

NIAIR

Review

Native American Rights Fund

A Simple Question of Humanity The Moral Dimensions of the Reburial Issue

by Vine Deloria, Jr.

Editor's Note: Vine Deloria, Jr., is a member of the Standing Rock Sioux Tribe. He is currently a professor of political science at the University of Arizona, Tucson, AZ. As a noted author, theologian, historian and attorney he is uniquely qualified to address the Indian remains issue. His views on this issue will serve to further educate the Native perspective on this national problem.

1. Are American Indians human beings?

One of the most volatile and controversial issues in America today concerns the retention of the human remains and burial offerings of American Indians by museums, federal agencies and curio shops. The scope of this practice is enormous: the best estimate is that the remains and/or burial offerings of some 2 million Indians are now in the possession of museums, state historical societies, universities, the National Park Service offices and warehouses, and curio shops. These remains are, for the most part, classified as "resources" rather than as human remains. They are used for unspecified "scientific" experiments or simply displayed as part of entertainment or educational programs. Widespread opposition to American Indian efforts to reclaim ancestral remains persists among some anthropologists, archeologists, state historical society personnel, National Park Service officials, and anti-Indian groups such as the Society for American Archeology. Although

there have been some successes by American Indians, the battle has just been joined and the overall outcome is still very much in doubt.

American Indians, led by the Native American Rights Fund, the National Congress of American Indians, tribal representatives, and an increasing number of supportive state and federal legislators, are beginning to make a significant impact on this moral crisis, yet a great deal more needs to be done. In May 1989, Nebraska lawmakers enacted precedent-setting legislation which requires state-sponsored museums to return tribally identifiable skeletal remains and associated burial offerings to Indian tribes for reburial. Stanford University, the University



Contents: Vol.14, No.4, Fall 1989

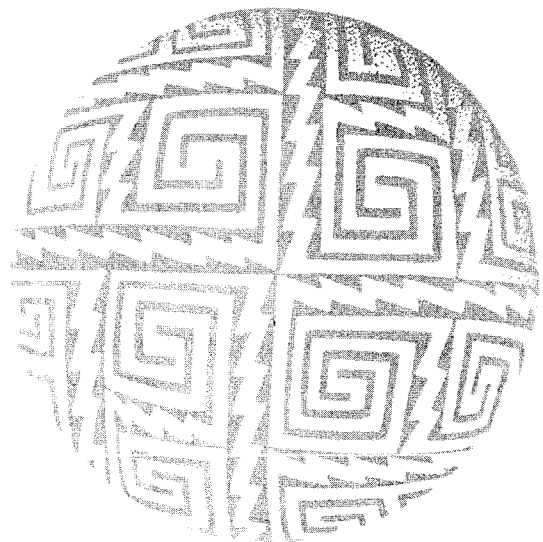
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of Minnesota, Seattle University and the University of Nebraska have been the first major institutions to step forward on behalf of American Indians, agreeing to return human remains for proper reburial. Recently the Smithsonian Institution, long a major center of opposition to Indian requests for return of human remains, reversed a long-standing, entrenched policy and agreed to return tribally identifiable human remains and associated funerary offerings to requesting tribes. The Smithsonian Institution adopted a modified policy in which access to information regarding the possession of human remains and burial offerings by the institution will be made available to tribes and interested Indian individuals and returns will be initiated. Although the Smithsonian action falls far short of most Indian expectations, it is a welcomed step in the process of educating American society about the issue. But such major museums as the Field Museum in Chicago and the American Museum of Natural History in New York remain outside the growing mainstream of progressive institutions, as their policies remain unchanged.

The most virulent opponent of American Indians at this point is the National Park Service which continues to stubbornly insist that human remains, particularly those of deceased American Indians, are "resources," as defined by the Antiquities Act of 1906 and the Archeological Resources Protection Act of 1979. Purporting to define the scope and intent of this legislation, the Park Service routinely engages in a practice of opposing Indian efforts at the state level when restoration and reburial are the subject of legislative action, and insists that these remains are under the federal control of the Park Service. This posture of the Park Service is in direct defiance of the American Indian Religious Freedom Act of 1978, a congressional directive which charged all federal agencies with the responsibility of avoiding the infringement of the practice of religious freedoms by American Indian tribes.

Exactly what is the controversy? Are American Indians being unreasonable about this matter or is there a real interest at stake here? The lines of the argument are easily drawn. American Indians insist that ancestral remains deserve the respect which the dead of every human society have always been accorded. Some anthropologists, museum directors and National Park Service officials insist that while the dead of other races merit respect, American Indian remains are more properly described as "resources" which belong in display cases, exhibits and scientific labs.

If this issue had been recently discovered and exploited by American Indians there might be some cause for suspicion and complaint by the other side. The fact is that Indians have been in a desperate struggle to affirm their humanity ever since Columbus visited these shores. Yet, in spite of all their efforts to achieve respect, on the whole Indians have been and continue to be denied the status of human beings. Some years ago Golden Books published a little children's reader featuring various animals with their offspring and an Indian mother and her child; professional sports teams continue to use derogatory and racist images of Indians; and federal agencies seem to work overtime in finding ways to inhibit and prohibit Indian religious and cultural activities. While all



these problems are symptomatic of the status of American Indians as a quasi-human species, it is the issue of reburial of human remains that enables us to focus precisely on the issue of humanity. The story goes far back and is worth mentioning.

In 1550, at the request of King Charles of Spain, a Council of Fourteen prominent Spanish scholars, representing the collective scientific and theological establishment of Spanish society, was convened at Valladolid to hear a debate on the establishment of conditions under which a "just" war could be waged against the Indians. The debaters were Juan de Sepulveda, a secular humanist scholar and leading European authority on Aristotle, and Bartolome de Las Casas, a Dominican scholar, the former Bishop of Chiapas, and an outspoken defender of the rights of the natives of the New World.

Sepulveda had never visited the New World, knew nothing about the inhabitants of it, and probably had not even seen some of the Indians who were living in Spain at that time. His argument, much like the arguments raised by anthropologists and museum directors today, relied upon abstract doctrines of science and politics which sought to maintain that the human species was naturally divided into two kinds of men: (1) the civilized man who was believed to have intelligence, sentiments, emotions, beliefs and values and (2) the brute or barbarian who lacked these essential qualities and who, by his very nature, would find it difficult, if not impossible to acquire them. Civilized men, it was vigorously argued, were naturally masters and brute men were by their very nature slaves.

Las Casas argued on the basis of cultural relativism, showing that in some respects American Indians were superior to some of the ancient societies which the Spanish admired, and that in other instances, they had admirable customs and beliefs comparable in their rationality and sincerity to anything Europe had to offer. Las Casas had vast experience in the western hemisphere; he had been an aggressive opponent of the

encomienda system of slavery as it had been practiced by the second generation of Spanish invaders of the New World, and had even denied the last rites to the Spanish landholders who practiced brutality against the natives.

For obvious reasons the debate did not reach a clear conclusion. The members of the Council of Fourteen apparently wrote some opinions on the debate but shared them only with each other. Las Casas prepared some well written, extensively documented tracts proving by then acceptable scholarship that Indians were the equal of every other human society in many respects. His major work on this subject, the *Apologia*, STILL has not been published, indicating that its evidence and arguments were too powerful to be refuted and would cause great spiritual discomfort to succeeding generations of Spanish churchmen and intellectuals. Sepulveda's arguments were very popular because they justified wholesale enslavement of the native population and appropriation of their property.

In the course of the last five centuries, other racial groups have been subjected to the same kind of discussions. During the first half of the last century, Americans seriously debated whether or not Blacks were sufficiently human to have equal rights within the American constitutional system. Immense tracts by legal scholars and theologians sought to justify slavery on the same grounds as Aristotelian scholars had originally used against American Indians. It was seriously maintained in the Supreme Court of the United States that black slaves were comparable to cattle, had no independent will of their own, and could not make decisions, and consequently were "freight" instead of human beings (Boyce v. Anderson, 1829). It took a bloody civil war and three Constitutional amendments to admit the humanity of Blacks and a century later a prolonged Civil Rights movement to begin to open American society to them.

Both the genocide of American Indians and the enslavement of Blacks were justified

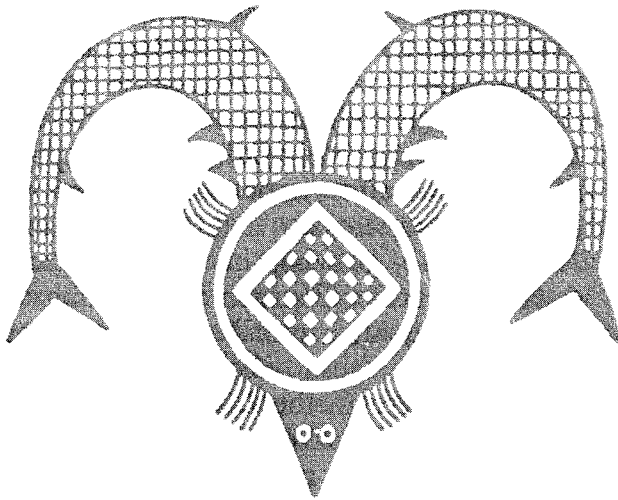
by appeals to Christianity and civilization. The so-called "just war" against the Indians was waged because the Indians did not immediately submit to the dictates of the Gospel when it was read to them in Latin prior to Spanish attacks on their villages. Massacres of Indian villages in New England were justified by citations from the Old Testament; the Sand Creek massacre was led by an ordained Methodist minister. Black slavery was felt to be justified because the slaves were being exposed to Christian slaveholders and would be baptized and converted during the course of their lives in slavery. Earlier in this century in the South a group of Blacks was used in an experiment with syphilis with the justification that science could learn a great deal by using human subjects.

With the appearance of Orientals in the United States, it became a commonly accepted doctrine that Chinese and Japanese workers had no human sentiments and could do work which no other races could do. These workers were brutally exploited as draft animals when the transcontinental railroads were being built. Then sporadic massacres against them occurred in the western states. Japanese immigrants were denied basic human rights and the rights of land ownership. When they were forced to grow vegetables under high power transmission lines, they were accused of thereby planning to sabotage American industry. During the Second World War the Japanese were rounded up and interned in concentration camps. We still do not know the number of Japanese prisoners killed or brutalized by American guards in these camps. We do know that while Congress has authorized payments to the survivors of these camps, it has been reluctant to appropriate funds to make the payments. And of course we have the constant reminder of the treatment of Mexican farm workers in the newspapers every day. As late as the 1920s there were articles in leading American magazines citing scientific "experts" to the effect that Mexicans were built closer to the

ground than other people, and were therefore intended by nature to serve as migrant farm workers.

American treatment of racial minorities has differed from Nazi Germany's treatment of the Jews primarily because it has taken place over a longer period of time and has not been as systematic as the Nazi program. Science and religion, however, have always been available as apologists for the majority who wished to dehumanize minorities for commercial and political purposes. But NONE of the groups mentioned has become the exclusive province (and property) of scholars to the extent that the bones of their dead can be disinterred with impunity to be displayed in museum cases or used in speculative scientific experiments. NONE of the other racial groups has been forced to prove their humanity by using the published works of their opponents. And NONE of the other groups has been systematically exploited by federal agencies charged by federal law to protect them.

When we look at present conditions and then look back at the debates at Valladolid, we find an uncomfortable sense of sameness. We scoff at the Spanish of the sixteenth century. Could people have seriously debated the humanity of a racial group? Wasn't Spanish behavior ludicrous because, while the scholars were earnestly debating the humanity of the Indians, other Spanish people were in the New World doing their best through rape, concubinage and occasional marriage to merge their civilized genes with the eggs of acknowledged brutes and barbarians? It is equally ludicrous today to have one group of scientists and museum directors in the nation's capitol telling congressional committees that the human remains of Indians must be kept in the Smithsonian and other institutions, and at the same time to have lines of theologians, anthropologists and psychologists waiting to be admitted to an Indian sweat lodge so they can experience Indian spirituality--the spirits of the sweat lodge, of course, often being the spirits of the dead.



Now consider the present situation that American Indians face. Museums, state historical societies and the National Park Service are waging a furious battle to prevent Indians from reclaiming their dead. They argue that retention of the human remains of American Indians is essential to the progress of science and is of great benefit in educating the American people about Indians. The human remains of American Indians are, to this way of thinking, an important national resource over which they alone must have custody. They do not and will not admit the proposition that Indians have any sentiment at all towards their dead. And if such a belief is true, the attitude is that it really doesn't matter and that the secular claims of a small group of scientists and National Park Service museum directors should have precedence over the religious beliefs and practices of American Indians.

The schizophrenia here is painfully and embarrassingly clear. How can people hold these contradictory views? Either Indian religions are a real tradition to be experienced and protected and from which it is possible to learn, or they are not. If they are valuable, there should be no question that they should be protected in the fullest capacity of the law as rapidly as possible, without any debate whatsoever. If Indian religions are not valuable, then scholars and theologians and the general public should

stop the traffic in Indian artifacts, cease visiting reservations for research and spiritual enlightenment, and return all of these worthless things lying around museums and art galleries to the simple people who do, in their primitive ignorance, cherish these things.

II. How valuable are Indian human remains for science?

When Indian tribes approach museums and other institutions to seek return of human remains, they are often told that it is necessary to keep the Indian human remains because of their great value to science. Allegedly profound and sophisticated experiments are being conducted with these remains which promise great things for all of humanity. But what are these profound studies? In spite of the repeated attempts by American Indians to get a bibliography of the studies being done by these so-called scientists, scholars have yet to produce any significant materials which would justify their claims. Scientific arguments should therefore not be given credence unless and until a clear and concise statement is made explaining the urgency and hysteria behind the scientific opposition to the reburial of Indian human remains. At the present time the arguments used by museum directors and scientists appear to be merely a crude appeal to the authority status of science and little else.

Assuming, for the moment, that American Indian human remains are critical to scientific knowledge, no explanation has been given regarding the peculiar characteristics which make Indian remains more valuable than the remains of other races. What could possibly be learned exclusively from Indian bones which could not also be learned from the bones of other races? The answers that Indians generally receive to this question are superficial and unsatisfactory. Diet? The annual reports of the Commissioner of Indian Affairs, particularly the reports of the Indian agents, can provide much more accurate information on the diets of these people in

historical times. For periods of time earlier than modern recorded history, it is a matter of such tenuous speculation that scientific tests would not reveal much of anything. It is a fact, recorded in the agents' reports, that many Indians starved to death on the reservations when Congress failed to appropriate funds for rations which were due Indians. To conduct tests to see whether or not Indians starved is superfluous and would be comparable to testing the bones of holocaust victims to see if they had died of malnutrition.

Some representatives of science claim that the prevalence of disease can be recorded using human remains in specific tests. But most of the diseases afflicting Indians in historical times are well recorded in government reports; discovering diseases of earlier Indians would produce information only mildly interesting and, in any case, speculative in the extreme. It is also suggested that by testing bones and other materials it is possible to demonstrate that American Indians actually came from Asia. But why should this proposition need to be supported by tests? It is absolute doctrine for most scientists in spite of the massive evidence in the oral traditions of the tribes that they had their origin elsewhere. In any case, tests on human remains cannot tell which way the footprints were heading and it may well be that Asia was populated from the western hemisphere, but no present test could confirm or deny that proposition.

Let us suppose for the moment that a great deal of information about disease can be elicited from human remains. Why use Indian remains when there are so many other, easily identified remains that would yield an incredible body of important and vitally needed information? In the nineteenth century the southern coastal cities were periodically ravaged by epidemics of typhoid fever and cholera. What actually caused these epidemics? Did they strike only the slaves, the free whites, or the slave-owning families? We have records and graveyards available. We can run precise tests on the remains of

people who died of these diseases and those who survived them. Why isn't the Smithsonian Institution digging up the family graveyards of the first families of Savannah, Charleston, and New Orleans, perhaps even Mobile, in an effort to obtain this data?

It is a known fact that human beings in America are growing in average size and stature of skeletal structure. Soldiers who served in the American Revolution were a bit smaller than those who were engaged in military service in the Civil War. The First and Second World Wars also saw a rise in the average size of the men in the military. What caused this increase in size? Was it the benefits of democracy, since most of these wars were waged to establish and protect democracy? Was it the rations or the military training? Did the size and capability of the weapons influence the growth of body size? These questions are important because we intend to continue waging wars and we should be at work now doing everything we can to produce future armies that are bigger and better than what we have historically fielded in our wars.

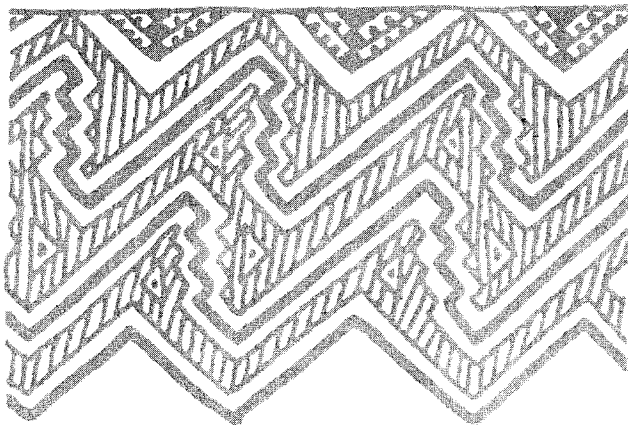
During the First World War, America was hit with a devastating form of influenza. Perhaps more deaths were suffered from this flu than from military service. We have never had a satisfactory explanation of what this sickness was. In subsequent decades the nation has been periodically visited by serious kinds of flu; during Gerald Ford's presidency "Swine Flu" became as serious as the current AIDS epidemic. We should exhume the remains of the people who died of this flu and those who survived in pre-determined test groups so that we can identify the origin and potency of this disease. During the Second World War a substantial number of men could not pass their physical examination for admission into the Armed Forces. Some scientists have attributed this high rate of rejection to the bad diet of the Depression years. But is this answer satisfactory? Could not other factors be involved here? The cemeteries of every American town and city

and the military cemeteries overseas could give us better answers than we have now.

The point of the scientific argument reaches the deceased of every racial, ethnic and economic group in America if it is taken seriously. The answers we can get from Indian remains will always be highly speculative because we don't know very much about these people. Where we already have good data on human remains we can ask increasingly sophisticated questions and receive more precise data. We need to know why we have such good athletes, why we can produce more Nobel Prize winners than anyone else, why we have so many self-made millionaires. Exhumation and testing of their remains would yield invaluable information that would increase the gross national product significantly. We really OWE IT to humanity to provide answers to these questions and we should start excavating the remains of specific individuals immediately.

III. How long should human remains be available to science?

Although some of the human remains of American Indians now in museums and state historical societies are relatively recent, most of the remains have been held by these institutions for many years, some remains for more than a century. What can possibly justify this practice? Are there so many different kinds of tests now available to



science that human remains must be held for more than a century? Or must institutions keep these remains so that each generation of scholars can perform that same tests on these bones? The justification, of course, is that valuable information is being obtained but, as we have seen, this information is not easily located and is not readily available to people who would like to see it.

Recently a group of scientists from the University of Arizona exhumed the remains of the men who were allegedly murdered and eaten by Alfred Packer, the West's most notorious cannibal. In spite of the sophisticated tests that were conducted on these remains and in spite of the fact that a good deal was known about the circumstances under which these people were believed to have been killed, the only significant information that was obtained was that one of the men might have resisted Packer's advances, a conclusion hardly worth the expense of exhumation and tests. What is more important in this respect is that the human remains were not kept by the University of Arizona for use in training its students nor were they put on display. The bones were in fact given a proper reburial.

Much the same disposition is made of other human remains that become the subject of scientific inquiry. Remains found in the desert which suggest foul play receive a variety of tests and then are properly interred. Even remains that are essential to the prosecution of accused murderers are eventually buried even though the appeals of the convicted murderer take as much as a decade to be decided by the higher courts. If there was any justification on a scientific basis for the retention and use of human remains, why aren't scientists making their voices heard in these various instances? The behavior of scientists voids their arguments from the very beginning.

IV. Is there a freedom of religion question present here?

American Indians are now citizens of the United States and therefore presumably granted constitutionally protected rights which we know as "freedoms" - press, speech, assembly, due process, and exercise of religious preference and so forth. Indians became citizens in 1924 in a short but concise federal statute that few people understood or took seriously. It was not until the 1950's that western states allowed Indians to vote since theretofore they classified Indians as persons in guardianship or non compos mentis because of the federal trust imposed on reservation lands. Since it was the practice to regard Indians as being outside the scope of constitutional protections during most of American history, the conveyance of citizenship has meant very little in terms of Indian rights.

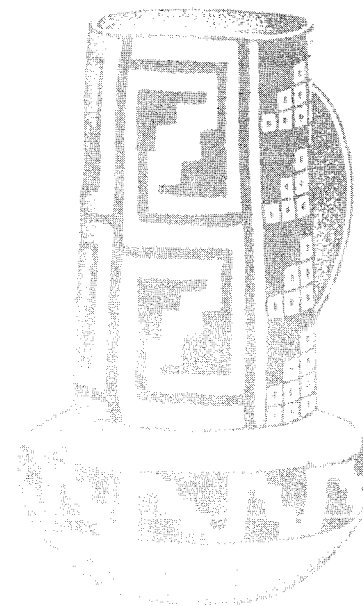
In 1978, in order to redress some practices that were badly out of balance, Congress adopted the American Indian Religious Freedom Resolution and thereby admonished federal agencies to avoid any conflicts with the practice of Indian traditional religions. In the years since that Resolution was adopted there has been a very significant increase in litigation over Indian religious practices. Courts have generally ruled against the tribes by adopting a balancing test whereby private economic interests and federal agency administrative procedures are found to have superior rights to the practice of tribal religions. About all the Freedom of Religion Resolution accomplished was to encourage federal and state agencies to adopt more restrictive formal rules to inhibit the practice of Indian religions.

The Resolution, when seen in the context of religious freedom in prisons, appears in its true light. Prison cases have generally suggested that Indian religious practices must represent the core or central belief of the religion. If a ceremony is not regarded as essential to the religion itself, it has generally been disapproved. This standard, if applied impartially to all religions represented by the prison population, would prohibit anything except baptism and circumcision, the two

absolutely essential rituals in Christianity and Judaism, respectively. Gone would be the services, hymn sings, and dietary restrictions which would be understood as peripheral cultural practices designed to keep the flocks together.

Today when the question of reburial of human remains are raised by Indians, there is a demand that Indians prove that their burial practices are central to their religious beliefs and practices. Presumably, burial ceremonies must be central to Indian beliefs to be acceptable to secular science and interested historical groups. That Indians would be required to prove this basic fact of human existence suggests that Sepulveda's arguments of the non-human nature of Indians are still taken seriously. Can any scholar or museum director honestly argue that Indians do not have the same or similar feelings toward their dead as other people? On what possible basis could this argument be sustained? Every society of which we have knowledge has dealt gently with its deceased and it is incredible to have people seriously arguing that Indians hold no feelings for their dead.

On what basis has this distinction been made? Presumably, Indians have approached death in a somewhat different manner than some other human societies and this difference is supposed to indicate a less than



human reverence on the part of American Indians. What does the evidence actually show? Most tribes had extensive ceremonies of condolence designed to deal specifically with the experience of death. Warriors, when they knew they were about to die, sang "death songs" which bravely summarized their lives and declared that death had no ultimate power over human personality. Relatives of the deceased often went to extravagant lengths to show their mourning, gashing their arms and legs with knives, cutting their hair, painting their faces black, killing beloved dogs and horses of the deceased, and burying personal property of the deceased with the body.

In many tribes the family of the deceased spent a year in mourning and did not appear as active participants in community affairs until the time of mourning had passed. The Plains tribes had a special ceremony called the "Keeping of the Soul." In this ceremony a small piece of hair from the deceased relative was put into a medicine bundle along with intimate things that were often specifically associated with the dead person. This bundle was kept in a special place in the home and was treated as a regular member of the family for a designated period of mourning. Some families kept these bundles as long as they needed to have the presence of the departed near them. Finally, in a special ceremony, the soul was released and the bundle carefully buried.

All of these customs testify to the very deep and religious feelings of Indians regarding the dead. Non-Indian behavior, on the other hand, is often impersonal, callous, and lacking in any significant depth of religious belief. It is characterized chiefly by a studious avoidance of the subject of death. A person is "sleeping," has "passed away," or, in military intelligence terms, has been "terminated." Insurance salesmen sell billions of dollars of life insurance "in case something happens" with the implication that, barring some accident, we are all immortal. Most non-Indians are buried in leakproof caskets although we all know the body decays and

turns to dust. Even Christians generally believe that the soul receives a new body at Judgment Day, but concurrent with this belief is the faith that the original body will somehow be made new again, a wholly unwarranted materialistic belief. Even today the burial service for sailors relates how the sea will one day be forced to give up its dead. So the physical aspect of death is avoided and concern for the body often outweighs the concern for the soul.

Non-Indians are further encouraged to forget the dead as soon as they can manage it. The family is expected to withhold any show of emotion during the burial service and prayers at the grave. When they do show a sign of grief, a bevy of priests, ministers, and friends rushes over to console them and remind them not to show grief in public. The task of the non-Indian in the death situation is to pretend that death has not happened, that nothing essentially is wrong. Words of comfort are more often logical analyses of how the bereaved can continue without the missing family member - you can always have more children, you can remarry, you can't expect Grandpa to live forever, and most important, they say everyone died instantaneously - all rational propositions to make death seem logical if not eminently reasonable.

As between American Indians and non-Indians, there is no doubt that Indians view death as one of the two fundamental experiences of human life, and their religious traditions and customs have some elaborate rituals to deal with death. Non-Indians, on the other hand, do not seem to take death seriously; their religious response is to deny death, both its effect and its occurrence, and they are determined to pick up their lives following a death as if nothing fundamental had happened. Judging in these terms the non-Indian should have an exceedingly difficult time proving that death is a part of the religious tradition in which he or she stands. There is no question, then, that Indian burials are within the scope of

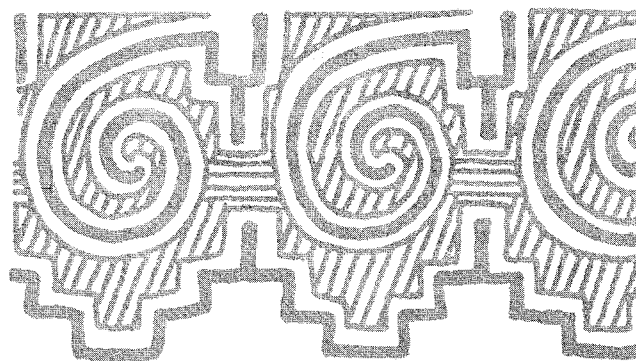
Constitutional protections, regardless of when or where they may have been made.

V. Should burial offerings be included within the religious freedom protections?

An exceedingly strange argument has recently been raised concerning the burial offerings that have been excavated along with the human remains in Indian graves. While admitting that some human remains should be returned to the tribes and communities from which they were taken, some museums and historical societies have insisted that any offerings that were found must remain with the museum or historical society if and when the human remains are returned. It is not exactly certain how this demand is justified, but apparently at the bottom of the argument is the idea that Indians were simply throwing away burial offerings or the personal property of the deceased when they placed these things in the grave with the body.

Not only is there not a shred of evidence to support this argument but merely raising the question denies the humanity of Indians once again. Funerary objects of a very personal and religious nature have always been placed with bodies when buried. The motive for placing anything with a body can be exceedingly varied; it can range from deep religious convictions or the personal desire to place the individual's most prized personal belongings with him or her. Different tribes have different customs; while some tribes would burn personal effects, others would distribute them to friends and relatives or place them with the body. The fact that one tribe might destroy personal effects does not mean that all personal effects found with bodies should be the subject of confiscation. One might as well draw distinctions between the way various Christian denominations treat burials, as use tribal customs to justify confiscation of personal goods and burial offerings.

The comparable situation in the non-Indian world would be the inclusion of rosaries, confirmation prayer books,



Congressional Medals of Honor, musical instruments, spurs and chaps, good luck charms, and wedding rings with the bodies of non-Indians. Does anyone seriously support the right of a museum or historical society to dig up graves and take possessions of these things for its own enrichment? All burial offerings and personal goods of non-Indians are protected by law. Non-Indians are not required to cite scholarly articles which suggest that the deepest religious beliefs of Catholics hold that the spirit of the dead will need the beads and prayer books in the afterlife, that the buried war hero will need his medals for a parade in Valhalla, or that the dead rodeo rider will need his equipment to compete in that heavenly roundup. Yet museums and state historical societies argue that Indians must justify the protection of burial offerings with some scholarly evidence as to the utility of the object in the afterworld.

Museum people, in part, dismiss as superstitious the Indian belief that the soul actually uses burial offerings in the next life. But if the belief is held--as it is by some tribes--then the burial offerings should be protected under the religious freedom provisions, not classified as superstition. How do we KNOW that this belief is not true? Some years ago on the Rosebud Reservation in South Dakota my father conducted a funeral for an aged Indian man. His extensive family passed by the grave and reverently placed different kinds of food on the grave. The white priest who had assisted with the funeral service began to object violently to this practice and started to take the food off the grave. "When do you think the soul of this

man will come up and eat this food?" he angrily asked the family. One of the sons pointed at a grave of a white man, recently buried and now covered with wreaths of flowers and said, "About the time your friend comes up to smell the flowers."

The objection to this comparison might be that we all know that the dead don't smell flowers or eat food, but that bit of common sense is not shared by everyone. We actually don't know if the dead eat or smell things; a certain percentage of people prefer to believe that they don't. But if Indians do believe that souls partake of food offerings or prefer to have their personal belongings buried with them, that is all the more reason why the Indian graves should be protected. They mean something; they are a part of a living religious belief system.

VI. Why are only Indians required to present evidence of their beliefs?

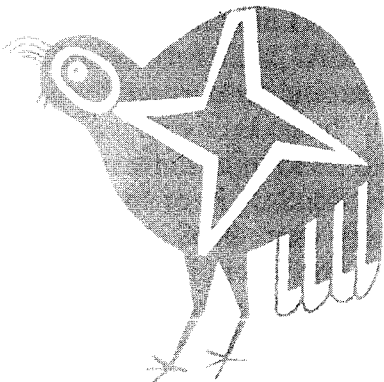
The protections of the Constitution are supposed to treat all religions as equals, the protecting principles applicable to every religion on an impartial basis. But such is not the case when it comes to American Indian religions. Indians must defend their faith against an array of museum directors, anthropologists and archeologists, National Park Service personnel, and state historians--people representing not only their own personal and professional interests, but representing secular science as well. Legislators at the state and federal level quite

frequently give great weight to the arguments of the secular scientists and balance their opinions against the testimony of Indian religious leaders and practitioners.

What body of evidence would lead any legislator to think this way? How can any scholar, no matter how well educated, possibly know more about the religious beliefs, feelings and practices than a practitioner of a religion? The most frequent answer to this question, usually delivered with a sneer of contempt, is that the scholar has objectively studied the Indian religion and therefore sees things which members of the tribe miss. But it is a well-known fact, confessed by every scholar writing on tribal religions, that all the information on religion comes from "informants" - that is, people who are willing to talk about certain aspects of their religion. The scholar is not the objective scientist which he or she is made out to be. Rather, the scholar picks up that bit of information which Indians wish to share. There are vast bodies of knowledge concerning tribal religions about which scholars know very little or nothing. EVERY scholarly writing on tribal religions is WOEFULLY incomplete.

How would other religions protect themselves if subjected to the same attack and criticism by scholars and scientists? How can devout Jews prove, to the secular mind, that religious circumcision has any religious significance at all? Aren't non-Jews also circumcised as a matter of health? Then why call circumcision religious?

Do Christians actually believe that the bread and wine they consume at Mass are the body and blood of Jesus? A simple scientific lab test could dispel this superstition. Why do Moslems avoid pork? Pork products are an important part of the American economy. Every other religion, if forced to defend their beliefs and practices in the manner required of American Indians, probably would not come out as well as most tribes do. Yet, while scholars and secular humanists are not given status as ultimate authorities over these other religions, they are given superior status when



is needed before it can be supported by NARF.

H.R. 1646 and S. 1021, Native American Grave and Burial Protection Act: On the House side, this bill was introduced by Congressman Udall on March 23, 1989, and referred to the Committee on Interior and Insular Affairs. This bill makes it illegal to sell native skeletal remains, use them for profit, or to transfer them across state lines without proper tribal or native consent. Further, Natives would be given control over the disposition of remains and burial offerings found on public or tribal lands. And, federal museums and agencies in possession of these objects would have to inventory and repatriate them unless they were shown to be acquired with tribal or Native consent or "indispensable" to a pending, important

scientific study. No hearings have been scheduled on this important bill.

On the Senate side, the companion to H.R. 1646 is S. 1021 which was introduced by Senator McCain for discussion purposes on May 17, 1989, and referred to the Select Committee on Indian Affairs. This bill is similar to H.R. 1646, but extends most of the protective measures to include grave goods and ceremonial objects.

NARF is in general support of H.R. 1646 and S. 1021 and will offer suggested minor amendments to these important bills at the appropriate time.

For further information concerning any of the above bills and NARF's position, please contact staff attorneys Walter Echo-Hawk, Henry Sockbeson or Steve Moore.

Nebraska Lawmakers Enact Precedent-Setting Indian Burial Legislation

by Robert Peregoy

In May 1989, Nebraska lawmakers enacted a precedent-setting law which requires state-sponsored museums to return Indian skeletal remains and associated burial goods to tribes of origin for reburial. The law is the first of its kind in the country that expressly requires the return of all tribally identifiable skeletal remains and linkable burial goods to Indian tribes for reburial.

The historic action taken by Nebraska lawmakers reflected public sentiment. A scientific poll conducted on behalf of the *Omaha World Herald* in February 1989 revealed that 69% of those polled favored the reburial of Indian skeletal remains and burial goods.

The precedent-setting legislation is the result of a prolonged struggle by indigenous and present-day Nebraska tribes to secure equal protection and treatment of the Indian dead. Similar bills in the 1987 and 1988 legislatures were unsuccessful. The 1989 lobbying campaign was led by NARF on behalf of the Pawnee Tribe of Oklahoma and the Winnebago Tribe of Nebraska, in conjunction with the Nebraska Indian Commission and affiliated tribal representatives.

The decade-long controversy which culminated in the new law pitted the constitutional religious freedom and equal protection rights of Indian peoples against the interests of science and history in retaining and studying dead Indian bodies and burial goods. During the 1989 legislative session, the widely-publicized controversy focused on a year-long dispute between the Pawnee Tribe and the Nebraska State Historical Society (NSHS) which had rejected numerous requests to return over 300 dead Pawnee bodies and associated burial goods to the Tribe for reburial. The Pawnee people believe the spirits of their ancestors will

wander and never be at peace if the remains of their deceased and grave goods are disturbed or separated.

The opposition to the legislation was led by James Hanson, executive director of the NSHS. Hanson was joined on the losing side by the newly formed "Citizens to Save Nebraska's History," a small special interest group spawned, in part, by several individuals employed in key positions by the Midwest division of the National Park Service.

The opponents waged an extensive grass-roots campaign of misinformation, sensationalism and half-truths about the intent, scope and effect of the bill. Tactics employed included outrageous, erroneous allegations that the Pawnee people no longer practice their religious beliefs with regard to their dead, that burial goods are not religious objects, and that the Pawnee would sell the remains and burials goods of their ancestors on the antiquities market.

The historic legislation was sponsored by Sen. Ernie Chambers of Omaha, a staunch advocate of the rights of the oppressed and long-time friend of the Indian community. Under the provisions of the new law, Nebraska institutions must return all tribally identifiable skeletal remains and linkable burial goods to Indian tribes within one year of the date of the tribal request. The new law also prohibits the unnecessary disturbance of unmarked burials and establishes criminal penalties for trafficking the contents of burials located within the state. In the event unmarked Indian graves must be disturbed in instances such as road construction, the legislation requires state authorities to contact identifiable Indian tribes and comply with their decision as to reburial or other disposition. *(Robert Peregoy is a NARF staff attorney and lobbied for enactment of the Nebraska legislation.)*

Update on Kansas Reburial Legislation

by Edgar T. Bristow

The tribal pleas for equal treatment of human remains was recently brought to the forefront in Kansas. The result shows what can happen when local government and citizenry recognize their moral obligation, and demonstrate their willingness to cooperate.

The plea in Kansas was raised in relation to the burial site of 146 Caddoan dead near Salina. These 146 Caddoan people were buried in a communal cemetery between 600 and 700 years ago near the confluence of the Salina and the Smoky Hill Rivers. There they remained at rest for several hundred years. However, in the 1930s, the landowner, who was a sheriff-turned-amateur archaeologist, excavated the burial ground in the interest of science. Science soon turned to profit when the site was sold to a local grocer/farmer as a tourist attraction business.

The Indian remains were exposed by excavation at various levels, with a pedestal of dirt left as a display table. The decedents' bones were encased in several thick layers of shellac. A metal shed was then constructed over the burial ground. Inside there is a concrete walkway with a fence to keep viewers off the dead bodies. Several billboard signs along Interstate 70 guide the tourist to the "Indian Burial Pit." Once at the site, for a \$3.50 fee, 10,000 visitors per year enter the shed and view this macabre sight.

Thus continued a thriving "business" until 1985 when an Indian woman's curiosity led her to the "Indian Burial Pit." The woman was shocked and deeply disturbed by the commercial exploitation she saw there. She contacted the faculty at Haskell Indian Junior College in Lawrence, Kansas. The result was a seminar in which Indian leaders and others were invited to discuss the commercial exploitation of that Indian burial ground. At this seminar Indian leaders learned that the State of Kansas planned to purchase the site

and construct a museum there. It became clear to the State that this was not acceptable to the Indian leaders.

NARF was retained by the three tribes comprising the descendants of the Caddoan people buried at the pit: the Pawnee Tribe of Oklahoma, the Wichita and Affiliated Tribes, and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

NARF engaged in a lobbying effort for legislation to purchase the site and to rebury the remains. Earlier legislation to purchase the site had failed, because the landowners increased the proposed sales price during the process. In the many meetings which followed, the landowners, state and county historical societies, the State Archaeologist, state legislators, and the Tribes demonstrated their willingness to cooperate and compromise in order to obtain a fair and workable solution. Indeed, the final outcome was made possible only by the sensitive support of the Salina community, the Kansas State Historical Society, and the State Archaeologist. For the injured Tribes, it was very heartwarming to see such an outpouring of support from the local community and government.

The final result of the negotiations was the Treaty of Smoky Hill of February, 1989, in which it was agreed that: 1) landowners would sell the site and an ingress/egress easement to the state for \$90,000, 2)) commercial operation of the "Indian Burial Pit" would cease as of the date of sale, 3) the site improvements would be removed and the remains reburied in situ at the expense of the state, 4) \$40,000 would be approved by the State to assist in the reburial, and 5) the site will be maintained by the state and county historical societies. This agreement, which became final upon the passage of enabling legislation in April 1989, facilitated passage of the "Kansas Unmarked Burial Sites

Preservation Act," HB No. 2144 which was signed by Governor Mike Hayden on April 24, 1989. These new laws evince that the Kansas lawmakers were quick to accept the moral responsibility for seeing these 146 remains properly buried.

HB 2144 protects unmarked burials in Kansas on a state-wide basis from unauthorized disturbance and prohibits unregulated displays of human remains. The law passed the Legislature with overwhelming support on a 123 to 1 vote in the House and a unanimous vote in the Senate. The new law will be carried out by a nine-member board (four members are Indian appointees by the four Kansas Tribes) which will be attached to the Kansas State Historical Society.

With the passage of these new burial protection and reburial laws, Kansas joins the ranks of a growing number of states which have legislated in recent years to protect the

sanctity of Indian graves from unnecessary disturbances and to prohibit the mistreatment of Indian dead.

A tribal reburial ceremony in Salina, Kansas, is set for December 2, 1989, to be conducted by the three Tribes. Donations are now being sought by the Pawnee Tribe to cover the reburial expenses not covered by the state. Donations may be sent to: Robert Chapman, President, Pawnee Tribe, P.O. Box 470, Pawnee, Oklahoma 74058, 918-762-3624

As exemplified by the sensitivity and support from the Salina and Kansas communities, society is beginning to recognize that Indian dead deserve the same respect as the dead of other races, and their burial sites deserve equal protection under the laws. (*Edgar T. Bristow is a NARF attorney.*)

Case Updates

Gwich'in Steering Committee v. Lujan

NARF recently filed suit against the Department of Interior on behalf of the Gwich'in Athabascan Tribes in Alaska and Canada in *Gwich'in Steering Committee v. Lujan*. The suit challenges the adequacy of a legislative environmental impact statement the Department of Interior submitted to Congress regarding the impact of oil development on the Arctic National Wildlife Refuge. The Refuge is home to hundreds of thousands of caribou upon which the Gwich'in people rely for their livelihood and cultural well-being.

Alaska Supreme Court Rules Non-Reservation Native Villages Are Tribes

On September 22, 1989, the Alaska Supreme Court, for the first time in its history held that non-reservation Native Villages in Alaska are "tribes" possessing certain governmental powers. The Court held that the Nome Eskimo Community, a Native group organized under the Indian Reorganization Act (IRA) of 1934, constituted a "tribe" within the meaning of the IRA and its tribal building was protected against tax foreclosure proceedings by the City of Nome. The Nome decision is significant because it provides land protection to all 70 IRA tribes in Alaska and covers all their lands, both developed and underdeveloped. It protects against any kind of involuntary loss of such lands without the Tribe's consent. The decision opens the door to the other 130 traditional village councils who may now opt to organize under the IRA in order to secure land protections.

NARF Resources and Publications

THE NATIONAL INDIAN LAW LIBRARY

The National Indian Law Library (NILL) has developed a rich and unique collection of legal materials relating to Federal Indian law and the Native American. Since its founding in 1972, NILL continues to meet the needs of NARF attorneys and other practitioners of Indian law. The NILL collection consists of standard law library materials, such as law review materials, court opinions, and legal treatises, that are available in well-stocked law libraries. The uniqueness and irreplaceable core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. Those materials in the public domain, that is non-copyrighted, are available from NILL on a per-page-cost plus postage. Through NILL's dissemination of information to its patrons, NARF continues to meet its commitment to the development of Indian law.

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The NILL Catalogue

One of NILL's major contributions to the field of Indian law is the creation of the National Indian Law Library Catalogue: An Index to Indian Legal Materials and Resources. The NILL Catalog lists all of NILL's holdings and includes a subject index, an author-title table, a plaintiff-defendant table and a numerical listing. This reference tool is probably the best current reference tool in this subject area. It is supplemented periodically and is designed for those who want to know what is available in any particular area of Indian law. (1,000 + pgs. Price: \$75).

Bibliography on Indian Economic Development

Designed to provide aid on the development of essential legal tools for the protection and regulation of commercial activities on Indian reservations. This bibliography provides a listing of articles, books, memoranda, tribal codes, and other materials on Indian economic development. 2nd edition (60 pgs. Price: \$30). (NILL No. 005166)

Indian Claims Commission Decisions

This 43-volume set reports all of the Indian Claims Commission decisions. An index through volume 38 is also available, with an update through volume 43 in progress. The index contains subject, tribal, and docket number listing. (43 volumes. Price \$820). (Index price: \$25). (Available from the Indian Law Support Center).

Prices subject to change

INDIAN RIGHTS MANUAL

A Manual for Protecting Indian Natural Resources. Designed for lawyers who represent Indian tribes or tribal members in natural resource protection matters, the focus of this manual is on the protection of fish, game, water, timber, minerals, grazing lands, and archaeological and religious sites. Part I discusses the application of federal and common law to protect Indian natural resources. Part II consists of practice pointers: questions to ask when analyzing resource protection issues; strategy considerations; and the effective use of law advocates in resource protection. (151 pgs. Price \$25).

NARF Resources and Publications

A Manual on Tribal Regulatory Systems. Focusing on the unique problems faced by Indian tribes in designing civil regulatory ordinances which comport with federal and tribal law, this manual provides an introduction to the law of civil regulation and a checklist of general considerations in developing and implementing tribal regulatory schemes. It highlights those laws, legal principles, and unsettled issues which should be considered by tribes and their attorneys in developing civil ordinances, irrespective of the particular subject matter to be regulated. (110 pgs. Price \$25).

A Self Help Manual for Indian Economic Development. This manual is designed to help Indian tribes and organizations on approaches to economic development which can ensure participation, control, ownership, and benefits to Indians. Emphasizing the difference between tribal economic development and private business development, this manual discusses the task of developing reservation economies from the Indian perspective. It focuses on some of the major issues that need to be resolved in economic development and identifies options available to tribes. The manual begins with a general economic development perspective for Indian reservations: how to identify opportunities, and how to organize the internal tribal structure to best plan and pursue economic development of the reservation. Other chapters deal with more specific issues that relate to the development of businesses undertaken by tribal government, tribal members, and by these groups with outsiders. (Approx. 300 pgs. Price \$35).

Handbook of Federal Indian Education Laws. This handbook discusses provisions of major federal Indian education programs in

terms of the legislative history, historic problems in implementation, and current issues in this radically changing field. (130 pgs. Price \$20).

1986 Update to Federal Indian Education Law Manual (\$30) Price for manual and update (\$45).

A Manual On the Indian Child Welfare Act and Law Affecting Indian Juveniles. This fifth Indian Law Support Center Manual is now available. This manual focuses on a section-by-section legal analysis of the Act, its applicability, policies, findings, interpretations, and definitions. With additional sections on post-trial matters and the legislative history, this manual comprises the most comprehensive examination of the Indian Child Welfare Act to date. (373 pgs. Price \$35).

PUBLICATIONS

ANNUAL REPORT. This is NARF's major report on its programs and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations, and to others upon request.

THE NARF LEGAL REVIEW is published by the Native American Rights Fund. Third class postage paid at Boulder, Colorado. Susan Arkeketa, Editor. There is no charge for subscriptions.

Tax Status. The Native American Rights Fund is a nonprofit, charitable organization incorporated in 1971 under the laws of the District of Columbia. NARF is exempt from federal income tax under the provisions of Section 501 (c) (3) of the Internal Revenue Code, and contributions to NARF are tax deductible. The Internal Revenue Service has ruled that NARF is not a "private foundation" as defined in Section 509(a) of the Internal Revenue Code.

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Native American Rights Fund

The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian rights. The priorities of NARF are (1) the preservation of tribal existence; 2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments of Native Americans; and (5) the development of Indian law.

Our work on behalf of thousands of America's Indians throughout the country is supported in large part by your generous contributions. Your participation makes a big difference in our ability to continue to meet ever-increasing needs of impoverished Indian tribes, groups and individuals. The support needed to sustain our nationwide program requires your continued assistance. Requests for legal assistance, contributions, or other inquiries regarding NARF's services may be addressed to NARF's main office: 1506 Broadway, Boulder, Colorado 80302. Telephone (303) 447-8760.

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