

Bridging the Gap: A Perspective From Two Generations

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I. Introduction

Five years ago, the Texas Indian Bar Association¹ was asked to work with members of the American Indian Resource and Education Coalition, an Austin-based, statewide Indian education organization, and other interested Indians to get Indian input and perspective on a state bill for protection of unmarked burial sites.² Protection of unmarked burial sites is an issue of particular import to Indians because the majority of unmarked burial sites in Texas are Indian. The state currently has no protection for these sites, which are often singled out for looting and destruction as if Indians were subhuman creatures whose graves are of little consequence. To understand why this is a crucial issue to Indians requires some knowledge of the history of Indians in Texas, federal law, and applicable laws governing unmarked graves.

When the authors began this paper, they realized that they had come away from the 1997 legislative session in Texas, when proposed graves protection had once again failed to pass, with different perspectives on the issue. They felt it was important to present both of their viewpoints separately because in that manner they probably more fairly represent the feelings of the Indian groups who worked on the legislation. Thus, Helen L. Harris' viewpoint is contained in indented quotes, unless a specific quote is attributed to another

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1. The Texas Indian Bar Association was created in 1992 by a handful of Texas Indian lawyers. The association was created to help educate the public about Indian law and issues, and also as an organization to help meet the needs of Indian lawyers and legal professionals. The association has worked to bring changes to the Texas Family Code to accommodate the Indian Child Welfare Act; to study and publish a report on legal needs of Indians in Texas; to sponsor annual Indian law conferences; and to help with legislation to protect unmarked burial sites in Texas. The association's mailing address is P.O. Box 12911, Austin, TX 78711.

2. Tex. H. B. 1179, 73rd Leg., R.S. (1993).

source, and Ruth Soucy's perspective is included in the body of this article.

Should our dead deserve respect? Should the articles buried on their bodies and with them, laid there with love and reverence, in keeping with the customs of their times, be considered part of their burial and not ripped off of their bones or pillaged from their graves to be sold on the open market? Should those Indians—men, women, and children—who were murdered and simply buried in mass graves or thrown into a ditch somewhere be denied respectful reburial and given the rites that their own people and people of good will and sympathy would like to bestow on them? No person with respect for his or her own family members and fellow humans would say “No.”

II. Texas Law Provides Limited Protection for Unmarked Burial Sites

The Texas Penal Code criminalizes both abuse of a corpse and theft from a body or grave. Section 31.03 provides that it is a felony to steal property from a human corpse or grave,³ and section 42.08 of the Penal Code provides that it is a Class A misdemeanor to traffic in human corpses or to remove or to treat a human corpse in a seriously offensive manner.⁴ If these provisions were to be enforced against grave robbers of unmarked burials, those who intentionally break into unmarked graves could face a penalty of up to a year in jail and a fine of up to \$4,000.⁵ If theft from an unmarked burial were to be considered a crime under section 31.03, individuals who steal from unmarked graves and sell these items could face up to two years in jail.⁶

Moccasins from a dead Indian or a grave can bring \$25,000-\$35,000 a pair, and a painted and beaded war shirt can bring \$40,000 at specialized sales. Sotheby's of New York and Butterfield in San Francisco sold or expected to sell such 19th

3. TEX. PENAL CODE § 31.03 (West 1998) provides that theft is a criminal offense. Subsection (e)(4)(B) of this section provides that it is a state jail felony if “regardless of value, the property is stolen from the person of another or from a human corpse or grave.”

4. TEX. PENAL CODE § 42.08 (West 1998) provides that it is a Class A misdemeanor if a person “intentionally or knowingly:

(1) disinters, disturbs, removes, dissects, in whole or in part, carries away, or treats in a seriously offensive manner a human corpse;
 (2) conceals a human corpse knowing it to be illegally disinterred;
 (3) sells or buys a human corpse or in any way traffics in a human corpse; or
 (4) transmits or conveys or procures to be transmitted or conveyed, a human corpse to a place outside the state.”

5. TEX. PENAL CODE § 12.21 (West 1998) provides that the penalty for an individual convicted of a Class A misdemeanor can consist of both a fine not to exceed \$4,000 and jail time not to exceed one year.

6. TEX. PENAL CODE § 12.35(a) (West 1998) provides that “an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.” Subsection (b) provides that a state jail felony may also carry a fine not to exceed \$10,000.

and early 20th century items for these prices.⁷ When articles from the past are offered for sale, it is doubtful that generous Indians simply gave them away.⁸ Burial sites might contain hundreds of items that can bring in more money than an honest business would. In the marketplace, it is hard to find a common ground to plead when you cannot assume that respect for a fellow human and respect for the dead count for anything compared to money and prestige.

Although it would appear that these laws protect unmarked burial graves, several attorney general opinions indicate that they are not protected in Texas.⁹ In Attorney General Letter Opinion No. 89-7, the Attorney General was asked specifically “whether theft from an Indian burial ground constitutes an offense under section 31.03.”¹⁰ Curtis Tunnell, the Executive Director of the Texas Historical Commission who requested the decision, outlined the following fact situation:

I have received numerous reports that the systematic looting of American Indian cemeteries is taking place in Northeast Texas and other regions of the state. Law enforcement officials seem reluctant to investigate under this statute because the incidents are being perpetrated on private property with the permission of the property owner, and the graves are not marked with tombstones as is frequently found in a non-Indian cemetery.¹¹

In addressing this question, the Attorney General discussed various Penal Code provisions that criminalize abuse of corpses and theft from graves, but rather than specifically addressing the question of whether looting from unmarked graves constitutes theft under section 31.03 of the Penal Code, he focused on a case, *Mullinax v. State*,¹² which reversed a conviction for desecration of a burial site.¹³ The facts of *Mullinax* were very different from the facts presented to the Attorney General; in *Mullinax*, the defendant built a fence and cleared some vegetation over an unmarked burial site.¹⁴ The court also relied upon the defendant’s contention that he did not know the land contained graves, and that the defendant’s actions in putting up a fence and clearing a few

7. Butterfield & Butterfield, *American Indian Art*, Summer 1996, at 11 (advertisement for auction of tribal works); Sotheby’s, *American Indian Art*, Summer 1996, at 9 (advertisement for auction). The prices for the moccasins and the war shirt are consistent with the five-figure prices paid for selected artifacts, making grave robbing “a multi-million dollar industry.” Geoffrey Cowley et al., *The Plunder of the Past*, NEWSWEEK, June 26, 1989, at 58.

8. Diggers sign sworn statements that artifacts are legally obtained when submitting them for sale, and it is virtually impossible to prove otherwise. Cowley, *supra* note 7 at 58.

9. Op. Tex. Att’y Gen. No. LO-89-7 (1989); *but see* Op. Tex. Att’y Gen. No. LO-92-45 (1992); *see generally* Op. Tex. Att’y Gen. No. O-1767 (1940).

10. Op. Tex. Att’y Gen. No. LO-89-7 (1989).

11. *Id.*

12. 756 S.W.2d 40, 42 (Tex.App.—Texarkana 1988, no pet.).

13. Op. Tex. Att’y Gen. No. LO-89-7 (1989).

14. 756 S.W.2d 40, 41 (Tex.App.—Texarkana 1988, no pet.).

trees were not the type of actions which could be considered disrespectful to the dead.¹⁵ The defendant was not taking part in the intentional looting of graves for the remains and personal items in the graves.¹⁶

The issue presented to the attorney general concerned individuals who specifically, knowingly, and intentionally target Indian burials for their commercial value and then loot those sites, but the decision relies upon a case in which the unmarked graves are essentially undisturbed. Although the attorney general opinion states that it cannot determine “[w]hether a particular action constitutes a crime,” its reliance on *Mullinax* leaves the clear impression that it would be difficult, if not impossible, to criminally prosecute for theft or abuse of a corpse when the situation involves unmarked Indian burial sites.¹⁷ The attorney general quotes from *Mullinax*:

The statute does not make criminal those acts which are undertaken as the proper exercise of a claimed right, for in such cases there is no criminal intent. If a person is acting under a claim of right, albeit ill-founded, he is not guilty of an intentional desecration. If the act is not legally justified, it may constitute a civil trespass or other civil wrong which can be redressed by civil remedies, but it is not a crime.¹⁸

A later opinion, Attorney General Letter Opinion No. 92-45,¹⁹ more specifically addresses Section 31.03 of the Texas Penal Code, which makes theft from a human corpse or grave a felony offense.²⁰ Although this decision states that Indian bodies and graves must be treated the same as the bodies and graves of non-Indians,²¹ it notes that “conviction of an offense under section 31.03 requires that there be an identifiable living ‘owner’ of the property as of the date of the alleged theft.”²² Although unmarked Indian graves may once have been identifiable by family members who lived nearby, the state itself, under the official Indian extermination policy of Republic of Texas President Mirabeau Buonaparte Lamar, eliminated those who might have identified these graves.²³ Certainly neither opinion addresses whether the tribes which were forcibly removed from Texas have a claim to items stolen from tribal members’ graves.

The Native American Graves Protection and Repatriation Act

15. *Id.* at 41.

16. *Id.* at 40.

17. Op. Tex. Att’y Gen. No. LO-89-7 (1989).

18. 756 S.W.2d at 42, *quoted in* Op. Tex. Att’y Gen. No. LO-89-7 (1989).

19. Op. Tex. Att’y Gen. No. LO-92-45 (1992).

20. TEX. PENAL CODE ANN. § 31.03(e)(4)(B) (West 1998).

21. There is a very strange attorney general opinion that concludes that no Texas law is violated by displaying the body of a mummified African-American baby. Op. Tex. Att’y Gen. No. O-1767 (1940). The opinion also appears to distinguish between fresh bodies and “mummies, skeletons, and skulls” which the opinion states are actually private property and protected under Texas property law as such. *Id.* at 11. Under the reasoning of this decision, it would appear that if someone were to obtain the skulls of Mirabeau Buonaparte Lamar or Sam Houston, the person would have a protected property interest in these skulls and could display them as desired or turn them into ashtrays, as has been done with the skulls of Indians.

22. Op. Tex. Att’y Gen. No. LO-92-45 (1992).

23. T.R. FEHRENBACH, LONE STAR 280 (1968).

(NAGPRA) protects burial sites on federal and tribal lands and also provides for the repatriation of Indian remains and stolen grave objects.²⁴ However, because the majority of unmarked Indian graves in Texas are located on private or state-owned property rather than federal or tribal land, NAGPRA is of limited help in protecting Indian graves in Texas from looters.²⁵ As the destruction and looting of unmarked graves in Texas continues without prosecution or hope of prosecution, changing state law to criminalize the intentional destruction and looting of unmarked graves appears to be the best way to protect all unmarked burial sites, both Indian and non-Indian.

III. Efforts to Change Texas Law on Unmarked Burial Sites

The Texas Indian Commission was a state agency created in the 1960s to promote unity among Texas Indians and to promote understanding of the general public about Indians.²⁶ The Indian Commission had the authority to help with legislation relating to Indians at both the state and national levels.²⁷ It was the only statewide entity with the power to work with both Indians of the three tribes in Texas (the Alabama-Coushatta, the Tigua, and the Kickapoo), and other Indians to coordinate and promote their common interests. The first move to create legislation to specifically criminalize looting of unmarked graves in Texas was in 1987 when the Texas Indian Commission and the Texas Historical Commission joined forces to sponsor legislation to protect unmarked burial sites.²⁸ The proposed legislation did not pass the legislature that year.²⁹ The Indian Commission, which could have served as a central force to push for graves protection legislation, was sunsetted in 1989.³⁰

The Texas Legislature actually passed a bill in 1989 to criminalize robbing unmarked cemeteries. However, that bill was vetoed by Governor Bill Clements, apparently in deference to private property rights interests.³¹ In 1990 President Bush signed NAGPRA into law, which means that if looted remains and grave objects are held by governmental entities receiving federal funding, there is the possibility of repatriation and reburial with dignity. However, the state legislation proposed once again in 1993 did not address NAGPRA and left some gaps concerning how remains and grave contents seized from grave robbers would be treated.³²

The Office of the State Archaeologist and the Historical Commission supported legislation in 1993 to protect unmarked burial sites, but disagreed with the Indians over what language needed to be included in the legislation

24. 25 U.S.C.A. §§ 3001-13 (1994).

25. Steve Russell, *Sacred Ground: Indian Graves Protection in Texas Law*, 6-8 (Oct. 1987) (presented at the 1997 Texas Indian Law Conference). See also, Steve Russell, *Saved Ground: Unmarked Graves Protection in Texas Law*, 4 TEX. F. ON C.L. & C.R. 3 (WINTER 1998).

26. TEX. GOV'T CODE ANN. § 461.021 (West 1988) (repealed 1989).

27. *Id.*

28. Steve Russell, *Picking Bones in the Legislature*, TEX. OBSERVER, Aug. 1, 1997, at 15-

16.

29. *Id.*

30. TEX. GOV'T CODE ANN. § 461.002 (West 1988) (containing sunset provisions).

31. *Id.*

32. H.R. 1179, 73rd Leg., Reg. Sess. (Tex. 1993).

proposed during the 73rd Legislative Session. The Indian lawyers wanted language in the bill that would make it clear that the human remains and other objects would go to some agency which would be subject to NAGPRA's repatriation process. The Indians testified against the bill in the Senate International Relations, Trade and Technology Committee, making clear that while they wanted legislation to protect burial sites they wanted input into how that bill was drafted. These objections by Indians to the bill, as written, forced the legislation into a special committee representing both the Indian and the archaeological perspective to seek some sort of compromise. The bill died in the Senate International Relations, Trade and Technology Committee when time ran out in the 73rd Legislative Session.

I speak from the perspective of a Choctaw woman of almost 70 years of age. I have attended numerous hearings on grave protection. From the original group of us who worked on this legislation, several have died, including two veterans who had served through several wars and had hoped to see protection for Indians' graves before their lives ended. One was cremated. Another lies buried in a small country graveyard in East Texas beside his wife's grave. I have doubts that his bones will remain undisturbed because small cemeteries, even marked, have a tendency to be overlooked when land is needed for a new highway, a new housing addition, or city expansion. Several of us are in remission from cancer; age is upon us. We probably will not live to see any legal protection for unmarked graves, especially Indian graves, in our lifetimes. However, we will continue to work for passage of this bill. Our children and grandchildren will carry on the work.

A law which was desperately needed and which meant a great deal to Indians, had no hope of being passed in 1993 due to the mistrust and wariness between Indians and non-Indians. Overcoming that gulf seemed insurmountable, even though we had common ground in wanting to pass legislation that would protect unmarked burial sites. There was not a breakdown of communication between the archaeologists and the Indians or the lawyers and the non-lawyers. There were lawyers on both sides of the negotiating table, and the Indian organizations which were represented in the process included Indian archaeologists. While the Indian negotiators, as members of a minority group, were used to working with non-Indians, it did not appear that the bill sponsors had dealt very often with Indians, even though the proposed legislation covered an issue that is important to the Indian community. The lack of communication and understanding was apparent in the bill sponsors' surprise that modern Indians would be concerned about the graves of Indians to whom they are not directly related. An inquiry was made as to the "Indianness" of one of the Indian lawyers. In retrospect, although this inquiry infuriated the entire group of Indian lawyers, I believe the question arose from ignorance of who Indians are and why we are concerned about this issue.

As for the question designed to entrap us: Are we real Indians? I consider it both amusing and a compliment to us. The obvious implication is that if we aren't full blood, of the same tribe as the buried or unburied Indian, then we have no damn business sticking our big noses in respectable citizens' property. These people were no relatives of ours. An obvious conclusion to be gathered, however, considering the state of things, is that no one but a real Indian would be interested in treating human remains respectfully. I appreciate that assumption. However, even a group of concerned non-Indians, if they wanted to express human dignity and offer burial rites to the remains of another human and prevent grave looting, should be allowed to do so. Few people, even lobbyists, would dare to publicly ask anyone trying to protect children from prostitution whether they were indeed the birth parents of victims and tell them that if they weren't, they had no right to interfere with profitable transactions. Wrongs, whether they are illegal or not, are still wrongs, and people who respect themselves, their families, and their fellow men will continue to fight against them. Eventually, people with principles will triumph.

One of the lessons we learned from watching the 1993 legislation die is that the only way to create a bridge of understanding is for all of us, Indian lawyers, archaeologists, and others, to insist on being part of the process. Because there are few Indians in this state, we do not have a great deal of political clout in forcing legislation.³³

When the Texas Legislature convened in 1995 for the 74th Session, Indians and state archaeologists had become more accustomed to working together. This time, both Indian archaeologists and Indian lawyers had input into the legislation to protect graves, and Indian groups worked enthusiastically in support of the proposed legislation.³⁴ With this united front, the bill was approved by both the House Committee on International Relations, Trade & Technology and the Senate Committee on State, Federal, and International Relations. After these committees gave the bill their stamp of approval, the bill passed the Senate, but drew fire from property rights advocates and died in the House. The bill died because the time allotted for the House session ran out before a vote could be held on the House floor. Those of us who worked on the legislation were surprised by this development, but assumed that there had been a lack of communication concerning the scope of the bill that could be corrected in the next session.

I am always amazed that people can maintain their serious demeanor when they dredge up the same old objections to

33. Indians are one of the smallest minority groups in Texas. Figures from the 1990 census indicate there are about 70,000 Indians in Texas, making up only about 0.4 percent of the population. [State Bar of Texas department of research and analysis, Texas Indian legal needs assessment, (June 1997).]

34. S. 528, 74th Leg., Reg. Sess. (Tex. 1995).

protecting unmarked graves. However, I have to remember that what is legal does not necessarily encompass ordinary human decency or even ethics. Salary and prestige are powerful inducements. Lobbyists' loyalties are usually well paid for. People in political offices must do as their most influential constituents ask or risk losing prestigious positions.

Two years later, during the 75th Legislative Session, we discovered that some lobbyists and legislators also need more diversity in their lives and more contact with Indians. Legislation to protect unmarked cemeteries was once again introduced with combined support of Indians and archaeologists.³⁵ The proposed legislation passed the Senate Criminal Justice Committee, but met heavy resistance from private property advocates in the House Committee on State, Federal, and International Relations, where it was left pending.³⁶ The House committee heard testimony from archaeologists, lawyers, and other interested parties in favor of this bill. A number of these people were Indians, including lawyers from the Texas Indian Bar Association. Supporters of the legislation met lobbyists and legislators who were sympathetic and favorably disposed toward the legislation, including many who by now had become used to the "Indian presence" from working with us in prior sessions. However, not all of the legislators had this attitude, as evidenced by the types of questions that were raised over and over again and the comments that were made.

No matter how the bill reads, no matter what assurances are made, in keeping with the language of the bill, the objectors choose to maintain that they can't believe that the graves protection bills won't give *carte blanche* to a bunch of Indians who will probably run all over private property, maybe even tie women to wagon wheels, and do heaven knows what other heathenish things. Therefore, if I accept that they honestly cannot believe what they can read, what lawyers assure them, then they must believe that we are lying and this must not be the bill that we are trying to sneak through.

Questions were raised about the possibility that inadvertent disturbances of graves could subject citizens to criminal prosecution. These concerns were addressed in-depth by lawyers familiar with the proposed bill and its language. Concerns were expressed that the legislation would create an economic hardship on farmers who might have to stop work to call the police if they uncovered bodies and also that Indians would use the legislation as an excuse to trespass on private property. Questions were raised about the ability of an average person to tell Indian bones from dog bones. Many Indians believe in private property rights, especially given their history of being deprived of private property, so there clearly should have been common ground between the non-Indian private

35. S. 810, 75th Leg., Reg. Sess. (Tex. 1997). Companion bill was H.R. 3425, 75th Leg., Reg. Sess. (Tex. 1997).

36. *Id.*

property rights advocates and the Indian graves protection advocates.³⁷ However, once again, a chasm arose between the non-Indians and the Indians. My own belief is that all of the concerns expressed by opponents of grave protection could have been expressed by a simple statement: "We have never worked with Indians before and we don't trust them anyway."

As for the many acres of land that will lie fallow should bones be found there, one body doesn't occupy forty acres; nor does a burial pit. We all occupy little more space than the dimensions of our bodies when we are buried. As for the naive plea of not being able to determine whether foot bones are a dog's or an Indian's, I wonder if these people think that dog boots will fit their feet. If it will work, they can save money.

IV. Conclusion

A diverse society is one that includes people of various ethnic, cultural, and religious backgrounds and encourages individuals to interact while overcoming their own prejudices. Texas has Indian lawyers and archaeologists, which as minority members of their respective professions are accustomed to working with non-Indians. Because these Indians speak the language of their respective professions, they inspire more trust in Indian communities because they are seen as more understanding of the viewpoint of Indians than are non-Indians.³⁸ It is in this way that the gap between Indians and non-Indians may be closed. We bridge the gap between cultures individually, by our presence and by our continuing existence.

Until unmarked graves protection laws are passed in Texas, a number of us will continue to be haunted by a vision of Texas filled with graves that continue to be looted, with bones tossed aside and crushed like garbage, or even gathered up as collectibles. Our experience in working with this issue has clearly shown that the passage of legislation important to Indians depends on our ability to bridge the communication gap with people who seem surprised that we are alive, much less that we have interests we want protected. We will continue to build connections, to bridge differences, and to overcome legislative barriers so that some day Texas may finally agree to accord our dead the same respect and dignity commonly granted to the dead of other races.

A few years after my eighteen-month old brother died during World War I, some non-Indian citizens from the small

37. Federal governments, state governments, and even ambitious individuals have in the past felt free to eject Indians from privately owned Indian lands. For example, when gold was discovered in the 1820s on lands owned by the Cherokees in Georgia, their neighbors armed themselves, invaded homes owned by Cherokees, ejected the families living there, and proclaimed themselves owners of newly acquired homes, personal possessions, cultivated land, and livestock. RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL* 115 (1987) (part of the *Civilization of the American Indian Series No. 186*).

38. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 145 (1983).

community broke into his tiny crypt to see what valuables were buried in it. His crypt was in a marked grave in the community cemetery. Yet he was Indian; looting his grave was not considered an outrage. Evidently attitudes have changed little since then. Surely people in this country and this state will someday progress to the stage that they can affirm that all people deserve respect, that if a group of people expect their buried dead to remain buried, along with their possessions, then such an expectation can be honored. Perhaps they can also agree to penalize people who prey on the dead, robbing graves and selling artifacts.