Legal Articles

Sacred Ground: Unmarked Graves Protection in Texas Law

Steve Russell*

> Listen. We need to tell you some of our stories. We need to tell them and you need to hear them. By "we," I mean the American Indian and other indigenous cultures of North America. By "you," I mean the non-Indian people of North America.[1]

I met Dean B. Suagee, who wrote the words above, when we were both serving on the board of the Native American Bar Association. Suagee and I are both mixed-blood Cherokees, are lawyers, and understand that Indians can learn from anthropology in general and archaeology[2] in particular. Suagee's concern, and mine, is that learning and respect pass in both directions and that many *yonega*[3] scientists curb the *yonega* tendency to define "common ground" as whatever the Indians have left. We are not anti-science, but if "your" burials are sacred, so are "ours." The story of the earliest peopling of this continent is "ours," and we demand a voice in its telling.

I. Introduction

The earliest European burials likely to be found in Texas are in the *campo santo*, or sacred ground, around the Spanish Catholic missions. If Jews and Christians buried their dead, and if the burials were sacred ground, perhaps the claim of Native Americans that *their* burials are also sacred ground should not

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1. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground,* 21 VT. L. REV. 145, 147 (1996).

2. "The systematic recovery and scientific study of material evidence of human life and culture in past ages" can correctly be spelled "archaeology" or "archeology." *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 36 (Peter Davies ed., Paperback ed. 1976). When referring to particular offices or organizations, this article will adopt the spelling adopted by the referant.

3. I am admonished now and then that the Cherokee *yonega* (literally, "white") or the Lakota *wasichu* (literally "fat-takers," connoting greed) or similar words from Native languages are "racist speech." If so, they should be tolerated in a culture peppered with "American Indian," "Native American," "Redskin," "Brave," "Buck" and "Squaw," this latter known among Indians as "the S____ word" as we resist this application to our women relatives of a corrupted term for the female organ meant in the context when it was coined to describe an Indian woman kept for sexual use. Even our tribal designations in the parlance of the dominant culture are often words appropriated from our enemies. So please understand that my purpose is not to offend but to accentuate the alterity that lies between us.

be completely unfamiliar. In the words of Pawnee Historian James Riding In:

> Many Indians assert that disinterment stops the spiritual journey of the dead, causing the affected spirits to wander aimlessly in limbo. These affected spirits can wreak havoc among the living, bringing sickness, emotional distress, and even death. Many tribes such as the Navajo, Apache, and Pawnee believe that anyone who disrupts a grave is an evil, profane, and demented individual who plans to use the dead as a means of harming the living. Reburial within Mother Earth enables the disturbed spirits to resume their journey.[4]

This concept of a spirit journey is not characteristic of all Native American religious thought—many cultures expressed their spiritual impulses in many ways[5]—but the concept is not peculiar to Native Americans. *Ecclesiastes*: 12:7 reminds us that in the Judeo-Christian tradition, ". . . the dust will return to the earth as it was, and the spirit will return to God who gave it."

The sanctity of the grave as recognized by both European and Native cultures might now seem easily protected as a straightforward matter of human dignity. Native Americans no longer pose any threat to Euro-America's manifest destiny to span the continent, but our contemporary lack of closure on this issue was demonstrated again on November 16, 1990, when the Native American Graves Protection and Repatriation Act[6] (NAGPRA) was signed into law.

NAGPRA is seen by Native American activists as the culmination of a civil rights movement on behalf of the dead,[7] a movement that has sought judicial intervention since at least 1907.[8] Indians have insisted that their dead be treated with the same respect as European dead and that the dead Indians that outnumber the live Indian students on many campuses be "repatriated," returned to their descendants for reburial. The movement has been opposed by amateur treasure hunters on one side and archaeologists, physical anthropologists and museums on the other.

Amateur treasure hunters do not fare well in public opinion when they rob graves. In the principal case in which grave looters tried to establish legal

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4. James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L.J. 11, 13 (1992) (footnote omitted). *See also* Margaret B. Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 148-49 (1989) (discussing the conflict between Native Americans and the scientific community over the reburial of human remains).

5. It is hazardous to generalize about the religious principles of over 500 federally recognized tribes and an unknown number of unrecognized tribes, but the best attempt is VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION (2d ed. 1994).

6. Pub.L. 101-601, §2, Nov. 16, 1990, 104 Stat. 3048 (codified as amended at 25 U.S.C.A. §§ 3001-3013 (West Supp. 1998)) [hereinafter "NAGPRA"]

7. *See generally* ROGER C. ECHO-HAWK & WALTER R. ECHO-HAWK, BATTLEFIELDS AND BURIAL GROUNDS: THE INDIAN STRUGGLE TO PROTECT ANCESTRAL GRAVES IN THE UNITED STATES (1994) (recounting popular history of the modern repatriation movement with emphasis on the Pawnee).

8. Kim Dayton, *"Trespassers, Beware!": Lyda Burton Conley and the Battle for Huron Place Cemetery*, 8 YALE J.L. & FEMINISM 1, 1 (1996).

ownership of grave goods, the Louisiana courts had little trouble passing them over in favor of the Indian tribe whose ancestors had been dug up and robbed.[9]

Grave robbing in the name of science comes wrapped in an aura of respectability that escapes amateur looters. From within that aura, some scientists take on a patronizing tone, speaking almost *ex cathedra*:

> The position of those opposed to archaeology is understandable in emotional terms, but in intellectual terms it is not acceptable. It is nonintellectual in that it places no value on public ownership and preservation of the evidences of the past. It is anti-intellectual in that it proclaims that everything we need to know is already known. Introduction of the notion of private ownership is contrary to the position taken by federal legislators over the past 75 years; it also raises serious conflicts over conflicting claims from *other* private interests (property owners, dealers, relic collectors, local museums and community interests).[10]

The "private ownership" that disturbs Professor Clement Meighan, a leading spokesman against reburial, is ownership by an Indian tribe. Leaving aside that tribal ownership *is* public ownership, he admits that "most archaeologists do not object to Indian ownership of collections that are preserved and properly curated in a museum; the controversy is over whether collections should be reburied or otherwise destroyed and dissipated."[11]

Former Texas State Archeologist Robert Mallouf, making the same point, bordered on hysteria:

> The perceived inability of the archeological community to present a united and enlightened defense during past repatriation debates will, in the long run, only encourage religious fundamentalists, self-proclaimed mystics, ethnic "wannabes," aspiring politicians, and vacillating "archeocrats" to continue plucking away at our well-spring of scientific collections and basic research rights.[12]

Euro-Americans do not normally hear the remains of their ancestors referred to as "collections."[13] If archaeologists see a need to study Euro-

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9. Charrier v. Bell, 496 So. 2d 601 (La. Ct. App. 1986), *cert. denied*, 498 So. 2d 753 (La. 1986).

10. Clement W. Meighan, *Archaeology: Science or Sacrilege?*, *in* ETHICS AND VALUES IN ARCHAEOLOGY 208, 222 (Ernestine C. Green ed. 1984).

11. Michelle Bourianoff Bray, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 243 (1990).

12. Robert J. Mallouf, *The Human Remains Issue: Archeology Under the Gun*, TEXAS ARCHEOLOGICAL STEWARDSHIP NEWSLETTER, March 1993 at 1.

13. "In short, the sensibilities of modern Christians still need to be appeased, while those of other faiths are often accorded less importance: there are cases in the Middle East where Muslim labourers are assured, falsely, that the skeletons they are disturbing are Roman rather than Muslim, in order to avoid trouble; the sensibilities of the dead members of defunct religions are safely

American burials, they seek permission[14] or a court order and are careful to say so when they publish their results.[15]

A study of Euro-American funerary artifacts is accomplished not by robbing graves but by surveying morticians.[16] This study, incidentally, found that two-thirds of contemporary burials involve funerary artifacts.[17] "In fact, among morticians, it is considered unethical not to inter any legally allowed artifact presented by relatives for burial along with their dead."[18] While many of the funerary artifacts interred today probably do not carry the religious significance of those interred with Native Americans, it is fair to wonder whether the relatives of the deceased thought they were honoring their dead or contributing to a "collection."

Grave robbing, whether or not under color of scientific investigation, has been more of a problem for Native Americans than for other groups.[19] Even when disinterment is accidental, securing reinterment is more difficult for Indians.[20] "There is no question that *most* Native American remains are retained

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ignored. Why can we disturb and put on show the remains of the Palenque Maya chieftain or a famous Egyptian ruler, but not those of Elizabeth I or Napoleon?" Paul G. Bahn, *Do Not Disturb? Archaeology and the Rights of the Dead,* 3 OXFORD J. OF ARCHAEOLOGY 127, 133 (1984).

14. Little, Lanphear & Owsley, *Mortuary Display and Status in a Nineteenth-Century Anglo-American Cemetery in Manassas, Virginia,* 57 AM. ANTIQUITY 397, 398 (1992). These exhumations (and reburials) were also under court order. *Id.*

15. *Id.* This writer has found one exhumation of a Frenchman without a court order. Kathleen Gilmore & H. Gill-King, *An Archeological Footnote to History,* BULL. TEX. ARCHEOLOGICAL SOC'Y 303 (1989). However, at the time the body was exhumed, it was thought to be Native American. *Id.*

16. John R. Elliott, *Funerary Artifacts in Contemporary America,* 14 DEATH STUDIES 601 (1990); *see generally* Randall H. McGuire, *The Sanctity of the Grave: White Concepts and American Indian Burials, in* CONFLICT IN THE ARCHAEOLOGY OF LIVING TRADITIONS 167 (Robert Layton ed. 1989)(differentiating research methods for Indian and European burials).

17. Elliott, *supra* note 16, at 602-3.

18. *Id.* at 604.

19. *See generally* Riding In, *supra* note 4, at 23-24; *See* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History,* 24 ARIZ. ST. L.J. 35, 43 (1992); Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items,* 24 ARIZ. ST. L.J. 79, 95 (1992); Diana Dee Thomas, Comment, *Indian Burial Rights Issues: Preservation or Desecration,* 59 UMKC L. REV. 737, 741-45 (1991).

20. *See* Bowman, *supra* note 4, at 149-50 (explaining why most human remains curated in federal institutions are Native American); "An Indian skeleton was found on the edge of a white pioneer cemetery being relocated for a highway. State Archaeologist Marshall McKusick removed the Indian bones to the laboratory in Iowa City for study, and the white remains were exhumed by morticians to be reburied immediately. . . . McKusick was adamant that he would not turn over the bones to some radical Indian group and that Iowa law gave him responsibility for the bones. It took a court order to get the bones reburied." Larry J. Zimmerman, *Made Radical by My Own: An Archaeologist Learns to Accept Reburial* in CONFLICT IN THE ARCHAEOLOGY OF LIVING TRADITIONS, *supra* note 16, at 60-1; "When the archaeological laboratory of the State University of New York at Binghamton raised objection to the destruction of archaeological materials in 1971 they were allowed to come in and excavate the Indian graves and other parts of the prehistoric site. The archaeologist in the field decided what was an Indian grave and what was an indigent White grave. The department of transportation would then call the undertaker to get the White graves. The decision seemed to be based primarily on whether there were goods with the graves of obvious Indian origin, the presence or absence of a casket, and the position of the body. The archaeologists excavated at least nine Indian graves, eight prehistoric and one in a coffin and clearly historic. Other historic Indian burials were probably removed by the undertaker because they were mistaken

in academic collections, while *most* Euro-American remains are reburied."[21]

The alleged scientific necessity for this disparate treatment apparently dates from the time when racial inequality was thought to have a scientific as well as a theological basis.[22] "American investigators had become interested in the American aborigines perhaps before they began to think systematically about Africans, and in the cases of American Indians, Africans, and Australian aborigines, white investigators extrapolated from measurements of heads, jawbones, and skeletons to the moral and intellectual powers of the persons who possessed these attributes."[23]

Whether one's view of modern science is of the Leakeys in Olduvai Gorge pushing back the dawn of humankind[24] or of United States Army troops after the Sand Creek Massacre[25] beheading warm Cheyenne corpses,[26] an overt appeal to racism will no longer serve to justify disparate treatment of Euro-American and Native American dead, at least since Congress elevated the status of dead Indians from "archeological resources"[27] to human beings with the passage of NAGPRA.

However, two peculiarities of Texas history limit severely the application of NAGPRA in Texas.[28] First, the Republic of Texas prosecuted a not unique

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for Whites. The graves dug up by the archaeologist were put in boxes and curated; they have never been studied." McGuire, *supra* note 16, at 170-171 (notes omitted).

21. Thomas E. Emerson & Paula G. Cross, *The Sociopolitics of the Living and the Dead: The Treatment of Historic and Prehistoric Remains in Contemporary Midwest America*, 14 DEATH STUDIES 555, 571 (1990).

22. J. R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 295-96 (1978); Riding In, *supra* note 4, at 17-18.

23. POLE, *supra* note 22, at 296. *See generally* Robert E. Bieder, *The Collecting of Bones for Anthropological Narratives*, 16 AM. INDIAN CULTURE & RESEARCH J., number 2, 21, 24-27 (1992) (discussing of the rise and fall of the "science" of phrenology).

24. L.S.B. LEAKEY, OLDUVAI GORGE: 1951-61 (Vol. 1, 1965); P.V. TOBIAS, OLDUVAI GORGE: THE CRANIUM AND MAXILLARY DENTITION OF AUSTRALOPITHECUS (ZINJANTHROPUS) BOISEI (Vol. 2, 1967); MARY D. LEAKEY, OLDUVAI GORGE: EXCAVATIONS IN BEDS I AND II, 1960-1963 (Vol. 3, 1971); MARY D. LEAKEY, OLDUVAI GORGE: MY SEARCH FOR EARLY MAN (1979); RICHARD E. LEAKEY, THE MAKING OF MANKIND (1981).

25. The mutilated remains of the mostly Cheyenne people murdered at Sand Creek, Colorado, on November 29, 1864, while sleeping under the protection of an American flag, were finally laid to rest in 1993. Connie H. Yellowman, *"Naevahoo'ohtseme"—We Are Going Back Home: The Cheyenne Repatriation of Human Remains—A Woman's Perspective*, 9 ST. THOMAS L. REV. 103, 109 (1996).

26. Riding In, *supra* note 4, at 19; Trope & Echo-Hawk, *supra* note 19, at 40-41. Characterizing the issue as "grave robbing" perhaps diverts attention from the fact that many Native American dead never even got buried, at least not buried intact, before being "collected." *Id.* at 40-1; Riding In, *Six Pawnee Crania: Historical and Contemporary Issues Associated with the Massacre and Decapitation of Pawnee Indians in 1869*, 16 AM. INDIAN CULTURE & RESEARCH J. 101 (1992).

27. 16 U.S.C.A. § 470bb(1) (West Supp. 1998). The Antiquities Act of 1906, 16 U.S.C.A. §§ 431-433 (West 1998), was the beginning of dead Indians as "data." The Archaeological Resources Preservation Act of 1979, 16 U.S.C.A. § 470bb(1) (West Supp. 1998), then specifically defined "human skeletal materials. . . at least 100 years of age" as an "archaeological resource." Regulations under the Antiquities Act of 1906 have been amended to comply with NAGPRA. 25 C.F.R. § 262 (1998).

28. *See generally* Steve Russell, *The Legacy of Ethnic Cleansing: Implementation of NAGPRA in Texas*, 19 AM. INDIAN CULTURE & RESEARCH J., number 4, 193 (1995).

but uncommonly successful program of ethnic cleansing,[29] a state policy of giving virtually all Native Americans residing in Texas a simple choice: leave or die. The slaughter began as state policy in 1838 and continued until all Native American tribes and most Native Americans indigenous[30] to Texas were either killed or displaced outside of Texas. Second, the terms under which Texas entered the federal union left most "unoccupied" land in state rather than federal ownership[31] and therefore outside the reach of NAGPRA.

Ethnic cleansing has limited NAGPRA's applicability in Texas because an Indian tribe must show some cultural or geographical relationship to the materials the tribe claims under NAGPRA.[32] Those tribes that could make such a showing are gone from Texas—some merely evicted,[33] others extinguished by assimilation or military action.[34] The "civilized" Indians who were sedentary farmers and relative newcomers (also evicted at gunpoint)[35] and the tiny tribes retaining land in Texas[36] were less likely to be victimized simply because their burial practices resembled those of their Euro-American neighbors.[37] NAGPRA applies to future grave robbing that takes place on federal or tribal land,[38] but federal and tribal land together comprise less that two percent of Texas. Because of NAGPRA's limitations upon who can bring a claim and where the grave must be found, only Texas law can effectively protect Native American burial sites.

With the exception of NAGPRA, all of the law discussed herein applies to robbing of unmarked graves generally, without regard to the ethnicity of the

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29. "Ethnic cleansing" is used herein to mean exactly what it means when applied to the former Yugoslavia: killing or removing people of an unwanted ethnicity for the purpose of appropriating their land.

30. Words like "indigenous" or "autochthonous" or "aboriginal" must be equivocal even when used by an anthropologist, because in a strict sense they could not apply to any habitat this side of Eden. Use of these words always assumes a certain slice of time. Assuming, for example, first contact with white people, Comanches and Apaches would not be "aboriginal" inhabitants of Texas. It remains as certain as such matters ever are that any human remains deposited in North America prior to first contact are those of human beings ancestral in some sense to modern Native peoples, unless we resurrect the early "scientific" attribution of the Mississippian mounds to space aliens or the lost continent of Atlantis. *See generally* ROBERT SILVERBERG, MOUND BUILDERS OF ANCIENT AMERICA: THE ARCHAEOLOGY OF A MYTH (1968).

31. BASCOM GILES, HISTORY AND DISPOSITION OF TEXAS PUBLIC DOMAIN 6 (1945).

32. 25 U.S.C.A. § 3005 (West Supp. 1998) (stating that cultural affiliation may be shown "by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.")

33. *E.g.*, Apache, Caddo, Comanche, Kiowa, Tonkawa, Wichita.

34. *E.g.*, Atakapan, Coahiltecan, Jumano, Karankawa.

35. *E.g.*, Cherokee, Chickasaw, Choctaw, Lenape (Delaware), Muscogee (Creek), Potawatomi, Shawnee.

36. Alabama-Coushatta, Traditional Kickapoo, and Ysleta del Sur Pueblo.

37. *E.g.*, DICK PING HSU, TEXAS STATE BUILDING COMMISSION AND TEXAS STATE WATER DEVELOPMENT BOARD, THE ARTHUR PATTERSON SITE: A MID-NINETEENTH CENTURY SITE IN SAN JACINTO COUNTY TEXAS 11 (1969). In this case, the professional grave robber named his published report after the amateur grave robber whose depredations led to discovery of the site. Only ornamentation on the clothing distinguished these Alabama-Coushatta people from any other farmers. *Id.* at 46. *See also* McGuire, *supra* note 16, at 170-171 (stating that when graves contain a casket, the primary determinant of ethnicity is the nature of the grave goods.)

38. 25 U.S.C.A. § 3002(c), (d) (West Supp. 1998).

corpse. Therefore, given the limitations of NAGPRA, the interests of African-Americans in abandoned slave cemeteries, the interests of descendants of Catholic converts at the oldest Spanish missions, the interests of pioneer descendants in abandoned family cemeteries, and the interests of modern Native Americans are identical in the protection their graves receive—or do not receive—under Texas law. This article will explore the evolution of Texas law in regard to protection of graves and will propose a means for interment protection. Section II will provide an analysis of English and American common law to show how it has shaped current Texas statutory law and why it does not provide a satisfactory remedy. Part III examines current Texas law and uncovers the limits of its protection. Finally, Part IV displays the attempts and failures of past legislators to create adequate protection for unmarked burials.

II. Common Law of Burials

The common law of England applies to Texas law in matters to which statutory and constitutional law have not spoken.[39] Nearly as important, an understanding of the common law is useful to understand the current state of Texas statutory law. Blackstone addressed the property status of burials as follows:

> [T]hough the heir has a property in the monuments and cutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one in taking up a dead body steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral.[40]

In a discussion of the common law crime of larceny, Blackstone used burials to demonstrate the requirement that there be a property interest before there can be larceny:

> Notwithstanding however that no larciny can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie, for the goods of a person unknown. In like manner as among the Romans, the *lex Hostilia de furtis* provided that a prosecution for theft might be carried on without the intervention of the owner. This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing

39. TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 1986).
40. WILLIAM BLACKSTONE, 2 COMMENTARIES 428 (3rd ed. rev. 1884) (footnote omitted).

> the corpse itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the grave-cloths be stolen with it.[41]

While human remains were clearly not considered "property" in English common law,[42] graves were not entirely without protection. Blackstone's "parson"[43] had the power and the duty to keep the sanctity of the place where most people were buried—the churchyard[44]—and the ecclesiastical courts would provide a remedy against disturbers of the dead.[45]

Texas has never had ecclesiastical courts with secular authority, and the practice of burying the dead outside of churchyards was not confined to Native Americans.[46] Small community cemeteries, slave cemeteries, and family cemeteries are found down every ranch road, and the markings of these cemeteries often failed to survive the community, the institution of slavery, or the family as an economic enterprise. Even some churchyards probably became unmarked when Spanish missions failed and the missionaries were recalled to what is now Mexico.[47]

Common law in the United States, because of burial practices so different from those of England, came to vest responsibilities for the dead in next of kin rather than with Blackstone's "parson"[48] or Bernard's "ordinary."[49] American common law follows English common law in recognizing no property interest in a corpse,[50] although courts in the United States have used tort law rather than property law to award damages.[51] Tort law requires that the distressed party

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41. WILLIAM BLACKSTONE, 4 COMMENTARIES 236 (3rd ed. rev. 1884) (footnotes omitted). Illustrating how another culture viewed disturbing of graves, Blackstone went on: "Very different from the law of the Franks, which seems to have respected both as equal offenses: when it directed that a person who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants, till the relations of the deceased consented to his re-admission." *Id.*

42. H. MARCUS PRICE III, DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 21 (1991); HUGH Y. BERNARD, THE LAW OF DEATH AND DISPOSAL OF THE DEAD 16-17 (1979).

43. BLACKSTONE, *supra* note 40.

44. BERNARD, *supra* note 42, at 14.

45. PRICE, *supra* note 42, at 21.

46. *See generally* KIM PARSONS, A REFERENCE TO TEXAS CEMETERY RECORDS (1988). In early Texas, death could come so suddenly and in such isolated places that any interment at all was a triumph over circumstances. *E.g.*, Frank Collinson, *Obsequies on the Prairie*, RANCH ROMANCES, March 2, 1937, at 128.

47. "The idea of reducing the Indians through mission-presidios, and thus forming an Hispanicized core to populate and hold Texas, died slowly and painfully. Mission after mission failed, as Indians died out or moved away, or became bitterly hostile." T. R. FEHRENBACH, LONE STAR 63 (1983).

48. BLACKSTONE, *supra* note 40.

49. BERNARD, *supra* note 42, at 13.

50. 22A AM. JUR. 2D *Dead Bodies* § 2 (1988); 25A C.J.S. *Dead Bodies* § 2 (1966); Walter F. Kuzenski, *Property in Dead Bodies*, 9 MARQ. L. REV. 17, 18 (1924). *See generally*, 28 TEX. JUR. 3d *Dead Bodies* § 8 (1983).

51. Tort damages are derived from "intentional infliction of serious emotional distress." BRAY, *supra* note 11, at 243. However, the Restatement recognizes "interference with dead bodies" as an independent cause of action and recommends that standing not be limited to family members. RESTATEMENT (SECOND) OF TORTS § 868 (1982).

have standing—here, a relationship with the corpse—to sue,[52] though one wonders how strict a standing requirement would be if someone decided to run a backhoe through an abandoned Euro-American cemetery in search of wedding rings. American secular courts have looked to families to protect the repose of the dead where English courts have relied on ecclesiastical authority over burial places. The American version of property rights analysis also contains a standing requirement, although not one likely to be applied as strictly as in a tort action.

In the United States, responsibilities toward the dead became connected to what the American cases call a quasi property right in the next of kin.[53]

> Interest in a corpse came to be accepted as a bundle of legal rights inhering in the next of kin or other person charged with the duty and right of burial and preservation of the remains. These rights did not depend upon a finding or a holding that there is a conventional property right in a corpse, or that the remains have monetary value. The bundle of rights includes that of holding and protecting the body until it is processed for burial, cremation or other lawful disposition; selecting the place and manner of disposition, and carrying out the burial or other last rites; and the right to the undisturbed repose of the remains in grave, crypt, niche, urn, or elsewhere sanctioned by law. Unlawful violations of these rights constitute actionable wrongs.[54]

Such quasi-property rights are far from absolute. In any clash between the interests of the dead[55] (regardless of who may be asserting those interests) and the interests of the living, presently extant persons prevail. The dead may be disturbed, for example, by the government's exercise of the power of eminent domain[56] or by the necessity to exhume a body to determine facts that affect the rights of the living.[57]

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52. Harry R. Bigelow, Jr., Notes and Comment, *Damages: Pleading: Property: Who May Recover for Wrongful Disturbance of a Dead Body*, 19 CORNELL. L.Q. 108, 111-12 (1933).

53. *E.g.*, Gray v. State, 114 S.W. 635, 641 (1908); Burnett v. Surratt, 67 S.W.2d 1041, 1042 (Tex. Civ. App.–Dallas 1934, writ ref'd); Rosenblum v. Mt. Sinai Cemetery Ass'n, 481 S.W.2d 593, 594-95 (Mo. Ct. App. 1972). *Accord* 22A AM. JUR. 2D *Dead Bodies* § 3 (1988).

54. BERNARD, *supra* note 42, at 17.

55. "The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose." Yome v. Gorman, 152 N.E. 126, 129 (N.Y. Ct. App. 1926) (citations omitted) (Cardozo, J.). Whether the dead have "rights" is more a question of moral philosophy than of law. Bahn, *supra* note 12. However, it has been suggested that the thorny issue of repatriation might be easier to work out among living persons if bones—like the rivers and trees of Justice Douglas' famous dissent in *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972)—had standing to sue. Gerald Vizenor, *Bone Courts: The Rights and Narrative Representation of Tribal Bones*, 10 AM. INDIAN Q. 319 (1986).

56. BERNARD, *supra* note 42, at 4.

57. *Gray*, 114 S.W. at 642. The only commentator who has suggested that Texas should change the status of the human body as not being the subject of property rights is more interested in the status of *living* human bodies: specifically ownership interests, market alienability and commodification of organ transplantation, surrogate motherhood and prostitution. *See generally*

While the evolution of the common law of burials is understandable in light of the burial practices of European settlers, the same common law affords little protection for the graves of Native Americans. The age of some Native American remains and Native American burial practices[58] make determining the "next of kin" in the European sense problematic. Also, kinship systems differed substantially among Native American tribes generally, and even among the tribes that once inhabited Texas.[59] In *United States v. Unknown Heirs of All Persons Buried in Post Oak Mission Cemetery, Comanche County, Okla.*,[60] for example, a court was asked to adjudicate competing claims of next of kin status by two wives of the "celebrated and distinguished"[61] Comanche Chief Quanah Parker.[62] Who was the "surviving spouse" of a man whose culture recognized polygamy? This was a difficult determination for a judge socialized in a monogamous culture. While the judge was able to return Quanah Parker's remains to repose without rendering any marriages void or children illegitimate, the case was still a close brush with the perils of cross-cultural application of laws.

In a pre-literate society, what genealogy exists is oral and is based upon a culture-bound definition of what relationships constitute "kin." Today's Native Americans, literate in English and culturally assimilated, are protected by the common law rights of the next of kin. Their ancestors are not, and ". . . showing respect to the dead and carrying out burial arrangements in accordance with the deceased's wishes is a way of according dignity to all human beings, because death is the one thing all individuals have in common."[63]

If Indians are to be accorded the same respect, "according dignity to all human beings," standing requirements will have to be adjusted. Such an adjustment would be more likely in a case involving Euro-American dead, and even then a court might introduce age as a proxy for ethnicity[64] and leave Indian

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Bray, *supra* note 11.

58. John E. Peterson II, *Dance of the Dead: A Legal Tango for Control of Native American Skeletal Remains*, 15 AM. INDIAN L. REV. 115, 129 (1990).

59. *See* W. W. NEWCOMB, JR., THE INDIANS OF TEXAS (1961). The differences in kinship systems among the aboriginal inhabitants of Texas would be a lengthy digression, but Newcomb offers some description of Coahuiltecan, *id.* at 44-6; Karankawa, *id.* at 73; Lipan Apache, *id.* at 121; Tonkawa, *id.* at 142-43; Comanche, *id.* at 170-71; Kiowa, *id.* at 201; Wichita, *id.* at 265-67; and Caddo family structures, *id.* at 305-6. Of the Atakapan, it is known only that they practiced teknonymy (naming the father after the child). *Id.* at 327. Jumano culture has been entirely lost to what some anthropologists call "Mexicanization" (cultural synthesis between the Spanish conquerors and the Indian conquered) and merger with the Apaches. *Id.* at 232-34.

60. 152 F.Supp. 452 (W.D. Okla. 1957).

61. 152 F.Supp. at 453.

62. "In his twenties, he was to be acclaimed a war chief and, in his way, to become the greatest Comanche chief of all time. The Texans would hear of him, fear him, hate him, and eventually come to honor him, writing—half in boasting, half in bitterness—that blood would always tell." T. R. FEHRENBACH, COMANCHES: THE DESTRUCTION OF A PEOPLE 441 (1986). Quanah was the half blood son of the Comanche Chief Nawkohnee and the famous Texan "captive" Cynthia Ann Parker. *Id.* at 440-41. *See also United States v. Unknown Heirs*, 152 F.Supp. 452, 455 (W.D. Okla. 1957).

63. Bray, *supra* note 11, at 243.

64. Of course, age is much more than just a proxy for ethnicity. It makes identification more difficult and scientific value of study before reburial more weighty for extremely old bodies. Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection*

burials unprotected. In addition, the tribes whose ancestral remains are at the most risk maintain their governmental offices in Oklahoma or New Mexico, where they have problems that take priority over sending lawyers to Texas to argue over graves desecration, however offensive they may find it to be.

These practicalities limit the potential for a strain of common law authority suggesting that:

> 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, friends, or courts of equity have been held to have standing to protect bodies from wrongful or unnecessary disturbances or removal.[65]

Common law solutions are an uphill battle against the legal barrier of standing and do not provide adequate protection for unmarked burials. To overcome this barrier, a statutory solution is necessary. However, civil remedies are subject to the same standing problem as common law remedies. Further, the expense of litigation necessary to pursue a civil remedy creates an insurmountable obstacle for an impoverished people. The prohibitive cost essentially renders a civil solution moot.

An effective solution should be by way of criminal statute. The prosecuting authority must be vested somewhere in addition to the local elected officials who are certainly more likely to be influenced by local grave robbers than by an out of state Indian tribe or the office of the State Archeologist. In spite of prior disagreements between Indians and the Texas Historical Commission,[66] that agency is the logical place to vest such authority, because the Historical Commission is responsible for the protection of Texas' archeological and historic heritage by statute.[67] In addition, the Office of the State Archeologist, which would be providing expert testimony in most grave robbing prosecutions, is organized under the Texas Historical Commission.[68]

III. Current Statutory Graves Protection

A. Texas Health and Safety Code and Texas Natural Resources Code

The civil statutes are a possible source of rights and duties for those dealing with human remains, and the definitions in the Texas Health and Safety Code do not on their face distinguish Native American burials[69] from any other

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and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains, 22 HARV. ENVTL. L. REV. 369, 378-79 (1998). However, at the extreme end of the anti-reburial position, any remains dating before first contact are "prehistoric," and therefore data rather than human beings—the presupposition being that history in North America starts with white people.

65. John B. Winski, Note, *There are Skeletons in the Closet: The Repatriation of Native American Human Remains and Burial Objects*, 34 ARIZ. L. REV. 187, 211 (1992) (footnotes omitted).

66. Russell, *supra* note 28, at 202-05.

67. TEX. GOV'T CODE ANN. § 442.003 (Vernon 1998).

68. TEX. GOV'T CODE ANN. § 442.007 (Vernon 1998).

69. There are, of course, distinctions outside the text of the statutes, and the courts will

burials: "'Cemetery' means a place that is used or intended to be used for interment, and includes a graveyard, burial park, or mausoleum;[70] 'interment' means the *permanent* disposition of remains by entombment, burial, or placement in a niche;[71] and 'remains' means either human remains or cremated remains."[72] While desecration of a cemetery is subject penalties,[73] or "a park or other area clearly designated to preserve of a deceased person or group of persons." the only reach of the statute outside of a cemetery involves "A gravestone, monument, or other structure commemorating a deceased person or group of persons"[74] Indian burials are not typically marked in such a fashion, and it is clear both by the location of the statute and the numerous references to "cemetery organization"[75] The Health and Safety Code also sets out which relatives may claim a decedent's remains when no person was designated by the deceased,[76] to provide that the claimant ". . . *shall* inter the remains,"[77] and to impose liability for the costs of interment.[78]

Interestingly enough, another section of the statute also includes a ". . . representative of an organization to which the deceased belonged. . ." among the persons authorized to claim a body for burial.[79] An organization as crucial to personal identity as an Indian tribe should certainly have no problem claiming the remains of an identifiable tribal member, since the statute appears to be much broader than would be necessary to accomplish that result. This writer would speculate that the intent of the statute was to allow veterans' organizations to claim their members and accord them military honors even if they die without immediate family, an intent that seems well served by according Indian tribes the same privilege.

Finally, the statute sets out in detail the legal requirements for disinterment, which may be lawfully accomplished only by the written consent of the operator of the cemetery, the written consent of the current owner(s) of the plot, and the next of kin of the deceased[80] or by court order.[81] Since the

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have to decide whether the distinctions amount to differences. "First, Indian burial customs varied widely over both time and space, and it was not uncommon for the dead to be placed in locations not specifically set aside for that purpose. Second, Indians often relied upon natural features and oral tradition to denote burial locations rather than specialized grave markers. Third, Indians lost track of specific burial grounds because they were forced to relocate in response to, or under pressure from, government policy and Euro-American settlement." John E. Peterson II, *A Conflict of Values: Legal and Ethical Treatment of American Indian Remains*, 14 DEATH STUDIES 519, 531 (1990).

70. TEX. HEALTH & SAFETY CODE ANN. § 711.001(2) (Vernon Supp. 1998).
71. TEX. HEALTH & SAFETY CODE ANN. § 711.001(16) (Vernon Supp. 1998) (emphasis added).
72. TEX. HEALTH & SAFETY CODE ANN. § 711.001(28) (Vernon Supp. 1998).
73. TEX. HEALTH & SAFETY CODE ANN. § 711.0311 (a)-(b) (Vernon Supp. 1999).
74. TEX. HEALTH & SAFETY CODE ANN. § 711.0311 (c)(2) (Vernon Supp. 1999).
75. TEX. HEALTH & SAFETY CODE ANN. § 711.0311 (b)(d)(e)(f)(h) (Vernon Supp. 1999).
76. TEX. HEALTH & SAFETY CODE ANN. § 711.002(a) (Vernon Supp. 1998).
77. *Id.* (emphasis added).
78. *Id.*
79. TEX. HEALTH & SAFETY CODE ANN. § 691.024(b) (Vernon 1992).
80. TEX. HEALTH & SAFETY CODE ANN. § 711.004(a) (Vernon Supp. 1998).
81. TEX. HEALTH & SAFETY CODE ANN. §§ 711.004(c) - 711.007(a) (Vernon Supp. 1998).

statute both requires mandatory notice and allows for discretionary notice[82] when consent cannot be obtained, the statute appears to contemplate a hearing prior to disinterment. Statutory law seems clear that the duty of the living regarding a corpse is to bury (or rebury) it. The only exception is for medical education and research.[83]

Even though medical education enjoys this statutory license, medical schools generally emphasize voluntary donations of cadavers and practice respect for the wishes of the deceased and the deceased's relatives.[84] The medical profession came by its respectful attitude the hard way:

> Medical studies in the late eighteenth century demanded bodies, and, in New York City in 1788, few noticed when the graves of paupers and Blacks were emptied for science, but riots flared when students tampered with the graves of "people who mattered," i.e., people of property. These riots, known as the "Doctor Riots" or the "Anti-Dissection Riots," led to legislation in New York in 1789 and eventually in Congress in 1790 prohibiting such practices; the legislation made available for science only the bodies of persons convicted of murder, arson, or burglary. Compliance with these laws made medical studies difficult, so "body snatching" continued but predominantly in rural areas. Poor people and nonwhites continued to make the greatest sacrifices to science.[85]

While Native American remains are generally safe from disruption in the name of medical education, burial sites may still be disturbed in the name of scientific research. The authority for such action, however, remains unclear. The authority of the State Archeological Program is determined by statute,[86] and the statute does not mention burials, although the authority to survey and excavate "significant archeological or historic sites"[87] might arguably include burial sites. Likewise, the Natural Resources Code declares a public policy to locate, protect and preserve "archeological sites of every character,"[88] and specifically "prehistoric and historical American Indian or aboriginal campsites, dwellings, and habitation sites. . . ."[89] The same language is used to describe

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82. TEX. HEALTH & SAFETY CODE ANN. § 711.004(c) (Vernon Supp. 1998).
83. TEX. HEALTH & SAFETY CODE ANN. § 691.033 (Vernon 1998).
84. Bruce A. Iverson, *Bodies for Science*, 14 DEATH STUDIES 577, 586 (1990).
85. Bieder, *supra* note 23, at 23.
86. TEX. GOV'T CODE ANN. § 442.007 (Vernon 1990). During the sunset process in 1995, responsibility for the State Archeological Program was moved from the Antiquities Committee to the Texas Historical Commission, but the contents of the program apparently remain the same. At this same time, the Legislature simultaneously reserved a seat on the Commission for "a professional archeologist," TEX. GOV'T CODE ANN. § 442.002(b) (Vernon Supp. 1998) and declined to reserve a seat for a tribally enrolled Indian, accepting a plainly incorrect Sunset Commission staff report that an Indian seat would violate anti-discrimination law. Steve Russell, *American Indians in the Twilight of Affirmative Action*, 2 CHI. POLICY REV. 37 (1998).
87. TEX. GOV'T CODE ANN. § 442.007(e)(3) (Vernon 1990).
88. TEX. NAT. RES. CODE ANN. § 191.002 (Vernon 1993).
89. *Id.*

what items and places are eligible to be designated as state archeological landmarks.[90] Indeed, the only reference to burials in the Antiquities Committee statute is:

> No person who is not the owner, and does not have the consent of the owner, proprietor, lessee, or person in charge, may enter or attempt to enter on the enclosed land of another and intentionally injure, disfigure, remove, excavate, damage, take, dig into, or destroy any historical structure, monument, marker, medallion, or artifact, or any prehistoric or historic archeological site, American Indian or aboriginal campsite, artifact, *burial*, ruin, or other archeological remains located in, on, or under any private land within the State of Texas.[91]

The statute's convolutions make drafting a charging instrument or a jury charge very difficult, and the size of the penalty[92] makes a prosecution hardly worth the effort. It is still worth noting, however, that the only time the Antiquities Committee statute mentions burials is to criminalize disturbing them. This penal statute, hidden away in the Texas Natural Resources Code, is no protection at all for unmarked graves. Making intentional intrusions into unmarked burials criminal in an enforceable way requires attention to the general requirements of the Texas Penal Code. Current criminal proscriptions, like the Texas Natural Resources Code, have proven inadequate.

B. Texas Penal Code

Texas law appears to condemn all grave robbing. While a "desecration of a venerated object" statute that included burials was repealed in 1993,[93] the Texas Penal Code still contains a pretty clear proscription of grave robbing:

> § 42.08 Abuse of Corpse
> (a) A person commits an offense if, not authorized by law, he 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.

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90. TEX. NAT. RES. CODE ANN. § 191.092(a) (Vernon 1993).
91. TEX. NAT. RES. CODE ANN. § 191.133 (Vernon 1993) (emphasis added).
92. A fine of not less than $50 or more than $1,000 and/or up to 30 days in jail. TEX. NAT. RES. CODE ANN. § 191.171(a) (Vernon 1993).
93. Acts 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3679.

(b) An offense under this section is a Class A misdemeanor.[94]

While the statute unambiguously forbids the disturbance of burial sites, prior statutes substantially similar to section 42.08 have gone virtually ignored. Reported Texas appellate cases reveal no conviction for violating this statute. There is, however, a truly bizarre attorney general's opinion written under a predecessor statute, bizarre in both the facts presented and the conclusion reached. The facts are as follows:

> In 1926 a child with abnormal skin was born to a Negro couple in Port Arthur, Texas. The epidermis consisted of plate-like scales. The infant died three days after birth. Its body was 'mummified' instead of buried by the parents. The mummy was then loaned for exhibition purposes to an individual who has now asked the Texas State Board of Health for information concerning the procuring of a permit for 'an educational exhibit' of the human specimen.[95]

The State Health Officer requested that the Attorney General to opine the extent of the Health Department's authority in this matter. The conclusion that the Health Department had no authority is unremarkable, since any legislature could be excused for failing to anticipate this particular situation, but the Attorney General further opined that the proposed exhibition did not ". . . contravene the civil or criminal statutes of Texas"[96] in the face of penal statutes substantially identical[97] to section 42.08.[98]

The opinion accepts the Texas Court of Criminal Appeals opinion in *Gray v. State*[99] as binding Texas authority, and quotes this language from *Gray*:

> While the body is not property in the usually recognized sense of the word, yet it may be considered as a sort of quasi property, to which certain persons may have rights, as they have duties to perform toward it, and the right to dispose of a corpse by decent sepulture includes the right to the possession of the body in the same condition in which death leaves it.[100]

While *Gray* correctly announces the common law of the United States and of Texas, the Attorney General cites the above language just before concluding: "It is logical to assume that the Texas Courts would recognize

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94. TEX. PENAL CODE ANN. § 42.08 (Vernon 1994).
95. Op. Tex. Att'y. Gen. No. O-1767, at 2 (1940).
96. *Id.* at 1.
97. TEX. PENAL CODE ANN. § 42.10 cmt. (Vernon 1989).
98. Arts 529 & 530, TEX. PENAL CODE ANN (Branch 1956). The substance of this law has not changed appreciably over the years. Arts 510, 511 & 512, TEX. PENAL CODE ANN. (Branch 1916).
99. 114 S.W. 635 (1908).
100. *Id.* at 641 (citation omitted).

property rights in a preserved specimen of human malformation."[101] The basis for this astonishing conclusion is apparently that the "scientific" value[102] of this exhibition constitutes a public interest that overcomes the duty of the next of kin to provide decent sepulture noted in the *Gray* case.

While the nature of the exhibition contemplated by the Attorney General can only be surmised from the opinion's use of the term "turtle baby,"[103] it is safe to say that a physical anthropologist or archeologist could demonstrate at least the same degree of scientific value in almost any proposed course of study or exhibition of human remains.

Two other statements in the Attorney General's opinion—both devoid of any citation to authority—are of serious concern in the debate over Native American remains in Texas:

> Mummies, skeletons, and skulls are subjects of property, and are not confined to the medical classroom and laboratory. . . . Besides, the specimen with which we are concerned is approximately fourteen years old, and represents a definite piece of property, the rights of ownership and possession of which the law will protect.[104]

The Attorney General appears to opine, *sub silencio*, that when a corpse becomes a mummy or a skeleton it ceases being a corpse.[105] Virtually all Native American remains likely to be discovered in unmarked burials in Texas are over one hundred years old and therefore mummified or skeletal. Because this opinion is the only substantive annotation[106] under section 42.08, it would immediately come to the attention of anyone contemplating a prosecution.[107] Another attorney general opinion has pointed out the futility of trying to use the theft statute against robbers of old graves, the primary problem being proof of "ownership."[108] While the Texas Penal Code appears to provide adequate burial protection, the opinions of the Attorney General and the lack of any formally or informally reported prosecutorial activity are evidence of its shortcomings.

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101. Op. Tex. Att'y. Gen. No. O-1767, at 4 (1940).

102. *Id.* at 3-4.

103. *Id.* at 1, 2, 5, 7, 8, 11 and 12.

104. *Id.* at 11.

105. There is some authority for this position. *See generally* J.A. Bryant, Jr., J.D., L.L.M., Annotation, *Construction and Application of Graverobbing Statutes*, 52 A.L.R. 3d 701, 710 (1974).

106. The only other annotation is about whether evidence of dismemberment of a murder victim should be subject to a limiting instruction regarding the extraneous offense of abuse of a corpse. Luck v. State, 588 S.W.2d 371, 376 (Tex. Crim. App. 1979), *cert. denied*, 446 U.S. 944 (1980).

107. Two convictions under a predecessor statute were reversed for failure to plead the name of the corpse. Leach v. State, 72 S.W. 600 (Tex. Crim. App. 1903); Williamson v. State, 72 S.W. 600 (Tex. Crim. App. 1903).

108. Op. Att'y. Gen. No. LO-89-7 (1989).

C. Insufficiency of Current Law

The current criminal and civil schemes do not provide protection to the extent necessary. Exceptions have been created that frankly do not exist. As mentioned above, medical research proceeds with statutory authority[109] while archaeological research proceeds—as to human remains—without it. Archaeological research proceeds not only without authority, but also in the face of a civil statutory scheme that appears to require interment for all human remains, and also in a state that recognizes a cause of action for wrongful disinterment.[110] If archaeology might rationally be seen as a cut above the "turtle baby" exhibition apparently allowed by the criminal statute, it must also be somewhat less imbued with public purpose than medical research:

> Disinterment of dead bodies is discouraged by courts and is repugnant to the sentiment of humanity. The normal treatment of a corpse, once it has been decently buried, is to let it lie. It is commonplace to hear this idea spoken of as a "right" of the dead and a charge on the quick. Neither the ecclesiastical, common, nor civil system of jurisprudence permits exhumation for less than what are considered weighty, and sometimes compelling, reasons.[111]

If there is a continuum of reasons for allowing disturbance of the dead, it should begin with the immediate needs of living persons (forensic disinterment and eminent domain cases) and proceed to more abstract needs (medical education and research) but stop well short of idle curiosity or personal profit. While the Texas Legislature has not authorized disturbing the dead for either recreational or scientific purposes, exceptions have appeared that make new and more specific law necessary.

In NAGPRA Congress has placed archaeology and physical anthropology at a place on the continuum that does not justify disturbing the dead if the disturbance would offend certain living persons, and the sale of Native American human remains is flatly outlawed regardless of the provenience of the

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109. TEX. HEALTH & SAFETY CODE ANN. § 691.033 (Vernon 1992).

110. *See* Nixon v. Collins, 421 S.W.2d 682, 684 (Tex. Civ. App.— San Antonio 1967, no writ); Classen v. Benfer, 144 S.W.2d 633 (Tex. Civ. App.—San Antonio 1940, writ dism'd judgm't cor.); Flores v. De Galvan, 127 S.W.2d 305 (Tex. Civ. App.—San Antonio 1939, writ dism'd jugdm't cor.). *Accord* RESTATEMENT (SECOND) OF TORTS § 868 (1982).

111. 28 TEX. JUR. 3d *Dead Bodies* § 14 at 571 (1983)(footnote omitted). Texas cases deny disinterment *by the widow* absent necessity or a compelling reason. Ferrel v. Ferrel, 503 S.W.2d 389 (Tex. Civ. App.—San Antonio 1973, no writ); Fowlkes v. Fowlkes, 133 S.W.2d 241 (Tex. Civ. App.—Galveston 1939, no writ); Curlin v. Curlin, 228 S.W. 602 (Tex. Civ. App.—Amarillo 1921, no writ). In Samsel v. Diaz, 659 S.W.2d 143 (Tex. Ct. App.—Corpus Christi 1983, no writ), disinterment was denied to the surviving parents on the same grounds. *But see* Dueitt v. Dueitt, 802 S.W.2d 859 (Tex. App.—Houston [1st Dist.] 1991, no writ), where the court analyzed the above cases and held that this matter has been controlled by statute since 1934. 802 S.W.2d at 863. While *Dueitt* is correct about the failure of the cases to take the statute, *supra* note 85, into account, the cases and TEXAS JURISPRUDENCE still correctly state the common law of disinterment, to be applied in fact situations to which the statute does not speak.

remains.[112] The living persons who have standing under NAGPRA to claim control of human remains and funerary objects are, in order of priority, lineal descendants of the deceased, the tribe on whose lands the deceased was discovered, the tribe which has the closest cultural affiliation with the deceased, or the tribe that has been recognized (by a final judgment of the Indian Claims Commission or the United States Court of Claims) as aboriginally occupying the area in which the deceased was discovered. [113] The language of NAGPRA, while it might be persuasive to a Texas court, has no binding authority over most Native American graves in Texas and no authority at all over non-Indian graves that deserve the same protection.

IV. Legislative Failures in Texas

Texas would not be the first state to determine that state legislation is needed to protect Native American graves,[114] but recent history might lead one to wonder whether it will be the last. As of the 1999 session, twelve years have passed and the state Legislature has done nothing to defend the archaeological heritage of Texas. Nothing has been formulated within Texas statutory law to prevent the outrage caused by disinterment or the chaos that has ensued in the courts of other states.[115] A bill to criminalize grave looting was introduced with the support of both the Historical Commission and the now sunsetted Indian Commission in 1987, but it failed to pass.[116] A second attempt successfully passed the Legislature, only to be vetoed by Governor Bill Clements.[117] A third attempt in 1993, House Bill 1179, passed the House only to perish in a Senate subcommittee. The Texas Historical Commission could not agree with the demands of Indian groups that any human remains or funerary artifacts taken into custody as a result of a criminal prosecution for grave robbing be sent to a museum or university covered by NAGPRA.[118]

Indian involvement continued between the Texas Legislature's biannual sessions, finally resulting in an agreement with the Texas Historical Commission that split the issues of graves protection and repatriation insofar as those issues can be split by forgoing[119] any reference to extant "collections."

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112. 18 U.S.C.A. § 1170 (West Supp. 1998). The situation of grave goods is not so clear. Subsection (a) applies to human remains except for persons with a right of possession under NAGPRA. Subsection (b) forbids the sale of grave goods obtained in violation of NAGPRA, which circles back to applicability only on tribal or federal land. Since NAGPRA, the open sale of Indian bones is practically unknown. Funerary objects remain subject to commerce because the provenience—usually not discoverable—is part of the government's proof in a prosecution under NAGPRA. *Id.*

113. 25 U.S.C.A. § 3002(a)(1) (West Supp. 1998).

114. *See generally* Catherine Bergin Yalung & Laurel I. Wala, *A Survey of State Repatriation and Burial Protection Statutes*, 24 ARIZ. ST. L.J. 419 (1992).

115. *See generally* William L. Evans, *Who Owns the Contents of Ohio's Ancient Graves?*, 22 CAP. L. REV. 711 (1993); Steven R. Dowell, *Chaos in Kentucky: The Question of Standing to Recover the Fair Market Value of Indian Relics Found Upon Private Property*, 15 AM. INDIAN L. REV. 207 (1990).

116. THE TEXAS INDIAN COMMISSION, SELF-EVALUATION REPORT—PART I 16 (1987).

117. *Texas Burial Bill*, 1 CADDO ARCHEOLOGY 5 (Fall 1989).

118. Russell, *supra* note 28, at 202-06.

119. This "forgoing" was completely verbal and undertaken by this writer to quiet the

The compromise graves protection bill, Senate Bill 528, was identical in all respects with what the Indians had demanded in 1993: any state seizure of human remains or grave goods was to end in a connection to NAGPRA, designation of a repository that had received federal funds.[120]

State Senator Gonzalo Barrientos (D-Austin), who had rescued Indian interests in the 1993 session, helped pass SB 528 in the Senate, stating on the floor "We are all human beings, not curios. We all want to ensure that our family members have gone to rest peacefully."[121]

Barrientos' eloquence was persuasive in the Texas Senate, but when SB 528 arrived in the House it came to the attention of lobbyists for oil and gas interests, public utilities, lignite owners, and the Farm Bureau. Their legitimate concern is that people who are engaged in lawful activity will be enmeshed in criminal liability for inadvertently disturbing a grave. Unfortunately, most of the lobbyists for these interests have never practiced criminal law, and they want to amend the bill with "exceptions" for every legitimate occupation prosperous enough to afford a lobbyist. [122]

The difficulties come from section 2.02(b) of the Texas Penal Code, which requires that "[t]he prosecuting attorney must negate the existence of an exception in the accusation charging commission of the offense and prove beyond a reasonable doubt that the defendant or defendant's conduct does not fall within the exception."[123]

The first difficulty is that the string of exceptions proposed makes the drafting of a charging instrument a multi-page and extremely complicated affair. The second and insurmountable difficulty is that the prosecutor cannot, unless the Fifth Amendment is repealed and the defendant can be forced to testify and/or the Fourth Amendment is repealed so that a sheriff can come on private property without a warrant, prove what the defendant was *not* doing.

The appropriate place to take legitimate activity into account is as an affirmative defense under § 2.04, Texas Penal Code[124] and relying on the prosecutor's duty to prove *mens rea* beyond a reasonable doubt.[125] No sooner are the lobbyists convinced of the realities of the criminal law than the "property rights" advocates are ready to take over arguing, *inter alia*, that they have a property interest in graves and that a requirement that the finding of human remains on private property be reported to either the Sheriff[126] or the State

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hysteria apparently caused by Indian involvement in the legislative process, since no legislation passed or proposed, before or since, applied to extant collections. *Id.* Bills were passed on one side or the other since the Indians got involved in the 73rd Legislature (H.B. 1179, 1993), the 74th Legislature (S.B. 528, 1995), and the 75th Legislature (S.B. 810, 1997).

120. 25 U.S.C.A. § 3001(8) (West Supp. 1998).

121. *Quote of the day*, AUSTIN AMERICAN-STATESMAN, Apr. 27, 1995, City-State Section.

122. *E.g.*, Rep. Bob Hunter (R-Abilene) amended his own H.B. 1179 in committee to create "exceptions" for farmers, lignite rights owners, and pipeline owners, rendering the criminal provision effectively unenforceable against anyone claiming they were involved in related activities. H.B. 1179, Committee Amend. No. 2, 73rd. Leg. (Tex. 1993).

123. TEX. PENAL CODE ANN. § 2.02(b) (Vernon 1994).

124. TEX. PENAL CODE ANN. § 2.04 (Vernon 1994).

125. TEX. PENAL CODE ANN. § 2.01 (Vernon 1994).

126. The law enforcement interest is apparent, at least to law enforcement officers and relatives of missing persons. It takes scientific expertise to determine the age of human remains. In 1997, the Legislature added § 37.09 (d)(2) to the Penal Code, requiring that the presence of

Archeologist violates some unspecified but important privacy interest.

Graves protection died in the House under this fire in 1995 and came to a similar end in 1997 after again passing the Senate under Barrientos' sponsorship, with the further disappointment that Rep. Bob Hunter (R-Abilene), who had twice sponsored the legislation, defected under pressure and refused to call up the bill for a vote, effectively bottling it in his committee.[127]

V. Conclusion

This Symposium Issue of the Texas Forum on Civil Rights and Civil Liberties will see print in the 12th year of attempts to protect unmarked graves in Texas. It comes as a joint endeavor of Indians and archaeologists, most of whom have come to recognize that if we do not speak with one voice there will soon be very little left to save. In this respect, Texas is slow to see the advantages of Indians and scientists working together.

Walter Echo-Hawk, the principal Indian lobbyist behind NAGPRA, suggested analyzing the problems in terms of competing valid interests in 1986, four years before NAGPRA.[128] Three years later, the World Archaeological Congress adopted the Vermillion Accords,[129] an outline for mutual respect between scientists and indigenous people. Now, there is a Model Statute for the Treatment and Protection of Cultural and Archaeological Resources[130] that goes far beyond anything so far proposed in Texas.

Indian interest in the reburial issue will continue because of the nature of the dispute. Those Indians who see repatriation as a religious issue have no choice but to continue the battle. Those who see it as a political issue are also unlikely to go away simply because the right of a people to bury their dead is so fundamental that denial of the right amounts to dehumanization. Native Americans are not the only to notice that the bodies of the dead may help to accomplish the political ends of the living,[131] and this need for recognition as human beings is the key to understanding the repatriation debate from the Indian side. This is why some Indians who see the graves of their ancestors desecrated with no consequences are ready to dig up some *yonega* graves for "curios" or

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human remains be reported to a law enforcement agency "under circumstances in which a reasonable person would believe that an offense has been committed." Of course, this does not protect Indian graves, and it does not safeguard the law enforcement interest unless the "reasonable person" happens to be a forensic pathologist or physical anthropologist.

127. Steve Russell, *Picking Bones in the Legislature*, 89 TEXAS OBSERVER 15 (Aug. 1, 1997).

128. Echo-Hawk, *Museum Right vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986).

129. Larry J. Zimmerman, *Reflections on the Issues: Implications for the Scholarly Disciplines*, 14 DEATH STUDIES 629, 641 (1990); Conferences: *Archaeological Ethics and the Treatment of the Dead*, ANTHROPOLOGY TODAY, Feb. 1990, at 15; Larry J. Zimmerman, *Archaeology, Reburial, and the Tactics of a Discipline's Self-Delusion*, 16 AM. INDIAN CULTURE & RESEARCH J., number 2, 37, 50-51 (1992).

130. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U.L. REV. 559, 673 (1995).

131. Anne-Marie Cantwell, *The Choir Invisible: Reflections on the Living and the Dead*, 14 DEATH STUDIES 613 (1990).

"research" and see how quickly the law finds its moral compass.[132]

With the loss of human dignity is also a loss of our story, which, if you could ever accept us as equally human, would be also a part of your story. As our elders pass away in obscurity rather than celebration and archaeological sites are looted for curios rather than carefully documented, there is a very real danger that by the time you are ready to listen to our story there will be no one left with both the knowledge and the inclination to speak.

132. This very real temptation receives a hilarious fictional treatment in TONY HILLERMAN, TALKING GOD 1-6 (1989).