

THERE ARE SKELETONS IN THE CLOSET: THE REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND BURIAL OBJECTS

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INTRODUCTION

What would you do if you discovered that the dead bodies of your relatives had been removed from the grave and placed in a box on a shelf? Worse yet, what if they were placed on public display? What if you saw your grandmother's wedding ring, which she wore to the grave, for sale at a local jewelry store? If you are like most Americans, White, of Judeo-Christian background,¹ you would probably rely on the legal system to provide a remedy for the return of these remains and burial objects.²

Most civilizations believe in burying their dead³ and allowing them to remain in the ground unmolested.⁴ All states have enacted comprehensive legislation regulating the decent and proper treatment of the dead and their sanctuary, and the entitlement of all human beings who die within the state to a decent and proper burial.⁵ Most states provide perpetual care for old or abandoned cemeteries.⁶ In addition, many states have enacted provisions requiring consent for autopsies and regulating the duties of coroners and other

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1. The 1990 Decennial Census reports that 80.3 % of the United States population is White. U.S. Dep't of Commerce, Bureau of the Census, Wash., D.C.. Additionally, the most recent census results show that 49.3 % of the U.S. population report regularly attending Christian churches and 2.5 % report that they are Jewish. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES: THE NATIONAL DATA BOOK (110th ed. 1990).

2. In an attempt to promote heightened sensitivity of this issue, this Note uses the term "burial objects" to refer to those items interred in the grave with the dead rather than the term "grave goods," which is often found in the literature.

3. Historians believe the practice of burying the dead dates back nearly 50,000 years, to subhuman Meanderthalus cultures. SYDNEY ADLER, CEMETERIES: LEGAL AND BUSINESS PROBLEMS 7 (1972).

4. PERCIVAL E. JACKSON, THE LAWS OF CADAVERS AND OF BURIALS AND BURIAL PLACES 170 (2d ed. 1950). "The sentiment of all civilized peoples, since earliest Biblical times, has held in great reverence the resting places of the dead as hollowed ground. In such matters we deal with concerns that basically are spiritual. Awe toward the dead was a most powerful force in forming primitive systems of grappling with the supernatural." Mills v. Carolina Cemetery Park Corp., 86 S.E.2d 893, 898 (N.C. 1955).

5. See *infra* notes 139-41 and accompanying text.

6. See *infra* notes 145-50 and accompanying text.

medical examiners.⁷ Finally, nearly every state protects an individual's right to have his body disposed of as he or his relatives wish.⁸ With such a complex web of legislation protecting human remains and human burials, it is difficult to believe that there are an estimated 600,000 skeletons in museums and in private collections throughout the United States.⁹

It is more understandable, however, when one considers that most of these remains are the remains of Native Americans.¹⁰ "It's very clear there are two policies. There's a policy for Indian bodies and there's a policy for non-Indian bodies."¹¹ Many Native Americans are deeply offended by the treatment of their dead.¹² The widespread removal and retention of dead Indian bodies and burial objects has had a tremendous impact on the Indian people, causing emotional trauma and spiritual distress.¹³ Native Americans have special ceremonies, practices, mortuary traditions, and customs concerning the dead.¹⁴ Most Indian religions believe that an Indian's spirit is released when his or her physical remains are disinterred,¹⁵ and that this spirit cannot rest again until the remains are reburied.¹⁶ Additionally, objects buried with the dead have religious significance beyond their material value and are believed to help the deceased in the afterlife.¹⁷

The belief that human remains should not be disturbed is not unique to Native American cultures. Concern for the dead is a nearly universal trait that is reflected in the common law and statutes of this country.¹⁸ Throughout the centuries people have buried their dead for various reasons, including

7. See *infra* notes 142-44 and accompanying text.

8. See *infra* notes 142-44 and accompanying text.

9. David Arnold, *Indian Artifacts: Where Do They Rightfully Belong?*, BOSTON GLOBE, April 2, 1990, at A29.

10. In this Note, the terms Native American and Indian will be used interchangeably. These terms encompass all Native Americans, Eskimos, Aleuts, and Native Hawaiians.

11. Margaret B. Bowman, *The Re-burial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENV. L. REV. 147, 150 (1989). Ms. Bowman's article addresses those issues surrounding the conflict that arises between the scientific community and Native Americans over reburial of remains uncovered during construction or excavation projects and suggests possible compromise solutions to these problems.

12.

[T]he prevalent view in the society ... that Native American human remains are public property and artifacts for study, display and cultural investment ... is in conflict with and repugnant to those Native people whose ancestors and near relatives are considered the property at issue. Most Native American religious beliefs dictate that burial sites once completed are not to be disturbed or displaced, except by natural occurrence.

REPORT ON S. 978, THE NATIONAL AMERICAN INDIAN MUSEUM ACT, S. REP. 143, 101st Cong., 1st Sess. 1-2 (1990).

13. *Id.*

14. *Id.* See also *Native American Museum Claims Commission Act, Hearings on S. 187 Before the U.S. Senate Select Committee on Indian Affairs*, 101st Cong., 100th Sess. (1988).

15. Disinterment is defined as "the removal of a dead body or remains from its place of repose after disposal has been completed." THOMAS F.H. STUEVE, *MORTUARY LAW* § 9.2, at 67 (5th ed. 1975).

16. See Bowman, *supra* note 11, at 148.

17. *Id.*

18. See *infra* notes 136-48 and accompanying text.

respect for the dead and their relatives, health reasons and religious reasons.¹⁹ Indians and non-Indians alike have sought respect for their dead; yet only non-Indians have received this respect.

Many museums in the United States contain collections of Native American human remains and burial objects.²⁰ The proper treatment of these items is a divisive issue. Indian tribes have made repeated requests for the repatriation²¹ of these items for many years. Few of these tribes have received satisfactory responses to their requests,²² and many have received no response at all.²³ The issue of repatriation is very important to these tribes. Lack of control over their ancestors' remains and burial objects hinders the practice of religious beliefs²⁴ and constitutes a bitter reminder of past discrimination and injustices.²⁵ Many Native Americans see this as a continuing form of discrimination.²⁶

The scientific community²⁷ is also deeply concerned about the repatriation issue. Many scientists believe that they have a right and a responsibility to examine the remains and insist that no remains should be returned to the tribes until they have been examined.²⁸ Moreover, these scientists argue that collecting such data is in the best interest of the Native American peoples and that returning the remains will prevent Native Americans from learning more about their ancestors and about themselves.²⁹ Other scientists acknowledge

19. See ADLER, *supra* note 3, at 7-8; CYRIL J. POLSON, *THE DISPOSAL OF THE DEAD* 3 (2d ed. 1962).

Questions which relate to the custody and disposal of the remains of the dead do not depend upon the principles which regulate the possession and ownership of property, but upon the considerations arising partly out of the domestic relations, the duties and obligations which spring from family relationship and the ties of blood; partly out of sentiment so universal among all civilized nations, ancient and modern, that the dead should repose in some spot where they will be secured from profanation; partly out of what is demanded by society for the preservation of the public health, morality and decency, and partly often out of what is required by proper respect for and observances of the wishes of the departed themselves.

JACKSON, *supra* note 4, at 170.

20. Arnold, *supra* note 9.

21. Repatriation refers to the tribes' efforts to secure the return of their ancestors' remains. Repatriation is commonly defined as a "return or restoration to one's own country," and is usually used to refer to the return of prisoners of war. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1532 (2d ed. 1988).

22. Report of the Panel for a National Dialogue on Museum/Native American Relations, February 28, 1990, at 3 [hereinafter Heard Report]. The Panel was formed at the request of the Senate Select Committee on Indian Affairs and was sponsored by the Heard Museum in Phoenix, Arizona.

23. *Id.*

24. *Id.*

25. *Id.*

26. Harvey Arden, *Indian Burial Grounds: Who Owns Our Past*, NAT'L GEOGRAPHIC, March 1989, at 175, 376-92.

27. The term "scientific community" is used to refer to those archaeologists, anthropologists and museum representatives, among others, who are actively involved in this dialogue.

28. Heard Report, *supra* note 22, at 3.

29. *Id.* at 13.

the necessity of responding to tribal demands for repatriation and have made efforts to work with tribes in order to resolve these problems.³⁰

Native American remains and burial objects are in the hands of private collectors as well.³¹ Art dealers collect and trade Native American art and Native American remains. These dealers feel they play an important role by preserving Native American culture and art.³² Although many of these objects were taken from the graves of Native Americans,³³ these dealers assert the right to retain possession of these objects and oppose repatriation efforts.³⁴

This Note discusses our forefathers' failure to respect the right of Native Americans to let their dead rest in peace. It also discusses the current efforts being undertaken to address the problems resulting from these failures. Section I provides the reader with a brief history of the disinterment of Native American remains and burial objects and the legislative and judicial efforts of Native Americans to bring about the repatriation and reburial of these items. Sections II and III survey the federal and state law pertaining to the Native American claims for repatriation. Finally, Section IV concludes that the common law in this country clearly establishes the right of all people, including Native Americans, to protect the burial sites of their ancestors, and to repatriate those remains which have been wrongfully removed from the earth.

I. PURPOSES FOR WHICH NATIVE AMERICAN BURIAL REMAINS HAVE BEEN SOUGHT

"In 1788 Thomas Jefferson opened a burial mound near his home in Virginia and began an American preoccupation with digging and collecting Native American human remains and burial objects."³⁵

Three distinct groups are responsible for removing most Native American remains from the grave. The earliest group sought Native American remains for racial origin studies.³⁶ Later, archaeologists studying Native American cultures became the leading collectors of Native American

30. Council of the American Association of Museums, *Policy Regarding the Repatriation of Native American Ceremonial Objects and Human Remains* (January 15, 1988).

31. Arnold, *supra* note 9.

32. *Protection of Native American Graves and the Repatriation of the Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646 and H.R. 5237 Before the House Committee on Interior and Insular Affairs*, 101st Cong., 1st Sess. 234-43 (1990) (statement of Mr. James Reid, Antique Tribal Art Dealers Association) [hereinafter Reid Statement].

33. *Native American Grave and Burial Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Committee on Indian Affairs*, 101st Cong., 1st Sess. (1990) (testimony of Mr. Walter Echo-Hawk, Native American Right's Fund) [hereinafter *Hearings on S. 1980*].

34. Reid Statement, *supra* note 32, at 242.

35. Robert E. Bieder, *A Brief Historical Survey of the Expropriation of American Indian Remains*, NATIVE AMERICAN RIGHTS FUND 1 (1990).

36. See *infra* notes 38-47, and accompanying text.

remains and burial objects. Private collectors and traders also seek Native American burial objects and remains for commercial reasons.³⁷

Studies of Racial Origins

The scientific community has fostered the prevailing attitude of disrespect for Indian burial sites. Scientists seeking knowledge about the native inhabitants of this continent are responsible for disinterring most Native American remains.³⁸

Many of the prejudices against Indians that have existed throughout the last two hundred years result from "scientific" facts published by early phrenologists.³⁹ In the early 1800's, *monogenists* believed that all men descended of the same human ancestors, while *polygenists* argued that whites, blacks, and Indians were each separately created.⁴⁰ The polygenists hoped to determine which of these separate races was superior through studies of human crania.⁴¹ In the largest such "Indian Crania Study," the United States Army shipped the heads of unarmed Cheyenne people who were killed at the infamous Sand Creek massacre⁴² to Washington, D.C..⁴³ Other cranial specimens were taken from graves only hours old.⁴⁴ Intelligence rankings were given to each race, based on the measurements of the crania.⁴⁵ Not surprisingly, non-whites were determined to be inferior.⁴⁶ Countless Native American human remains were disinterred for racial origin studies. Most have found their way into museum collections across the country.⁴⁷

Indian bodies were used for other purposes as well. It was not considered outrageous to desecrate Indian grave sites, or the graves of blacks and

37. See *infra* notes 53-84, and accompanying text.

38. The Smithsonian Museum alone has more than 14,000 Indian remains in its collection. REPORT ON S. 978, THE NATIONAL AMERICAN INDIAN MUSEUM ACT, S. REP. 143, 101st Cong., 1st Sess. 1-2 (1990).

39. See Bieder, *supra* note 35, at 10-14. Phrenology is defined as "a system by which an analysis of character and of the development of faculties can allegedly be made by studying the shape and protuberances of the skull." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, *supra* note 21, at 1351.

40. Bieder, *supra* note 35, at 5. The polygenists came to the conclusion that each race was separately created based on skeletal remains of each race that showed little signs of change throughout the centuries. *Id.*

41. *Id.*

42. On November 29, 1864, the Colorado Militia attacked and killed a band of 150 peaceful Cheyenne men, women and children. The event is likened to the Holocaust by the Cheyenne people and has come to be known as the Sand Creek Massacre. See THAN HOIG, THE SAND CREEK MASSACRE (1961).

43. Suzan Shown Harjo, *Let Indians Re-bury Their Dead*, WICHITA EAGLE, Sept. 17, 1989, at 17A.

44. *Id.*

45. *Id.*

46. *Id.* See also Bieder, *supra* note 35, at 2. Tests were conducted by filling the crania of each subject with sand in order to determine the size of the cranial region. The race which demonstrated the largest cranial region was presumed to be the most advanced since it could accommodate the greatest "natural mental power." *Id.* at 11. The results of these tests have since been discredited as non-scientific. *Id.* at 51-52.

47. Interview with Mr. Walter R. Echo-Hawk, Attorney for the Pawnee, Wichita and Three Affiliated Tribes (Nov. 27, 1990).

the poor.⁴⁸ In 1788, King's College students in New York City, who were required to provide corpses for dissecting, often stole bodies during the night from potter's fields and black burial grounds without incident.⁴⁹ When some students became bolder and began taking bodies from the graveyard at Trinity Church, however, the white populous rose up in outrage.⁵⁰ The ensuing riots laid the foundation for early grave protection statutes in the United States.⁵¹ It should be noted, however, that the continued looting of graves in potter's fields and Indian burial sites did not cause protests.⁵²

Archaeological Studies

The nineteenth century witnessed a shift in the study of Indian remains. Emphasis was placed on archaeological studies rather than racial origin studies.⁵³ Thousands of Indian bodies were disinterred as American museums worked to build their collections of Indian artifacts and remains.⁵⁴ Some collectors excavated entire burial mounds primarily to retrieve burial objects that were interred with the dead.⁵⁵ Acquiring good skeletal specimens was incidental to the collection of these burial objects.⁵⁶

Native American remains in museum collections are given little respect. The majority of these remains are stored in boxes and are the subject of scientific research.⁵⁷ Others, however, are on public exhibition.⁵⁸ These remains are treated as relics or fossils of the past, not deserving of basic respect or human decency.⁵⁹ For example, in 1897, famed polar explorer Robert Perry returned from one of his excursions with six live Eskimos.⁶⁰ The Eskimos were taken to the American Museum of Natural History in New York and were housed in the basement.⁶¹ All of the Eskimos contracted pneumonia within two months. Six months later, four of the Eskimos were dead.⁶² One surviving adult left and returned North. The remaining child, whose father had died, was comforted by a funeral held for his father.⁶³ His father was never buried. Rather, the museum workers buried a log wrapped in furs in his

48. See Bieder, *supra* note 35, at 21.

49. WILLARD A. HEAPS, RIOTS U.S.A. 19-21 (rev. ed. 1970). See also Bieder, *supra* note 35, at 21.

50. Bieder, *supra* note 35, at 21.

51. *Id.*

52. *Id.*

53. *Id.* at 23. Archaeology is defined as "The scientific study of the life and culture of ancient peoples." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, *supra* note 21, at 96.

54. See Bieder, *supra* note 35, at 28.

55. *Id.*

56. *Id.*

57. *Hearings on S. 1980*, *supra* note 33, at 473.

58. *Id.*

59. *Id.* at 477.

60. David Arnold, *Peary Delivered Five Living Artifacts*, THE BOSTON GLOBE, April 2, 1990, at B3. See also KENN HARPER, GIVE ME MY FATHER'S BODY (1986).

61. Arnold, *supra* note 60.

62. *Id.*

63. *Id.* at B5.

place,⁶⁴ while the body "was taken to a 'bone house' on a farm in northern New York state, where it was exposed to animals and insects that would eat away the soft tissues. The skeleton was then returned to the museum."⁶⁵ The child, meanwhile, was adopted by a museum worker and did not discover the truth about his father's remains until 1907, when he visited the museum and saw an exhibit entitled: "QISUK — A GREENLAND ESKIMO."⁶⁶

There has been a growing effort to present Native American exhibits in a more humane and sensitive manner in recent years.⁶⁷ Many museums have voluntarily removed Native American remains from their exhibits.⁶⁸ Other museums voluntarily return remains of their tribal ancestors to Native Americans when requested if such remains are readily identifiable.⁶⁹ Still other museums address the concerns of Indian tribes on a case-by-case basis.⁷⁰

Nevertheless, scientists continue to disinter Native American remains and burial objects. In 1971, an Iowa road construction crew accidentally unearthed an unmarked cemetery and twenty-seven graves were unearthed.⁷¹ All but one of the unearthed graves contained bodies of white settlers, which were reburied in a nearby location.⁷² One grave, however, contained the bodies of an Indian woman and her baby. Rather than being reburied with the rest of the bodies, the Indian bodies were shipped to the state archaeologist for study.⁷³

As a result of these early racial origin studies and later archaeological research, the scientific community has built large collections of Native American burial objects and human remains.⁷⁴ Most of these remains and burial objects are still in museum collections.⁷⁵

Commercialized Grave Digging

The disinterment of Indian remains is not limited to scientific research. Countless horror stories tell the tales of the disinterment of Indian remains.⁷⁶

64. *Id.*

65. *Id.*

66. *Id.* Qisuk was his father's name.

67. Vicki Quade, *Who Owns History?*, BARRISTER, April 8, 1990, at 18. (The *Barrister* is a publication of the Native American Rights Fund). For a discussion of the "love-hate" relationship that exists between Native Americans and museums, see Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986). See also Michael Tymchuk, *Skeletal Remains: In Defense of Sensitivity and Compromise*, 8 COUNCIL FOR MUSEUM OF ANTHR. NEWSLETTER 2-3 (1984).

68. Heard Report, *supra* note 22, at 3.

69. *A Perspective on Reburial and Repatriation*, 8 SOC'Y AMER. ARCH. BULLETIN 6 (April, 1990).

70. *Id.*

71. Quade, *supra* note 67, at 16.

72. *Id.* at 17.

73. *Id.*

74. Heard Report, *supra* note 22, at 7.

75. *Id.*

76. Gregg Jones, *Sale of Indian Artifacts Topic of Hot Debate*, ARKANSAS GAZETTE, June 3, 1990, at D6.

In one such case, in 1936, a farmer unearthed a 600 year-old Northern Caddoan Indian cemetery in Salinas, Kansas.⁷⁷ Instead of reburying the bodies, he put them on public display.⁷⁸ All 146 skeletons were exhibited by the farmer who collected a small fee from tourists wishing to view the ghastly sight.⁷⁹ This site was sold but the new owner continued the commercial exploitation.⁸⁰ After facing the threat of litigation by the present-day descendants of the Northern Caddoan Indians,⁸¹ an agreement was reached in January of 1990 to have the Salinas Pit permanently closed.⁸²

Others collect Native American human remains and burial objects simply to trade or sell.⁸³ Many of these objects bring high prices at trading houses.⁸⁴ Private collectors and traders remain in possession of countless specimens of Native American remains and burial objects which were removed from what should have been their final resting places.

II. FEDERAL LAW

Federal legislation concerning Native American human remains and burial objects has changed dramatically over time. The earliest legislation protected Native American burials for later archaeological research.⁸⁵ More recent legislation was intended to protect and permanently preserve such burials.⁸⁶ The most recent federal legislation provides for the repatriation of those remains and burial objects which were disinterred under federal authority.⁸⁷

Early Historic and Archaeological Preservation Statutes

An examination of federal legislation demonstrates that it has historically promoted desecration, rather than preservation, of Native American burial sites. The oldest historic and archaeological preservation statute is the Antiquities Act of 1906.⁸⁸ This act allows the President to withdraw public lands⁸⁹ to protect prehistoric and historic ruins, monuments, and other objects located on federal property.⁹⁰ The Act was intended to preserve such sites,

77. Quade, *supra* note 67, at 18.

78. *Id.*

79. *Id.*

80. Interview with Walter R. Echo-Hawk, *supra* note 47.

81. The Northern Caddoan Indians are currently organized into three separate tribes: the Pawnee Tribe of Oklahoma; the Wichita and Affiliated Tribes of Oklahoma; and the Three Affiliated Tribes of the Fort Berthold Reservation of North Dakota.

82. Interview with Mr. Walter Echo-Hawk, *supra* note 47.

83. *Id.*

84. *Id.*

85. See *infra* notes 88-105 and accompanying text.

86. See *infra* notes 113-35 and accompanying text. For a discussion of federal legislation which protects Indian Cultural Resources, see Robert L. Cooper, *Constitutional Law: Preserving Native American Cultural and Archaeological Artifacts*, 4 AM. IND. L. REV. 99 (1976); Dean. B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1 (1982).

87. See *infra* notes 113-35 and accompanying text.

88. 16 U.S.C. §§ 431-433 (1988).

89. 16 U.S.C. § 431.

90. *Id.*

including Indian burials, for later research by those holding federal permits. The Act thus protected Indian burials from private vandalism and exploitation, but it expressly condoned excavation of these sites by permit holders.⁹¹

The Antiquities Act and, more recently, the Archaeological Resources Protection Act of 1979 (ARPA)⁹² assert federal title to all archaeological resources located upon federal lands.⁹³ Native American human remains over one hundred years old located on federal lands are defined as "archaeological resources"⁹⁴ under these acts. Defined as such, they may be dug up by one holding a federal permit authorizing the excavation of archaeological resources.⁹⁵ The items recovered pursuant to a permit are to be preserved and stored in public museums, but still remain the property of the United States government.⁹⁶ The net effect of these statutes is to set aside large portions of public lands for scientific research.⁹⁷ This legislation is primarily concerned with protecting these sites from private looting, not with preserving these sites.⁹⁸ While these acts do prohibit excavations on federal lands without a federal permit, they do not affect burial sites located on state or private lands.

91. *Id.* A permit to excavate Archaeological Resources can be obtained under the Antiquities Act by public museums, universities, or other specified educational institutions. 16 U.S.C. § 431(B)(3).

92. 16 U.S.C. §§ 470aa-470mm (1988). ARPA has largely superceded the Antiquities Act.

93. 16 U.S.C. § 470cc(B)(3). "Archaeological resources excavated or removed from public lands remain the property of the United States." 43 C.F.R. § 7.3(a)(ii) (1991).

94. 16 U.S.C. § 432. "Archaeological Resources" are defined by ARPA as "material remains of past human life or activities which are of archaeological interest" which are at least 100 years old. 16 U.S.C. § 470bb(1); 43 C.F.R. § 7.3(a).

95. A permit to excavate Archaeological Resources can be obtained under the Antiquities Act or under ARPA. In 1974, the Ninth Circuit held that the enforcement section of the Antiquities Act was unconstitutionally vague because the Act did not define "ruin," "monument," or "object of antiquity." *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974). ARPA, however, provides that no permit is required under the Antiquities Act if one is issued pursuant to ARPA. 16 U.S.C. § 470cc(H)(1); 43 C.F.R. § 7.5(b)(5).

96. *See supra* note 93 and accompanying text. ARPA provides that "gatherings shall be made for permanent preservation in public museums, universities, or other specified educational institutions." 16 U.S.C. § 470cc(B)(3).

97. ARPA made a distinction between public lands and Indian lands. 43 C.F.R. § 3.16 (1991) expressly prohibits excavation on public or Indian lands without a permit. A permit cannot be granted for excavation on Indian lands under ARPA without the consent of the Indian owner or Indian tribe with jurisdiction over the lands. No such consent is required for excavations on public lands. 16 U.S.C. § 470cc(g)(2). ARPA does require, however, that tribes be given notice of any permits issued for excavation on public lands that may damage religious or cultural sites. 16 U.S.C. § 470cc(c). The ultimate decision of whether to issue the permit, however, is left to the Secretary of the Interior. 16 U.S.C. § 470dd.

98. A 1987 GAO report found high levels of commercial looting taking place on federal lands in the four-corners region despite the protections offered by ARPA, that the federal government did not properly care for artifacts removed from federal lands, and that current methods of documenting looting on public lands are inadequate to protect against future looting. U.S. General Accounting Office, *Cultural Resources: Problems Protecting and Preserving Federal Archaeological Resources*, GAO/RCE 88-81 (December, 1987).

Other federal acts purport to protect archaeological and historical sites and assert federal title to all artifacts found upon federally owned lands.⁹⁹ The Reservoir Salvage Act of 1960 (RSA) gives the Secretary of the Interior responsibility for preserving archaeological data that might be lost through federal dam construction projects.¹⁰⁰ The Archaeological and Historic Preservation Act of 1974 (AHPA) expanded the scope of this authority to all federal, federally assisted, and federally licensed projects.¹⁰¹ Together, these acts authorize the Secretary to permit excavations of sites condemned for federal construction projects.¹⁰²

These Acts demonstrate that federal legislation authorized the removal of Native American remains and burial objects for scientific research, but it should be noted that ARPA asserts federal title to human remains and burial objects as archaeological resources,¹⁰³ and the Secretary of the Interior is given authority to establish regulations concerning the curation, exchange, and ultimate disposition of archaeological resources discovered under an ARPA permit.¹⁰⁴ Therefore, any museum that obtained such items under a federal permit can legally retain possession of such items, although this right is subject to federal regulation.¹⁰⁵ While these Acts establish legal obstacles to prevent unauthorized looting of Native American burials, the primary purpose of federal legislation has, until very recently, been to protect sites for authorized scientific research, not to preserve such sites.

Recent Preservation Statutes

ARPA was followed by the National Historical Preservation Act of 1966 (NHPA).¹⁰⁶ NHPA established a structure for developing an inter-governmental/private partnership for preserving places of historical significance.¹⁰⁷ NHPA established the National Register of Historic Places which affords certain protections to designated sites of historical significance.¹⁰⁸ It also provides grants for State Historic Preservation offices.¹⁰⁹ As distinguished from the earlier preservation statutes such as ARPA, the NHPA is intended to permanently preserve the designated sites in their original condition rather than to preserve them for later scientific research.¹¹⁰

While NHPA offers the framework under which Native American burial sites can be protected from further desecration, few were initially designated

99. Numerous acts have been enacted and subsequently repealed. This Note has attempted to address the principal statutes which comprise the current framework for preservation law.

100. 16 U.S.C. § 469a-1 (1988).

101. The Reservoir Salvage Act and the AHPA are codified under 16 USC §§ 469-469c-1 (1988).

102. *Id.*

103. See *supra* notes 93-97 and accompanying text.

104. 16 U.S.C. § 470a(a)(7)(A) (1988).

105. *Id.*

106. 16 U.S.C. §§ 470-470w (1988).

107. *Id.* § 470(a)(7).

108. *Id.* § 470a(1)(A).

109. *Id.* § 470a(c)(3).

110. 16 U.S.C. §§ 470-470w.

as historic sites.¹¹¹ The National Historic Preservation Act Amendments of 1980, however, for the first time required all federal agencies to identify and protect significant archaeological sites within their jurisdiction.¹¹²

Repatriation Statutes

Since 1980, several attempts have been made to increase the federal government's role in protecting historic sites, particularly Native American historic sites.¹¹³ In addition, federal legislation has now begun to focus on ways to repatriate human remains and burial objects which had previously been disinterred under the Antiquities Act and ARPA.

The National Museum of the American Indian Act (NMAI) took the first big step.¹¹⁴ NMAI established a new national museum devoted exclusively to the history, music and art of the American Indian cultures.¹¹⁵ When NMAI was passed, the Smithsonian possessed over 18,000 Native American skeletal remains, acquired from the Army Medical Museum and through private donations.¹¹⁶ The Act requires that all remains be identified and inventoried.¹¹⁷ If the tribal origin of such remains can be adequately determined, the affected tribe must be notified and given an opportunity to request their return.¹¹⁸ The Secretary must then return the remains to the descendants or to the tribe for proper burial.¹¹⁹

In the One Hundred First Congress, Native American rights groups won a major legislative victory when Congress adopted the Native American Graves Protection and Repatriation Act (NAGPR).¹²⁰ NAGPR clearly establishes tribal ownership or control of Native American cultural items and human remains which are excavated or discovered on federal lands in the future.¹²¹ For the first time, Native American grave sites on federal lands

111. S. REP. NO. 1070, 91st Cong., 2d Sess., at 2-3 (1980).

112. 16 U.S.C. § 470h-2. See H.R. REP. NO. 1457, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.C.A.N. 6378.

113. *Native American Museum Claims Commission Act, Hearings on S. 187 Before the U.S. Senate Select Committee on Indian Affairs*, 101st Cong., 100th Sess. (1988) (S. 187 would have amended ARPA to provide for greater Native American access to and recovery of human remains and items of religious significance). Significantly, the American Indian Religious Freedom Act was adopted by Congress in 1978. 42 U.S.C. § 1996 (1988). A discussion of this Act's effect on Native American claims to human remains and burial objects is beyond the scope of this Note. For a discussion of this subject, see generally Echo-Hawk, *supra* note 67, at 439; Bowen Blair, Note, *Indian Rights: Native American's Versus American Museums — A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125 (1979).

114. 20 U.S.C. §§ 80q-1 to -15 (Supp. I 1989).

115. *Id.* § 80q-1(a).

116. *Id.* § 80q(7), (8).

117. *Id.* § 80q-9(a).

118. *Id.* § 80q-9(c). The Act requires that the tribal origin must be determined by a preponderance of the evidence, using the best available means of identification. *Id.* § 80q-9(a)(2), (b). In those instances where the exact identity of an individual is ascertained, that person's descendants may also request repatriation. *Id.* § 80q-9(c).

119. *Id.* § 80q-9(c).

120. Pub. L. No. 101-601, 104 Stat. 3048 (1988) (codified at 25 U.S.C. §§ 3001-3013 (Supp. II 1990)).

121. 25 U.S.C. § 3002(a). The Act grants tribes "ownership" rights over "affiliated burial objects" and the right of "control" over human remains. See *infra* notes 185-240 and accompanying text for a discussion of the distinction between these two concepts.

receive legislative protections allowing tribes to make the final decision concerning what may be done with these sites.¹²² The Act grants priority rights of ownership or control to the lineal descendants of the deceased.¹²³ If lineal descendants cannot be found, priority goes next to the Indian tribe on whose land the items are found.¹²⁴ Where remains or burial objects are found on federally owned non-tribal lands, priority shifts to the tribe with the closest cultural affiliation to such remains or objects.¹²⁵ Finally, if the cultural affiliation cannot be reasonably ascertained, priority goes to the tribe that originally occupied the area where the remains or objects were found.¹²⁶

To the chagrin of much of the scientific community,¹²⁷ excavation of Indian burials upon federal land is strictly prohibited unless the conditions of ARPA are met and, in addition, permission for such excavation is obtained from the tribe holding the highest priority claim to such objects or remains.¹²⁸

The Native American Grave Protection and Repatriation Act also requires all federal agencies and museums receiving federal funding to inventory their collections to determine the cultural affiliation of all Native American remains and burial objects.¹²⁹ Once the identification and inventory is complete, the agency or institution must notify the affiliated tribe which may then request the return of the item or items.¹³⁰ Failure to comply with these requirements may result in stiff penalties being levied against the institution.¹³¹ The significance of this legislation as it relates to tribal concerns for repatriation cannot be overstated: NAGPR's net result should be to bring about the repatriation of most of those human remains and burial objects which have been disinterred for scientific research.¹³² NAGPR essentially renounces the title asserted by the federal government under the Antiquities Act and ARPA.¹³³ It does not, however, protect human remains and burial objects located on state or privately owned lands and it does not affect the disposition of human remains or burial objects which are currently held by collectors who do not receive federal funds, or those items in any collection that were taken from state or privately owned lands.

122. 25 U.S.C. § 3002.

123. *Id.* § 3002(a).

124. *Id.* § 3002(a)(2)(A).

125. *Id.* § 3002(a)(2)(B).

126. *Id.* § 3002(a)(2)(C)(1).

127. See Reid Statement, *supra* note 32, at 69.

128. *Id.* § 3002(c).

129. The statute uses the term "funerary objects." *Id.* § 3003(a).

130. *Id.* §§ 3003(d), 3005(a).

131. *Id.* § 3007(a). A procedure for establishing the amount of such penalties is to be established by regulations, promulgated by the Secretary of the Interior, taking into account such factors as: "(1) the archaeological, historical, or commercial value of the item involved; (2) the damages suffered, both economic and noneconomic, by the aggrieved party, and (3) the number of violations that have occurred." *Id.* § 3007(b).

132. H.R. CONF. REP. NO. 5237, 101st Cong., 2d Sess., pt. 1, at 6 (1990).

133. *Id.* at 12.

III. STATE LAW

The federal statutes only protect those Native American burials located on federal lands.¹³⁴ Likewise, the Native American Grave Protection and Repatriation Act only provides for the repatriation of remains and burial objects which are currently in the possession of federal institutions or other institutions which receive federal funding.¹³⁵ Because federal law only protects archaeological sites located on federal lands, tribes must turn to state law to protect burials located on state lands or privately owned lands. Additionally, tribes must turn to state law for the repatriation of Native American remains and burial objects which are in private collections or held by institutions which do not receive federal funding, and for those items taken from state or privately owned lands.

State Cemetery Protection Statutes and Other Legislation

An enormous body of statutory law governs the disposition of dead bodies. Through the exercise of their power to protect the public health, safety, morals¹³⁶ and general welfare,¹³⁷ states¹³⁸ have enacted comprehensive legislation concerning the decent and proper treatment of the dead and their sanctuary and entitling all who die within the state to a decent and proper burial within a reasonable time.¹³⁹

The typical legislative scheme provides for a proper burial of all persons who die within the state.¹⁴⁰ Provisions are made for careful controls over the

134. See *supra* notes 88-112 and accompanying text.

135. See *supra* notes 120-33 and accompanying text.

136. "[T]he courts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes." *Louisville & Nashville R.R. Co. v. Wilson*, 51 S.E. 24, 25 (Ga. 1905).

137. Health considerations are most often used to justify state regulation concerning the dead. In *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387, 393-94 (Mo. Ct. App. 1941), the Missouri appellate court was faced with the question of whether a state has authority to regulate the location of cemeteries. The court wrote: "Indeed, all such regulations respecting the right to make use of lands as burial grounds are referable to what is broadly known as the police power, and find their only sanction in the power of the state and its municipalities to enact the same with a view to safeguarding the public health." See also *Moritz v. United Brethren Church*, 199 N.E. 29, 31 (N.Y. 1935) ("Statutes enacted to prevent the use of land for burial purposes are enacted under the police power of the state to conserve the public health."); *Bryan v. Birmingham*, 45 So. 922 (Ala. 1908) (Considerations of the public health and well-being of the people justify regulation of the establishment and discontinuance of cemeteries.).

138. This power may also be delegated to municipal corporations or other public corporations. See *Carpenter v. Borough of Yeardon*, 158 F. 766 (3d Cir. 1908); *Gordon v. Commissioners of Montgomery County*, 164 A. 676 (Md. Ct. Spec. App. 1933); *Bryan*, 45 So. 922; *Odd Fellows' Cemetery Ass'n v. San Francisco*, 73 P. 987 (Cal. 1903). See generally C.T. Drechsler, *Annotation: Validity of Public Prohibition or Regulation of Location of Cemetery*, 50 A.L.R.2d 905 (1956).

139. See, e.g., GA. CODE ANN. § 31-21-23 (Harrison 1990); HAW. REV. STAT. § 841-10 (1985); IDAHO CODE § 31-2802 (1983); ILL. ANN. STAT. ch. 144, para. 1551, § 1 (Smith-Hurd 1986); LA. REV. STAT. ANN. § 8:651 (West 1986); MASS. ANN. LAWS ch. 113, § 2 (Law. Co-op 1975); NEB. REV. STAT. § 68-114 (1990); VA. CODE ANN. § 32.1-288 (Michie 1950).

140. Exceptions are generally made so that bodies of indigents from prisons, hospitals, and other institutions that are to be buried at public expense can be used for medical, educational,

granting of gifts of organs, requiring the consent of the donor.¹⁴¹ Criminal and civil penalties are imposed for the mutilation of the dead¹⁴² and the unlawful removal of human remains. Trafficking in human remains is prohibited.¹⁴³

Cemeteries are protected from desecration,¹⁴⁴ and provisions are made for the perpetual upkeep of abandoned cemeteries.¹⁴⁵ If an owner of land on which a cemetery is located wishes to dedicate the land to another purpose, strict provisions must be met, providing notification to the relatives of the deceased and the reinterment of the remains in a proper manner.¹⁴⁶ Exhumation is permitted only when it is in the public interest.¹⁴⁷ Some states provide additional protections for burials of war casualties and military veterans.¹⁴⁸

Most state legislation has been ineffective in protecting Native American graves from desecration.¹⁴⁹ While not establishing a *de jure* exclusion of Native American remains, the statutes, as applied, have not been used to prevent unauthorized disinterment of Native American remains from

and scientific purposes, unless the state receives a request for burial from the relatives or friends of the deceased. *See, e.g.*, ALA. CODE § 22-19-22 (1990); D.C. CODE ANN. § 2-1403 (1988); IOWA CODE § 142.8 (1989); ME. REV. STAT. ANN. tit. 22, § 2883 (West 1992); MISS. CODE ANN. § 41-39-7 (1972); OR. REV. STAT. § 97.170 (1991). Bodies received for such purposes can only be used for those purposes and must be properly buried after use. *See, e.g.*, ARK. CODE ANN. § 20-17-708 (Michie 1991); KAN. STAT. ANN. § 65-903 (1985); NEV. REV. STAT. § 451.020 (1991); OR. REV. STAT. § 97.200 (1991); S.C. CODE ANN. § 44-43-560 (Law. Co-op. 1976).

141. Every state has adopted the Uniform Anatomical Gift Act, which establishes the procedures to be followed when making a gift of one's organs or one's entire body. *See* Hugh Y. BERNARD, *THE LAW OF DEATH* 55-67, 93-95 (2d ed. 1979).

142. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-861 (West 1991); CAL. HEALTH & SAFETY CODE §§ 7050.5, 7051 (West Supp. 1992); D.C. CODE ANN. §§ 27-126, 127 (1991); IDAHO CODE § 18-7028 (1987); LA. REV. STAT. ANN. §§ 8:653, 654 (West 1986); OR. REV. STAT. § 166.085 (1991).

143. *See, e.g.*, D.C. CODE ANN. §§ 2-1406, 6-2601 (1988); FLA. STAT. ANN. §§ 872.01, 873.01 (West 1976); LA. REV. STAT. ANN. § 17:2280 (West 1982); MD. HEALTH-ENV'T'L CODE ANN. § 5-408 (Supp. 1991); MO. ANN. STAT. § 194.140.2 (Vernon 1983); N.D. CENT. CODE §§ 23-06-18, 23-06-26 (1991); VA. CODE ANN. § 32.1-289.1 (Michie Supp. 1991), 32.1-303 (Michie 1985).

144. *See, e.g.*, ALA. CODE § 13A-11-12(a)(1) (1982); ARIZ. REV. STAT. ANN. § 13-1604 (1989); FLA. STAT. ANN. § 872.02 (1976 & West Supp. 1992); GA. CODE ANN. § 36-60-6 (Harrison 1990); KAN. STAT. ANN. § 21-4115 (Supp. 1991); MINN. STAT. ANN. § 307.08 (West Supp. 1992); OR. REV. STAT. § 166.075 (1991).

145. *See* BERNARD, *supra* note 141, at 78-80. The following states have adopted the Perpetual Care Fund for Abandoned Cemeteries Act, which preserves and protects abandoned cemeteries: Arkansas, Georgia, Hawaii, Kansas, Maine, Massachusetts, Minnesota, New Hampshire, North Dakota, Oklahoma, Oregon, and Texas. *Id.*

146. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-451 (1990); COLO. REV. STAT. §§ 25-1-655, -656, -658 (1990); DEL. CODE ANN. tit. 16, § 3159 (1983); KY. REV. STAT. ANN. § 381.755 (Bobbs-Merrill 1970); LA. REV. STAT. ANN. §§ 8:659, 660 (West Supp. 1992); MD. ANN. CODE art. 16, § 120 (1990); R.I. GEN. LAWS §§ 23-18-7, 23-18-7 (1989); W.VA. CODE §§ 37-13-1 to -13-6 (1985).

147. *See, e.g.*, DEL. CODE ANN. tit. 16, § 3159 (1983); HAW. REV. STAT. § 328-325.5 (1985); IOWA CODE ANN. § 144.34 (West 1989); OR. REV. STAT. § 97.220 (1991); R.I. GEN. LAWS § 23-18-10(c) (1989); TEX. HEALTH & SAFETY CODE ANN. § 711.04 (West 1991).

148. *See, e.g.*, HAW. REV. STAT. § 363.5 (1985); ME. REV. STAT. ANN. tit. 13, § 1101 (West 1981); R.I. GEN. LAWS § 23-18-10.1 (1989).

149. *See* *Hearings on S. 1980*, *supra* note 33, at 72-73.

state or private lands.¹⁵⁰ Much of the legislation governing human remains and burial objects and prohibiting disinterment applies only to recent burials and not to those that are considered ancient.¹⁵¹ For example, in *State v. Glass*,¹⁵² the Ohio Court of Appeals interpreted the then-existing Ohio "Grave Robbery" statute¹⁵³ making it a misdemeanor to remove human remains from a burial without a permit, and held that the statute did not apply where the remains were so ancient as to have been nearly fully decomposed.¹⁵⁴ The court reasoned that the statute was intended to protect the sensitivities of the living descendants of the deceased and to protect against health hazards from disturbing recent burials.¹⁵⁵ Because the remains in question were determined to be well over two hundred years old, the court did not feel that these concerns were present.¹⁵⁶

Some states expressly distinguish between ancient burials and more recent ones, reserving for the state the right to excavate ancient burials and retaining title to such sites.¹⁵⁷ In states which do not make such a distinction, Indian burials are often not protected because the legislation only protects "recognizable" grave sites and does not protect scattered burials, which are common in Indian cultures.¹⁵⁸ In California, for instance, disinterment of human remains from a location other than a dedicated cemetery was not a criminal offense until 1982.¹⁵⁹ In any event, enforcement of statutory pro-

150. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 80 (1955) (Black, J., dissenting), the dissent noted that equal protection issues may arise where Indian remains are treated differently than white remains. See *Echo-Hawk*, *supra* note 67, at 451.

151. See *State v. Glass*, 273 N.E.2d 893 (Ohio Ct. App. 1971). See also J.A. Bryant, Jr., *Annotation: Construction and Application of Graverobbing Statutes*, 52 A.L.R. 3d 701, 710-11 (1973). But see *State v. Robinson*, 274 N.W.2d 553 (Neb. 1979) (holding that the terms "dead body" and "place of deposit or burial" are broad ones which, without express limitation or qualification, naturally apply to all dead human bodies, portions or remains thereof, and to all places of burial, whether marked or unmarked).

152. 273 N.E.2d 893.

153. OHIO REV. CODE § 2923.07 (repealed 1974).

154. The court wrote: "A cadaver is not an everlasting thing. After undergoing an undefined degree of decomposition, it ceases to be a dead body in the eyes of the law. Disinterment of anything not remotely identifiable as a human corpse, though carried out with no good intent, could not amount to 'grave robbing.'" *Glass*, 273 N.E.2d at 898. See also *Carter v. Zanesville*, 52 N.E. 126 (Ohio 1898); *Meads v. Dougherty County*, 25 S.E. 915 (Ga. 1896).

155. *Glass*, 273 N.E.2d at 898.

156. *Id.*

157. See ALA. CODE § 41-3-1 (1991); ARIZ. REV. STAT. ANN. §§ 41-841, 41-842 (1992); FLA. STAT. ANN. § 267.13 (West 1991); ILL. REV. STAT. ch. 127, § 133c1 (West Supp. 1991); MASS. ANN. LAWS ch. 7, § 38A (Law. Co-op. 1988).

158. See *infra* note 159.

159. In 1854, the California legislature distinguished between "a public graveyard" and "any graveyard", defining a public graveyard as a place where six or more bodies are buried. Stats. 1854, ch. VIII, § 4. Molestation of a public graveyard was made a crime, but the same protection was not afforded to "any graveyard." *Id.* In 1982, CAL. HEALTH & SAFETY CODE § 7050.5(a) (West Supp. 1992) was enacted to make it unlawful to disinter human remains, without authority of law, from the place of interment. It appears that this section was enacted to eliminate any uncertainty with respect to the disinterment of isolated human remains buried on private property, while providing lesser penalties for disinterment of such burials. It should be noted, however, that in 1982 California also made it unlawful to obtain or possess disinterred Native American human remains that were removed after 1984. Obtaining and possessing remains disinterred after January 1, 1988 is a felony. CAL. PUB. RES. CODE § 5097.99 (West Supp. 1992). A thoughtful analysis of this subject is presented in Op. Cal. Att'y Gen. (May 21,

hibitions against desecration and disinterment has been almost nonexistent, resulting in large numbers of Native American human remains being disinterred from burials on state and private lands and finding their way into museum collections.¹⁶⁰

State Common Law

Although state legislation is ineffective in preserving Native American burials and providing a means of repatriation for those already disinterred, state common law causes of action may provide sufficient protections for burials and means of repatriation.

The Law of Artifacts

In order to be considered the "owner" of an item of personal property, one must possess an item with the intent to own it.¹⁶¹ General common law principles of property hold that an owner of land also owns those objects attached to the surface, embedded in the soil, and partially exposed on, or deposited upon, the surface.¹⁶² If property is discovered on privately owned land, the property discovered is in the constructive possession¹⁶³ of the owner of such land.¹⁶⁴ Legally, this property is neither mislaid nor lost,¹⁶⁵ and no one can assert title to items imbedded in or attached to another person's property under a theory of "finders are keepers."¹⁶⁶

These same principles have been held to apply to Indian artifacts embedded in the earth. In *Allred v. Biegel*,¹⁶⁷ the plaintiffs discovered an ancient Indian canoe, recently exposed by heavy rains, embedded in land owned by Mrs. Evans.¹⁶⁸ They relayed the news of their discovery to the defendant, who removed the canoe the following day.¹⁶⁹ The plaintiffs paid the life tenant of the property for her interest in the canoe, and also paid her two sons for their interests, and then sued the defendant to recover the property.¹⁷⁰

1990) [hereinafter *Informal Opinion*], concerning property rights in human interments. The Attorney General's informal opinion suggests that the passage of this statute in no way suggests that a previous right to possession of such remains ever existed. *Informal Opinion*, at 5.

160. Interview with Mr. Walter Echo-Hawk, *supra* note 47.

161. See *Eads v. Brazelton*, 22 Ark. 499 (1861). See also RAI ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* 13 (Walter Rauschenbush, 3d ed. 1975).

162. See *Goddard v. Winchell*, 52 N.W. 1124 (Iowa 1892); *Schley v. Couch*, 284 S.W.2d 333 (Tex. 1955). See also *Bowman*, *supra* note 11; *JACKSON*, *supra* note 4; *BROWN*, *supra* note 161, at 18.

163. A person having constructive possession is "deemed" to possess an item when he has the power to control and an intent to control. *BLACK'S LAW DICTIONARY* 285 (6th ed. 1990).

164. *Id.* See also *McAvoy v. Medina*, 93 Mass. 548 (1866).

165. See *Schley*, 284 S.W.2d 333; *Bishop v. Ellsworth*, 234 N.E.2d 49, 51-52 (Ill. App. Ct. 1967).

166. See *State v. Green*, 456 So.2d 1309, *rev. denied*, 464 So. 2d 555, *appeal dismissed*, 466 So.2d 217 (Fla. Dist. Ct. App. 1984); *Allred v. Biegel*, 219 S.W. 2d 665 (Mo. Ct. App. 1949); *Hannah*, 1945 K.B. 509. See Note, 46 MICH. L. REV. 235 (1947); *Burke Shartel*, *Meanings of Possession*, 16 MINN. L. REV. 611, 615, 619 (1932).

167. 219 S.W.2d 665.

168. *Id.*

169. *Id.*

170. *Id.*

Mrs. Evans, who held the remainder interest in the property, intervened.¹⁷¹ The Missouri Court of Appeals held that the canoe rightfully belonged to Mrs. Evans.¹⁷² The court reasoned that, because the canoe was embedded in the soil, it rightly belonged to the owner of the property and not to the plaintiffs as finders.¹⁷³ The court noted that there is a presumption that the owner of property owns all property attached to or embedded in the property and that the finder acquires no property rights in property he discovers on the owner's land.¹⁷⁴

The owner of the land is considered the owner of all property embedded in the soil even if he is unaware that the property is there. In *Favorite v. Miller*,¹⁷⁵ property owners brought suit seeking the return of a remnant of a valuable statue of King George III.¹⁷⁶ The defendant found the remnant embedded in the plaintiff's property.¹⁷⁷ The Connecticut Supreme Court found for the plaintiff. The court held that property embedded in the earth is presumptively the property of the owner of the land.¹⁷⁸ This rule applies even if the owner has no way of knowing that the property is there.¹⁷⁹ Therefore, the finder acquires no rights to the article found.¹⁸⁰ In dicta, the court also suggested that a finder cannot profit from his find, even if such articles are not embedded within the soil, if he is a trespasser.¹⁸¹ These cases are not isolated holdings, rather, they are examples of the common law rule that the owner of the land is the owner of all property attached to, or embedded in, the surface.¹⁸²

According to the reasoning of these cases, Native artifacts¹⁸³ belong to the owner of the land on which they are found, rather than to the excavator of the land. As will be demonstrated below, this rule does not apply to *burial objects* or *human remains* which are located within the ground.

171. *Id.*

172. *Id.* at 667.

173. *Id.* at 666.

174. *Id.* (citing *Elwes v. Briggs Gas Co.*, 33 Ch. 562, 55 L.J. Ch. 734 (1886)).

175. 407 A.2d 974 (Conn. 1978). A person cannot "abandon" rights in property that he does not know exists. One can only abandon a "known" right. *State v. Holmes*, 687 P.2d 662 (Mont. 1984).

176. The statue was apparently toppled and hacked to pieces by patriots on July 9, 1776, after hearing of the Declaration of Independence. While the lead remains of the statue were being taken to a bullet molding factory in Lichtfield, Connecticut, Tories retrieved the remains and scattered them about in the area where the plaintiff's land is located. *Favorite*, 407 A.2d at 976.

177. *Id.*

178. *Id.*

179. *Id.* at 978.

180. *Id.*

181. *Id.* (citing *Barker v. Bates*, 30 Mass. (13 Pick.) 255, 23 Am. Dec. 678 (1832)). See also *BROWN*, *supra* note 161, at 24 n.10; *Hibbert v. McKiernan*, 2 K.B. 142 (1948); Note, 21 MINN. L. REV. 191 (1937); Edward P. Morton, *Public Policy and Finder's Cases*, 1 WYO. L.J. 101, 105 (1947).

182. See *Hibbert v. McKiernan*, 2 K.B. 142 (1948); *BROWN*, *supra* note 161, at 24 n.10; Note, *supra* note 181; Morton, *supra* note 181, at 105.

183. Artifacts are defined as: "Something produced by human work." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, *supra* note 21, at 106.

Burial Objects

The law clearly distinguishes between items which are considered *artifacts* and those which are considered *burial objects*. Burial objects are objects placed in the grave with the deceased with the intent that they should remain there forever with the body.¹⁸⁴

Common law cases agree that burial objects, if removed from the grave, belong to the person who buried the deceased, or that person's descendants.¹⁸⁵ For example, *Tennant v. Boudreau* considered who owned valuable items of jewelry which had been stolen from a coffin.¹⁸⁶ The clerk of the court possessed the items after the thief was convicted of larceny.¹⁸⁷ The Louisiana Supreme Court ruled that even though the jewels placed in the grave were intended to remain there undisturbed, once removed, they rightfully belonged to the heir of the deceased.¹⁸⁸

The Missouri Supreme Court reached a similar result in *State v. Doepke*.¹⁸⁹ That court ruled that it was larceny to disinter and steal a coffin. A coffin is the property of the person who provides it for burial.¹⁹⁰

The Georgia Appellate Court reached the same result in *Maddox v. State*.¹⁹¹ In *Maddox*, the court upheld a defendant's theft conviction. The

184. See *Charrier v. Bell*, 496 So. 2d 601, 604-605 (La. Ct. App. 1986).

185. *Id.* See also *Busler v. State*, 184 S.W.2d 24 (Tenn. 1944); *Maddox v. State*, 121 S.E. 251 (Ga. Ct. App. 1924); *Tennant v. Boudreau*, 6 Rob. 488 (La. 1844); *Wonson v. Sayward*, 13 Mass. (Pick.) 402 (1832); *State v. Doepke*, 30 Am. Rep. 785 (Mo. 1878). An interesting question arises as to ownership of such items where the person who buried the deceased or the deceased's descendants cannot be located. The property would probably be treated as "unowned" and therefore, by statute, treated as property of the state. "The State is the owner of all ... property of which there is no other owner." CAL. CIV. CODE § 670 (West 1990). "All property within the limits of the State, which does not belong to any person, belongs to the people. Whenever the title to any property fails for want of heirs or next of kin, it reverts to the people." CAL. GOV'T CODE § 182 (West 1990).

186. *Tennant*, 6 Rob. at 489.

187. *Id.* at 492.

188. *Id.* at 493. In *Grill v. Abele Funeral Home*, 42 N.E.2d 788 (Ohio Ct. App. 1940), a funeral home operator removed a diamond ring, a wedding ring and a wristwatch from the body of the plaintiff's deceased wife. The Ohio Court of Appeals held that the plaintiff, the husband of the deceased, had a cause of action in contract against a funeral home operator who had agreed to bury the deceased with those items. The court recognized in dicta that the plaintiff maintained rights in the items and that once removed from the corpse they belonged to the plaintiff to dispose of as he wished.

189. 30 Am. Rep. 785.

190. *Id.* at 786. The coffin was not abandoned. The court wrote:

[I]t is contended that when he had the body interred [the owner of the coffin] parted with all the property he had in the coffin, and that, therefore, the conviction of the defendant cannot be sustained. Roscoe, on his work on criminal evidence, says: "A shroud stolen from a corpse must be said to be the property of the executor, or whoever else buried the deceased."

Id. (citing 1 CHITTY CRIM. LAW 44 (5th Am. Ed.); 1 Hawkins, P.C. 144, 148; SHARSWOOD'S BLACK, 4th vol. 235).

All these authorities, it is true, speak only of shrouds and ornaments buried with the dead, but the principle upon which these may be alleged to be the property ... of the person who buried the deceased, will certainly sustain the allegation that the coffin is the property of the person who buried the deceased.

Id.

191. 121 S.E. 251.

defendant took a casket from a recent grave, intending to clean and resell it.¹⁹² The court held that the casket was personal property of value, belonging to the widower who purchased it.¹⁹³ Once the casket was removed from the ground, it reverted to its former status of personal property of the widow.¹⁹⁴

In *Charrier v. Bell*,¹⁹⁵ the Louisiana Court of Appeals extended this reasoning to hold that burial objects removed from a 300-year-old Indian grave site by an amateur archaeologist rightfully belonged to the descendants of the deceased Indians. The archaeologist brought a declaratory judgment action attempting to quiet title to certain items which he had removed from an ancient Indian burial mound.¹⁹⁶ Originally, the plaintiff sued the six non-resident owners of the land from which the remains were recovered and the plaintiff requested a declaratory judgment confirming himself as the owner of the items.¹⁹⁷ Alternatively, he requested compensation on the theory of unjust enrichment.¹⁹⁸ The State of Louisiana intervened in the proceeding.¹⁹⁹ Asserting the duty to protect its citizens, the state claimed to be a proper party to the action since the lawful heirs of the deceased whose graves had been desecrated were not present.²⁰⁰ The Tunica-Biloxi Indians subsequently intervened in the suit seeking to quiet title in themselves to the remains and burial objects.²⁰¹

The archaeologist's claim to the artifacts rested upon a theory of abandonment.²⁰² The court reasoned that the burial objects were neither *res nullis*²⁰³ nor *res derelictae*.²⁰⁴ The court concluded that the Tunica Indians who placed the items in the grave did not intend to abandon them²⁰⁵ because the intent to abandon must include the intent to let the first person who comes

192. *Id.* at 252.

193. *Id.* at 251.

194. *Id.* at 252. The court's holding seems to suggest that while the coffin is interred in the ground, it is not the personal property of anyone.

195. 496 So. 2d 601. The remains and burial items recovered from the burial mound totalled over one and a half tons.

196. *Id.* at 603.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* In 1981, the Tunica and Biloxi Indians were given federal recognition as a Native American tribe. Their subsequent intervention was permitted by the court since the court accepted the federal government's recognition of the tribe as establishing the Indians' claim to be the true descendants of the Tunica Indians whose graves had been desecrated. These tribes represent the entire Northern Caddoan family, the ancient, aboriginal inhabitants of the Central Plains region of the United States, and as such would be the proper parties to bring an action. *Id.* at 604.

202. *Id.*

203. *Res nullis* refers to things which are wild, not owned by anyone, such as wild game or fish. *Id.* at 605.

204. *Res derelictae* refers to those items "voluntarily abandoned by their owner with the intention to have them go to the first person taking possession." *Id.*

205. "[T]he fact that the descendants or fellow tribesmen of the deceased Tunica Indians resolved, for some customary, religious or spiritual belief, to bury certain items along with the bodies of the deceased, does not result in a conclusion that the goods were abandoned." *Id.* at 604.

along acquire them.²⁰⁶ This is not the case with burial items.²⁰⁷ The court also denied the plaintiff's unjust enrichment claim on two separate grounds. First, the court held that any enrichment which the tribe received from the archaeologist's effort was justified,²⁰⁸ and second, the court held that the tribe was not enriched in any real sense, since it desired the remains and artifacts to remain in the earth undisturbed.²⁰⁹ In fact, the court would have allowed the Tunicas to maintain an action for *damages* resulting from the disinterment of the items.²¹⁰ The *Charrier* decision suggests in dicta that tribal members and lineal descendants have standing to sue when an Indian grave is desecrated²¹¹ and holds that primary ownership of burial objects rests with the lineal descendants or tribesmen of the deceased.

None of the cases discussed above considered it relevant that the rightful owner of the burial objects did not own the land where the graves were located.²¹² This point is discussed further in the following section.

206. *Id.* at 605. Other courts have likewise held that property is not abandoned until the person abandoning the property intends to let the next person who comes along acquire it. In *State v. O'Quist*, 327 N.W.2d 587 (Minn. 1982), the Minnesota Supreme Court considered whether a criminal defendant has a privacy right in property placed in his garbage can. In dicta, the court stated that the defendant may not have abandoned the garbage under traditional theories of property law. *Id.* at 590. The defendant may not have "voluntarily, intentionally and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest." *Id.* Nevertheless, the court held that although the defendant may be considered the owner of the garbage, he had no reasonable expectation of privacy that was invaded. *Id.* at 591. See also *City of St. Paul v. Vaugh*, 237 N.W.2d 365, 371 (Minn. 1975) ("[I]n essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy."). In *People v. Edwards*, 458 P.2d 713 (Cal. 1969), the California Supreme Court reached the opposite conclusion on the privacy issue, holding that garbage is not abandoned and that a defendant retains a reasonable expectation of privacy in garbage until it has become part of a "large conglomerate of trash elsewhere." *Id.* at 718.

207. Remains and burial items are not "treasure" under article 716 of the French Civil Code and thereby are not subject to discovery. *Edwards*, 458 P.2d at 718 (citing *Blancherot v. Couilhy*, Bordeaux, 6 Aug. 1806, 38 DALLOZ JURISPRUDENCE GENERAL § 186, at 230 n.1 (1857)). The *Charrier* court wrote: "The French commentator Demolombe noted the special treatment that should be given to burial goods, stating that such objects 'have not been placed underground with the same intention which informs the deposit of what is called treasure, which in the latter case is, for a temporary period.... Rather, they are an emplacement for a perpetual residence therein....'" 496 So. 2d at 605 (citing 13 C. Demolombe, *Cours de Code Napoleon* § 37, at 45-46 (2d ed. 1862)).

208. A claim of unjust enrichment requires: (1) an enrichment, (2) an impoverishment, (3) connection between the enrichment and the impoverishment, (4) absence of justification or cause for enrichment and impoverishment, and (5) no other remedy at law available to the plaintiff. *Charrier*, 496 So. 2d at 606.

209. *Id.*

210. "[D]escendants have a right to enjoin the disinterment of their deceased relatives, as well as to receive damages for the desecration involved." *Id.* at 607.

211. *Id.* at 601.

212. In *Busler v. State*, 184 S.W.2d 24 (Tenn. 1944), the Tennessee Supreme Court held that although the owner of the land may technically have possession of burial objects, he does not own them. He is merely in "possession of them as trustee for the donors." *Id.* at 27.

Human Remains

It has long been the rule that no one can have a property interest in interred human remains.²¹³ This rule finds its origins in Roman Law, which recognized certain categories of things as being exclusively of divine cognizance (*in divini juris*) and, therefore, beyond human proprietary interest (*in nullius bonis*).²¹⁴ Human remains and burials fall within this group.²¹⁵ Early English common law also recognized this distinction.²¹⁶

Ecclesiastical authorities acquired exclusive jurisdiction over the treatment of the dead.²¹⁷ Initially, every disinterment of a dead body was a crime.²¹⁸ As practical necessities arose requiring the occasional relocation of burial places, this rule changed so that disinterment and relocation of human remains was lawful only with the consent of the church, and no one had any enforceable rights in this regard.²¹⁹ Thus, under early English common law, only the land owner could bring suit for trespass if a grave site was vandalized. No one could bring an action for desecration of the body of the deceased.²²⁰

American common law departed from this early English precedent by recognizing that relatives and friends of the deceased have an interest in assuring the appropriate treatment and disposition of the deceased's remains.²²¹ American precedent gives relatives and friends standing to assure a proper burial.²²²

In *Alderman v. Ford*, the Kansas Supreme Court affirmed this common law right and expressed several of the fundamental principles of the doc-

213. See BERNARD, *supra* note 141, at 13-18; JACKSON, *supra* note 4.

214. For a thorough historical examination, see STUEVE, *supra* note 15, at 10; *Informal Opinion*, *supra* note 159.

215. STUEVE, *supra* note 15, at 10.

216. See 2 BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 40-41 (Samuel E. Thorne trans., 1968).

217. *Id.* See also JACKSON, *supra* note 4, at 126; STUEVE, *supra* note 15, at 10. Lord Coke wrote: "The burial of the cadaver, that is *Caro Data Vermibus*, is *nullius in bonis*, and belongs to the ecclesiastical cognizance." *Id.*

218. See BERNARD, *supra* note 141, at 13.

219. *Id.* at 16. See also R.F. Martin, *Annotation: Removal and Reinterment of Remains*, 21 A.L.R.2d 472, 478 (1951).

220. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *429; 4 *id.* at *236; BERNARD, *supra* note 141, at 16. See also *Sanford v. Vinal*, 552 N.E.2d 579 (Mass. App. Ct. 1990); *Meagher v. Driscoll*, 99 Mass. 281, 284 (1868) ("[T]hough the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes.").

221. See *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 584-85 (1829); *Sherrard v. Henry*, 106 S.E. 705 (W.Va. 1921); *Matter of Fromm*, 117 N.Y.S.2d 81 (1952). See also Martin, *supra* note 219, at 482. English law has also adopted a similar approach. See POLSON, *supra* note 19, at 43. A common law right to receive a proper burial exists independent of statute. See *King v. Frame*, 216 N.W. 630 (Iowa 1927). The duty to bury the deceased falls either upon the relatives of the deceased or upon the state. "[A] body must be disposed of. If no one interested in kinship will do it, the public must." *Evans v. Evans*, 12 O.N.P. 619 (1912).

222. See *Fuller v. Marx*, 724 F.2d 717 (8th Cir. 1983); *Larson v. Chase*, 50 N.W. 238 (Minn. 1938); *O'Donnell v. Stack*, 55 P. 906 (Cal. 1899). See also Martin, *supra* note 219 at 482.

trine.²²³ In *Alderman*, the plaintiff sought damages for an unauthorized autopsy performed on the plaintiff's deceased relative.²²⁴ The court held that the plaintiff had a valid cause of action.²²⁵ The court noted that while there is no property interest in a dead body in any commercial sense,²²⁶ certain legal rights to possession and custody of the body for purposes of a decent burial do exist.²²⁷ This common law right to possession of the body normally vests in the nearest relatives or friends of the deceased²²⁸ and an action can be maintained by the person entitled to possession if this right is interfered with or the body is disturbed.²²⁹

Some courts have deemed this a "quasi-property right" since the right is not predicated upon a property interest in the remains in the normal sense.²³⁰ The body is not a part of the deceased's estate as are chattels, real and personal property.²³¹ Therefore, recovery cannot be made on any strict "property" theory such as replevin.²³² Likewise, the person entitled to possession of the dead body cannot be considered its owner.²³³ This rela-

223. 72 P.2d 981 (Kan. 1937).

224. *Id.* at 982.

225. *Id.* at 984.

226. *Id.* at 983. See also *Sanford v. Ware*, 60 S.E.2d 10, 12 (Va. 1950); *Goldman v. Mollen*, 191 S.E. 627, 631 (Va. 1937); *Neighbors v. Neighbors*, 65 S.W. 607 (Ky. Ct. App. 1901).

227. "[A]ll courts now concur in holding that the right to the possession of a dead body for purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect." *Alderman*, 72 P.2d at 983 (citing *Larson v. Chase*, 50 N.W. 238 (Minn. 1938)). See also *Pettigrew v. Pettigrew*, 56 A. 878 (Pa. 1904).

228. *Alderman*, 72 P.2d at 983. Generally, this right vests first in the surviving spouse of the deceased. If no surviving spouse exists, this right vests in the nearest next of kin. *Parker v. Quinn-McGowen Co., Inc.*, 138 S.E.2d 214 (N.C. 1964); *Simpkins v. Lumbermens Mut. Cas. Co.*, 20 S.E.2d 733 (S.C. 1942); *Pollard v. Phelps*, 193 S.E. 102, 106 (Ga. Ct. App. 1937). The order of priority is often set by statute. See STUEVE, *supra* note 15, at 27-29.

229. See *Alderman*, 72 P.2d at 983. In *Neighbors*, 65 S.W. at 608, the Kentucky Court of Appeals wrote: "The current authority in this country is to the effect that there is not a property right to a dead body in a commercial sense, but there is a right to bury it which the courts of law will recognize and protect." See also *Spiegel v. Evergreen Cemetery Co.*, 186 A. 585 (N.J. 1936). See generally STUEVE, *supra* note 15, at 8-14.

230. See *Rivers v. Greenwood Cemetery*, 22 S.E.2d 134, 135 (Ga. 1942). See also *District of Columbia v. Smith*, 436 A.2d 1294 (D.C. 1981); *In re Johnson*, 612 P.2d 1302 (N.M. 1980); *Aetna Life Ins. v. Burton*, 12 N.E.2d 360 (Ind. Ct. App. 1938); *Travelers' Ins. Co. v. Welch*, 82 F.2d 799 (5th Cir. 1936); *Kingsley v. Forsythe*, 257 N.W. 95 (Minn. 1934); *Keyes v. Konkel*, 78 N.W. 649 (Mich. 1899); *Pierce v. Proprietors of Swan Cemetery*, 10 R.I. 227, 236-37, n.1 (1872). See also BERNARD, *supra* note 141, at 16; 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 9.4, at 624 (2d ed. 1986); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984).

231. See *In re Moyer's Estate*, 577 P.2d 108, 110 (Utah 1978). Although the executor has lawful possession of the body for the purpose of disposal, there is no property right in the dead body. Therefore, the body may not be withheld or taken from him as security for any debt of the deceased. See JACKSON, *supra* note 4.

232. Furthermore, the administrator of an estate does not have standing to sue for wrongful interference with the right to preserve the body. *Burns v. Anchorage Funeral Chapel*, 495 P.2d 70 (Alaska 1972). That right belongs exclusively to the surviving spouse or next of kin of the decedent. *Id.* at 73. See also *Hovis v. City of Burns*, 415 P.2d 29 (Or. 1966). Nor can an executor sue for mutilation of a dead body. *Simpkins*, 20 S.E.2d 733.

233. See *Gadbury v. Bleitz*, 233 P. 299 (Wash. 1925). See generally *Martin*, *supra* note 219; JACKSON, *supra* note 4, at 138. This right of possession is similar to an easement,

tionship may more accurately be described as a trust relationship between the person in possession of the body and the relatives and friends of the deceased.²³⁴ The person entitled to possession owes a duty to the relatives of the deceased to see that the body is properly disposed of in accordance with the deceased's wishes.²³⁵ Consequently, the right to possess the body extends only so far as is necessary to perform this duty, or to the extent necessary to protect the corpse after burial. It terminates when the body is properly disposed of.²³⁶

When a body is properly interred, disturbance of a dead body is subject to the control and direction of a court of equity.²³⁷ Consent of judicial authority has been held to be a prerequisite to disinterment even for the nearest next of kin to the decedent.²³⁸ Consent should not be given without weighty or compelling reasons.²³⁹ The next of kin, having the right to properly dispose of the body, also have legal standing to object to wrongful disinterment or removal, and to demand return of the body.²⁴⁰

Courts have held that the next of kin of the deceased are entitled to notice before the body of the deceased is disturbed²⁴¹ and that liability for

whereby permission of the descendants or of the court is required for a disturbance of a burial. *Bowman*, *supra* note 11, at 167-68; *Ware v. State*, 121 S.E. 251 (Ga. Ct. App. 1924).

234. See *Alderman*, 72 P.2d 981.

235. See *id.* A body cannot be disposed of by will. See *Enos v. Snyder*, 131 Cal. 68, 70 (1900). Courts have, however, recognized that a person should have the right to have his body disposed of according to his wishes, so long as the disposal is within the limitations of human decency. See *Moyer's Estate*, 577 P.2d 108; *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438 (W.Va. 1985).

236. See *Alderman*, 72 P.2d 981. "[T]he right of disposal is in the nature of a sacred trust and once exercised, the right is extinguished." *STUEVE*, *supra* note 15, at 68.

237. See *Application of Cabot*, 286 N.Y.S.2d 598 (1968); *Seidler v. Seidler*, 258 N.Y.S.2d 253 (1965); *Frost v. St. Paul's Cemetery Ass'n*, 254 N.Y.S.2d 316 (1964).

Where there is no adjective law on the subject, or a statute does not constitute a bar, the matter rests within the province of a court of equity, for determination with due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association.

JACKSON, *supra* note 4, at 113. See also *ADLER*, *supra* note 3, at 85-86.

238. The right of disposal does not include the right to disinter. *STUEVE*, *supra* note 15, at 68. The final decision as to whether or not to disinter remains rests with the court, not with the next of kin. "A widow has high priority in selecting the place and manner of her deceased's spouse's burial, but the widow's desire is not always determinative, particularly where the body has already been laid to rest." *Application of McEvilly*, 283 N.Y.S.2d 293, 295 (N.Y. Sup. Ct. 1967). See also *Bellevue Masonic Temple, Inc. v. Lokken*, 452 P.2d 544 (Wash. 1969). In *Atkins v. Davis*, 352 S.W.2d 801, 802 (Tex. Civ. App. 1961), the Texas Court of Appeals noted that, although a surviving spouse may have the right to remove a body, this right is qualified, and removal should only be permitted where circumstances indicate a necessity or compelling reason for removal.

239. See *Mills v. Carolina Cemetery Park Corp.*, 86 S.E.2d 893, 898 (N.C. 1955); *Goldman v. Mollen*, 191 S.E. 627 (Va. 1937); *Thompson v. Deeds*, 61 N.W. 842 (Iowa 1895).

240. See *Travelers' Ins. Co.*, 82 F.2d 799; *Lumley v. Pollard*, 7 S.E.2d 308 (Ga. 1940); *Aetna Life Ins. Co. v. Burton*, 12 N.E.2d 360 (Ind. Ct. App. 1938); *Pilloud v. Linn-Benton Memorial Park Ass'n*, 365 P.2d 116 (Or. 1961); *Whitehair*, 327 S.E.2d 438.

241. See, e.g., *Trueba v. Pawley*, 407 So. 2d 945 (Fla. Dist. Ct. App. 1981); *McDonald v. Butler*, 74 S.E. 573 (Ga. Ct. App. 1912); *Jacobus v. Congregation of Children of Israel*, 33 S.E. 853 (Ga. 1899).

damages arises for secret disinterments.²⁴² The notice requirement is considered necessary to ensure that the final sepulcher is not disturbed against the wishes of those who have a right to object²⁴³ and to provide those same parties with an opportunity to be present to be assured that exhumation is done without indignity or molestation and to afford them the opportunity to know there is a reburial and where the reburial is located.²⁴⁴ This duty of notice pertains even though the next of kin do not own the land containing the remains.²⁴⁵ Following this well-established common law rule, the Kansas Supreme Court held, in *Hamilton v. Individual Mausoleum Co.*, that a cause of action exists for the relatives of the deceased even if the relatives do not own the property where the remains are interred.²⁴⁶ In *Hamilton*, the defendant broke into a family mausoleum and moved a casket from one vault to another without the permission of the family.²⁴⁷ The court noted that the issue of land ownership was irrelevant because the basis for the injury was the "violation of the feelings of the living by the indignity to the dead, rather than the invasion of a right to property."²⁴⁸

In *Heiligman v. Chambers*,²⁴⁹ the great-grandson of the deceased, who was buried in a family cemetery, sued for an injunction when the current owner of the land where the cemetery was located tried to have the interred remains removed to a public cemetery.²⁵⁰ The lower court held that the great-grandson was a proper plaintiff²⁵¹ and granted an injunction, which was affirmed by the Oklahoma Supreme Court.²⁵² It also held that once land is dedicated as a graveyard, it remains protected regardless of later changes in ownership.²⁵³ Furthermore, new owners must permit reasonable access to family members to visit the graves.²⁵⁴ It would appear, therefore, that lineal

242. See, e.g., *Ferguson v. Utilities Elkhorn Coal Co.*, 313 S.W.2d 395 (Ky. 1958); *Louisville Cemetery Ass'n v. Downs*, 45 S.W.2d 5 (Ky. 1931).

243. See *Gardner v. Swan Point Cemetery*, 40 A. 871 (R.I. 1898).

244. See *Trueba v. Pawley*, 407 So. 2d 945 (Fla. Dist. Ct. App. 1981); *Downs*, 45 S.W.2d 5.

245. See *Hamilton v. Individual Mausoleum Co.*, 86 P.2d 501 (Kan. 1939); *North East Coal Co. v. Pickelsimer*, 68 S.W.2d 760 (Ky. 1934); *North East Coal Co. v. DeLong*, 70 S.W.2d 972 (Ky. 1934); *Downs*, 45 S.W.2d 5.

246. *Hamilton*, 86 P.2d 501.

247. *Id.* at 501.

248. *Id.* at 504. Actually, this interest in next of kin is not predicated upon a property interest in the remains as such. Rather, it is predicated on the acknowledged sentiments of friends and relatives concerning the treatment and disposition of their loved ones. *Gardner*, 40 A. 871. See also *Keyes v. Konkel*, 78 N.W. 649 (Mich. 1899); *HARPER*, *supra* note 230, § 9.4, at 654; *KEETON*, *supra* note 230, at 63; *Berman Swartz, Nature of Burial Rights in Dead Bodies — Right of Burial*, 12 SO. CAL. L. REV. 435, 446 (1939).

249. 338 P.2d 144 (Okla. 1959).

250. *Id.* at 146.

251. *Id.* The landowner challenged the plaintiff's standing. He had obtained permission to move the remains from one of two remaining granddaughters of the deceased who were the nearest next of kin. The court held, however that permission of both granddaughters would have been required in order to grant such authority. *Id.* at 148-49.

252. *Id.* at 150.

253. Once a burying ground is established, it creates an easement against a fee interest. The easement continues until the burial is abandoned or until the bodies are removed under proper statutory authority. *Id.* at 148.

254. *Id.*

descendants of deceased Indians whose graves have been desecrated can bring suit to bring about the reinterment of the dead.

Applying these principles to the claims of Indian tribes, it is likely that tribes have standing to sue for the disinterment of their members' ancestors. An Indian tribe may properly act in a number of different capacities as a party plaintiff for purposes of litigation. Many, if not all, tribes are empowered to sue to protect or safeguard the legal interests or welfare of tribal members by virtue of their federally-approved corporate charters or constitutions.²⁵⁵ An Indian tribe thus has the capacity to represent the legal interests of its entire membership.²⁵⁶ In such instances, a tribe would be representing all known descendants of tribal ancestors.²⁵⁷ Moreover, an Indian tribe may also have standing to maintain suit in its sovereign capacity as a federally recognized Indian tribe.²⁵⁸

The tribe could also bring suit even if it could not be proved that the remains were in fact those of tribal ancestors. Where next of kin fail to act, more distant kin,²⁵⁹ friends,²⁶⁰ or courts of equity²⁶¹ have been held to have standing to protect bodies from wrongful or unnecessary disturbances or removal.²⁶²

For example, in *Beatty v. Kurtz*,²⁶³ a Lutheran organization sued to prevent desecration of a burial ground conveyed to the Lutheran church.²⁶⁴ The Supreme Court held that the association could maintain suit though there was no evidence that the Church authorized the plaintiffs to sue.²⁶⁵ The Court

255. See, e.g., Corporate Charter of the United Keetoonah Band of Cherokee Indians in Oklahoma § 1(a), (c), which includes these enumerated powers: "(a) To define and safeguard the rights and powers of the United Keetoonah Bank of Cherokee Indians in Oklahoma and its members; (c) To promote in any other way the general welfare of the Indian of the United Keetoonah Band of Cherokee Indians in Oklahoma." Article V, § 1(a) of the amended constitution and bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona, purports to vest in the tribe the power to "represent the tribe and act in all matters that concern the welfare of the tribe."

256. The concept that an organization may represent the interests of its members is not limited to Indian tribes. The Supreme Court wrote: "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 738-39 (1972).

257. See *Charrier*, 496 So. 2d at 604.

258. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

259. See *Codell Constr. Co. v. Miller*, 202 S.W.2d 394, 397 (Ky. 1947) (holding that the right of action is a "family right" and one or more descendants may maintain a class action "where some of the heirs are unknown ... [and] so numerous that it is impracticable to bring all of them before the court within a reasonable time.").

260. See *Female Union Band Ass'n v. Unknown Heirs at Law*, 403 F. Supp. 540 (D.D.C. 1975), *aff'd*, 564 F.2d 600 (D.C. Cir. 1977); *Koon v. Doan*, 2 N.W.2d 878 (Minn. 1942); *Davidson v. Reed*, 53 Ill. 613 (1884); *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566 (1829).

261. See *Beatty*, 27 U.S. (2 Pet.) 566; *Female Union Band Ass'n*, 403 F. Supp. 197; *Larson v. Chase*, 50 N.W. 238 (Minn. 1891).

262. See *Echo-Hawk*, *supra* note 67, at 450; Laurence Rosen, *The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility*, 82 AM. ANTHROPOLOGIST 5, 8-10 (1980).

263. 27 U.S. (2 Pet.) 566.

264. *Id.* at 568.

265. *Id.* at 584-85.

noted that standing was proper because the plaintiff organization was suing to protect the sepulcher of the dead.²⁶⁶

A similar case is *Female Union Band Association v. Unknown Heirs at Law*²⁶⁷ involving a dispute between cemetery trustees, representing the descendants of the interred and the Afro-American Bicentennial Corporation (ABC) over the appropriate disposition of an historic Black cemetery.²⁶⁸ The cemetery was founded in 1824 and had fallen into disrepair.²⁶⁹ The trustees²⁷⁰ petitioned and received an order to disinter the bodies and to rebury them in another cemetery that provided perpetual care.²⁷¹ ABC, a non-profit organization that had no direct relation to the decedents, intervened and asked the court to vacate the disinterment order, asserting that the upkeep and care of the cemetery had materially improved, making the disinterment order unnecessary.²⁷² The court agreed with ABC and vacated its order.²⁷³

Courts have been willing to protect the rights of the descendants, even where the descendants themselves have not brought suit. In *United States v. Unknown Heirs*,²⁷⁴ the district court was faced with the question of what should be done with the remains of Quanah Parker, a Comanche Indian Chief.²⁷⁵ Chief Parker was buried in a grave at the Post Oak Mission near Lawton, Oklahoma in 1911.²⁷⁶ In 1957, the Department of the Army decided to enlarge Fort Sill, a nearby military reservation.²⁷⁷ Suit was brought in the United States District Court to condemn the cemetery land and to get legal authority to remove and reinter the bodies of those buried there.²⁷⁸ Two rival groups of Indians sought to intervene in the action, claiming to be relatives of Chief Parker.²⁷⁹ The rivalry between these groups was over who should

266. *Id.*

267. 403 F. Supp. 540.

268. *Id.* at 541.

269. *Id.* at 541-42.

270. The descendants formed a non-profit organization, the Female Union Band Association, to represent their collective interests. *Id.*

271. *Id.* at 542.

272. *Id.*

273. *Id.* at 551. The court noted that disinterment would be an "affront" to Black culture and heritage. *Id.* See also *St. Peter's Evangelical Church v. Klunfelter*, 8 Pa. D. & C. 612, 614, 29 Dauph Co. 240, 242 (Pa. 1926) (holding that where ancient burials are concerned, "any church, patriotic organization, or person of the community" has standing to prevent desecration).

274. 152 F. Supp. 452 (W.D. Okla. 1957).

275. Chief Parker was the last Chief of the Comanche Indians, the son of Chief Nokoni and Cynthia Parker. His mother was a white woman who was kidnapped by the Comanches in Texas when she was nine years old and became fully assimilated to Comanche lifestyle. Chief Parker led the Comanches in the final major uprising of the Great Plains Indians in 1875, being the last Chief to surrender. *Id.* at 455. He had a distinguished career after surrender, gaining many concessions for his people from the Army and serving as a Judge on the Indian Court in 1888. See CLYDE L. JACKSON & GRACE JACKSON, *QUANAH PARKER, LAST CHIEF OF THE COMANCHES: A STUDY IN SOUTHWEST FRONTIER HISTORY* (1963).

276. *Unknown Heirs*, 152 F.Supp. at 455.

277. *Id.* at 453.

278. *Id.*

279. To-Pay, an 87-year old Indian woman, claimed to be the only surviving widow of Chief Parker. Others claimed to be the children of Chief Parker and another wife, To-nar-cy, who, they alleged, the Chief chose as his only wife when he abandoned polygamy in 1907. *Id.*

designate the place of reburial.²⁸⁰ The legitimacy of each group's claim of relation to Chief Parker was in question.²⁸¹ The judge found it unnecessary to determine whether any of the interveners were actually related to Chief Parker.²⁸² Instead, the judge held that the court is vested with discretion to determine the proper place of reinterment.²⁸³ Moreover, a court has a duty to protect the rights of the relatives of the deceased by seeing that remains are properly reinterred, even where the relatives themselves have not brought suit.²⁸⁴ Similarly, in *In re Indian Cemetery, Queens County, New York*,²⁸⁵ Indian remains in a long abandoned burial ground were safeguarded by the New York Supreme Court when the cemetery was condemned.

It should be noted that the burden is upon the person in possession of a dead body to show authority to possess the body.²⁸⁶ There is a presumption against the propriety of removal of a dead body even if the purpose is merely for reinterment in another place.²⁸⁷ This presumption logically grows stronger where no reinterment is contemplated.²⁸⁸

There is no principled reason why these liberal standing rules should not apply to Indian tribes as well. In fact, courts have not hesitated to extend these same types of considerations to protect American Indian burials.²⁸⁹ Under the above broad standing rules, Indian tribes should have little difficulty in establishing their standing to maintain suit for wrongful interference with the right to disposition of the remains of tribal ancestors, or for interference with a property right to burial goods.

CONCLUSION

The courts have made it clear that the common law does not recognize any right to retain possession of a body other than that recognized in the family and friends of the deceased. Therefore, without statutory authority to the contrary, the descendants and relatives of the deceased have a superior right to possession of a body for the purpose of a proper burial than do individuals or institutions. When burial objects are removed from the grave, ownership vests in the relatives of the deceased, for disposal in whatever manner they see fit.

280. *Id.* at 453-54.

281. *Id.* at 455.

282. *Id.*

283. *Id.*

284. *Id.* at 456.

285. 169 Misc. 584 (N.Y. Sup. Ct. 1938).

286. *See* 25A C.J.S. *Dead Bodies* § 9, at 523 n.76; 22A AM. JUR. 2D *Dead Bodies* § 4, at 11.

287. *See* 25A C.J.S. *Dead Bodies* § 9, at 523 n.76. "In a proper case, a body may be disinterred solely for the purpose of changing the place of burial or for purposes essential to the administration of justice." 22 AM. JUR. 2D *Dead Bodies* § 4, at 11.

288. *See, e.g., State v. Johnson*, 50 P. 907 (Kan. Ct. App. 1897) (unexplained possession of a dead body illegally removed is *prima facie* evidence of wrongful possession); *State v. Schaeffer*, 64 N.W. 276 (Iowa 1895) (burden on defendant to show he had lawful authority to disinter a dead body).

289. *See Indian Cemetery*, 169 Misc. 584; *Charrier*, 496 So. 2d 601.

Recent federal legislation essentially renounces any federal assertion of title to Native American remains and burial objects which resulted from the early archaeological preservation statutes. Consequently, individuals and institutions that possess such remains and burial objects based upon this federal assertion of title can no longer claim any legally recognizable interest in Native American remains or burial objects.

The case law generally holds that absent a statute to the contrary, no one can have a true property right in human remains and that burial objects legally belong to the persons who buried them with the deceased or to their heirs. This case law indicates that if Native American remains or burial objects are disinterred, either the state or the lineal or tribal descendants of the deceased may bring suit for their repatriation.