

Comment

# Antiscientific Laws? A Brief Defence of Repatriation Laws

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**Abstract:** Weiss's paper argues that repatriation laws prevent further research and new scientific knowledge, particularly in anthropology. For Weiss and others, these laws are unscientific. In this commentary, I offer a brief defence of repatriation laws. I argue that these laws prevent further significant historical harms and trauma that can result from research on Native American remains and that researchers ought to embrace such laws. Furthermore, I suggest we have reason to be sceptical about Weiss's argument.

**Keywords:** repatriation laws; NAGPRA; repair; Native Americans; antiscientific

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Elizabeth Weiss's paper 'The Study of California's Past is Dead and Reburied', published in this same journal, offers an analysis of anthropological research on Native American human remains in Californian public universities following the Native American Graves Protection and Repatriation Act (NAGPRA) and more specifically the California Native American Graves Protection and Repatriation Act (CalNAGPRA). In brief, NAGPRA requires federally funded institutions to return Native artefacts, including but not limited to human remains and funerary objects, to federally recognised tribes who have rightful claims over those artefacts. CalNAGPRA, expands on NAGPRA, requiring state-funded institutions in California to proactively reach out to and consult with both federally recognised and non-federally recognised Native American Tribes to repatriate Native artefacts in their possession. Ultimately, these laws ensure the timely return of important cultural artefacts to their rightful owners and form part of a larger reparative process to help repair historical wrongs and the compounding harms associated with holding and researching Native American remains and artefacts. In her paper, Weiss fails to acknowledge the moral importance of these laws. Instead, she is mainly concerned with

the scientific consequences of these laws for anthropological research. She suggests that repatriation laws are antiscientific and warns that they will 'bury our ability to study human remains in California' and the rest of America (Weiss, 2024, p. 2).

This is a strong claim and, in an effort to support it, email replies from 11 publicly funded universities in California are cited, all of which 'indicate' that there are currently no research opportunities involving Native American human remains. In addition, Weiss claims to have reviewed publications in top academic journals over the past nine years, concluding that research on Native American skeletal remains in top research journals and California public universities is vanishing (Weiss, 2024, pp. 2–8). This may be the case, and I am in no position to provide evidence to the contrary. In fact, after conducting a brief search of the journals mentioned in Weiss's paper, I too struggled to find recent publications on Native American skeletal remains. However, I have my doubts as to whether this standard of evidence – email replies and a claimed literature review – is sufficient to support the claim that such research has disappeared, let alone the claim that it will disappear entirely. At the very least, a thoroughly conducted and peer-reviewed literature review would be necessary to support such a claim.

Nevertheless, let us turn to what I consider to be the principal argument in Weiss's paper: *that we have reason to believe research on Native American skeletal remains has disappeared from California public universities and top journals as a result of repatriation laws, and, on these grounds, such laws should be rejected*. Weiss's paper is primarily dedicated to making and supporting the empirical premise of this argument, that research on Native American remains is declining because of repatriation laws. While the normative conclusion is not stated explicitly, it emerges throughout the paper and becomes apparent through Weiss's brief discussion of the ethical issues pertaining to the repatriation of Native American artefacts and remains and her claim that the 'benefits' of studying real human remains outweigh the concerns (Weiss, 2024, p. 9).

My argument here is straightforward: even if repatriation laws do hinder scientific research, this is not a morally justifiable reason to reject repatriation laws. Regardless of the potential benefits of any research, if significant harm ensues, then carrying out that research is unjustifiable and morally wrong. Furthermore, any law designed to prevent significant research harm is morally justifiable and should be wholeheartedly embraced. The notion of significant harm is important here as it sets a threshold for what harm is justifiable when undertaking research. Research often causes *minor* harm that is justified. For instance, when a research participant's human dignity and autonomy are respected, and when informed consent is obtained, research that involves direct minor physical or emotional discomfort to the participant (such as taking a blood sample or conducting a survey that may cause slight distress) is often justified.

The harm caused by anthropological (and other) research on Native American skeletal remains is, in some cases, well above the justifiable harm threshold. For centuries, Western institutions and authorities have systematically exercised control over Indigenous bodies and their property under the prejudiced belief that 'Indigenous Peoples should be treated as property and must remain in perpetual service, both in life and death, to colonially entrenched institutions and non-Indigenous beneficiaries' (Fforde et al., 2023, p. 76). This has resulted in significant harm. Among these harms is the appropriation of Native American human remains by colonisers for research purposes which constitutes a distinct form of trauma suffered by many Native Americans. Thornton refers to this form of trauma as *cultural trauma* (Thornton, 2020, p. 785). Much like other kinds of

trauma, cultural trauma has profound impacts and often leads to severe social and health disparities. Anthropological research (and any research for that matter) that causes such levels of harm is unjustifiable and morally wrong.

Earlier I noted that repatriation laws such as NAGPRA and CalNAGPRA form part of a larger reparative process that aims to help repair historical injustices and associated harms. Repatriation laws have helped to heal individual, community and cultural trauma suffered by Native Americans. By affording Native Americans control over ancestral remains and their rightful historical artefacts of cultural importance, repatriations have brought some closure to episodes of Native American history. Thornton writes that 'closure to trauma is important to mental health on both individual and group levels, and the closure of repatriation has undoubtedly improved the collective mental health of Native Americans in American society, and even that of individual Native Americans' (Thornton, 2003; 2020, p. 793). Repatriation laws prevent further significant harm and the prolongation of trauma. They also help to repair historical injustices and resulting trauma. While repatriation laws such as NAGPRA and CalNAGPRA might negatively impact anthropological research, this is not a morally justifiable reason to reject these laws. Instead, researchers have strong moral reasons to wholeheartedly embrace repatriation laws.

Furthermore, we have reason to believe that the empirical premise of Weiss's argument is not as concrete as she suggests. In other words, we have reason to believe that repatriation laws are *not* unscientific and don't result in the decline of research of Native American remains. Instead, many scholars researching Native American remains and artefacts claim that these laws facilitate more fruitful research opportunities for the field of anthropology and the human sciences more generally. Repatriation laws offer the opportunity for much needed collaboration and are a positive step forward in the way science is conducted and a step away from the deeply colonial and at times harmful ways science has been conducted historically (Fforde et al., 2023, 2020). They enabled a lot of work and research opportunities and new findings have emerged as a result (Raff, 2022).

Many researchers and scholars have objected to repatriation laws for the same reason given by Weiss in 'The Study of California's Past is Dead and Reburied'. Namely, that such laws prevent further research and the advancement of scientific knowledge. However, we have reason to be sceptical of these arguments and objections. Repatriation laws seem positive for scientific inquiry and can present new collaborative opportunities for researchers. Yet, more importantly, these laws help to repair historical harms, and trauma, and aim to right historical wrongs. In her paper, Weiss advances a concern that lacks adequate moral justification.

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