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The Legacy of Ethnic Cleansing: Implementation of NAGPRA in Texas

STEVE RUSSELL

INTRODUCTION

Most people understand that interment of human remains is permanent, “earth to earth, ashes to ashes, dust to dust.”¹ But for Native Americans since their earliest contacts with Europeans, this understanding has been violated. The Pilgrims brought loot from a grave back to the Mayflower²—according to the admissions in a journal first published in 1622—setting a precedent of European disrespect for Native American dead that continues to this day.³

The sanctity of the grave as a straightforward matter of human dignity might seem easily protected in these enlightened times. Indians no longer pose any threat to European-American expansion; the new country on the “new” continent has achieved its manifest destiny. Continued grave robbing may only add insult to numerous injuries, but our contemporary lack of closure on this issue was demonstrated again on 16 November 1990, when the Native American Graves Protection and Repatriation Act (NAGPRA) was signed into law.⁴

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NAGPRA's principal concern is reversing the results of grave robbing, past and present—that is, the disposition of human remains and funerary objects—but the new statute also deals with sacred objects and cultural patrimony. Both cultural patrimony and the identification and disposition of sacred objects can be disputed among reasonable persons, but the contents of graves—human remains and funerary objects—present much more simple questions and will therefore be the focus of this article. If the contents of graves cannot be protected by federal or state law, any hope of returning other religious and cultural artifacts to their true owners would be futile, both legally and politically. This may not be true nationally, where an electronic search of the 1994 and 1995 *Federal Register* reveals four proposed repatriations of sacred objects and none of human remains, but the trend in Texas is clear. At this writing, the few repatriations in Texas have been of human remains only; the additional burdens of proof NAGPRA requires to identify sacred objects and cultural patrimony could be daunting given the political atmosphere in Texas—where “property rights” reign supreme—and the absence from the state of the rightful claimants for reasons shown later in this article.

A complication in the apparently simple matter of protecting graves is that physical anthropologists and archaeologists cite the need to advance human knowledge as justification for disturbing Indian graves and appropriating the contents. Under scientific imprimatur, “imperial archaeology”⁵ (in the words of Pawnee historian James Riding In) has succeeded in making the self-evident problematic. The burden has fallen on modern Indians to assert rights to defend the repose of early historic and prehistoric Native American remains. Part of their effort to meet this burden has been the enactment of NAGPRA.

The promise of NAGPRA, however, remains elusive in Texas. The American Indian Resource and Education Coalition (AIREC), an intertribal organization founded in response to Texas' dissolution of its Indian Commission in 1989, has spent years locked in a struggle with recreational grave looters on one side and scientific grave looters on the other. AIREC's bylaws require that a majority of its governing board be enrolled in a federally recognized Indian tribe, and the organization has, to date, acted only as a proxy for Indian tribes formerly residing in Texas, at the request of those tribes. AIREC is the trustee for the Comanche National Cemetery, a final resting place on donated federal land in central Texas for

remains repatriated under NAGPRA or as a result of demands AIREC continues to make outside of the letter of NAGPRA.

The Comanche National Cemetery is so named because the first people reinterred there were Comanche. The intertribal nature of the cemetery was underscored in 1994 when Tonkawa and Comanche remains were reburied in an intertribal ceremony, historical enemies at rest together while their descendants shared prayers and food. To understand how an intertribal organization in Texas became the instrument for repatriation of remains identified with Oklahoma tribes, it is necessary to understand which Indians live in Texas today and, more important, which Indians do not.

ETHNIC CLEANSING IN TEXAS

The 1990 census indicates that about 66,000 self-identified Native Americans live in Texas,⁶ forming one of the larger surviving Indian populations in the United States, even if allowances are made for inflation of the figures by the Census Bureau's practice of accepting self-identification at face value. Most of these people live in urban areas and are more or less assimilated, living lives indistinguishable at a distance from their Euro-American neighbors, speaking English, and having little contact with tribal governments.

There are three Indian reservations and therefore three tribal governments in Texas.⁷ None of these tribes—Alabama-Coushatta, Kickapoo, and Tigua—is indigenous to Texas.

Spanish explorer Hernando de Soto first encountered the separate tribes that became the Alabama-Coushatta in 1540–41 in the lands now known as Mississippi and Alabama. Alabama and Coushatta people, squeezed west by white settlement, arrived in Texas in the mid-1780s. Having aided the "Texians" (now Texans) during the revolution, the Alabama were given a reservation by the Texas Legislature in 1854, where they were joined by the Coushatta by 1858.⁸

French explorer Samuel de Champlain first encountered the Kickapoo in 1612 in the land now known as Michigan. Forced south by white settlement, the Kickapoo divided, and many were forced to accept reservations, first in Missouri, then Kansas, then Oklahoma. Other Kickapoo settled in Texas in the early nineteenth century, sided with Mexico in the Texas Revolution, and raided south Texas from across the Mexican border as late as 1873. During the 1940s, the Mexican Kickapoo became migrant farm

workers, crossing into the United States for seasonal work.⁹ They were recognized as having U.S. citizenship in 1983¹⁰ and received their reservation land from private donors in 1985.

Spanish explorer Francisco Coronado first encountered the Tigua (or Tiwa) in 1540 when he spent part of the winter of that year in their Ysleta (now Isleta) Pueblo, located in the land now known as New Mexico. The Tigua retreated with the Spanish to what is now El Paso, Texas, after the Pueblo Rebellion in August 1680. Their Ysleta del Sur Pueblo was established on its present site by 1684.¹¹

A number of individuals and families from southeastern tribes (Muscogee, Choctaw, Chickasaw, Cherokee), like the Alabama and Coushatta, and from a few other tribes (Potawatomi, Delaware, Shawnee), like the Kickapoo, were pushed into Texas by Euro-American expansion at roughly the same time as the earliest American settlements.¹²

Because all of these tribes arrived in Texas after Europeans did, and because they are numerically small—accounting for about 5 percent of the Indians currently residing in Texas—they are unlikely to make significant claims under NAGPRA. Their dead are buried, for the most part, in the same manner and in the same places as their European settler contemporaries.

Three powerful forces contended for nineteenth-century Texas: Americans, Mexicans, and the Comanche-Kiowa Alliance. Several immigrant tribes in east Texas—principally the Cherokee—strove through diplomacy to protect their farms but never became more than pawns of one party or another. Promised title to their farms in return for neutrality during the Texas Revolution, the Cherokee were driven out of Texas by force of arms.¹³ Like the Indians remaining on the three tiny reservations in Texas, these east Texas farmers—“civilized Indians”—are no more likely to draw the attention of grave robbers than the Euro-American farmers who lived and died around them.

This is not to say that rural graves do not get robbed without regard to the ethnicity of the deceased. But when the disturbed graves contain Indians, even Indians from historical times, Texas’ response is to investigate whether the robbers missed anything. A Texas archaeologist drew these conclusions from Alabama-Coushatta burials dated in the latter half of the nineteenth century:

The Indians who buried their dead here had become completely dependent upon store-bought items. This depen-

dency upon trade goods did not destroy all the Indians' knowledge of native arts and crafts, but rather created an easier avenue of obtaining raw materials. For instance, the clothes may be store-bought, but the making and placement of silver conchos or the design pattern composed of glass beads is entirely Indian.¹⁴

These less-than-earth-shattering conclusions came from stripping Indian corpses dating from a time that produced more European corpses. If such conclusions do provide scientific necessity to strip corpses, today's Indians have reason to ask whether European corpses are being afforded an equal opportunity to be stripped in the name of science.

Grave robbing is an even more serious problem for the earlier inhabitants of Texas, and among those tribes none has suffered more than the Caddo. One reason for this was the Caddoan burial practice of lavishly providing for the departed soul's journey.¹⁵ The other reason was the sheer artistry of Caddoan potters. The reputation of Caddoan pottery among amateur and professional pot hunters makes every Caddoan grave a potential bonanza.¹⁶ A recent scientific looter of Caddoan graves found that "(m)any objects had been placed in the graves with the dead, including ceramics, bone tools, arrowpoints, plant and animal food items, clay pipes, rattles, and jewelry."¹⁷ The Caddoan Confederacies were destroyed by European diseases long before the Texas Revolution. The surviving Caddo, heirs to cultural if no longer material wealth, are located near Binger, Oklahoma.

The Atakapan, a small east Texas tribe, lost its identity entirely in the European onslaught, with the known survivors ending up on the Caddo Reservation in Oklahoma or intermarried with the Alabama-Coushatta people in Texas.

Two other indigenous peoples are now extinct in terms of tribal identity—the Coahuiltecan by disease and intermarriage with Mexicans¹⁸ and the Karankawa by military action.

At the time of first contact with Spanish explorers Francisco Coronado and Juan de Oñate, the Wichita were located in what is now Kansas. "Wichita peoples migrated southward during the seventeenth and eighteenth centuries for several reasons. One of the most powerful was the military pressure exerted from the north by the Osages—equipped with European weapons."¹⁹ After migrating to Texas, the Wichita were first weakened by disease and then finally removed by military action to their current reservation in Anadarko, Oklahoma. Because the Wichita prac-

ticed interment of funerary artifacts, their graves are in serious danger of desecration, a danger that has not escaped the notice of the remaining Wichita.

Wichita president Gary McAdams wrote in response to AIREC's plea to support an antigraverobbing bill in Texas during the 1993 legislative session:

I cannot resist pointing out the irony in the way the State covets the remains of our ancestors. It was only 134 years ago in 1859 when the Wichita were forcibly removed from aboriginal territory at the insistence of the citizens of Texas. Many of our grandmothers and grandfathers died during that forced march to the Indian Territory. Those people who were not even given the basic human right of existence are now treated like some state treasure. I am sure that the citizens of Texas would not want the Tribes to hold them accountable for those past actions and would feel unjustly accused. I am sure they would say that those were different times and indeed they were different times. But if the treatment of Native American remains continues to be less than respectful, less than dignified, you are preserving the judgments and the actions of the state on that infamous day in 1859. . . . The burials are sacred to the Wichita. These spots mark the final resting place of the earthly bodies of our grandmothers and grandfathers. They mark the return to the bosom from whence they came, the completion of a cycle.²⁰

There was one more major agricultural tribe in Texas. "Of all the Texas Indians the Jumanos are the least known, and the few facts about their culture that we do possess seem to raise more questions than they answer."²¹ The Jumanos appear to have been ground between the Spanish and the Apache²² just as the Apache were later ground between the Mexicans and the Comanche.²³ Some Jumanos became Mexican wageworkers;²⁴ some joined Apache bands.²⁵ No Jumano tribe as such exists today.

Other early inhabitants of Texas were Southern Plains Indians. The exact identity of Southern Plains Indian sites is often subject to dispute among archaeologists.²⁶ A Southern Plains Indian burial, whether Lipan Apache, Comanche, Kiowa, or Tonkawa, is likely to contain funerary artifacts, because all of these people interred personal equipment with their dead.

If the only conflict between Europeans and Indians in Texas had been with the Plains Indians, it would be unfair to use the term *ethnic cleansing*. The war between the Spanish and the

Apache and later the war between the Texans and the Comanche and Kiowa could have rationally been adjudged fair fights, with no more blameworthiness on either side than any other war. The Indians had something the Europeans wanted, and these particular Indians fought the Europeans to a standstill until enough European technology²⁷ could be brought to bear to turn the tide. That both sides slaughtered helpless noncombatants is an unsavory fact that passes no more moral judgment than a debate comparing Coventry with Dresden.

This very real war for the Plains, however, became an excuse for the republic of Texas to remove all natives from Texas soil as a matter of official policy. The only exceptions to this policy were the Alabama-Coushatta, who were owed a debt of gratitude from their actions in the Texas Revolution, and the Tigua, who were peaceful and out of sight and therefore out of mind in El Paso. Together, these tribes were numerically insignificant.

Republic of Texas president Mirabeau Buonaparte Lamar declared in his December 1838 inaugural address,

The white man and the red man cannot dwell in harmony together. Nature forbids it. . . . knowing these things, I experience no difficulty in deciding on the proper policy to be pursued towards them. It is to push a rigorous war against them; pursuing them to their hiding places without mitigation or compassion, until they shall be made to feel that flight from our borders without hope of return, is preferable to the scourges of war.²⁸

Lamar's anti-Indian position was popular. In the words of Texas historian T.R. Fehrenbach, "To the frontier white, all Indians were vermin. Searching for the most damning epithet to dehumanize the race, Texans called them 'red niggers.' The frontier proverb 'The only good Indian is a dead Indian' did not originate in Texas, but it was probably used more there than in any other state."²⁹ Whether the roots of Lamar's policy were economic inevitability or simple race hatred, he turned on the east Texas Cherokee, who had been peaceably farming their land for twenty years.³⁰

Instead of clear title to their farms—the reward they were promised for their neutrality in the Texas Revolution of 1836—Cherokee people were repaid with fire and steel. The Texans engaged the Cherokee on 15 July 1839. After two days of battle, during which Duwali, the eighty-three-year-old Cherokee leader, was killed, the Cherokee were driven from their homes.

This battle was followed by the forcible expulsion of at least eight other tribes from east Texas, among whom only the Caddo were indigenous to Texas.³¹ In 1841, Texas once again elected Sam Houston to the presidency, causing a hiatus in the “leave or die” policy toward Indians. Houston, an adopted Cherokee,³² had always favored peaceful policies toward both “civilized” and “wild” Indians,³³ but, in the end, it would be Lamar’s policies that built Texas as it is today, without a significant organized Indian presence.³⁴

With a little help from early ecological warfare—purposeful extinction of the bison³⁵—the Plains Indians were broken militarily, finally subdued with the surrender of Quanah Parker in 1875, and removed to Oklahoma. The Comanche tribe is now headquartered in Lawton, the Kiowa in Carnegie. The few surviving Tonkawa live in an Oklahoma town called Tonkawa. Most surviving Lipan Apache live on the Mescalero Apache Reservation in New Mexico.

The extinction and exile of virtually all Texas Indians threaten to sever the ties between surviving Indians and their ancestors. Since NAGPRA limits the right of repatriation (when no lineal descendants in the European sense come forward) to Native American tribes,³⁶ and since none of the tribes currently residing in Texas as tribes had aboriginal lands in Texas, the success of Texas’ campaign of ethnic cleansing continues to have ramifications for Indians, both for those who chose to leave and for those who chose to die.

STATE LEGISLATION

The success of ethnic cleansing as a state policy, at least in Texas, may have profound implications for the long-range viability of the policies underlying NAGPRA. One such implication is the difficulty “outside agitator” Indians have had and will have in securing state law protection for Native American graves.

State law protection will be necessary because, when Texas entered the Union, it retained its public domain; therefore, the only land owned by the United States government in Texas has been acquired by purchase or donation since statehood.³⁷ After Texas settled its border disputes with Mexico in the 1848 Treaty of Guadalupe-Hidalgo and with the United States in the Compromise of 1850, it was within today’s still-expansive borders, and all public land was owned by the state.³⁸ Since 1850, the United States

has acquired only 2,844,943 acres of land in Texas.³⁹ All three federally recognized Indian tribes in Texas together own less than five thousand acres.⁴⁰ Future discoveries of Native American remains and funerary objects in Texas will be covered by NAGPRA if they take place on less than 2 percent of Texas land.

NAGPRA does require an inventory⁴¹ of those covered items currently curated by institutions that receive federal funds,⁴² an inventory that is intended to lead to repatriation in appropriate cases.⁴³ However, the inventory appears to be a one-time requirement, and the proposed regulations implementing NAGPRA contain no duty to update the inventory.⁴⁴ How, then, would the tribes that have been expelled from Texas learn that their ancestors have been disinterred? After the inventory required by NAGPRA, the only right to notice would be of disinterments taking place on the minuscule lands owned by the federal government or Indian tribes.⁴⁵

If notice to the evicted tribes from Texas is problematic after the first NAGPRA inventory, notice to the extinguished tribes is impossible. An Indian burial on the great barrier islands of the Texas coast, for example, dating from First Contact to the republic of Texas, would almost certainly be Karankawa. NAGPRA's fallback positions help little. The Indian tribe "recognized as aboriginally occupying"⁴⁶ the barrier islands would be the Karankawa even though their occupation was never recognized "by a final judgment of the Indian Claims Commission or the United States Court of Claims."⁴⁷ This leaves "closest cultural affiliation,"⁴⁸ a matter that could be subject to some dispute, given the unique setting of the Karankawa culture. The problem here is not that Texas tribes are likely to dispute "closest cultural affiliation" to the Karankawa among themselves, but that scientists will use the genuine puzzle over whom to notify as an excuse not to notify anyone.

The limitations of NAGPRA in light of Texas history do not diminish the accomplishment of the Native American Rights Fund and others in lobbying for this landmark statute. Indeed, the NAGPRA Review Committee recently posted draft regulations for comment that, if adopted, would largely resolve the problem of extinguished tribes.⁴⁹ However, the remaining problems in Texas of absentee tribes and very little land in federal or Indian ownership invite recourse to state law.

Texas would not be the first state to determine that state legislation is needed to protect Native American graves,⁵⁰ but recent

history leads one to wonder whether it will be the last. A bill to criminalize grave looting was introduced with the support of the Indian Commission in 1987 but failed to pass.⁵¹ A second attempt successfully passed the legislature, only to be vetoed by Governor Bill Clements.⁵² A third attempt in 1993, House Bill 1179, passed the house only to perish in a senate subcommittee chaired by Senator Gonzalo Barrientos—a friend of Indian interests—when the Texas Historical Commission could not agree with the demands of AIREC and the Texas Indian Bar Association (TIBA) that any human remains or funerary artifacts taken into custody as a result of a criminal prosecution for grave robbing be sent to an institution that receives federal funds and therefore is covered by NAGPRA.⁵³

AIREC, representing every tribe that took a position, and TIBA, representing AIREC, provided all of the Indian testimony in the senate committee hearing. There was no Indian testimony in the house committee hearing (allegedly because the state archeologist had failed to keep a promise to notify AIREC),⁵⁴ where the state archeologist made the case against grave looting in terms of scientific data being lost, and no mention was made of repatriation or NAGPRA or what would become of Indian remains seized from “collectors” under authority of the new law, except that the state archeologist would take possession and “consult with the appropriate tribal leaders or ethnic group” and consider their claims before he designated an “appropriate repository.”⁵⁵ Informally, the state archeologist not only refused to promise any repatriation at all but also made it clear that repatriation guidelines from his office—if any—would not resemble NAGPRA, because he was in disagreement with NAGPRA.⁵⁶

That the Texas Historical Commission would obstruct implementation of NAGPRA was fairly predictable. Two months after NAGPRA was signed into law, the Texas Historical Commission passed a resolution stating its “opposition to the reburial of scientifically valuable human skeletal remains and associated burial objects except in cases where such remains can be identified as a known individual or living descendants can show a specific family relationship to the remains.”⁵⁷ The executive committee of the Texas Historical Commission reaffirmed this same position of disdain for a mere federal statute a year later.⁵⁸

Curtis Tunnell, executive director of the Texas Historical Commission and Texas’ state historical preservation officer (SHPO)⁵⁹

wrote a memorandum to the commission while the 1993 legislature was still in session, flagrantly misstating the nature of the controversy over H.B. 1179:

The bill passed the house back in March, but has been delayed in a Senate Committee (sic) by a local organization who (sic) want to add provisions *concerning reburial of museum collections*.⁶⁰

The controversy, in fact, had to do with disposition of evidence after a criminal prosecution; no application to "museum collections" seems even remotely possible on the face of the bill or the proposed amendments.⁶¹ Tunnell went on to pronounce the issue "dead for the session," when all that would have been required to pass the bill out of subcommittee would have been for Tunnell to agree not to use a criminal prosecution as a vehicle for placing Indian remains or grave goods beyond the reach of NAGPRA. The Texas Historical Commission repeated Tunnell's misrepresentation more than six months later, stating that H.B. 1179 "was tied up in a Senate subcommittee when a Pan-Indian group (a non-tribal organization with both Indian and non-Indian membership) demanded that the bill be amended to allow Pan-Indian groups to repatriate scientific archaeological collections from museums for the purpose of reburial."⁶²

This legislative debacle illustrates two points: First, the Texas Historical Commission is not unaware of the political mileage to be gained in the late twentieth century by exploiting the results of ethnic cleansing in the late nineteenth century. So-called "Pan-Indian groups" are the only means short of retaining attorneys for the tribes forcibly removed from Texas to have any voice in either repatriation under state law or compliance with NAGPRA. If the Texas Historical Commission's marginalizing rhetoric is successful, NAGPRA's implementation will depend on the very people whose disregard for living or dead Native Americans made NAGPRA necessary.

The second point illustrated by the Texas Historical Commission's willingness to kill legislation over a fairly trivial mention of NAGPRA is that Texas remains in the professional wagon-circling mode that predated the passage of NAGPRA on the national level.⁶³ State archeologist Robert Mallouf typified the hysterical level of the H.B. 1179 debate:

The perceived inability of the archeological community to present a united and enlightened defense during past repa-

triation debates will, in the long run, only encourage religious fundamentalists, self-proclaimed mystics, ethnic “wannabes,” aspiring politicians, and vacillating “archeocrats” to continue plucking away at our well-spring of scientific collections and basic research rights.⁶⁴

Mixed metaphors and creative epithets aside, it was difficult to negotiate in that atmosphere, since any Texan who believed that reburial might be appropriate would be subject to attack as an anti-intellectual book burner. The hilarious but fictional mailing to a museum spokeswoman of her grandparents’ remains⁶⁵ began to seem a valid tactic. More important, the debate on the state level became a rematch of the cultural clash that was supposed to have ended on the federal level with the passage of NAGPRA.

Although most of the concern about implementing NAGPRA has focused on the alleged⁶⁶ need for money to inventory collections,⁶⁷ the collision between the Texas Historical Commission and Indian intertribal organizations points to another problem. Even though SHPOs have little to do with NAGPRA on its face,⁶⁸ the absence of Texas Indians from their aboriginal lands because of exile or extermination has left the SHPO, by default, the only source of information and advice concerning compliance with NAGPRA for state institutions. Universities and museums have long-established relations with the SHPO; Indians in Texas have been virtually invisible since the legislature allowed the Indian Commission to sunset in 1989, and, at this writing, no self-identified Native American holds any statewide office in Texas, elected or appointed.

Curtis Tunnell, the incumbent SHPO, solidified his position as arbiter of NAGPRA requirements by successfully urging the Texas Historical Commission to pass a resolution that, “in accordance with the intent of NAGPRA, [the Commission] henceforth recognizes only Native American tribal groups as defined by the Bureau of Indian Affairs (*Federal Register* 58, no. 250) for purposes of deliberations and prerogatives relating to the repatriation of scientific collections.”⁶⁹ With this resolution, a state agency—well aware that most repatriation decisions in Texas are, of necessity, outside the letter of NAGPRA—has informed a particular racial group, Indians, that remains of their ancestors are still “scientific collections” in Texas and that no one need even try to discuss repatriation outside of the minimal requirements of NAGPRA. In urging passage of the resolution, Tunnell compounded his past misrepresentations by referring to “(o)ur recent loss of im-

portant burial legislation due to intractable Pan-Indian involvement. . . .”⁷⁰

After four appearances over two years on the Texas Historical Commission agenda, during which this writer⁷¹ and others pointed out the commission’s public disregard for NAGPRA and the Texas Constitution,⁷² both the anti-NAGPRA resolution and the anti-AIREC resolution were explicitly “superseded” by a new resolution promising that “the Texas Historical Commission shall consult in the spirit of stewardship with Indian tribes, private organizations and individuals, local governments, and others concerning the preservation and protection of Texas’ prehistoric and historic archeological resources and collections.”⁷³

Pan-Indian involvement continued to be intractable between the Texas Legislature’s biannual sessions, resulting in an agreement with the Texas Historical Commission that split the issues of graves protection and repatriation insofar as those issues can be split. The compromise graves protection bill, Senate Bill 528, was identical in all respects with what the Indians had demanded in 1993: Any state seizure of human remains or grave goods was to end in a connection to NAGPRA, with designation of a repository that had received federal funds.

State Senator Gonzalo Barrientos, who had rescued Indian interests in the 1993 session, passed S.B. 528 in the senate. In committee, Barrientos recalled the deadlock on H.B. 1179 and announced that the Indians were as united in support as they had been in opposition two years earlier. Senator Peggy Rosson of El Paso—home of the Ysleta del Sur Pueblo—expressed her gratitude that Barrientos had persevered, and the bill gained a unanimous favorable report. In laying out the bill before the full senate, Barrientos stated, “We are all human beings, not curios. We all want to ensure that our family members have gone to rest peacefully.”⁷⁴

Barrientos’s eloquence was persuasive in the Texas senate, but, when S.B. 528 arrived in the house of representatives, it suffered the death of a thousand cuts. Amended at the request of lobbyists for oil and gas interests, public utilities, lignite owners, and real estate developers,⁷⁵ the bill then drew fire from “property rights” advocates. The house sponsor received at least one call from a landowner who had leased his land to “collectors” who wished to “mine” for Indian artifacts, claiming that the value of the land was diminished by the value of the leases. Perhaps mercifully, time ran out on the legislative session before S.B. 528 reached a floor

vote in the house.⁷⁶ The “intractable” Indians will have to return again in 1997, fully ten years after the Texas Indian Commission first raised the issue.

With no Indian Commission and little organized and vocal Indian population, AIREC and the Texas Indian Bar Association appear to stand alone in Texas. The three tiny Texas tribes are supportive in principle, but the Tigua are litigating with the state over the Indian Gaming Regulatory Act, the Alabama-Coushatta are litigating with a Texas school district over the right of Alabama-Coushatta boys to wear their hair in accordance with their traditions, and the Kickapoo—formerly resident under a highway bridge in Eagle Pass—live a hand-to-mouth existence with little excess energy to expend on abstract political principles. The tribes that were forcibly evicted from Texas—particularly the Caddo, the Wichita, the Tonkawa, and the Comanche—protect their dead as best they can, directly and through AIREC.⁷⁷ The Fort Hood military reservation, which follows NAGPRA to the letter, has received and honored repatriation demands from the Comanche,⁷⁸ the Tonkawa,⁷⁹ the Caddo,⁸⁰ and the Apache.⁸¹ AIREC’s trusteeship of the Comanche National Cemetery was created by a memorandum of understanding among AIREC, the army and the Comanche Tribal Council. No sovereign tribe among those affected has expressed lack of interest in their dead or has failed to act to protect their dead when a feasible action was available to them.

CONCLUSION

As the Texas Legislature was once more failing to act in 1995, a Texas Tech University graduate archaeology student was documenting the continuing despoliation of Indian graves, particularly Caddoan graves in east Texas,⁸² where “collecting” is common and accepted behavior and trinkets made from Indian bones can still be bought at gun shows. Recreational “collectors” continue to collect and scientific collectors continue to protect their collections, while Indians remain intractable in opposition to both.

Tribal and intertribal Indian intractability on the reburial issue will continue because of the nature of the dispute. Those Indians who see repatriation as a religious issue have no choice but to continue the battle. Those who see it as a political issue are also unlikely to go away, simply because the right of a people to bury

their dead is so fundamental that denial of the right amounts to dehumanization. This is the key to understanding the repatriation debate in Texas and perhaps in the rest of the country. This is also why the rights of the living depend in a very practical political sense on the rights of the dead to return from whence they came: earth to earth, ashes to ashes, dust to dust.

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NOTES

1. "The Order for the Burial of the Dead" in *The Book of Common Prayer* (Philadelphia: George W. Jacobs & Co., 1894), 299.

2. George Mourt, *Mourt's Relation: Journal of the Plantation at Plymouth* (1622; Boston: J.K. Wiggin, 1865, and photo reprint, 1971), 33–34. The Pilgrims were aware that Indians would disapprove of grave robbing and, in fact, had declined an earlier opportunity for that reason. "We supposed there were many other things, but because we deemed them graves, we . . . left the rest untouched, because we thought it would be odious unto them to ransacke their Sepulchers" (Ibid., 20). "Mourt" is thought by historians to be one George Morton, who recommended this journal to the public but was not the author. While the authorship of *Mourt's Relation* has been questioned since its first publication in the seventeenth century, its authenticity has not.

3. Cheryl Ann Munson, Marjorie Melvin Jones, and Robert E. Fry, "The GE Mound: An ARPA Case Study," *American Antiquity* 60:1 (1995): 131–59; Harvey Arden, "An Indian Cemetery Desecrated: Who Owns Our Past?" *National Geographic* 175 (March 1989): 376–392.

4. 25 U.S.C.A. §§ 3001–3013 (West Supp., 1995).

5. James Riding In, "Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians," *Arizona State Law Journal* 24 (Spring 1992): 11–34; see also Jack F. Trope and Walter R. Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," *Arizona State Law Journal* 24 (Spring 1992): 35–77.

6. Bureau of the Census, *General Population Characteristics, Texas* (Washington, DC: Government Printing Office, 1992), 159.
7. Richard Schott, "Contemporary Indian Reservations in Texas: Tribal Paths to the Present," *Public Affairs Comment* 39:3 (Austin, TX: Lyndon B. Johnson School of Public Affairs, 1993).
8. Texas Indian Commission, "Alabama-Coushatta Indian Tribe" in *The Texas Indian Commission and American Indians in Texas* (Austin, TX: Texas Indian Commission, 1986), unpaginated.
9. Felipe A. Latorre and Dolores L. Latorre, *The Mexican Kickapoo Indians* (New York: Dover Publications, 1976).
10. 25 U.S.C.A. § 1300b-11 et seq.
11. J.M. Espinosa, ed., *The Pueblo Indian Revolt of 1696 and the Franciscan Missions in New Mexico: Letters of the Missionaries and Related Documents* (Norman: University of Oklahoma Press, 1988), 37.
12. Anna Muckleroy, "The Indian Policy of the Republic of Texas—Chapter I," *Southwestern Historical Quarterly* 25 (April 1922): 229-60, 237-41.
13. Waggoner Carr, "A Look at Texas-Cherokee Nation Land Dispute," *Texas Bar Journal* 58 (April 1995): 346-50.
14. D.P. Hsu, *The Arthur Patterson Site: A Mid-Nineteenth Century Site in San Jacinto County, Texas* (Austin, TX: Texas State Building Commission and Texas State Water Development Board, July-August 1969), 11. In this case, the professional grave robber named his published report after the amateur grave robber whose depredations led to discovery of the site.
15. W.W. Newcomb, Jr., *The Indians of Texas* (Austin: University of Texas Press, 1961), 301.
16. A.T. Jackson, "Ornaments of East Texas Indians," *Bulletin of the Texas Archeological and Paleontological Society* (September 1935): 11-28.
17. Carol J. Loveland, "Human Skeletal Remains from the Clark and Holdeman Sites, Red River County, Texas," *Bulletin of the Texas Archeological Society* 57 (1986): 165-81, 166.
18. Although the tribal identity of Coahuiltecan Indians is gone, Spanish mission records—baptisms and marriages—would probably document "Mexican-American" persons living today with more Indian blood than some card-carrying members of federally recognized tribes.
19. Muckleroy, "The Indian Policy of the Republic of Texas," 230.
20. Letter from President Gary McAdams, Wichita and Affiliated Tribes, to Texas senator Gonzalo Barrientos (27 April 1993).
21. Newcomb, *The Indians of Texas*, 244.
22. *Ibid.*, 233.
23. *Ibid.*, 125.
24. *Ibid.*, 233.
25. *Ibid.*, 234.
26. *Ibid.*, 105.
27. Disease was less a factor in the demise of these "wild" Indians, because they would not associate with Europeans enough to contract the diseases that wiped out more "civilized" tribes. European diseases took a terrible toll on

Plains Indians, but that toll was less than the cultural extinction suffered by more sedentary tribes. T.R. Fehrenbach, *Comanches* (New York: Alfred A. Knopf, 1974), 388–91.

28. Quoted in Fehrenbach, *Lone Star* (New York: American Legacy Press, 1983), 453.

29. *Ibid.*, 452.

30. Dianna Everett, *The Texas Cherokees: A People Between Two Fires 1819–1840* (Norman: University of Oklahoma Press, 1990), 23. The “two fires” of Everett’s title are “removal and extermination” (preface, xiii).

31. *Ibid.*, 457.

32. Muckleroy, “Indian Policy of the Republic of Texas—Chapter V,” *Southwestern Historical Quarterly* 26 (October 1922): 128–48.

33. Muckleroy, “Indian Policy of the Republic of Texas—Chapter VI,” *Southwestern Historical Quarterly* 26 (January 1923): 184–206, 204–205. On 7 October 1844, President Houston met representatives of nine tribes and explained the change in policy: “Six years ago, I made a peace with the Comanche: that peace was kept until a bad chief took my place. That Chief made war on the Comanche and murdered them at San Antonio: He made war, too, on the Cherokee, and drove them from the country. Now this has to be mended, war can do us no good.” Dorman Winfrey, ed., “Minutes of Council at the Falls of the Brazos” in *Texas Indian Papers 1844–1845* (Austin, TX: Texas State Library, 1960), 103, 104.

34. See generally “Red Niggers, Red Vermin,” in Fehrenbach, *Lone Star*, 445–64 (capsule history of how Lamar’s policies prevailed).

35. Newcomb, *The Indians of Texas*, 95; Fehrenbach, *Comanches*, 524–25. By 1878, a group of Indians leaving Indian Territory to hunt found themselves in Palo Duro Canyon, subsisting on Charles Goodnight’s cattle. James M. Day and Dorman Winfrey, eds. “Petition from Clarendon, Donley County, Texas (Dec. 30, 1838)” in *Texas Indian Papers 1860–1916* (Austin, TX: Texas State Library, 1961), 406. The Texas adjutant general commented to the governor, “*There are no Buffalo*, and very little game of any Kind in the section of the country occupied by them” (letter from J.B. Jones to O.M. Roberts [Feb. 15, 1879],” *ibid.*, 417 [emphasis added]).

36. 25 U.S.C.A. § 3005(a) (West Supp., 1995).

37. Bascom Giles, *History and Disposition of Texas Public Domain* (Austin, TX: Texas General Land Office, 1945), 6.

38. *Ibid.*, 9.

39. Bureau of Land Management, *Public Land Statistics-1991* (Washington, DC: U.S. Government Printing Office, 1992), 5.

40. V. Tiller, ed., *Discover Indian Reservations USA: A Visitors’ Welcome Guide* (Denver, CO: Council Publications, 1992), 311–13 (Alabama-Coushatta and Tigua); Schott, “Contemporary Indian Reservations in Texas,” 6 (Kickapoo).

41. 25 U.S.C.A. § 3003 (West Supp., 1995).

42. 25 U.S.C.A. § 3001(8) (West Supp., 1995).

43. 25 U.S.C.A. § 3005 (West Supp., 1995).

44. 58 Fed. Reg. 31,122 (1993).
45. 25 U.S.C.A. § 3002.(d) (West Supp., 1995).
46. 25 U.S.C.A. § 3002.(a)(2)(C)(1) (West Supp., 1995).
47. 25 U.S.C.A. § 3002.(a)(2)(C) (West Supp., 1995).
48. 25 U.S.C.A. § 3002.(a)(2)(B) (West Supp., 1995).
49. 60 Fed. Reg. 32,163 (1995).
50. Catherine Bergin Yalung and Laurel I. Wala, "A Survey of State Repatriation and Burial Protection Statutes," *Arizona State Law Journal* 24 (Spring 1992): 419–33.
51. The Texas Indian Commission, *Self-Evaluation Report—Part I* (Austin, TX: Texas Indian Commission, 1 July 1987).
52. Robert Mallouf, "The 'Battle of the Bill' in Texas," *Caddoan Archeology* (Winter 1989–90): 7.
53. 25 U.S.C.A. § 3001(8) (West Supp., 1995).
54. Personal communication to the author from Shiloh Perkins, Onondaga and chair of the AIREC Repatriation Committee.
55. Texas House Committee on International and Cultural Relations, *House Committee Report on H.B. 1179* (1st printing), 22 March 1993.
56. Letter from R. Kimball Smith, archaeologist and AIREC member, to Tricia Tingle, Choctaw and president of the Texas Indian Bar Association (15 February 1993).
57. Resolution of the Texas Historical Commission, 25 January 1991.
58. Minutes of the Texas Historical Commission, 3 February 1992, page 3.
59. 16 U.S.C.A. § 470a (b) (West, 1985). Congress' recent provisions for Indian tribes to assume the functions of SHPOs on tribal lands, 16 U.S.C.A. § 470a (d) (West Supp., 1995), will have little impact in Texas for the reasons discussed supra.
60. Memorandum from Curtis Tunnell to the THC commissioners, 17 May 1993 (emphasis added).
61. Compare H.B. 1179, by Hunter of Taylor (engrossed version) with H.B. 1179, Proposed Committee Substitute, by Barrientos.
62. Texas Historical Commission and Texas Antiquities Committee, *Self-Evaluation Report to the Sunset Advisory Commission* (Austin, TX: December 1993): 36. The distinction between intertribal and "non-tribal" and the fact that a majority of the AIREC board must be enrolled members of federally recognized tribes were lost in this report.
63. Larry J. Zimmerman, "Archaeology, Reburial, and the Tactics of a Discipline's Self-Delusion," *American Indian Culture and Research Journal* 16: 2 (1992): 37–56.
64. Robert Mallouf, "The Human Remains Issue: Archeology under the Gun," *Texas Archeological Stewardship Newsletter* (March 1993): 1.
65. Tony Hillerman, *Talking God* (New York: Harper & Row, 1989), 1–9.
66. Some scientists seem oblivious to the absurdity of simultaneously claiming that they are holding items of such great scientific and historic significance as to outweigh simple human dignity and that they have no idea exactly what they are holding and cannot find out without spending a lot of money.

67. See generally *Oversight Hearing on Understanding How the Native American Graves Protection and Repatriation Act is Being Implemented Before the Committee on Indian Affairs of the Senate*, 103d Cong., 1st sess. (1993).

68. The SHPO "may be able to facilitate consultation necessary to comply with NAGPRA." Francis P. McManamon and Larry V. Nordby, "Implementing the Native American Graves Protection and Repatriation Act," *Arizona State Law Journal* 24 (Spring 1992): 217-52, 222. It should be obvious that if the SHPO may facilitate, he or she may also obstruct.

69. Resolution of the Texas Historical Commission, 23 July 1993.

70. Minutes of the Texas Historical Commission, 23 July 1993, exhibit 3.4.

71. Letter from the author to Texas Historical Commission executive director Curtis Tunnell (22 February 1994).

72. Texas Constitution Article 1, § 27 guarantees the right of any citizen to communicate with any government agency "by petition, address or remonstrance." AIREC took the position that it could discuss human remains and grave goods not covered by NAGPRA, understanding that it could make no claims under NAGPRA except as a direct representative of a tribal government.

73. Resolution of the Texas Historical Commission, 20 April 1995.

74. "Bill OK'd Protecting Unmarked Burial Sites," *Austin American-Statesman*, 27 April 1995, City-State section.

75. Not all of the amendments were unfriendly. The Del Webb Corporation, based in Arizona and used to dealing with Indians on a more equal playing field, pushed an amendment to extend the preservation of human remains to the soil immediately surrounding the remains in the interest of a complete traditional reburial.

76. Letter from Texas state representative Edmund Kuempel to the author (7 June 1995).

77. Memorandum from Gary McAdams, president of the Wichita and Affiliated Tribes, to all tribal leaders at the Anadarko agency, Oklahoma (9 April 1993).

78. Memorandum of Understanding among the Comanche Tribal Council, The American Indian Resource and Education Coalition, Inc., and the United States Army at Fort Hood, Texas on the Use of Federal Land for Reburial of Repatriated Human Remains (25 October 1991).

79. Letter from Tonkawa Tribal Council president Virginia Combrink to Colonel Albert G. Bungard (24 October 1994).

80. Letter from Caddo tribal chairman Noah Frank to Colonel Albert Bungard (3 October 1994).

81. Letter from Apache tribe of Oklahoma chairman Henry Kostzuta to Colonel Albert G. Bungard (31 August 1994).

82. Ruth Marie, "For Sale to the Highest Bidder" (Unpublished paper produced under the supervision of Dr. William J. Mayer-Oakes, Texas Tech University, 28 April 1995).

