. The article stated, “[C]ourt records allege that Reinhard pretended to play basketball with the victim’s skull, removed a cardboard box containing her remains only after complaints about the odor, and handled the remains in a slip-shod fashion.”²⁴⁵ Reinhard vehemently denied these accusations, and the court never granted Bjorklund a new trial. The *LJS* reported the alleged misconduct concerning both the Native American remains and the murder investigation as grossly offensive conduct, demonstrating the notion that the handling and storage of human remains, whether those of a Caucasian or Native American, require care and respect.

Although the U.S. legal system purports to guarantee that an accused is “innocent until proven guilty,” the shocking possibility of such mistreatment of human remains

²⁴³ Joe Duggan, “Prof accused of mishandling remains Bjorklund bids for new trial in Candi Harms murder,” *Lincoln Journal Star*, May 28, 1999. This article was the basis for a lawsuit that Reinhard filed against Hitchcock. *Reinhard v. Hitchcock*, 2003 WL 23790890 (D. Neb. 2003).

²⁴⁴ *Reinhard v. Hitchcock*, 2003 WL 23790906 (D. Neb. 2003), paragraphs 7-11.

²⁴⁵ Duggan, “Prof accused of mishandling remains,” *Lincoln Journal Star*, May 28, 1999.

attached a presumption of guilt to Reinhard, an association that he never overcame. Although the Grimit Report concluded that no solid evidentiary basis existed for the accusations against Reinhard, it conceded, “[V]irtually everyone (except Reinhard) accuses Reinhard of being responsible for the human remains in [BH 109].”²⁴⁶ *Indian Country Today* described the “callous handing” of Native American remains by UNL anthropologists, who stored four boxes of remains containing bone fragments from 23 individuals in drawers amidst fast food wrappers.²⁴⁷ The article declared that Reinhard “proved to be the staunchest resister of repatriation reform...Reinhard has espoused the idea that Western science theory supersedes any moral obligation the university has to repatriate the remains.”²⁴⁸ One *DN* article reported the Indian tribes’ call for the immediate suspension of Reinhard and their plan to file a formal resolution based on 20 counts of specific claims.²⁴⁹ Fred LeRoy, a source for the *DN* article, told readers that Reinhard’s suspension would be the best solution to the problems the university faced. He said, “if you look at his past history, [Reinhard] didn’t care.”²⁵⁰ Pamina Yellow Bird, repatriation specialist and member of the Mandan, Hidatsa, and Arikara Indian nations, added that, to Reinhard, the remains were “no more important than garbage...he left bones laying around on counters and stashed in closets.”²⁵¹

²⁴⁶ *Report of Robert T. Grimit*, 13.

²⁴⁷ Avis Little Eagle, “University of Nebraska-Lincoln remains are now bones of ‘Dis’ content,” *Indian Country Today*, May 28, 1998.

²⁴⁸ Avis Little Eagle, *Indian Country Today*, May 28, 1998.

²⁴⁹ Lindsay Young, “Tribes call for professor’s sanction,” *Daily Nebraskan*, September 17, 1998.

²⁵⁰ Young, “Tribes call for professor’s sanction,” *Daily Nebraskan*, September 17, 1998.

²⁵¹ Young, “Tribes call for professor’s sanction,” *Daily Nebraskan*, September 17, 1998.

The bias against Reinhard signals a broader shift in public opinion. Newspapers, particularly the *LJS*, largely restricted Reinhard's defenders to the "Letters to the editor" section. One UNL chemistry professor pointed to the bylaws of the UNL Board of Regents and the clear devotion to "freedom in research;" this research is not required to "find favor with some particularly noisy group of activists." The professor attributed complaints against Reinhard as simply acts of a "witch hunt."²⁵² One letter reminded readers of the forensic work that Reinhard completed for state authorities and thanked Reinhard for his work on these investigations.²⁵³ Finally, Dorothy M. McEwen, a retired secretary who worked in the anthropology department at the time of Reinhard's questionable actions, wrote that she observed Reinhard's behavior towards objects and colleagues as respectful and careful.²⁵⁴

The severity of the charges against Reinhard, combined with the unfavorable press coverage, fostered a presumption of his guilt, despite the conclusions of the Nebraska State Patrol Report and the Grit Report. When the Nebraska State Patrol concluded that there was no evidence of any violation of state criminal code, the *DN* quoted tribal representatives, who argued that the investigators were not objective and did not interview all relevant witnesses. The *DN* featured two quotations from the article in the "Quotes of the Week" section: Pamina Yellow Bird stated, "I'm extremely disappointed... I still maintain laws were broken. The investigation was not very

²⁵² Gerry Harbison, letter to the editor, *Lincoln Journal Star*, December 3, 1998.

²⁵³ David Jaffe, letter to the editor, *Lincoln Journal Star*, June 3, 1999.

²⁵⁴ Dorothy M. McEwen, letter to the editor, *Lincoln Journal Star*, April 9, 2000.

thorough.”²⁵⁵ Chancellor Moeser spoke in favor of the Nebraska State Patrol Report. His statement appeared directly below Yellow Bird’s and was much less compelling: “I’m pleased to learn that there’s no violation of state law.”²⁵⁶ While Yellow Bird’s quotation evokes an emotional response from the reader, Moeser’s statement deals strictly with the law.

At the outset of his report, Gritmit explained, “I have consciously avoided using footnotes...in the interest of space, I have not made reference to each specific document or each specific piece of evidence...that additional material would be of little value.”²⁵⁷ Similar to newspaper articles, the Gritmit Report forced the public to rely on conclusions drawn by the author rather than allowing readers to conduct their own evaluation of the evidence. The Nebraska State Patrol remains in possession of all the documents it used in its report. However, these documents are only available to the public upon written request and the payment of at least \$380.00.²⁵⁸

The ARRC, a faculty committee that investigated allegations about Reinhard’s professional conduct, concluded that UNL should terminate his employment. The tone of the press coverage regarding the ARRC report is noticeably different than that about the Nebraska State Patrol Report. For example, in an *Aberdeen American News* article, the Nebraska State Patrol Report “*appears to clear*” Reinhard of criminal charges, but the

²⁵⁵ Lindsay Young, “UNL violated no state law, report finds,” *Daily Nebraskan*, October 21, 1998; Pamina Yellow Bird, Quotes of the Week, *Daily Nebraskan*, October 23, 1998.

²⁵⁶ Chancellor James Moeser, Quotes of the Week, *Daily Nebraskan*, October 23, 1998.

²⁵⁷ *Report of Robert T. Gritmit*, 1.

²⁵⁸ Wendy Wussow and Kari Schmidt, fax message to author, November 30, 2010. The Nebraska State Patrol explained that the expenses stemmed from the number of documents found and the clerk’s time to read through the documents and make the required redactions.

ARRC report “recommended that the university fire” Reinhard.²⁵⁹ The *LJS* printed Reinhard’s response to the ARRC report, “They can go to hell in a hand basket.”²⁶⁰ Though Lincoln attorney David Buntain stated that the ARRC’s decision was not supported by sufficient evidence, he explained to the *LJS*, “Reinhard acted inappropriately and unprofessionally with students and colleagues in some cases and...was ‘often rude, insensitive, and annoying.’”²⁶¹ UNL officials did not act on the recommendation of the ARRC report, but it received more favorable news coverage than either the Nebraska State Patrol Report or the Gruit Report.

Many of the statements printed in the *DN* and *LJS* predicted that UNL’s reaction to these events would set an important precedent and raise national awareness about NAGPRA. For example, the *DN* asserted that the September Agreement “set a national example”²⁶² and should inspire “any university that holds culturally unaffiliated remains [to] feel pressured to re-examine those remains and, if needed, repatriate those bones and make amends with the proper tribe’s descendants.”²⁶³ Native Americans reacted with both sadness and outrage, but the September Agreement offered encouragement of UNL’s progression toward reconciliation.²⁶⁴ The front page of the *DN* showed Native American protestors sitting on the steps of the Nebraska State Capitol. One woman held a

²⁵⁹ “Investigation of remains closer to resolution,” *Aberdeen American News*, May 13, 2000.

²⁶⁰ “Committee urges firing professor in bones controversy,” *Lincoln Journal Star*, March 29, 2000.

²⁶¹ Martha Stoddard, “Embattled UNL professor to keep job, Investigator: Evidence lacking in misconduct charges,” *Lincoln Journal Star*, February 1, 2001.

²⁶² Young, “Researchers suggest keeping some remains,” *Lincoln Journal Star*, September 24, 1998.

²⁶³ “A noble decision,” opinion pages, *Daily Nebraskan*, September 3, 1998.

²⁶⁴ Regina Thunderhawk, University of Nebraska-Lincoln, “UNL Academic Senate Meeting Minutes” East Campus Union, Great Plains Room (September 2, 1998), <http://www.unl.edu/asenate/exec/98sep2mins.htm> (accessed November 23, 2010).

sign with the word “Distressed” capitalized and bolded above a picture of an upside down U.S. flag; another sign pleaded, “Let Our Ancestors Remains Rest in Peace.” Protestors marched from the Nebraska State Capitol to UNL’s campus to raise awareness of the improper treatment of human remains by the anthropology department in the 1960s. While the disposal of remains in the 1960s might not have been offensive at the time, society’s beliefs have shifted and such conduct is no longer acceptable.²⁶⁵

The Response of Karl Reinhard

Although several investigations technically exonerated Reinhard, the accusations concerning BH 109 were not without consequence. In a United States Nebraska District Court complaint, Reinhard’s attorney explains that the charges against him “were devastating...[h]is work in forensic activity was forever tainted so that we would be completely vulnerable to challenge any time he offered testimony. His reputation has been irreparably damaged.”²⁶⁶ On a more personal level, after the publication of the various allegations against him, Reinhard “s[a]nk into depression” and entertained “thoughts of suicide as a rational solution to saving the reputation of the Department of Anthropology...he became so lethargic he could not function at his job or with his family.”²⁶⁷ Although the Nebraska State Patrol Report and Gruit Report both cleared Reinhard of any *legal* wrongdoing, negative stigma continued to surround him because of the heinous nature of the accusations. The gravity of these assertions is evidence of a

²⁶⁵ Kim Sweet, “Demonstrators protest remains’ handling,” *Lincoln Journal Star*, September 1, 1998.

²⁶⁶ Reinhard v. Hitchcock, 2003 WL 23790897 (D.Neb. 2003), paragraphs 21 and 22.

²⁶⁷ Reinhard v. Hitchcock, paragraphs 21 and 22.

broader social trend that is more sympathetic to the protection of Native American remains, artifacts, and beliefs than to the Western emphasis on scientific analysis.

The Response of the Law

University administrators nationwide, scientists, and Native Americans realized the potential influence of the decision to repatriate Native American remains, even those considered culturally unaffiliated. The *Seattle Times* declared the “unfolding drama” at UNL “could shake the foundations” of NAGPRA.²⁶⁸ The *DN* stated that UNL’s “decision [to return unaffiliated remains and funerary objects] may have opened the door for other groups to oppose research and scientific test material.”²⁶⁹ UNL’s discretionary action to repatriate remains in 1998 became required under NAGPRA on May 14, 2010, when the Secretary of the Interior established enhanced regulations concerning Native American remains that have not been culturally identified.²⁷⁰ Prior to this date, in order to return culturally unaffiliated remains, NAGPRA required museums and federal institutions to complete a complicated agreement approval and hearing process that required permission from the Secretary of the Interior. During the 20 years under the former system, the Secretary of the Interior approved 82 agreements, which resulted in the return of 4,000 sets of remains.²⁷¹ Six months after enactment of the new CUI Rule, museums and federal institutions have already returned approximately 4,000 unaffiliated remains.

²⁶⁸ Diedra Henderson, “Human Bones: What to do with them?” *Seattle Times*, October 11, 1998.

²⁶⁹ “A noble decision,” opinion pages, *Daily Nebraskan*, September 3, 1998.

²⁷⁰ The CUI regulations passed March 15, 2010, but came into force May 2010.

²⁷¹ National Parks Service Release, “Process Established for Disposition of Native American Human Remains,” <http://home.nps.gov/news/release.htm?id=973> (accessed December 11, 2010).

Instead of the previous cumbersome process, museums and federal institutions may now publish a notice of action 30 days prior to repatriation in place of ad hoc approval from the Secretary of the Interior. In addition, consultation between Indian tribes and NAGPRA officials led to the identification of approximately 5,000 previously unaffiliated remains.²⁷² The CUI rule demonstrates the ability of NAGPRA to transition in tandem with shifting societal norms. The controversy at UNL paved the way for a general acceptance of the CUI rule through its socially moderate but legally progressive response to the events surrounding BH 109.

The discovery of Native American remains in BH 109 and its aftermath was not the first time in state history that Nebraska found itself at the forefront of controversy with the repatriation of Native American objects. A decade earlier, in 1988, the Nebraska State Historical Society (NSHS), through its executive director James Hanson, refused repeated Pawnee requests for repatriation.²⁷³ Hanson explained that “a bone is like a book...and I don’t believe in burning books.”²⁷⁴ Other NSHS officials explained that Native American religious beliefs concerning their dead and their associated funerary objects “are not religious objects like crucifixes, rosaries and bibles.”²⁷⁵ Despite resistance from the NSHS, on June 1989—17 months before the passage of NAGPRA—the Nebraska state legislature passed the Unmarked Human Burial Sites and Skeletal

²⁷² National Parks Service Release.

²⁷³ Robert M. Peregoy, “Nebraska’s Landmark Repatriation Law: A Study of Cross-Cultural Conflict and Resolution,” *American Indian Culture and Research Journal* 16:2 (1992): 139-195; Orlan J. Svingen, “The Pawnee of Nebraska: Twice Removed,” *American Indian Culture and Research Journal* 16:2 (1992): 121-137; James Riding In, “Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians,” *Arizona State Law Journal* (Spring 1992): 11-34.

²⁷⁴ Peregoy, “Nebraska’s Landmark Repatriation Law,” 141.

²⁷⁵ Peregoy, “Nebraska’s Landmark Repatriation Law,” 141.

Remains Protection Act.²⁷⁶ This law required public museums to repatriate any items or skeletal remains linked to a living tribe. The Nebraska legislature passed the act, even though it estimated that the NSHS would lose around 10,000 artifacts and one third of its 800 Native American skeletons.²⁷⁷ In September 1990, the NSHS returned more than 400 coffins for reburial.²⁷⁸ In both the NSHS and BH 109 episodes, the decisions and voluntary actions taken by the Nebraska state legislature and the UNL administration, respectively, later became mandatory under federal law.

In the aftermath of the BH 109 incident, Chancellor Moeser said, “[UNL] learned a great deal from this experience. We have greatly appreciated the assistance and support of the tribal leaders who were signatories of the [Agreement], and I believe [the Gritmit Report] clearly demonstrates our strong commitment to follow the law and to do the right thing. We will continue to do so.”²⁷⁹ Since 1998, UNL has adhered to this commitment. Its most recent repatriation was on September 10, 2010 with the return of the remains of 436 individuals and 159 associated funerary objects.²⁸⁰

²⁷⁶ *Unmarked Human Burial Sites and Skeletal Remains Protection Act*, Neb. Rev. Stat. §§ 12-1201 - 12-1212 (2008).

²⁷⁷ Geoffrey Cowley et al., “The Plunder of the Past,” *Newsweek*, June 26, 1989.

²⁷⁸ Svingen, “The Pawnee of Nebraska,” 133.

²⁷⁹ *Report of Robert T. Gritmit*, “News Release” cover page.

²⁸⁰ Priscilla Grew, *Chronology of NAGPRA Implementation at the University of Nebraska-Lincoln (UNL) Following the Signing of the September 1, 1998 Agreement with the Signatory Tribes*.

CHAPTER SIX CONCLUSION

A society's laws provide insight into its cultural values and beliefs. A comparative analysis of early and modern artifact laws reveals a notable shift in legislative thought and action. The Antiquities Act of 1906 sought to protect Indian artifacts from foreign excavators and preserve them for study by American scientists. In 1979, ARPA strengthened the Antiquities Act by providing a more detailed description of artifacts and sites subject to its enforcement. NMAI and NAGPRA, enacted in 1989 and 1990, respectively, created—for the first time in U.S. history—retroactive policy regarding Native American human remains and sacred objects within the possession of museums or federal institutions.

Although it certainly articulates the most protective policy to date, the implementation of NAGPRA has not been without serious difficulties. Take, for example, the repatriation of T'xwelátse. The two entities on opposite sides of that repatriation process present a “best-case” scenario. The Burke Museum prides itself on positive relations with Indian tribes, and the Stolo (and, eventually, the Nooksack) exercised patience and a willingness to negotiate with museum staff. Yet, the return of T'xwelátse took 15 years.

The UNL case presents another example of NAGPRA's enforcement dilemmas. Tribes can only request the items reported by museums and federal institutions. Native American objects hidden deep within museum and university walls, although subject to NAGPRA, do not become part of the repatriation process. Federal institutions caught

withholding artifacts are subject to penalties, but NAGPRA currently has no investigative authority—its power is merely reactionary.

The juxtaposition of pre-NAGPRA behavior, including Cody's Wild West and Boas' artifact excavation, and post-NAGPRA conduct, a case study from UNL, demonstrates society's evolving attitude toward Native Americans. Media coverage of Reinhard's alleged mistreatment of the Omaha Indian child's remains and the remains of Candice Harms show changing norms concerning the treatment of Native American remains. Regardless of the timeframe, Reinhard's alleged actions towards the remains of murder victim Candice Harms, a Caucasian female, are considered offensive. The alleged behavior concerning the Omaha Indian child's skull might have been acceptable or even comical in another context, but the *LJS* declared that both sets of conduct were offensive and intolerable. The fact that Reinhard's behavior regarding both sets of remains was viewed as equally distasteful provides evidence of an important transition within the public's perspective—a noteworthy shift from Native American bones viewed as mere scientific artifacts to a collective understanding that ancestral remains are crucial to many Native Americans' religious and cultural practice.

The BH 109 events at UNL provide a lens through which one may capture the shifting viewpoints about Native American remains. This picture illuminates the synchronization process between broader historical forces and the more specific provisions within NAGPRA. The declarations of the UNL administration, faculty, students, Native Americans, and the press all provide examples of the changing tide of Native/non-Native relations. Perhaps this thesis presents another.

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