

RESPECT FOR THE LIVING AND RESPECT FOR THE DEAD: RETURN OF INDIAN AND OTHER NATIVE AMERICAN BURIAL REMAINS

I. INTRODUCTION

When I am dead, cry for me a little. Think of me sometimes, but not too much. It is not good for you to allow your thoughts to dwell too long on the dead. Think of me now and again as I was in life. At some moment it is pleasant to recall. But not for long. Leave me in peace and I shall leave you too, in peace. While you live, let your thoughts be with the living.¹

Unfortunately, the thoughts of many American Indians and other Native Americans² must dwell too long on their dead, because museums, universities, historical societies, and other institutions in the United States and around the world store the remains of many of their ancestors.³ These remains range in size from bone fragments to entire skele-

1. Traditional American Indian burial prayer, from Evelyne Wahkinney Voelker, Executive Director, American Indian Center of Mid-America, 4115 Connecticut, St. Louis, MO 63116.

2. The term "Native American" describes the indigenous or aboriginal peoples of the American continents. The term includes Indians, Eskimos, Aleuts, and Native Hawaiians.

3. There is no accurate count of the number of remains. *Hearing Before the Select Committee on Indian Affairs, United States Senate, on S. 187*, 100th Cong., 1st Sess. 52 (1987) [hereinafter *S. Hrg.* 90] (testimony of Thomas King, director of the Office of Cultural Resource Preservation of the Advisory Council on Historic Preservation); *Hearing Before the Select Committee on Indian Affairs, United States Senate, on S. 187*, 100th Cong., 2d Sess. 60 (1988) [hereinafter *S. Hrg.* 931] (testimony of three museum professionals).

Estimates range from 100,000 to 2,000,000. See, e.g., Deloria, *A Simple Question of*

tons.⁴ In addition to skeletal remains, many burial objects are in storage or on display.⁵

Humanity: The Moral Dimensions of the Reburial Issue, 14 NATIVE AM. RTS. FUND LEGAL REV., Fall 1989, at 1 (2 million); Harjo, *A Barbaric Way to Treat American Indians*, St. Louis Post-Dispatch, Sept. 20, 1989, at 3C, col. 3 (more than 1.5 million); Moore, *Federal Indian Burial Policy - Historical Anachronism or Contemporary Reality?*, 12 NATIVE AM. RTS. FUND LEGAL REV., Spring 1987, at 1 (300,000 to 600,000 in the U.S. and 500,000 outside U.S.); Interview with Jonathan Haas, Vice President, Collections and Research, Field Museum of Natural History, Roosevelt Rd. at Lake Shore Dr., Chicago, IL 60605-2496 (Feb. 6, 1990) (100,000 to 150,000, extrapolated from known collections at the major U.S. museums).

Pending federal legislation proposes to inventory collections at all institutions which receive federal funds. See *infra* note 69. However, even if an inventory is done, the actual count would still be unknown, because many remains can be found in private collections and outside the U.S. Interview with Joseph M. Nixon, Department of Anthropology, University of Missouri - St. Louis, 8001 Natural Bridge Rd., St. Louis, MO 63121-4499 (Feb. 9, 1990).

Even the low estimates represent a total number of remains which is more than 10% of the current Native American population. In 1980, the population of American Indians, Eskimos, and Aleuts was 1,419,873. U.S. Congress, Office of Technology Assessment, *Indian Health Care*, OTA-H-290, at 66 (Washington, D.C.: U.S. Government Printing Office, Apr. 1986) [hereinafter *Indian Health Care*] (table from Census Bureau information). In the 1980 census, a total of 6.7 million persons identified some or all of their ancestry as American Indian and 51,000 persons identified their ancestry as Eskimo or Aleut. *Id.* at 59.

4. S. Hrg. 90, *supra* note 3, at 68 (testimony of Robert McCormick Adams, Secretary, Smithsonian Institution, Washington, D.C.).

5. As with remains, an accurate count of burial goods is not available. This Note focuses primarily on human remains, not on burial objects, artifacts, or grave goods. However, many of the arguments regarding the importance of remains, see *infra* notes 12-24 and accompanying text, and much of the law of human burial remains, apply also to objects. See *infra* notes 155-66 and accompanying text.

Until recently, human remains were also on public display in many locations. But the attitude towards public display has changed. For example, the Field Museum of Natural History in Chicago decided several years ago to remove from public display all skeletal remains of American Indians. In 1989, the museum fully implemented the policy. The museum, working with Native Americans, has found other ways to inform the public about Indian life and practices. Haas, *supra* note 3.

Also in 1989, Indian groups negotiated the closing of the Salina Burial Pit, a privately-operated exhibition in Salina, Kansas. The 50-year-old operation featured the shellacked skeletons of 146 Indians and attracted many visitors who paid a three dollar admission fee. As part of the closing, the state of Kansas agreed to buy the site for \$90,000. *Indian Burial Site Becomes Big Issue in Little Salina, Kan.*, Wall St. J., May 17, 1989, at A1, col. 4. See Treaty of Smoky Hill, Feb. 1889, and accompanying legislation. *Testimony of Walter Echo-Hawk, Staff Attorney of the Native American Rights Fund, Before the House Committees on Interior and Insular Affairs, Administration, and Public Works and Transportation on the National American Museum Act, H.R. 2668*, app. 1 (1989) (unpublished manuscript on file at Washington University Journal office).

In addition, the Museum of New Mexico removed Indian skeletons from display

In response to growing concern about these collections, Congress,⁶ many states,⁷ and some institutions⁸ have passed or are considering laws or policies concerning the return of burial remains. Courts also are addressing the issue.⁹ This Note discusses current legislation and litigation and proposes solutions for two unresolved issues: (1) how to determine the cultural affiliation of remains which cannot be identified as belonging to a particular individual;¹⁰ and (2) what should be done with so-called "unaffiliated" remains, those remains which cannot be

more than 20 years ago. The Milwaukee Public Museum did the same in 1972. Recently, the Angel Mounds site in Indiana, an open burial display operated by the state, removed its skeletons from display. In 1988, the National Park Service voluntarily removed all skeletal remains on exhibit in National Parks. In October 1989, the Alabama Museum of Natural History closed to the public its exhibition of burials at Mound State Monument. *Statement on the Closure of the Dickson Mounds Museum Burial Exhibit*, Illinois State Museum, Spring and Edwards, Springfield, IL 62706 (Jan. 2, 1990) (policy statement on file at Washington University Journal office).

Today, the only place in the United States which displays human remains is the Dickson Mounds Museum near Lewiston, Illinois. At Dickson Mounds, the skeletal remains of 234 Indians are shown as they were uncovered. The remains mostly consist of full skeletons, and are over 900 years old. One-third of the remains are skeletons of children. Excavation of the site began in 1927, initially as a private museum that was later transferred to the state. The burial site, about 5,000 square feet, is now enclosed by the major wing of the museum. The state scheduled closing of the burial display for February 1990, but postponed action due to political pressure from local residents who see the display as part of their heritage, with much educational and economic value. *Indian Display to Remain Open*, St. Louis Post-Dispatch, Apr. 3, 1990, at 6A, col. 4. See *infra* note 73.

6. See *infra* notes 27-69 and accompanying text.

7. See *infra* notes 103-33 and accompanying text.

8. See, e.g., North Dakota Historical Society, *S. Hrg.* 931, *supra* note 3, at 226 (June 30, 1988 policy supporting reinterment of all remains); Haas, *Reconsecration of Human Remains at Field Museum*, 61 FIELD MUSEUM OF NAT. HIST. BULL. 14-15 (Jan./Feb. 1990) (explaining museum's new policy concerning requests for reinterment of human remains and burial objects) (policy on file at Washington University Journal office); *American Indians Seek Reburial of Remains*, St. Louis Post-Dispatch, Sept. 25, 1989, at 20B, col. 1 (University of Missouri at Columbia, which in 1986 had remains of at least 1,486 individuals in 175 cardboard boxes in three warehouses, will return upon request the few remains considered recent and identifiable); *Old Bones, New Fight*, TIME, July 10, 1989, at 29 (anthropology professor contests Stanford University's decision to return 550 remains); *Skeletons in the Closet*, Washington Post, Oct. 3, 1989, at D5 (University of Minnesota agrees to release remains of 1,000 Indians and Seattle University will return 150 boxes of bones); Washington University, St. Louis, Mo. (policy of Department of Anthropology which authorizes release of remains to any individual or group who demonstrates cultural affiliation or direct ancestry) (policy on file at Washington University Journal office).

9. See *infra* notes 134-52 and accompanying text.

10. See *infra* notes 71-89 and accompanying text.

definitively identified.¹¹

II. FUNDAMENTAL BELIEFS

A. *Native Americans*

Many Native Americans want all skeletal remains returned for reburial.¹² They consider the disinterment, storage, and use of the bones of their ancestors offensive, sacrilegious, and degrading. Although most Native Americans would accept some delay to allow research,¹³ their goal is return and reburial of all skeletal remains and burial goods. Motivated in part by political¹⁴ and human rights¹⁵ concerns, the Native Americans' primary impetus for return and reburial is spiritual and religious.

Most Indians believe in the permanence of the spirit and view death as one part of an eternal spiritual journey.¹⁶ They also believe that the

11. See *infra* notes 90-102 and accompanying text.

12. Interview with Evelyne Wahkinney Voelker, Executive Director, American Indian Center of Mid-America, 4115 Connecticut, St. Louis, MO 63116 (Jan. 29, 1990). Interview with Michael Haney, Chairman, Repatriation Committee, United Indian Nations in Oklahoma, P.O. Box 38, Concho, OK 73022 (Feb. 6, 1990); Oklahoma Tribal Leaders Summit (OTLS) Resolution No. 90-14, Jan. 19, 1990 ("[We] do hereby support the complete repatriation of skeletal remains and sacred objects now held by all federal and state repositories, museums, other collections, and federally supported collections."). OTLS speaks for 36 tribal governments in Oklahoma, representing over 250,000 Indians. See also H.R. REP. NO. 340, 101st Cong., 1st Sess., pt. 1, at 10 (1989) [hereinafter H.R. REP. NO. 340, pt. 1] (Indians have been seeking repatriation of remains).

13. See state legislation providing for a reasonable period for research before reburial, *infra* note 133 and accompanying text. Native Americans were involved extensively with developing this legislation. Interview with Chet Ellis, Director, Heart of America Indian Center, 611 W. 86th St., Kansas City, MO 64114 (Feb. 6, 1990). See also *Hearing on Indian Religious Freedom Issues, Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives*, 97th Cong., 2d Sess., 139-40 (1982) [hereinafter *Hearing*] (testimony of Walter Echo-Hawk and Susan Harjo).

14. See Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 150 (1989). Bowman explains many of the reburial issues, but explicitly restricts her scope to newly uncovered remains, not curated remains. *Id.* at 153.

15. For examples of Indian remains treated differently than other remains, see *Hearing, supra* note 13, at 136; Bowman, *supra* note 14, at 149-50; Moore, *supra* note 3, at 1-2. One of the reasons for the state laws regulating disposition of newly-found remains was to eliminate the different treatment of Indian remains. Ellis, *supra* note 13.

16. Although beliefs and treatment of the dead differ among Native Americans, nearly all recognize a spiritual journey and continued connection with the living.

living have a responsibility to see that the dead lie undisturbed.¹⁷ If the dead are accidentally or deliberately removed, every Indian has the duty to see to their reburial. Removing the remains interrupts the spiritual journey, but this interruption is only temporary and can be corrected by properly reburying the body.¹⁸ Federal laws protect these deeply-held religious beliefs, but the extent of protection is unclear.¹⁹

Voelker, *supra* note 12; Interview with Van A. Reidhead, Chair, Dep't of Anthropology, University of Missouri - St. Louis, 8001 Natural Bridge Rd., St. Louis, MO 63121-4499 (Feb. 16, 1990).

17. Many Indians also believe the spirits of the disturbed dead can adversely affect the living. Voelker, *supra* note 12; Reidhead, *supra* note 16. Some Indians see action by the angry spirits of the dead whose remains are unburied as a cause of serious health and social problems among American Indians. Voelker, *supra* note 12; Haney, *supra* note 12. The problems are enormous:

[O]n almost every measure [the health of American Indians] is still far behind that of the U.S. all races population. [Indians] are at considerable risk for death by accident, suicide, homicide, and other external or "social" causes. In addition, they suffer disproportionately from alcoholism, diabetes, and pneumonia. . . . Indian infants continue to be at greater risk for death than infants of all other U.S. races combined.

Indian Health Care, *supra* note 3, at 151.

18. Voelker, *supra* note 12.

19. Both the Constitution and statutes protect Native American religious beliefs. *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."); American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1988) ("[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions . . ."); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (applying the free exercise clause to the states through the fourteenth amendment).

The constitutional protection applies to Native Americans. Some Indians received citizenship and equal protection of the laws in 1887. Dawes Act, ch. 119, § 6, 24 Stat. 390 (Indians who have been allotted reservation land under the act and "every Indian . . . voluntarily [residing] separate and apart from any tribe of Indian therein, and has adopted the habits of civilized life"). After World War I, Congress extended citizenship to Indians who served in the military during the war. Act of Nov. 6, 1919, ch. 95, 41 Stat. 350. Not until 1924 did all Indians become citizens. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 3 (1935)) ("[A]ll non-citizen Indians born within the territorial limits of the United States . . . are hereby, declared to be citizens of the United States."). Since 1952, any "person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe" is a citizen at birth. 8 U.S.C. § 1401(b) (1988).

Protection from intrusion on religion, however, is not absolute. Free exercise of religion, even for Native Americans, can be burdened if the burden is the least restrictive means to achieve a compelling government objective. *See Recent Development, No More Religious Protection: The Impact of Lyng v. Northwest Indian Cemetery Protective Association*, 38 WASH. U.J. URB. & CONTEMP. L. 369, 370 (1990). In addition, the government action must not coerce an individual into sacrificing a belief or penalize an

B. Curators

Those who retain burial remains hold equally strong beliefs. Some curators refuse to return any remains.²⁰ Other curators agree, at the very least, to return ethnically identifiable remains.²¹ Many curators believe that the remains have yielded much useful information,²² and

individual for a belief. *Id.* at 371, 383. Whether this coercion/penalty requirement applies beyond the use of sacred land, as with *Lyng*, remains unclear. *Id.* at 384. Whether retaining Native American remains is an unconstitutional intrusion on religious belief has yet to be decided. The *Lyng* ruling does appear to make a religion-based claim more difficult. Bowman, *supra* note 14, at 184.

20. For instance, Illinois requires all newly-found remains be placed in a central repository. See *infra* note 107. Curators who hold to this practice can be called "perpetual keepers," who believe that the remains will always be of scientific and educational value. Nixon, *supra* note 3.

21. See *supra* note 8 for some curators who have adopted this approach. See *infra* notes 71-89 and accompanying text for discussion of cultural affiliation and ethnic identity.

The return of some remains, with ethnic identity or some other parameters being the deciding factors, seems to be a viable "compromise" position, balancing the interests of the various groups. However, this position presumes roughly equal validity in the interests, a presumption which does not stand up to the scrutiny of those who believe that proper treatment of the dead should be of paramount importance.

Another "compromise," with a similar, though less pronounced, conflict is recordation, sampling, and return. Nixon, *supra* note 3. Recordation involves taking measurements and making casts and videos of the bones. Sampling involves retention of small fragments for future research. For example, the long bones of the leg (tibia) are particularly dense so very little is needed for adequate research. Most of the remains could then be returned for reburial.

22. *Joint Hearing Before the Select Committee on Indian Affairs, United States Senate, and the Committee on Rules and Administration, United States Senate, on S. 1722 and S. 1723, Part 1, 100th Cong., 1st Sess., pt. 1, at 75-88 (1987) [hereinafter S. Hrg. 547, pt. 1] (statement of Robert McCormick Adams, Secretary, Smithsonian Institution, Washington, D.C.), reprinted in S. REP. NO. 494, 100th Cong., 2d Sess. 29-35 (1988) [hereinafter S. REP. NO. 494]. Overall, there has been an "enormous and diverse array of information about human behavior and biological similarity and diversity." S. Hrg. 547, pt. 1, *supra*, at 75. For example, the remains have contributed to knowledge of human health and disease, including the prevalence of osteoporosis, a weakening of the bone, and of arthritis. *Id.* at 77-78. They have enhanced studies of human population and behavior, including life spans and expectancies, population size, rate of population growth, and the relation of the environment to these population factors. *Id.* at 81. Comparison of teeth, skulls and other remains for bone structure and genetic markers have helped trace the migration, mixing, and relation of different groups. *Id.* at 82. See also S. Hrg. 90, *supra* note 3, at 190 (statement of Adams) (information about gender ratios, age profiles, stature, body build, and skeletal variations).*

The skeletal remains are an "irreplaceable resource," study of which "requires access to large well-documented skeletal collections." S. Hrg. 547, pt. 1, *supra*, at 85-86. Such collections are the only "hope of moving beyond oral history and ethnographic analogy in the reconstruction of the past." S. Hrg. 90, *supra* note 3, at 189 (statement of Ad-

assert that new technology will lead to new discoveries.²³ Further, they believe this information will continue to benefit those who want the remains returned.²⁴

Ironically, in order to preserve Native American cultures, many collectors violate one of the cultures' principal beliefs: the sanctity of burial.²⁵ Nonetheless, one should not judge most collectors or curation advocates too harshly.²⁶ Attitudes about burial remains are changing,

ams). See also H.R. REP. NO. 340, pt. 1, *supra* note 12, at 10-11. Furthermore, "universal reburial of all human remains . . . would effectively halt all future research worldwide on human evolution, prehistoric demography, disease, and cultural history." Letter from Jonathan Haas, Vice President, Collections and Research, Field Museum of Natural History, Roosevelt Rd. at Lake Shore Dr., Chicago, IL 60605-2496 to David J. Harris (Apr. 16, 1990).

23. "Information remains to be extracted from these samples as scientific understanding and methods advance." *S. Hrg. 547*, pt. 1, *supra* note 22, at 86. Examples of these methods are trace element analysis of bone and teeth to show relation between diet and disease, and extraction of proteins from bone. *Id.* at 86-87. Other methods include advanced dating techniques, *S. Hrg. 90*, *supra* note 3, at 184-85 (statement of Adams), and dietary reconstruction from the trace element studies. *Id.* at 191 (statement of Adams). Chemical comparisons of these trace elements, deposited in different parts of the body, can also determine whether individuals moved during their lives because these elements reflect the environment in which the individuals lived. Haas, *supra* note 8.

24. Examples include the observation that Eskimos' dietary deficiency of calcium can be overcome by "vigorous exercise," occurrence of arthritis and other joint diseases, and occurrence of cleft palate or cleft lip among American Indian children. *S. Hrg. 547*, pt. 1, *supra* note 22, at 77-79. The techniques of forensic anthropology also help identify recent remains by comparison with remains from the past. *Id.* at 83-85.

But see Quade, *Who Owns the Past? How Native American Indian Lawyers Fight for Their Ancestors' Remains and Memories: Human Rights Interview with Walter Echo-Hawk*, 16 HUM. RTS. A.B.A. Winter 1989-90, at 24, 25-26 (Indian health service officials have never heard of any information relevant to American Indian health problems). "Where is all this information going? They haven't done a thing about arthritis, tuberculosis, gall bladder problems that have been known since the 1920's." Voelker, *supra* note 12.

25. Bowman, *supra* note 14, at 152-53; Preston, *Skeletons in Our Museums' Closets: Native Americans Want Their Ancestors' Bones Back*, HARPER'S MAG., Feb. 1989, at 68; Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 438-39 (1986).

For a history of the eras when many of the bones were collected, see R. BIEDER, *SCIENCE ENCOUNTERS THE INDIAN, 1820-1880: THE EARLY YEARS OF AMERICAN ETHNOLOGY* (1986) and C. HINSLEY, JR., *SAVAGES AND SCIENTISTS: THE SMITHSONIAN INSTITUTION AND THE DEVELOPMENT OF AMERICAN ANTHROPOLOGY, 1846-1910* (1981).

26. See, e.g., K. HARPER, *GIVE ME MY FATHER'S BODY: THE LIFE OF MINIK, THE NEW YORK ESKIMO* 98 (1986):

however, as illustrated by growing public concern and recent federal and state laws.

III. A FEDERAL RESPONSE: MANDATING IDENTIFICATION AND RETURN

A. *The Museum Act and the Smithsonian Institution*

The National Museum of the American Indian Act (Museum Act) is the most significant federal response to the return and reburial issue.²⁷

It is simple to characterize these men as cold, unfeeling, dispassionate scientists who cared little for the human consequences of their work. It is easy to do - too easy - for it is wrong. This stereotype of the early anthropologist is not borne out by fact. Most of these men did care. It was their interest in human beings which had drawn them to the science of anthropology in the first place. They and their colleagues in cultural anthropology . . . were proud of their liberalism and open-mindedness. They would have been hurt deeply if anyone suggested that they were, at heart, racists.

They were, nevertheless, products of their times, and the intellectual and cultural traditions from which they had emerged were permeated throughout with an insidious and respectable bigotry. The endemic prejudices of the late nineteenth century were racist and sexist. . . .

An eminent historian of science, in a compassionate evaluation of the work of such men, has suggested that, from our vantage point, "[i]t is a little unfair . . . to criticize a person for not sharing the enlightenment of a later epoch, but it is also profoundly saddening that such prejudices were so extremely pervasive" (quoting C. SAGAN, *BROCA'S BRAIN* 12 (1980)).

As an example of this attitude, Harper tells the sad story of Minik Wallace, an Eskimo from north-western Greenland. Wallace was brought to New York in 1897, along with his father, Qisuk, and four other Eskimos, by Robert Peary, the American explorer. Peary abandoned them. Qisuk and three others died soon after arrival. Officials of the American Museum of Natural History in New York faked Qisuk's burial for Minik and instead dissected, boiled to the bone, and later displayed Qisuk's skeleton at the museum. Minik discovered the display several years later and was devastated. *Id.* at 89-95.

27. National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (1989) (to be codified at 20 U.S.C. § 80q) [hereinafter Museum Act]. Congress enacted the Museum Act on November 28, 1989. The President signed the Act into law on November 29, 1989. The Act establishes a museum dedicated to Native Americans. *Id.* § 3(a). The museum will be on the Mall in Washington, D.C., in an area bounded by Third Street, Maryland Avenue, Independence Avenue, Fourth Street, and Jefferson Drive, S.W. *Id.* § 7(a). The Act also creates a branch museum in New York and appropriate touring displays. *Id.* § 3(b)(4), (10). The museum will be under the auspices of the Smithsonian Institution and its Board of Regents, *id.* § 3(a), and will be supervised by a 25 member Board of Trustees. *Id.* § 5. Initially, seven Trustees must be Indians. *Id.* § 5(e)(2). Eventually, 12 of the 25 Trustees must be Indians. *Id.* § 5(f)(2).

The Museum Act also authorizes transfer of the assets of the Heye Foundation to the new museum. *Id.* § 4. The Heye Foundation, located in New York, has one of the largest collections of Native American art objects and artifacts in the world. *Id.* § 2(3).

The Museum Act, in part, requires the Smithsonian Institution to inventory, identify, and return Native American remains and burial goods.²⁸ The Smithsonian houses the largest collection of remains in the United States.²⁹

The Museum Act mandates the Secretary of the Smithsonian to “in-

28. *Id.* §§ 11-14 (to be codified at 20 U.S.C. §§ 80q-9 to 12). The federal government controls the Smithsonian. It is “constituted” under the executive branch and the Chief Justice of the Supreme Court. 20 U.S.C. § 41 (1988). It is governed by a 17-member Board of Regents, composed of the Vice-President, the Chief Justice, three members each of the Senate and the House of Representatives, and nine other persons. *Id.* § 42. Authority to obtain and keep burial remains comes from its general charter to “increase and diffus[e] . . . knowledge,” *id.* § 41, and specifically from broad authorization to conduct “anthropological researches among the American Indians and the natives of lands under the jurisdiction or protection of the United States” and to “excavat[e] and preserv[e] archaeological remains.” *Id.* § 69. Section 69 was passed April 10, 1928 and amended August 22, 1949 “to give permanent statutory authorization to activities of the Smithsonian Institution which have been carried on with continuous congressional approval for upwards of 70 years.” H. R. REP. NO. 1055, 81st Cong., 1st Sess., reprinted in 1949 U.S. CODE CONG. & ADMIN. NEWS 1841.

29. The Smithsonian houses skeletal remains of 34,190 individuals. 14,523 (42.5%) are remains of North American Indians. 4,061 (11.9%) are Eskimo, Aleut, and Koniag remains. 1,744 (5.1%) are black, 6,829 (20%) are white, and 7,033 (20.6%) are classified as “other.” Thus, there are remains of at least 18,584 Native Americans at the Smithsonian. *S. Hrg.* 547, pt. 1, *supra* note 22, at 73 (statement of Robert McCormick Adams), reprinted in S. REP. NO. 494, *supra* note 22, at 27-28, repeated *Joint Hearing Before the Select Committee on Indian Affairs, United States Senate, and the Committee on Rules and Administration, United States Senate, on S. 978*, 101st Cong., 1st Sess. 1 (1989) [hereinafter *S. Hrg.* 203] (statement of Sen. Inouye), reprinted in S. REP. NO. 143, 101st Cong., 1st Sess. 1-2 (1989) [hereinafter S. REP. NO. 143].

The Army Medical Museum transferred 4,170 of the 34,190 remains to the Smithsonian between 1898 and 1910. The sources of these remains are:

Native North American (United States)	3,070
Native North American (Canada/Greenland)	90
Native South/Central American	482
Native Hawaiian	154
Black/White North American	96
Other	278

A total of 77 were American Indians killed by U.S. soldiers during the Indian wars, while 33 were Indians killed by other Indians. *S. Hrg.* 931, *supra* note 3, at 50 (testimony of Anderson). Many of the other 4,060 remains were collected following a directive from Army General Madison Mills, probably issued in 1868, stressing the importance of collecting Indian skulls, weapons, and utensils. 133 CONG. REC. S12,859 (daily ed. Sept. 25, 1987) (statement of Sen. Inouye). This directive was pursuant to an order of the Surgeon General of the Army, which required Army Medical Officers to obtain skulls to form a sufficiently large collection to get accurate average measurements of aboriginal races. *Id.*; *S. Hrg.* 931, *supra* note 3, at 208-09 (statement of the Native American Rights Fund); S. REP. NO. 601, 100th Cong., 2d Sess. 4 (1988) [here-

ventory the Indian human remains and Indian funerary objects in the possession or control of the Smithsonian Institution³⁰ and identify their origins.³¹ The Act does not specify a deadline.³² If the Smithsonian identifies any remain or object with a particular Indian tribe,³³ the Secretary must notify that tribe.³⁴ Upon request, the Secretary must return the remain or object.³⁵

The request and return provisions encompass two categories of remains: remains of a particular individual³⁶ and remains of an individ-

inafter S. REP. NO. 601]; *S. Hrg.* 547, pt. 1, *supra* note 22, at 74 (testimony of Robert McCormick Adams).

Approximately 600 of the Army's remains were assigned tribal identification. Approximately 270 of those may be accurate. *Id.* at 73. Only 14 can be identified by name. *S. Hrg.* 931, *supra* note 3, at 61 (testimony of Anderson).

In an earlier estimate, out of approximately 18,000 Native American remains, 3,500 were dated "since . . . Columbus" and 700 to 800 were from the last 150 years. Of the latter group of remains, 45 might be individuals identifiable by name. *S. Hrg.* 90, *supra* note 3, at 65 (testimony of Adams). The remains from the Army "came in boxes, and they were put on whatever shelves there were in those boxes" and have not yet been studied. *Id.* at 69-70.

Ales Hrdlicka collected many of the Eskimo, Aleut, and Koniag remains in the 1930s. See A. HRDLICKA, *THE ANTHROPOLOGY OF KODIAK ISLAND* (1944). Much of his book describes the discovery of skeletal remains. Although clear descendants of the Koniag tribe lived on the island at the time, *id.* at 354, Hrdlicka never asked permission to excavate. The descendants are still trying to retrieve their ancestors' bodies from the Smithsonian. See Quade, *supra* note 24, at 25.

30. Museum Act, *supra* note 27, § 11(a)(1). "Funerary object" is defined as an object "intentionally placed with individual human remains" as part of a death rite or ceremony. *Id.* § 16(4). "Human remains" is not defined.

31. *Id.* § 11(a)(2). This identification is to be done using the best available methods. *Id.* See *infra* text and accompanying notes 74-76 for what might constitute these methods.

32. See H.R. REP. NO. 340, 101st Cong., 2d Sess., pt. 2, at 26 (1989) [hereinafter H.R. REP. NO. 340, pt. 2] ("complex and requir[ing] an extended period to complete").

33. "Indian tribe" is defined by section 4 of the Indian Self-Determination and Education Assistance Act. Museum Act, *supra* note 27, § 16(8). That Act has a slightly circular definition:

"Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

25 U.S.C. § 450b(e)(1988). Indian is defined as "a person who is a member of an Indian tribe." *Id.* § 450b(d).

34. Museum Act, *supra* note 27, § 11(b). Notice must be at the earliest opportunity. *Id.*

35. *Id.* § 11(c),(d). Return must be timely. *Id.*

36. *Id.* § 11(c).

ual "culturally affiliated" with a tribe.³⁷ The Act also defines two classes of funerary objects: objects associated with one of the two types of remains³⁸ and objects not associated with remains but traced to the burial site³⁹ of an individual "culturally affiliated" with a tribe.⁴⁰ The request for return of remains or objects must come from the descendants of the particular individual⁴¹ or from the affiliated tribe.⁴² All identification must be "by a preponderance of the evidence."⁴³ These provisions extend to remains of Native Hawaiians.⁴⁴

The Act requires the Smithsonian to consult and cooperate with Indian religious and government leaders throughout the inventory, iden-

37. *Id.* See *infra* notes 71-89 and accompanying text for discussion of the cultural affiliation requirement.

38. Museum Act, *supra* note 27, § 11(c).

39. "Burial site" is defined to take into account all variations in burial practice. *Id.* § 16(3).

40. *Id.* § 11(d).

41. *Id.* § 11(c). This section leaves unclear whether descendants of a culturally affiliated individual need to request return. The context implies that the two types of remains are exclusive; either an individual is particularized and therefore has identifiable descendants or an individual is culturally affiliated and not identifiable with particularity and therefore no identifiable descendants exist.

This section is also ambiguous as to whether a particular individual without descendants can be requested by the culturally affiliated tribe. The law does not explicitly require notice to descendants in the same way it requires notice to a tribe. A notice requirement must be implied.

42. *Id.* § 11(c)-(d).

43. *Id.* § 11(b)-(d). This evidentiary requirement is the standard of proof used in civil cases. 9 J. WIGMORE, EVIDENCE § 2498, at 419 (ed. 1981). Neither the text nor the legislative history of the Act explains why the drafters chose this standard. However, Smithsonian officials had expressed concern about giving remains to those who could not demonstrate legal standing as descendants. *S. Hrg. 547*, pt. 1, *supra* note 22, at 75 (statement of Adams), reprinted in *S. REP. NO. 494*, *supra* note 22, at 28. An unarticulated concern was probably civil liability were remains or objects turned over to the wrong individuals or groups. It can be assumed that Congress adopted the "preponderance of evidence" standard to allay the liability concerns by giving a prima facie case in favor of the decision, thus guarding the Smithsonian from suit.

44. Museum Act, *supra* note 27, § 13(a). "Native Hawaiian" is defined as an individual affiliated with the people who, before 1778, occupied what is now Hawaii. *Id.* § 16(11). The definition of American Indian does not include Native Hawaiians. See 25 U.S.C. § 450b(c) (1988). Although two Hawaiian organizations are specifically mentioned as possible recipients of the remains and objects, Museum Act, *supra* note 27, § 13(a)(2), other groups or individuals are not excluded. 135 CONG. REC. S15,842 (daily ed. Nov. 16, 1989) (statement of Sen. Inouye). Senator Inouye, the senior senator from Hawaii, serves as the chairman of the Senate Select Committee on Indian Affairs, and acted as the principal sponsor of the Senate version of the Museum Act.

tification, and return process.⁴⁵ A five member committee⁴⁶ will monitor and review the process⁴⁷ and help resolve disputes.⁴⁸ Indian tribes or organizations will nominate three of the five members.⁴⁹ None of the five can work for the Government or the Smithsonian, or be affiliated with the Smithsonian.⁵⁰ This administrative structure, along with the near majority of trustees on the museum board,⁵¹ gives Indians and other Native Americans a great deal of influence over return decisions.

Congress appropriated money to carry out the inventory, identification, and return,⁵² and for the review committee.⁵³ The Secretary of the Interior can provide grants to Indian tribes to facilitate and implement return agreements with the Smithsonian and "other Federal and non-Federal entities."⁵⁴ The Museum Act explicitly allows for other repatriation decisions or remedies.⁵⁵

B. *An Historic Approach*

The return and reburial provisions of the Museum Act shows the rapid change in attitude toward the proper disposition of Native American remains.⁵⁶ The Act's 1987 version⁵⁷ did not mandate return and

45. Museum Act, *supra* note 27, § 11.

46. *Id.* § 12(b).

47. *Id.* § 12(a).

48. *Id.* § 12(a)(3).

49. *Id.* § 12(b)(1).

50. *Id.* § 12(b)(2).

51. *Id.* §§ 5(e)(2), (f)(2).

52. *Id.* § 11(f) (a million dollars a year, starting in fiscal year 1991). Fiscal year 1991 begins October 1, 1990.

53. *Id.* § 12(h) (a quarter-million dollars a year, starting in fiscal year 1991).

54. *Id.* § 14(a). A million dollars was appropriated for fiscal year 1991. *Id.* § 14(b).

55. *Id.* § 11(e). See *infra* note 154 for possible litigation remedies.

56. The Museum Act significantly departs from the way federal law views Native American remains. Remains and burial objects have been viewed as resources and as property of the federal government. Previously, other federal legislation has either subordinated or ignored Native American religious or spiritual concerns. See Bowman, *supra* note 14, at 161-64, 185-96; Moore, *supra* note 3, at 2-4. Among the relevant statutes and policies are:

Antiquities Act of 1906, 16 U.S.C. §§ 431-43 (1988). This law required federal permits for excavation, and prescribed penalties for violations. *Id.* §§ 432-33.

Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461-67 (1988).

Reservoir Salvage Act of 1960, 16 U.S.C. §§ 469-469c (1988). This Act provides for preservation of "data (including relics and specimens)" which might be destroyed by

reburial.⁵⁸ It required determination of geographic and tribal origin of the skeletal remains,⁵⁹ but limited interment only to unidentifiable remains.⁶⁰ Disregarding the advice of Native Americans on proper interment procedures,⁶¹ the original drafters proposed a concrete memorial at the museum.⁶² A second version of the Act, in 1988, would have established a task force to determine disposition of the remains.⁶³

federally funded or licensed projects, particularly dams. *Id.* § 469. The Secretary of the Interior is given broad discretion to determine how to dispose of any recovered relics or specimens. *Id.* § 469a-3. This act led to much of the recent collections of remains.

National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. §§ 470-470w (1988). NHPA declared a policy of preservation and stewardship of historic resources. *Id.* § 470-1.

Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa-470mm (1988). ARPA supplemented the Antiquities Act of 1906. Included in the definition of "archaeological resource" are "human skeletal materials . . . at least 100 years of age." *Id.* § 470bb(1). Disposition of remains follows the Reservoir Salvage Act, except that Indians must consent to disposition of remains found on Indian land. *Id.* § 470dd(2). ARPA also prohibits the sale, exchange, or transport of archaeological resources, *id.* § 470ee(b), except for collections which were lawfully possessed prior to October 31, 1979. *Id.* § 470ee(f).

Department of the Interior, Guidelines for the Disposition of Archaeological and Historical Human Remains 2 (July 23, 1982).

National Park Service, Curation of Federally-Owned and Administered Archaeological Collections, 52 Fed. Reg. 32,740 (1987).

Department of Agriculture-Forest Service, Southern and Eastern Regions, Treatment of Human Remains 1 (Jan. 29, 1988).

Although many of these statutes and policies apply to the reburial conflict, they primarily grant "procedural protections." Bowman, *supra* note 14, at 195.

Application of existing statutes and regulations to facilitate return of burial remains is an interesting topic beyond the scope of this Note. That subject is addressed in part in the broader context of Indian religious practices in the Federal Agencies Task Force, *American Indian Religious Freedom Act Report* (Aug. 1979).

57. S. 1722, 100th Cong., 1st Sess. (1987) (introduced by Senator Inouye on Sept. 25, 1987); H.R. 3480, 100th Cong., 1st Sess. (1987) (introduced by Representative Udall on October 13, 1987).

58. Another bill introduced that year, however, proposed a Native American Claims Commission to resolve disputes over remains, burial goods, and other artifacts. S. 187, 100th Cong., 1st Sess. (1987). The commission is modelled on the Indian Claims Commission which resolved land disputes. S. REP. NO. 601, *supra* note 29, at 2.

59. S. 1722, 100th Cong., 1st Sess. § 202 (1987).

60. *Id.* § 203.

61. *Id.* § 203(b).

62. *Id.* §§ 103(c)(2), 201(a)(2). Many Native Americans objected to this method of treating the unidentified remains. See *infra* notes 96-99 and accompanying text.

63. S. 1722, 100th Cong., 2d Sess. § 106 (1988); S. REP. NO. 494, *supra* note 22, at 14.

Also introduced in 1988 was the Indian Remains Reburial Act, H.R. 5411, 100th

A third version of the Act⁶⁴ gave the Smithsonian three years and one million dollars to study the remains and make recommendations regarding disposal.⁶⁵ After hearings on this version, Native American groups and the Smithsonian agreed on procedures for disposition of the remains.⁶⁶ Congress incorporated this agreement, along with prior legislation dealing with the return of remains,⁶⁷ into the final version of the Museum Act.

C. Pending Legislation

The Museum Act applies only to the Smithsonian.⁶⁸ Congress is considering legislation which applies similar requirements to all organizations and institutions receiving federal funds.⁶⁹ Nevertheless, the current federal response constitutes a major step in resolving the debate

Cong., 2d Sess. (1988). The Act mandated return upon request of all identifiable remains dating from at least 1600 A.D. In 1989, the Act was reintroduced, with the only change being a starting date of 1500 A.D. H.R. 1124, 101st Cong., 1st Sess. (1989).

64. S. 978, 101st Cong., 1st Sess. (1989) (introduced by Sen. Inouye on May 11, 1989); H.R. 2668, 101st Cong., 1st Sess. (1989) (introduced by Rep. Campbell on June 15, 1989).

65. *Id.* § 9.

66. H. R. REP. NO. 340, pt. 2, *supra* note 32, at 15-16.

67. *See supra* notes 58 and 63 and *infra* note 69 for discussion of prior legislation regarding return of remains.

68. *See supra* note 28 for discussion of the Museum Act.

69. Native American Grave and Burial Protection Act. H.R. 1646, 101st Cong., 1st Sess. (1989) (introduced by Rep. Udall on March 23, 1989); S. 1021, 101st Cong., 1st Sess. (1989) (introduced by Sen. McCain on May 17, 1989). Only minor differences exist between the two bills. Each applies to federal agencies or instrumentalities, H.R. 1646, *supra* § 5; S. 1021, *supra* § 6, and to museums receiving federal funds, H.R. 1646, *supra* § 6; S. 1021, *supra* § 8. "Museum" is defined as "any museum, university, government agency, or other institution receiving Federal funds which possesses or has control over any Native American skeletal remains or sacred ceremonial objects." H.R. 1646, *supra* § 3(7); S. 1021, *supra* § 3(7).

Each bill gives two years to inventory, another year for notice, and another year for a tribe to request return. H.R. 1646, *supra* §§ 5(a)-(c); S. 1021, *supra* §§ 6(a)-(c)(1). Items not "definitely identifiable" are judged by a "more likely than not" standard. H.R. 1646, *supra* § 5(b); S. 1021, *supra* § 6(b)(1)(B). All items must be returned upon request, unless the tribe provides express written consent to retain, H.R. 1646, *supra* § 5(d)(1); S. 1021, *supra* § 6(c)(2)(A), or the item is "indispensable for the completion of a specific scientific study, the outcome of which would be of major benefits to the United States." H.R. 1646, *supra* § 5(d)(2); S. 1021, *supra* § 6(c)(2)(B). Any museum not complying with this procedure loses all federal funding. H.R. 1646, *supra* § 6; S. 1021, *supra* § 8(c).

Each bill also prohibits the sale, use for profit, or interstate transport of skeletal remains, grave goods, or sacred objects, without express written consent of either the heirs

about Native American burial remains. However, the Act still leaves several issues unresolved. These issues include: (1) how to determine cultural affiliation, and (2) what to do with unaffiliated remains or objects.⁷⁰

IV. UNRESOLVED ISSUES

A. *Identification and Cultural Affiliation*

The Museum Act applies to remains or objects identified with a particular individual or an individual culturally affiliated with a particular tribe.⁷¹ Only a small portion of the collections meets the "particular individual" requirement.⁷² Therefore, the method of deciding affiliation will determine whether most remains and objects must be returned.

Professionals and lay persons disagree with each other and among themselves on how to determine an individual's cultural affiliation or ethnic identity.⁷³ The Museum Act requires "using the best available

or the tribe culturally affiliated with the remains, goods, or objects. H.R. 1646, *supra* § 4(a); S. 1021, *supra* § 4(a).

In the House version, heirs or the culturally affiliated tribe have the right to dispose of any skeletal remains found after enactment. H.R. 1646, *supra* § 4(b). In the Senate version, the right to dispose belongs to heirs or the Indian tribe of which the deceased is a member. S. 1021, *supra* § 5(a). Tribal affiliation might lie in the tribe with jurisdiction over the reservation where the remains are found, the tribe with aboriginal inhabitants of the area, or the tribe with cultural affiliation. *Id.* § 5(b). These three criteria also determine ownership of grave goods and sacred objects found after enactment. H.R. 1646, *supra* § 4(c); S. 1021, *supra* § 5(b).

On November 21, 1989, Senator Inouye introduced a bill similar to H.R. 1646 and S. 1021, expanding the return policy to include sacred objects. Native American Repatriation of Cultural Patrimony Act, S. 1980, 101st Cong., 1st Sess. (1989). As with other legislation, these three bills do not define "culturally affiliated." Further, they do not say what to do with unaffiliated or unidentifiable remains.

See also 135 CONG. REC. S5,517 (daily ed. May 17, 1989) (statement of Sen. McCain); 135 CONG. REC. S12,397 (daily ed. Oct. 3, 1989) (statement of Sen. McCain that the inventory and repatriation procedure of S. 1021 is similar to the Museum Act).

70. Two other issues, beyond the scope of this Note, are whether the mandated return of remains or objects is a taking which requires compensation, and what effect the legislation will have on state and private actions.

71. See *supra* notes 36-40 and accompanying text.

72. Only 14 out of 18,584 can be identified by name. See *supra* note 29.

73. "We as Indians don't recognize the tribal divisions or the divisions of history and prehistory. Those time scales are for people who do that type of study. But they are not ours." Voelker, *supra* note 12.

One of the clearest examples of this disagreement occurred at the public hearings on the decision to close the public burial display at the Dickson Mounds Museum. See

scientific and historical documentation" to identify the remains.⁷⁴ This method includes consideration of acquisition records, field notes, research findings, tribal oral tradition and history,⁷⁵ and traditional religious practices and beliefs.⁷⁶

Federal regulations on related matters could help determine affiliation. Regulations from the Department of the Interior's Bureau of Indian Affairs detail the procedures an Indian group must follow to establish itself as an Indian tribe.⁷⁷ The Bureau only acknowledges "ethnically and culturally identifiable" groups.⁷⁸ The petition for acknowledgement must state facts establishing a substantially continuous⁷⁹ Indian identity.⁸⁰ A group can show this historical continuity through evidence of repeated identification, or relations; dealings with federal, state, local or Indian authorities; or evidence from anthropologists, historians, other scholars, newspapers, or books.⁸¹ The petition

supra note 5. Among the arguments in favor of keeping the display open include the assertion that the Indians on display had no living descendants; that research indicated that the tribes inhabiting the area died out and became extinct; therefore those asserting kinship rights and asking for reburial had no basis for that position.

Many individuals argued for closing the display. Some belonged to Indian tribes which had once occupied the area around Dickson Mounds. More than 150 years earlier, the government forcibly removed the occupants of that area. Other individuals represented tribes which the federal government recognized as indigenous to the area. Descendants of individual Indians whose families never left the area also advocated closure.

For Native Americans, the problem of establishing a connection with the past is exacerbated by the government's former policy of displacement which removed them from ancestral lands and deliberately disrupted and destroyed their culture.

74. Museum Act, *supra* note 27, § 11(a)(2).

75. H.R. REP. NO. 340, pt. 1, *supra* note 12, at 15-16; H. R. REP. 340, pt. 2, *supra* note 32, at 25-26.

76. S. REP. NO. 601, *supra* note 29, at 7.

77. 25 C.F.R. § 83 (1989) (Procedures for Establishing That an American Indian Group Exists as an Indian Tribe). This acknowledgement of tribal status is a prerequisite for many government services and benefits. *Id.* § 83.2.

78. *Id.* § 83.3(a).

79. "Continuously" is defined as "extending from generation to generation throughout the tribe's history essentially without interruption." *Id.* § 83.1(m). The use of the words "substantially" and "essentially" indicates that there can be continuity despite some gaps in time.

80. *Id.* § 83.7(a). The continuity need date back only to historical times. *Id.* "Historical" means from the "earliest documented contact" with the United States or its predecessors. *Id.* § 83.1(l).

81. *Id.* § 83.7(a)(1)-(7).

must also state facts establishing residence in a specific area,⁸² political authority,⁸³ and known members.⁸⁴ Acceptable evidence of membership includes evidence similar to that for historical continuity and affidavits from tribal elders or leaders.⁸⁵

The tribal recognition regulation establishes a multi-factor test for identity and affiliation.⁸⁶ The test presumably would apply to cultural affiliation in the reburial context.⁸⁷ Given the large role Native Americans play in overseeing inventory, identification, and return of remains,⁸⁸ the standard for cultural affiliation will likely be result-oriented, facilitating return of as many remains as possible.⁸⁹ Yet the question persists: What should be done with those remains which cannot be returned under the current law or policy?

B. *Unidentified and Unaffiliated Remains*

Very few of the remains at the Smithsonian are currently identified.⁹⁰ Even if the Smithsonian could identify all its remains using the "cultural affiliation" standard, many more remains exist in other collections.⁹¹ Other curators who use the cultural affiliation standard⁹²

82. *Id.* § 83.7(b).

83. *Id.* § 83.7(c)-(d).

84. *Id.* § 83.7(e).

85. *Id.* § 83.7(e)(4).

86. *See, e.g.*, 54 Fed. Reg. 51,502-05 (Dec. 15, 1989) (recognition allowed because all factors met); 54 Fed. Reg. 47,136 (Nov. 9, 1989) (recognition denied because of insufficient documentary evidence regarding continuity of petitioning group's activities from 1941 to the present); *Price v. Hawaii*, 764 F.2d 623, 627-28 (9th Cir. 1985) (recognition denied). In *Price*, the Ninth Circuit applied the test to determine if an Hawaiian group was recognized, for purposes of jurisdiction under 28 U.S.C. § 1362, which gives district courts original jurisdiction over civil actions brought by recognized tribes.

87. A tribal resolution claiming cultural affinity along with evidence from tribal ethnographers may be enough to establish cultural affiliation and to satisfy a preponderance of evidence requirement. *Haney, supra* note 12.

88. *See supra* notes 45-51 and accompanying text.

89. There is nothing wrong or unfair with this approach. In addition to the legal issues involved, legislation cannot solely address the ethical and moral dimensions to this issue. *See generally* Deloria, *supra* note 3. As with many other issues, the legal standard is interpreted with the moral goal in mind.

90. *See supra* note 29.

91. *See supra* note 3.

92. *See, e.g.*, Haas, *supra* note 8 (museum's use of cultural affiliation standard); Washington University, *supra* note 8 (anthropology department's use of cultural affiliation standard).

still may not be able to identify all remains or may have procedures that inadequately address Native Americans' concerns. Many curators assume they will be able to keep any remains not definitively identified.⁹³ Most Native Americans want all remains returned, regardless of identity.⁹⁴ A conflict clearly exists concerning unaffiliated remains.

Some Native Americans have suggested that the remains be returned to whomever wants them.⁹⁵ The legislative history of the Museum Act provides little guidance on the issue. Indian leaders objected strongly to a proposal that all unidentified remains be permanently interred in a concrete memorial within the new museum.⁹⁶ Suggested alternatives included individual burial in a cemetery,⁹⁷ federal land set aside for a burial ground which the museum would oversee,⁹⁸ and recommendations resulting from a consensus of tribal leaders.⁹⁹ Congress adopted none of these solutions.

State responses to reburial provide additional guidance for resolving this issue,¹⁰⁰ along with recent court decisions¹⁰¹ and the common law.¹⁰² Ultimately, however, law will not resolve the disposition of unaffiliated remains; rather, politics and morals will determine it.

93. See *S. Hrg.* 931, *supra* note 3, at 64 (statement of Cheryl Ann Munson, Chairman, Government Affairs, Society for American Archaeology, Washington, D.C.); H.R. REP. NO. 340, pt. 1, *supra* note 12, at 16 ("many human remains in the collection are of unknown origin and will, therefore, remain in the collection"). Part 1 is the report of the Committee on Public Works and Transportation. The report of the Committee on House Administration does not contain this sentence even though the paragraphs in the two reports before and after are identical. H.R. REP. NO. 340, pt. 2, *supra* note 32, at 26.

94. See *supra* note 12. See also *Joint Hearing Before the Select Committee on Indian Affairs, United States Senate, and the Committee on Rules and Administration, United States Senate, on S. 1722 and S. 1723*, 100th Cong., 1st Sess. 71 (1987) [hereinafter *S. Hrg.* 547, pt. 2] (statement of Hon. John Gonzales, President, National Congress of American Indians).

95. Voelker, *supra* note 12. "We'll adopt them." Haney, *supra* note 12.

96. *S. Hrg.* 547, pt. 2, *supra* note 94, at 69, 75, 83.

97. *Id.* at 69.

98. *Id.* at 75.

99. *Id.* at 83.

100. See *infra* notes 103-33 and accompanying text.

101. See *infra* notes 134-54 and accompanying text.

102. See *infra* notes 155-66 and accompanying text.

V. STATE RESPONSES: MODELS TO FOLLOW?

A. *A Variety of Approaches*

Two broad categories of state legislation deal with unidentified burial remains: statutes that explicitly affect existing collections and statutes that do not.¹⁰³ The first category consists of statutes which directly address the return of remains¹⁰⁴ or prohibit public display and sale of remains.¹⁰⁵ The second category includes statutes which ban future collections,¹⁰⁶ specify procedures for newly-found remains,¹⁰⁷

103. For a different categorization and, in some ways, a more comprehensive description, of relevant state laws, see J. Nixon & D. Herschel, *The Reburial Process: New Laws for Old Problems. An Inquiry Into the Status of Reburial Legislation.* (1989) (unpublished manuscript on file at Washington University Journal office).

104. NEB. REV. STAT. §§ 12-1201 to 12-1212 (Supp. 1989) (Unmarked Human Burial Sites and Skeletal Remains Protection Act). See *infra* notes 112-24 and accompanying text.

105. Eight states prohibit the display or sale of remains. See IDAHO CODE § 27-502(2)(b)-(c) (Supp. 1989); KAN. STAT. ANN. § 75-2748(a)(3)-(4) (1989); NEB. REV. STAT. § 12-1208(2) (Supp. 1989); N.H. REV. STAT. ANN. § 227-C:8-i(II) (1989); N.C. GEN. STAT. § 70-37(2) (1989); OKLA. STAT. ANN. tit. 21, § 1168.1 (West Supp. 1990) (no sale); OKLA. STAT. ANN. tit. 21, § 1168.3 (West Supp. 1990) (no display); OR. REV. STAT. § 97.745(2)(b)-(c) (1989); WASH. REV. CODE § 27.44.040(2) (1990) (no sale). In addition, Florida requires the Division of Historical Resources of the Department of State to develop guidelines for display. FLA. STAT. ANN. § 872.05(8)(b) (West 1988). The District of Columbia prohibits exhibition of dead bodies, except at government museums or at schools. D.C. CODE ANN. § 27-120 (Supp. 1989).

106. Seven states ban future collections. See CAL. PUB. RES. CODE § 5097.99 (1984) ("No person shall obtain or possess any Native American artifacts or human remains which are taken from a Native American grave or cairn on or after January 1, 1984 . . ."); IDAHO CODE § 27-502(2)(a) (Supp. 1989) (on or after Jan. 1, 1984); KAN. STAT. ANN. § 75-2748(a)(2) (1989) (on and after Jan. 1, 1990); ME. REV. STAT. ANN. tit. 22, § 4720 (1982) (from Oct. 3, 1973); N.H. REV. STAT. ANN. § 227-C:8-I (1989) (after Jan. 1, 1987); N.C. GEN. STAT. § 70-37(1) (1989) (after Oct. 1, 1981); OR. REV. STAT. § 97.745(2)(a) (1989) (after Oct. 3, 1979).

107. 17 states specify procedures for newly-found remains. See CAL. PUB. RES. CODE § 5097.98 (West 1989); 1989 Conn. Legis. Serv. 913-4 (West) (Pub. Act No. 89-368 §§ 10-11); FLA. STAT. ANN. § 872.05 (West 1988); HAW. REV. STAT. § 6E-43 (Supp. 1989); IDAHO CODE § 27-503 (Supp. 1989); IOWA CODE ANN. §§ 305A.7-8 (1988); KAN. STAT. ANN. §§ 75-2741 to 75-2754 (1989); ME. REV. STAT. ANN. tit. 22, § 4720 (1982); MASS. ANN. LAWS ch. 7, § 38A (Law Co-op. 1988); MINN. STAT. ANN. § 307.08 (West Supp. 1990); MO. ANN. STAT. §§ 194.400-410 (Vernon Supp. 1990); NEB. REV. STAT. §§ 12-1201 to 12-1212 (Supp. 1989); N.H. REV. STAT. ANN. § 227-C:8 (1989); N.C. GEN. STAT. §§ 70-26 to 70-40 (1989); OKLA. STAT. ANN. tit. 21, § 1168 (West Supp. 1990); OR. REV. STAT. §§ 97.740-.760 (1989); WASH. REV. CODE § 27.44.040 (1990).

Of the 17 states, eight, Connecticut, Florida, Hawaii, Kansas, Missouri, Nebraska, New Hampshire, and North Carolina, have enacted similar legislation addressing all

control acquisition of remains primarily by permits,¹⁰⁸ or regulate disposition of dead bodies.¹⁰⁹

Laws directly addressing the return of remains and laws specifying procedures for newly-found remains provide the best guide for resolv-

newly-found skeletal remains. Regulation of Native American remains constitutes a major part of these comprehensive laws.

Four other states, California, Massachusetts, Minnesota, and Oklahoma, have similarly comprehensive, but less detailed laws.

Three states, Idaho, Oregon, and Washington, are similar to each other and focus exclusively on Indian remains.

The remaining two states, Iowa and Maine, have the oldest and briefest statutes, passed in 1976 and 1973 respectively. Each is unique in content.

In addition to these 17 state laws, three states which are termed "permit" states, *see infra* note 108, make some provision for newly-found remains. Arizona requires "all reasonable steps" be taken to preserve newly-found remains on state land. ARIZ. REV. STAT. ANN. § 41-844 (1985). Illinois considers newly-found remains to be held "in trust for the people of Illinois" and requires them to be maintained by the State Museum. ILL. REV. STAT. ch. 127, ¶ 2674 (Smith-Hurd 1989). Many Indians are opposed to this central repository provision and will be working to get it changed. Voelker, *supra* note 12. Virginia plans regulations for appropriate disposition. VA. CODE ANN. § 10.1-2305(D) (1989).

See also Bowman, *supra* note 14, at 196-207 (California, North Carolina, Massachusetts, and Iowa discussed in detail).

108. Nine states control acquisition of remains primarily by permit. *See* ARIZ. REV. STAT. ANN. § 41-841 (1985); ALASKA STAT. § 41.35.200(a) (1989); ILL. REV. STAT. ch. 127, ¶ 2673 (Smith-Hurd 1989); KY. REV. STAT. ANN. § 164.720 (Michie/Bobbs-Merrill 1988); LA. REV. STAT. ANN. § 41-1606 (West Supp. 1990); 1989 N.M. Laws 267 (to be codified at N.M. STAT. ANN. § 18-6-11.2); N.Y. EDUC. LAW §§ 233-4 (McKinney 1988); OHIO REV. CODE ANN. § 149.51 (Anderson 1984); VA. CODE ANN. § 10.1-2305 (1989).

The content and effectiveness of the permit procedures and any resulting regulations are beyond the scope of this Note.

109. Nearly all states have statutes which indicated who has burial right and responsibility; describe what is to be done with unclaimed bodies; and criminalize grave robbing, grave tampering, and unauthorized exhumation. For example, the right of burial belongs first to the surviving spouse, then to children, next to parents, finally to other relatives. Descent and distribution statutes determine priority. If no next of kin is available, the right belongs to persons or fraternal, religious, or charitable organizations willing to assume responsibility, or to a local government entity. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-831 (Supp. 1989) (duty to bury body of dead person); CAL. HEALTH & SAFETY CODE § 7100 (West 1989) (custody of dead bodies). Unclaimed bodies can be used for medical research but then must be properly disposed. *See, e.g.*, ALA. CODE §§ 22-19-20 to 30 (1989) (distribution of unclaimed bodies for scientific study); ALASKA STAT. § 12.65.100 (1989) (unclaimed bodies to be "plainly and decently buried").

These types of dead body statutes probably do not apply to skeletal remains, either newly-found or in existing collections. *See infra* note 165 and accompanying text. They can, however, serve as analogies for those claiming rights to the remains or advocating decent reburial.

ing the issues of affiliation and disposition of unaffiliated remains.¹¹⁰ Laws prohibiting public display and sale, banning future collection, and controlling acquisitions by permit exemplify a growing respect for the proper treatment of Native American dead. Because these laws do not involve the issues of affiliation and unaffiliated remains, they will not be discussed further.¹¹¹

B. *State Laws Which Address Existing Collections*

Only the state of Nebraska mandates return from existing collections.¹¹² Nebraska requires “[any] entity in [the] state which receives funding or official recognition from the state or any of its political subdivisions” to return “any disinterred human skeletal remains or burial goods of American Indian origin which are reasonably identifiable as to familial or tribal origin” upon request of the relative or Indian tribe.¹¹³ Unidentified remains may be studied for up to one year and then reburied. If, however, the remains are “of extremely important, irreplaceable, and intrinsic scientific value,” they may be curated until they can be reburied “without impairing their scientific value.”¹¹⁴ Identified but unclaimed remains are treated like unidentified remains.¹¹⁵ “Reasonably identifiable” means “by a preponderance of the evidence . . . based on any available archaeological, historical, ethnological, or other direct or circumstantial evidence or expert opinion.”¹¹⁶

Disputes over remains or goods are subject to arbitration, with either a mutually selected third party or the Public Counsel acting as arbitra-

110. *See infra* notes 125-33 and accompanying text.

111. State administrative procedures which relate to Native American burial sites or remains are also beyond the scope of this Note. *See* J. Nixon & D. Herschel, *supra* note 103.

112. NEB. REV. STAT. § 12-1209 (Supp. 1989). The Nebraska statute resulted from a heated and sometimes bitter dispute between the Nebraska State Historical Society and the Pawnee Indian Tribe, now in Oklahoma. The Pawnee requested the return of remains of nearly 200 Pawnee Indians and their associated burial goods. These remains represent about one-fifth of the Historical Society's collection. The Society refused the request. After three years of discussion, debate, and the threat of legal action, the state legislature passed the current law. It has not yet been challenged in court.

113. *Id.*

114. *Id.* § 12-1208(2).

115. *Id.* § 12-1208(3).

116. *Id.* § 12-1204(6).

tor.¹¹⁷ By a majority vote, the two original parties and the arbitrator resolve the dispute.¹¹⁸ The arbitration decision is appealable.¹¹⁹ Indians and Indian tribes may sue to enforce this law.¹²⁰ A prevailing plaintiff is entitled to actual damages¹²¹ and the prevailing party may recover attorney's fees.¹²²

The Nebraska law and the federal Museum Act are similar in their approach to the return and reburial of identified remains.¹²³ Nebraska's statutory method of determining identity parallels the procedure proposed for the Museum Act.¹²⁴ Nebraska goes further than the Museum Act and applies its law to all state funded or recognized entities. The statute also deals explicitly with unidentified remains, encouraging reburial after a reasonable study period, and establishes a detailed dispute resolution and litigation process.

C. *State Laws Which Address Newly-Found Remains*

The statute containing Nebraska's existing collection provisions also addresses disposition of newly-found remains. Nebraska treats newly-found remains and existing collections identically.¹²⁵ Many other states have similar statutes concerning newly found remains.¹²⁶ These states express a strong preference for the return and reburial of newly-found remains¹²⁷ and share several common elements. After discov-

117. *Id.* § 12-1211.

118. *Id.*

119. *Id.*

120. *Id.* § 12-1212(1).

121. *Id.* § 12-1212(2)(b).

122. *Id.* §§ 12-1212(2)(a), (3).

123. *See supra* notes 30-43 and 112-122 and accompanying text.

124. *See supra* notes 71-89 and accompanying text.

125. NEB. REV. STAT. § 12-1208 (Supp. 1989). This provision takes effect unless the county attorney determines the remains are associated with a crime. *Id.* § 12-1207. After use in a criminal investigation, the remains may be reburied. *Id.*

126. *See supra* note 107. Nebraska's law is one of the more recent. The state statutes went into effect as follows: Maine (Apr. 1, 1974), Iowa (1976), Oregon (1977), Connecticut (June 1, 1981, rev. Oct. 1, 1989), North Carolina (1981), California (1982), Idaho (1984), Minnesota (1986), New Hampshire (Jan. 1, 1987), Massachusetts (1987), Oklahoma (July 1, 1987), Missouri (1987), Florida (Oct. 1, 1987), Hawaii (1988), Washington (July 3, 1989), Nebraska (Aug. 25, 1989), and Kansas (Jan. 1, 1990).

127. Whether these statutes might extend to existing collections is an interesting topic beyond the scope of this Note. In Missouri, for example, the Unmarked Human Burial Consultation Committee has contacted most institutions in the state which could possess skeletal remains. The committee requested an inventory and an evaluation of

ery, a state official or agency locates descendants or affiliates who can help decide what to do with the remains.¹²⁸ If the remains are unaffiliated, or identified parties cannot reach an agreement, the statutes either mandate disposition, with reburial being favored,¹²⁹ or a com-

the possibility for return and reburial of the remains. Some institutions have willingly turned over their remains, for instance, the Missouri Historical Society in St. Louis. *Bone Burial: Historical Society To Give Indian Remains To Leaders*, St. Louis Post-Dispatch, June 6, 1990, at 1A, col. 4. Others would like to retain their collections, for instance, the University of Missouri at Columbia. *American Indians Seek Reburial of Remains*, St. Louis Post-Dispatch, Sept. 25, 1989, at 20B, col. 1. The committee is still developing its policy. Nixon, *supra* note 3.

128. CAL. PUB. RES. CODE § 5097.98(a) (West 1989) (Native American Heritage Commission notifies most likely descendants); 1989 Conn. Legis. Serv. 913 (West) (Pub. Act No. 89-368 §§ 10(b)-(c)) (if leaving remains on site is unfeasible, state archaeologist, landowner, and Native American Heritage Advisory Council arrange removal and reburial); FLA. STAT. ANN. § 872.05(6)(b) (West 1988) (state archaeologist to locate direct kin or tribal, community or ethnic relation); HAW. REV. STAT. § 6E-43(f) (Supp. 1989) (historic preservation department consults relevant ethnic group and any lineal descendants); IDAHO CODE § 27-503(1) (Supp. 1989) (reinterment supervised by appropriate Indian tribe); IOWA CODE ANN. § 305A.7 (1988) (state archaeologist has primary responsibility; in practice, however, the state Indian Advisory Committee is consulted); KAN. STAT. ANN. § 75-2749(d) (1989) (state historical society shall consider kin or descent groups); ME. REV. STAT. ANN. tit. 22, § 4720 (1982) (to appropriate Indian Tribes for reburial); MASS. ANN. LAWS ch. 7, § 38A (Law Co-op. 1988) (state archaeologist and commission on Indian Affairs); MINN. STAT. ANN. § 307.08(7) (Supp. 1990) (state archaeologist and Indian affairs council try to determine tribal identity and turn over to contemporary tribal leaders); MO. ANN. STAT. §§ 194.408(1)-(2) (Vernon Supp. 1990) (state historic preservation officer tries to find direct kin or descendants or living people with ethnic affinity); NEB. REV. STAT. § 12-1208(3) (Supp. 1989) (state historical society notifies relatives or any reasonably linked Indian tribes); N.H. REV. STAT. ANN. § 227-C:8-d(I) (1989) (state archaeologist notifies and consults with Indian tribes or groups known to have affinity); N.C. GEN. STAT. § 70-32 (1989) (chief archaeologist notifies and consults with appropriate tribal group or community); OKLA. STAT. ANN. tit. 21, §§ 1168.2, .4(E)(2) (West Supp. 1990) (consult with tribal leaders); OR. REV. STAT. § 97.750 (1989) (appropriate Indian tribe); WASH. REV. CODE § 27.44.040(1) (1990) (appropriate Indian tribe).

129. CAL. PUB. RES. CODE § 5097.98(b) (West 1989) (landowner reinters with appropriate dignity); 1989 Conn. Legis. Serv. 914 (West) (Pub. Act No. 89-368 § 11(c)) (all remains reburied; state archaeologist, Native American Heritage Advisory Council and commissioner of environmental protection determine ceremony); IDAHO CODE § 27-503(1) (Supp. 1989) (reinterment supervised by appropriate Indian tribe; director of state historical society designates appropriate tribe. *Id.* at (3)); ME. REV. STAT. ANN. tit. 22, § 4720 (1982) (to appropriate Indian Tribes for reburial); NEB. REV. STAT. § 12-1208(2) (Supp. 1989) (immediate reburial or curation and reburial when no longer of scientific value); N.H. REV. STAT. ANN. § 227-C:8-g(III) (1989) (state archaeologist arranges reburial or permanent curation); N.C. GEN. STAT. § 70-35 (1989) (chief archaeologist arranges permanent curation); OKLA. STAT. ANN. tit. 21, §§ 1168.2, .5 (West Supp. 1990) (state officials may rebury or curate); OR. REV. STAT. §§ 97.750(1)-(2) (1989) (reinterment supervised by appropriate Indian tribe; Commis-

mittee decides what to do.¹³⁰ The committees include Native American representatives.¹³¹ Most states permit study before reburial or disposition other than reburial, but require the consent of the descendants, affiliates, or committee.¹³² Several states also place a time limit on how long the remains can be kept before reburial.¹³³

In addition to these common statutory themes, recent case law and the common law offer guidance on the issues of affiliation and unaffiliated remains.

VI. CASE LAW ON NATIVE AMERICAN REMAINS

A. Charrier v. Bell

*Charrier v. Bell*¹³⁴ is the leading case regarding the return of Indian

on Indian Services designates tribe. *Id.* at (3)); 1989 WASH. REV. CODE § 27.44.040(1) (1990) (reinterment supervised by appropriate Indian tribe).

130. FLA. STAT. ANN. § 872.05(6)(c) (West 1988) (persons with relevant experience); HAW. REV. STAT. § 6E-43(f) (Supp. 1989) (historic preservation department or office of Hawaiian affairs if remains possibly Native Hawaiian. *Id.* at (c)(4)); IOWA CODE ANN. § 305A.7 (1988) (state archaeologist has primary responsibility; in practice, however, the state Indian Advisory Committee is consulted); KAN. STAT. ANN. 234 § 75-2749(d) (1989) (Unmarked Burial Sites Preservation Board directs any disposition or reinterment); MASS. ANN. LAWS ch. 7, § 38A (Law Co-op. 1988) (state archaeologist and commission on Indian Affairs); MINN. STAT. ANN. § 307.08(7) (Supp. 1990) (state archaeologist and Indian affairs council); MO. ANN. STAT. § 194.408(3) (Vernon Supp. 1990) (Unmarked Human Burial Consultation Committee).

131. FLA. STAT. ANN. § 872.05(6)(c) (West 1988) (two out of four committee members are Native Americans); HAW. REV. STAT. § 6E-43(f) (Supp. 1989) (no numbers given); IOWA CODE ANN. § 305A.7 (1988) (two of at least six committee members are Native Americans); 1989 Kan. Sess. Laws 234 § 4 (four of nine committee members are Native Americans); MASS. ANN. LAWS ch. 7, § 38 (Law Co-op. 1988) (seven of seven committee members are Native Americans); MINN. STAT. ANN. § 307.08(7) (Supp. 1990) (no numbers given); MO. ANN. STAT. § 194.409(1) (Vernon Supp. 1990) (two of seven committee members are Native Americans).

132. See *supra* notes 128-30. See also HAW. REV. STAT. § 6E-43(c)(3) (Supp. 1989) (no physical anthropological study if lineal descendants oppose it).

133. FLA. STAT. ANN. § 872.05(7) (West 1988) (written report within two years); KAN. STAT. ANN. § 75-2749(d) (1989) (one year with possible six month extensions); ME. REV. STAT. ANN. tit. 22, § 4720 (1982) (no longer than one year); MASS. ANN. LAWS ch. 7, § 38A (Law Co-op. 1988) (one year with possible extensions); MO. ANN. STAT. §§ 194.408(2)-(4) (Vernon Supp. 1990) (one year with possible extensions); NEB. REV. STAT. § 12-1208(2) (Supp. 1989) (one year or longer if "clearly found to be of extremely important, irreplaceable, and intrinsic scientific value"); N.H. REV. STAT. ANN. §§ 227-C:8-d(III)(b)-(c), e(II)(b)-(c), f(III)(c)-(d) (1989) (requires agreement on timetable for analysis and reports); N.C. GEN. STAT. §§ 70-32(c)(2)-(3), 33(b)(2)-(3), 34(c)(3)-(4) (1989) (requires agreement on timetable for analysis and reports).

134. 380 So. 2d 155 (La. Ct. App. 1979) (stayed pending outcome of state action),

remains. In *Charrier*, a Louisiana court held that the Tunica-Biloxi Tribe, an Indian Tribe federally recognized in 1981, legally owned burial artifacts removed from the site of an ancient Tunica Indian village.¹³⁵

Leonard Charrier, who described himself as an amateur archaeologist,¹³⁶ excavated the site between 1967 and 1971.¹³⁷ He removed about two and one-half tons of artifacts.¹³⁸ Charrier tried to sell the artifacts to, among others, the Peabody Museum at Harvard University. The Museum doubted Charrier's ownership of the artifacts and refused to buy them. Instead, the Museum leased the artifacts, then inventoried, catalogued and displayed them.¹³⁹ Unable to sell due to doubtful ownership, Charrier sued the landowners to determine his right to the artifacts.¹⁴⁰ The state intervened¹⁴¹ and in 1978 bought the land and artifacts.¹⁴²

cert. denied, 382 So. 2d 165 (La. 1980), 547 F. Supp. 580 (M.D. La. 1982) (a later proceeding), 496 So. 2d 601 (La. Ct. App. 1986), *cert. denied*, 498 So. 2d 753 (La. 1986). See also Moore, *supra* note 3, at 5-6; Bowman, *supra* note 14, at 170-74 (discussing *Charrier*).

135. *Charrier*, 496 So. 2d at 605. The village was on the Trudeau Plantation, 150 acres near Angola, Louisiana. *Id.* at 602. The age of the village is not stated, but Tunica Indians lived there as late as 1764. *Id.* at 604. Colonial sources were consulted to find it. *Id.* at 603.

The Bureau of Indian Affairs recognized the Tribe following the procedures of 25 C.F.R. § 83 (1989). See *supra* notes 77-87 and accompanying text. Affirming the trial court's judgment, the court of appeals held that this evidence sufficiently proved descent. 496 So. 2d at 604.

136. *Id.* at 602.

137. *Id.* Charrier claimed he initially had permission from the landowner to locate and excavate burial plots. *Id.* He soon learned that the person who gave him permission was not the landowner but the caretaker. *Id.* He continued to excavate. *Id.* Six nonresidents owned the land. *Id.* at 603.

138. *Id.* The court's opinion does not mention human remains, just artifacts. Presumably, the two and one-half tons contained some remains. One commentator refers to human remains and artifacts. Bowman, *supra* note 14, at 172.

139. In order to keep his source secret, Charrier initially told the Museum he found the artifacts in a cave. *Charrier*, 496 So. 2d at 603. Later, he told the Museum the true source, which the Museum confirmed. *Id.*

140. *Id.*

141. *Id.* The state intervened on many different grounds, including protection of its citizens in the absence of any lawful heirs. *Id.*

142. The state paid \$175,000. *Charrier*, 380 So. 2d at 156. The court determined that, at \$1,000 an acre, the state paid \$150,000 for the land and \$25,000 for the artifacts. *Id.* The state also agreed to defend and indemnify the owners in any litigation. *Charrier*, 496 So. 2d at 603.

In 1981, the Tunica-Biloxi Tribe intervened, subordinating to the state any claim in the land. The state subordinated to the Tribe any claim in the artifacts.¹⁴³ The trial judge held that the Tribe, not Charrier, legally owned the artifacts.¹⁴⁴ The court of appeals affirmed.¹⁴⁵

The court reasoned that burial did not equal abandonment of the remains and artifacts.¹⁴⁶ The nonabandonment rationale relied on by the court reflects respect for religious and spiritual beliefs¹⁴⁷ and is based upon common law.¹⁴⁸ Therefore, ownership properly remained with descendants of the Tunica Indians. Looking to the method by which the federal government recognized the Tunica-Biloxi Tribe, the court found the requisite historic link, although the "chain of title" was not perfect.¹⁴⁹

Charrier strongly supports Indian claims to burial remains over any other claims.¹⁵⁰ Some commentators, however, observe that its precedential value might be limited to situations where the claimants do not dispute ownership of the land on which the remains are found.¹⁵¹

143. *Id.* The Tribe initially removed the action to federal court and filed a parallel action. The court stayed jurisdiction pending outcome of state court action. *Charrier*, 547 F. Supp. at 580.

144. *Charrier*, 496 So. 2d at 603.

145. *Id.* at 607. The court also denied Charrier's request for compensation. Charrier had claimed under the theory of unjust enrichment. *Id.* at 606-07.

146. *Id.* at 604. Abandonment is "[v]oluntary relinquishment of all right, title, claim and possession, with the intention of not reclaiming it." BLACK'S LAW DICTIONARY 1 (Abridged 5th ed. 1983).

147. *Charrier*, 496 So. 2d at 604-05.

148. *Id.* at 605. See *infra* notes 155-66 and accompanying text (common law of dead bodies and human remains).

149. *Id.* at 604 (proof of descent "adequately satisfied"). This proof of descent is particularly sound against claims of an unrelated third party who uncovers burial goods. *Id.* at 605.

150. *Charrier* also shows how the federal recognition procedure establishes affiliation. See *supra* notes 77-87 and accompanying text.

Regarding land claims, *Charrier* has no precedential value. The court was not presented with, and therefore did not consider, a Tunica-Biloxi tribal claim to the land. *Charrier*, 496 So. 2d at 606.

151. Bowman, *supra* note 14, at 173-74; Moore, *supra* note 3, at 5-6. The concern expressed particularly applies to claims against the federal government, because Native Americans often ceded title in land to the United States. The issues and history of Indian Treaty construction, and the beliefs regarding what attributes of land can actually be "owned," are beyond the scope of this Note. However, some argue that Indian Treaties did not give away rights to religiously buried bodies or items. See Moore, *supra* note 3, at 6-7; *Testimony of Walter Echo-Hawk, Staff Attorney of the Native American Rights Fund, Before the House Committees on Interior and Insular Affairs, Administra-*

B. *Other Case Law*

Apart from *Charrier*, few reported cases specifically address Native American burial remains.¹⁵² Several factors may account for this lack

tion, Public Works, and Transportation on the National American Museum Act, H.R. 2668, app. 11, at, 3-8 (July 20, 1989) (unpublished manuscript on file at Washington University Journal office). The nonabandonment rationale supports this idea. Also, federal legislation which recognizes the superior claim of the Indians could moot this issue.

152. Two interesting cases of limited application show how ineffectively Native American rights are protected. In *Newman v. State*, 174 So. 2d 479 (Fla. Dist. Ct. App. 1965), the court stated, "[t]he sanctity of the final resting place of the Indian peoples or any other peoples should be recognized and should be accorded highest respect." *Id.* at 484. The result of the case, however, belied such sensitivity. In *Newman*, the skull of a Seminole Indian, two years dead, was taken by Newman. *Id.* at 480. The body had been placed in the open in a swamp, in accordance with burial custom. *Id.* at 481-82. Newman was found guilty of violating a Florida statute which prohibits disfiguring a tomb. The crime includes elements of wilful, wanton, and malicious action. *Id.* at 480 n. 1. Newman appealed the conviction and the court affirmed without opinion. *Id.* at 480. Upon subsequent appeal, the court quashed the affirmance, and therefore the conviction, because it found no evidence of wanton or malicious behavior. *Id.* at 484.

See also Oregon v. Cochran, 69 Or. App. 132, 133, 638 P.2d 1038, 1039 (Or. Ct. App. 1984) ("The whole purpose of the statute [prohibiting possession of Indian burial artifacts or remains] is to protect the native Indian heritage and culture"). While expressing this sentiment, the court affirmed dismissal of the charge because the information charging the individual did not specify "Native Indian" remains.

Another recent case attracted attention because a state court deferred to a tribal court order on the issue of disposition of the body of a recently deceased tribal member. *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985). Charles Mexican, an Oglala Sioux, died on March 14, 1985. *Id.* at 738. After thirty years of marriage, Mexican apparently became estranged from his wife. During the last two months before his death Mexican's wife did not visit him in the hospital. *Id.* Before the alleged estrangement, he told his wife where he wanted to be buried. During the last two months, however, Mexican indicated a different place to his sisters. *Id.* In a dispute between the wife and sisters over custody of his body, the tribal court awarded custody to the wife, primarily because tribal custom places the duty to bury on the surviving spouse, absent separation or a writing to the contrary. *Id.* at 739. A South Dakota circuit court awarded custody to the sisters. *Id.* The South Dakota Supreme Court deferred to the tribal decision and reversed, relying on principles of comity and noting that the tribal court decision was not inconsistent with state policy. *Id.* at 742. *See also United States v. Mid-Continent Petroleum Co.*, 67 F.2d 37, 44-46 (10th Cir. 1933) (deferring to tribal commission and tribal tradition in suit to determine the Indian tribal heirs of a landowner who died intestate in 1902). *But see United States v. Unknown Heirs*, 152 F. Supp. 452 (W.D. Okla. 1957) (rejecting Indians' reburial wish). In *Unknown Heirs*, a U.S. Army base expanded into the Post Oak Cemetery, in which a Comanche Indian chief, his mother, and approximately 700 other persons were buried. The government brought an action to move the bodies to a new cemetery. *Id.* at 453. The purported spouse and the children of the chief each wanted burial in a different place. *Id.* at 454. The court ruled that the new cemetery was the best burial place. *Id.* at 455. The opinion does not say what happened to the other 700 bodies or whether they were Indian. *See also Bellevue*

of case law, including insufficient legal representation for Native Americans,¹⁵³ concerns about creating unfriendly precedents, settlement before adjudication, and difficulties in establishing standing to sue.¹⁵⁴

VII. COMMON LAW OF DEAD BODIES AND HUMAN REMAINS

In contrast to the few cases on Native American burial remains, the common law details burial and proper treatment of dead bodies.¹⁵⁵ In American law, courts consider dead bodies in relation to the rights of the living rather than from the perspective of the bodies themselves.¹⁵⁶ Therefore, American courts do not treat a dead body as property in either a material or ordinary commercial sense.¹⁵⁷ Instead, the law considers a dead body "quasi-property"¹⁵⁸ and focuses on the "bundle of rights" held primarily by those who care for the body.¹⁵⁹ These

Masonic Temple v. Lokken, 75 Wash. 2d 537, 538-39, 452 P.2d 544, 545 (1969) (courts of equity have broad discretion in determining the details of the reinterment procedure).

153. See Quade, *supra* note 24, at 55. The situation is now improving, which has raised public awareness of Native American issues.

154. Bowman, *supra* note 14, at 169-70. Some state legislation gives Native Americans and other interested parties standing to sue. See, e.g., *supra* note 125 and accompanying text. The criterion of "cultural affiliation" might furnish a basis for standing for those asserting rights over remains.

In jurisdictions with inadequate legislation, Native Americans might have a cause of action in tort, for instance, intentional infliction of emotional distress. See, e.g., Carney v. Knollwood Cemetery Ass'n, 33 Ohio App. 3d 31, 514 N.E.2d 430 (1986). In Carney, cemetery workers negligently disinterred remains of a 1929 burial (ten pieces of the body and parts of the coffin) and then dumped them behind the cemetery. *Id.* at 31-32, 514 N.E.2d at 431. Relatives of the deceased attempted to recover in tort for mental anguish. *Id.* at 35-37, 514 N.E.2d at 434-35. The cemetery association challenged the grandchildren's standing to sue. *Id.* at 36, 514 N.E.2d at 435. Declining to identify all family members who have standing, the court held that appellees, as "direct blood descendants" of the deceased, could sue. *Id.* at 37, 514 N.E.2d at 436.

155. See generally H. BERNARD, THE LAW OF DEATH AND DISPOSAL OF THE DEAD (2d ed. 1979); P. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES (2d ed. 1950); T. STUEVE, MORTUARY LAW (7th rev. ed. 1984); Bowman, *supra* note 14, at 167-69. Moore, *supra* note 3, at 5; Annotation, Removal and Reinterment of Remains, 21 A.L.R. 2d 472 (1952) (cases dealing with disputes over whether a disinterment and removal of remains was justified or justifiable on private or personal grounds).

156. T. STUEVE, *supra* note 155, at 14.

157. P. JACKSON, *supra* note 155, at 129-31.

158. P. JACKSON, *supra* note 155, at 133-34 ("a qualified property right, one of custody, control, and disposition of a [thing] that itself is not material property"). T. STUEVE, *supra* note 155, at 10, 13 ("almost property").

159. H. BERNARD, *supra* note 155, at 17; 21 A.L.R. 2d at 485.

rights include:¹⁶⁰ (1) The person or persons who have the right or duty of burial are entitled to: (a) possession of the body for interment; (b) possession without interference; and (c) possession of the body in the same condition it was in at death; (2) the person who has possession of the body holds the body in trust for those who have the right or duty of burial; and (3) after interment, those persons who have the right or duty of burial are entitled to have the body remain undisturbed, except for a proper reason.¹⁶¹ Three principles guide the exercise of these rights: (1) Interment with consent is final;¹⁶² (2) disinterment without consent occurs for only the most compelling reasons;¹⁶³ and (3) unless there is a clear testamentary wish, the right of burial goes first to the surviving spouse and then to next of kin in order of relationship.¹⁶⁴

Although these principles and rights can be helpful in analyzing Native American burial claims, they are not determinative. For instance, there exists an unarticulated time limit on how long a dead body receives legal protection.¹⁶⁵ Further, statutes almost wholly control the law of burial. These statutes supplement, and often supersede, common law principles.¹⁶⁶

160. P. JACKSON, *supra* note 155, at 142-43; S. REP. NO. 601, *supra* note 29, at 7.

161. The right to have the body remain undisturbed forms the basis of a tort action. *See supra* note 154. For proper reasons to disinter, *see infra* note 163 and accompanying text.

162. P. JACKSON, *supra* note 155, at 116-17; 21 A.L.R. 2D at 476 ("The normal treatment of a corpse, once it is properly buried, is to let it lie.").

163. P. JACKSON, *supra* note 155, at 101, 104, 106. Statutes generally embody compelling public interests, which must be clearly articulated. *Id.* at 107-08. Jackson names only one public reason, the production of evidence for criminal proceedings. *Id.* at 107. He does not explore whether scientific research is compelling, but states that each case must be judged on its own facts. *Id.* at 122.

164. Who has the duty after this varies with each situation. Circumstances also determine whether the initial order applies. T. STUEVE, *supra* note 155, at 35.

165. Old skeletal remains are not necessarily "dead bodies." T. STUEVE, *supra* note 155, at 9 ("Nor do the bones of skeleton constitute a body."); 21 A.L.R. 2D at 477 ("A cadaver is not an everlasting thing; after undergoing an undefined degree of decomposition it ceases to be a dead body in the eyes of the law."). *See also* Meads v. Dougherty County, 98 Ga. 697, 25 S.E. 915 (1896) (skeletal remains not a dead body under statute requiring coroner to investigate bodies dead by unknown causes); *State v. Glass*, 27 Ohio App. 2d 214, 273 Ohio Op. 2d 391, 273 N.E.2d 893 (1971) (grave robbing statute does not relate to remains of persons long buried or decomposed, in this case, buried 125 years).

166. P. JACKSON, *supra* note 155, at 28. This fact emphasizes the importance of statutory analysis and comparison. *See supra* notes 103-33 and accompanying text.

VIII. CONCLUSION

Even if the legal principles governing dead bodies do not apply directly to Native American skeletal remains, the underlying purposes of those principles, the respectful treatment of the dead and of the living in their relation with the dead, do apply. In many ways, the issue of the return of Indian and other Native American burial remains is a spiritual rather than a legal issue, reflecting attitudes rather than law. Yet to be successful, any solution must be supported by legal principles.

Legal principles support legislative solutions mandating the return of all burial remains. The federal government and the states should continue and accelerate the return of all identifiable and affiliated remains. Any other use of the remains should require the consent of those entitled to them. The goal, moreover, should be to return all remains. This goal can be accomplished in one of two ways: (1) by promulgating standards for affiliation broad enough that virtually all remains would be affiliated, or (2) by deciding as an affirmative policy that unaffiliated remains also will be properly buried. A committee representing all interested groups could carry out the latter policy. Any other use of unaffiliated remains would require consent of the committee.

Indian and other Native American burial remains must be returned to people with some connection to the beliefs of the deceased. Those people will treat them as they expected to be treated. Return and reburial is superior to indefinite storage in boxes, bags, and drawers. Return of all burial remains best remedies the inequities of the past and affirms the proper and respectful treatment of Native American living and dead.

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