The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility

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The excavation of Indian burial sites poses serious ethical problems. Many American Indians regard the excavation of such sites as an affront to their actual and spiritual ancestors, while many archaeologists believe that scientific investigation should take absolute priority. This paper explores the judicial and legislative aspects of this practice in the United States and discusses attempts by professional associations to resolve the conflict. The paper suggests specific guidelines that could be followed by courts and legislators depending on whether the burial site is on reservation or nonreservation property, or whether the physical remains are recent or ancient. [archaeology, applied anthropology, ethics, anthropology and law, anthropology and public policy]

In recent years, anthropologists have become increasingly concerned with the ethical implications of their professional activities. They have come to realize that, whether because of their naiveté, impotence, or professional values, their scholarly projects may have adverse effects on the lives of the people they touch, effects no less disturbing when unforeseen than they are blameworthy when part of a conscious design. As a result, anthropologists have been forced to weigh carefully the scientific value of their work against the human impact it may have, and to develop, as individuals and as a profession, an appropriate set of priorities and ethical standards. In developing such standards it is necessary to articulate the broad values and general guidelines that should govern professional conduct. But it is also necessary to consider the specific situations with which a practicing anthropologist may be faced and to work out approaches to these separate issues on the basis of each problem's distinctive characteristics.

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The excavation of American Indian burial sites is one of those practices that poses significant ethical problems. Anthropologists have long been interested in tracing the development of human communities on the North American continent, and archaeological excavations of burial sites are generally regarded as indispensable to this project. Through such investigations, researchers can learn a great deal about the relations between diet, disease, ecology, and social arrangements as they affect mankind at present as well as in the past. Similarly, museums, as part of their educational function, have often placed on display human remains drawn from recent and ancient North American populations.

Ranged against these scientific and educational pursuits are the concerns of Native Americans who trace their actual descent or spiritual affiliation to ancestors whose graves, in their view, are disturbed in the name of dispassionate science. To many Indians, the disinterment or display of Indian skeletons is an indignity that most scientists would hesitate to inflict on their own predecessors. In the view of some, the desecration of Indian graves is simply the logical culmination of the discriminatory practices to which Indians have been subjected throughout their lives (Reinhold 1973).

Although research on human skeletal remains is not limited to archaeologists, it is they who are most often called upon to confront these difficult issues. When considering the excavation of a site that may contain human remains of interest to contemporary Indians, a great many archaeologists have consulted with them and been sensitive to the concerns of the local Indian population. Similarly, many Indians take pride in the discovery of their predecessors' accomplishments, and some have actively sought professional excavation of local sites. There is, of course, no single point of view shared by all Indians or all archaeologists on these issues, although the approaches of particular Indians and researchers frequently result in accord. Nevertheless, there continue to be many cases in which the interests of archaeologists and Indians remain unreconciled and the hard issue persists: Who has the right to excavate, or prevent the excavation of, a recent or ancient Indian burial site, and on what authority is that right to be based?

This article analyzes the problem with particular reference to alternative approaches that could be taken for its resolution. Consideration is given to the ways in which courts of law could approach the issue and to the legislative enactments that deal with this problem or those that might be enacted in the future. Also discussed is the role of professional associations in formulating guidelines for archaeologists. Finally, a set of guidelines and procedures is suggested that might be drawn upon in resolving disputes over burialexcavations. Although the analysis necessarily winds its way through a maze of legal details and considerations of primary concern to the field of archaeology, it will be seen that more is at issue here than some arcane features of archaeology and the law. What is really at issue is the way in which anthropologists must think their way through the difficult ethical problems that arise from their studies of other human beings—problems that pose analogous complexities in every domain of the social sciences.

THE JUDICIAL APPROACH

The excavation of Indian burials from federally recognized reservations and lands owned by the federal government is provided for in various statutes. The removal of human remains from cemeteries and private property poses more difficult problems, some of which have been the subject of extensive litigation. Four sets of issues arise in this context: (1) the nature of the burial site and the basis for permissible disinterment; (2) the legal standing of those seeking judicial relief; (3) the right of privacy of those involved in the dispute; and (4) the status of an action to prevent the display of burial remains.
Cemeteries and the Right of Disinterment

A cemetery is defined in the law as any area set aside for the interment of the dead (Oklahoma Supreme Court 1959; Anonymous 1939; Anonymous 1964). Some courts have drawn a distinction between public and private cemeteries. "A public cemetery is one used by the general community, a neighborhood, or a church, while a private cemetery is one used by a family or a small portion of the community" (Appellate Court of Indiana 1895). The use of a cemetery for a religious or pious purpose renders it a public cemetery even though access is limited to a particular class of persons (Missouri Court of Appeals 1927). Except for certain aspects of title, access, and conveyance, however, the distinction between public and private cemeteries appears to be important less for the overall status of those buried there than in delineating who may challenge subsequent disinterments.

Of greater significance to the Indian situation is the question whether a cemetery has been abandoned. Once abandoned, the protections that courts afford recognized burial grounds no longer attach. As long as a cemetery is preserved in such a fashion as to indicate the existence of graves therein, or as long as the public recognizes it as a cemetery, the site will not be considered abandoned. The fact that no burials have been made for some years and no further burials are possible does not mean that a site has been abandoned. However, if the graves have been allowed to lose their identity, if the public no longer recognizes the site as a graveyard, or if all the bodies have been removed, the cemetery may be judged abandoned (Supreme Court of Missouri 1890).

The judicial recognition of an Indian burial site as an unabandoned cemetery presents distinct problems. Indian burial customs differed widely, and it was not uncommon for Indians to inter their dead in widely scattered sites rather than in a place set aside for that specific purpose. Moreover, Indians often relied on natural features or oral tradition to maintain the memory of particular gravesites rather than on the use of specialized gravemarks. Indeed, since the majority of present tribal groups were forced to leave their ancestral lands as a result of governmental action (including treaty violations) or the pressures of white settlers, Indians have often lost track of specific burial grounds until their rediscovery by archaeologists. Where sites yield remains more than several hundred years old, the question of the relationship between the remains and the Indians who would seek to assert control over them also arises.

The problems posed for Indians in gaining recognition of burial sites are well illustrated by two cases: Town of Sudbury v. Department of Public Utilities, and Newman v. State. In Sudbury, the court upheld the right of the department to exercise its power of eminent domain in granting an easement to a utility company for construction of an overhead electrical line on land containing Indian gravesites. By statute, no tract of land used for burial for a period of one hundred years could be appropriated by eminent domain for any other purpose without authorization from the court. Testimony from a former president of the Massachusetts Archaeological Society indicated that an Indian skeleton was removed from the site 35 years earlier and that it was reasonable to assume that other burials would be shown by proper excavation to be scattered throughout the site of the former Indian settlement. The court, however, sustained the department's interpretation of the testimony as indicating that Indian burial was random in nature and that no tract of land was involved that had been specifically set aside for purposes of burial (Supreme Judicial Court of Massachusetts 1966:424).

A similar line of reasoning was taken by the court in Newman. There, the court held that no evidence had been presented to show that a University of Miami student had engaged in wanton or malicious conduct when he removed the skull of a Seminole Indian, who had died two years earlier, from a burial site in the Florida Everglades. In
deciding the case, the court relied heavily on testimony to the effect that the Seminole do not bury their dead in any particular area and that the survivors never return to visit the gravesites (District Court of Appeal of Florida 1965).

Indian burial sites often fall short of the threshold definition of cemeteries when the definition itself is constructed on lines that accord with white burial practices. However, once a burial site is recognized as such—whether by white standards or, presumably, even through the adoption of Indian definitions—courts are very hesitant to permit the removal of a body from that gravesite. Though each case must be decided on its own merits, most jurisdictions accept the argument made by one court in the last century: "We hold that the ground once given for the interment of a body is appropriated forever to that body. . . . Nothing but the most pressing public necessity should ever cause the rest of the dead to be disturbed" (Supreme Court of Pennsylvania 1859). Moreover, the importance of gravesites is sufficiently high to exempt them from some of the established laws of property. In the words of the Iowa court: "The peculiar use to which such property is dedicated, and the sentiment of sanctity with which mankind regard the burial place of the dead, furnish ample reason for declining to apply to it the ordinary rules of ownership and devolution" (Supreme Court of Iowa 1907). Thus, the courts will not permit cemetery lands to be partitioned and sold when a schism occurs in a religious congregation, nor are mortgages and encumbrances applicable to cemeteries as to other properties.

More to the point, it has been held that the purchaser of property on which a cemetery is located is not free to disturb the gravesites. Permission for removal must be sought, generally from the relatives of the dead person or from the court. In determining whether to authorize the removal, the court may consider the religious beliefs of the deceased, the rights and feelings of relatives and friends, the precepts of the religious body or institution that granted the initial right to burial in that place, and the interests of the public in the disinterment.

The religious beliefs of the deceased, as determined and interpreted by the court, may be given special emphasis in deciding on the appropriateness of disinterment. For example, courts have refused children the right to disinter the remains of an orthodox Jewish father because the religion forbids such disinterment (Supreme Court of Appeals of Virginia 1937). In the case of American Indians, it would therefore be relevant to the legal proceeding to establish the religious practices and beliefs of those whose remains are the subject of disinterment or archaeological investigation. When the remains are centuries old, however, significant problems of proof and legal standing exist.

Standing to Sue

Strictly speaking, there is no right of property in a dead body. . . . But in recognition of the universal sentiment of mankind, the right to decent burial is well guarded by the law, and relatives of the deceased may insist upon legal protection of the burial place from unnecessary disturbance or wanton violation [Supreme Court of Iowa 1907:336].

One who seeks to disinter or prevent the disinterment of a body must, as in any legal dispute, establish that he has legal standing to sue. The plaintiff must, therefore, demonstrate that he has such a vital stake in the dispute that he is likely to pursue the matter in court with such thoroughness that there is a good chance of reaching a fair decision, particularly one that may affect others not present in court. Surviving heirs of the deceased clearly have standing to sue to effect or prevent disinterment. Standing is also accorded the holder of title or the person in possession of the land on which the burial is located (Supreme Court of Georgia 1899; Anonymous 1964:749, note 14). The courts have also allowed friends to maintain an action for the preservation of others' graves (Supreme Court of Georgia 1899).
Court of Illinois 1884:616; 1904). Occasionally, they have even recognized the interests of friends as superior to those of the deceased's relatives (Supreme Court of Michigan 1942).

Of particular interest to the question of standing is the decision in *Beatty v. Kurtz*, in which the United States Supreme Court held that a group of members of an unincorporated Lutheran congregation that lacked any persons who could be designated as trustees of the church property could maintain a suit against those who sought to recover the land for private use. In the words of Mr. Justice Story:

The only difficulty is whether the plaintiffs have shown in themselves a sufficient authority, since it is not evidenced by any formal vote or writing. If it were necessary to decide the case on this point, we should incline to think that under all the circumstances it might be fairly presumed. But it is not necessary to decide the case on this point; because we think it one of those cases in which certain persons belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest as part of the same society for purposes common to all and beneficial to all. Thus, some of the parishioners may sue a parson to establish a general modus, without joining all; and some of the members of a voluntary society or company, when the parties are very numerous, may sue for an account against others without joining all [United States Supreme Court 1829:528].

In the context of Indian burials, the *Beatty* decision might be read to imply that plaintiffs who have established their interest in the burials concerned have standing to sue even though their formal relationship to the deceased is not that of appointed representatives from the group to which the dead person belonged. Standing under this interpretation might not be restricted solely to Indians of the same tribe or locality as the deceased.

Establishing a tie with those whose graves are involved is often a difficult matter. If, for example, archaeologists have opened the grave of a known Indian or of an unknown person buried in land near which an Indian community has continued to live since before the person's death, it may be relatively easy to show a connection between the deceased and those who share with him a common tie of kinship or tribal identity. But when the case involves ancient remains or plaintiffs who have not resided in the area for generations, if ever, the connection necessary to achieve legal standing becomes far more tenuous. To illustrate, consider the following set of facts:10

While excavating for a new airport, construction workers uncovered the remains of an ancient burial. Archaeologists from the state university, having obtained a permit from the state archaeologist, removed the bones from the site, established that they were about 3,000 to 5,000 years old, and placed the remains on display in the university museum. A group of Indians, none of whom was originally from the area where the remains were found, sought to have the bones returned to them for reinterment. Had suit been filed, they would obviously have faced a difficult standing problem. Several lines of argument might nevertheless be open to them. It could be asserted, for example, that the decision by the state archaeologist to grant a permit for excavation and removal was an administrative decision during the course of which, under the liberalized rules of standing for administrative proceedings, the plaintiffs should have had an opportunity, as part of a public hearing, to assert their objections to the removal.11 Alternatively, they could seek standing before a court of law in the exercise of that court's broad powers of equity. It is well established that courts of equity have power to settle disputes involving the burial, preservation, disinterment, and removal of the dead (Court of Appeals of Indiana 1973; Anonymous 1965:583, note 2). Plaintiffs might argue that the Indians of the region involved were involuntarily dispersed—for example, as part of a removal policy carried out in violation of a Supreme Court ruling (Burke 1969)—and that but for this action the Indians would have been able to maintain knowledge of and close attachment to the burial site of their ancestors. The span of several thousand years is no longer than that of those who honor biblical shrines, and the material remains found with the burials
might be shown to have close affinity with those of identifiable tribal groups still in existence. Furthermore, it may be possible to establish that oral traditions, similar to those that have been given evidentiary force in other Indian law cases, refer to the area involved as an ancestral home. Although the liberalized standing rule of Sierra Club v. Morton (United States Supreme Court 1972) and subsequent cases may be restricted to administrative law cases, the principle is noteworthy by a court of equity that the plaintiffs have been injured by desecration of the graves of persons to whom they are more closely related than are any of the other parties, and that the injury is a highly personal one affecting their ties to their ancestors.

Such an argument is, however, of questionable merit. Factually, it is difficult to determine precisely the burial customs or religious beliefs of ancient preliterate culture. Some historic tribes are known to have practiced burial only for criminals and outcasts; the remains of other tribesmen were exposed to the elements. To argue that contemporary Indians have a closer connection than scientists to ancient remains is to raise a question whose answer is far from self-evident. And, whatever the reasons for failure to retain contact with a gravesite, the equitable defense of laches (i.e., that the issue is so stale that it would be nearly impossible to marshal the proofs that could have been brought if plaintiff had sued earlier) might well diminish the Indians' claim to even a "quasi-property" right in the burial. There remains, however, one other argument that could be made by those seeking to prevent excavation—that the deceased continues to possess a right to be left alone.

The Right-to-Privacy Argument

In general, a cause of action for invasion of privacy does not survive the death of the individual involved. Some cases have held such actions to survive, but those cases almost always involved very close relatives and a very recent death, and were grounded on some right other than a bare right of privacy (e.g., implied contract or confidential relationship) (Court of Appeals of Kentucky 1912; Supreme Court of Georgia 1930). No cases have been found that raise a question of privacy for the actual remains of the deceased as opposed to the use of photographs, names, or other representations of the deceased that have a direct effect on living individuals.

It may be argued, however, that if it is tortious to intrude upon one's physical solitude or seclusion, as by invading one's home or temporary living quarters (Prosser 1971:807-809), it is also an invasion of one's privacy to intrude on one's grave. At the very least, it might be argued that no such intrusion should occur without a court hearing. That argument, however, would encounter standing problems similar to those set forth above and would require a significant extension of the privacy concept beyond its present confines. Perhaps the argument that would weigh most heavily with a court of equity would center on the following question: Would anyone want a stranger to open the graves of one's parents and remove their bones for investigation and display at any time in the near or distant future? The older the remains, however, the more tenuous the argument.

Actions to Terminate the Display of Indian Remains

In the factual situation set forth above, the excavated skeletons had been placed on display in an archaeological museum. The question arises whether, in addition to the equitable and legal actions previously mentioned, suit can be brought to prevent the display—offensive to some—of ancient or recent remains.
One possible theory on which an action could be based is that of defamation, either personal or of an entire group. The law of defamation, as it involves dead persons, has been clearly explicated by Harper and James:

The mere fact that the plaintiff's feelings and sensibilities have been offended is not enough to create a cause of action for defamation. He must show that his reputation has been hurt and that his standing in the community in which he lives has been impaired [1956:349-350].

Moreover, as the authors state:

Only a living person can be defamed. While the memory of the dead may be desecrated and this may amount to a crime, there can be no defamation of the dead under the common law principles of defamation [Harper and James 1956:360-361].

Where the display is that of an identifiable person whose relatives are thereby held up to ridicule, an action based on a theory of defamation may succeed. In the more usual case of a display of early remains, however, the display itself—though not necessarily any derogatory remarks contained in the literature surrounding the display—will not be adjudged defamatory of any living person.

A similar result stems from an action based on a theory of group libel. The United States Supreme Court (1952) has upheld criminal statutes punishing group libel. Such defamation will be found, however, only where the libel had a probable adverse effect on an individual who could be readily identified with the group defamed. No cases exist involving a civil action for group libel. As Prosser (1971:751) states:

Group defamation has been a fertile and dangerous weapon of attack on various racial, religious and political minorities, and has led to the enactment of criminal statutes in a number of states. Thus far any civil remedy for such broadside defamation has been lacking.

Finally, it may be noted that some jurisdictions have adopted the concept of a "tort of outrage," which is described in model legislation in the following terms:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm [American Law Institute 1965: Section 46(1); Supreme Court of Washington 1977].

Such an action may apply for very recent remains or for a particularly egregious museum display, but would have limited applicability beyond.

THE LEGISLATIVE APPROACH

The judicial approach to the problem of Indian burials, whether based on a theory of restitution, irreparable harm, or abuse of administrative discretion, necessarily turns on the particular facts of each case. Where remains are recent and identified with a known person or group, remedies may be available on the basis of existing case law. To extend the line of cases dealing with cemeteries and dead bodies to ancient remains, whatever the moral arguments in favor of such an approach, is to push the case law well beyond its current boundaries. Faced with the concern over burial sites expressed by Indians and archaeologists alike, Congress and the state legislatures have moved to enact laws directly affecting the status of these sites.

Excavations on Federally Recognized Reservations

The federal government, in the exercise of its plenary power over Indian affairs, has asserted control over archaeological excavations on Indian reservations and trust lands.
However, the statutory scheme involved failed to achieve the necessary clarification of legal rights.

Under Section 433 of Title 16 of the United States Code (1974a), Congress provided a criminal penalty for the unauthorized appropriation, excavation, injury, or destruction of "any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States." As part of the legislative scheme, licensing, supervision, reporting, and land-restoration procedures were also established (Code of Federal Regulations 1976a: Part 132). In United States v. Diaz, however, the United States Court of Appeals for the Ninth Circuit (1974) held Section 433 unconstitutional. The defendant had removed several masks and other objects from a cave on the San Carlos Apache Reservation, where they had been placed by the Indians following a ceremony several years earlier. The lower court had accepted the argument of an expert witness that although the materials were of recent vintage they were an integral part of an ancient ritual that itself constituted an "object of antiquity" granted protection under the statute (United States District Court, District of Arizona 1973). The appellate court, reversing, held that if materials known to be only a few years old qualified as "objects of antiquity" it would be impossible for an individual to know in advance whether his act might subject him to a criminal penalty. Accordingly, the statute was declared void for vagueness. It was not, however, clear whether the Ninth Circuit decision to hold Section 433 unconstitutional would be followed by other federal circuit courts if the statute were to be tested in their jurisdictions. The Justice Department took the position that no further legislation was necessary. Moreover, as the result of Diaz, it was uncertain whether related statutes using the same language would remain valid.

In April 1978 the secretary of the interior employed his rule-making authority to propose a definition of "object of antiquity" that would include artifacts at least 100 years old and, "when found within a cultural context, any skeletal remains of humans or other vertebrate animals (including fossils) that are at least 100 years of age" (Department of the Interior 1978:14976). Congress, however, decided that more comprehensive legislation was necessary and soon after passed the Archaeological Resources Protection Act of 1979.

The new act replaces the term "object of antiquity" with "archaeological resource" which is defined as "any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act." All such items must be at least 100 years of age. The statute specifically cites graves and human skeletal materials as examples of archaeological resources. Permits to excavate on Indian lands "may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe." Moreover, the exchange or ultimate disposition of materials is subject to Indian consent. The statute also increases existing penalties for violation of the law and even provides a reward for information leading to convictions.

The new law thus goes a long way toward clarifying Indian control over remains found on federally controlled lands. The House-proposed 50-year limit gave way to the Senate's version of the bill, but the provision requiring Indian consent and the implementation of tribal statutes would still serve to protect recent human and cultural materials regarded as sacred or valuable to the Indians. The statute does not, however, cover archaeological resources found outside of areas over which the federal government exercises some control. However, other statutes dealing with historic sites and environmental protection may be relevant to these situations.
Federal Legislation for Historic and Environmental Preservation

Although Congress passed several legislative acts in the first half of this century dealing with the preservation of historic and prehistoric artifacts, most of the important legislation on this topic has been enacted during the past decade. Where federal property, licensing, assistance, or funding is involved, these statutes, and their accompanying regulations, become applicable. Through these statutes, American Indians may be able to protect or preserve not only some of their burial sites but a wide range of cultural features.

In 1966, Congress, through the National Historic Preservation Act (United States Code Annotated 1974d), provided for an expansion of the National Register of Historic Places and established an Advisory Council on Historic Preservation that would serve, in part, to advise federal agencies on the impact of federal projects on historic sites. Only "a cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events" qualifies for protection under the act (Code of Federal Regulations 1976b: Section 800.10(b) (4)). American Indians have used this provision very little (Wilson and Zingg 1974:430). The act does, however, require states that wish to avail themselves of federal matching grants to develop preservation plans on a statewide level. It has thus encouraged some states to organize their archaeological activities and to survey their archaeological resources more thoroughly than they had previously.

Under the National Environmental Policy Act of 1969, federal agencies are required to file statements concerning the impact on the physical and cultural environment of federally assisted projects. In formulating projects, the agencies are to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences . . . " (United States Code Annotated 1977: Section 4332(2) (A)). Since one of the express purposes of the act is to "maintain, whenever possible, an environment which supports diversity and variety of individual choice" (United States Code Annotated 1977: Section 4331(b) (4)), the act may be drawn on by Indians to protect a wide range of institutions and practices.

As in other administrative proceedings, Indians who seek standing to challenge an agency decision adverse to their position will have to overcome certain barriers. Under the existing test, they will have to show that they have, in fact, been injured and that the protection they seek is indeed within the "zone of interests" meant to be covered by the statute. However, since noneconomic interests may qualify, the most difficult issue, again, will be the demonstration of a personal nexus to the alleged injury. If the injury is to gravesites on a reservation or trust land, the tribe or its individual members will have standing to require or challenge an environmental impact statement (United States Court of Appeals, Tenth Circuit 1972). Beyond the reservation or trust territory, as indicated earlier, the standing problem increases.

The Archaeological and Historic Conservation Act of 1974 authorizes the secretary of the interior, "upon notification, in writing, by any Federal or State agency or appropriate historical or archaeological authority," to survey, recover, and preserve data from archaeological sites that might be destroyed by federally related projects (United States Code Annotated 1974c: Section 469a-2; Scovill 1974). The law would thus preserve some sites not previously given protection. From the statute and its legislative history, however, it is clear that no provision is made for recommendations by Indians, as opposed to proper "authorities," much less for the active solicitation of Indian views on archaeological sites of interest to them. Regulations to implement this program are similarly silent on the issue of Indian concerns and the distinctive nature of reservation properties (United States Government 1977: Sections 66.2 and 66.3(a) (1)).
The Archaeological Resources Protection Act of 1979, mentioned above, increases Indian participation in the control of reservation sites but has little effect on nonreservation lands. However, in 1979 Congress passed the American Indian Religious Freedom Act (United States Code Annotated 1979). The act calls upon federal agencies to examine their regulations and procedures with an eye toward preserving the ceremonies, sites, and objects necessary for the exercise of Native American religions. The statute recognizes that Indians are often denied access to sacred sites, including offreservation cemeteries. The report by the secretary of the interior containing recommendations for protecting Indian religions pursuant to the act specifically states that federal museums should avoid acquisition of objects that are of current religious significance to Indians, that such objects should be returned to the tribes if they were improperly obtained or still possess religious value, and that traditional religious leaders be consulted on the display or conservation of such objects. As a result of the passage of this act, it is probable that various federal procedures will be altered that affect Indian burial sites and remains. Until specific regulations have been formulated, however, it will be difficult to assess the precise impact of this statute.

State Legislation Affecting Indian Burials

Most state legislatures have adopted antiquities laws. These statutes reflect widely divergent approaches to the control of archaeological work on state and private lands. Although many enactments have recently been drawn up to conform with the requirements of federal legislation, the laws of many states represent the particular problems of local archaeological resources, the divergent interests of those concerned with the archaeology of the region, and the varied degrees to which state legislators have been willing to take control of their state's historic and prehistoric remains.

Many states have provided legislation that protects archaeological remains found on property owned by the state. In some cases, the power of the state has been asserted for the taking by eminent domain of sites demarcated as archaeological landmarks (Alaska Statutes Annotated 1976: Section 41.35.060 (b); Massachusetts Laws Annotated 1971b). In other instances, state law merely urges private landowners not to destroy archaeological sites, including Indian burials, without consulting state archaeological authorities (e.g., North Carolina General Statutes 1975: Section 70-1; Georgia Code Annotated 1975; Delaware Code Annotated 1975: Title 7, Section 5305; South Dakota Compiled Laws Annotated 1974: Section 1-20-29). In many states, permits to excavate sites located on lands that are state owned or controlled are limited to qualified scientists who or institutions that will make their findings public (Alaska Statutes Annotated 1976: Section 41.35.080; Delaware Code Annotated 1975: Title 7, Section 5302; Maryland Annotated Code 1970: Article 66C, Section 110C). Some states also require restoration of excavation sites after archaeological work is completed (e.g., Alabama Code 1976: Section 275).

In response to efforts by archaeologists and Native American groups, some states have given special legislative attention to the problem of Indian burials. Alaska has adopted a statute that provides:

If the historic, prehistoric or archaeological resource involved is one which is, or is located on a site which is, sacred, holy or of religious significance to a cultural group, the consent of that cultural group must be obtained before a permit may be issued under this section [Alaska Statutes Annotated 1976: Section 41.35.080].

The state of Washington has made willful injury of the grave of any native Indian a gross misdemeanor (Washington Revised Code 1976: Section 27.44.010). A Michigan statute
that authorized penalties for unlawful disinterment, except where the remains were those of prehistoric persons "or of the aboriginal inhabitants of this country," has been amended to remove the exception granted to excavation of aboriginal remains (Michigan Compiled Laws Annotated 1977). In New York state, the office of parks and recreation is empowered to designate any Indian cemetery or burial ground as a historic site, thereby affording the site certain protections (New York Consolidated Laws 1977).

Perhaps the most comprehensive statutory scheme is that of California. In 1971, the state legislature declared a moratorium on the excavation of all Indian burial sites abandoned for less than 200 years, pending the report of a special task force set up to study the problem.²⁹ Five years later, a statute was adopted barring injury to Native American cemeteries and religious sites located on public property "except on a clear and convincing showing that the public interest and necessity so require." A commission, the majority of the members being Native Americans, was empowered to bring legal actions, through the state attorney general, to prevent injury to sacred sites and burial grounds. The commission could also prepare an inventory of such sites and recommend procedures for the protection of sites located on private property (California Codes Annotated 1977). Ordinances protecting Indian burial grounds had earlier been passed by several local government units in California (McGimsey 1972:230–234).

A number of the state statutes, like the statute found unconstitutional in United States v. Diaz, employ the phrase "objects of antiquity" (e.g., Florida Statutes Annotated 1976: Section 267.061; Nevada Revised Statutes 1973: Section 381.223; New Mexico Statutes 1974: Section 4-27-8-0; South Dakota Compiled Laws Annotated 1974: Section 1-20-18). Others use terminology that is closely related.³⁰ Although the constitutional status of those laws has not been challenged, their validity would be placed in question by an attack similar to that posed in Diaz. It may therefore be necessary to rewrite the criminal-penalty provisions of state laws that make it an offense to disturb "objects of antiquity."

The problem of balancing the interests of archaeological knowledge and Indian sensitivity is sharply posed by the adoption of state statutory schemes. South Dakota sets forth as the purpose of its antiquity law "that the public has the right to the knowledge to be derived and gained from the scientific study of these resources . . ." (South Dakota Compiled Laws Annotated 1974: 1-20-17). In contrast, the moratorium imposed by the California legislature during 1971–77 implicitly questions the value of unrestrained research on Indian remains and requires that decisions on further work be the result of consultation with the Indian as well as the scientific communities. As Indian objections to continued archaeological work have grown, professional archaeologists, individually and collectively, have also taken steps to resolve the conflict.

THE APPROACH OF PROFESSIONAL ARCHAEOLOGISTS

During the past decade, anthropologists and archaeologists have become increasingly mindful of the concern that Native Americans have expressed about the excavation of Indian burial sites. Responses by professional archaeologists have been quite varied and have involved personal arrangements by individual investigators, policies adopted by museums and universities, and guidelines laid down by professional associations.

In many instances, archaeologists have deferred to the views of a tribal council or various tribal members. As part of an arrangement worked out in 1967 between the Nez Perce tribe and scholars at the University of Idaho, an agreement was reached that all burial remains would be analyzed and returned to the tribe for reburial (Sprague 1974:2). In other instances, archaeologists have made an effort to involve local Indians in
the actual excavation of sites and have incorporated suggestions of the local participants in the design of their projects.

Professional groups have also demonstrated their appreciation of the problem of Indian burials even though the resolutions they have passed are not always addressed to the specific issues that arise in this context. Emphasizing that "the study of skeletal material must be undertaken with dignity, and with a regard for the feelings of the most sensitive among us," the American Association of Museums (1973) resolved that skeletal displays should be used only to further understanding, not simple curiosity, and that "the human being of whatever century and of whatever place is entitled to the same concern that would be accorded a member of one's own family. . . ." A resolution adopted by the New York Archaeological Council, the Society for American Archaeology, and the American Anthropological Association deplores excavation of any archaeological site solely or primarily for teaching purposes, and calls for sanctions against those engaging in such practices (American Anthropological Association 1975).

The problem of Indian burials also falls under the general provisions of statements on ethics adopted by various associations. Such statements are, in most cases, intended as general guidelines and carry weak or nonexistent sanctioning force. For example, the Principles of Professional Responsibility adopted by the American Anthropological Association in 1971 states:

In research, an anthropologist's paramount responsibility is to those he studies. When there is a conflict of interest, these individuals must come first. The anthropologist must do everything within his power to protect their physical, social and psychological welfare and to honor their dignity and privacy [American Anthropological Association 1973:1].

These guidelines, like those of other anthropological associations, were drawn up largely in response to revelations about the use of anthropological research on various development projects in Latin America and the use of anthropologists in the war in Southeast Asia. Thus, the resolutions were not drawn up with specific issues of Indian burials in mind and have not been subsequently expanded to deal with such issues directly.

As federal and state legislation concerning the environment has developed, professional archaeologists have sought to regularize the accreditation of those undertaking contract excavations as part of the formulation of an environmental-impact statement. The Society of Professional Archeologists, which grew out of an interim committee of the Society for American Archaeology, has established a list of archaeologists who meet the society's "Qualifications for Recognition as a Professional Archeologist." The society's Code of Ethics states that a qualifying archaeologist shall "be sensitive to, and respect the legitimate concerns of, groups whose culture histories are the subjects of archeological investigations . . ." (Society of Professional Archeologists 1976: Section 1.1(c)). Although archaeologists are not uniformly agreed on the wisdom of a national certification system, there is long-standing recognition that professional archaeology should be sharply distinguished from amateur treasure hunting, and that contract research should be given only to trained archaeologists. Many of the contracting agencies now require that archaeologists hired to prepare impact statements or excavate sites be capable of meeting the registration requirements of the Society of Professional Archeologists.

Statements of ethics and standards for professional training are worthwhile vehicles through which a profession can grope its way toward a sense of fairness and responsibility. As long as certification procedures do not become an instrument of discrimination, and ethical standards are not a tool for regimentation, their value may be substantial.
Nevertheless, as one critic (Sprague 1974:1) has noted of the statements by professional societies:

Resolutions, if not so insipid as to be worthless, have a unique ability to alienate a portion of the membership while lulling the remainder into complacent self-satisfaction. At the same time, resolutions create serious doubts in the minds of the general public while not giving any real assurance to the subject population.

Without rigidifying guidelines into an absolute code or statements of purpose into un-varying programs, it may be possible to face squarely the unresolved issues surrounding Indian burial excavations. However, a clear statement of the conflicts and interests that remain outstanding is necessary for approaching that goal.

THE RIGHT TO KNOWLEDGE VERSUS THE RIGHT TO PRESERVE INDIAN BURIALS

A recent commentator on the subject of archaeology and public policy has written: "...no individual may act in a manner such that the public right to knowledge of the past is unduly endangered or destroyed. This principle is crystal clear" (McGimsey 1972:5, emphasis in original). In fact, the "principle" is neither precisely articulated nor automatically acceptable. Certainly, for those to whom recognition of ancestral burials is an integral part of their continuing cultural identity, or for those who believe that curiosity and science are not self-justifying ventures, the quest for guidelines consonant with the complexity of actual situations is a matter not of rhetorical flourish but of painful effort. The problem of Indian burials is not a clash of good and evil, ignorance and wisdom: it is a conflict between propositions that must be accorded equal moral weight from the outset.

Beginning from that base, the following is an attempt to factor out the specific types of situations raised in the problem of Indian burials and to suggest a set of approaches to each of them. The proposals are drawn with several basic themes in mind. The purpose of guidelines such as these should be: (a) to help clarify the hard issues that are central to the overall problem; (b) to encourage, through such clarification, the extrajudicial resolution of disputes wherever that is possible or advisable; and (c) to offer proposals that are not so incompatible with existing law that they are unlikely to gain actual acceptance or, where wholesale revision of existing procedures is necessary, to lose in a wide-ranging legal challenge the specific issues connected with Indian burials. Moreover, the form of these guidelines is necessarily that which is consonant with some type of legal proceeding. We are, after all, dealing here not with situations that can be easily resolved through discussion or negotiation between the parties; we are dealing with hard situations in which a specific issue has been joined. Since such disputes do not exist in either a sociopolitical or a legal vacuum, it is desirable that guidelines take into account potential legal proceedings and the existing body of case law and statutes reviewed above. Disputants will therefore possess some degree of certainty when they enter discussions as to the broader legal aspects of their dispute, and the courts or agencies to which such disputes are brought will have some guidance in trying to understand the extrajudicial implications of the problem.

Excavations on Indian Reservations

The legal status of federally recognized Indian tribes, particularly their control of reservation lands and resources, has been the subject of contradictory and uncertain legislative and judicial action for more than two hundred years (Washburn 1976). Any
challenge to the ability of tribes to control their own archaeological resources raises complex issues of tribal sovereignty, the plenary power of Congress, and the nature of contradictory jurisdictional claims.

Given this uncertainty, archaeologists, who, in various statements on professional responsibility, have acknowledged their respect for the rights and sensibilities of native peoples, should defer to tribal control of reservation sites. The fact that a site contains recent or ancient remains should be irrelevant to the issue of site control, since the broader issue of tribal sovereignty and legal status remains insufficiently clarified.

Archaeologists should therefore recognize that the status of reservation tribes is different from and greater than that of state and private lands, and that however much they may feel that no one should be able to destroy or bar access to an important site, the status of tribal lands takes them out of the range of ordinary American property and constitutional law. The archaeologists' writ can run no further than that of the law, and deference to tribal authority, if not unambiguously demanded by the law, is a logical consequence of the archaeologists' self-imposed standards. Reservation sites should therefore be unqualifiedly under the control of tribal governments.

Recent Nonreservation Remains

When a conflict arises over the excavation of remains that are known or believed to date from historic times, the crucial question to be asked is that of the relationship between the remains and the present-day Indians who want to stop the excavation. Where there is reason to believe that the remains are those of an identifiable tribal group that presently exists, or where the remains are in an area to which a contemporary tribe has historic ties, after the relationship has been demonstrated through an appropriate hearing, the Indians should be accorded control over the remains. The hearing should be held, at the request of any interested party, before an administrative law judge whenever federal or state preservation law permits jurisdiction. The hearing should be limited solely to the issue of the nexus between the Indian litigants and the remains. The Indians should have the legal burden of showing the relationship, and the burden of proof should be no greater than that of demonstrating probable relationship. If excavations have not proceeded far enough to establish the nature of the remains, the hearing officer may retain continuing jurisdiction over the matter or supervise the preparation of a contract between the parties that specifies mutual obligations when certain discoveries are made. The hearing officer may also appoint a master—an expert in the field of archaeology—to advise him.36

State laws should also be rewritten, where necessary, to allow Indians who have established their ties to the remains to remove them from private property if the owner of the land wishes to use his property in a way that might disturb the remains. In cases of removal, the operation should be conducted jointly by the Indians and archaeologists. The latter should be permitted to make records of the removal but should receive permission from the Indians before analyzing the human remains.

In sum, where historic remains are involved the Indians should have the burden of demonstrating probable relationship to the remains. When such a relationship is shown, the Indians should possess the right to bar further excavation or to rebury the remains. Where existing statutes do not provide an administrative law forum for such a hearing, a court of law, in its equity powers, might follow similar guidelines.

Ancient Nonreservation Remains

When prehistoric remains appear to be involved, Indians seeking to bar excavation or
claim reburial rights should have to carry a much heavier burden of demonstrating their relationship to the remains. If they can show no more than that these remains are those of probable "ancestors," their rights should be no greater than those of the state or of a private landowner in granting permission for excavation.

Admittedly, no clear line can be drawn between ancient and recent remains, and hence no magic point at which the legal burden increases from probable to demonstrable relationship. A judge or hearing officer, confronted by parties who cannot work out their own accord on the matter, will have to use a sliding scale in determining relationship and will have to consider a wide range of evidence. In borderline cases where the remains are neither of great antiquity nor clearly those of an identifiable tribal group, one other legal device is available. If the Indians cannot bear the burden of demonstrating relationship, the burden might then be shifted to the archaeologist to show that what he might learn from these remains cannot be learned from casts, pictures, or other reproductions, or from similar remains already in collections. If the archaeologist cannot make a sound argument for probable scientific value, the Indians would be accorded control of the remains.

CONCLUSION

The excavation of Indian burial sites raises a fundamental issue of law and professional responsibility. Scientific study seldom lacks ethical implications, and each of the sciences—whether biologists doing recombinant DNA research or archaeologists studying the development of human populations—must squarely face the ethical dilemmas posed by their studies. It is to the credit of many archaeologists that they have appreciated that the interest of Indians in the graves of their predecessors is a poignant concern whose moral and political aspects are of legitimate importance. Every effort should be made to resolve such disputes without legal proceedings. But, when the parties cannot reach agreement, an administrative or judicial hearing is the proper forum for deciding the matter. The guidelines suggested above, however, are intended not only for courts of law. It is to be hoped that through the articulation of such principles, and if necessary through their consideration in a legal forum, all those concerned may, with mutual respect and forgiveness, confront their differences even as they acknowledge their common humanity.

NOTES

1 The author takes sole responsibility for the views expressed, which are not necessarily shared by any individual attorneys or legal organizations with whom the author has been affiliated.


3 See, e.g., the situations described in Anonymous (1977), Fowler (1977), and Special to the New York Times (1972).

4 See also Supreme Court of Kansas (1930), Anonymous (1941), and Warren (1961).

5 Similar holdings will be found in Court of Appeals of Tennessee (1974) and Supreme Court of Rhode Island (1974).

6 The same holding is found in Supreme Court of Pennsylvania (1854).

7 "One purchasing land containing a cemetery or burial lot is not thereby vested with the right to remove bodies buried therein" (Anonymous 1965:572, citing Supreme Court of Iowa (1907)).

8 Similar cases exist for many other religions. See Court of Appeals of New York (1926); Martin
1952:493–495, 498–503; and Anonymous 1965:574, notes 5–6). In granting a request for disinterment the interest of friends in preserving the burial place may even take precedence over the wishes of relatives if the court finds the deceased to have had closer ties with the former than with the latter (Supreme Court of Michigan 1942). The interest of the public, particularly as related to health matters, may also justify disinterment.

9 Similarly, Supreme Court of Rhode Island (1974) held that a dead body is not property, but "quasi-property" to which certain rights attach, and a burial site should not be disturbed without good reason.

10 The facts cited here are drawn from an actual situation but have been altered somewhat to preserve the anonymity of those whose involvement never became part of the public record.

11 On the law of standing applicable in such a context, see Davis (1972:419–439).

12 Such an extension of the concept of privacy is at least implicit in the arguments of Gerety (1977) and Bostwick (1976), particularly in the latter's argument that certain acts should be regarded as intrusions on the right to be let alone when they disrupt an individual's sanctuary or repose.

13 Only a few states retain group-defamation statutes. See, e.g., Connecticut General Statutes (1960); Indiana Code (1976); and Massachusetts Laws Annotated (1970). On the theory of group defamation, see Riesman (1942a; 1942b) and Stone (1978).

14 For an argument supporting the application of a group-defamation concept in civil proceedings, see Arkes (1975).

15 The same language is also used in Code of Federal Regulations (1976a: Section 132.1).

16 Section 132.2 of the same act originally gave the secretary of the interior the power to grant excavation permits. That provision was later amended to provide:

Permits may be granted only after obtaining the consent of the Indian landowners, who may impose special conditions for inclusion in the permit, and the concurrence of the Bureau of Indian Affairs official having immediate jurisdiction over the property [Code of Federal Regulations 1976a: Section 132.2].

17 The court was very explicit in its rejection of the statute: "In our judgment the statute, by use of undefined terms of uncommon usage, is fatally vague in violation of the due process clause of the Constitution" (United States Court of Appeals, Ninth Circuit 1974:115). On the doctrine of statutory vagueness, see Note (1974). For a general analysis of the Diaz case, see Cooper (1976).

18 Referring to the decision in Diaz, the following report was made to the Society for American Archaeology (1975:529): "The opinion now in National Park Service and other federal agencies is that the act is alright, but that the case was bad and has not been overturned by the decision."

19 For example, Code of Federal Regulations (1976a: Sections 132.1, 132.2).

20 The full text of the Navajo Tribal Code (1972: Section 233) reads:

Consent may be given by the Chairman of the Tribal Council, provided a majority of the district councilmen from the district approve, to the Secretary of the Interior to grant permits to excavate ruins and archaeological sites and for the gathering of objects of historic and scientific interest. Permits may be consented to for no larger areas than a land management district. See also the model statute in King (1972).


22 See United States Code Annotated 1974d. For a general discussion on this issue, see Meriwether (1975).

23 The procedure by which sites eligible for inclusion in the National Register are identified was rendered more direct by Executive Order 11593 (United States Government 1971). The emphasis remains on historic structures and is therefore of limited applicability to cemeteries and prehistoric
remains. See Code of Federal Regulations (1976b); Aten (1974). More recently, the Carter administration has established several committees that are to receive recommendations and formulate proposals leading to the establishment of a comprehensive national historic preservation policy. See Andrus (1978) and Anonymous (1978).

24 United States Supreme Court (1970). The criteria for standing may be more expansive in some state jurisdictions. Thus, the Supreme Court of New York, Suffolk County (1977:310), granted standing to nonresidents in a zoning case stating that redress should be available for every substantial wrong to which a plaintiff can show a reasonable relationship. On the question of legal standing, see Albert (1974); Note (1977a, 1977b); and Wolff (1976).

25 Many of these statutes are collected in McGimsey (1972). Given the pace of legislation in recent years, however, portions of that work are already out of date.

26 See, for example, the following statutes: Arkansas Statutes Annotated (1976: Section 8-802); Delaware Code Annotated (1975: Title 7, Section 5301); Florida Statutes Annotated 1976: Section 267.061); Hawaii Revised Statutes (1975: Section 6-12); Illinois Annotated Statutes (1967); Kansas Statutes Annotated (1976: Section 74-5403); Kentucky Revised Statutes Annotated (1971: Section 164.720); Mississippi Code Annotated (1977: Section 39-7-3); Missouri Statutes Annotated (1976); North Dakota Century Code (1972: Section 55-03-01); South Dakota Compiled Laws Annotated (1974: Section 1-20-25); and Texas Revised Civil Statutes (1976: Article 6145-9).

27 The Alaska law also bars the injury to or excavation of any gravesite “even though the gravesite appears to be abandoned, lost or neglected” (Alaska Statutes Annotated 1976: Section 41.35.200 (c) ).

28 Removals are allowed only with the permission of the president (or designated member of the faculty) of the University of Washington or Washington State College (Washington Revised Code 1976: Section 27.44.020).

29 This statute, which will be found in the 1972 edition of the California Codes Annotated, Public Resources Code at Sections 5097.93-.95, was repealed by Chapter 1332, Section 1, of the California Statutes of 1976, and replaced by California Codes Annotated (1977: Section 5097.9).

30 The Maine statute defines “object” as any “archaeological monument, artifact, relic or article” (Maine Revised Statutes Annotated 1974: Title 27, Section 373.3). The Massachusetts law defines “specimens” as all relics, artifacts, remains, objects, or any other evidence of a historical, prehistorical, archaeological, anthropological or paleontological nature one hundred and fifty years old or more which may be found below or on the surface of the earth, and which have scientific, historical or archaeological value, including but not limited to objects of antiquity, aboriginal, colonial or industrial relics, and archaeological or paleontological samples [Massachusetts Laws Annotated 1971a].

See also Missouri Statutes Annotated (1976).

31 For example, Johnson (1973) and Society for American Archeology (1974). Earlier statements on ethics often ignored the problem altogether (e.g., Society for American Archeology 1961).

32 The “Statement on Professional and Ethical Responsibilities” of the Society for Applied Anthropology (1975) states: “Recognizing that any ethical stance derives from or is intimately related to one’s political convictions, we are not offering any absolute set of rules or code of ethics.” The epilogue to the “Principles of Professional Responsibility” of the American Anthropological Association (1973:2) states:

To err is human, to forgive humane. This statement of principles of professional responsibility is not designed to punish, but to provide guidelines which can minimize the occasions upon which there is a need to forgive. When an anthropologist, by his actions, jeopardizes peoples studied, professional colleagues, students or others, or if he otherwise betrays his professional commitments, his colleagues may legitimately inquire into the propriety of those actions, and take such measures as lie within the legitimate powers of their Association as the membership of the Association deems appropriate.

33 Compare the statement by the Society for Applied Anthropology (1975) which reads as follows:
To the community being served we owe respect for its dignity, integrity, and internal variability. We should be constantly aware that it may not be possible to serve the interests of all segments of the community at the same time that we serve the interests of the contracting agency. Therefore, we should not recommend any course of action on behalf of our employers' interests when the lives, well-being, dignity, and self-respect of any portion of the community are likely to be adversely affected, without adequate provision being made to insure that there will be a minimum of such effect and that the net effect will in the long run be more beneficial than if no action were taken at all.

34 See, for example, the project requirements of the Tennessee Valley Authority (1976). On the general issue of certification, see Miller (1974:145).

35 For example, one could try to raise the question whether the "right to undisturbed burial" should be acknowledged by the courts as a "fundamental right" in the sense in which the Supreme Court has employed that concept in cases involving, for example, voting rights. Or, one could propose that the issue of Indian burials be dealt with by amendment to the federal or state constitutions. Either proposal would raise issues that extend far beyond the bounds necessary for a workable approach to this particular problem.

36 On the role of anthropologists as experts in legal proceedings generally, see Rosen (1977).

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