To the Graduate Council:

I am submitting herewith a dissertation written by Michelle Dawn Hamilton entitled "Seeking after Empire: Bioarchaeologists and American Indians in the New Millennium." I have examined the final paper copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Anthropology.

Murray K. Marks

Murray K. Marks, Major Professor

We have read this dissertation
and recommend its acceptance:

Acceptance for the Council:

Vice Chancellor and Dean of
Graduate Studies

SEEKING AFTER EMPIRE:
BIOARCHAEOLOGISTS AND AMERICAN INDIANS IN THE NEW MILLENNIUM

A Dissertation
Presented for the
Doctor of Philosophy
Degree
The University of Tennessee, Knoxville

Michelle Dawn Hamilton
December 2004

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DEDICATION

This project is dedicated to my family, the finest people I have ever known. To my parents, Anna Antonia Clemente Hamilton and Billy Dale Hamilton; I hope you realize how much your love, patience, kindness, and humor have always been a source of comfort and support to me, even when we were a continent apart. To my sister Nicole Scilla Hamilton; you are the most generous, funny, and decent sister I could ever hope for. You have always been an inspiration to me, and I am so lucky that you are in my life.

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NB: The views and opinions expressed within this work are solely the author's and do not necessarily reflect the views of my committee members, The University of Tennessee's Department of Anthropology, or the Eastern Band of Cherokee Indians.

ABSTRACT

New and amended cultural resource laws are changing the academic and scientific landscape of North American bioarchaeology and archaeology. The passage of the Native American Grave Protection and Repatriation Act in 1990 was an important watershed event in the history of the discipline of biological anthropology, and the increasingly successful utilization of Section 106 of the National Historic Preservation Act by federally recognized sovereign tribes is resulting in unanticipated legal restrictions on the scientific collection of bioarchaeological data from American Indian skeletal remains and mortuary site settings.

The evolving relationship between bioarchaeologists and American Indians is examined in the context of understanding these implemented changes to both the discipline of biological anthropology and the culture of modern American Indians, vis à vis the Eastern Band of Cherokee Indians. This study provides a historical perspective of this relationship, and challenges bioarchaeologists to adapt their approach to understanding these cultures by using new scientific paradigms drawing upon collaborative efforts with tribal communities.

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Chapter One

INTERSECTION OF CULTURES: ANTHROPOLOGISTS AND INDIANS

> We are two distinct races, and must ever remain so, with separate origins and separate destinies. There is little in common between us. To us the ashes of our ancestors are sacred and their final resting place is hallowed ground, while you wander far from the graves of your ancestors and, seemingly, without regret...your dead cease to love you and the land of their nativity as soon as they pass the portals of the tomb - they wander far away beyond the stars, are soon forgotten and never return (Chief Seattle's speech to Governor Isaac Stevens, December 1854).

The implementation of new and amended cultural resource laws is changing and challenging the academic and scientific landscape of North American biological anthropology and archaeology. The passage of the Native American Grave Protection and Repatriation Act (NAGPRA) in 1990 is an important watershed event in the history of the discipline of biological anthropology, while the increasingly successful utilization of Section 106 of the National Historic Preservation Act (NHPA) by federally recognized sovereign tribes has unleashed unanticipated legal restrictions on the scientific collection of data from American Indian skeletal remains and mortuary site settings.

To many in the anthropological community, these regulations represent legally imposed limitations on potential sources of information on North America's prehistoric past. Conversely, to the American Indian community, these regulations represent long overdue legal endorsement of the right to protect their own biological and cultural patrimony, and these laws are tantamount to modern civil rights legislation.

Because of the repatriation issue, words and concepts utilized more often by practitioners of cultural anthropology have been introduced into the lexicon of the biological anthropologist. Colonialism, imperialism, and exploitation are buzzwords and

concepts now familiar to biological anthropologists dealing with American Indian skeletons and the settings that yielded them.

This study outlines the evolving relationship between anthropologists and American Indians by focusing on recent cultural resource laws in the context of understanding their effects on both the discipline of anthropology and the culture of modern American Indian people. This study provides a perspective on this relationship as it existed in the past when anthropologists first initiated skeletal studies of indigenous American cultures, as it exists currently in the opening years of the new millennium, and as it may exist in the future. It also challenges anthropologists currently studying American Indian skeletons to adapt their approach to understanding American Indian cultures by using new scientific paradigms that draw upon mutually collaborative and symbiotic efforts between scientists and tribal authorities.

Through historical synthesis, personal interviews with anthropologists and American Indians, analysis of anthropological and American Indian repatriation literature, review of cultural resource laws, and application of bioethical standards to anthropological research, I suggest new theoretical and methodological avenues of research and inquiry for anthropologists to consider. I urgently propose refining the discipline in preparation for the future, and key themes to this evolving approach will be adaptation, empowerment, and collaboration.

Definitions

I have utilized a number of terms interchangeably to convey a broader or more specific meaning than may be typical. The following definitions are used within this study:

Anthropologist: Traditionally, this broad discipline is composed of four main fields of study including biological anthropology, archaeology, cultural anthropology, and linguistic anthropology. Depending on context, I use "anthropologist" to refer only to a specialist within biological anthropology or archaeology, as these are the specific sub-disciplines focused upon in this work. If called for, I will make explicit my intentions by specifying "biological anthropologist" or "archaeologist." Additionally, perhaps reflective of a certain desire to redefine the discipline, the term "biological anthropology" is supplanting the term "physical anthropology," although they are used interchangeably in this work, and the new terms "biocultural anthropology" and "bioanthropology" are increasingly utilized as well. In general, the overlapping specialization between the fields of biological anthropology and archaeology is called bioarchaeology, and that term will also be used where appropriate.

American Indian: This all-encompassing term includes ancestral and living "modern" descendants of the original indigenous populations of North America. I have chosen to use the term American Indian over Native American based on recent literature and conversations with numerous American Indians who prefer the former. "Native American" merely denotes a person born in the United States. Furthermore, because the focus of this research is cultural resource laws and their effects on the American anthropological landscape, when I refer to modern living American Indians, I refer only to those federally recognized groups of Indian tribes (bands, natives, peoples, nations, cultures, or other communities of Indians including Alaska village natives) or Native Hawaiian organizations (Hui Malama I Na Kapuna O Hawai'i Nei) recognized as eligible for special programs and services provided by the United States government because of their legal status as "Indians."

Cherokee: This study focuses on the federally recognized Eastern Band of the Cherokee Nation in North Carolina, although they refer more commonly to themselves as the Eastern Band of Cherokee Indians. In this work, the Eastern Band of the Cherokee Nation, the Eastern Band of Cherokee Indians, the Eastern Band, and Cherokee all refer to the aforementioned tribal entity. If reference is made to the other federally recognized Cherokee groups, the Cherokee Nation and the United Keetoowah Band of Cherokee, they will be specified within the text.

Cultural Resource Laws: This broad term includes a suite of legislation dictating procedure and treatment of archaeological, biological, historic, and sacred resources. NAGPRA, Section 106 of the National Historic Preservation Act, the Archaeological Resources Protection Act (ARPA) and others will be the major focus here. The world of cultural resource law is littered with an overwhelming abundance of abbreviations, and popular acronyms like ACHP, NHPA, NRHP, NEPA, NAGPRA, and ARPA which will be defined at their first appearance within the document.

Tribal Sovereignty: By virtue of treaties, policies, legislation, Executive Orders and other governmental declarations, federally recognized Indian tribes have a unique relationship to the Federal Government. This relationship extends to matters of American Indian cultural, archaeological, and biological patrimony.

> In general, states have no legal jurisdiction in Indian country, and therefore tribal and federal law govern in both criminal and civil cases. The American Indian experience is different from other ethnic minority groups in that 1) Indian nations were colonized by Europeans and did not immigrate from other places within the last 700 years, and 2) health care, education, and social programs were bought and paid for with ceded land by treaty. The term tribal sovereignty refers to this unique relationship by which Indian tribes/nations maintain the right (by treaty) to negotiate directly with the federal government as independent nations (Hendrix n.d).

Skeletal remains: In the eyes of American Indians, words such as archaeological materials, resources, specimens, relics, artifacts, and collections are offensive because they dehumanize the dead and transform them into objects of study. As a counterpoint, when forensic anthropologists refer to the dead they generally use descriptive terms such as victim, decedent, individual, person, male, female, and child, reminding us of their humanity. Throughout this work I have attempted to curtail my use of those terms deemed offensive to American Indians, and I utilize more descriptive language in their stead.

Race: The term "race" as it is now utilized in biological anthropology has changed significantly within the last decades of the 20th century. The following definition is from the American Association of Physical Anthropologists' "Statement on Biological Aspects of Race" (American Journal of Physical Anthropology 1996), and are lightly edited excerpts of offered revisions of the 1964 UNESCO statement on race:

> There is great genetic diversity within all human populations. Pure races, in the sense of genetically homogenous populations, do not exist in the human species today, nor is there any evidence that they have ever existed in the past.
>
> There is no necessary concordance between biological characteristics and culturally defined groups. There is no causal linkage between physical and behavioral traits, and therefore it is not justifiable to attribute cultural characteristics to genetic inheritance.
>
> Physical, cultural and social environments influence the behavioral differences among individuals in society. Although heredity influences the behavioral variability of individuals within a given population, it does not affect the ability of any such population to function in a given social setting.
>
> The genetic capacity for intellectual development is one of the biological traits of our species essential for its survival. The peoples of the world today appear to possess equal biological potential for assimilating any human culture.

Race is not so much a matter of biology as it is a complex cultural construct defined by physical and social environments. In this work, it is often necessary to use the term "race" as it applied to previous intellectual eras, when it defined differences between populations based on phenotypic and genotypic variation in skin pigmentation, hair type, eye color, cranial capacity, and intelligence level.

Use of photographs depicting skeletal remains: I have not included actual photographs of American Indian skeletons. Where crucial to content I have used artistic representations in the form of line drawings, sketches, and computer-modified images. Many American Indian groups, including the Eastern Band of Cherokee, view photographs of the dead as actual representations of death. Digital and photographic images captured by light are perfect one-to-one depictions of death, and are culturally and physically dangerous to Cherokee society in a manner that sketches, drawings, and other "imperfect" captures are not (Russell Townsend, personal communication 2004).

Project Rationale

Measuring diachronic and ecological change with bone and teeth is the most successful means of assessing past human adaptive efficiency in the absence of recorded social histories. Through the last twenty-five years of analyzing prehistoric human remains, modern biological anthropologists have cobbled together a unique explorative and ecologically-based theoretical and methodological paradigm defined through borrowed techniques from traditional health sciences such as medicine, dentistry, nutrition, pathology, growth and development, radiology, microscopy, etc., to attendant academic approaches including evolutionary biology, ecology, geology, and archaeological sciences

(for reviews see Armelagos et al. 1982, Katzenberg and Saunders 2000, Saunders and Katzenberg 1992, Steckel 1993). The body of theory and data generated by bioarchaeological research on American Indian skeletons has found increasing use in academic and applied areas outside of anthropology, including economics, history, demography, geography, health, and nutrition (Coatsworth 1996, Rotberg and Rabb 1985, Steckel 1993, Steckel and Rose 2003).

American biological anthropologists trained prior to the millennium learned and refined their osteological skills using prehistoric American Indian skeletons from mortuary contexts for study and the large volume of indigenous prehistoric American skeletons available for scientific analysis led to the generation of a sizeable body of descriptive data for interpretation and hypothesis testing. This research resulted in cohesive ecological theories of early human biological adaptation among this continent's earliest inhabitants.

The excavation and recovery of these remains *in situ* from burials, mounds, tombs, inhumations, cremations, and other mortuary programmes allowed the bioarchaeologist to interpret not only biological information, but cultural and social behaviors as well, leading to the development of new avenues of information regarding social status, political systems, social stratification, interpersonal violence, community organization, etc. (see Larsen 1982, Powell 1988, Storey 1992, Whittington 1997). Albeit exploitive, the prehistoric North American landscape, both biologically and socially, is arguably one of the world's best understood due in large part to bioarchaeological interpretations of that history.

The 1990 passage of the Native American Grave Protection and Repatriation Act (NAGPRA) and enforcement of other powerful cultural resource laws (see Chapter Three) have directly influenced the means by which American biological anthropologists now

conduct themselves and their research in North America. Undeniably, these laws and regulations now shape access and categories of information made available to anthropologists. Besides an obvious focus on other non-American Indian skeletal collections, i.e., historic, modern, forensic and international, NAGPRA and cultural resource laws have forced a paradigmatic shift in how American Indian skeletons are viewed and utilized. Rather than argue for the merits or disadvantages of the laws in the eyes of the discipline, it would be more instructive to examine the accommodations and shifts now possible within the field as a result of legal compliance with the laws. Savvy bioarchaeologists are re-tooling not only their methods, but also the entire theoretical format that previously guided opportunistic academic research policy and agenda.

Novel approaches in bioarchaeological study of North American prehistory are now being formulated with new theoretical domains, innovative research designs, and pioneering analytical techniques coming to the forefront, i.e., techniques that take advantage of non-destructive or minimally-invasive studies of human remains including digitization of skeletal landmarks, radiographic reliance, renewed interest in dental markers, body-cavity sampling, DNA and genetic signatures, etc. These perceptual adjustments mark a period of significant adaptation for researchers. The purpose of this work is to present a balanced and cohesive picture of the discipline's current adaptation to the post-NAGPRA environment.

To date, there has been little study of the complex ways in which NAGPRA and other cultural resource laws have affected the discipline of biological anthropology - surprising in light of the fact that bioarchaeologists are arguably those scientists most directly impacted by this legislation. This fundamental episode in the history of biological anthropology deserves a more detailed inspection. This research is a non-traditional

bioarchaeological study because it does not rely on bodies of data for statistical analysis, and while some may view that "[t]he average Ph.D. thesis is nothing but a transference of bones from one graveyard to another" (Dobie 1945), this research seeks to address significant issues within the discipline which have yet to be resolved. The underlying hypothesis is that biological anthropology as a discipline is modified in ways that have yet to be outlined, and this work will clarify how the discipline has adapted to the post-NAGPRA environment through the construction of a representative social and academic history. In this work, candid narratives by biological anthropologists and American Indians from the Eastern Band of Cherokees elevate the topic beyond the polarized debate by focusing on broader themes that constructively assess direct impacts to the field of biological anthropology, and identify new directions in theory, method, and practice. The major themes of this study include:

- The origin of the discipline of biological anthropology and its evolution from a practice concerned with racial typology, craniology, and the construction of ranked intelligence hierarchies to one of holistic bioarchaeology, focusing on biological similarities and adaptive capabilities across all environments.

- Early events and academic practices leading to outcry, political reaction, and response in the American Indian community over research and displays of excavated skeletons, mortuary goods, and material remains by museums, academic institutions, and roadside attractions.

- A review of NAGPRA and associated cultural resources legislation and a discussion of the costs and benefits to both American Indian and anthropological communities.

- A narrative component by members of the Eastern Band of Cherokee Indians and their policy on repatriation and reburial, perspectives on death and their impressions of the work of biological anthropologists.

- A narrative component by biological anthropologists drawn from interviews and published accounts on a broad range of themes designed to assess the impacts of NAGPRA and cultural resource laws to the discipline and how they view the future of prehistoric skeletal studies in North America.

- An argument that anthropologists have an obligation to consider the physical and spiritual well-being of a people and to insure that their research is not actively causing harm, illustrating this scenario via modern examples from the Eastern Band of Cherokee Indians.

Chapter Two

THE BEGINNINGS OF ANTHROPOLOGY

> Man may be excused for feeling some pride at having risen, though not through his own exertions, to the very summit of the organic scale; and the fact of his having thus risen, instead of having been aboriginally placed there, may give him hope for a still higher destiny in the distant future...[H]owever...Man still bears in his bodily frame the indelible stamp of his lowly origin (Darwin, 1871:405).

In its broadest sense, science is a tool of inquiry used to explain and understand process in the natural world. When questions are posed that are not answerable by current scientific fields, the result is the development of new scientific disciplines to explain the new descriptive information (Kuhn 1977). Molecular biology and evolutionary studies are examples of scientific fields within biology developed to address new information and specific questions (Mayr 1982). The same is true within the social sciences, where the birth of a new discipline often results from new categories of information. The fields of biological anthropology and archaeology were social sciences that developed in response to new discoveries, new ways of thinking about the past and present, and new insight into the human biological and cultural condition, with an eye towards ultimately understanding human evolution and human variation (Johnson 1999, Strum 1999, Washburn 1951).

Formalized anthropology, including the intertwined disciplines of biological anthropology and archaeology, arose two hundred years ago as part of the intellectual outgrowth of the biological, natural, and geological sciences in Europe (Spenser 1982, Willey and Sabloff 1993). Historical forerunners and contributors to the development of anthropology, however, span much of the length of recorded human history (Bindon

2004). Three centuries before Christ, in *Corpus Hippocraticum*, Hippocrates noted that variability in human body form and shape was influenced by environmental constraints like aridity and climate (Lloyd 1984), while Aristotle in *Historia Animalia* noted the similarities of monkey and ape species to human beings (Thompson 1992). Three hundred years after the birth of Christ, St. Augustine in *De Civitate Dei Contra Paganos* (Funkenstein 1989) notes that all men are descended from the biblical Adam, stressing monogenesis as the source of creation for humanity and the role of the *scala naturae* in determining man's place in nature (discussed later in this chapter).

From Chaos to Order: Classification and Typology

By the Age of Enlightenment in the 18th century, scientists and naturalists were firmly invested in systematics as a way to order and understand the living world. Hunt notes:

> [C]lassification is a necessary forerunner of disciplined research, especially in the formative stages when the boundaries of problems and orderly methods of investigation are being defined and formulated (1981:341).

The publication of Linnaeus' *Systema Naturae* in 1758 laid the foundations for the scientific classification of all living organisms. Scientists were spurred by the wealth of new plant and animal discoveries coming from the New World, as well as expeditions into the Old World that were bringing to light a diversity of human beings and societies from those previously known to Europeans (Hogden 1964, Hunt 1981). It was in the Aristotelian tradition of ordering this "abundance of new types of human kind" with which European scientists and naturalists began to preoccupy themselves (Shapiro 1959). In this atmosphere, variation was seen as fixed and in this scientific climate, "[t]he

diversity or variability of organisms, or human races, or diseases, [was] thus classified into a fixed number of discrete, sharply separated essences or archetypes." (Hunt 1981:341). By the 19th century, typological classification of human races using comparative morphology via craniometry and anthropometry was a major focal point of interest (Brew 1968). This emphasis on distinguishing characteristics of human phenotypes soon became the domain of a formalized new discipline that incorporated both the practitioners and paradigms of biology, medicine, and the natural sciences (Hrdlicka 1899, 1918). By the mid 1800's, anthropology in Europe was firmly entrenched as an established discipline, and at its foundation laid racial classification, of both extant humans and newly discovered fossil forms.

In the United States, as in Europe, similar scientific currents were also navigated. Early American scientists and naturalists were interested in the history of their New World and their attention soon focused on the origins of the American Indian. In this atmosphere of intense curiosity about the continent's first inhabitants, archaeological excavations for prehistoric Indian settlements and artifacts routinely uncovered skeletal remains that at that time were not seen as holding any scientific value. With the new and growing emphasis on typology and classification, however, scientists soon began to assign a new importance to prehistoric Indian skeletons. Biological anthropology was now well established as a scientific discipline in America and its new practitioners were anxious to tackle the question of origin and race in prehistoric America (Boas 1938).

Previous conceptions about the placement of man in nature, extending from the "great chain of being" to the *scala naturae* firmly established man in the highest echelon of living forms on earth (Lovejoy and Boas 1948). The underlying principle of this precept held man's relationship not as part of nature, but in dominion over all life forms as

granted by scripture. But soon a shift in focus from the assumption of man as occupying the exclusive summit of creation to an attempt to understand and place him comparatively on earth questioned this relationship, and this shift was heralded by a number of important and influential scientists.

Linnaeus, while still attempting to map the *scala naturae* onto human and animal life, published the tenth edition of *Systema Naturae* in 1758 and broke with then current doctrine by classifying humans with the primates. He also formally listed humans as *Homo sapiens* and separated them into four distinct geographical categories while invoking the Hippocratic tradition of the "Four Humors" first advanced by Aristotle. The categories included white *Homo europaeus* ("sanguine" and "muscular"), red *Homo americanus* ("choleric" and "upright"), yellow *Homo asiaticus* ("melancholy" and "stiff"), and black *Homo afer* ("phlegmatic" and "relaxed").

George Louis Leclerc, Comte de Buffon, in *Varieties of the Human Species* (1749) used the *scala naturae* as his guiding principle while also promoting the position that differences in human populations were the result of environmental adaptations. His position on the physical and mental endowments of the American Indian are quite clear:

> In the [American] savage, the organs of generation are small and feeble. He has no hair, no beard, no ardour for the female. Though nimbler than the European, because more accustomed to running, his strength is not so great. His sensations are less acute; and yet he is more cowardly and timid. He has no vivacity, no activity of mind...It is easy to discover the cause of the scattered life of the savages, and of their estrangement from society. They have been refused the most precious spark of Nature's fire. They have no ardour for women, and, of course, no love of mankind...Their heart is frozen, their society cold, and their empire cruel (Comte de Buffon quoted in Berkhofer 1978:42).

Johann Friedrich Blumenbach, a student of Linnaeus, published a classificatory manuscript titled *On the Natural Variety of Mankind* in 1775. He modified Linnaeus' system of classifying humans according to perceived cultural traits and characteristics (i.e.,

Homo americanus as choleric, characterized by a violent and vengeful temperament) and instead attempted to assign humans to groupings made on the basis of anatomical characteristics. His schema grouped humans into five categories: Caucasoid (White), Mongoloid (Yellow), American (Red), Ethiopian (Black), and Malayan (Brown). Although Blumenbach saw all five categories of humans as a single human species and attempted to remove cultural characteristics from his divisions, he could not help but infuse his own cultural convictions: Europeans were still perceived as the highest expression of humanity, while the other four were degenerative corruptions of the European phenotype (Figure 1). Blumenbach's research using measurements of cranial collections (published in the *Collectio Craniorum Diversarum Gentium*, 1790–1828) ushered in the scientific discipline of craniometrics as a tool to classify differences among the races.

Charles Darwin's theories regarding evolution and natural selection saw publication one hundred years later in the groundbreaking volume *The Origin of Species by Means of Natural Selection or, The Preservation of Favoured Races in the Struggle for Life* published in 1859. While studiously avoiding mention of humans, the implication that they descended from more "primitive forms" was clear.

In this new scientific milieu where the ordering of humans within the animal kingdom was achieving a foothold in scientific methodology, it was logical to apply the principles of the *scala naturae* to rank different races of human beings into more or less primitive and descended forms, with the over-riding and inherent implication that certain races were either more or less evolved than others. Since White European scientists were the ones proposing these relationships it comes as no surprise that they ranked White Europeans at the highest pinnacle of human development and civilization among all races.

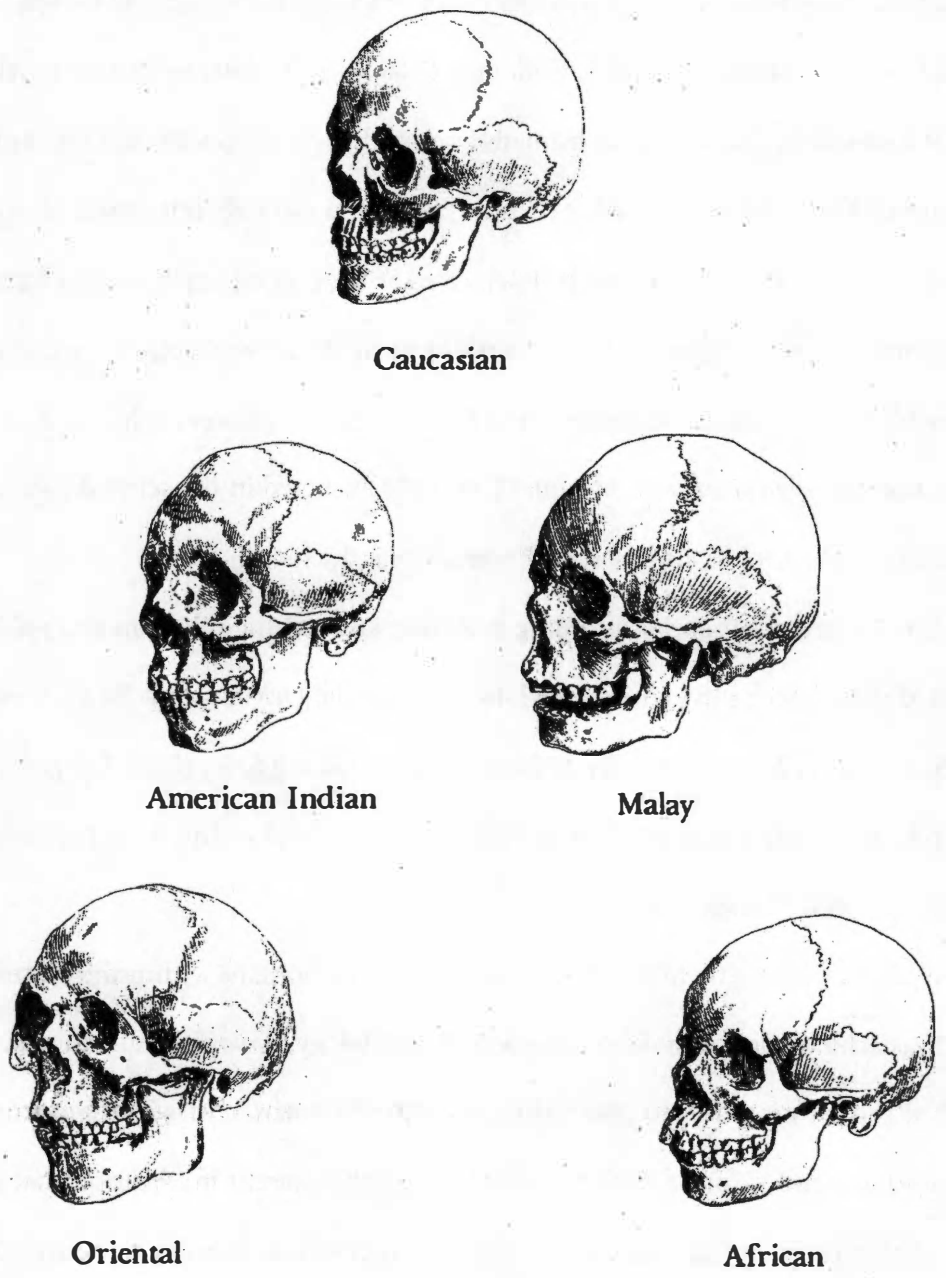

Figure 1. Plate from Johann Blumenbach's 1865 reprint of *Anthropological Treatises* showing the "degeneration" of races from the ideal Caucasian (European) phenotype.

First Goals: Ordering the New World

In the New World, scientists applied these hierarchical concepts to the American Indian. Initial attempts by biological anthropologists at racial classification of prehistoric American Indians was through craniometric study of excavated skulls. This was a period when anthropologists got out of the armchair and into the field, collecting data to further hypotheses regarding the character of the aboriginal Americans. Craniometric analysis had been in use in Europe for some time, with practitioners including Paul Broca, Johann Blumenbach, and Franz Boas. The early skull collectors in America utilized similar approaches, recording individual measurements of large series of American Indian crania to define the operational methodology in the Americas, where perhaps the most well-known example "signaling the beginning of biological anthropology in America" is Samuel George Morton's 1839 publication of *Crania Americana; or, a Comparative View of the Skulls of Various Aboriginal Nations of North and South America* (Thomas 2000:40), about whom Hrdlicka notes "biological anthropology in the United States speaking strictly begins with Samuel G. Morton" (Hrdlicka 1918:137). As a follower of polygenesis, a theological doctrine that held that there were multiple and separate creation events by God for the different races, Morton opposed prevailing ideas about the source of mankind, in direct contrast to believers in monogenesis, who held that man came from one single source of creation - in this case, Adam and Eve. While Morton's polygenetic viewpoint allowed the American Indians great antiquity, it also served to further underline the differences between American Indians and Euroamericans.

Morton embarked on a voyage to prove his theories correct by examining the skulls of American Indians. He soon ran into a stumbling block that he did not anticipate.

> Strange to say, I could neither buy nor borrow a cranium of each of these races...Forcibly impressed by this great deficiency in a most important branch of science, I at once resolved to make a collection for myself (Morton 1848).

Thus began Morton's ambitious project to collect American Indian crania, and eventually he amassed nearly a thousand crania for his comparative studies (Figure 2). His findings were not surprising in light of his beliefs - Europeans were scored as the highest in terms of cranial capacity with 87 cubic inches, while American Indians scored a lower cranial volume at 83 cubic inches, and they were deemed less intelligent than Europeans. Recent statistical reanalysis of Morton's original data by Gould (1996) have shown that American Indians actually had an equivalent score of 87 cubic inches and that regardless, there were no significant statistical differences between any of the groups Morton measured.

Ethnocentrism was a hallmark of the social science fabric during this period and anthropology was no exception. Ushered in by Morton's study, other attempts to craniometrically classify the American Indian had at their core an agenda that promulgated the concept of the American Indian as intellectually inferior to the European. It was argued that based on features of the skull of American Indians in comparison to others, they were more primitive and therefore less advanced socially and biologically.

In 1855, a student and devotee of Samuel Morton named Josiah Nott wrote a scientific treatise in honor of Morton entitled *Types of Mankind* in which he noted:



Figure 2. Crania of a South American Araucanian Indian (top) and a North American Huron Indian (bottom) from Samuel Morton's 1839 *Crania Americana.* Lithographs by John Collins.

> Intelligence, activity, ambition, progression, high anatomical development, characterize some races; stupidity, indolence, immobility, savagism, low anatomical development characterize others. Lofty civilization, in all cases, has been achieved solely by the 'Caucasian' group... Not merely have all attempts to civilize the [Barbarous tribes of America] failed, but also every endeavor to enslave them. Our Indian tribes submit to extermination, rather than wear the yoke under which our Negro slaves fatten and multiply...The pure-blooded savage still skulks untamed through the forest, or gallops athwart the prairie?...It is as clear as the sun at noon-day, the last of these Red men will be numbered with the dead...[t]o one who has lived among the American Indians, it is in vain to talk of civilizing them. You might as well attempt to change the nature of the buffalo (Nott 1855:69).

Nott's work and others that followed were colored by the tone and implication of Morton's scientific research. In fact, in order to analyze the assumed inferiority of the Indian, a mandate in 1868 by Joseph Pelucci, the U.S. Surgeon General, ordered US Army field and service personnel to procure (more accurately, scavenge) skulls of American Indians from battlefields and cemeteries for analysis at the Smithsonian Institution in Washington. Thousands of American Indian crania were collected under this directive and most were decapitated from the fresh remains of war dead resulting from United States Cavalry and Indian skirmishes.

The promulgation of this insidious and pervasive view among anthropologists was advanced and accepted by the American and European public and was used to foster the perception of the American Indian as an extinct and vanished people (Bieder 1986, Stedman 1982, Thornton 1987). This erroneous perception was to play a large role in subsequent discriminating federal government policies and justifications for "relocating Indian tribes, taking tribal land, and conducting genocide - in certain instances - against American Indians" (Trope and Echo-Hawk 2001:11).

Abusing Darwin: New Uses for Evolutionary Theory

Besides using craniometrics to promote hierarchies of primitiveness in non-European populations, racial classification by cranial features took a decidedly unsettling shift to determination of sociocultural evolution. By the start of the 20th century, the climate in anthropology had shifted, mirroring and in many cases supporting social, economic, and political agendas.

Scientists began co-opting Darwin's theories of biological descent to sociopolitical contexts, culminating in eugenics, an expression of social Darwinism at its most insidious (Shipman 1994). Eugenics, a term coined in 1883 by mathematician Francis Galton, expressed optimism that science would affect the human species by giving "the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable" (Galton 1883:24-25). Victorian scientists in both Europe and America used the underlying principles of eugenics to make predictions about social and economic classes, inferring that the poor, infirm, criminal, and generally less successful were biologically destined to be losers in a race where survival of the fittest was the grand prize. In effect, social programs that aided the less advantaged were viewed as wasteful; after all, why should governments assist unfortunates who might survive to reproduce even more burdens to society?

A slippery slope awaited those who bought into this ideology; many soon extended these ideas to propose that the undesirable members of society were a drain and dangerous to the fittest members of society (Black 2003). Forced institutionalizations, sterilizations, and the core of the Nazi agenda were attributable to standards promoted by eugenic science (Browning 2004, Friedburg 2000). It was in this arena that many biological anthropologists found themselves, some even leading the way. Eventually, the science

behind the eugenics movement was determined to be faulty research and biased assumptions, but old habits died hard (Gould 1996). While many anthropologists shook themselves free of the mantle of eugenics, they were still beholden to ideas born of the past. The perception of the races as hierarchically ranked and differentially successful in arenas such as culture, intelligence, and capability persisted. In effect, the American Indian was still classified as something less than European.

Evolution of New Disciplines

In order to appreciate the character and background of Indian-anthropologist relationships in the new American millennium, it is vital to understand the historical forces that shaped this association, landmark events which set the tone, and what is yet to come. A brief sketch of the historical underpinnings of the inter-related sciences of archaeology and biological anthropology is now presented, with emphasis on important themes, precursor ideas, founding personalities, and schools of thought in each discipline. These foundations set the stage for scientific interactions with the indigenous American population and they continue to permeate and direct anthropological research to this day.

While antiquarian scholars in previous ages held firm to biblical belief in a young earth and recent life, new discoveries in geology, biology, and related sciences were steadily pushing back the age of the earth. New principles in science like Lyell's uniformatarianism and Darwin's doctrine of evolution helped to refine the age of the earth from Bishop Ussher's widely accepted starting date of 4004 B.C. to many more millennia than previously assumed. The discovery of fossil life forms increasingly difficult to explain in antediluvian terms, and evidence of prehistoric human civilizations required new levels of explanation. These and other cascading developments in the geological, natural, medical,

and biological sciences helped to bring in the advancement of the disciplines of archaeology and biological anthropology.

American Archaeology

Archaeological historians have categorized five major stages of development in the field of American archaeology and they are briefly presented here (see Ashmore and Sharer 1996, Johnson 1999, Meltzer 1983, Patterson 1993, Trigger 1986, and Willey and Sabloff 1993 for historical reviews). Archaeological attitudes towards American Indians today are colored by many of the events charted in the history of this discipline (Trigger 1984; 1989.

Speculative Period (1492-1840): This first stage, lasting almost 400 years, is the Speculative Period, ranging from discovery of the New World in 1492 to the mid-Victorian 1840. It is defined by a lack of concrete excavations, surveys, data, theory, or models. Great weight is given to accounts by European explorers, Conquistadors, and travelers with reference to indigenous peoples, cultures, civilizations, and archaeological sites. The "Myth of the Moundbuilders," described later in this chapter, is an example of a flawed and scientifically unsupported idea that was formulated and accepted in the Speculative Period. The latter half of this period is occupied by those engaging in archaeology as an avocational pursuit - giving rise to the so-called dilettantes and armchair archaeologists.

Classificatory-Descriptive Period (1840-1914): The second phase in the development of American archaeology is termed the Classificatory-Descriptive Period and spans from 1840-1914. While still adhering to non-scientific ideas proposed during the Speculative Period, new emphasis is placed on the actual description and classification of

archaeological sites. During this time Boucher des Perthes proposed his schema for the antiquity of man (1860), giving credence to the advanced age of the earth and its inhabitants, and Darwin's evolutionary postulates are proposed (1859), opening the door for ideas of evolution, adaptation, and change in human history. Archaeology, like biological anthropology, does not really come into its own as a formalized scientific discipline until this period in Europe, after new discoveries from expansion into the New World and other colonial outposts (Willey and Sabloff 1993). In North America in the mid-1800's, American archaeology is marked by an interest in the material remains of American Indian culture. Collecting and trafficking in antiquities is the main goal of most excavations (Trigger 1986, Messenger 1989). Thomas Jefferson's investigations into mounds located in Montpelier in 1784 marks a deviation from many of his contemporaries for his careful stratigraphic excavations at the mounds of Monticello, in Charlottesville, Virginia. Jefferson is sometimes called the "Father of American Archaeology" because his meticulous and scientifically accurate methodologies for excavations as well as his writings on the subject reveal that Jefferson anticipated many of the theories and techniques that were to become hallmarks of scientific archaeology.

In his *Notes on the State of Virginia* in 1787, Jefferson notes his observations on the existence of mounds, their inferred purpose, and the cultures who created them:

> I know of no such thing existing as an Indian monument; for I would not honour with that name arrow points, stone hatchets, stone pipes, and half-shapen images. Of labour on the large scale, I think there is no remain...unless it be the barrows of which many are to be found all over this country.
>
> They are repositories of the dead, has been obvious to all: but on what particular occasion constructed, was matter of doubt. Some have thought they covered the bones of those who had fallen in battles fought on the spot of interment. Some ascribed them to the custom, said to prevail among the Indians, of collecting, at certain periods, the bones of all their dead, wheresoever deposited at the time of death.
>
> But on whatever occasion they may have been made, they are of considerable notoriety among the Indians; for, a party [of Indians] passing, about thirty years ago, through the

> part of the country where the barrow is, went through the woods and directly to it without any instructions or inquiry and having staid about it sometime, returned with expressions which were construed to be those of sorrow, they returned to the high road, which they had left about half a dozen miles to pay this visit, and pursued their journey.
>
> There is another barrow, much resembling this in the low grounds of the South branch of the Shenandoah...and another on a hill in the Blue Ridge of mountains, a few miles North of Wood's gap, which is made up of small stones thrown together. This has been opened and found to contain human bones, as the others do. There are also many others in other parts of the country.

Classificatory-Historical Period I (1914 to 1940): The third stage in the development of American archaeology is termed the Classificatory-Historical Period I and lasted from 1914 to 1940. Building on continual refinements from the successes of previous periods this stage represents the solidification of initial attempts to correlate theories with data. New advances and understanding in both chronology and stratigraphy define these years, and increased methodological emphasis on field and excavation procedures occurs. While the speculation and unsupported theories of the earlier periods are avoided, this stage is still defined by themes of description and classification. Anthropologists working in this period include Franz Boas, Ales Hrdlicka, Alfred V. Kidder, and Alfred Kroeber.

Classificatory-Historical Period II (1940-1960): The fourth stage in American archaeology is the Classificatory-Historical Period II, from 1940 to 1960, representing the second half of the Classificatory-Historical Period. This stage is one of transition, marking a new understanding of the goals of archaeology. A new focus on ethnographic techniques like cross-cultural comparison is borrowed and adapted from researchers such as Julian Steward and Clyde Kluckhohn to archaeology. New functional approaches are introduced, looking at artifacts as markers of behavior, and borrowing from cultural anthropological frameworks (i.e., Sahlins and Service 1960). Gordon Willey and Philip Phillips introduce

their landmark work called *Method and Theory in American Archaeology* in 1955, in which they advocate three goals of archaeological research including observation, description and explanation. Studies of settlement patterns, context, and site distribution rise to the forefront, as do comparisons of different cultures in similar environments and the resulting adaptations based on diverse technologies.

New Archaeology/Processualism (1960-): The last defined stage of American archaeology is called the New Archaeology, or Processualism. This phase began in 1960 and continues to this day, complete with multitudes of attendant post-processualist critiques. New Archaeology was a reaction to Culture History and all previous stages in archaeology. Its proponents stressed a more scientific approach structured around holistic anthropological frameworks, positing hypotheses instead of purely amassing descriptive data. Briefly summarized, the main principles of the New Archaeology are to:

1) highlight evolutionary generalizations, not culture history approaches
2) utilize an explicitly scientific methodology (including quantitative procedures)
3) search for universal laws across all human cultures
4) avoid ethnocentrism and cultural relativism to remain objective and neutral
5) focus on etic phenomena
6) recognize culture as humanity's extrasomatic adaptation to the environment
7) understand culture from a systems perspective
8) utilize a positivist position for explanatory models

Archaeologists defining this explanatory systems approach include Lewis Binford, James Deetz, William Sanders, Scott MacNeish, and Kent Flannery (i.e., Binford 1962; 1965; 1968, Flannery 1967; 1972). An outgrowth of New Archaeology is the focus on

evolutionary processes in the archaeological record (Boone et al.1998), heralded by researchers who apply Darwinian theory to archaeological questions, where material culture change and adaptation is interpreted in terms of natural selection and other Darwinian processes (i.e., Dunnell 1982, Leonard 2001, Neff 1993). Perhaps more so than any other movement in archaeology, the New Archaeology also has its detractors, critics who see flaws in the strictly scientific approach. In the view of these "Post-Processualists," interpretations about the past cannot be made except within a culture's own social context, a difficult endeavor when the object of study is a long vanished culture. To the Post-Processualists, great reliance is placed on the use of modern ethnographic examples to interpret similar prehistoric societies, although the over-riding thrust of this movement is that the human past cannot be known because there is no real way to verify archaeological hypotheses and inferences (Hodder 1982; 1986; 1991).

American Biological Anthropology

Biological anthropology in many ways is an intellectual parallel of archaeology, adapting its methodologies, theories, techniques and principles to the biological human landscape as archaeology did to the human material culture landscape. Like all of the subdisciplines of anthropology, physical anthropology (now called "biological anthropology" by an increasing number of practitioners) is the umbrella term for many diverse subfields. These include the applied branch of forensic anthropology, as well as fields such as paleoanthropology, human evolution, primatology, and others. This present study concerns the subfields of American biological anthropology variously termed physical anthropology, bioarchaeology, skeletal biology, paleopathology, craniometrics (now being termed morphometrics), human osteology, anthropometry, paleodemography, and others

concerned with the analysis of deceased North American *Homo sapiens* in non-forensic contexts.

A historical sketch of the development of American biological anthropology in some ways mirrors the growth of American archaeology, albeit in a stunted form. While archaeologists have *always* been concerned with material culture remains, their interest in human biological remains - the skeletons of indigenous American archaeological populations - is a relatively recent development. In fact, for much of the early history of American anthropology, human skeletons were regarded as devoid of any useful categories of information. This position is not one relegated to the distant past; Clark Larsen (1997) points out a characteristic opinion held by many on the utility of human remains in archaeological contexts by Ivor Noël Hume, retired Director of Archaeology for the Colonial Williamsburg Foundation. In his 1975 textbook, *Historical Archaeology*, Hume advises archaeologists that

> [B]urials on historical sites are much more trouble than they are worth...[U]nless the circumstances are very special, I would advise quickly covering them over and forgetting you ever saw them (Hume 1975:158, 160).

This perception within the anthropological community lead Owsley and coworkers to note:

> [M]any American archaeologists have not appreciated the full potential of osteological research as a source of information on biocultural behavior and human adaptation. Many of these views persist, as reflected in an archaeologist's statement to a reporter visiting a field school excavation in Colorado: 'Human bones don't provide that much information. After all, we know that they are Indians' (Owsley et al. 1989:122).

Despite the persistence of erroneous presumptions by some archaeologists and scientists, the value of human skeletal remains in archaeological contexts has slowly been acknowledged by members of the archaeological community, as noted by archaeologist

Christopher Peebles:

> A human burial contains more anthropological information per cubic meter of deposit than any other type of archaeological feature. A burial represents the latent images of a biological and cultural person frozen in a clearly delimited segment of space and time...If there is an adequate sample of burials from a locality or a region, and if the archaeological control of these features is sufficiently precise, then these burials can be used to construct demographic and social models for either a community or for an entire cultural system (Peebles 1977:124).

Notwithstanding the impressions conveyed by the scenarios illustrated above, modern physical anthropologists understand the inherent significance of examining the biological human organism in order to understand its adaptation to a particular environment. The modern guiding principles of biological anthropology are to refine our knowledge of both human evolution and variation across all geographic and temporal spectra. In essence, to shed light on the mechanisms of both mode and tempo in the evolution of the human species.

Unfortunately, this has not always been the purpose and agenda. Perhaps more so than any social science, biological anthropology's past has been steeply mired in both racism and faulty science, begetting what one observer has called a "compromised science" (Dewar 2002:27). This is an inheritance that in many respects has been difficult to overcome, and one in which anthropologists are still accused of operationalizing and utilizing today.

The beginnings of American biological anthropology are roughly traced to only about two hundred years ago, but like archaeology, historical antecedents stretch further back in time. Unlike American archaeology, American biological anthropology cannot be charted as a series of discrete phases; rather, a brief historical perspective is now presented with emphasis on contributions by important practitioners, evolving directions, and key themes in the discipline.

Ancient Foundations: As previously alluded to, many important European naturalists, scientists, philosophers, anatomists, and religious scholars contributed to the foundations of what was to become the formalized discipline of biological anthropology.

Three centuries before Christ, Hippocrates and Aristotle both considered the potential environmental causes of variation in human beings. Hippocrates believed that there existed two types of people - apoplectic (squat and phlegmatic), and phthisic (thin and choleric) - depending on their climate and lifestyles. Aristotle felt that there were similarities between humans and non-human primates, and offered causal explanations for differences in hair phenotypes between Scythians and Aethiopians relating to moist versus arid climates, respectively.

Religious beliefs regarding the origin and derivation of various races developed from the Judeo-Christian tradition, with Noah's sons functioning as ultimate progenitors of the diverse human races. Ham ("dark") and his sons were believed to have given rise to Africans and "Mongoloids" (including American Indians), Shem ("renown") and his sons gave rise to Semitic groups (i.e., Shemites), while Japheth ("fair") and his sons are credited with giving rise to the Caucasoid and Indo-European lines.

A few centuries after the birth of Christ, St. Augustine's conviction that the patterns of the *scala naturae* can be elucidated to place humans midway between angels and beasts are precursors to views that would anticipate formal anthropological taxonomic principals.

During this time, Galen dissected monkeys and noted their great similarities to humans, but inferred no evolutionary relationship. Instead he postulates the similarities are merely coincidental.

By the Age of Discovery, large-scale state sponsored European voyages like those of Marco Polo in the 13th century and Columbus in the 15th century set the stage for the

expansion of worldviews. Exploration of new continents and encounters with new kinds of people demonstrated an unexpected variety in the expression of human phenotypes and cultures, and Western scholars quickly began debating the origins and hierarchy of the varieties of mankind coming to light.

Renaissance to the Age of Enlightenment: A revolution in the sciences, medicine, art, and philosophy characterize the period from the 14th to the 18th centuries in Europe. Explanations for natural phenomena move away from reliance on biblical interpretation to more empirical observations.

Particularly relevant to biological anthropology is the advancement of anatomical knowledge, evident in the works of master anatomists Leonardo Da Vinci, Andreas Vesalius, Bernhard Siegfried Albinus, and others.

During the 15th century, Edward Tyson, a British physician and anatomist, is the first European to gain access to the cadaver of a chimpanzee for comparative dissection to a human cadaver, compiling a detailed systematic study of ape anatomy (Else 1986).

During this century many influential ideas which were of direct influence to biological anthropology were established. Linnaeus introduces his formal taxonomies including his geographical human varieties, Comte de Buffon suggests that human variation is due to adaptation to local environments, and Blumenbach proposes his racial classification system. These and other influential thinkers laid the groundwork for the formal and refined development of biological anthropology which was to occur in the next two centuries.

19th Century: The first half of this century is, in tone and scope, very similar to the 18th century. The forerunners of American biological anthropologists were still anatomists, physiologists, and medical specialists (Hrdlicka 1914), and the focus on racial typologies as markers of intelligence and superiority was still a dominant theme. This was evidenced by the faulty craniometric studies of Samuel Morton in his quest to rank different races (including American Indians) in *Crania Americana* (1839) and the subsequent *Crania Aegyptica* (1844). Josiah Nott published his *Types of Mankind* in honor of Morton, and Nott's disciples, J. Aitken Meigs and Joseph Leidy, worked to continue Morton's research, with Meigs eventually producing *The Cranial Characteristics of the Races of Men* and Leidy producing *Primitive Diversity of the Races of Man* in Nott and George R. Gliddon's *Indigenous Races of the Earth*, published in 1857. These works and others like them continued to exert great influence on the agenda and policies of burgeoning anthropological science, but as Hrdlicka later optimistically noted in referring to these specific works,

> It is to be regretted that these publications and particularly the *Types of Mankind* were strongly attached to the biblical traditions...devoted to efforts at harmonizing the results of the rising science with the biblical Genesis...They have not advanced or benefited physical anthropology in this country to any great extent, and are now but seldom referred to (Hrdlicka 1914:526).

The intellectual climate of the second half of the 19th century differs from the first half markedly, with the publication of Darwin's theory of evolution. Although the principals of evolutionary theory were not widely embraced by all scientists at the time of publication in 1859, enough were intrigued and saw an inherent fit with what they were observing in the natural world to consider and apply evolutionary postulates to their own works. Early biological anthropologists were no different, seeing in this theory a new way to strengthen widely held ideas of racial and geographical hierarchies. By displacing the

scala naturae and substituting evolutionary theory, scientists continued to work to confirm Europeans at the top of the ladder of civilization. Another development that was to have great impact on anthropological scientific trends was the discovery of fossil hominid forms (later determined to be *Homo neandertalensis*) in Europe, with Gibraltar Man discovered in 1848 and Neandertal in 1856. Rudolf Virchow, an eminent German physician, erroneously diagnosed the Neandertal fossil as that of a pathologic modern human who suffered from arthritis and rickets, while Gibraltar Man was "slipping into a kind of intellectual dustbin" of misunderstood, problematic evidence (Shapiro 1959:373).

These first tentative traces of the antiquity of the human species and an evolutionary theory with which to guide research catapulted the development of biological anthropology in Europe. Virchow was responsible for the development of anthropology as a discipline in Germany during this period. While Virchow was a firm believer in the racial typological concept, he cautioned that the use of craniometrics for assessing populational affinity in archaeological remains was problematic:

> Here we must come to a clear understanding as to whether we wish to lay greater weight upon skull form or pigmentation ...whether we wish to divide mankind more from the standpoint of the osteologist or from that of the dermatologist...to select a few categories of skull type as a basic principle for classifying man ...has had no thoroughgoing success. Even the corrections which have been undertaken in the course of the years, have not made it possible for even a practiced craniologist to tell for certain without knowing anything of the provenience of the skull, to which race, let alone stock, it belonged (Virchow 1950:191).

Pierre Paul Broca, the French surgeon and anatomist, founded the world's first anthropological society and training laboratory in France in 1859. He continued the tradition of Morton in measuring crania, fully formalizing and standardizing craniometry and anthropometry, which spread from Broca's laboratories to other institutions. It is important to note that Broca was not a believer in biblical theories of human descent, nor

that human variation could be understood or explained in terms of corruption and degeneration from a single superior human group.

The latter half of the 19th century saw the development of physical anthropology as a formally recognized scientific discipline in Europe and this trend continued into America, with universities like Columbia, Harvard, and the University of Pennsylvania leading the way in graduate biological anthropology programs. In the very last years of the 19th century, the very first Ph.D. in physical anthropology was awarded to Frank Russell in 1898 for his study of Eskimo crania at Harvard (Spenser 1982).

20th Century: Franz Boas, who has the honor of being called the "Father of American Anthropology" was an academic trained in physics, geography, and psychology. Originally from Germany, Boas emigrated to the United States to escape rising anti-Semitism in the 1880's. He was a strong proponent of the four field approach in anthropology and was a gifted researcher in those fields. He is known today for his ethnographic work among the Kwakiutl of the Northwest Coast as well as studies in human cranial plasticity, demonstrating great variation in cranial traits that were once thought to be strong racial signifiers. He was also a reluctant skull collector, noting that "it is most unpleasant work to steal bones from graves, but what is the use, someone has to do it" (Franz Boas quoted in Bieder 1990:30). Boas also establishes one of the first academic Ph.D. programs in anthropology at Columbia University, is a curator at the American Museum of Natural History in New York, and is responsible for founding the American Anthropological Association in 1902 (still in existence today). Boas' influence is far reaching. He trained such notable ethnographers as Alfred L. Kroeber, Margaret Mead, and Ruth Benedict.

Besides Boas, there is another key figure central to the development of

biological anthropology in America. Although it seems that founding fathers in anthropology are numerous, Ales Hrdlicka is referred to as the "Father of American Physical Anthropology." Hrdlicka, a medical student from Czechoslovakia, trained for a period in Paris in Broca's anthropology laboratory before coming to the United States. Once in America, he took a position with the United States National Museum in 1903, where his research into biological anthropology continued until his death in 1945. Hrdlicka managed to personally collect or direct others to amass over 17,800 indigenous American Indian skeletal remains, some of which are still housed at the Smithsonian Institution (Loring and Prokopec 1994). At a lecture given at The University of Tennessee, Knoxville, in 1995, Smithsonian Institution anthropologist Stephen Ousley estimated that although upwards of 3,400 American Indian skeletons had been repatriated as a requirement of NAGPRA, there were over 10,000 remaining in the collections which had been inventoried but not repatriated, with many years worth of work to finish the documentation of the remains as a requisite of NAGPRA. Hrdlicka established the *American Journal of Physical Anthropology* in 1918, and founded the major organization of American biological anthropologists, the American Association of Physical Anthropologists in 1928, with charter members including Franz Boas, Juán Comas, W.K. Gregory, Earnest A. Hooton, William Krogman, Dudley Morton, Adolph Schultz, Harry Shapiro, William Straus, T. Dale Stewart, Robert J. Terry, T. Wingate Todd, and Mildred Trotter. These journal and association foundings were significant landmarks for the history of the field of biological anthropology because they:

> [H]ad the immediate effect of securing the discipline's identity [and] provided Hrdlicka with an opportunity to codify the discipline in broader and essentially more modern terms, [while giving] him a platform from which to continue his campaign for the recognition of physical anthropology as a legitimate and independent science (Spencer 1982:6).

Another founding influence was Earnest A. Hooton, who received a Ph.D. from Wisconsin in general anthropology in 1911 and then went to England for more specialized training with Sir Arthur Keith where he received a specialized degree in physical anthropology as a Rhodes Scholar from Oxford University (Shapiro 1959). After returning to the United States he was appointed to the anthropology department of Harvard, where he eventually created the first major training program devoted specifically to physical anthropology. While at Harvard he studied a wide array of skeletal biological topics, and he is perhaps best known for his research on the skeletal remains of Indians from Pecos Pueblo (Hooton et al. 1930). Hooton's theoretical leanings can be traced to earlier traditions which held that biological determinism could be elucidated from morphological types, harkening back to ideas initiated by Morton and others who thought that racial characteristics would mirror populational histories (Armelagos et al. 1982). Hooton is responsible for producing some of the first books for the lay-person on the topic of physical anthropology with the publication of *Apes, Men, and Morons* (1937) and *Up from the Ape* (1946). Under Hooton's watch, Harvard becomes a center for the study of physical anthropology, training such notables as Alice Brues, Carleton Coon, Stanley Garn, W.W. Howells, Edward Hunt, Harry L. Shapiro, and Sherwood Washburn.

It is appropriate now to break from the overview of important personalities to focus on the observable trends they and their institutions influenced in the development of the field in the 20th century.

By the mid-20th century, with the forefathers of anthropology in place and their former students occupying physical anthropology teaching positions at other academic institutions, the spheres of influence of the discipline expand. No longer are physicians, anatomists, and pathologists the primary specialists conducting anthropological inquiry;

now the field is staffed by practitioners trained specifically in the defined principals of the discipline. At the "Origin and Evolution of Man" symposium held in Cold Spring Harbor in New York in 1951, a retrospective of the discipline was published which reviewed its foundations and suggested new directions. Sherwood L. Washburn's article *The New Physical Anthropology* was groundbreaking because it admonished biological anthropologists to reject the racial history approach still in use. He advocated that research design should reflect a focus away from typology and craniometric determination of populational affinity to new standards based on scientific methodology inclusive of experimentation and hypothesis testing. This insight offered a reassessment of direction and a fresh perspective on future trends. Like the New Archaeology, the New Physical Anthropology directed its practitioners to modify their research directives and agenda to scientifically formalize and standardize the discipline in a matter that had been until then lacking.

Although at the outset of this review it was noted that discrete stages for the development of biological anthropology are not as simple to outline as those of archaeology, it is possible to tease out phases that are characterized by unified themes presented in the historical reviews above. Armelagos et al. (1982) offer useful outlines of broad patterns in the history of physical anthropological.

The first phase is the use of historically descriptive racial typologies developed in the 18th century. This stage still continues to this day. A survey of physical anthropological literature conducted by Lasker in 1970 noted :

> Despite statements to the contrary [physical anthropologists] are still largely concerned with historical, rather than processual, problems. Although theoretical aspects are often discussed, physical anthropologists have tended to focus on the description of events rather than on an explanation of the processes that have brought about these events (Armelagos et al. 1982:306).

The second trend recognized by Armelagos and coworkers is the use of anthropometry and craniometrics with associated multivariate statistical procedures to infer biological relationships. This phase also depends on the historical-descriptive aspect of physical anthropology, and does not include evolutionary process in an explanatory framework. As noted, "anthropometric studies will continue to be typologically and historically oriented and will provide no real understanding of human evolution in general" (Armelagos et al. 1982:316).

The third trend is a borrowed approach with some pedigree from the biological sciences based on growth and ontogeny. This analysis is based on the principles of form and function pioneered by Thompson in 1942, which can illuminate anatomy and biomechanics as biological, evolutionary, and adaptive processes (Thompson 1992). Anthropologists using this functional approach and its guiding theoretical framework are "beginning to have a major impact on the analysis of the skeletal biology of archaeological populations...It is the key to understanding the significance of *intra*populational and *inter*populational variation" (Armelagos et al. 1982:320, 321).

As another avenue to identify and characterize phases in the evolution of modern skeletal biology, Owen Lovejoy and co-authors (1982) reviewed five decades of publications of the *American Journal of Physical Anthropology*, from 1930 to 1980. Conducting a content analysis of these themes by decade, some overall patterns indicative of research trends emerged.

1930-1939: This decade is a descriptive period focused on non-analytical research. Qualitative and quantitative anatomical studies emphasize description, especially using

craniometric data. Descriptive pathology reports on single skeletons are also present.

1940-1949: Like the previous decade, this is a non-analytical period that emphasizes descriptive reports. Again, research is mainly composed of descriptive anatomical and pathological studies, with the initial beginnings of biological profiling techniques to determine age, sex, and race of skeletal remains.

1950-1959: This decade reflects a new emphasis on biological patterns of growth and development with continued focus on metric and non-metric descriptive anatomical studies.

1960-1969: While anatomical reports still compose the majority of publications, a new functional viewpoint is present. Paleopathology reports steadily increase, as do studies of growth, demography, and multivariate procedures to assist in the aging and sexing of skeletal remains.

1970-1980: This decade displays a cumulative refinement of statistical procedures (especially multivariate approaches) to determine biological distance. Paleopathology reports increase, characterized by single specimen descriptive reports.

1981-1990: Although the Lovejoy et al. article only previewed the *Journal* up to the year 1980, the following decade can be characterized as further refinements of multivariate statistical procedures in the analysis of skeletal variables, emphasis on sex, age, stature, and race of archaeological and forensic skeletal material, an enhanced focus on

bioarchaeological research examining archaeological populations, and an increase in paleopathology reports.

1991-2004: The period continues with trends from previous decades, but sees the adoption of reports embracing new technologies such as genetic studies and DNA results, continued bioarchaeological research, complex multivariate statistical procedures, the use of microscopy techniques, forensic anthropological techniques, and an increase in non-human primate studies. Additionally, there are declining descriptive paleopathological case-based reports.

Claud Bramblett offers a useful summary that is applicable to this review of the history of physical anthropology, and the personalities and forces that shaped it:

> Ideas have a phylogeny too. As in biology, ideas have precursors and must have environments that tolerate them. The interplay of political and historical events that shape our society also influences the availability and practice of science. Science as a way of knowing is relatively recent in popular Western thought...Modern physical anthropology was formed in the 1950's by scientists who brought a modern perspective on science to the anthropological study of human biology (Bramblett 2001).

Explaining the American Indian

> [It is] the right of our manifest destiny to over-spread and to possess the whole of the continent which Providence has given us (John L. O'Sullivan, 1845).

As the synopses presented within this chapter illustrate, the development of American archaeology and biological anthropology occurred concurrently with burgeoning curiosity in the biological and material remains of indigenous North American Indian cultures. It is clear that scientific research on prehistoric New World populations could be

accomplished by measuring Indian crania and excavating prehistoric Indian archaeological sites. How did the work of anthropologists affect the conceptualization of *living* Indians?

Anthropology's main impediment to a more refined understanding of Indian prehistoric cultures was the fact that its practitioners assumed a chronological perspective - an approach that failed to see American Indians (both living and archaeological) as cultures subject to continuous change and adaptation to environmental constraints. Instead, cultures were viewed as static and immobile; snapshots frozen in time with no bearing or relationship to groups that came before or after.

The image of American Indians as static, primitive, and extinct was pervasive in early Euroamerican culture, and this characterization also dominated the science of American archaeology and biological anthropology for centuries. The divergence between European and American archaeology stemmed from the influence of the American Indian stereotype - while European archaeologists were concerned with tracing the European continent's uninterrupted chain of cultural evolution from prehistoric to modern times, American archaeologists were not similarly preoccupied (Kehoe 1998, Martin et al. 1947, Trigger 1980).

Although certainly promoted by anthropologists, these stereotypes surrounding the American Indian were entrenched long before archaeologists and biological anthropologists took interest in New World prehistory. At the time of entry into the Americas, European explorers conceptualized the American Indian in a variety of ways. Typical of these main ideas was the romantic portrayal of the American Indian as Rousseau's "noble savage," as warlike barbarians, as cannibals, as lost biblical tribes, Nordic colonists, children of Noah's son Ham, or as Aristotle's "natural slaves" (Ackrill 1963, Hardie 1968, Hulme 1978). These and other cultural stereotypes had a similar theme in

common: the assertion that American Indians were inferior and barbarous in comparison to civilized Euroamericans (Pagden 1982). European expansion into the New World in effect necessitated these "less than European" views of the Indian, in order to justify colonization and Christian missionization. The earliest perceptions of Indians as socially and culturally unadvanced fed into settler's assertions that they were also undeserving of the lands they occupied. Seizing their land was deemed acceptable on a religious basis - they argued that as a more civilized and advanced people, they were fulfilling God's wish by making use of land that the Indians were under-utilizing (Trigger 1980).

By the 1800's, religious validation for the appropriation of Indian land and property soon transformed into political and racial justification. Because living Indians were branded as an aggressive and primitive people, rationalization for seizure and removal of tribal groups from occupied lands was done under the mantra of American expansion.

The feeling of the majority of American settlers towards the Indian is probably summed up by this portrayal offered by President Theodore Roosevelt:

> I suppose I should be ashamed to say that I take the Western view of the Indian. I don't go so far as to think that the only good Indians are dead Indians, but I believe nine out of every ten are, and I shouldn't like to inquire too closely into the case of the tenth. The most vicious cowboy has more moral principle than the average Indian...Reckless, revengeful, fiendishly cruel, they rob and murder, not the cowboys, who can take care of themselves, but the defenseless, lone settlers on the plains (Theodore Roosevelt, *The Winning of the West* 1889).

The course of action desired by the majority of American settlers towards controlling the Indian "problem" is exemplified by these two newspaper editorials from the *Aberdeen Saturday Pioneer* in South Dakota, written by the author of a famous children's book:

> The Whites, by law of conquest, by justice of civilization, are masters of the American continent, and the best safety of the frontier settlements will be secured by the total annihilation of the few remaining Indians. Why not annihilation? Their glory has fled, their spirit broken, their manhood effaced; better that they die than live the miserable wretches that they are. History would forget these latter despicable beings (L. Frank Baum [author of "The Wonderful Wizard of Oz"] December 20, 1890).

> [T]he PIONEER has before declared that our only safety depends upon the total extirmination [sic] of the Indians. Having wronged them for centuries we had better, in order to protect our civilization, follow it up by one more wrong and wipe these untamed and untamable creatures from the face of the earth. In this lies safety for our settlers and the soldiers who are under incompetent commands. Otherwise, we may expect future years to be as full of trouble with the redskins as those have been in the past (L. Frank Baum [author of "The Wonderful Wizard of Oz"] responding to the Wounded Knee massacre, January 3, 1891).

The doctrine of "Manifest Destiny" held that occupation and expansion on the new continent was a divine right of the American people. The principles of divine conviction insured that anything that stood in the way of American advancement would be destroyed, churned over by the vehicle of American progress. Manifest Destiny was more than an ideological compass bearing; it served as the national dictum by which America conducted itself. For the American Indian, it was a racial and sociopolitical juggernaut that was devastating on all fronts.

The Lesson of the Moundbuilders

An additional characterization of the American Indian was of a people incapable of adapting to the civilized European lifestyle and this inherent inflexibility colored scientific conceptions. As Trigger states, "This view of Indians as being primitive, alien, and part of America's past had archaeological implications" (Trigger 1980:663). One well-known example of the damage caused by biased perceptions of the American Indian follows. While the archaeological record appeared to endorse the view of Indians as a people incapable of social or cultural evolution, evidence of advanced prehistoric civilizations in the eastern United States was difficult for archaeologists and historians to explain. In the 1800's, this complex culture was dubbed the "Moundbuilder" civilization

and was attributed to a *non*-Indian culture that was both unrelated and more civilized than Indians (Silverberg 1986).

The remnants of a past civilization capable of monumental prehistoric earthworks and possessed of refined artifacts and technologies were deemed too advanced to belong to prehistoric American Indians. Investigations into the mounds by American antiquarians Ephraim Squier and Edwin Hamilton Davis, published in their *Ancient Monuments of the Mississippi Valley* in 1848, did nothing to dissuade public opinion. Squier and Davis themselves were advocates of non-Indian origins for the mounds, and many fanciful ideas flourished regarding the true identity of the Moundbuilders, including the Greeks, Egyptians, Phoenicians, Romans, Lost Tribes of Israel, Vikings and Aztecs (Patterson 1993).

Besides denying the American Indian rightful credit as heirs to the "Moundbuilder" civilization, the myth of the Moundbuilders also had a more sinister component. It postulated that the vanished Moundbuilders were exterminated by the more primitive and barbarian American Indian cultures. This archaeologically endorsed mischaracterization further served to justify governmental seizure of Indian-occupied land and warfare against those tribes who resisted, and contributed to formal American policies of Indian genocide and removal (Trigger 1980, 1989; Bieder 1986).

The mythical civilization of the Moundbuilders and the associated damaging stereotype of the American Indian was eventually put to rest due to careful research initiated by the Smithsonian Institution's Cyrus Thomas, head of the Bureau of Mound Exploration, whose careful research by 1890 attributed the monumental earthworks to prehistoric American Indian cultures (Thomas 1894, Willey and Sabloff 1993). The lesson of the Moundbuilder myth is viewed today in tribal circles as analogous to the current

theories of anthropologists who posit that North America was not inhabited first by the ancestors of American Indians, but by populations who were more similar to "Caucasoid" peoples (see Chapter Four).

This chapter has presented a brief overview of the history, social repercussions, and political implications of early scientific research on American Indian skeletal remains. The following chapter will establish the legal history of cultural resource laws designed to protect American Indian archaeological materials and skeletal remains from the public, and to legislate access to these items by members of the scientific anthropological community.

Chapter Three

LEGISLATING PREHISTORY

> The bill before us is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights...For museums that have dealt honestly and in good faith with Native Americans, [NAGPRA] will have little effect. For museums and institutions which have consistently ignored the requests of Native Americans, this legislation will give Native Americans greater ability to negotiate (Senator Daniel Inouye, sponsor of NAGPRA legislation, 1990).
>
> In the larger scope of history this is a small thing. In the smaller scope of conscience, it may be the biggest thing we have ever done (Congressman Morris Udall, sponsor of NAGPRA legislation 1990).

The landscape of modern America is built upon remnants of countless past civilizations. The variety and scope of prehistoric cultures taking advantage - often overcoming - a wide range of ecological niches offered by the New World are as diverse as that of any continent on planet earth. From the terrain of the Southwest, where desert people flourished among the creosote and junipers, to the territories of the Northwest Coast, where sea-goers in carved wooden boats harpooned orca, to the lands of the Southeast, where mound builders designed zoomorphic earthworks; modern America is just a soil layer away from the mantle of its original human inheritance.

The earliest American colonists recognized these traces of antiquity from the artifacts, landforms, village sites, relics, art works, skeletons, and ruins left behind, and immediately set out to do what Americans have always done best; make a profit. A thriving trade for collectors and traffickers in antiquities soon flourished, and the race was on to acquire unprovenienced artifacts of material culture through looting, pot hunting, vandalizing, and grave robbing (Anderson 1990, Blair 1979, Messenger 1989, Nichols et al. 1989). Much of America's prehistory was lost to these early episodes of capitalism, but

without legislation to prohibit these activities, they continued, many at the behest of paying museums who offered bounties for the finest exemplars of wanted items.

It was not until the 20th century, in the year of the great San Francisco earthquake of 1906, that the first legislation was finally enacted to protect these dwindling and endangered resources. From the first tentative steps in 1906 to about the 1950's, however, there was a dearth of new archaeological resources protection laws, but beginning in the 1960's a new corpus of legislation to regulate and protect America's cultural patrimony was written and placed on the books.

Presently, there is a powerful suite of cultural heritage resource laws that exist in the form of legislation, regulations, standards, Executive Orders, and Presidential Memoranda designed to oversee and direct the protection of America's cultural resources, many developed only recently in response to unanticipated needs or as the result of public outcry.

Besides protecting America's cultural heritage, these newer laws are having a direct and unenvisioned effect on the disciplines of bioarchaeology and archaeology. Federally recognized Indian tribes are now wielding these laws as extensions of sovereignty, protecting their own cultural, biological, historical, and archaeological patrimony. As a result of the utilization of these proactive legislative tools by American Indians, anthropologists are finding there are ever-increasing restrictions being placed on the types and degrees of research permitted (Holt 1990). A prime example of this is the Native American Grave Protection and Repatriation Act of 1990 (NAGPRA) (Appendix A).

The passage of this act resulted in the protection of American Indian burial sites, skeletal remains, and associated mortuary material. NAGPRA mandates that museums and universities provide detailed listings of their indigenous American collections for

repatriation. This means that universities and museums must return requested American Indian skeletal and material holdings to culturally affiliated tribal groups. Many members of the scientific anthropological community view this law as a serious blow to all active and future research involving archaeological Native American remains and artifacts. Anthropologists argue that once these remains are returned for repatriation, they can never be studied again, and valuable sources of data on human adaptation in the prehistoric North American past will be lost. The American Indian counterpoint to this debate is that NAGPRA institutes the ethical and respectful treatment of their ancestral dead, an issue that is of the utmost importance to most indigenous American groups.

NAGPRA will be discussed at length within this chapter because it plays an extremely pivotal role to both the anthropological and American Indian communities, and it will also be illustrative to examine certain key items of legislation preceding the passage of this bill. In pre-NAGPRA era laws the roots of repatriation legislation are to be found. A brief review of the articles of legislation that affects the management of America's cultural resources is presented, and is grouped into three categories: laws, standards and guidelines, and Executive Orders and Presidential Memoranda. This list is not exhaustive but does include the most significant legislation employed in the protection of archaeological resources, especially as it pertains to their use by tribal entities and restrictions placed on bioarchaeological research.

American Cultural Resource Laws

American Antiquities Act of 1906 as amended (16 USC 431-433): This law, authorized by President Theodore Roosevelt, establishes national monuments to preserve characteristics of historic, prehistoric, and scientific interest. It prohibits and forbids unauthorized injury

of objects of antiquity on federal lands. It sets fines and prison terms for those convicted under the law. Devil's Tower National Monument in Wyoming, Petrified Forest National Monument in Arizona, and Mesa Verde National Park in Colorado were the first monuments established in 1906. An excerpt of the text of the legislation dealing with fines for illegal disturbance of archaeological objects and the requirements for legal excavations is included below. Note the fine levied is a mere $500.00, a large sum in 1906 but insignificant by today's standards when single objects can bring hundreds of thousands of dollars on the antiquities black market.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.
>
> *Sec. 3.* That permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulation as they may prescribe: Provided, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

Historic Sites Act of 1935 as amended (16 USC 461-467): This law establishes a national policy of preservation for sites of historic significance for the people of the United states, under stewardship of the Secretary of the Interior and the National Park System Advisory Board. An excerpt of the text of the legislation is included below:

> It is declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States. (Aug. 21, 1935, ch. 593, sec. 1,49 Stat. 666.)

> The Secretary of the Interior (hereinafter in sections 461 to 467 of this title referred to as the Secretary), through the National Park Service, for the purpose of effectuating the policy expressed in section 461 of this title, shall have the following powers and perform the following duties and functions:
>
> (b) Make a survey of historic and archaeologic sites, buildings, and objects for the purpose of determining which possess exceptional value as commemorating or illustrating the history of the United States.
>
> (f) Restore, reconstruct, rehabilitate, preserve, and maintain historic or prehistoric sites, buildings, objects, and properties of national historical or archaeological significance and where deemed desirable establish and maintain museums in connection therewith.
>
> (g) Erect and maintain tablets to mark or commemorate historic or prehistoric places and events of national historical or archaeological significance.
>
> (h) Operate and manage historic and archaeologic sites, buildings, and properties acquired.

Museum Properties Management Act of 1955(16 USC 18): This law establishes museums as institutions to inform the American public, as administered by the Secretary of the Interior through the National Park Service. An excerpt of the text of the legislation is included detailing museum acquisitions is outlined below:

> The Secretary of the Interior, notwithstanding other provisions or limitations of law, may perform the following functions in such manner as he shall consider to be in the public interest:
>
> (a) Donations and bequests
> Accept donations and bequests of money or other personal property, and hold, use, expend, and administer the same for purposes of this section and sections 18f-2 and 18f-3 of this title;
>
> (b) Purchases
> Purchase museum objects, museum collections, and other personal properties at prices he considers to be reasonable...

National Historic Preservation Act of 1966, as amended (16 USC 470 et seq.): The National Historic Preservation Act (NHPA) perhaps rivals NAGPRA in its use by American Indians in the protection of their heritage resources, as well as being a powerful tool for preservationists to utilize to ensure that Federal agencies consider the effects of

their undertakings on cultural resources. It "establish[es] historic preservation as a national policy and defines it as the protection, rehabilitation, restoration, and reconstruction of districts, sites, buildings, structures, and objects which are significant in American history, architecture, archaeology, or engineering" (U.S. Air Force Cultural Resources Website, n.d.). It establishes an oversight body, the Advisory Council on Historic Preservation (ACHP), and directs the Secretary of the Interior to "establish guidelines for nationally significant properties, curation of artifacts, documentation of historic properties, and preservation of Federally-owned historic sites" (U.S. Air Force Cultural Resources Website. n.d.).

There are two important components to this legislation; Section 106 and Section 101(d)(6)(B). The governing authority for the NHPA is the ACHP, and they offer clear guidance and definitions of these sections:

> The purpose of Section 106 is to avoid unnecessary harm to historic properties from Federal actions. Commonly known as Section 106 review, the procedure for meeting Section 106 requirements is defined in ACHP's regulations, "Protection of Historic Properties" (36 CFR Part 800). The regulations include both general direction regarding consultation and specific requirements at each stage of the review process.
>
> The two amended sections of NHPA that have a direct bearing on the Section 106 review process are Section 101(d)(6)(A), which clarifies that historic properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register, and Section 101(d)(6)(B), which requires Federal agencies, in carrying out their Section 106 responsibilities, to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking. ACHP's regulations incorporate these provisions and reflect other directives about tribal consultation from Executive orders, Presidential memoranda, and other authorities" (ACHP Website n.d.).

Section 106 is triggered by the funding of the project by Federal monies or through the granting or application of Federal licenses or permits (i.e., United States Army Corps of Engineers stream permits). Section 106 governs the protocol necessary to protect or mitigate adverse effects on properties listed on or eligible for listing on the National

Register of Historic Places (NRHP). The NRHP is maintained by the National Park Service (Department of the Interior) under the aegis of the Keeper of the Register. It is an official listing of districts, sites, structures, and objects significant to American history, archaeology, architecture, engineering, and culture. Eligibility for the Register is based on four criteria set forth in 36 CFR 60.4 which include:

Criterion A: Properties that are associated with events that have made a significant contribution to the broad patterns of American history (i.e., Revolutionary War Battlefields).

Criterion B: Properties that are associated with the lives of persons significant in the American past (i.e., George Washington "slept here" locations).

Criterion C: Properties that embody the distinctive characteristic of a type, period, or method of construction or that represent the work of a master, or that possess high artistic values (i.e., Hoover Dam).

Criterion D: Properties that have yielded or may be likely to yield information important in prehistory or history (i.e., any significant archaeological site).

It is vital to remember that a property does not actually have to be listed on the NRHP to be afforded the protections available within the Section 106 process, it merely has to be *eligible* for listing based on the criteria above. For the most part, archaeologists and bioarchaeologists deal in properties that fall under Criterion D eligibility.

Codified within Section 106 is that Federal agencies involved in undertakings which may impact NRHP-eligible properties must allow another independent Federal agency, the ACHP, to review and comment on the proposed undertaking. The ACHP will determine and suggest if alternate methods exist to mitigate damages or impacts to the properties in question.

Section 106 is a complicated and at times difficult process, but for clarity the regulations, taken from the Tennessee Department of Transportation guidelines (TDOT n.d.) may be broken down as follows:

> 1. Initiate Section 106 Process: The Federal Agency responsible for the action establishes the undertaking, determines whether the undertaking has the potential to affect historic properties (i.e., properties listed in or eligible for listing in the NRHP) and identifies the appropriate State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO). At this time, the agency plans to involve the public and identify other consulting parties.
>
> 2. Identify Historic Properties: If the agency's undertaking has the potential to affect historic properties, the agency determines the scope of appropriate identification efforts and proceeds to identify historic properties within the area of potential effects. Identification involves assessing the adequacy of existing survey data, inventories, and other information on the area's historic properties. This process may also include conducting further studies as necessary and consulting with the SHPO/THPO, consulting parties, local governments, and other interested parties. If properties are discovered that may be eligible for the NRHP, but have not been listed or determined eligible for listing, the agency consults with the SHPO/THPO and , if needed, the Keeper of the National Register to determine the eligibility status of the property.
>
> 3. Assess Adverse Effects: The agency, in consultation with the SHPO/THPO, assesses the potential effects to historic properties affected by the undertaking. The agency at this time will determine that the action will have "no adverse effect" or an "adverse effect" on historic properties. Consulting parties and interested members of the public are informed of the findings. The regulations provide specific criteria for determining whether an action will have an effect, and whether that effect will be adverse. Generally if the action may alter the characteristics that make a property eligible for the NRHP, it is recognized that the undertaking will have an adverse effect. If those alterations may be detrimental to the property's characteristics, including relevant qualities of the property's environment or use, the effects will be recognized as "adverse."
>
> 4. Resolve Adverse Effects: The agency consults with the SHPO/THPO and other consulting parties including members of the public. The ACHP may choose to participate in consultation, particularly under circumstances where there are substantial impacts to historic properties, when a case presents important questions

about interpretation, or if there is a potential for procedural problems. Consultation usually results in a Memorandum of Agreement (MOA). If agreement cannot be reached, the agency, SHPO/THPO, or ACHP may terminate consultation. If the SHPO/THPO terminates consultation, the agency and the ACHP may conclude the MOA without SHPO/THPO involvement. If the SHPO/THPO terminates consultation and the undertaking is on or affecting historic properties on tribal lands, the ACHP must provide formal comments. The agency must request ACHP comments if no agreement can be reached.

From a tribal standpoint, Sections 101(d)(2) and the related 101(d)(6)(B) are among the NHPA's most important portions. They establish the creation and authority of the Tribal Historic Preservation Office, a tribal entity for federally recognized tribes with powers and authority over Indian reservation lands as well as traditional territories not on reservation lands (see Begay 1991). The THPO functions as a federal land manager and operates in an equal authority with the State Historic Preservation Office.

Not all tribes have an established THPO; even so, those that do not still have the same authority over reservation lands as tribes with a THPO. The Eastern Band of Cherokee Indians has a THPO, and it is staffed by a number of anthropologists. In terms of territory, its authority covers large portions of eight states (Figure 3). It is one of the most active THPOs in the American Southeast, and is actively involved in the protection of its cultural and biological patrimony. Under the principles governing the policies of the Eastern Band of Cherokee Indians, the THPO does not advocate excavation and research of their skeletal dead (see Chapter Five), and as such it utilizes Section 106 of the NHPA to limit or exclude access to archaeologists and bioarchaeologists. This is significant, when one considers the size and range of Cherokee traditional territory.

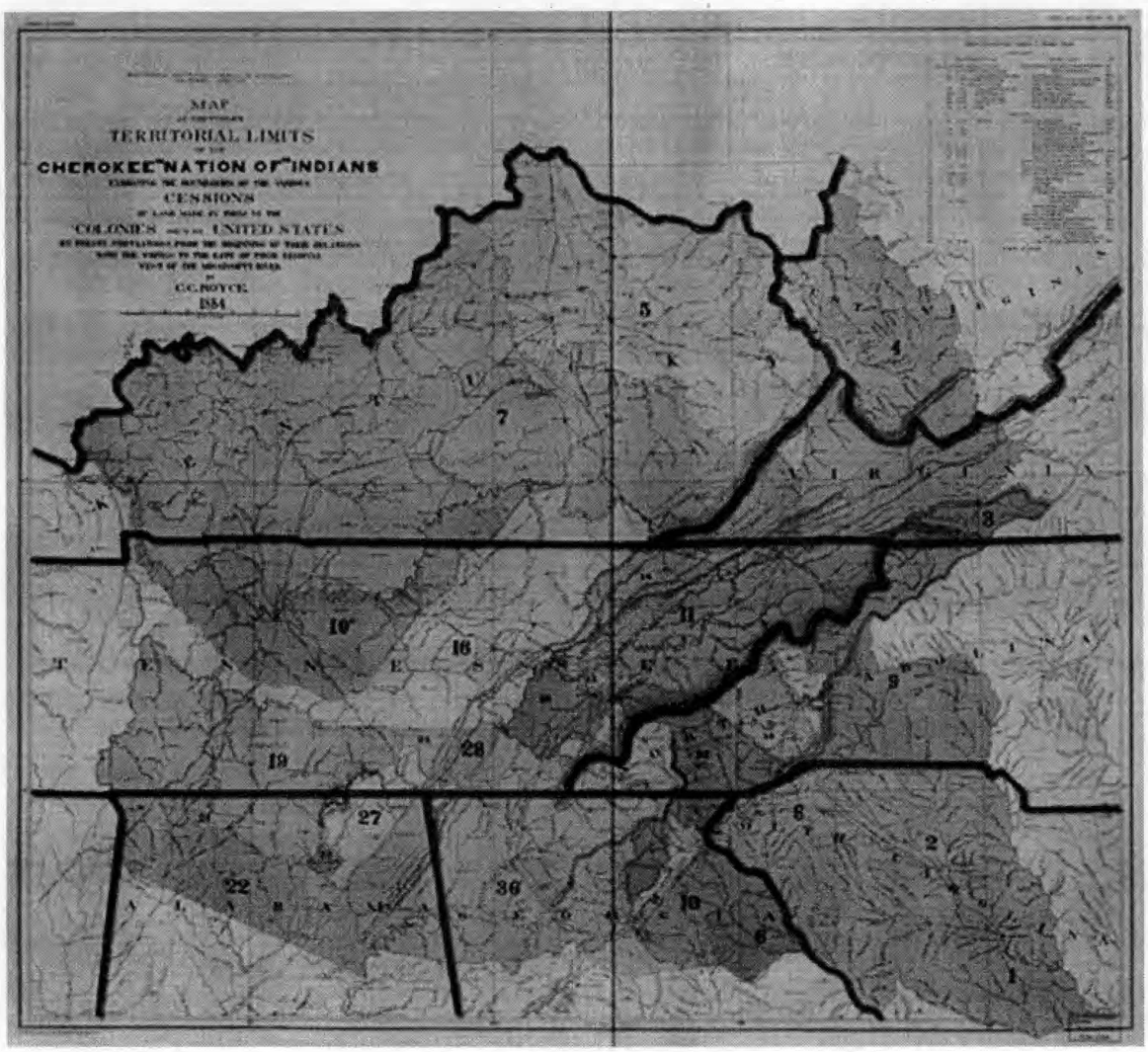

Figure 3. Map of the former territorial limits of the "Cherokee 'Nation of' Indians exhibiting the boundaries of the various cessions of land made by them to the colonies and to the United States by treaty stipulations, from the beginning of their relations with the whites to the date of their removal west of the Mississippi River." Plate VIII. C.C. Royce (1884), Fifth Annual Report of the Bureau of Ethnology to the Secretary of the Smithsonian Institution 1883-84. Washington, Government Printing Office.

National Environmental Policy Act of 1969 as amended (42 USC 4321, and 4331-4335): The purpose of the National Environmental Policy Act (NEPA) is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation." The key section of this lengthy act as it relates to archaeological endeavors is a small clause in Section 101 (4) which states that it is the responsibility of the Federal Government to use "all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may...(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice..."

This act, which on the whole deals more with natural and environmental considerations such as clean water, does in fact force the Federal Government to also consider archaeological and cultural resources as well, requiring the creation of detailed impact studies known as Environmental Impact Statements (EIS) and Environmental Assessments (EA).

American Indian Religious Freedom Act of 1978 as amended (42 USC 1996 and 1996a): This legislation is important in terms of archaeological concerns because it allows American Indians the free exercise of their religious freedom, with implications for sacred sites such as cemeteries, grave sites, and burials. The text of this law follows:

> Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of

the United States Constitution;

Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws and policies often deny American Indians access to sacred sties required in their religions, including cemeteries;

Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of American in Congress assembled, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rights.

Archaeological Resources Protection Act of 1979, as amended (16 USC 470aa-mm): The Archaeological Resources Protection Act (ARPA), requires that individuals or institutions must obtain a permit from the federal land manager (which includes the THPO for tribal lands) before excavating/removing archaeological resources from public lands. The purpose

of ARPA is the protection of irreplaceable archaeological resources from any unauthorized excavation, removal, alteration, damage, or defacement.

Native American Grave Protection and Repatriation Act of 1990 (25 USC 3001 et seq.): This law was signed into effect by President George W. Bush in 1990, and represents the greatest legislative impact to the field of bioarchaeology (Appendix A). It mandates that culturally affiliated American Indian skeletons and skeletal collections must be returned from federal institutions (including universities and museums) to their living descendants if so requested (Boyd and Haas 1992).

The power of NAGPRA lies in its intentions, in spite of its uneven execution. NAGPRA is considered by many to be an article of human rights legislation, and is one of the few acts specifically written with protective procedures in place for American Indian and Hawaiian tribal groups. As noted,

> NAGPRA is part of a larger historical tragedy: the failure of the United States Government, and other institutions, to understand and respect the spiritual and cultural beliefs and practices of Native people (Trope and Echo-Hawk 2001:32).

NAGPRA represents a split between church and state, between science and religion. It is an article of legislation that actually enforces what is viewed as religious in the eyes of American law and as a result "NAGPRA is unique legislation because it is the first time that the Federal Government and non-Indian institutions must consider what is *sacred* from an Indian perspective" (Trope and Echo-Hawk 2001:32). NAGPRA is an act that encompasses a wide range of protective categories, including human skeletal remains, grave and funerary objects, sacred or ceremonial objects, and items of cultural patrimony. In addition, it also mandates ownership and installs protective measures when these items are recovered from federal and tribal lands. A legal test-case of NAGPRA will be presented

later in this chapter, with a discussion of the Kennewick Man debate, eventual outcome, and possible implications for bioarchaeologists.

This legislation, in effect, places authority in the hands of "culturally affiliated" American Indian tribes to decide the disposition of their ancestral human remains and items of cultural patrimony located in museums, universities, and other institutions.

This has been a severe blow to the discipline of American biological anthropology, with thousands upon thousands of skeletons formerly held in academic communities now legally mandated to be returned to their descendant Indian groups for reburial, resulting in an enormous loss of skeletal material for scientific investigation. American Indians counter this assertion by noting that NAGPRA is the first step towards "finally recogniz[ing] that Native American human remains and cultural items are the remnants and products of living people, and that descendants have a cultural and spiritual relationship with the deceased" (Trope and Echo-Hawk 2001:31).

While the complexity of NAGPRA as a legal body is acknowledged, the components that make up this law are easily broken down into succinct parts:

Human Remains and Associated Funerary Objects: NAGPRA outlines the responsibilities for federal institutions (with the exception of the Smithsonian, which is regulated by the National Museum of the American Indian Act) for dealing with known or suspected skeletons and grave items form American Indians. Human remains or funerary items with verified tribal affiliations must be returned upon request to tribal authorities. In the case of items that are not legally accepted as having tribal affiliation, there must only be a preponderance of evidence which may include "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other

relevant information or expert opinion." Preponderance in this case means 51% or more likely than not - note that this is very different from a "scientific certainty."

In addition, Federal institutions are required to inventory and document in writing all items of American Indian origin to be made available should tribes request such information. It should be noted that while these inventories are "not an authorization for the initiation of new scientific studies - [they do] not preclude further scientific study either" (Trope and Echo-Hawk 2001:24).

NAGPRA defines cultural affiliation as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."

A Review Committee is established in the event that conflicts arise in the dispensation of materials, i.e., if items are claimed by multiple tribes, or if material remains unidentified. This committee will work in conjunction with tribal groups and Federal institutions to determine affiliation, and will issue recommendations regarding ultimate findings.

Unassociated Funerary Objects, Sacred Objects and Items of Cultural Patrimony:
This portion of the act details procedures for the repatriation of objects and items not found or retained with the associated skeleton. Definitions of these items include: "Unassociated funerary objects" are those believed to have been placed with individual human remains either at the time of death or later. "Sacred objects" are those ceremonial items which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.

"Cultural patrimony" is considered to be an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself.

In order to repatriate these unassociated items, four criteria must be met:

1) The item claimed must be shown by the tribal group as falling under one of the above defined categories of funerary object, sacred object, or an item of cultural patrimony.

2) The item's cultural affiliation must be determined, as well as prior ownership (in the case of an item of cultural patrimony) demonstrated.

3) The tribal group must present evidence that the federal institution or museum holding the item did not have a right of possession to the object (for example, in cases where items were legally sold to museums by tribal members or their creation commissioned by museum authorities).

4) If the above three criteria are met by the tribal group asserting the claim to the object, the final step involves the museum or federal institution. The onus rests on the agency to prove their right of possession to the object. If their right to the item is not provable, then they must turn over the object to the claimants "unless the scientific study or competing claims exceptions apply" (Trope and Echo-Hawk 2001:27).

Inventory of Human Remains and Associated Funerary Objects: This section of NAGPRA outlines the requirement that federal institutions and museums must inventory all human skeletal remains and funerary items in conjunction with representatives of tribal governments, and assign a specific cultural affiliation if possible. The completion of these inventories was given a deadline date of November 1995, although exceptions for legitimate reasons were granted. NAGPRA does not intend for the compilation of these inventory lists to necessitate retention of materials longer than necessary, nor does it

intend for the inventory process to be the impetus for the initiation of new scientific research. Once inventories are complete, notice must be served to all involved tribal groups. These "notices of intent to repatriate" can be viewed at http://www.cast.uark.edu/other/nps/nagpra/nir.html.

Summaries of Unassociated Funerary Objects, Sacred Objects, and Items of Cultural Patrimony: In the case of items without clear associations or cultural affiliation, museums and federal institutions may prepare "summaries" of material instead of item-by-item inventories. These summaries must "describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable." As in the case of associated items described above, these summaries must be prepared in conjunction with tribal authorities in a timely manner, and the preparation of these summaries are not to be used as delaying tactics or as an opportunity to conduct new scientific studies.

Tribal Ownership and Control - Embedded Cultural Items: This section establishes the far-ranging scope of NAGPRA, because it details procedures for items yet to be discovered on tribal or federal lands. Ownership and control of these "embedded cultural items" discovered in the future, whether by purposeful excavation or accidental discovery, must be determined in accordance with the regulations outlined by NAGPRA. In addition, regulations regarding purposeful excavations on tribal or federal lands are imposed, including obtaining authorization under the Archaeological Resources Protection Act of 1979. In the case of accidental discovery, for example during the course of construction, activities must cease until appropriate federal and tribal authorities are notified. The tribal

authorities then have a period of thirty days to decide which actions to take regarding disposition of the materials.

Trafficking in Native American Human Remains and Cultural Objects: The trafficking and sale of human remains is expressly prohibited (except under very special circumstances - for example if the next of kin of the individual are involved and consent). First time offenders are subject to a fine of $100,000 and up to one year in jail or both, while a second offence carries a maximum fine of $250,000 and five years in jail or both.

Individuals obtaining funerary objects, sacred objects, and items of cultural patrimony illegally are subject to the same fines and punishment as persons involved in the black-market trafficking of human remains. Although still a rarity, there are individuals being convicted of this crime using the provisions of NAGPRA in the court systems, as in a 1999 case in Pilot Rock, Kentucky. This case involved an individual who had excavated and then attempted to sell several American Indian skulls to undercover FBI agents, for which he was sentenced to two months of house arrest, 18 months of probation and an additional 100 hours of community service, but no fine (Scripps Howard News Service 2001).

Review Committee: This provision allows for the creation of a seven member Review Committee, appointed by the Secretary of the Interior. The Committee is composed of three individuals nominated from tribal groups, three individuals nominated from museum or scientific organizations, and one individual nominated by the other six members. The purpose of the Committee is to oversee that provisions under NAGPRA

are implemented in accordance with the stated laws, ranging from the inventory process to the submission of yearly reports of these activities to Congress.

Enforcement and Implementation of NAGPRA: Finally, NAGPRA outlines steps to take in the event that museums or federal institutions do not comply with the requirements of the law. The Secretary of the Interior is charged with determining the amount of civil penalties depending on key factors including the value of the items, damages suffered by the tribal party, and the number and severity of infractions.

NAGPRA is not perfect legislation; it represents a compromise between a number of parties and in the end it satisfies none of them completely (Watkins 2004). From the American Indian viewpoint, NAGPRA is flawed in many ways, especially in how it defines cultural affiliation, reckons descent, and applies only to Federal lands (Russell Townsend, unpublished manuscript).

Executive Orders and Presidential Memoranda

Executive Order 13007 - Indian Sacred Sites (1996): This Executive Order, signed into law by President William J. Clinton, insures that Indian religious practices and sacred sites are protected and preserved. An excerpt of the Order is printed below. Note that clause (2) includes wording that can be used by tribes to protect sites that may have archaeological (i.e., burial) components.

> *Section 1. Accommodation of Sacred Sites.* (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.

Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments (2000): Perhaps one of the most powerful Presidential Orders utilized by American Indians, this Executive Order was signed by President William J. Clinton. Its purpose is to "establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes." Although this Executive Order is not specifically a cultural resources document, it affirms tribal sovereignty and requires agencies of the Federal Government to consult with federally recognized Indian tribes on a formal government-to-government basis. In terms of archaeological endeavors, it works with Section 106 of the NHPA to oversee, protect, and enforce tribal mandates. An excerpt addressing tribal sovereignty is printed below:

> Section 2. Fundamental Principles.
>
> In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:
>
> a. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.
>
> b. Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.
>
> c. The United States recognizes the right of Indian tribes self-government and supports tribal sovereignty and self-determination.

Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relations with native American Tribal Governments (1994): Working in conjunction with Executive Order No. 13175 (Consultation and Coordination with Indian Tribal Governments), this memorandum signed by President William J. Clinton reinforces the special relationship American Indians have with the Federal Government by virtue of legal treaties, statutes, and court decisions. It instructs Federal departments and agencies to comply with policy in their dealing with sovereign tribes. Once again, this Memorandum is used by THPOs to insure cultural resource issues are addressed to the satisfaction of the tribe.

The Eastern Band of Cherokee Indians THPO regularly, successfully, and on a day-by-day basis utilizes components of these laws to enforce and promulgate their policies of restricted (or no) research access to aboriginal American Indian remains in portions of eight states. When viewed from the standpoint of anthropologists, this is an incredible loss of potential scientific data at the hands of a powerful tribal authority that has only been in existence less than a decade.

The legislation allowing for the creation of THPOs dates only to 1992, and out of some 550 federally recognized tribes in the United States, only about 55 have assumed THPO status. If the Eastern Band of Cherokee Indians' THPO is any indication of things to come, in the next few decades other federally recognized tribes with strengthening THPOs and those tribes applying for THPO status will soon determine access to a great majority of America's cultural and biological patrimony.

While much of the focus of this chapter has been on NAGPRA, more power lies in Section 106 to allow tribes to control access to their own prehistory. A point

anthropologists would do well to remember is that NAGPRA is finite. Eventually, federal and academic institutions will have completed their inventories and returned human skeletons, sacred items, funerary objects, and objects of cultural patrimony to their culturally affiliated tribes. Once this is done, these institutions will only have materials that not culturally linked to a living descendant population. The inability to determine cultural affiliation may be the result of the fact that there truly are no extant descendants, the material may have curational or provenience problems, or institutions may refrain from performing specialized studies on valued collections in the fear that they may lead to loss of those collections. Regardless, there will be very little new human osteological material coming into institutions, and the pool of available research collections will steadily decline. This will be a direct result of Section 106 legislation and the restrictions it will place on future research. NAGPRA may be finite, but Section 106 of the NHPA is long-term.

Chapter Four

REPATRIATION, NAGPRA, AND KENNEWICK MAN

> Each tribe has its own creation story and most are complicated. Some tribes believe that they emerged from this continent from sacred, underground sites. One theme that runs through some tribes' creation story is that the world was first covered with water, then living beings - animals mostly - brought mud from the bottom to form the earth before humans emerged from the underground. These places of emergence are revered as sacred sites... tribes universally recognize the Western Hemisphere as their motherland (Mihesuah 1996:46).

The conditions that led to the creation of NAGPRA and associated laws in the United States do not seem to have occurred in other nations with similar colonial histories. Countries such as Mexico, Peru, and others in both South and Central America have a demonstrable heritage in their cultural and archaeological patrimony, and there exists no analogous religious or political movements against the excavation and analysis of biological or cultural materials. Ubelaker and Grant (1989) propose an explanation; that these populations recognize and embrace the fact that their European histories are intertwined with their Indian heritage, while the American public has never felt a shared sense of history with the American Indian.

> If Americans had considered the Indian past to be part of their own heritage, and showed interest in it out of a sense of descent rather than a sense of curiosity about 'different' people, it is arguable that the growing hostilities over reburial and other issues might be mitigated (Ubelaker and Grant 1989:255).

In the previous chapter, a number of laws intended for the management of America's cultural and heritage resources were reviewed with special emphasis on those with the most potential to affect bioarchaeological investigations of America's prehistory. These articles of legislation are designed with the protection of resources in mind, but a case can be made that NAGPRA is unique among them because besides mandating

protections for human remains, funerary objects, and items of cultural patrimony, it also legislates the repatriation of any affiliated items to their descendant communities. Many factors coalesced to bring about passage of this law, not the least of which was outcry from the American Indian community over what they perceived as a long history of desecration of their cemeteries by an insensitive and unstoppable anthropological community. This chapter will examine some of the catalysts leading to the creation of NAGPRA and culminate with highlights from the court battle over Kennewick Man, which represents the largest legal test case of NAGPRA to date.

Repatriation

NAGPRA is repatriation legislation. The American Heritage Dictionary defines repatriation as the act of "restoring or returning to the country of birth, citizenship, or origin." The Federal Government of the United States has a national policy of recovering their dead from military conflicts. The creation of the United States Army Central Identification Laboratory, Hawaii (CILHI) (a.k.a the Joint POW/MIA All Accounting "JPAC") demonstrates the commitment of Americans to recover their war dead. The following excerpt is from their mission history:

> Since the 1840s, the U.S. Government has made a concerted effort to recover and properly inter its service members killed in war. Unfortunately, as has always been the case, many men who died in battle were buried where they fell. The Spanish-American War marked a major policy development. For the first time in U.S. history, the remains of U.S. servicemen interred in battlefield cemeteries on foreign soil were systematically disinterred and returned for permanent burial. During World War II, Congress again recognized the importance of returning the remains of U.S. service members to their native soil and delegated this responsibility to the Secretary of the Army. In May 1976 the U.S. Army Central Identification Laboratory, Hawaii (CILHI) was establish in Honolulu, Hawaii. With its renaming and relocation came an expanded mission. CILHI was now responsible for the search, recovery, and identification of all unrecovered U.S. service members from past wars. In 2000 the Deputy Secretary of Defense again acknowledged the CILHI's role in supporting the

> American people by expanding the organizational strength to 247 positions and jointly staffing the unit. Today the CILHI is composed of Army, Navy, Air Force, Marines and civilians (Excerpt from now inaccessible CILHI Website, last accessed 2003).

The importance the U.S. Government places on the identification, recovery, and repatriation of their military dead is clear. It should come as no surprise that tribal governments feel the same with upwards of 600,000 American Indian skeletal remains collected and boxed up in storage at a number of institutions in the United States including museums, universities, and teaching colleges. Additional remains are housed in a number of European museums (Bieder 1990; 1992; 1996, Moore 1994, Price 1991, Quigley 2001, Winski 1992).

Many American institutions acquired the bodies of American Indians in a multitude of ways. Besides the great quantities of American Indian skeletons and crania collected through anthropological endeavor, many were scavenged from historic Indians killed during skirmishes with the United States Cavalry. Official government policy dictated by the United States Surgeon General Joseph Pelucci of the United States Army Medical Museum and General E. S. Otis of the U.S. Army in the 1860s instructed U.S. field troops to scavenge and decapitate the fresh remains of Indian war dead and pack the skulls up for study and eventual accession into museum collections. During the next two decades under these imperatives, over 18,000 Cheyenne remains alone were collected (Bieder 1990, Hart 2001). Bieder and Deloria explain:

> In the post-Civil War years, collecting Indian skeletal remains proved a preoccupation of museums...A desire to make comparative racial studies of Indian tribes led the Surgeon General to issue orders to Army medical personnel requesting them to collect Indian remains. And remains were collected from battlefields and from Indian graves. Other museums, like the Chicago Field Museum and the American Museum of Natural History, were also active in making similar collections (Bieder 1990:ii).

> The idea came that you could determine race simply by the morphology – which is the bone structure of the creature. So there were horrendous things that went on [in] the

> battlefield. They'd cut the skulls off dead Indians and ship them to the Smithsonian, rob graves at night...(Vine Deloria on PBS 2000).

The litany of ill-considered decisions made by anthropologists and museum personnel regarding the acquisition and display of American Indian skeletons in part led to the creation of Federal laws mandating ethical behavior on the part of anthropologists.

A small example that may help illustrate the unequal treatment given to the bones of American Indians versus those of other American groups: In 1971, an archaeological excavation unearthed the skeletal remains of twenty-six White American pioneers and one American Indian in Iowa. The decision that was made regarding these individuals served as a catalyst for angry American Indian sentiment when all twenty-six pioneers were immediately reburied while the American Indian skeleton was promptly placed in a museum display for the paying public (Anderson et al. 1985). It was similar occurrences, happening regularly all across the United States, that set the stage for the development of new laws to clarify the responsibilities of anthropologists. In many states, relationships between anthropologists and American Indian groups were also coming to a head. Confrontation over archaeological excavations, museum displays, and road-side attractions were occurring with increasing frequency. As Bray notes,

> The fact that Native American dead were accorded different treatment than Whites, and the seeming disregard with which archaeologists treated the sensibilities of modern tribes became powerful symbols of oppression and the pervasiveness of racist attitudes for the Native community (Bray 2001a:2).

Many American Indian political groups took part in or were formed exclusively to engage the scientific community over the excavation and study of American Indian skeletons. Beginning in the mid-1970's groups such as the American Indians Against Desecration (AIAD), and later groups such as the National Congress of American Indians

(NCAI) and the Native American Rights Fund (NARF) unified to protest American Indian grave treatments. These groups argued their case for reburial on multiple fronts.

According to longstanding religious traditions, many American Indian groups stress that excavation and study of their ancestors is disruptive to the spirits of the deceased, as well as to the living community. While there are as many religious traditions as there are tribal groups, many groups such as AID propose that it is a pan-Indian responsibility to care for the remains of all deceased Indians, especially those used for scientific research and data collection. They argue that repatriation allows the ancestral dead a measure of peace, and also forestalls misfortunes that may befall the living community because of restless or disturbed dead (see Chapter Five for the Eastern Band of Cherokee Indians' perspective).

There are also segments of the American Indian population who view the work of anthropologists as paternal and neocolonial in both scope and attitude (Deloria 1969;1988;1992, Riding In 1992). They see the study of American Indian skeletal remains as a racial pursuit; an examination of the primitive "other." Trope and Echo-Hawk note that:

> American social policy has historically treated Indian dead differently than the dead of other races...as *archaeological resources, property, pathological material, data, specimens*, or *library books* but not as *human beings* (Emphasis in original, Trope and Echo-Hawk 2001:13).

Biological anthropologists and archaeologists argue that today, no one would condone the types of actions and offensive behaviors that led to such conflict between themselves and American Indians. Yet this is the inheritance anthropologists must overcome, and it is a legacy that Indians have never forgotten.

Anthropologist Randall McGuire has provided a thoughtful analysis of Euroamerican perceptions of the sanctity of American Indian graves, and the resulting necessity for the

creation of protective legislation for non-disturbance of their burials (McGuire 1994). He proposes a link between the misconception of the American Indian as a vanished symbol of the American past and the treatment accorded to their gravesites. Indeed, as Euroamerican philosophies of death (and the afterlife) determine the sanctity of their graves, Euroamerican concepts of Indians influence the opposing non-sanctity of their graves.

In the majority of Western culture, including the discipline of physical anthropology, Indians are viewed as a vanished, almost mythical people. This definition of Indians as a group so outside the normal experience of everyday Americans in effect relegates them to the role of extinct civilizations (Berkhofer 1978, Dippie 1982, McGuire 1997, Pearce 1965, Trigger 1980). This viewpoint makes it a simple matter to disregard the markers of their death - their graves- as areas with any imbued sanctity and instead shifts them into the realm of scientific curiosity, as items of natural history to be investigated as are dinosaur bones and other extinct fossil creatures (Goetzmann and Goetzmann 1986, Sellars 1980, Willey and Sabloff 1993). This insistence and persistence in conception of Indians as non-existent people confines them to the past in a "temporal construct that creates otherness by relegating people to an ancient time, regardless of their true historical context" (Fabian 1983:18).

Because of these influences, their graves and sacred places are seen as sources of information about prehistory, and not places that should be accorded the same respect as non-Indian burials. Although Indian religious views are as diverse as the tribes themselves, it is safe to note that for Euroamericans, burials are left alone out of respect for surviving family members, while for Indians, sacredness is imbued in the burial itself and on the deceased individual, and not on living relatives (Medicine 1973, Hammil and Zimmerman

1983, Talbot 1984, NCAI 1986). In other terms, for Euroamericans the sanctity of the grave is in direct proportion to surviving near relatives. There are parallels to this axiom in the treatment of American Indian burials by anthropologists, where sanctity of the grave is only granted when direct lineal descent is legally proven (McGuire 1994).

While the general public tends to side with American Indian viewpoints on the issue of grave disturbance (McGuire 1994, Garza and Powell 2001), anthropological viewpoints conflict because this transference of sanctity (and hence untouchability) to Indian graves removes the burials from the arena of the scientific and places them in the realm of the sacred. This dichotomy in perception between American Indians and anthropologists (and indeed anthropologists and the general public) is the impetus for legislation protecting Indian graves from disturbance, excavation, and study.

The social demand for recognition and repatriation of their dead by Indian tribes culminated in the passage of NAGPRA. The legal genesis of NAGPRA was a suite of state-level burial laws and the 1989 National Museum of the American Indian Act (NMAIA); regulations and statues that were forerunners contributing to its passage. A brief review of these laws now follows.

General Laws - Legal Protection for Unmarked Graves: The majority of states in the U .S. maintain unmarked grave protection legislation applicable to all cemeteries, including prehistoric burials. These laws guarantee protection of graves from deliberate disturbance. For example, the state of Tennessee within their statutory laws concerning cemetery and burial site laws includes the following:

> (Tennessee Code Annotated) - Title 39. Criminal Offenses: 39-17-312. Corpses; abuse
> a) A person commits an offense who, without legal privilege, knowingly:
> (1) Physically mistreats a corpse in a manner offensive to the sensibilities of an ordinary person;

(2) Disinters a corpse that has been buried or otherwise interred; or
(3) Disposes of a corpse in a manner known to be in violation of law.
b) A violation of this section is a Class E felony.

Specific Repatriation Laws - Legal Protection for Native Remains: By the late 1980's, the individual states of Arizona, California, Hawaii, Kansas and Nebraska had all passed specific repatriation statutes beyond general cemetery protections. They specifically addressed American Indian remains. These items of legislation were the immediate precursors to NAGPRA and there is much similarity in their content.

For example, Nebraska enacted their "Unmarked Human Burial Sites and Skeletal Remains Protection Act" in 1989, which required all museums with culturally affiliated grave items or skeletal remains to hand over these materials upon request to the authorized tribal authority (Peregoy 1992).

Salina Indian Burial Pit

The Kansas statute was in specific response to a roadside tourist attraction erected in 1936 known as the Salina Indian Burial Pit (Figure 4). Over 140 excavated prehistoric American Indian skeletons from the Smoky Hill River culture (whose descendants include the Pawnee, Wichita, Mandan, Arikara, and Hidatsa) were on display to passing motorists (Stein 1989). For a fee payable to the landowner, vacationers could gaze upon their exposed and pedestaled remains while the operator of the attraction lectured on the display. The following excerpt is from a transcript of the PBS program called *Who Owns the Past: The American Indian Struggle for Control of their Ancestral Remains* (PBS 2001). It describes a meeting held at Haskell Indian Nations University in Kansas between representatives of American Indian tribes and the state of Kansas regarding a plan for the



Figure 4. Photographic postcard of the historical marker for the Salina Indian Burial Pit discovered in 1936 near Salina, Kansas. The roadside attraction allowed paying visitors to view the skeletal remains of 146 Smoky Hill River people, whose descendants today include the Pawnee, Wichita, Mandan, Arikara and Hidatsa.

state to purchase the attraction and develop it further to display the skeletons. The outcome of this meeting led to the eventual closure of the attraction.

Title: The Indian Burial Pit, Salina, Kansas.

[Dissolve to Indian Burial Pit sign.]

Daniel Wildcat, Historian, Haskell Indian Nations University: I became aware of the Indian Burial Pit probably in the late Seventies. And that was just from driving down I-70 and seeing this sign. Many people have asked, "Why didn't Native people make an issue of this site earlier?" For many of us, the whole notion somehow that one would visit a desecrated burial site is something that is repulsive and to many of us we would view as very harmful to our own spiritual and physical wellbeing.

Narrator: The Indian Burial Pit was just a few miles from where the Mulberry Creek Massacre took place. It belonged to the Price family, who ran it as a roadside attraction. In the early 1980s the State of Kansas developed a plan to turn the exhibit into an up-to-date museum.

[Dissolve to Gerald Gipp at the podium. Super: 1986*]*

Gerald Gipp, president, Haskell Indian Nations University: With us today is a gentleman who has a great deal of knowledge about that particular burial pit. Representing the state of Kansas, Mr. Tom Witty, who is the state archaeologist.

Narrator: Haskell Indian Nations University convened interested parties to discuss the state's plans.

Tom Witty, Kansas State Archaeologist: I've been involved with Kansas archaeology for 25 years, almost all of that time directly related to recognizing and interpreting the Indian cultures of Kansas. So I have a strong identity and involvement with your people.

Wesley Plenty Chief, Arikara: I wonder...I just wonder if one of our tribe people would find bones of a non-Indian and put them out on display and ask for admission. I wonder what they would do to us.

Rob Daugherty, Cherokee, Haskell Indian Nations University: Our first priority should be, and hopefully it will be, to close this place down immediately.

Wildcat: If you understand that the roots of many of those organizations, the activists involved, had to do in sort of a reconnecting to our own spiritual and religious traditions, then I think it makes perfect sense that this was going to be an issue that was going to be placed really prominently on the agendas.

Dale Thomas, Prairie Band Potawatomi: But yet we have teachers all across this land. And if you do not study what they are teaching, you are going to flunk that test. Because it is their interpretation of the Indian lifestyles.

Charles Eaves, Pawnee: Let's bury the people. Let's bury them. We don't want these

people on display any more. I think they've been on display for 50 years, and I think that is enough. If the archaeologists cannot find something within that 50 years, then they never will.

Wildcat: These people lived in those Smoky...Smoky Hills for hundreds, thousands of years before you arrived. What right do you have to dig up those burials, to make commercial profit, to exploit those peoples?

Walter Echo-Hawk at Haskell: There's legislation pending right now in the state of Wisconsin as well. So it's not only Kansas that is coming to grips with this issue.

Narrator: The Haskell symposium changed Tom Witty's plans. The State of Kansas bought the Burial Pit in order to close it down.

Tom Witty on camera: This property was acquired by more or less a contract or an agreement prepared by Walter Echo-Hawk called the Smoky Hill Treaty. There was to be 30 days set aside for study of the remains. And then the burial pit was to be filled in with sand. And once that was up to the top of the wall, a 6" concrete slab was put over it.

Dissolve to wide shot of Witty walking around fenced enclosure.

Witty voice-over: I realized later, and not too shortly after that, that this had to be. Because if they would have been nice and polite, I wouldn't have accepted it. In other words, it's like the old joke: How do you get the mule's attention? You hit him across the forehead with a 2x4.

Wildcat on camera: It really startles people when we step out of this sort of invisible status we have to say, "We're here."

A popular website devoted to the successful "Roadside America" books includes this telling comment regarding the Salina Indian Burial Pit, now permanently closed:

> We were saddened to hear that the Prehistoric Indian Burial Pits in Salina, KS, had been bulldozed under. This place was built like a bunker, off a dirt road with an owner who talked tough through his battery-powered larynx. But the Indians got their way and the human skeletons (along with their informative signs) have been returned to the soil — hopefully for future vacationgoers to unearth and enjoy (www.roadsideamerica.com, accessed July 2004).

National Repatriation Laws - Legal Protection for American Indian Remains: While many states acted individually to grant repatriation rights, the mounting pressures from American Indian groups and lobbyists served as catalysts to spur the Federal Government into adopting widespread, national legislation on the treatment of American Indian

skeletal material and cultural items as well. These initial attempts would result in the passage of NAGPRA in 1990 and in federal legislation aimed at the protection and repatriation of culturally affiliated skeletons, sacred items, and grave objects.

Some of the more notable case studies used to urge Congress towards adopting this bill included the Smithsonian Institution's curation of over 18,000 skeletons (Preston 1989), and the passage in 1989 of the National Museum of the American Indian Act (NMAIA). The purpose of this act was the specific creation of the National Museum of the American Indian within the Smithsonian Institution. Notable are the provisions included within this act, such as the establishment of strict legal guidelines that the Smithsonian must adhere to concerning disposition of American Indian biological and cultural materials, and the establishment of a directed committee to monitor repatriation of these items. The legal foundations and requirements outlined in the NMAIA were obvious and direct precursors, lending their organization and structure to what was to become NAGPRA. Two well-known cases involving applications of NAGPRA are the Dickson Mounds site, and the Kennewick Man skeleton.

Dr. Dickson's Mounds

The Dickson Mounds site in Illinois is well known to physical anthropologists. Private excavations in the 1920's by the landowner, Dr. Dickson, led to the discovery of a large skeletal assemblage ranging from the Woodland to the Mississippian period of prehistory (roughly 1000 B.C. to 1550 A.D.). This skeletal collection is arguably one of the most analyzed and a number of seminal bioarchaeological articles have resulted from the study of these individuals (i.e., Blakey and Armelagos 1985, Goodman et al. 1984a, Goodman et al. 1984b, Goodman et al. 1980, Lallo et al. 1978; 1980, Martin et al. 1979).

As with the Salina Burial Pit, these remains were also initially put on display for paying customers, but the site was closed on April 3, 1992 as a result of pressure from American Indians and new NAGPRA regulations. The following excerpt is from the transcript of the PBS program *Who Owns the Past: The American Indian Struggle for Control of their Ancestral Remains* (PBS 2001) and details the climate and events leading up to the closure of the Dickson Mounds site:

> *[Title:* Dickson Mounds, Lewistown, Illinois.*]*
>
> *Narrator:* In 1927 Dr. Don F. Dickson, an Illinois chiropractor, turned a burial mound on the family farm into a roadside exhibit.
>
> *Janet Rhodes, teacher:* In grade school we went pretty often to Dickson Mounds, and this was my first introduction to Indian culture.
>
> Dr. Dickson got down in with the graves and...and he talked about the culture. And as a child, it made me wonder "What was it like then for the Indians?" It gave me a respect for them.
>
> *Janet Rhodes (voice over):* He brought out a sensitivity in us toward the American Indian. This is our view of the American Indian: a strong person. A person that lived with the land, and we can identify with that person.
>
> *Judith Franke, Curator, Dickson Mounds Museum:* So, the Dickson Family died, and they sold the state the property and then it was developed by the state into a modern museum facility.
>
> *Narrator*: The new building perches atop the burial site. Archaeologist Alan Harn became Dr. Dickson's successor.
>
> *Harn in the burial pit:* But if you look closely at 106 – at the clavicle? The clavicle has just been completely crushed on the right side.
>
> *Alan Harn, archaeologist, Dickson Mounds Museum:* We are so isolated here in Central Illinois that the average Illinois citizen has never seen a real Indian. His only contact with Indian people or with Indian culture comes through a visit to a museum like Dickson Mounds.
>
> *Mike Haney, Seminole, American Indians Against Desecration:* They should learn that they could learn more by talking to live Indians than they ever could by questioning or studying dead ones.
>
> *Kathy Baird, Crow, Repatriation Activist:* People to a certain extent feel that they're acting reverent. They look upon these remains and there are hushed tones. And they have to view it very quietly and with a lot of respect. And then they leave, and they walk over to

the snack shop to buy a hot dog, and then go outside on circus day and get a balloon from the clown.

Narrator: Native American activists decided to take a stand at Dickson Mounds.

Franke: It became a very acrimonious debate at that time. It wasn't even a debate. It was a number of Indian representatives making clear their point of view, and local people with very diametrically opposed views.

Mike Haney, Lakota/Seminole, United Indians of Oklahoma: [shoveling dirt onto skeletons in news film] This is a sacred site. Anyone that interferes with us will be prosecuted.

Haney interview: We had several demonstrations, several rallies. It took us about a year and a half, but finally, we jumped down into the burial pit and physically used shovels and...and covered up many of the bodies. Cuz I said, "Arrest us. If it's a law that prevents us from burying our dead, it needs to be challenged."

Mike Haney [in news film]: We've tried to work with these people, pleaded with them, talked to them. We've gone to the Congressman. Sometimes it's important to do what's right, not necessarily what's legal.

Alan Harn, archaeologist, Dickson Mounds Museum: I've been a great admirer of the American Indian from the time I was big enough to read. Through my professional years I was a champion and a supporter of the Indians and of the Indian people in general. And I was really taken aback when all of a sudden I learned that I was a part of something that was very bad.

Janet Rhodes As far as people coming in now and saying, well, this was wrong, we didn't think about it being wrong.

Judith Franke, Curator, Dickson Mounds Museum: Late in '89 the Illinois State Museum, of which we're a part, decided to recommend closure of the Dickson Burial exhibit to public view. There was a tremendous amount of consternation on the part of local people, local politicians that they had not been forewarned of this. They had never realized it was a problem. It came as a great shock to them.

Local resident: (old man) The sad thing is that this is a place where many young children first confront their own mortality. They realize that someday they are going to die. But more importantly they realize that these Indians that they see before them were actually people.

Three kids outside Dickson Mounds: It was pretty neat! Pretty neat! Pretty neat!

Their Grandmother: They're gonna miss an awful lot. I mean the children really are gonna miss an awful lot, and I'm sorry that it had to happen like this.

Offscreen Interviewer: Is there some good that comes out of this?

Grandma: I don't know. I don't think so. I don't think so. Because we got so many people now that say "I have a right for this and a right for that. You know?"

Kathy Baird: A lot of the problems that exist today in urban Indian communities are a

direct result of...of not having an identity, of not having anything to cling to. By restoring a little bit of this...this dignity and respect of our ancestors gives us a place, and therefore, gives us a base to combat some of these problems.

Local Man: What we're dealing with is a small group of people from Oklahoma that are trying to advance their cause at our expense.
Man in hat: It's something, you know, that once it's closed it kind of goes away. And this is something that's our heritage or our past that's happened here.

Narrator: Despite the local people's resistance, the burial room at Dickson Mounds finally closed its doors.

Mike Haney: It's the women that called up the men and said, "Have you lost your warrior blood?" We're gonna ask these ladies to take these sacred tobacco ties and hang them on the doors.

Kathy Baird voice-over: Our culture and our heritage have been taken over by scientific people and historians who feel that they're in a better position to relate our history. Indians are not only a people of the past, but they're people of the present and people of the future.

Narrator: In 1990 what was happening in the states became national policy. Congress passed the Native American Graves Protection and Repatriation Act.

James Riding In: As Indian people we entered into numerous treaties with the United States, but at no time did we ever cede the dead. We ceded some of our land. We got things in return from the federal government. But we maintained our right to own our dead.

Suzan Shown Harjo: We have to find some way to change the course of history. We did that in the late 1980s and the early 1990s through the repatriation laws. And did that make up for anything in the past? No. But it stopped it from happening again.

Wildcat: It really is the culmination of the Indian activism that began in the late '60s challenging young American Indian men and women to get involved and play a role in their own nation's self-determination. We're the first generation to get college educations. It's given Native people the expertise, the knowhow to tackle these issues in the forms and the institutions that are the dominant societies.

Making It So: Kennewick Man

In some ways, the genesis of my research began with the discovery and subsequent debate over Kennewick Man. As an anthropology graduate student in 1996, it was difficult to conceptualize that there were alternative viewpoints to that of the scientific position, which was that Kennewick Man belonged to all Americans, and that his story

would shed light on the mosaic of humanity that first settled the North American continent (see Downey 2000). It was inconceivable that American Indian groups would claim, *could claim*, direct ancestry to a human being who lived more than 9,000 years ago, and that the United States Government, in the form of the Department of the Interior and the U.S. Army Corps of Engineers, would even think of returning the bones to claimant tribes without allowing scientific study. The case soon exploded into an all-out conflict, however, pitting the Government and American Indian tribes against the scientific community in a battle that went all the way to the 9th U.S. District Circuit Court of Appeals, with an ultimate judgment rendered in early 2004.

The saga of Kennewick Man is now well-known and the ongoing court battle between anthropologists and claimant tribes appears to have reached a final conclusion. An extremely brief précis of the events leading up to the court decision of February 2004 is outlined.

- In 1996, human bones were found eroding out of the banks of the Columbia River in Kennewick, Washington. The coroner and a local anthropologist named James C. Chatters were called in, and they determined that it was not modern and therefore not of medicolegal significance. Dr. Chatters initially believed the 98% complete skeleton was that of a historic male of European descent based on a number of factors. Chatters explains "The completeness and unusually good condition of the skeleton, presence of Caucasoid traits, lack of definitive Native-American characteristics, and the association with an early homestead led me to suspect that the bones represented a European settler" (Chatters 1997).

- Upon submitting the postcrania to computed tomography (CT) scans, an embedded object was detected in the ilium of the right innominate. The object turned out to be a prehistoric leaf-shaped Southern Plateau Cascade projectile point, dating roughly from around 5,000 to 9,000 years ago.

- Once it was discovered that Kennewick Man represented the remains of one of the oldest American skeletons and was not that of a historic individual, regional American Indian tribes in the area including the Umatilla, Yakama, Colville and Nez Perce tribes petitioned the Department of the Interior's Secretary of the Interior Bruce Babbitt for the return of the bones under NAGPRA.

- Secretary Babbitt agreed to the tribes' request, and the U.S. Army Corps of Engineers, after having stored the bones pending the Department of the Interior's decision, agreed to turn over the remains to the claimant tribes.

- Subsequent to that decision, a number of anthropologists and a geologist, organized as plaintiffs, filed a lawsuit for the return of the bones and the opportunity to examine the remains. They cited a number of criteria for their legal action; that the bones could not be determined to be culturally affiliated to the claimant tribes under the requirements of NAGPRA, and that their civil liberties as scientists had been denied.

- In 2002, U.S. Magistrate John Jelderks of the U.S. District Court in Portland pronounced his decision awarding the scientists the right to study Kennewick Man,

agreeing that under NAGPRA's requirements, cultural affiliation could not be established.

- The claimant tribes appealed Judge Jelderks' decision, and on February 4, 2004, the 9th U.S. District Circuit Court of Appeals in Seattle, Washington, denied their appeal, agreeing to allow scientific study of Kennewick Man.

The 9th U.S. District Circuit Court of Appeals agreed with the lower court decision made by Judge Jelderks and found that legally NAGPRA did not apply because of a lack of evidence connecting Kennewick Man's remains with those of an existing and culturally affiliated tribe. The remains are now eligible for study under the Archaeological Resources Protection Act .

The Kennewick Man case challenged how the Department of Interior and other federal agencies had been interpreting NAGPRA. According to the 9th Circuit opinion, the Department of Interior mistakenly had been giving tribes authority over all prehistoric remains based on the definition of an American Indian as "any person predating European settlers," shutting the door to any other potentially unknown or unverified visitors like the Vikings. Under this definition, anyone who arrived on the continent before Columbus' voyage was an American Indian, regardless of where they came from. "We cannot conclude that Congress intended to pursue an absurd result," the court wrote. NAGPRA, the court decided, should be interpreted to demand that the tribes first must show a direct relationship to any human remains before they claim authority over them.

Comments from two of the scientist plaintiffs affirms their belief that the cause of science achieved a victory with the ruling of the higher court:

> I'm absolutely thrilled that the court has affirmed the public's right to knowledge and rejected this attempt, on religious grounds, to limit scientific inquiry (James C. Chatters quoted in Paulson 2004).
>
> These are rare finds, rare individuals...This is a win for science, for openness and against an attempt at censorship (Robson Bonnichsen quoted in Paulson 2004).

"America Before the Indians" - Kennewick's New Paradigm

The scientific anthropological community has now been granted legal permission to study the Kennewick Man remains. This is not to say that scientific research on Kennewick Man has never been conducted. In fact, from 1996 onwards, throughout all the legal proceedings, anthropologists have been measuring replica casts made by James Chatters before the actual bones of Kennewick Man were seized by the U.S. Government. Craniometric research on the skull of Kennewick Man (along with approximately thirteen other ancient American skeletons) by physical anthropologists has resulted in the pronouncement of a new hypothesis; that ancient Americans like Kennewick Man are not related to modern American Indians, but instead to a putative "Indo-European" stock.

Within the last few years, a group of physical anthropologists have proposed a new scenario for the migration of anatomically modern humans into North America, removing American Indians as the continent's "first people" and replacing them with a wave of "Indo-Europeans." Proponents for these new theories for the peopling of the Americas argue that the earliest humans to inhabit the North American continent were not of American Indian ancestry; that there is no direct ancestor-descendant relationship (Jantz and Owsley 2001, Owsley and Jantz 2001).

These researchers have based this conclusion on their craniometric analysis of the earliest humans on the continent (i.e., Spirit Cave, Browns Valley, Pelican Rapids, Lime Creek, Wizards Beach, etc). They state that these earliest skeletons do not share

morphological similarities to modern American Indians, but instead demonstrate traits more like those of "Caucasian" populations (Figure 5). Their arguments are based on analysis of thirteen or so fragmentary individuals, and involve craniometric evaluation and comparison with skulls from the W.W. Howells worldwide recent (historic) database sample (Jantz and Owsley 2001). The Howells database includes twenty-eight comparative worldwide samples, but only two of these samples are American Indians. In order to make up for this deficiency, the authors and their associates included cranial measurements from an additional six historic American Indian populations. Owsley lists caveats that go along with utilization of the Howells database:

> Given sample skulls we can often recognize describable metric differences between populations...There are complications, however. Any collection from one ethnic group might contain one or more individuals from a totally different group...The way we look at a skeleton today is radically different than Howells. I think we are better able to identify and understand how different activities are affecting the skeletons (Douglas W. Owsley quoted in Hall 1997).

The researchers took twenty-two measurements on the eleven skulls and then:

> Cranial variation was examined by calculating the Mahalanobis distance between each pair of fossils, using a pooled within sample covariance matrix estimated from the data of Howells (Jantz and Owsley 2001:146).

After using these statistical techniques to compare cranial measurements from the eleven ancient skulls to those of the eight American Indian groups in their sample (as well as those from the twenty-six other Non-American Indian world-wide groups in the original Howells sample), they find that many share similarities with the European samples, and that three of the ancient skulls "provide evidence for the presence of an early population that bears no similarity to the morphometric pattern of recent American Indians" (Jantz and Owsley 2001:146).

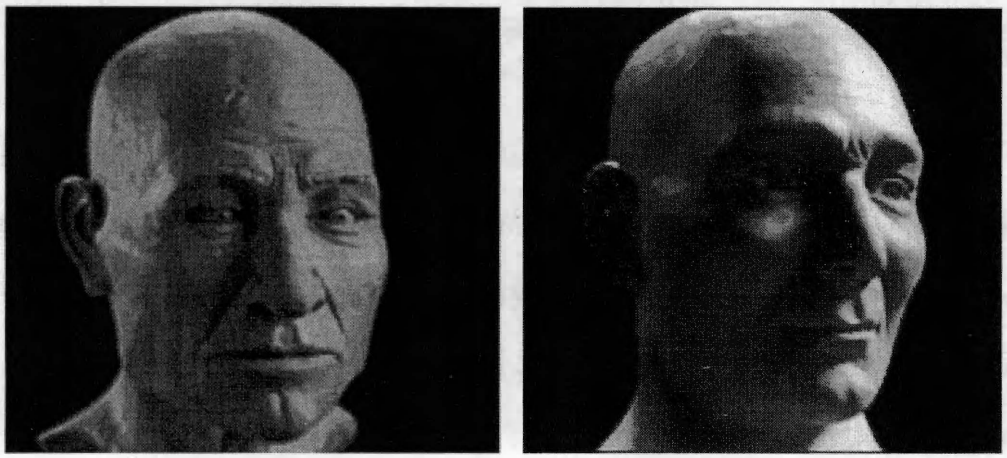

Figure 5: Clay facial reconstructions of the skulls of Kennewick Man (left) and Spirit Cave Man (right). In addition to the strongly "Caucasoid" features in both reconstructions, note the presence of a cleft chin in each bust, a distinctly non-American Indian facial feature. Cleft chins, like ears, eye color, and lip shape are soft tissue markers which are artistically subjective and not reflective of underlying skeletal morphology (i.e., bilobate mandibles are not indicators of cleft chins). The decision to include this unknowable feature in both reconstructions further enhances their non-American Indian appearance.

Spirit Cave Man bust by Sharon Long. Photograph from *Nova: Mystery of the First Americans*, www.pbs.org/wgbh/nova/first/claimjant.html.

Kennewick Man bust by James Chatters and Thomas McClelland. Photograph from *Nova: Mystery of the First Americans*, www.pbs.org/wgbh/nova/first/kennewick.html.

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Critics of this theory argue that what is reflected in the ancient American skeletal record is not indicative of colonization of the Americas by early "European" ancestors, but by the ancestors of American Indian populations who do not resemble their descendant populations anymore due to influences of chronology, evolution, environment, and adaptation (Van Vark et al. 2003). A significant but unknown component to this

argument is at what point in time in the last 10,000 years did American Indian cranial morphology assume its modern form, and what evolutionary processes and environmental constraints (at both the macro and micro level) shapes the human cranium over time. Another consideration not addressed by this research is what influence did factors such as genetic drift and demographic growth have on the structure and morphology of the earliest Americans (Powell and Neves 1999:153). Thomas renders this critique:

> In North American Indian populations (and, indeed, human populations worldwide), there has been a distinct tendency for skulls to become more globular ("rounder") and less robust over the last 10,000 years. This being so, no experienced physical anthropologist should be surprised that the Kennewick skull has a longer, more robust face than recent Native Americans...Although forensic anthropologists can often produce spectacular results in separating modern "races," this success requires very specialized assumptions that are wholly inappropriate when projected into the deep past (Thomas 2000:116).

Lastly, the small sample size examined, the sometimes fragmentary and incomplete nature of the remains, and the craniometric methodology used begs for caution when analyzing and publicizing the results of these remains (Anderson 2003, Swedlund and Anderson 1999, Watkins 2003). Acceptance of this theory among biological anthropologists is by no means widespread; many are awaiting the results of further research (Morrel 1998a). Jantz and Owsley respond to criticism of their research by acknowledging that:

> It is fashionable now to minimize cranial morphology as a source of information about past populations. We can readily acknowledge that we are a long way from understanding the causes which underlie specific changes in cranial morphology. Some of the variation, possibly even a majority, may be neutral variation...and selection may have played a role...(Jantz and Owsley 2003:187).

Support for the "Europeans First" Position

The simplified message of this research promulgated in both the scientific and mainstream press – that Europeans were the first people on this continent - has exposed

the public to headlines from respected publications like the Washington Post which proclaim *Skulls Show Caucasians Among First Immigrants* (Anonymous 1997).

Unfortunately, this theory has also found a very accepting audience among a segment of the population more than ready to embrace the underlying racial implications. It seems that this new paradigm of "Caucasians First" has found a popular niche outside of the academic community. Nazi groups are now pointing to anthropological research on Buhl Woman, Spirit Cave Man, Wizard's Beach, and Kennewick Man as proof of the inherent superiority, dominance, and primacy of the White race (Figures 6,7,8).

The question of the peopling of the Americas is acknowledged as a very intriguing and sticky issue (Greenberg et al. 1986, Meltzer 1989), but anthropologists would do well to insure that the meaning they convey is not simplistically reduced to "Europeans arrived in the Americas before American Indians did," because in the eyes of the lay public, mainstream press, and fringe elements, this is the message received and accepted as fact. The following position on Kennewick Man and other ancient skeletons by a Nazi organization is now held by many in the mainstream as well:

> The reasons for the American Indian sensitivity over the issue are obvious- proof that Whites - even if only in small numbers - walked the continent of North America before the Amerinds themselves would undermine the latter's claim to be the original 'Native Americans.' For the sake of political correctness, much valuable scientific data is being suppressed (March of the Titans Website 1999).

Contrast the above position with a very similar opinion left on the "Friends of America's Past" website, which promotes the positions of the anthropological claimants in the Kennewick Man case:

> Indians seem much more preoccupied that someone will find earlier inhabitants and eventually realize that they might not have been the first inhabitants in North America but rather coming here to escape persecution somewhere else. This could very well prove that Native Americans themselves dismantled a preexisting population long before theirs (Friends of America's Past Website n.d.).

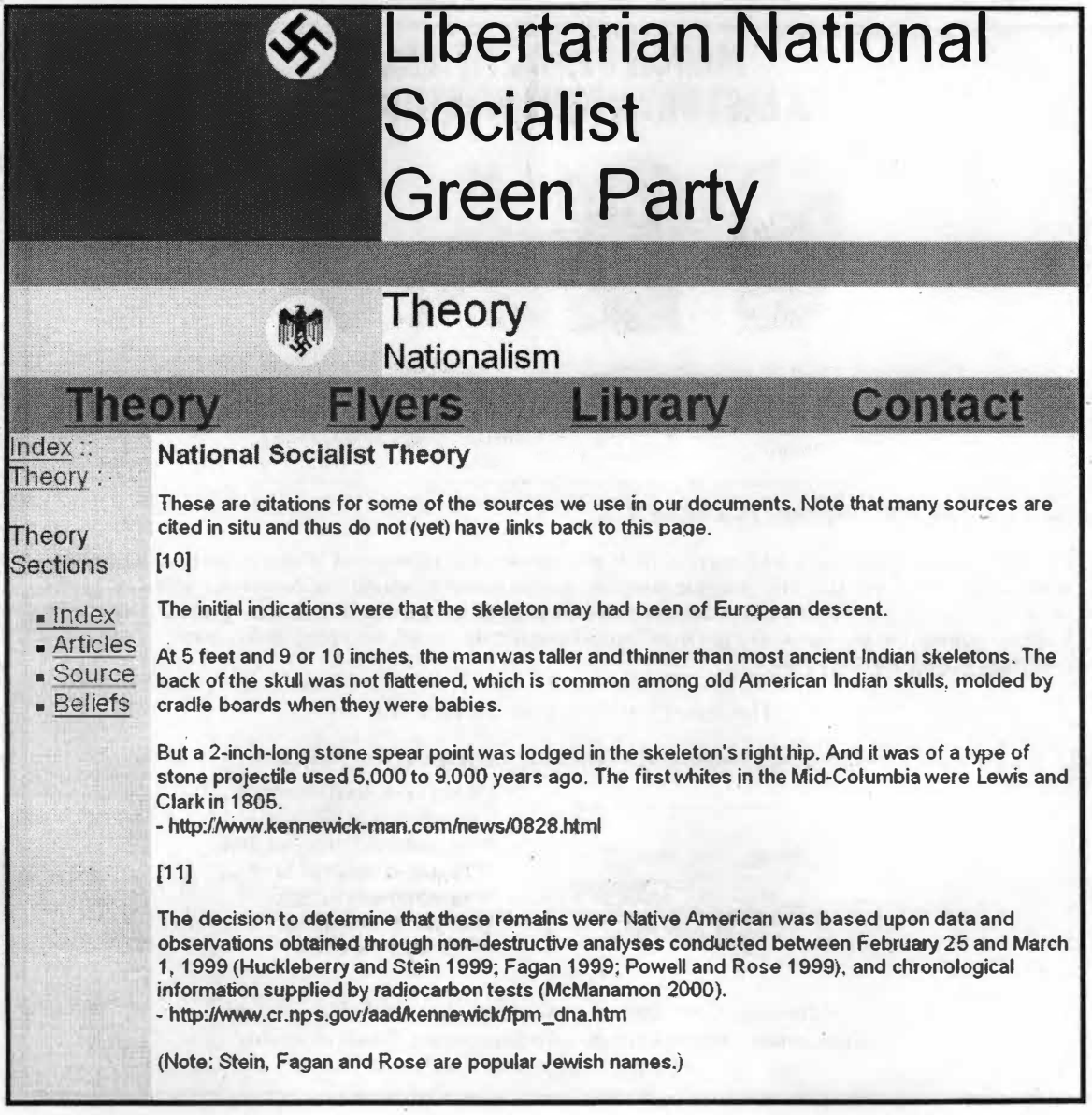
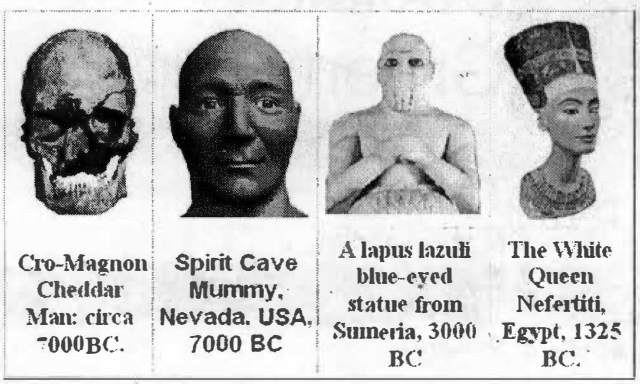


Figure 6: Webpage from the Libertarian National Socialist Green Party discussing the skeleton of Kennewick Man as an individual of European descent (Libertarian National Socialist Green Party Website 2003).

MARCH OF THE TITANS - A HISTORY OF THE WHITE RACE



Cro-Magnon Cheddar Man: circa 7000BC.

Spirit Cave Mummy, Nevada. USA, 7000 BC

A lapus lazuli blue-eyed statue from Sumeria, 3000 BC

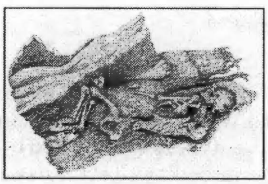
The White Queen Nefertiti, Egypt, 1325 BC.

7000 BC - THE FIRST WHITES IN AMERICA

One of the most enigmatic of the lost great White migrations is the existence of Whites in North America from at least the year 7,000 BC. This stunning discovery is comparatively recent and has been backed up by the discovery of a number of skeletal remains and one mummy on that continent which show clear White racial traits, as opposed to the Amerind (American Indian) racial traits, which are Mongolian (Asiatic - the original homeland of the Amerind peoples).

The Spirit Cave Mummy, Nevada, USA :

Physical Evidence of Whites in North America, 7000 BC.



USA. The skeletal structure is clearly that of a White male - putting Whites on that continent either prior to, or simultaneous with, the originally Mongoloid Amerind population.

The Spirit Cave Mummy was the first - but not the last - ancient White remains found in America and has forced a rethink on exactly who are "Native Americans".

Figure 7: Webpage from the *March of the Titans - A History of the White Race*, discussing the "racial traits" of the Spirit Cave Mummy as clearly reflecting European characteristics (March of the Titans Website 1999).

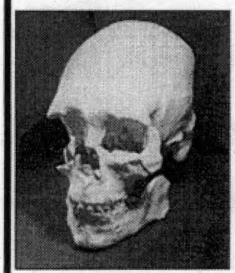
MARCH OF THE TITANS - A HISTORY OF THE WHITE RACE

The Amerind tribe involved, the Paiutes, laid claim to the corpse under an American law, the Native American Graves Protection and Repatriation Act of 1990, which allows for the return and reburial of bodies of "Native Americans".

This is not the only case where American Indians have blocked the study of obviously non-Amerind remains. Another case, that of Kennewick Man (detailed below) was similarly held up by Indian objections; and in 1993 another skeleton was found near Buhl in the state of Idaho.

The reasons for the American Indian sensitivity over the issue are obvious- proof that Whites - even if only in small numbers - walked the continent of North America before the Amerinds themselves would undermine the latter's claim to be the original "Native Americans". For the sake of political correctness, much valuable scientific data is being suppressed.

KENNEWICK MAN - WHITE RACIAL TYPE 7200 BC





Above The skull of a 9,000 year old White racial type discovered in North America: Kennewick Man, found in the Kennewick River in Washington State, USA. Artifacts found in the surrounding area suggests he was part of a larger community. Right: A reconstruction of the face of Kennewick Man, based on the skull. The features are clearly not American Indian and show clear White characteristics.

On 28 July 1996, another dramatic find was made in the state of Washington in the north western United States: on that day a well-preserved skeleton was found in the Columbia River in Kennewick. This skeleton has become known as Kennewick Man as a result. The nearly intact skeletal remains, found with a stone arrowhead lodged in the pelvic bone, are so obviously White, that forensic anthropologists and local police first thought them to be those of a 19th Century White male, about 45 years old, who was killed by an arrow.

Radiocarbon dating of a finger bone, however, showed it to have great age - at least 9000 years old, putting the individual on the North American continent around the year 7200 BC. Like the Spirit Cave Mummy, Kennewick Man's White racial traits are the cause of much controversy.

As with the Spirit Cave Mummy, local American Indian tribes filed claims for possession of Kennewick Man. After a protracted legal dispute, scientists won the right to forensically examine the remains, a project completed in 1999.

Initial examination of Kennewick Man's skull shows very clearly the White, even Nordic, cranial structure, differing greatly from the Amerind Indian (Mongoloid) skull shape of American Indians. The skeleton is nearly complete, missing only the sternum and a few small bones of hands.

Figure 8: Webpage from the *March of the Titans - A History of the White Race*, discussing the "racial traits" of Kennewick Man as clearly reflecting European characteristics (March of the Titans Website 1999).

The Friends of America's Past is a not for profit organization whose mission is:

> [D]edicated to promoting and advancing the rights of scientists and the public to learn about America's past. Friends of America's Past provides information about the Kennewick Man dispute, news of other ancient remains, a variety of views on these issues, and how you can help meet the challenge to our rights to learn about prehistory" (Friends of America's Past Website n.d.).

Their larger mission is to promote the viability and legality of studying ancient American human remains, and they advocate the following view: "We all share the past -- no one owns it. Imagine if a few people could decide by whom, when, and how evidence from the past can be studied. Is this the legacy we want to leave to future generations?" A number of professional anthropologists, including the plaintiff scientists involved with the Kennewick Man case, are associated with Friends of America's Past (via donations, articles, promotion in graduate courses, etc.), as is the lawyer who worked *pro bono* on behalf of the scientists. One viewpoint included in their website as supportive of their mission with regards to NAGPRA and skeletal analysis comes from an individual who speaks on behalf of his organization, the Ethnic Minority Council of America, which claims a membership of over 3000 members (Figure 9). An internet search reveals that the Director the Ethnic Minority Council of America is an avocational anthropologist and a prolific editorial letter writer to his local paper, wherein he identifies himself as a representative of ethnic minorities and espouses his views on a number of topics of interest to American Indians, including the use of American Indian mascots in sports (which he endorses), repatriation of American Indian skeletons (which he opposes), and the closure of Dickson Mounds (which he opposes) (Neiburger 1991, 1994, 2003).

A Statement of the Ethnic Minority Council of America

Ethnic Minority Council of America
33263 North Cove Road
Grayslake, Illinois 60030

STATEMENT OF THE ETHNIC MINORITY COUNCIL OF AMERICA ON THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: RECOMMENTDATIONS FOR DISPOSAL OF CULTURALLY UNIDENTIFIABLE HUMAN REMAINS

The Ethnic Minority Council of America (EMCA) is a group of over 3,000 citizens concerned with the promotion of their ethnic heritages. We wish to make recommendations to the committee concerning the disposal of unidentified human remains.

The EMCA believes that there is a serious problem with the disposal of these remains as is now done. Incompletely or poorly identified remains are often disposed by giving them to the closest geographic or politically connected Native American (Indian) tribal group out of convenience. The assumption that all remains are "Native American" (Indian) prior to 1492 is controversial and does not recognize contact/colonization by Asian and European peoples (e.g., Viking, Kennewick man).

There is a significant legal and spiritual danger in presenting non-related remains to groups who may, assuming them as their kin, bury these remains in family/tribal cemeteries, claim artifacts and land rights.

There is a significant danger that remains may be turned over to a particular group who may not represent (due to politics, geographic local) the true descendants of those remains since many Native Americans do not live or associate with their 'assigned' tribes or recognize the particular tribal political leaders representing the tribe.

Remains given to the unrelated people deprive the real descendants of their loved ones and cures (sic) the present custodians who may treattheir remains as their own. ManyNative Americans believe such curses as real and threatening to present and future generations. It is a serious religious issue.

Because of these dangers of mis-identification and wrongful custody, the EMCA recommends:

1. All unidentifiable remains be studied using all scientific means (e.g. DNA studies), allowing reputable researchers full access to the remains in an effort to make a positive forensic identification.
2. All identifications must be supported by credible scientific and historic evidence.
3. Location of the remains not be used as the prime method of identification. Many groups have historically moved, mixed and otherwise relocated over time. Location is not an accurate indicator of biological relationship.
4. The true, individual descendent(s) be identified before the release of the remains. Identifying groups or tribes, rather than individuals, is not appropriate for identification; however, individuals who are identified as direct descendents can appoint tribes or other groups as their agents.
5. Remains left unidentified, should be curated and respectfully stored for further scientific study pending new forensic technology which will eventually result in accurate identification. Access to these remains should be free and available to all that wish to view or study them. This may take many years or even centuries. Accuracy in identification is the most critical issue.
6. This is a private issue between the people represented by the remains and their direct descendents. Taxpayer money should not be utilized except for excavation and storage. Those claiming ownership of the remains should pay for the testing used to identify their kin.

Respectfully submitted, E. Neiburger - Director, EMCA

Figure 9. Letter of support from the "Friends of America's Past" website for the study of culturally unidentified human remains from the director of the "Ethnic Minority Council of America" (Friends of America's Past Website n.d.).

It seems ill-advised for the Friends of America's Past, as the scientific website of the Kennewick scientists and lawyers, to offer this individual's letter as evidence of support for the scientific study of ancient American skeletal remains as endorsed by a large coalition of ethnic minorities.

Chapter Five

THE EASTERN BAND OF CHEROKEE INDIANS

> It seems from your list that you have no skull of the Cherokees. I am going to pay them a visit about the 1st of next month and I will try to get you one or more if I can, but those fellows do not like that anybody disturb the bones of their dead (Gerald Troost in an undated letter to Samuel Morton, responding to his request for Cherokee skulls, quoted in Bieder 1990:8).

> [B]y treating generalizations about human behavior as being the primary or even the only significant goal of archaeological research, archaeologists have chosen to use the data concerning the native peoples of North America for ends that have no special relevance to these people. Instead, they are employed in a clinical manner to test hypotheses that intrigue professional anthropologists and to produce knowledge that is justified as serving the broader interests of Euroamerican society (Trigger 1980:671).

In order to appreciate the division that exists between the aims of bioarchaeologists and the viewpoints of American Indians, the perspective of the Eastern Band of Cherokee Indians will be presented. As a tribe, they have had and continue to have regular interaction with anthropologists on multiple levels, including ethnographic research, historical overviews, scientific analysis of their ancestral dead, retention of excavated human remains and cultural artifacts in institutional repositories, and investigation of archaeological sites (i.e., Bates 1982, Bigbee 1992, Bogan 1980, Chapman 1988;1994, Duggan 1998, Finger 1984; 1991, Fogelson 1975, Green 1996, Howard 1997, Mooney 1992, Owsley and Bellande 1982, Owsley and Guevin 1982, Owsley and O'Brien 1982, Riggs 1999, Witthoft 1983, Wright 1974).

The Eastern Band of Cherokee Indians have a strong cultural ethos regarding mortuary behavior as well as traditionally defined and clearly elucidated restrictions towards the treatment of the dead. They are not representative of other tribal American

Indian nations; in fact, they are not even representative of the other Cherokee groups. They are a unique people formed through historical events and shaped by their own traditions, language, religion, worldview, and culture. In this respect, they are different from all other American Indian groups who also have their own diverse traditions, religions, beliefs, and cultures. But they are also similar, with the same shared European contact experience, subjugation, and population decline as all other indigenous people in this country (Asad 1973, Crosby 1972, Dobyns 1983, Lunenfeld 1991, Lurie 1988, Smith 1987, Taussig 1987, Thornton 1987). The great variety and expression of American Indian cultures existing and flourishing today in the new millennium is a testament to the perseverance of a people in the face of colonization, destruction, and assimilation, and in this sense the perspectives of the Eastern Band serve as useful barometers to measure generalized American Indian perceptions towards anthropologists in Indian Country.

This overview of the Eastern Band of Cherokee Indians is not comprehensive. For an in-depth history of the Cherokee people, including the Eastern Band of Cherokee Indians, the reader is advised to consult a number of seminal works including Anderson 1991, Finger (1984;1991), King (1983), McLoughlin (1994), Perdue (1989), Thornton (1990), and Woodward (1983).

A Brief History of the Eastern Band of Cherokee Indians

The Eastern Band of Cherokee Indians are one of only three federally recognized tribes of Cherokee Indians, the others being the Cherokee Nation and the United Keetoowah Band of Cherokee, both based in Oklahoma. They were once collectively members of what Euroamericans called the "Five Civilized Tribes," (Cherokee, Chickasaw, Choctaw, Creek, and Seminole), an appellation given to these Southeastern tribes in the

1850's by Euroamericans because of their perceived similarities to European societies and possession of similar institutions, including a written constitution, bicameral legislature, a developed judicial system, an executive branch, public schools, and successful agricultural systems (Cotterill 1954, Debo 1940, Foreman 1934).

The Cherokee are remarkable for developing a written language. Sequoyah (George Guess or Gist) created the Cherokee syllabary in 1821 after many years and many attempts (Foreman 1938). The invention of the Cherokee syllabary is the only known example of a spontaneously created written system for a pre-existing spoken language. The syllabary, composed of 85 symbols representing all phonemes in the Cherokee language was amazingly simple to grasp and within a few years the majority of all Cherokees were literate. This ability to write in Cherokee led to the creation of a newspaper in 1828 called the *Cherokee Phoenix and Indian Advocate*, written in both Cherokee and English and still in publication today.

All three Cherokee groups trace their shared ancestry and homelands to the same regions of the southern Appalachian highlands; they resided there until the majority of Cherokees were displaced to Indian Territory west of the Mississippi by President Andrew Jackson's Indian Removal Act of 1830 resulting in the infamous "Trail of Tears" (Foreman 1932; Perdue and Green 1995). During the Trail of Tears ("Nunahi-duna-dlo-hilu-i," the "Trail Where They Cried" in Cherokee) which took place between June and December 1838, over 15,000 Cherokees were rounded up, displaced from their homes, families, and lands, interred in United States Government holding forts, and forced to march over a thousand miles through North Carolina, Georgia, Alabama, Tennessee, and Arkansas to what is now Oklahoma. Estimates of mortality along the trail are upwards of 4,000 people, or 37% of those who were forced to march along the trails (Ehle 1997).

There were a group of Cherokee who avoided the forced displacement, however. The remnants of the original Cherokee populations who managed to evade removal through cunning, skill, diplomacy, and negotiation remained in western North Carolina and became the Eastern Band of Cherokee Indians (Finger 1984). In 1924 they were finally granted United States citizenship, as were all American Indians with Congress's passage of the Indian Citizenship Act.

United States Census Bureau statistics from 1990 list Cherokees as the most populous American Indian group in the United States, with over 300,000 people claiming Cherokee ancestry. It should be noted, however, that these figures reflect people who self-identify as Cherokee and may not necessarily appear on the rolls required by the Eastern Band of Cherokee Indians, the Cherokee Nation, or the United Keetoowah Band of Cherokee for recognition as Cherokee citizens.

The Eastern Band of Cherokee Indians make their home today in western North Carolina. The majority of the population (about 9,000 out of a total of around 13,000) live on the Qualla Boundary which spans both Jackson and Swain Counties, while the remainder reside in nearby communities such as Snowbird in Graham County, or are dispersed throughout the United States. The Qualla Boundary, a Federal government public trust land held for the Eastern Band of Cherokees, is composed of about 57,000 square miles of land and sits at the base of the Great Smoky Mountains National Park.

The Qualla Boundary is what remains of the former aboriginal homelands of the Cherokees, composed initially of ceded lands ranging over large portions of several Southeastern states. By 1889, the Eastern Band of Cherokee Indians was given a state charter by North Carolina. It wasn't until 1925 that their land holdings were placed into federal trust, guaranteeing that they would perpetually remain in Cherokee possession.

Land cannot be purchased on the Boundary, but enrolled members can be issued title as possessory holdings. Proper towns within the Boundary include Big Cove, Birdtown, Paintown, Wolftown and Yellowhill.

Although the Qualla Boundary is today the seat of Eastern Band territory, the official traditional lands of the Cherokee are defined by maps of ceded territory, and include parts of the following eight states: North Carolina, South Carolina, Georgia, Alabama, Tennessee, Kentucky, West Virginia and Virginia (refer to Figure 3).

Today, the Eastern Band of Cherokee Indians are as modernized as any people in America and partake of all aspects of Western American culture. Thanks in large part to tourism and the establishment of Harrah's Cherokee Casino and the monetary resources it provides to the Boundary, the tribe has a financial infrastructure which provides health services, child care, housing, elder care, business opportunities, counseling services, education, downtown revitalization plans, and other social services to all enrolled members of the tribe.

The major industry of the Boundary is tourism (Finger 1991), with many venues devoted to visitors in the areas of cultural attractions (the state of the art Museum of the Cherokee, the outdoor drama Unto these Hills, and living Cherokee history at Oconaluftee Village), attractions for children (racetracks, miniature golf, and petting zoos) for sports enthusiasts (fly fishing, hiking, river sports), and of course, attractions devoted to shoppers composed of sprawling downtown strips selling non-Cherokee "Pan-Indian" items like plastic tomahawks, moccasins, and Kokopelli rugs. There are a small number of shops devoted to authentic Cherokee arts, featuring master woodcarving and basketry items.

With the election of Principal Chief Michell Hicks in late 2003, the tribe has a new mandate on education. If they desire, Cherokee parents can send their children to colleges

and universities all over the United States with financial assistance from the tribe. The re-acquisition of previously held Cherokee land and the construction of a new elementary and high school complex on this site in the Ravensford Tract (formerly owned by the National Park Service but deeded to the Eastern Band of Cherokee Indians in a much celebrated land swap finalized in 2004) is a great source of pride and accomplishment for the tribe.

Tribal members are diverse in their faith and religious beliefs, and there are a typical southern variety of churches on the Boundary representing Lutheran, Catholic, Baptist, Independent Baptist, Church of Christ, Methodist, Church of the Nazarene, and numerous Non-Denominational churches.

There are a number of educational linguistic programs on the Boundary geared towards teaching the Cherokee language to both children and adults, and there are many other revitalization programs devoted to teaching traditional artistic crafts, farming techniques, songs, dances, games, and other cultural aspects of traditional Cherokee society.

Many Eastern Band members, like other American Indian groups, view volunteer service in the United States military as an honorable duty. Eastern Band males (and females, as of late) are encouraged to enroll in the armed forces, with the Army and Marines being the preferred branches (being the "toughest" services, in the opinion of some). As an ethnic group, American Indians have the highest documented record of military service of any ethnic group in America (U.S. Department of Defense Website 1998), and U.S. Census data from 1990 shows that 39% of American Indians have been in military service, versus 32% of the general population.

As this brief snapshot depicts, the Cherokee are fully invested in their families, their community, their faith, their country, and the pursuit of Western ideals. However, the Cherokee are not a completely assimilated people. Many retain aspects of traditional culture, and are committed to the maintenance of these values at both the personal level and through diverse institutions. There are a number of tribally-funded departments on the Boundary devoted to aspects of traditional Cherokee culture, including Tsalagi linguistic programs, a granting foundation for research involving Cherokee interests in western North Carolina, the Cultural Resources department staffed with traditionalists and linguists, the Tribal Historic Preservation Office which oversees Cherokee cultural properties and archaeological undertakings within traditional Cherokee territory, multiple museums devoted to Cherokee culture, and sponsored celebrations, dances, children's activities, and other programs devoted to the continuance and promotion of core Cherokee values.

Prehistoric Background

The physiologic province of the Eastern Woodlands known as the Appalachian Summit is characterized by almost ten thousand years of continuous American Indian occupation (Purrington 1983, Ward and Davis 1999). Today, the Eastern Band of Cherokees make their home in the Southern Appalachian mountain region of western North Carolina.

Debate has centered on the origin of the Cherokee, with convincing arguments proposed for the *in situ* evolution of Cherokee from antecedent regional archaeological populations (Coe 1964, Dickens 1980, Schroedl 1986a; 1986b; 2001, Sears 1955, c.f. Lewis and Kneberg 1939, Webb 1938). Earlier archaeological research on the Cherokee

focused on the migration of Iroquoian speakers into the southern Appalachians as the precursors to the modern Cherokee, but current theories have focused on the development of the Cherokee culture *in situ*, with special attention to regional Lamar, Mouse Creek and Dallas sites as potential ancestral archaeological populations to the Cherokee (Schroedl 1986, 2001; Sullivan 1986). Ongoing research on the Mississippian period Pisgah and Late Mississippian/Early Historic Qualla phases in the Appalachian Summit may provide tangible evidence for an *in situ* development of what would become the modern Cherokee, although by all accounts there has been a paucity of archaeological fieldwork in this mountainous region of Western North Carolina, and the linkage between Late Woodland phase populations and Early Mississippian period stages in the region is poorly understood.

A detailed synthesis of prehistoric Southeastern cultures and associated archaeological findings is beyond the scope of this work, but seminal references are available for consultation (see Hudson 1976, Lewis and Kneberg 1958, and Swanton 1946). Archaeological cultures are not static entities occupying clearly defined regional locations, and while this discussion focuses on the archaeology of the western North Carolina mountains, overall interpretation must be accomplished in the broader regional and cultural context which includes other provinces of North Carolina as well as neighboring states of Tennessee, Georgia, and South Carolina. This said, a brief sketch of the archeological background of North Carolina and the surrounding regions beginning with the earliest prehistoric occupants and ending with the modern Cherokee will serve to illuminate the rich history of the area and the ties the Cherokee hold by virtue of their occupation in the region.

Paleo-Indian Period: The first period of human occupation in the New World, the Paleo-Indian Period, extends in the Southeast from about 12,000 to 10,000 B.P. (Ward 1983). This period of seasonally nomadic hunters, foragers, and gatherers who exploited a diverse subsistence base (Anderson 1992) is characterized by a distinctive toolkit which includes scrapers, drills, fluted projectile points, and side-notched projectile points as defined by Clovis, Dalton, and perhaps Hardaway points (Coe 1964, Phelps 1983, Williams 1965). The overall density of Paleo-Indian populations in North Carolina appears sparse, however, with few intact archaeological sites dating to this period (Ward and Davis 1999). The oldest Paleo-Indian site in North Carolina is the Hardaway site (31ST4) in the Piedmont region of the Uwharrie Mountains of Stanly County. The chronological and stratigraphic record of this site is problematic, and there is debate as to whether variation in Hardaway complex tools represents temporal differences (Coe 1964) or if they are representative of a mixed component site reflecting a terminal phase Paleo-Indian and Early Archaic occupation (Daniel 1998). Regardless, the artifact types recovered from Hardaway generally conform to Coe's (1964) typological classification of Paleo-Indian chronology, and research in states including Tennessee and West Virginia have demonstrated similar chronological and classificatory findings (Broyles 1971, Chapman 1975). To date, very little evidence of Paleo-Indian occupation has been found in the Mountain regions to the west of the Piedmont of North Carolina with the exception of a handful of fluted projectile points found in the Appalachian Summit region (Perkinson 1973). This may be reflective of differing constraints on food sources and the environment (Delcourt and Delcourt 1981), with resources in the mountains less accessible or desirable than in the Piedmont.

Archaic Period: The Archaic Period in the Southeast dates from 10,000 to 3,000 B.P., and is a transitional period from the earlier Paleo-Indian Period. The millennia encompassed by the Archaic Period saw warming climate changes that approximated our modern environment, and cultural changes characterized by diversification in material culture and reliance on increasingly varied subsistence strategies (Coe 1964). The Archaic toolkit builds on previous Paleo-Indian tools by introducing functional changes to pre-existing tools and creating new forms including corner-notched and broad-stemmed projectile points, as well as stone containers. Cultural changes that typify this period include mounded earthworks, larger settlement sites, mortuary programmes which included cremation and burials, and evidence of long-distance trading routes (Bense 1994, Chapman 1973).

Early Archaic (10,000-8,000 B.P.): In contrast to the mobile and nomadic Paleo-Indian populations, the Early Archaic saw the beginnings of intensive occupations at a number of sites, including Hardaway. This development is characterized by periods of aggregation and dispersal wherein these larger sites may be thought of as base camps, settlements from which seasonal forays were made in search of resources, while smaller sites may be special purpose resource procurement camps. A variety of materials and artifacts are recovered from these sites, suggesting multi-seasonal occupations (Ward 1983).

Middle Archaic (8,000-6,000 B.P.): A change in tool technologies characterizes the Middle Archaic. A hallmark is the abandonment of certain types of Paleo-Indian Period tools such as end scrapers, and the increasing utilization of locally derived raw materials for lithic resources and the introduction of new technologies in the form of atlatls and

mortars. Cultural shifts take place as well, as we begin to see utilization of food storage pits and purposeful mortuary burial programmes. This suite of modifications has lead to debate about Middle Archaic settlement patterns. Two main competing arguments have arisen as a result of these changes visible in the archaeological record. The first theory is that the relative abundance of sites in this period of the Middle Archaic are evidence of the beginnings of increased sedentism and corresponding decreases in mobility (Goodyear et al. 1990, Ward 1983). In direct contrast, the second theory is that the cultural and material changes we see manifested in the Middle Archaic may represent high levels of populational mobility and that the large numbers of sites may, in fact, not represent different groups of people but the same people using these camps during their highly mobile existence (Cable 1982, Sassaman 1983). As is usually the case with directly competing theories, there is also a third theory that is a combination of the two main arguments which holds that increasing population pressures would have caused sedentary groups to become more mobile based on the need to acquire increasingly limited resources (Abbot et al. 1995).

Late Archaic (6,000-3,000 B.P.): Building on further refinements from the previous Archaic periods, this stage is characterized by large Savannah River Stemmed projectile points (Coe 1964), steatite vessels, pecked lithic artifacts, ground and polished stone artifacts, and grinding stones (Bense 1994, Sassaman 1993). While there is evidence of fiber-tempered pottery at about 4,000 B.P. in neighboring areas, evidence from North Carolina is sparse. Settlement patterns also begin to mirror the warming climatic conditions, with sites now located in all temperate areas in order to take advantage of increasing resources.

Woodland Period: The Woodland Period in the Southeast ranges from about 2,000 to 500 B.C., but in the North Carolina mountain regions, this phase does not make its appearance until about 1000 to 700 B.C. The hallmark of the Woodland Period is the introduction of new technology in the form of fired clay pottery. In the Southeast, evidence for increased (and sometimes habitual) sedentism is present in coastal areas where humans were able to take advantage of both inland and maritime faunal and floral resources. In the inland locales, band level mobility patterns still persist, with populations often following seasonal faunal and floral resources. Sustained horticulture as a subsistence base most likely begins late in the Woodland Period.

Early Woodland (750 to 350 B.C.): Mobile Early Woodland populations in North Carolina show patterns of utilization of a variety of environmental locales, with seasonal settlements located in upland sites, inter-riverine areas, and alluvial floodplains. While evidence of cultigens is not present, Ward and Davis (1999) argue that the presence of large hearths and storage pits may point to their existence, especially in buried floodplain sites. In terms of material culture, the Woodland Periods are typified in the Appalachian and Piedmont areas by Dunlap (Wauchope 1966) and Swannanoa (Keel 1976) pottery. One of the markers of the Early Woodland are the decorative treatments these ceramic vessels begin to receive, including cord marked, fabric impressed, and simple stamped designs. Projectile points are typified in the region by Savannah River Stemmed, Swannanoa Stemmed, Plott Stemmed, and Transylvania Triangular styles (Keel 1976).

Middle Woodland (300 B.C to 800 A.D.): Some researchers argue the floodplain settlement patterns in the Middle Woodland Period may be an indication of a shift to a horticultural subsistence base (Purrington 1983), but no ethnobotannical evidence is yet available to confirm this. The most distinctive ceramic traditions in the Middle Woodland in this area are the decorated Pigeon and Connestee styles (Keel 1976). Many have argued that evidence from the Pigeon culture shows signs of external influence, mainly from cultures from east Tennessee and the Georgia Piedmont (Keel 1976, Purrington 1983, c.f. Dickens 1980). Regional projectile point styles during this period are the Haywood Triangular and the Connestee Triangular (Keel 1976). The Connestee phase, in particular, shows strong material evidence of external influence, and Keel (1976) has suggested intriguing similarities to Hopewellian sites in Ohio. Ward and Davis (1999:154) believe that Connestee sites are more complex and "reflect greater occupational intensity" than Pigeon sites. Factors that distinguish Connestee sites are their large floodplain settlements covering several acres and the presence of structures. Ward and Davis contend that this evidence may point to a subsistence regime based on the cultivation of regional plants, in addition to hunting, gathering, and fishing.

Late Woodland (800 to 1100 A.D.): In this region of North Carolina, the terminal phase of the Woodland Period is very poorly identified and documented. While the Middle Woodland Connestee phase may still extend into this period, as may be evidenced at the Cane Creek site in mountainous Mitchell County, as Ward and Davis note,

> [T]he cultural dynamics and stylistic markers of the Late Woodland period in the Appalachian Summit region are poorly understood. Currently, only ideas, suggestions, and hypotheses can be offered to fill the void between the Middle Woodland period and the beginning of the Mississippian Period (1999:157).

Regardless, it is a vital period to understand, because the crux of the debated origin of the Cherokee may hinge on answers revealed by regional Late Woodland cultures. Ward and Davis summarize this period and its importance to understanding the origin and evolution of Cherokee culture:

> With the current, limited data base for the Late Woodland period, it is easy to speculate about a transitional archaeological complex bridging the gap between the Connestee and Pisgah phases, as well as other Mississippian phases, and to thus argue that the Historic Cherokee were the product of an extremely long sequence of cultural development in the mountains. However, if the data are correct in this chronological placement of the Cane Creek site, then the emergence of Mississippian culture appears even more abrupt and a hypothesis of extended, in situ cultural evolution becomes more tenuous and complicated (1999:158).

Mississippian Period (1000 A.D.-European Contact): The Mississippian Period in the Appalachian Summit ranges from about 1000 to 1540 A.D. Like other regional Mississippian Periods, it represents the final culmination of Southeastern cultures before decimation and rapid culture change caused by European arrival (Dobyns 1976;1983, Thornton 1987; 1990). It is a period of fluorescence and elaboration on all previous technologies, with large scale mounded ceremonial centers, stratified societies, complex social organization, agricultural subsistence, and a refinement in all levels of material culture. In this region of the North Carolina mountains, Mississippian sites include the Tuckasiegee, Warren Wilson, Coweta Creek, Peachtree Mound, and Garden Creek sites. Pottery is typified by the decorated Pisgah and Qualla styles (Dickens 1976), and a variety of artifacts are present, including ornamental worked shell and mica, microtools, celts, triangular projectile points, drills, pipes, scrapers, gravers, and perforators (Keel 1976). The Mississippian Period in the region is broken down into two phases, the Pisgah phase and the later Qualla phase, which is a Late Mississippian expression that extends into the Historic period (Riggs 1999).

In *sensu strictu*, archaeological evidence for intact Cherokee culture dates back to about 1000 years, as typified by the Pisgah Phase which dates to between 1000-1500 A.D. (Dickens 1976). Pisgah villages are typically located on rich alluvial soils, which were preferable for domesticated agricultural cultigens like maize, squash, beans, and gourds. Additional ethnobotannical and zooarchaeological evidence shows a wide-range of foodstuffs, including non-cultigens and animal resources (Moore 1987). Well-known Pisgah sites include Warren Wilson (31BN29), a palisaded village near Asheville, and Garden Creek (31HW1), a mounded village on the Pigeon River near Canton. Material signatures of this phase include stamped-pattern ceramics, cooking pottery and utensils, chunkey gaming discs, and personal jewelry and ornamentation of mica, shell, clay, and beads.

Historic Background

The terminal stage of the Pisgah phase culminates in the Qualla Phase, which has the distinction of being both a Late Mississippian culture and an Early Historic period phase, lasting from 1500-1850 A.D. As Moore (1987:5) notes, "Because of similarities of artifact styles, house and village structure, and burial patterns it is quite clear that the Pisgah folk were direct ancestors of the Cherokee people." The Qualla Phase represents the climax of Mississippian influence in western North Carolina prior to European arrival (Keel 1976), as well as an extension of *in situ* Cherokee culture into the 19th century. Nununyi Mound (31SW003) located on the Qualla Boundary in Swain County and Ela (31SW005) near Bryson City in Swain County are examples of Qualla Phase occupation sites.

Historic Period - Post-Contact: The first Europeans who came seeking after empire in the Southeast were initially disappointed by the opportunities afforded by the New World. Spaniards had expected the wealth of North America to be equal to the vast riches they found among the conquered Inca and Aztec of Latin America. They came in search of gold, silver, and other treasures that surpassed their take from Peru and Mexico, but they were not destined to find it.

The waves of early explorers who landed in the New World and traveled through the region of the American Southeast began with the Columbian entrada in 1492 and continued in 1524, with Giovanni de Verrazzano exploring the coast of North Carolina. Two years later Lucas Vazquez de Ayllon and 500 settlers attempted to establish a Spanish colony on the coast of South Carolina that failed due to epidemics of smallpox and other diseases. While none of these explorers traveled far inland and it is unlikely that they had any direct contact with the indigenous Mississippian populations in Cherokee traditional territory, European entrada and presence was firmly established in the Southeast and would eventually continue, reaching into Florida, North Carolina, Tennessee, Georgia, Alabama, and other regions beginning in the year 1539 with De Soto's campaign (Hudson 1976; 1998, Swanton 1939). Hernando De Soto, after serving under Francisco Pizarro during the conquest of the Incas in Peru, set his sights on the New World in search of more treasure to plunder (Figure 10). In 1539 he entered at Tampa Bay, Florida, and began a doomed three-year campaign, eventually dying of a fever in 1542 in the region of Louisiana. During his campaign, he and 950 Spaniards traveled from village to village, searching for gold and slaughtering the native inhabitants. There is so much debate as to the route through the Southeast taken by De Soto and his conquistadors that we may never have a definitive picture of the landscape he traversed or the people he encountered,

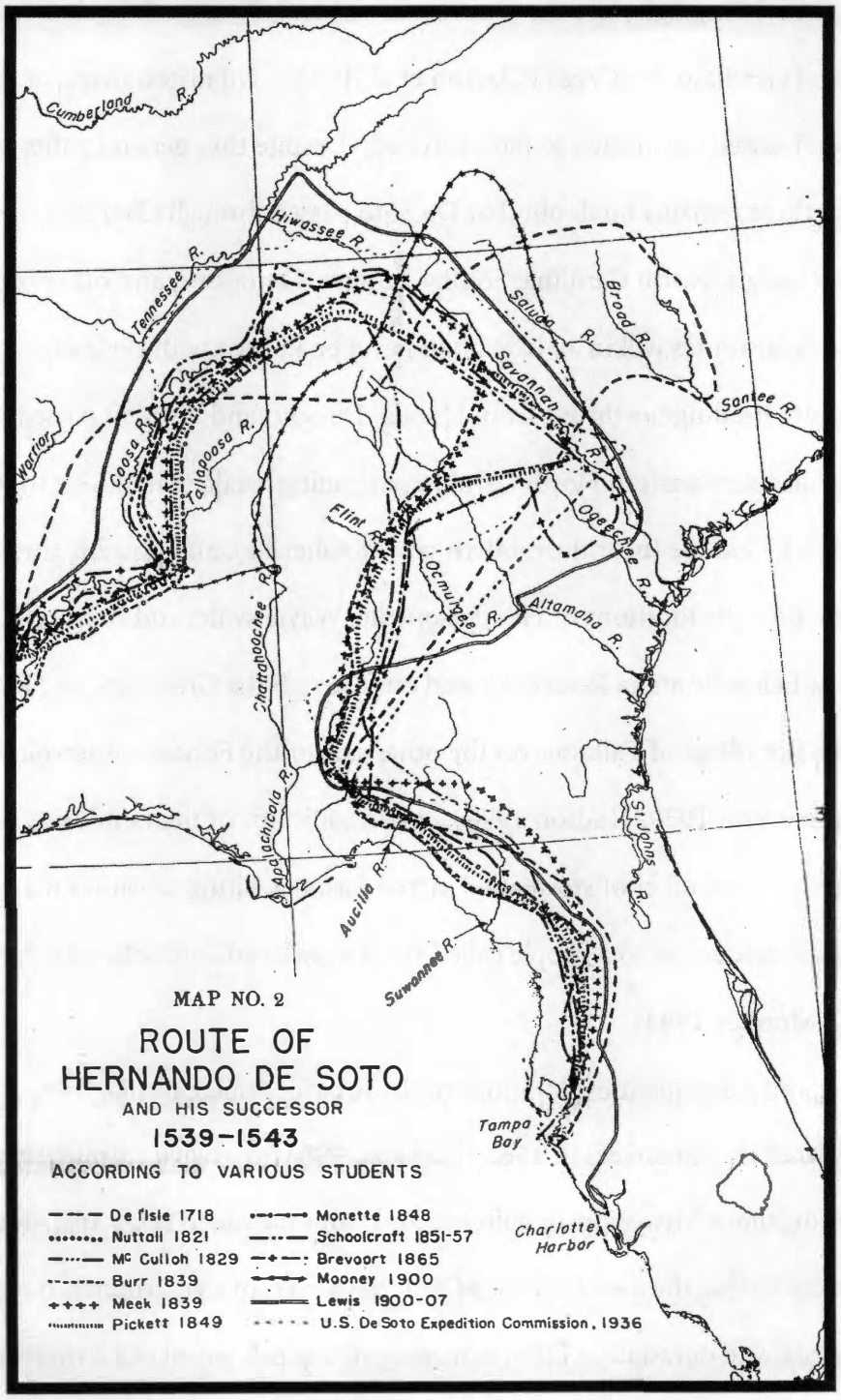


Figure 10: Various postulated routes of Hernando De Soto's expedition through the Southeastern United States. From the United States De Soto Expedition Commission (Swanton 1939).

despite the presence of historic narratives by members of the expedition. The main chroniclers of the campaign were the Gentleman of Elvas, Rodrigo Rangel, Luis Fernández de Biedma and Garcilaso de la Vega (Clayton et al. 1993). No notes, maps, or writings from De Soto himself are known to have survived. Despite this, general paths can be inferred, and there remains no doubt that De Soto passed through Cherokee traditional territories in Georgia, North Carolina, South Carolina, Tennessee, and other regions, although the exact routes will in all likelihood never be known with certainty.

By 1540, heading northwest from Florida, De Soto and his men passed through regions and villages in western North Carolina, including Xuala (Saluda, on the border of South Carolina), Guaxale (near the modern city of Asheville), and possibly through regions today that are now the locations of Hendersonville, Waynesville, and Bryson City, to Chihaha (now below Fontana Reservoir), and out through the Great Smoky Mountains to Tennessee via the village of Tallassee on the other side of the Fontana reservoir (Clayton et al 1993, c.f. Swanton 1939, Hudson 1976). As an indicator of their enduring influence on the Cherokee, a number of stories and sacred formula dating to earlier than the 19th century contain references to a people called the Ani-swka-ni, better known today as "Spaniards" (Mooney 1992).

These and subsequent explorations of the interior Southeast like that of Juan Pardo who encountered the Cherokees in 1567 (Hudson 1990) eventually culminated in the collapse of indigenous Mississippian cultures, and from the mid-1500's and onwards, the Cherokees were feeling the direct effects of European presence via contact, trade networks, European goods, and devastating European epidemics which wiped out a majority of all Southeastern American Indian tribes (Dobyns 1983, Crosby 1972, Thornton 1987).

Information regarding the Cherokee post-contact period derives from a rich and well documented ethnographic history, of particular note is the role the Cherokee played in European and American political affairs. From the 1600's, European colonists, explorers, traders, and military personnel began to regularly interact with Cherokees. It is from these early encounters that written records, memoirs, and maps were produced, allowing a detailed picture of Cherokee life, as when Lieutenant Henry Timberlake traveled to the Cherokee villages in the late 1760's and produced a memoir with a detailed map of the Overhill Cherokee villages (Figure 11).

For a concise account of the swift decline of the Cherokee due to European encroachment, the following account is taken verbatim from David G. Moore's essay on "Cherokee Archaeology" from the *Newsletter of the Friends of North Carolina Archaeology*:

> During the 1700s, English colonists began trading with and living in native towns in the Appalachian Summit and surrounding areas (Goodwin 1977; Hatley 1995). Maps and journals from the eighteenth century note the presence of several distinct groups of Cherokee towns (Smith 1979). The Middle Cherokee towns were situated along the upper Little Tennessee, Cullusaja, and Ellijay rivers in what is now western North Carolina--including settlements at the Nequassee, Cowee, and Dilland mounds. The Lower Cherokee towns were located along the Keowee, Jocassee, Seneca, Tugalo, Chauga, Chattooga, and Tallulah rivers of northeastern Georgia and northwestern South Carolina--including settlements near pyramidal earthen mounds at the Tugalo, Chauga, and Estatoe sites. Other Lower Cherokee towns were probably situated along the headwaters of the Chattahoochee River in northern Georgia, near the Nacoochee mound. The Cherokee Valley towns were located along the upper Hiwassee River, and along tributaries such as the Notteley and Valley rivers, in southwestern North Carolina, including towns at the Spikebuck and Peachtree mounds. The lower Little Tennessee Valley in southeastern Tennessee was home to the Overhill Cherokee settlements, near the earthen mounds at Toqua and Citico. And the Tuckasegee and Oconaluftee rivers in North Carolina were home to the Cherokee Out towns, including the mound and sacred town of Kituwha. People in these distinct provinces spoke different dialects of the Cherokee language, and inherited different traditions of material culture, but kinship and shared cultural practices connected different Cherokee communities to each other (Dickens 1986; Hally 1986; Hill 1997; King 1979; Schroedl 1986).
>
> In the early 1700's the British (South Carolina) government defined five Cherokee groups. In east Tennessee, the Cherokee lived along the Tellico and Little Tennessee rivers, in what were called the Overhill Towns. The Lower Towns were found in north Georgia, on the Tugalo, Keowee and upper Savannah rivers. Three divisions were

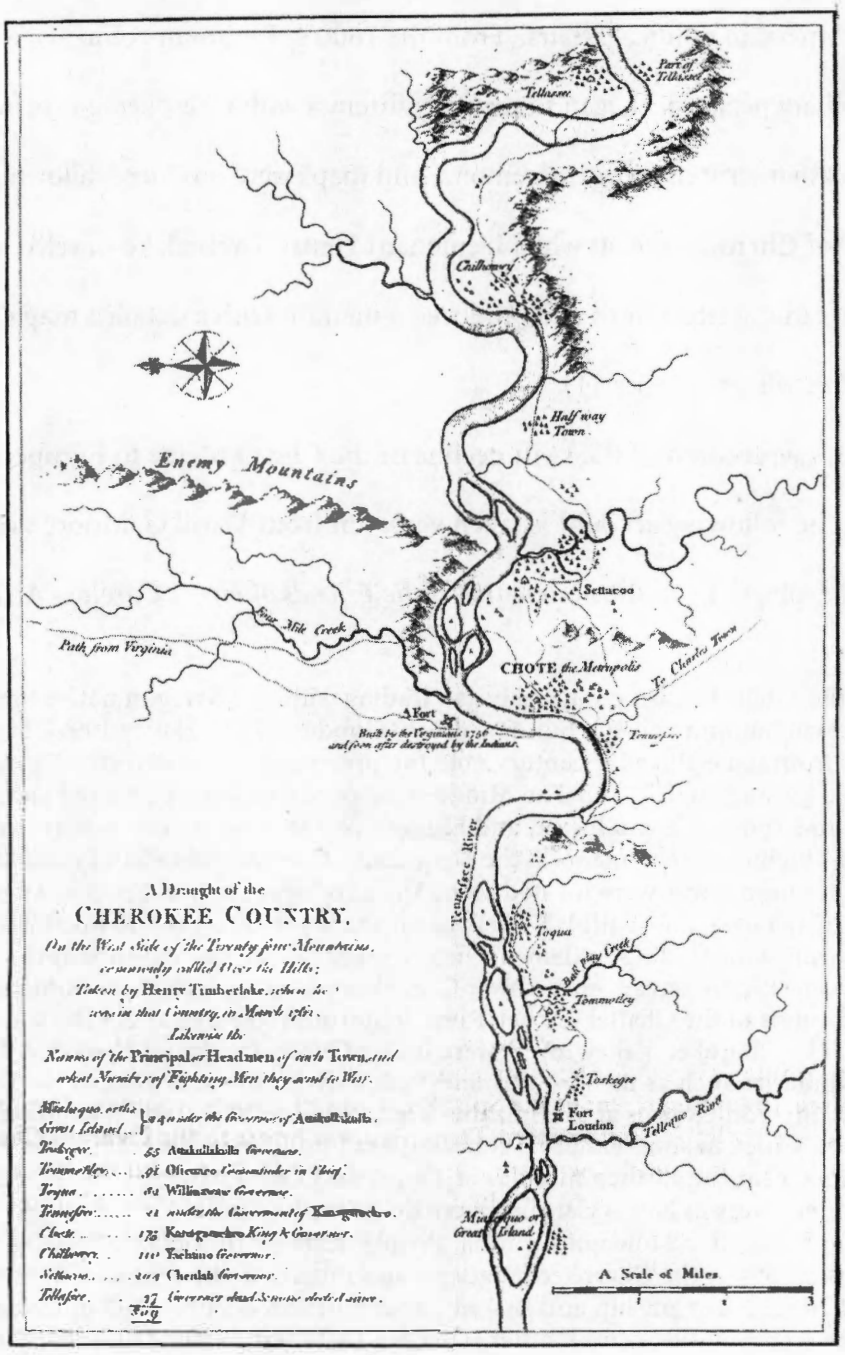


Figure 11: Map by Henry Timberlake of Cherokee Country in East Tennessee made in 1762, depicting Overhill Cherokee towns, their populations, and their Principal Chiefs.

present in North Carolina, including the Middle Towns, located on the headwaters of the Little Tennessee River; the Valley Towns, on the Hiwassee and Valley rivers; and the Out Towns on the Tuckaseegee and Occonoluftee rivers. The 18th century saw the Cherokees continually embroiled with their Indian neighbors and the governments of the frontier populations, first with the British Colonial and French governments and ultimately with the United States government. It was a period of shifting alliances formed to protect their lands and preserve trading relations. The Cherokees were often more favorably disposed towards the French, who were less interested in land than in trade; however, the Cherokee often found themselves allied with the English against their traditional enemies such as the Tuscarora and Creek Indians in the early 1700's.

In 1730 Sir Alexander Cuming embarked on a mission to secure Cherokee allegiance to the British. Cuming met with several Cherokee chiefs at the Town of Nequassee where he convinced them to submit to English rule. This first official treaty also established Chief Moytoy of Tellico (Overhill) as emperor and leader of the Cherokee Nation. (Today all that remains of the town of Nequassee is the large earthen mound preserved next to the Little Tennessee River within the city limits of Franklin in Macon County). By mid-century the Cherokee were drawn inexorably into regular and necessary trade with the British. However, the Cherokee continued to suffer the encroachment of the colonial frontier, leading to intermittent but sustained hostilities, particularly during the French and Indian War. The war had disastrous consequences for the Cherokee. In 1769 a large English force under Colonel Archibald Montgomery marched on and destroyed all 15 of the Middle Towns.

The wars' end served only to increase the numbers of settlers coming into Cherokee territory and by the time of the Revolution the Cherokee were rather easily persuaded to assist the English by attacking American frontier settlers. The Americans answered with armies directed at the Cherokees. In 1776 General Griffith Rutherford led a North Carolina militia against the Middle, Valley, and Out Towns while South Carolina forces attacked Lower Towns. Finally, a Virginia force destroyed the Overhill Towns. [The Overhill Cherokee villages were politically aligned with the British during both the French and Indian War (1754-1763), and the American Revolutionary War (1776). As a culmination of these and other political reasons, Chilhowee and five other Overhill towns were burned and destroyed by American revolutionary forces in 1776, and by 1781 militias led by agents of the government, including John Sevier, had destroyed all remaining Overhill towns - author].

Sporadic actions occurred for the duration of the war and the end of the war saw additional land lost and the further disintegration of Cherokee political and social boundaries. In less than 60 years most of the Cherokees were forcibly removed from what remained of their homelands on the infamous Trail of Tears (Moore 1987:5,9).

Ethnographic Beliefs Surrounding Death

Ethnographic research among the Cherokee has identified a traditional theoretical model of death structured around the "multiple souls" or "four souls" concept.

Interestingly, the Cherokee theory of multiple souls is very similar to that identified in Aztec theology, where the first three souls in both the Aztec and Cherokee worldview are similar (Ortiz de Montellano 1990), leading to speculation that this may be a very ancient New World belief. John Witthoft, in an article entitled *Cherokee Beliefs Concerning Death* (1983), relates information on the Cherokee four souls concept as told to him in the 1940's by Cherokee traditionalist Will West Long (an informant who also worked with anthropologists Leonard Broom, James Mooney, and Frank Gouldsmith Speck).

The first soul is described as that of memory and conscious life, and it is housed in the head, immediately under the intersection of the sagittal and coronal sutures of the skull ("front fontanelle" as explained to Witthoft). This soul flees the body immediately at the point of death, and continues on with its own life, sometimes lingering as a benign, ghostly presence. The characteristic of this soul is that it "is conscious, self-conscious, has personality, memory, continuity after death, and is unitary, not quantitative in its essence. It creates or secretes the watery fluids of the body: saliva, phlegm, cerebro-spinal fluid, lymph, and sexual fluids" (Witthoft 1983:69). Will West Long speculated that this soul eventually makes its way towards the west, the direction of the dead (u-sv-hi-yi, or the "Darkening Land"), or that this soul searched out entrances to the underworld by following paths of rivers and entering through spring-heads. Witthoft speculates that the practice of scalping is intended to affect this soul. Once this soul leaves the body, the remaining three souls also begin to die.

The second soul is that of the physiology, and is seated in the liver. This soul begins to leave the body at the point of death, but it departs in degrees, with the entire soul gone by the seventh day. The characteristic of this soul is that it is "...a substance, is not

anthropomorphic in any [way], has no individuality, and is quantitative, there is more or less of it. Its secretions are yellow bile, black bile, gastric juice, etc" (Witthoft 1983:69). The location of this soul in the liver is significant, as the liver is the organ especially subject to magical attack by witches who may turn the liver yellow (manifested as hepatitis or cirrhosis) or black (manifested as gall bladder maladies or pancreatitis). The liver is prized by witches, who consume the organ in order to prolong their lives. Once the liver is "exhausted" by these maleficent forces, physiological death results due to the "absence of the soul" (Witthoft 1983:69). Will West Long related the following explanation to Witthoft with reference to this soul and its attraction to witches:

> When the animating soul of conscious life leaves the body at the moment of death, stopping all life processes, the other souls begin to die. That of the liver is gradually diffused back into nature as a life-force and it takes a week for all of it to disappear from the body, if death has been normal. If death has not been caused by liver-soul loss, all of this soul is still present at death, and is available to the witch in the dying or the newly dead as an intact resource for extended life. With each day after death the resource is dwindling and is less tempting to the witch, so that the greatest danger is in the first night after death, less danger the first night after burial, and much less the second night after burial. Loss of the liver soul to the witches seems to do no damage to the first soul of the deceased or to the living community, so there is no practical reason why it should not be permitted. However, it is viewed as desecrative of the corpse, and also, attempts by witches give the opportunity to the conjuror to try and kill the witch, thus eliminating an enemy of the community who is dangerous in other contexts. The conjuror expects witch attacks at night just before death, during the first night after death, and soon after burial, and so keeps his lonely vigil just before death and just after death and after burial. The defenses against or obstacles to successful witch attacks are the strength or health of the victim, if alive, the strength and magical power of the fire on the household hearth, and the magical power, vigilance, and knowledge of the conjuror. Powerful witches will make their attempt to steal the liver-soul the first night after death and the first night after burial; only very feeble, incapable, and desperate witches would be tempted by the small residues left six days after death. The great crisis and the great magical conflicts would come the night after death, with the conjuror keeping his solitary vigil before the fireplace in the room with the corpse (Witthoft 1983:69-70).

The third soul is of the blood or circulation, and it is housed in the heart. This blood soul takes a month to leave the body from the point of death. Its characteristics are that it is "non-individual and quantitative...its substance gradually diffusing back into nature as a

life force" (Witthoft 1983:70). Unlike the liver, the organ of the heart or the blood soul itself "is of no use or interest to witches or conjurors after death. The living may be attacked by magic through the blood soul, in methods called 'blood sucking,' producing various anemic diseases" (Witthoft 1983:70).

The fourth soul is that of the bones, and it takes a full year to dissipate from the moment of death. Like the blood soul, the bone soul also diffuses back to nature, where its by-products are converted and it lends "its material to the growth of crystals in the ground, especially to the quartz crystals used in divination and conjuring" (Witthoft 1983:70).

Today, it is almost impossible to find retention or even recognition of the traditional four souls concept among the younger Cherokee generation. Even among the elderly population and among respected traditionalists and Cherokee Elders, the concept may be recognized, but the stages are not credited as functional or practical explanations of the body's postmortem processes. Western Judeo-Christian biblical concepts of death, heaven, and hell have supplanted this traditional interpretation, with the Christian afterlife and its attendant single-soul concept the dominant belief among modern Eastern Band Cherokees (Hughes 1982).

In spite of this, a limited residual of the four souls tradition still appears to be in existence, especially as it concerns the vulnerability of the physiological soul to supernatural exploitation. Witches are still a dangerous facet of life in Cherokee country, and Cherokee stories still abound with cautionary tales of witches attempting to ingest the livers of the dead. The wake in Cherokee funerals lasts a full seven days (the period it traditionally takes the physiological soul to dissipate within the liver), and relatives or family friends sit with the body at night during the extended wake (Hughes 1982). The

most vulnerable period for the soul of the dead person is the first night after death, when the liver is still nutritive and whole and when witches (tsi-sgi-li), also known as "night goers" (sv-no-yi ane-do-hi), "evil speakers" (u-ya igawa-sti), and powerful Raven Mockers (kalona a-ye-li-sgi), are most likely to seek out the liver for consumption in order to preternaturally prolong their lives. Witches and Raven Mockers are often sighted disturbing freshly dug graves.

Mooney (1992) relates a harsh fact of life among these creatures: witches and Raven Mockers are not united in purpose. Instead, a natural hierarchy exists and witches are "jealous of the Raven Mockers and afraid to come into the same house with one. When at last a Raven Mocker dies, these other witches sometimes take revenge by digging up the body and abusing it" (Mooney 1992:402). According to Cherokee scholar Alan Kilpatrick, the belief in these malevolent beings is very real, and "to the Cherokee sensibility witches (whether male or female) represent the ultimate expression of human depravity and antisocial deviance. This is their cardinal trait" (Kilpatrick 1997:10). Fogelson also notes that many Cherokees view these creatures who feed from the dead as "undead" themselves, because they offend Cherokee notions of order and lack morality (Fogelson 1979:87). Incidentally, there may now be a subtle shift taking place in the traditional seven day wake, with recent deaths on the Boundary observing shorter wakes of only one to three days duration.

The Cherokee therefore do not utilize the traditional belief in the four souls as a working conceptualization of osteological disintegration and the rationale for prohibition against bioarchaeological research. Instead, Cherokee opposition against the anthropological study of the remains of their dead stems from a complicated avoidance proscription based on cultural theories of pollution and corruption, as well as a deeper

conviction that it is degenerate behavior to disturb the dead, and runs counter to all moral and ethical human behavior. These intertwined worldviews make up the Cherokee ethos regarding mortuary treatment of the dead, and influence attitudes and opinions towards bioarchaeological research.

Cherokee Perspectives on Anthropological Research

The information in this section was derived from conversations with Cherokee Elders, traditionalists, and others who guide and oversee modern Cherokee policies concerning anthropological research.

The author of this study is a non-Indian employee of the Tribal Historic Preservation Office (THPO) of the Eastern Band of Cherokee Indians. The THPO is a tribally- appointed and federally mandated entity responsible as federal land managers to oversee all Eastern Band traditional and aboriginal territory. The THPO has the same rights and powers as the State Historic Preservation Offices on tribal lands (Section 101.d.2 of the National Historic Preservation Act), and this authority in the case of the Eastern Band extends off Boundary to cover all traditional Cherokee territory (refer to Figure 3). The THPO is charged with reviewing federal Section 106 undertakings to determine the degree of impact on Cherokee cultural resources.

The formation of the THPO system was initiated in 1992 by the United States Congress, and is further clarified by the Advisory Council on Historic Preservation (ACHP Website n.d.):

> In 1992 the U.S. Congress adopted amendments to the National Historic Preservation Act (P.L. 102-575) that allow federally recognized Indian tribes to take on more formal responsibility for the preservation of significant historic properties on tribal lands. Specifically, Section 101(d)(2) allows tribes to assume any or all of the functions of a State Historic Preservation Officer (SHPO) with respect to tribal land. The decision to participate or not participate in the program rests with the tribe.

> As a formal participant in the national historic preservation program, a tribe may assume official responsibility for a number of functions aimed at the preservation of significant historic properties. Those functions include identifying and maintaining inventories of culturally significant properties, nominating properties to national and tribal registers of historic places, conducting Section 106 reviews of Federal agency projects on tribal lands, and conducting educational programs on the importance of preserving historic properties.
>
> In accordance with Section 101(d)(2), the tribes on the National Park Service list have formally assumed the responsibilities of the SHPO for purposes of Section 106 compliance on their tribal lands. They have designated Tribal Historic Preservation Officers (THPOs) whom Federal agencies consult in lieu of the SHPO for undertakings occurring on, or affecting historic properties on, tribal lands.

The Eastern Band's Tribal Historic Preservation Office and related Cultural Resources Department is composed of personnel that includes archaeologists, cultural specialists, biological anthropologists, Cherokee linguists, oral history specialists, and historic sites keepers. The Eastern Band's THPO is exceptionally capable of handling issues of anthropology and human remains, in contrast to many other Federally recognized tribal groups who are not yet as well-equipped to address these issues. By virtue of her position as the Tribal Historic Preservation Specialist, the author regularly deals with Section 106 of the National Historic Preservation Act, including impacts to Eastern Band archaeological sites and unanticipated discoveries of human skeletal remains. In her position she is regularly tasked with enforcing Cherokee guidelines for bioarchaeologists working with Cherokee or Cherokee-precursor skeletal remains and archaeological sites.

She also has regular and continuous interaction with members of the Eastern Band of Cherokee Indians, as well as members of the other two federally recognized Cherokee tribes. She has had many opportunities to discuss the work of anthropologists (and specifically bioarchaeologists) with Cherokees in the course of her duties and is privy to information and procedures necessary to properly address the correct approach in dealing with Cherokee skeletal remains.

The information in this section has been gathered in the course of that employment, with the author having many conversations with other Cherokee employees on various aspects of these matters. Cherokee traditionalists have stated to the author that to commit information to print that is not yours to give (i.e., is not of your culture and therefore is not ethical for you to relate) is against strongly ingrained Cherokee principals of balanced and correct behavior. As one Cherokee related,

> We hate [James] Mooney. Even though the information he was given was sometimes wrong or incomplete, once it was printed it was ruined! We could no longer use it, because it was no longer secret or sacred to the Cherokees only. Everyone knew it once it was published, and it was no longer ours.

For these reasons, the author will not include in this document *specific* information regarding specialized Cherokee cultural beliefs about the dead that are not already printed, published, outlined or understood from other arenas (i.e., Fogelson 1975;1979, Hughes 1982, Townsend and Hamilton 2004, Witthoft 1983). To do so would be both disrespectful and unbecoming towards Cherokee culture. Due to the extremely sensitive nature of this topic to members of the Eastern Band of Cherokee Indians, it was not possible to collect a large quantity of data regarding concepts of death. However, though small in size, the information presented here is a representative overview. With this caveat in place, the following information relates to general Cherokee perspectives on the sanctity of the dead, prohibitions against contact or proximity with the dead, perceptions of bioarchaeologists and osteological research, and other central themes and motifs that make up the Cherokee worldview as it relates to this topic.

Western Science versus Indigenous Knowledge

To a question directed towards how the Cherokee see anthropologists and the results of their bioarchaeological research, a Cherokee traditionalist answered by first cautioning that knowledge for its own sake is not a means to an end. "There's knowledge, which scientists want, and then there's wisdom, which we have." Anthropologists and other researchers do have a responsibility towards the living, and there are moral obligations and social dimensions to consider. When asked about the appropriation of Cherokee cultural and biological remains for bioarchaeological studies, a Cherokee traditionalist explained that in the Cherokee worldview, "knowledge without a conscience yields corrupted results." An example of this was relayed to me using the following analogy: "Nazi research and scientific experimentation on concentration camp inmates was barbaric and inhuman, but it was still science. Does that make it okay?" For example, much of the information we have today on the effects of hypothermia on the human body was the result of Nazi experimentation on unwilling subjects in the 1930's and 1940's (Pozos 1992), but most scientists today would agree that there were alternative methods to gain that knowledge; better ways that did not involve the unethical use of unwilling participants. The Cherokee Elder argued this point; just because bioarchaeologists feel they have a right to unearth and study the remains of people from the Cherokee culture does not make it acceptable; in fact, it is morally indefensible science and runs counter to basic human modes of behavior in Cherokee eyes.

I asked if the Cherokee thought that bioarchaeologists, by virtue of their work with human remains and their desire to study archaeological populations, were viewed as "ill" because they lacked the "moral center" that guides proper behavior in Cherokee culture. I had based this line of questioning on my understanding of propriety in Cherokee culture,

and the opinion that those who show unbalanced behavior (i.e., coming into purposeful contact with the dead, as witches and Raven Mockers do) were themselves unhealthy. The Cherokee Elder responded that anthropologists who disturb graves "are not sick in and of themselves; they have a different worldview. They quest after knowledge, and sometimes knowledge results in money, so this is why they behave the way they do." While anthropologists themselves may not be viewed as sick or evil individuals, their actions are viewed as grossly improper:

> [I]t is nevertheless important to firmly understand that Cherokees believe that these supernatural creatures who spread illness and conflict are drawn to death, and this is why disease and discord are associated with proximity to the bones of the dead....It is held by traditional Cherokees that research by anthropologists on the bones of the dead is a dire danger to the living community of modern Cherokees...anyone conducting anthropological research on human remains without undergoing cleansing is a carrier of disease, misfortune, and death....Any scientist coming into Cherokee country with the intention of conducting this research is viewed as someone coming into the community with the goal of either purposefully or accidentally spreading malignancy (Townsend and Hamilton 2004:6).

Death as Contamination: Protecting the Living from the Dead

The topic of corpse pollution, disease, malignancy, and required purification ceremonies are culturally sensitive and private topics among the Cherokee. The majority of this section relies on previously published information to outline traditional prohibitions and required actions necessary to negate the dangerous effects of contact with the dead.

It has been previously stated that the fundamental precept of the Cherokee worldview is the concept of sustained order. This is accomplished, both by the individual and by the community, by adhering to two basic tenets: balance and purification, accomplished through "ethical action" and "mutual concern and mutual respect" for others (Kilpatrick 1997:100). As Hughes reinforces,

> The dichotomy of purity and pollution is the central theme in the Cherokee belief system. Nowhere is this more evident than in the beliefs concerning death. Contact with the dead through preparation of the dead for burial or attending a funeral can cause spiritual contamination which is both harmful and contagious (Hughes 1982:73).

Cherokee behave in ways that are deemed culturally appropriate behaviors designed to avoid corruptive pollution from a variety of sources, chief among them the bodies of the dead. This is true today as it was in 1775, when James Adair traveled through Cherokee country and witnessed that "the Cheerake observe this law of purity in so strict a manner, as not to touch the corpse of their nearest relation" (Adair 1775:130). Kilpatrick relates that in historic times, in order to "restrict the spread of contamination," Cherokees pre-assigned individuals in the community to be responsible for the treatment and disposition of the dead (Kilpatrick 1997:102), and indeed one Cherokee individual in his late 40's confirmed that his own mother was once assigned this responsibility, noting that a woman in the community was chosen to attend to female deaths while a man was chosen to attend to male deaths. A traditionalist related that the majority of modern Cherokee still avoid visiting cemeteries and grave sites after family members have been interred.

Accidental exposure to the residue of the dead was also dangerous, as is related by an informant of Kilpatrick's parents who advised that "when building a house one must be eternally vigilant about the materials used because "blocks of sand and gravel may contain the disintegrated bodies of the dead. Even new lumber may be impregnated with the blood of the dead" (Kilpatrick 1997:103). The dead are viewed as vessels of pollution by the Cherokee:

> Traditional Cherokee beliefs hold that there are dire consequences to coming into contact with the dead without undergoing the appropriate cleansing rituals. These consequences include sickness and disease that are seen to originate from the pollution and corruption of the dead (Hughes 1982, Kilpatrick 1997, Witthoft 1982). Great care is exercised in traditional Cherokee funerary practices, in part to avoid or cleanse participants of pollution associated with death (Hughes 1982). In addition, Fogelson (1979) indicates that besides diseases being caused by vengeful animals, sickness can

> also be caused by ghosts and other supernatural beings associated with death (Townsend and Hamilton 2004:6).

This is at the heart of what Cherokee Elders and Traditionalists believe: that negative forces are drawn to bones of the dead, and that the living can become infected and spread the contagion to others. In order to cleanse and purify individuals who have come into contact with the dead, purification rituals must be performed. These involve water as a purifying and cleansing agent, and the ceremony of "going to water" (amo-hi at-sv-sdi, "to go to [the] water place"). Mooney relates the following historic account of the purification ritual:

> [T[he details of the ceremony are very elaborate and vary accordingly to the purpose for which it is performed...The bather usually dips completely under the water four or seven times, but in some cases it is sufficient to pour water from the hand upon the head and breast (Mooney 1992:335).

Hughes, a Cherokee scholar and member of the Eastern Band, relates that even in modern times this ritual purification is still performed to protect the living from the effects of the dead and the associated dangers that come with exposure:

> Today, after a funeral some family member makes sure that no one is affected by the deceased through the ritual of 'going to water.' This can be achieved either by going to a riverside, a small branch, or one can get water from the creek and put it into a small container. The Indian doctor will use the water and his abilities to foresee any dangers that lie ahead...If there is some reason to show concern the head member of the family will be told. Then a series of 'going to water' will be advised for the afflicted until the danger of being affected is cleared (Hughes 1982:76).

Anthropologists must therefore realize that Cherokee have strongly ingrained aversions to the dead. Their outrage at the unearthing and studying of their ancestor's bones resonates on two levels: first, that it is morally and ethically wrong to disturb the rest of the dead and is therefore unbalanced and immoral human behavior; and second, that the dead are extremely and potently dangerous to the living, and when

anthropologists unearth and study those remains they subject the Cherokee to contamination and a host of ill-effects that anthropologists are unaware of or purposefully choose to disregard. As Hughes sums up:

> Among traditional Cherokees the concepts of purity and pollution regarding the dead are still prevalent. These deeply rooted ideas have survived two centuries of Christian influence. These vestiges will probably outlast all other remnants of traditional culture (Hughes 1982:84).

The Cherokee Doctrine of Non-Disturbance

When asked to explain what importance Cherokees place on the retention and maintenance of original burial and interment sites, a number of explanations were offered. Interestingly, all utilized related themes of location, geography, and space as it related to the Cherokee cosmological model of balance. When speaking of the skeletons of their ancestors still buried, one Cherokee echoed this observation by stating that "They are still here, and if we disturb them we've upset order and balance. Once their resting place is disturbed, it's no longer sacred. Their existence - our existence - is wiped away." This tie to the sacredness and inviolability of space was further illustrated by a Cherokee traditionalist: "If you move Stonehenge, it becomes just another pile of big rocks. The meaning and essence is gone."

So important is the concept of non-disturbance and maintenance of balance that official EBCI THPO *General Guidelines for the Re-Interment of Native American Remains* written policy (Appendix B) outlines proper procedures to follow to maintain balance. The first preference of the THPO is always "preservation in place." This means avoidance of human burials through research design, creative planning, protective measures, and other methods to ensure burials are left *in situ.* In the event that these methods fail, or

burials are disturbed and must be removed, reburial must occur in a location and manner that is consistent with (in fact, mirroring) the original burial:

> First, with regard to where the reburial should occur, it is the traditional belief of the Eastern Band of Cherokee Indians (EBCI) that reburial should occur as close to the original interment as physically and logistically possible, and that the reburial be within line of sight to the original interment location.
>
> Secondly, with regard to the layout of the new interments, it is the belief of the EBCI that reburials should mirror the original interments. Therefore, if the individuals were originally buried separately, then the new interments should reflect this pattern and bury the individuals within their own grave shafts. The same would apply to a group/mass grave situation. The spacing of the burials should reflect, to as close as logistically possible, the original spacing, as well.
>
> Thirdly, in reference to the individuals themselves, they should be oriented directionally and physically to mirror the original interment (Ex: If they were buried facing east, this pattern should be followed. Also, if they were found in a flexed position, this pattern should be replicated.) Additionally, any and all artifacts found in association with the original interment (funerary objects) and any of the original burial matrix should be reburied with the individual. All funerary objects should be oriented with the individual and the grave shaft to replicate the original interment.

The vast difference between cemetery traditions of prehistoric/historic Cherokee and those of Euroamericans was also touched upon. "Just because Western cemeteries are marked with stones and in a marked place, no one disturbs them. But what if we wanted the bones of Andrew Jackson to study or put on display in *our* museums?" This intriguing question was followed by another point: "It's just like breaking and entering. You wouldn't dig around in someone else's house, why do you think it's okay to dig around in someone's burial?" Another cultural traditionalist stated "I've never understood why people think it's so fascinating to dig up our people and study their bones...the remains are just as much alive today...no matter how many thousands of years ago they were put in the earth."

By an act of Tribal Council, the Eastern Band has legislated the treatment and sanctity of buried Cherokee ancestors. Article 1, Section 70 of the Cherokee Code

(published by Order of the Tribal Council of the Eastern Band of Cherokee Indians and codified through Resolution Number 20, enacted on October 10, 2001) addresses *Skeletal Remains and Burial Site Preservation* (Appendix C):

> Section 70-1. Excavation of skeletal remains:
>
> (a) The graves of Cherokee people and their ancestors are sacred and shall not be disturbed or excavated.
>
> (b) In the event skeletal remains of a Cherokee are excavated, such remains shall be reburied, together with all associated grave artifacts as soon as shall be reasonably possible. All such remains disinterred outside Cherokee trust lands shall be reburied in a manner consistent with procedures set forth by the NAGPRA Committee with the procedures being first approved by the Tribal Council of the Eastern Band of Cherokee Indians.
>
> (c) The remains of Cherokee people shall not be subjected to destructive skeletal analysis.
>
> (d) All unassociated funerary objects shall be treated in a manner consistent with procedures set forth by the NAGPRA Committee with the procedures being first approved by the Tribal Council of the Eastern Band of Cherokee Indians.
> (Resolution No. 92, 1-30-1983; Ordinance Number 57, 2-1-1996)
>
> Section 70-2. Sanctity of ancestors who are buried throughout the aboriginal Cherokee lands:
> The joint policy of the Tribal Council of the Cherokee Nation and the Eastern Band of Cherokee is as follows:
>
> (a) The graves of our ancestors are sacred and we desire that they not be disturbed.
>
> (b) In the event the remains of Cherokee ancestors are excavated, such remains shall be reburied together with all associated grave artifacts, as soon as shall be reasonable.
>
> (c) The remains of Cherokee ancestors should not be subjected to destructive skeletal analysis.
>
> (d) The remains of Cherokee ancestors and associated grave artifacts which have been disinterred and are now in possession of museums, universities, federal agencies or other institutions and persons, should be returned to the proper tribes for reburial.
>
> (e) Such remains should be buried at the original site where possible.
> (Resolution Number 121, 4-5-1990; Resolution Number 301, 5-29-1991).

Interestingly, when the Cherokee speak of "disturbing" human remains (the undeniable result of bioarchaeological excavations), Cherokee Code 70 offers a legal definition for the term. It reveals a level of meaning extending into the realm of purposeful and, to the Cherokee culture, malevolent and unbalanced action: "*Disturb* includes defacing, mutilating, injuring, exposing, removing, destroying, desecrating, or molesting in any way."

Cherokee Perspectives on NAGPRA and Repatriation

NAGPRA and other cultural resource laws, without a doubt, have been employed for the benefit of tribal interests all across North America. To the Cherokee, this law is one more tool in their arsenal of heritage laws used to great effect to protect their traditions, their culture, their sovereignty, and their dead. But for the Cherokee, NAGPRA is not a perfect law, and is not without its flaws. Because the ultimate result of the concluded NAGPRA process is the return of human remains to the affiliated tribe, more often than not this means a direct transfer of human materials from the returning institution to Cherokee representatives. As has been made clear, proximity of living Cherokee to the remains of the dead is strictly avoided on the basis of cultural concerns for the health and welfare of the living, and the potential for them as vectors of transmission to spread contamination to the entire community. A Cherokee traditionalist explained it this way:

> To give the remains back [to Cherokee people] makes us an accessory to the disturbance, to unbalance. We have to do a lot of preparation to make sure we are protected and that they [the Cherokee ancestors who are now skeletal remains] don't transfer over anything to us if we have to receive them back. That's what people didn't think about when they wrote NAGPRA.

When asked how this situation could be resolved or alleviated, he responded that because human remains are so dangerous to the Cherokee, it is better that no living

Cherokee come into contact with them. The solution, in his opinion was "for the people who had disturbed the remains already to do the right thing and rebury them - not expose us to them."

THPO guidelines for reburials do in fact include provisions for reburial ceremonies, even though, as all American Indian tribes will point out, historically there was never a need for ceremonies for secondary reburials. Although they range the spectrum in variety and form, most American Indian reburial ceremonies have been improvised and in content contain an offering or prayer ritual for the deceased.

The first preference of the Eastern Band will always be preservation in place, negating contact with the dead and the necessity for reburial ceremonies. If this treatment program is not an option, however, the EBCI THPO *General Guidelines for the Re-Interment of Native American Remains* outlines the following policy:

> [N]o tribe, of course, has a traditional reburial ceremony, this ceremony mostly consists of prayers and blessings for the individual. Typically, the reburial of individuals only requires the presence of two to three members of the EBCI with the knowledge and approval of the tribe to conduct such ceremonies/rites. This ceremony is to be conducted at the darkest moments just before dawn and is to only be witnessed by the EBCI members conducting the ceremony. We also typically do not require the presence of archaeologists or agency personnel to do the proper ceremonies. In most cases, within just a day (24 hours) prior to the ceremonies occurring, the new grave shafts are to be prepared and all individuals and funerary objects are to be placed in the open shafts as described above. From the moment that the individuals are removed from the repository until the time that the reburial is completed, the individuals and funerary objects are to be closely monitored and protected by an agency staff member and member(s) of the tribe(s) performing the ceremonies. At no time should the remains or funerary objects be left out of the sight, possession, and care of the assigned personnel/tribal members. Immediately following the ceremony, crews hired or agency staff assigned to complete the burials (filling in the grave shafts with archaeologically sterile soil) should begin their work and complete it within the day. The EBCI does not allow any media or cameras present during the preparation of the reburial area or during the ceremonies. Moreover, it is our preference that the entire reburial process from proposal to completion not become a topic for media coverage.

While this is the current written policy, ever-evolving input and consultation with tribal Elders and traditionalists may herald a shift in direction for the Eastern Band. In order to prevent exposure to the living Cherokee and their associates, reburials lately have been directed in absentia by the THPO while being physically carried out by representatives of federal agencies and/or their archaeological contractors.

Representations of Death in Cherokee Culture

Official written policy as outlined in the protocol document EBCI THPO *Treatment Guidelines for Human Remains and Funerary Objects (Survey, Excavation, Laboratory/Analysis, and Curation Guidelines)* includes the following statement with reference to photography of human remains (Appendix D):

> The EBCI requests that in the event human remains, funerary objects, sacred objects, or objects of cultural patrimony are encountered, no photographs of such items be taken. Detailed drawings are permissible, however.

Many American Indian groups, including the Eastern Band of Cherokee Indians, view photographs of the dead as actual representations of death, and photographic depictions of the dead are as hazardous to Cherokee health and well-being as exposure to actual skeletal remains. Perhaps one of the most important points for the anthropologist to realize is that Cherokee aversion to death involves clear avoidance of *all* dead, and not just Cherokee dead. This extends to the dead of other American Indian groups, to African American dead, to European American dead, in short, to the dead of any member of humanity, regardless of ancestry or ethnicity.

Cherokee traditionalists and Elders affirm that photographs of the dead are as potent as the actual bones of the dead, and thus are classified as objects to be avoided. The reason photographs are seen to manifest the same potentiality for disease, discord, and social

unease is that digital and photographic images captured by light are perfect one-to-one depictions of death, and are culturally and physically dangerous to Cherokee society in a manner that sketches, drawings, and other "imperfect" captures made by human hand and through human interpretation are not (Russell Townsend, personal communication 2004).

Cherokee Expectations of Anthropologists

It may come as a surprise that the overwhelming majority of archaeologists and physical anthropologists working in Indian country have been exquisitely poor ambassadors for the field of anthropology. When conducting research on American Indian cultures, anthropologists enter Indian communities, examine Indian dead, research Indian history, excavate Indian sites, examine Indian documents, and interview Indian people. They collect their data, transform it into a body of academic work, and then neglect to inform the American Indian community of their findings in ways accessible to the non-academic layperson. The experience of the American Indian has been that anthropologists always take but that they rarely, if ever, give back.

As a result of this apparent unwillingness to disseminate the results of their research (gathered solely by virtue of another culture's existence), many Cherokees view anthropologists as elitists who collect their information on Cherokee society and then transform that knowledge into personal cachet, monetary reward, academic prestige, thesis and dissertation topics, journal and book publications, and tenure opportunities with complete disregard for the fact that Cherokees might actually wish to learn the results to potentially gain more insight as well. As Mihesuah notes,

> American Indian remains, their cultural objects, in addition to their images, serve as the focal points of many anthropologists' careers. The fact that Indians exist allows these people - as well as historians - to secure jobs, tenure, promotion, merit increases,

> fellowships, notoriety, and scholarly identity - all without giving anything back to the Indian community (Mihesuah 2000a:97).

At consultation meetings between professional anthropologists and Cherokees, the Cherokees were asked if they valued anthropological research. They responded that they would be very interested in learning the results of that research, but that it was never shared with them. This is a remarkable indictment of the unprofessional disregard anthropologists hold for native communities. The few times that anthropologists have shared their research with the Eastern Band can probably be counted on one hand, but the results have been stunning:

> Certainly Cherokee people have a great interest in understanding their past, yet many Cherokees remain unconvinced that archaeology is the best or even a good method for gaining that understanding. However, the past fifteen years have seen the Cherokee people warming slightly towards the science of archaeology. We do not believe that this is a reflection of changing cultural norms within the Cherokee populace, but rather of the patient work of a small number of archaeologists who have taken the time to ask the Cherokee people what they want to know about their past. Brett Riggs has produced a fine example using Cherokee interest in ceramic manufacture to connect modern Cherokee potters with their counterparts of the past. Dr. Riggs has been able to answer the questions of interested Cherokees about the development of Qualla pottery and in doing so has fired the imagination of a new generation of Cherokee potters who once again continue the development of the Qualla tradition (Townsend and Hamilton 2004:7).

When it comes to osteological studies on Cherokee ancestors, the Eastern Band is very explicit. Cherokee Code 70, Sections 70-1 and 70-2 state that "The remains of Cherokee people shall not be subjected to destructive skeletal analysis" (Appendix C). Note that this prohibition does not say that skeletal analysis cannot be performed, only that certain types of analyses are not permissible. The EBCI THPO *General Guidelines for the Re-Interment of Native American Remains* includes this statement (italics added):

> [O]ur preference is always avoidance/preservation in place. Unless there are very good reasons as to why this is not possible, we will not immediately enter into discussions of excavation, removal, study, reburial, etc. That being said, if remains must be moved, it is always our preference that they be out of the ground for only as long as it takes to move them to their new resting place, which should be as close to

> the original resting place as possible (within line of sight). *Sometimes, we do allow minimal study of the remains, especially if it can be done with the remains in situ. If longer study is needed, we prefer a field lab to sending them off some distance to be studied in a lab. The bottom line is that the less time they are exposed to the air, the better it is for the people involved and the Tribe.*

Finally, when Cherokee Elders were asked about the ultimate value of bioarchaeological studies to the community, they were hard pressed to find a benefit:

> [M]ortuary archaeology and studies in bioarchaeology have yielded little of interest for Cherokee people. For a time mortuary patterning appeared as though it might help delineate the spatial and temporal boundaries of the Cherokee world. However, as resistance to cultural resource laws like NAGPRA has developed within the anthropological community, archaeologists have grown laconic and reticent to use this data for this purpose. With regard to skeletal biology we have yet to speak to anyone in any Cherokee community who feels these studies have contributed to their understanding of their ancestors' past (Townsend and Hamilton 2004:7).

I believe this stance is reflective of a number of missed opportunities presented to bioarchaeologists. The first is to interact with American Indian communities on an equal footing. This involves understanding the living culture even while studying the past. An awareness of the cultural sensitivities involved with types of bioarchaeological research will enhance all levels of research. The second is to return back to the Indian community a portion of what was taken away; the Cherokee are interested in their past and want to know the results of academic research on their people. Perhaps by involving tribes in anthropological research, bioarchaeologists can change the perceptions held by many tribal groups.

Lastly, when asked about the chances of acceptance for osteological studies in Cherokee country, a traditionalist responded that maybe that time will come when Cherokees look at bioarchaeological research as a viable method of learning about their past. He also noted that perhaps one hundred years from now anthropologists would not be dealing with the same restrictions and prohibitions because these traditions might not

be passed along to future generations of Cherokee, eventually becoming lost. But he added that regardless, anthropologists must deal with these restrictions *now*, and it is up to them to do so in a way that is ethical, moral, courteous, and respectful towards Cherokee culture and beliefs.

Anthropological historian Bruce Trigger offers the following comment which most Eastern Band of Cherokees (and indeed, most American Indians) would echo:

> Viewing the Indians' past as a convenient laboratory for testing general hypotheses about sociocultural development and human behavior may be simply a more intellectualized manifestation of the lack of sympathetic concern for native peoples that in the past has permitted archaeologists to disparage their cultural achievements, excavate their cemeteries, and display Indian skeletons in museums without taking thought for the feelings of living native peoples. If prehistoric archaeology is to become socially more significant, it must learn to regard the past of North America's native peoples as a subject worthy of study in its own right, rather than as a means to an end (Trigger 1980:671).

Chapter Six

AMERICAN ANTHROPOLOGICAL PERSPECTIVES

> As a child in the village there used to be some anthropologists that pitched tents outside of the village and some archaeologists that dug around a little bit. At that time I didn't even know they were related to the human race. They got away with some mysterious things... (Turner 1994:189).

In the previous chapter, the attitudes of the Eastern Band of Cherokee Indians towards science, anthropology, repatriation, and treatment of the dead were explored, offering a window into generalized modern American Indian sentiments towards anthropological research. Although many bioarchaeologists may have chosen to detach themselves from these viewpoints in the broader epistemological interests of science, it is clear that in the opening years of the new millennium, American Indians still hold strong convictions regarding bioarchaeological appropriation and research on the bodies of their ancestors.

As a counterpoint to the current American Indian point of view, this chapter will present a number of positions held by members of the anthropological community (both bioarchaeologists and archaeologists) addressing a suite of topics including research on American Indian remains, NAGPRA, Kennewick Man, scientific responsibilities, and other contributing factors which touch upon the roots of conflict between anthropologists and American Indians.

The material incorporated into this chapter has been culled from a wide variety of sources, including academic articles and books, mainstream press reports, mass-market books, online publications, film transcripts, and personal one-on-one interviews with a number of anonymous professional biological anthropologists (approved by The University

of Tennessee Internal Review Board, IRB # 6464B, and credited as "Anonymous Bioarchaeologist 2003").

The majority of these viewpoints derive from the post-NAGPRA era, although there are some positions that predate passage of that act in 1990. The intent of this chapter is to display the diversity of opinion within the anthropological community, to identify key themes running through the narratives, to recognize unresolved issues, and to outline the discipline's attempt to adapt to the post-NAGPRA environment.

There seems to be a disparity in opinion and discussion level even among anthropological practitioners themselves; the majority of recent books and articles published on NAGPRA and repatriation issues have been produced by scholars specifically in the archaeological sector (i.e., Bray 2001b, Bray and Killion 1994, Fine-Dare 2002, Fforde et al. 2002, Layton 1994, Mihesuah 2000b, Swidler et al. 1997, Thomas 2000, Tweedie 2002, Watkins 2000).

While a number of relevant symposia and several older articles were produced by American biological anthropologists looking at the effects of repatriation (i.e., Buikstra 1983, Landau and Steele 1996, Rose et al. 1996, Ubelaker and Grant 1989), to date there has been no representative written social or academic history of the complex ways in which NAGPRA has affected the discipline of physical anthropology, surprising in light of the fact that skeletal biologists are among those scientists most directly impacted (although see Walker 2000 for a post-NAGPRA perspective).

There are as many points of view among anthropologists as there are individual anthropologists themselves. The intent of this chapter is to capture a representative slice of anthropological sentiment that runs the spectrum of opinion, from the polarized extremes (i.e., the late UCLA Emeritus professor Clement Meighan), to American Indian

archaeologists who themselves have grappled with these issues (i.e., Choctaw member Joe Watkins), to a non-anthropologist repatriation proponent (i.e., Miller 1997). The quoted viewpoints are free of individual interpretation or comment on this author's part. They are arranged in broadly-themed sections, introduced by a short opening statement to define the subject matter under consideration.

The purpose is not to argue for specific benefits or disadvantages of repatriation issues. This section does not attempt to include uniformity in all opinions, nor does it pretend to reflect a minority or majority view; instead, it presents a generalized picture of attitudes reflected within the discipline to the challenges of coexistence under NAGPRA.

Bioarchaeology: "A Tremendous Amount of Information"

Studies of mortality and morbidity in American Indian skeletal remains is an integral facet of bioarchaeological studies. In the absence of written histories or ethnographic accounts, people are known by the traces they leave in their passing; cultural artifacts, habitation sites, art works, and the most tangible evidence of all for their existence - their bones. The skeleton gives direct testimony of sickness, disease, and pathologies, and allows anthropologists to reconstruct past biological histories in ways and details that other avenues of anthropological inquiry simply can not.

The insight gained from bioarchaeological examination of the skeleton ultimately allows the charting of a people's successful or failed adaptation to their specific environment. It can be stated with certainty that the study of ancient American Indian bones does indeed provide knowledge and add to the information we have about those past populations. The following excerpts address the types of information that can be gleaned specifically through the study of osteological remains, and what value bioarchaeologists place on their ability to contribute to knowledge of the past.

There are things that material culture can't tell you, for example biohistory. If you dig an archaeological site and never get into the cemetery you can never find out what the body is about...at a forensic scene in a skeleton you don't have bullets but you might have the bullet holes. The material culture tells you a lot of things, but it doesn't tell you about osteoarthritis, or the age of the person, or if all the burials cluster as kids or females. The bones can supply a tremendous amount of information (Anonymous Bioarchaeologist 2003).

Osteological data are unique, and cannot be replaced by data from archaeology or any other discipline (Anonymous Bioarchaeologist 2003).

As a trained physical anthropologist at a state institution, I have the legal and ethical responsibility to curate, study, protect, and sometimes repatriate the human skeletons that come to my laboratory. From human skeletons, we can derive information relating to human diseases, injury, warfare, origins, migrations, and gene flow. The more ancient skeletons as well as the better preserved ones tend to be more important skeletons scientifically because of the vast amount of new information that they can provide (George W. Gill quoted on PBS 2000).

Analyses of skeletal remains are providing a unique window into patterns of health in past human populations. Until very recently the surviving hard tissues, most often bones and teeth...have usually been ignored in historical and prehistoric research, or at best, their analysis was relegated to the appendixes of archaeological site reports...However, archaeologists and historians have begun to realize that human remains are the most direct means for assessment of past biologies - and how those biologies interacted with social, political, and economic processes (Goodman and Martin 2002:12).

The study of human skeletal remains has been a component of biological anthropology since its origins 200 years ago. Human skeletons provide information about the past that is unobtainable from any other source, e.g., specific dietary components, activities, health, and genetic relationships (Richard L. Jantz quoted on PBS 2000).

Because the study of past biological systems is such an integral part of biological anthropology, this strong representation is driven by the fact that the hard tissues - bones and teeth - preserve the greatest amount of biologically relevant information about the past. Therefore, studies of earlier human groups will always rely on information gleaned from skeletons for addressing such issues as physiological stress, nutritional ecology, and activity patterns, although other important materials encountered in archaeological settings (e.g., plant and animal remains, coprolites) serve as complimentary sources of information to human remains (Larsen 1997:2).

We are learning all the time about functional morphology and how different activities are registered in terms of the muscle development...And we still have a long way to go (Douglas W. Owsley quoted on Hall 1997).

Ownership: "Ancient Human Skeletons Belong to Everyone"

The work of bioarchaeologists and archaeologists ultimately is to function as interpreters of the past; to tease from the archaeological record the pan-human history of our species. As a result, anthropologists hold very strong convictions that their data contribute to the world-fund of knowledge on the antiquity of our existence. All subscribe to the view that ancient human remains are potential sources of information that may yield insight into the scope and expression of human habitation on the American continent. This section collates comments from bioarchaeologists and archaeologists made with reference to the question of the right of scientists to study ancient American osteological material. While the term "ancient" is somewhat subjective, ranging from simply prehistoric (i.e., predating 1492 A.D. in the Americas) to millions of years in the case of hominid ancestors, for the purposes of this section the quoted excerpts are directed towards skeletons of 5,000 to 13,000 years of age from the North American continent.

> Just because some government officials claim that any ancient skeleton is Native American by their definition does not justify turning it over to one or more groups of modern Native Americans, who may have no close relationship (or any at all) to the skeleton. The old European-American assumption that 'if you've seen one Indian, you've seen them all' is a gross misrepresentation of reality (C. Loring Brace quoted on PBS 2000).

> Kennewick Man may be one of the most important skeletons ever unearthed in North America. It is a very ancient skeleton and therefore not a close relative of any human alive today. Thus, claims of cultural or biological affinity by any group existing today are so tenuous that they should not be allowed to prevent scientific study of this important find. The skeleton should remain in the domain of all humanity and not be claimed by any single federal agency or any single religious or cultural group. It should be studied by all qualified scientists whose research might be able to provide new knowledge from the secrets that these ancient bones contain (George W. Gill quoted on PBS 2000).

> For me and many scientists, the understanding of nature is based upon scientific investigations that add to humankind's ever increasing fund of knowledge. The fund is ever changing as new generations of scientists add to, debate, and reinterpret the data. For those who have devoted their lives to better understanding the peopling of the New World, the Kennewick find is a rare opportunity for a significant increase in knowledge

about who the early Americans were and how they relate to living tribes (C. Vance Haynes quoted on PBS 2000).

Skeletal remains help tell the story of human history; it is a history to which everyone is entitled. Access to human history should not be restricted by the government, nor should it be controlled by small groups of people (Richard L. Jantz quoted on PBS 2000).

A further wonder is the marvelous story [Kennewick Man] can tell about life in prehistoric America. Should this elder be silenced because people in modern times presumed they already understood all he could teach? No particular group -- be it governmental, ethnic, or scientific -- can respectfully claim that their path to understanding this story is paramount. Should a single interpretation or understanding of the course of events thousands of years ago become the accepted truth for all concerned? (Dennis J. Stanford quoted on PBS 2000).

I explicitly assume that no living culture, religion, interest group, or biological population has any moral or legal right to the exclusive use or regulation of ancient human skeletons since all humans are members of a single species...ancient human skeletons belong to everyone (Turner 1986:1).

Prehistoric Human Remains: "Control and Limitation"

Under threat of NAGPRA mandated repatriations, the issue of retention and control of American Indian skeletons has intensified among anthropologists. More than a decade after the passage of NAGPRA, anthropologists have largely come to terms with the fact that culturally affiliated, primarily historic skeletons must now be legally returned to the people they came from. New issues of control have surfaced, however, when ancient skeletons found on the American continent are claimed by Indian tribes in cases where cultural affiliation cannot be scientifically determined as outlined by NAGPRA's regulations. Cases of ancient Americans like the Spirit Cave Mummy in Nevada (Figure 12) and Kennewick Man in Washington have once again brought the question of anthropological control and access to prehistoric and ancient American skeletons to the forefront.

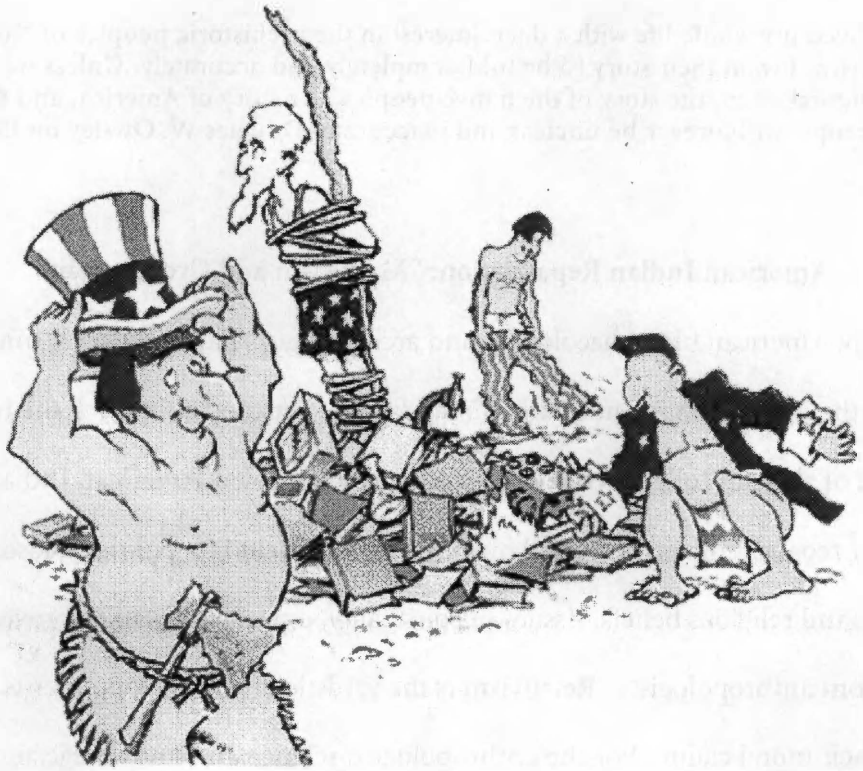


Figure 12. Cover illustration for the Nevada Journal article *Scalping Science: Sensitivity Run Amok May Silence the Spirit Cave Mummy Forever* (Muska 1998), addressing Paiute tribal claims to the Spirit Cave Mummy housed at the Nevada State Museum. Image depicts stereotyped Indians stealing Uncle Sam's clothing while preparing to burn him at the stake and setting fire to kindling made of books and scientific equipment at his feet.

> We are discussing here, in the question of reburial of prehistoric human skeletons, the important issue of direct control and limitation to the development of knowledge and advancement of science. That this knowledge can be of direct benefit to mankind must be recognized, as well as the fact that we risk severely limiting our ability to interpret the past (Buikstra 1981:27).
>
> Our knowledge of America's earliest biological and cultural heritage remains amazingly thin. For example, there are fewer than 35 dated human skeletal remains in the New World older than 8,000 years old. Most of these early remains are fragmentary. The Kennewick Man skeleton is one of the most complete early skeletons from the Americas, and its study by competent scientists is essential to understanding his morphology, genetics, health, diet, lifestyle, etc., and his relationship to other New and Old World populations. Only through the study of important individual skeletons, such as Kennewick Man, from different regions and different times will the scientific community be able to build a coherent picture of America's past (Robson Bonnichsen on PBS 2000).
>
> It's time to stand up for our right to ask questions about the past (Douglas W. Owsley on CBS 1998).
>
> I've lived my whole life with a deep interest in the prehistoric peoples of North America. I want their story to be told completely and accurately. Unless we study Kennewick Man, the story of the native peoples, the story of America, and the story of his people will forever be unclear and inaccurate (Douglas W. Owsley on PBS 2000).

American Indian Repatriation: "Mysticism and Creationism"

Many American bioarchaeologists and archaeologists have a difficult time reconciling the need to do science with demands by American Indians for the repatriation and reburial of skeletal collections. Many anthropologists view American Indians' demands for repatriation as motivated by many factors including political reasons, moral imperatives, and religious beliefs. Issues of spirituality, especially, seem to provoke strong reactions from anthropologists. Relativism is the yardstick by which opponents on each side stake their moral claim. For the anthropologist, science and knowledge are paramount; to contribute to our understanding of what went before in our shared human past is a noble and worthwhile endeavor. To many American Indians, knowledge

obtained through the excavation and study of human remains is a "horrifyingly inappropriate behavior" (Garza and Powell 2001:38).

With repatriation legislation, bioarchaeologists must now contend with the question: is scientific data deemed more valuable, important, necessary and worthwhile than a people's appeal to religion, ceremony, morality, and ethics? In some sense, the question has been answered by an authority who usually remains impartial in matters of the sacred: the United States Government. The passage of NAGPRA represents a stance taken by the Federal Government that validates the position of Native Americans over scientists; that religious concerns outweigh certain scientific ones. This section gathers a number of anthropological perspectives on repatriation and its links to American Indian beliefs, politics, heritage, and sovereignty.

> Over time my opinion has not changed significantly. Although I am sympathetic to the need of native groups to assert their rights to land, political power, and control over their heritage, I nevertheless am not a fan of NAGPRA's potential negative impact on archaeological collections (de-accession and reburial) and the ability to do research on North American and Hawaiian prehistory (Anonymous Bioarchaeologist 2003).

> The bottom line is what grief do you put on those Native Americans who live in that region who might look at this person and say 'here is my ancestor and you should leave him in peace.' Is your playing with haplotypes and craniometrics worth upsetting the spiritual beliefs of a people? It's not that prehistoric remains aren't sources of data, but with NAGPRA that time has passed. Politics and the right thing to do - winds blow at different times, and you know, I feel it's over. Look at old measurements if you want. What do you gain by the continual abuse of these people's spirituality? (Anonymous Bioarchaeologist 2003).

> Laws like NAGPRA strike at the heart of a scientific archaeology because they elevate the cultural traditions and religious beliefs of Indians to the level of science as a paradigm for describing or explaining reality (Geoffrey A. Clark quoted in Burke Museum Website n.d.).

> [I]t seems that the worldview of western science is under serious and sustained assault [from] a multipronged attack in which mysticism, religious fundamentalism, creationism and belief in the paranormal ... attack the critical realism and mitigated objectivity that are the central epistemological biases of the scientific worldview...We are all losers if, for reasons of political expediency, Native Americans rebury their past (Geoffrey A. Clark quoted in Muska 1998).

There are many other issues besides physical reality and facts involved in something like this. Human feelings, humans' perception of sacredness and spirituality, and whether the human spirit is still sensitively involved with its mortal remains. I mean, these are questions no human has ever been able to answer to the satisfaction of any other human. These are all unknowns that science can't even touch (Amy J. Dansie on PBS 2000).

I have tremendous respect for American Indians and their culture. In regard to those whose understanding of nature is prescribed by tribal mythology and religion, I respect their concern for proper treatment of their dead, but there must be clear genetic or cultural connection for repatriation. For skeletal remains that are thousands of years old, demonstration of an actual genetic connection may be possible but requires detailed scientific study (C. Vance Haynes on PBS 2000).

The New Age disposition to invoke or invent beliefs no one really holds, and to maintain that they are of a value at least equal to, if not supremely greater than, those that account for the triumph of Western civilization, is given concrete expression in the repatriation movement...multiple laws inhibiting archaeological research, physical anthropology, and museum studies have all been instigated and justified in the name of Indian religious beliefs. This is remarkable for a number of reasons. First, no other religious group in the United States has been given the same protection. Second, most Indians no longer hold these beliefs. Third, Indian knowledge of the traditions of their ancestors is derived in large part from the collections and scholarship that the activists among them are now seeking to destroy (Meighan 1994:66-68).

Under the first amendment one is free to believe whatever one wishes but cannot compel the actions of others in accord with one's religious beliefs. Reburial is an 'action' which is forced upon archaeologists based on professed Indian religion (Meighan 1996).

[Many American Indians] would have the world believe that this is simply another morality play between treaty-breaking whites and reservation-bound Indians (John Miller quoted in Muska 1998).

Few people, other than some biological anthropologists and archaeologists...would dispute the notion that Indians and tribes have a superior moral claim to the Indian remains and grave goods, based on traditional religious and cultural beliefs and values (Moore 1994:206).

Bioarchaeology in America: "Out of Business?"

One undeniable side-effect of NAGPRA and other cultural resource legislation such as Section 106 of the NHPA is that it has become increasingly more difficult to conduct bioarchaeological research in the United States on American Indian skeletal remains. As a result, there is a flow away from North American field sites to those in

countries where cultural resource laws do not exist or apply to skeletal remains. This trend will continue to create a vacuum in North American osteological studies, as researchers and their students turn to other opportunities in other lands. What this will signify in terms of effects to North American prehistory in the next few decades is unknown, but many anthropologists hold the position that the outcome will be bleak, both in terms of future insight into the prehistory of this country and for the discipline of bioarchaeology itself, while others see glimmers of hope for a strengthened and more holistic discipline.

> Skeletal research and NAGPRA don't coexist well in a single sentence, as far as I am concerned. NAGPRA mandates inventories and allows for only limited research on skeletal collections. When I worked in a repatriation program, our mandate was to do inventories to assist in the repatriation mission; the pursuit of research questions was discouraged (Anonymous Bioarchaeologist 2003).
>
> I was concerned when I learned about [NAGPRA], since I saw it as a challenge to museum collections and field research...My early training in mortuary site archaeology would probably have been affected if NAGPRA had been in effect at the time. But for the past 20+ years I've been working in Latin America, where NAGPRA does not apply (and there are so far not many examples of NAGPRA-like conflicts between archaeologists and native groups) (Anonymous Bioarchaeologist 2003).
>
> NAGPRA's effects will vary by geographic location, the composition and political views of specific tribes, the historical relationship between specific native groups, universities, museums, and individual anthropologists. If carried to its most extreme end, NAGPRA will effectively empty American museums of much of their archaeological collections, leaving behind only 'virtual' datasets of variable quality (Anonymous Bioarchaeologist 2003).
>
> My research interests...have not been directly impacted by NAGPRA, since most of my work is [outside of North America], where there is no political or legal movement analogous to NAGPRA (Anonymous Bioarchaeologist 2003).
>
> [The positive effects of NAGPRA to the discipline of bioarchaeology are]: 1) some unstudied skeletal collections will receive attention under NAGPRA regulations, 2) there will be new data produced through standardized approaches to data collection (NMNH database, Standards Volume of Buikstra and Ubelaker), although I have concerns about how 'comparable' all this data will be, given the highly variable levels of training and experience of those doing NAGPRA inventories and skeletal documentation. 3) NAGPRA has provided short-term jobs for many anthropologists. [The negative effects of NAGPRA to the discipline of bioarchaeology are]: 1) The reburial (or potential for reburial) of many important skeletal collections, 2) the imposition of regulations prohibiting the study of both extant and newly-excavated skeletons, 3) the polarization of opposing sides in the NAGPRA debate. (Anonymous Bioarchaeologist 2003).

In the case of American archaeology, the somewhat reluctant turn toward a more self-conscious, inclusive and humanistic approach to the construction of knowledge about the past has been accelerated by the passage of repatriation legislation (Bray 2001a:1).

Meanwhile, in university departments of anthropology, physical anthropologists are normally outnumbered by cultural anthropologists. The latter have little interest in osteological collections; more important to them is maintaining good relations with the living tribes with whom they work. As a group, cultural anthropologists include a considerable number of politicized academics. Many of them welcome an opportunity to demonstrate their solidarity with an allegedly oppressed minority, especially when it means insisting that the latter's native religion be respected. Since their own research will not be adversely affected, they have nothing to lose. Political correctness has rarely been so all-around satisfying...An entire field of academic study may be put out of business. It has become impossible for a field archaeologist to conduct a large-scale excavation in the United States without violating some law or statute. The result is that archaeology students are now steered away from digs where they might actually find some American Indian remains. American archaeology is an expiring subject of study--one in which new students no longer choose to specialize. Instead, they specialize in the archaeology of other countries, where they will be allowed to conduct their research and have some assurance that their collections will be preserved (Meighan 1994:66-68).

This statute [NAGPRA] has single-handedly sparked more analysis of human remains and funerary objects in the last eight years than was done in the last 100
(Timothy McKeown quoted in Burke Museum Website n.d.)

NAGPRA was supposed to create a set of rules to resolve conflicts between scientists who study dead Indians, and living Indians hoping to honor tribal customs. But it was never intended to stop anthropologists and archaeologists from conducting important research on ancient remains. Unfortunately, it has come very close to doing just that (John Miller quoted in Doherty 2002).

If Kennewick Man had been reburied without study, and if other ancient skeletons and future discoveries follow him into the ground, I'm afraid the field of American biological anthropology that studies ancient populations will slowly die. New researchers, seeing only restricted areas of investigation here, are likely to turn their attention to other countries. In the future, then, we may learn a great deal about ancient migration patterns and populations in South America, Asia, Africa, and Europe, but North America may become a question mark -- an unknowable area that leaves a great gap in the total picture (Douglas W. Owsley in PBS 2000).

Does NAGPRA and the ongoing process of repatriation and reburial ring the death knell for bioarchaeology as a research paradigm and profession?...The answer to these questions is no. On the contrary, NAGPRA will allow bioarchaeology to emerge as a vigorous and possibly more relevant and responsible profession (Rose et al. 1996:82).

The Kennewick Court Case: "A Happy Ending"

Opinions among anthropologists regarding the value of Kennewick Man and other ancient American skeletons is consistent: that he and others like him can add pieces to the puzzle of early human migration, habitation, and existence in America. For this reason, a number of anthropologists saw the claim by tribes in Washington state for the return of the bones of Kennewick Man under NAGPRA as an issue that had to be challenged in the court system, denying that Kennewick Man met the legal interpretation of "Native American" as defined within NAGPRA. This section showcases anthropological viewpoints leading up to the eventual victory in the courts in 2004 for the right of scientists to study Kennewick Man and the denial of the claimant tribes to rebury the remains.

> Does science have a right to study Kennewick? Not particularly. It's 9,000 to 13,000 years [old], it's obviously not Caucasian, right? I think all non-provenienced Native American skeletons should be returned to Native Americans. With non-affiliated remains, just because you can't assign it with a preponderance doesn't mean it doesn't belong to them. I think it should be reburied. They're not my ancestors, they're not African American. [Kennewick] gets around NAGPRA because you can't do tribal affiliation. Is there a time when science should look at him? If the Native American Indians in the area want science to look at him, *then* science should look at him (Anonymous Bioarchaeologist 2003).

> I am certainly in favor of the scientific study of Kennewick Man, to the same degree that I applaud the many years of study of the Ice Man by multinational researchers. The Ice Man is a model I would like to see followed in the rest of the world—Kennewick Man is an example of how problematic NAGPRA is (Anonymous Bioarchaeologist 2003).

> There isn't a prehistoric Native American skeleton anywhere without some legal ramification to it today (Anonymous Bioarchaeologist 2003).

> I think Kennewick Man has been a good thing if only because it has focused so much attention on this problem...It just has to have a happy ending (Richard L. Jantz quoted in Miller 1997).

> If we lose Kennewick Man, then every ancient skeleton in the United States could be lost to [NAGPRA] (Richard L. Jantz quoted in Miller 1997).

> Kennewick Man has been dated to about 9,000 years ago. Few securely dated, well-preserved Paleo-American skeletons have been discovered. Some of them have been

reburied, notably a 10,675-year-old female found near Buhl, Idaho and an 8,000-year-old skeleton found in Hourglass Cave in the Colorado Rockies. Neither was adequately studied by scientists. Yet, there's nothing in the NAGPRA regulations that prevents study. To keep Kennewick Man above ground until some of the unresolved issues brought about by ambiguous NAGPRA terms and restrictive interpretations of them could be addressed, we sued (Douglas W. Owsley on PBS 2000).

The more scientists who are able to examine a skeleton, the more likely we are to arrive at the truth. Even now, the few scientists who have seen Kennewick Man disagree on whether he had three broken ribs or six, whether his right arm was broken or his left elbow, whether the stone point in his hip hastened his death or was fully healed over when he died (Douglas W. Owsley on PBS 2000).

Judge Jelderks' interpretation of 'cultural affiliation,' whereby NAGPRA does not affect such ancient and unaffiliated remains as the ones that were subject of the Kennewick Man case, is in line with Congress' intent for the law (Seidemann 2003:169).

The Kennewick Man case represents a milestone in the history of anthropology. It illustrates the reality that genetic closeness is not the same as cultural affiliation. Just because two groups are Native American, one modern and one ancient, does not automatically mean that their belief systems are even remotely related. Unaffiliated groups should not be allowed to silence the voices of extinct cultures based on their own cultural conventions of what is and what is not 'right' (Seidemann 2003:176).

First Americans as European Ancestors? "A Right to Know"

As discussed in Chapter Four, the implications from research on Kennewick Man and other ancient remains in America have led some anthropologists to posit new theories for the peopling of the Americas. Based on interpretations of cranial morphology by some researchers, the earliest inhabitants of this continent show traits unlike those reflected in modern American Indians, and instead these researchers argue that the skulls show more affinity with "European" or early "Caucasoid" populations. Critics of these theories argue that the small sample sizes used to promote these theories, the scientific methodology used to measure and compare their cranial morphology, and the unknown and unaccounted for evolutionary processes affecting human cranial shape 10,000 years ago all need to be further considered and examined before a new paradigm replacing American Indians with "European" ancestors can be accepted.

Why do all this fumbling with the law? [Kennewick] seems to fall outside of NAGPRA. It's early, and you can't assign cultural affiliation, so it is problematic. I'd still give it back. What do you get out of this? You get scientific papers that say what? That someone other than Native Americans came here first based on a few incomplete skeletons? (Anonymous Bioarchaeologist 2003).

Some specialists are now considering the possibility that different colonizing groups from Asia and possibly Europe are required to account for the biological, cultural, and linguistic diversity found at the time of European contact and in the archeological record. Many specialists believe that the future of First Americans research must focus on exploring the validity of this new paradigm (Robson Bonnichsen on PBS 2000).

Well, the first thing I saw when I looked at that skull was a long narrow head with fairly prominent brow ridges and an extensive nose. This, to me, almost automatically said, OK, I'm probably dealing with a Caucasian. And in looking at this individual, if he's got characteristics that are similar to those of Europeans, then I'm thinking he's a fairly recent person (James C. Chatters on PBS 2000).

I really do object to saying there is such a thing as a Caucasoid trait...You can find changes in cranial size just within certain groups that lived in the same area. [In using the term Caucasoid to describe Kennewick Man] the hands of the anthropological clock had just been put back 100 years. Kennewick Man has become a textbook example of why race science is bad science (Alan H. Goodman quoted in Egan 1998).

The use of the term Caucasoid really is a red flag, suggesting that whites were here earlier and Indians were here later, and there's absolutely no reason to think that (Donald K. Grayson quoted in Slayman 1997).

Actually, I don't think anybody is doing racial typology today. However, that does not mean that cranial morphology is meaningless (Richard L. Jantz quoted in Fergus 2003).

It's an intriguing study...it suggests that there might have been a distribution of people 10,000 or more years ago throughout Asia who looked more European than [Asians] do now (Richard L. Jantz quoted in Morell 1998b).

Fortunately, a renewed interest in the crania of early Americans has occurred, using a modern analytical framework based on multivariate statistics. Initial studies have shown that the craniometric pattern departs from contemporary American Indians, often in the direction of European[s] (Jantz and Owsley 2001:146).

The 'Caucasoid' Kennewick Man...has been the subject of extensive heated correspondence...To call it 'Caucasoid' is to connote aspects of ancestry, not simply morphology; it directly suggests that America was settled by Europeans and that those now called 'Native Americans' are actually less 'native' than they think. This is a strongly political statement requiring an exceptional level of validation...[The] 'racial' variation in cranial form of prehistoric Native Americans is well attested from earlier studies...Other material similar to Kennewick...also appearing 'Caucasoid' and with a very old date, nevertheless has mitochondrial DNA markers characteristic of American Indians, just as we should expect. So what is the point of racializing these remains? It serves only to clothe 21st-century issues like NAGPRA in the conceptual apparatus and

vocabulary of the 19th century (Jonathan Marks quoted in Burke Museum Website n.d.).

I don't think this will change our view of Native American ancestry. The fact that Kennewick Man doesn't look to some like a Native American [morphologically] doesn't mean anything (David J. Meltzer quoted in Burke Museum Website n.d.).

That doesn't mean the two [Kennewick Man and Modern American Indians] are unrelated or that we have to look elsewhere than Asia for their origins (David J. Meltzer quoted in Wilford 1999).

Everything I was told about him suggested that Kennewick Man did not have physical features characteristic of Native Americans. I've been measuring, analyzing, and evaluating Native American remains, particularly those from the western half of North America, for the 25 years of my professional career...Kennewick Man's description didn't fit any group I knew of (Douglas W. Owsley on PBS 2000).

The scientists have never said, 'Kennewick Man is not Native American.' He could be. Or he might not be. But what we have said is that he has to be studied. I feel that a clear and accurate understanding of the ancient past is something that the American public has a right to know about (Douglas W. Owsley on PBS 2000).

We have never said Kennewick Man was this or that [American Indian or not American Indian]. But we do feel that it was far too important a discovery not to learn something from it (Douglas Owsley quoted in Egan 1999).

Even if the early people don't look like modern Indians, it's possible they are ancestral to today's Native Americans (Joseph F. Powell quoted in Wilford 1999).

[Owsley and Jantz note] in terms of its closest classification, [Spirit Cave Mummy] does have a 'European' or 'Archaic Caucasoid' look (Preston 1997:75).

What was made public today makes it very difficult for the Government to claim that Kennewick Man belongs to modern Native Americans (Alan Schneider quoted in Egan 1999).

The recent debate over the remains of Kennewick Man...has done little to foster a reconciliatory relationship, rather it has probably done more to polarize the issues (Society for American Archaeology quoted in Burke Museum Website n.d.).

Because we view our ancient past through the destructive filter of time, each new site where human remains are recovered is of incalculable importance. Therefore, the scientific study of remains such as Kennewick Man, Wizard's Beach, and Spirit Cave should be thorough, carefully done, and verified by other scholars....Verification of a scientist's studies provides assurance that data supportive of alternative interpretations are gathered. Without this verification, scientific analysis is incomplete (D. Gentry Steele on PBS 2000).

In North American Indian populations (and, indeed, human populations worldwide), there has been a distinct tendency for skulls to become more globular ("rounder") and less robust over the last 10,000 years. This being so, no experienced physical

> anthropologist should be surprised that the Kennewick skull has a longer, more robust face than recent Native Americans...Although forensic anthropologists can often produce spectacular results in separating modern 'races,' this success requires very specialized assumptions that are wholly inappropriate when projected into the deep past (Thomas 2000:116).

Time Depth and NAGPRA: "Destroying the Past"

One of the most contested topics by anthropologists complying with NAGPRA is the lack of specificity within the document in terms of temporal limits for repatriation claims by American Indians groups. In the recent Kennewick decision, time depth was a critical consideration for the courts because of the extreme age of Kennewick Man.

Seidemann (2003) argues (and the courts have agreed) that although not specified, NAGPRA was intended to only apply to those remains for which lineal descendants could be identified, placing the cut-off date for repatriation claims at 1492 A.D. Seidemann argues:

> [W]hat is abundantly evident from the legislative history [of NAGPRA] is that Congress was especially concerned with reparations for the wrongs committed against Native Americans since A.D. 1492...[and that] Congress' unique interest in the disposition of recent rather than all or ancient human remains (Seidemann 2003:166).

This interpretation argues that NAGPRA was only intended to apply to *historic* American Indian remains post-dating European arrival in the New World, an interpretation that no doubt would be contested by many American Indian groups. This section collects statements by anthropologists addressing the time depth of ancient human remains and their applications under NAGPRA.

> Once you get remains beyond 1,000 or 2,000 years, you're no longer able to culturally affiliate with many tribes or groups of people who came along later (Richard L. Jantz quoted in Fergus 2003).

> 'The past' is nowhere. It cannot be discovered. What exists now and has been continuously existing since its manufacture is evidence of just that, continuous existence for whatever length of time (Kehoe 1998:230).

> One of the questions I love to ask people is whether they know where their ancestors from 500 years ago are buried. Only the Queen of England knows for sure. We're talking about a skeleton that was around 5,000 years before the pyramids of Egypt were built. Repatriation is a loaded and improper term because it implies that you're giving something back to people who own it. They don't own it, and never did (Clement W. Meighan quoted in Silva 1993).
>
> There certainly were remains that shouldn't have been recovered--that should be returned. But when we get into taking all the prehistoric material and putting it in the ground--and when we get into the realm of even pushing it to this age [Spirit Cave Mummy at 9000 years] we're destroying the past (Douglas W. Owsley quoted in Hall 1997).
>
> It is also fair to ask at what point does a living person's cultural connection to a dead person become so attenuated that it merges into the common cultural heritage of all people, and thus no longer provides a moral basis for special rights and control (Walker 2000:23).

Bioarchaeology: "Antidote to Future Scalping"

What can be asserted about the work of bioarchaeologists investigating American Indian skeletons and the resulting value and benefits to modern living Indian people? With the passage of repatriation legislation, biological anthropologists have struggled to demonstrate the value of bioarchaeological studies to living people. While the value towards scientific research and the accumulation of knowledge is undeniable, assertions that these types of studies are of direct benefit to modern Indian people is proving difficult to uphold (Mihesuah 2000a).

In an effort to show the value of bioarchaeological research - and hence, the necessity of disturbing American Indian dead - many anthropologists claim that the study of prehistoric American Indian bones contributes to the health of current American Indians, and that information gleaned from bioarchaeological research may some day benefit the welfare of all living American Indians. However, it is difficult (if not impossible) to prove this in any single case or instance, despite efforts to the contrary (i.e., Landau and Steele 1996; Ubelaker and Grant 1989).

Anthropologists have thus far been unable to dispute the observation offered by Dr. Emery A. Johnson, former U.S. Assistant Surgeon General who worked as the Director of Indian Health Service for three decades:

> I am not aware of any current medical diagnostic treatment or procedure that has been derived from research on...[American Indian] skeletal remains. Nor am I aware of any during the 34 years that I have been involved in American Indian...health care (Emery Johnson quoted in Harjo 1989).

The often repeated bioarchaeological argument is that osteological studies of prehistoric remains may be of medical benefit to living Indians. This potentially may have been true in the early days of medicine, when the study of prehistoric Indian bones may have contributed to a clinical understanding of the general manifestation of human bone disease in all people. However, today, with the advances in medical technology including radiography, CT, MRI, Dexa Scans, and other bone imaging techniques, use of prehistoric American Indian skeletal remains are no longer necessary or even useful as analogues to modern human bones or osteopathological processes.

It is common to see bioarchaeological arguments for the relevance of osteological studies to modern, living, American Indians phrased similarly to the following: "The ways in which the study of Indian human remains benefit contemporary Indians are numerous and continue to grow" (Ubelaker and Grant 1989:250). However, by only proceeding to give examples such as prehistoric stature estimates and paleopathological analyses, many American Indians argue that these types of bioarchaeological research benefit *contemporary* Indians not a whit. The following two statements are typical of those found in print specifically addressing the perceived benefits of skeletal studies to modern American Indians.

> And how can knowledge of the prehistoric Crow Creek massacre or the practice of scalping be viewed as helpful to people of today? The answer can only be that our total

> history is who we are. The good and the violent....That is all of our history...We can only hope that by acknowledging that history can we keep it from being part of our future (Landau and Steele 1996:224).

> Indians living today stand to benefit from our conclusions. Additionally, study of the remains might aid Native Americans further. Examples of the applications of our analyses include determinations of biological relationships which support Indian land claims and understandings of prehistoric disease which could alleviate suffering among present-day Native Americans. If our studies of disease could result in understandings which saved just one child's life, then surely retaining skeletons for complete study is warranted (Willey 1981:26).

American Indians: "People without a History"

The study of ancient human remains from any locality on earth will lend insight to that region's past history of human occupation. Some argue that if there are extant living descendants of these past populations, anthropological analysis can throw light onto their ancestors' way of life that may otherwise have been lost to time and history. Many anthropologists take the position that much information on American Indian history is known by virtue of anthropological analysis of human remains and material culture, and that the study of American Indian skeletal remains demonstrates the great respect anthropologists hold for these cultures (i.e., Buikstra 1983).

Many American Indians counter that these points are arrogant and dismissive of their own oral, traditional, and cultural histories. It is also this line of argument that reinforces a conception held by large segments of the American public: that Indians are a vanished people, promoting the view of Indians as static throughout time and not subject to the same evolutionary biological and cultural processes as other groups. Even today, biological anthropologists primarily know American Indians through the study of their prehistoric past, and not through any interaction with the living communities represented by the objects of their study.

> In reference to both Spirit Cave and Kennewick Man's skulls [Jantz and Owsley] say, 'there are no close resemblances to modern Native Americans.' They are in fact arguing, then, that no morphological changes could have occurred within 9,000 or 10,000 years; this means that biology is static, and thus evolution is not valid when applied to Indian people. So like their culture, Indian biology is static and not open to change like the rest of humanity (Kortright n.d.).

> Personally, I have never felt any overwhelming respect for bones or artifacts. I do respect the people who left these behind. I respect them sufficiently to spend my life trying to understand them and write their history. I respect the ancient people far more than the minority of their self proclaimed descendants who want to deny studies and use the remains for their own political ambitions (Meighan 1992:42).

> In my view, archaeologists have a responsibility to the people they study. They are defining the culture of an extinct group and in presenting their research they are writing a chapter of human history that cannot be written except from archaeological investigation. If the archaeology is not done, the ancient people remain without a history (Meighan 1994:66).

> When you bury these collections, you're reinforcing the view that American history began with Columbus. As they rebury their past, they're really reburying a source of information of the past (Douglas W. Owsley quoted in Hall 1997).

> The study of human remains can generate information about past cultures and civilizations that is unavailable from any other source. For living people descended from those past cultures, the study of remains is a vital link to their past, a means of gaining insight into their present, and even offers the opportunity to catch a glimpse of the future...Through scientific analysis and long-term curation of Indian human remains, anthropologists and others who have devoted their careers to the study of American Indians can insure that this history is not lost. The tragedy of such a loss is not limited to American Indians who would never know the full extent of their glorious history, but would be felt by all mankind (Ubelaker and Grant 1989:250).

Ethics in Bioarchaeology: "At a Bare Minimum"

The following opinions reflect the attitudes of some anthropologists towards the incorporation, formulation, or need for a clearly defined ethical code when working with American Indian osteological and cultural materials.

> It's scientific imperialism - we feel we have a right in the name of science to do what we want. As long as there's a scientific veneer on it, then we have a right to it (Anonymous Bioarchaeologist 2003).

> Archaeologists are funded primarily from public coffers. Native Americans are a part of that public, and archaeologists must be responsive to their legitimate concerns. Many archaeologists are doing so. However, with the exception of SOPA [Society of

> Professional Archaeologists] and WAC [World Archaeological Congress], archaeological professional organizations do not recognize this obligation in their ethical statements (Garza and Powell 2001:52).
>
> [Anthropologists]...believe so strongly in the importance of knowledge and their responsibility to contribute to that knowledge, that to not do so would be unthinkable and unethical (Garza and Powell 2001:38).
>
> At a bare minimum, full consultation and proper permission should be obtained from Native descendants or spiritual kin, and, if denied, no excavation whatever should occur (Grimes 2001:102).
>
> [It was anticipated that with the requirements of NAGPRA, bioarchaeologists would have developed] a uniform set of standards for the study of human subjects, and osteologists will follow the same procedures for the prehistoric dead as are now required for research on the living and the recently dead (e.g. autopsy studies) (Rose et al. 1996:100).
>
> These convoluted academic arguments about the definition and justification for treating human remains with respect, of course, seem bizarre to indigenous people who view ancestral remains not as inanimate objects devoid of life but instead as living entities that are imbued with ancestral spirits (Walker 2000:21).
>
> [C]ertainly there are some archaeologists who are unable or unwilling to respect Native American rights, but others have been quite responsive once they realize the depth of concern and the ethical ramifications (Winter 1980:123).

Agreeing with Repatriation: "Traitors to Science?"

This section consists of an illuminating exchange between anthropologist Raymond D. Fogelson from the University of Chicago (a specialist on Cherokee culture) who wrote the following unpublished letter "circulated at the Smithsonian Museum where it evoked concern" (Bieder 1990:60). It is in response to comments published in 1989 by the Secretary of the Smithsonian Institution, Robert Adams, who was confronted with the specter of repatriation of the Smithsonian's American Indian skeletal collections. Fogelson writes:

> The insistence on 'known descendants,' 'links of descent,' ascertainment of tribal affiliation, and continuity of residence begs several questions. First, it assumes that Native Americans routinely reckoned descent beyond three generations and traced family lines in a manner comparable to Euro-American genealogists. Second, the statement implies that 'tribes' were primordial forms of social organization and not the

> product of Indian-White historical interaction. Third, proof of residential continuity seems an unduly restrictive criterion for release of skeletal remains...Secretary Adams clearly does not deny the collective identity of the prehistoric and historic bones in question as ancestral to contemporary Native Americans. This, it seems to me, should be the central premise on which policy should be based. In the vast majority of cases were specific identifications cannot be made, the bones should be returned for proper reburial to responsible Indian organizations in the regions where they were first discovered...As an anthropologist with some training in physical anthropology, I believe the scientific justification for retaining Indian skeletal remains is exaggerated. Anthropometric measurements and use of modern photometric and x-ray techniques before reburial can form a data base for most physical anthropological research. Procedures for dating bones and for reconstructing diet, which requires destruction of osseous material should only be undertaken with informed consent of responsible Indian organizations. Negotiations with such organizations to release small samples of bones may be possible, if they can be convinced of the relevance of such research...Ethnological and archaeological investigations indicate that many Native American groups endowed skeletal remains with special spiritual significance. Bones were believed to be imbued with power and vital properties. At the risk of being rebuked as a religionist and traitor to positivistic science, I believe the religious rights of Native Americans past and present should be respected and in this instance 'supersede the claims of science in dictating the contents of a natural history museum.' Can a nation that erects tombs to unknown soldiers, that spares no effort to retrieve unidentified bones of those missing-in-action in Korea and Vietnam not appreciate the concerns of Native Americans whose ancestors remain as spiritual hostages in natural history museums? (Raymond D. Fogelson quoted in Bieder 1990:59-60).

In response to Fogelson's letter, the Smithsonian's pre-eminent paleopathologist Donald J. Ortner decried Fogelson's stance, claiming it would:

> [O]pen the door to a whole series of anti-scientific, religiously based initiatives that would undermine future scientific research in several anthropological disciplines (Donald J. Ortner quoted in Bieder 1990:60).

Challenge to Anthropology: "Sharing Control of the Past"

Many archaeologists and bioarchaeologists now realize that the new mandates of NAGPRA and the increased exercise of tribal sovereignty are having real effects on their discipline. In order to continue pursuing their research interests, anthropologists are beginning to see the intrinsic value of developing relationships with the living descendants of the Indian populations they study. This is a difficult endeavor, to bridge a chasm that has existed since anthropologists first began to focus on the American Indian as an object

of study, but some anthropologists advocate that this is precisely what must be done. The following viewpoints are observations made by anthropologists around the theme of adapting the discipline and strengthening ties to descendant Indian populations.

> The bottom line is that Native American beliefs and values have as much credence in determining the scope of archaeological work in a Native American site as do the values of the archaeologist and the Euro-American scientific community. If these beliefs and values are understood and accepted, compromises satisfactory to both sides can be worked out (E. Charles Adams quoted in Burke Museum Website n.d.).
>
> The mandated consultations have also provided the opportunity for us to listen and learn from Native Americans, and our understanding of the issues has grown considerably as a result. We recognize that our approach is only one way of knowing the past and also that it can enrich, and be enriched by, other perspectives (Baker et al. 2001:69).
>
> The challenge to scientists is to convince Native Americans and the general public as well that the knowledge available to humankind from extensive collections of ancient bones far outweighs the value of the remains of a single individual. It's a hard sell (Hall 1997).
>
> Archaeologists have no intrinsic right to survey, excavate, or manipulate the material remains of the past, and their failure to understand this constraint is, we believe, the source of the current and continued contention between archaeologists and Native Americans (Klesert and Powell 1993:353).
>
> The political situation puts a lot of pressure on scientists. To say that these early skeletons are not related to modern American Indians has political ramifications for modern groups of people, indigenous people in the Americas. To deny that they are different also has potential ramifications, both from a scientific and political standpoint. So, this whole issue is tied up in politics to some degree. Scientists have worked very hard to try to extract themselves from that, but it can't be avoided (Joseph F. Powell on PBS 2000).
>
> Clearly the vast majority of skeletal collections will be repatriated and most probably reburied. NAGPRA and most of the state laws require consultation concerning excavation, scientific analysis, and ultimate disposition of skeletons. They do not prohibit traditional bioarchaeological or osteological research, and hence, consultation is the key to future research (Rose et al. 1996:98-99).
>
> It is in this context that skeletal biologists are increasingly being forced to adapt their activities to the value systems of the descendants of the people they study (Walker 2000:3).
>
> We are in the midst of a war over the heritage of the [New World]. Archaeologists and American Indians are battling over the physical and spiritual control of one of America's earliest inhabitants. Would the reburial of [Kennewick Man] tomorrow destroy that

> information? It might make a portion of it less available, but the information is there, in other places, waiting to be found. Perhaps this is one of those battles that archaeologists need to reexamine. What is at stake? Is it the freedom of Western science to continue to operate as it has in the past, as a self-appointed guardian of a self-defined truth, or is it the opportunity to develop a more meaningful blend between Western science and non-Western beliefs concerning the philosophy of the past? (Watkins 2000:180).

> Anthropologists must stop taking NAGPRA personally! The law was not created to make their lives miserable, but to take another's belief system into consideration and to provide equal treatment for all human remains...Each American Indian tribe or nation can choose to apply the law as it sees fit...There are some American Indian groups who can be persuaded to allow studies when they see the utility for them. The utility must be real to them, not just to the researcher (Joe Watkins quoted in Burke Museum Website n.d.).

> Native American peoples have been extraordinarily patient with archaeologists. They recognize that some archaeology is useful to them if applied using their rules. What archaeologists must understand is that their view of the past is peculiar to their discipline and has an impact on those they study. To communicate effectively with Native American people, archaeologists will need to learn how to share control of the past. Groups like WAC and the Society for American Archaeology have begun serious examination of what constitutes ethical practice. What is exciting about this new direction is that it does allow us the chance to become something quite different. If we don't take steps that are bold and creative in reinventing our profession, we will continue to lose access to the artifacts, sites, and people we wish to study (Zimmerman 1994).

As demonstrated in this chapter, bioarchaeologists display a diversity of opinions and strongly-held convictions regarding the practice of their discipline and their responsibilities to science, the public, and the past. The clash of world-views between anthropologists and American Indians still exists, and is not likely to be resolved on its own.

Certainly, American Indians are just as diverse in their opinions; many American Indians have forged relationships with bioarchaeologists to collaborate on research designs on their skeletal remains when it does not conflict with tribal cultural proscriptions (Begay 1997; Dongoske and Anyon 1997; Lippert 1997). However, other tribes, for reasons of traditional prohibitions, do not allow bioarchaeological research (i.e., the Eastern Band of Cherokee Indians, Chapter 5).

One impediment to more complimentary relationships between bioarchaeologists and American Indians is the lack of clearly defined and uniformly applied ethical standards in American bioarchaeological research protocols. The necessity created by NAGPRA for inventorying federally-held American Indian remains has led to the development of the *Standards for Data Collection from Human Skeletal Remains* (Buikstra and Ubelaker 1994) for recording standardized skeletal data, but it has not yet led to the generation of ethical standards; a fact that continues to be detrimental to the discipline of bioarchaeology in the eyes of American Indians and other non-anthropologists.

Chapter Seven

BIOARCHAEOLOGICAL ETHICS

> [M]any scientific associations are beginning to reconsider ethical principles that underlie their research activities. The field of bioarchaeology is especially problematic in this respect, positioned as it is between medicine, with its ethical focus on generating scientific knowledge for use in helping individual patients, and anthropology, with its ethical principles that stem from deep belief in the power of cultural relativism to overcome ethnocentrism and encourage tolerance (Walker 2000:3).

Many scientific disciplines have been forced to address the ethical implications of their research, and bioarchaeology is no exception. It is uniquely situated to address the ethical and moral components of its epistemological efforts; namely, *how we come to know* must be balanced against *by what means we come to know*. This distinction is critical for a discipline which must both contend with public sentiment and depend on public funding for most of its research initiatives.

What, then, is the purpose of anthropological science? Does it have responsibilities to the public good, and if so, what are they? In medical science, the Hippocratic dictum of "*Primum non nocere*" ("First, do no harm") guides practice and research, but what moral standard guides bioarchaeologists? More than a decade after the passage of NAGPRA, the development of a "uniform set of standards for the study of human subjects, [by which] osteologists will follow the same procedures for the prehistoric dead as are now required for research on the living and the recently dead (e.g. autopsy studies)" anticipated by Rose and coworkers in their seminal paper, *NAGPRA IS FOREVER: Osteology and the Repatriation of Skeletons* (1996:100), still has not come to pass.

The professional organization of American bioarchaeologists, the American Association of Physical Anthropologists (AAPA), includes a Code of Ethics for its membership, adopted in 2003. Surprisingly, nowhere in this ethics code does the AAPA specifically address issues concerning the use of American Indian skeletal remains for research, potential obligations of bioarchaeologists to descendant American Indian communities, and American Indian rights to their own biological and cultural patrimony. The section within the text of the Code of Ethics which may come closest to addressing these concerns is one which discusses research on human and primate subjects:

> A. Responsibility to people and animals with whom anthropological researchers work and whose lives and cultures they study.
>
> 1. Anthropological researchers have primary ethical obligations to the people, species, and materials they study and to the people with whom they work. These obligations can supersede the goal of seeking new knowledge, and can lead to decisions not to undertake or to discontinue a research project when the primary obligation conflicts with other responsibilities, such as those owed to sponsors or clients. These ethical obligations include:
>
> To respect the well-being of humans and nonhuman primates.
>
> To work for the long-term conservation of the archaeological, fossil, and historical records.
>
> To consult actively with the affected individuals or group(s), with the goal of establishing a working relationship that can be beneficial to all parties involved.
>
> 2. Anthropological researchers must do everything in their power to ensure that their research does not harm the safety, dignity, or privacy of the people with whom they work, conduct research, or perform other professional activities.

The lack of defined ethical guidelines for bioarchaeological researchers and students working with American Indian skeletal remains is disadvantageous to the discipline in a variety of academic, legal, professional, and public arenas. The AAPA includes no wording or protocols directed towards the study of American Indian dead and it is uncertain whether specific guidelines will ever be incorporated into an ethical policy owing to the

fundamental difficulties of reconciling the goals of American bioarchaeology with the new realities of cultural resource legislation.

A number of professional anthropological (non-bioarchaeological) associations are cognizant of potential ethical dilemmas that may arise during the study of living indigenous people, their deceased ancestors, and their material culture. While most of these organizations do not outline specific guidelines for research with skeletal remains and procedures of repatriation, their statements on expected ethical behavior can be interpreted as applying to the subject in various degrees.

The Society for American Archaeology (SAA) is the main professional body of practicing archaeologists in the United Sates. Founded in 1935, the SAA by-laws include regulations for members on the subject of ethics as they apply to their profession, to their colleagues, and to the public. Their statement regarding the excavation and study of human remains does not address the ethical implications of working with American Indian skeletal remains:

> Research in archaeology, bioarchaeology, biological anthropology, and medicine depends upon respectable scholars having collections of human remains available both for replicative research and research that addresses new questions or employs new analytical techniques...Whatever their ultimate disposition, all human remains should receive appropriate scientific study, and should be accessible only for legitimate scientific or educational purpose.

The Vermillion Accord on Human Remains (World Archaeological Congress 1989) outlines six tenets for working with skeletal remains of the dead. They are:

1. Respect for the mortal remains of the dead shall be accorded to all, irrespective of origin, race, religion, nationality, custom and tradition.

2. Respect for the wishes of the dead concerning disposition shall be accorded whenever possible, reasonable and lawful, when they are known or can be reasonably inferred.

3. Respect for the wishes of the local community and of relatives or guardians of the dead shall be accorded whenever possible, reasonable and lawful.

4. Respect for the scientific research value of skeletal, mummified and other human remains (including fossil hominids) shall be accorded when such value is demonstrated to exist.

5. Agreement on the disposition of fossil, skeletal, mummified and other remains shall be reached by negotiation on the basis of mutual respect for the legitimate concerns of communities for the proper disposition of their ancestors, as well as the legitimate concerns of science and education.

6. The express recognition that the concerns of various ethnic groups, as well as those of science are legitimate and to be respected, will permit acceptable agreements to be reached and honoured.

While the Vermillion Accord does apply towards the dead, it has not been adopted by the AAPA. Research involving the prehistoric dead should be a subject of discussion within the bioarchaeological community and it may be useful to frame the debate by examining other scientific fields which also addressed ethical and moral questions concerning use of the dead for research purposes (Goldstein and Kintigh 1990, Hubert 1994, Watkins 1999).

Invasion of the Body Snatchers

Human bodies are valuable as commercial commodities and research materials in biomedical research fields. Human tissues, including bone, are regularly subject to monetary, academic, and scientific transactions within the research community. The use of human bodies for anatomical research purposes in America has often been controversial and continues to be so today, with debate centering around lack of personal or familial consent, commercial value, and research potential.

The question of bioethics and research using bodies of the non-consenting dead (both prehistoric and modern) is a complicated issue that has received much consideration in biomedical settings. The dead body, whether fresh in a necropsy setting or hundreds of years old in an archaeological setting is classified as an "ambiguous entity;" legally

recognized as having both "sacred meaning...[and] instrumental value as an object for scientific study, clinical teaching and commercial gain" (Nelkin and Andrews 1998:261).

Early in the history of medicine, the dissection of the dead by anatomical researchers like Galen, Da Vinci, and Vesalius was an established practice (Sawday 1995), and by the turn of the 19th century, "the corpse was well-integrated in clinical thought, and the anatomical findings revealed by autopsies became the basis for both medical understanding and the development of the field of pathology" (Nelkin and Andrews 1998:262). Despite this, the institutionalized practice of using human bodies for training, experimentation, and research had not been widely accepted by the public (Jackson 1950). Early in America's medical history, sources of procurement for human corpses tended towards the more unsavory, including executed criminals, the homeless, and other socially marginalized members of society because in the public perception, "dissection remained a humiliation imposed on social outcasts" (Humphrey 1973:824).

Soon, the medical demand for the dead reached proportions beyond available supply, leading to a surge of "body snatching" by medical students who were expected to arrive at college with their own cadavers in tow, or by third party "resurrectionists" who procured cadavers for medical colleges (Richardson 1987). Body snatching, the unearthing and theft of recently buried bodies from graveyards, became a profitable industry. Just as American Indian graves were robbed of their bodies, Black cemeteries and potter's fields for the poor soon were looted for bodies. Demand eventually reached into cemeteries of all Euroamerican social classes, fueling fears among the public that their bodies would be stolen from the grave and used for dissection and scientific research. In the 1700's, when burials at the Euroamerican Trinity Church in New York began to be looted by nearby Kings' College medical students, community sentiment turned to anger and fear:

> Throughout that spring the medical students, though severely criticized in the two weekly newspapers, continued their activities recklessly while public anger increased. The reports were exaggerated by countless rumors, and everyone recalled the harrowing details of the grave-robbing epidemic in Scotland and England during the first half of the century (Heaps 1970:19).

By the late 1700's, Euroamerican public outrage had reached a threshold. In New York a body snatching incident in 1788 caused public mob rioting by the thousands when medical students were discovered practicing dissection on a recently dead woman known to the community. The "Doctor Riots" lasted three days, resulting in the students and physicians fleeing and seeking safety in jail , where they were eventually prosecuted and fined (Thomas 2000). This incident resulted in the development of new laws; the Anatomy Acts of 1789, which "decreed not only what bodies could be used for research but also made it legal for the courts to add dissection to the death penalty in cases of murder, arson, and burglary..[and] also established punishments for grave robbers" (Bieder 1990:21). Despite these and national laws which were enacted specifically to address the shortage and regulate the use of cadavers by the medical community (allowing anatomical schools to legally utilize the bodies of the unclaimed dead for dissection), "doctors and teachers in individual states...still encountered difficulty in legally securing sufficient bodies, and body snatching continued in rural areas well into the 1800's" (Heaps 1970:21).

In the modern age, of course, body snatching for medical research and clinical training is no longer practiced. The medical community gave up what was to them a lucrative method of procuring bodies for anatomical dissection - halting only when the tide of political and public opinion turned against these practices. Yet, this did not curtail their ability to conduct medical research. Gifts of anatomical donations by consenting individuals and state laws allowing the donation of the unclaimed dead by coroners and

medical examiners insure that there are medical cadavers available for training and teaching purposes. Also exciting is the increasing use of technological methods such as three-dimensional imaging, computerized medical mannequins, and virtual simulators to hone dissection and surgical techniques previously only practiced on cadavers.

In many respects, this episode in medical history has parallels to what is occurring today in bioarchaeology with the use of American Indian skeletal remains for research. Political and public perception of bioarchaeologists has heightened and the enactment of new laws like NAGPRA to protect American Indian dead from "body snatchers" and to regulate anthropological research in these arenas may be a forerunner to even more stringent social reactions in the future.

Ethical Uses of the Dead in Bioarchaeology

The use of the deceased to teach the living has an ancient and hallowed history - *mortui vives docent*, after all. The corpse has served as a valuable instructor to the medical establishment, and in bioarchaeology the dead also serve as guides to the past. The examination of prehistoric human skeletal remains forms the basis of all scientific research in bioarchaeology and studying the unearthed dead to complete a picture of humanity's past "has both intrinsic and instrumental value. All humans can benefit from it, and in that sense, all humans have a stake in its acquisition" (Schrag 2002:2).

That the ancient dead can serve to tell us about the past is not in doubt. A conflict arises, however, when basic cultural norms and mores are violated during the acquisition of this knowledge; in this instance respect for the wishes of deceased American Indians to remain buried and respect for the wishes of their descendants to insure these remains are not disturbed and harvested for the purposes of scientific research.

Ethical conflicts for the use of American Indian skeletons by bioarchaeologists may be classified as falling under the following moral and legal rubrics:

1) Lack of consent by the deceased to be used as research materials

2) Custodial ownership of human remains

3) Intrinsic value of bioarchaeological research

4) Prejudicial treatment

These broad categories encompass many moral, legal, and scientific positions, and a brief examination will reveal that while there are no easily applied answers to clarify the debate, there are a number of considerations that must be analyzed by bioarchaeology students and researchers actively using the skeletons of non-consenting American Indians in their research.

Lack of consent to be used as research materials: What is the obligation to respect the dead if their wishes are not expressed in writing? In the case of prehistoric dead, of course, there are no written instructions; therefore, is it reasonable to assume that deliberate burial implies an express wish on the part of the individual or the group to remain undisturbed? Does the absence of written or verbal consent obviate the sanctity of the grave and indicate permission for bioarchaeologists to utilize human bodies for their own research and experimental agendas? Is bioarchaeological research automatically a matter of conscription for dead American Indians above all other ethnic groups? These are questions rarely posed and discussed in anthropological arenas.

When a modern individual wishes their remains to be used for medical purposes or scientific research (i.e., organ donation, medical cadavers, and anthropological studies),

advance consent must first be obtained from that individual or members of the decedent's family. It would be considered morally inappropriate (and indeed wholly illegal) to remove from hospitals, funeral homes, medical examiner's offices, and cemeteries the bodies of the recently dead for the purpose of scientific studies without prior consent. The same legal principles, however, do not extend to prehistoric (and sometimes historic) American Indians.

Another facet to consider are court decisions that have pronounced that "physical mutilation of remains may be expected to distress the next of kin. But where they believe that the treatment will affect the afterlife of the deceased, the impact inevitably is greater" (Kohn v. the United States, E.D.N.Y. 1984), where courts have also ruled that scientific research in itself may constitute this abuse or mutilation (Hassard v. Lehane, N.Y. 1911).

The Nuremberg Code (1947), instituted as the result of the amoral scientific experiments conducted by the Nazi regime, established a new standard in ethical medical research, including explicit instructions outlining the requirement of informed consent on behalf of the individual. One of the ten tenets of the Code states that "the voluntary consent of the human subject is absolutely essential" in cases involving scientific research, experimentation, and investigation (Mitscherlich and Mielke 1947).

The Declaration of Helsinki (1964), superceding the Nuremberg Code and acting in conjunction with its tenets, dictates twelve basic principles for researchers involved in biomedical research using human subjects (World Medical Organization 1996). The fifth basic principle states that:

> Every biomedical research project involving human subjects should be preceded by careful assessment of predictable risks in comparison with foreseeable benefits to the subject or to others. Concern for the interests of the subject must always prevail over the interests of science and society.

The National Bioethics Advisory Commission (NBAC) offers policy guidance on ethical issues involved in the use of human biological samples such as human tissue and genetic material, both of which are routinely harvested and utilized in bioarchaeological research.

While neither the Nuremberg Code, the Declaration of Helsinki, or the NBAC explicitly define their codes and policy statements as applying to American Indian dead, nor indeed to the bioarchaeological field, a casual inspection of these adopted tenets shows that they do not explicitly *exclude* the dead or their families from the need for consent prior to conducting scientific research.

The fact still stands that the body of the "dead person is not considered to be a human subject [and these] protections do not apply" but that "it is important to recognize an individual's right to refuse to participate in post-mortem research. If the individual has expressed no position before death, the right should be exercisable by his or her next of kin" (Nelkin and Andrews 1998:271).

Because there is no accepted guidance or policy statement on these matters by the lead American physical anthropology associations, whether and to what degree the use of dead American Indians is morally acceptable to the academic bioarchaeological researcher now seems to be a matter of personal judgment. This is a nebulous ethical position to assume when dealing in the public arena because it involves research on deceased human beings who have not given their consent, and whose descendants often strongly advocate against using them for these purposes.

Custodial ownership of human remains: Is it logical to assume that cultures in the present can speak for the wishes of their ancient ancestors, and can we presume that the beliefs of

the ancient dead are the same as the beliefs of their modern descendants? Should this "cultural uniformatarianism" be applied only towards direct lineal descendants, or can it extend back to prehistoric populations? Who has moral authority to speak for the remains, and can deceased human beings be considered property, capable of being owned, borrowed, traded, displayed, sold, and experimented upon by other humans and institutions in the absence of consent? In some ways, this is the crux of the debate between bioarchaeologists and American Indians; when the obligation to the dead shifts from a respect for the body of the deceased and the sanctity of their grave to respect for the religious or cultural obligations of the living towards their ancestors. Within the anthropological community there often exists a supposition that "as relational bonds become weaker, presumption of custodial claim becomes weaker" (Schrag 2002:4), a stance that does not mirror that taken by many American Indians, as exemplified by the following quote:

> We don't accept any artificial cut-off date set by scientists to separate us from our ancestors. What Europeans want to do with their dead is their business, we have different values (Walter Echo-Hawk, quoted in Burke Museum Website n.d.).

The position that humans may "own" other humans (whether in life or in death) as actual property is one that has obvious parallels in American history, and is no longer supported either legally or morally. However, the assertion that humans may claim custodial responsibility over the remains of the dead are common. In the case of American Indian remains these claims most often come from two opposing positions: from the descendant Indian populations who are acting as guardians and caretakers of their dead, and from institutions such as academic anthropology departments and museums who are in possession of American Indian skeletons (Echo-Hawk 1986).

With respect to those descent populations claiming custodial responsibility for American Indian remains, NAGPRA has placed strict requirements to prove cultural affiliation when dealing with prehistoric remains. While factors such as geographic and temporal continuity, oral history, and language are factors that can influence the determination of cultural affiliation of ancient American Indian remains, cases like Kennewick Man demonstrate that these criteria are not always enough to prove cultural affiliation to a scientific or legal certainty. When does a human lineage begin and end? Many anthropologists argue that descent is lost in multitudes of human generations, when direct and specific lineages are no longer traceable. This is a weakness in the regulations of NAGPRA and the debate on ancient American skeletal remains - beyond a span of thousands of years, descent is difficult if not impossible to prove. However, NAGPRA simply dictates affiliation is a "preponderance" of evidence (i.e., more likely than not). Assuming that cultural affiliation is proven between a descendant American Indian population and human remains, does this imply a stronger moral claim to custodial responsibility, or is "the rational connection between an ethnic group and human remains too distant and faint to have any moral standing"? (Schrag 2002:6).

Museums and academic institutions may also claim custodial responsibility and guardianship for American Indian skeletal remains over competing claims from descendant communities. Essentially, museums are repositories for dead things, with American Indian skeletal remains still occupying many shelves and glass cases even in the post-NAGPRA environment. A common anthropological position regarding ownership of human remains (i.e., Turner 1986) holds that the "remains of the dead belong to the living human race and that museums are, appropriately, the custodians of the remains on behalf of the human race" (Schrag 2002:3). While the interpretation that museums are adequate

and respectful institutions for the housing of both culturally identified and unidentified American Indian human remains, this viewpoint does not hold a strong moral claim for custodial responsibility when compared to the competing declarations of descendants asserting cultural affiliation (Handler 1991, Higginbotham 1982).

Intrinsic value of bioarchaeological research: Anthropologists argue that the study of American Indian skeletons benefits all of humanity, and especially contemporary Indians by illuminating their past lifeways, adaptations, and histories that are lost to both time and memory. This is the position bioarchaeologists stress when justifying the study and retention of American Indian skeletal remains. There are legal questions, however, that apply towards the fundamental value of scientific research in scenarios involving the non-consenting dead.

Nelkin and Andrews have noted that during autopsy protocols, "the law has protected the dead from invasions designed merely to further medical or scientific goals" (Nelkin and Andrews 1998:279). This is a point worthy of bioarchaeological consideration; whether research on non-consenting American Indian dead is an appropriate action in cases where the main outcome is to satisfy scientific curiosity (i.e., Hamilton 1998).

Anthropologists maintain that the study and analysis of American Indian cultural and biological remains contributes to scientific advancement, knowledge acquisition, and adds to the understanding of those cultures by modern descendants, but many American Indian groups contend that this stance:

> [C]annot be justified on the grounds that the world has a right to this knowledge. Nor can it be justified on the grounds that scientific study provides more reliable or accurate understanding of Native American culture than that embodied in the oral and nonverbal formulations of Native American cultures (Schrag 2002:6).

Another concern for American Indians is the use of their dead for the express purpose of promoting research agendas that attempt to define (or redefine) them as a population and culture. American Indians do not want their own dead used by bioarchaeologists to formulate or link theories about them. Examples of this type of use of American Indian biological material include the collection in the 1860's of Indian crania ordered by the United States Surgeon General in order to promote the intellectual inferiority of the American Indian (see Chapter Two), as well as current anthropological theories situating Kennewick Man as replacing Indian populations as the continent's First Americans (see Chapter Four).

Prejudicial treatment: Lastly, the fact must be considered that American Indian skeletal remains receive prejudicial treatment above all other American ethnic groups by bioarchaeologists. Anthropologists may deny this, or alternately claim that this is a sign of the deep respect they hold for American Indian cultures (i.e., Buikstra 1983). Numerous examples have been given within this study demonstrating the uneven treatment of American Indian dead versus equivalent Euroamerican dead. Anthropologists must reconcile this fact and determine how to best address this criticism. For example, do the human remains of 18th century Euroamericans hold less intrinsic bioarchaeological research interest than do the remains of 18th century American Indians? If the answer is no, then anthropologists must reconsider the unequal treatment meted out to American Indians. If the answer is yes, "is it because the research potential is less, or is it because there is a reluctance to do similar research on subjects who share the same ancestry?" (Anonymous 2002:6). While most bioarchaeologists undoubtedly do not feel this way, the

veneer of prejudicial treatment is still there and bioarchaeologists must realize this. It certainly remains a divisive issue in the opinion of American Indians.

These legal and moral philosophical arguments may appear both esoteric and abstract when applied towards bioarchaeological research protocols, but they bear consideration as factors inherent in the public perception of anthropological study. Constructive debate on these issues by bioarchaeological researchers would strengthen and clarify the discipline's ethical and scientific positions on the study of American Indian skeletal remains.

Chapter Eight

NEW BEGINNINGS

> [W]e can expect considerable self-consciousness until we relearn what we may never have known, namely, how to let those whose bones we transmute by a strange alchemy into data rest in peace (Grimes 2001:102).

> The Skull Wars, alas, seem far from over. Too many people are still talking past each other. But if archaeologists – of all people – can draw some lessons from the past, perhaps we can rediscover a more human side to our science and come to value once again the importance of face-to-face relationships with those whose ancestors we wish to study (Thomas 2000:276).

> [A] knowledge of history as detailed as possible is essential if we are to comprehend the past and be prepared for the future (Pearl S. Buck, *My Several Worlds*, 1954).

This project began as an exploration of the attitudes of American physical anthropologists and archaeologists facing strengthening cultural resource legislation limiting bioarchaeological research on American Indian skeletal remains. The increasingly successful utilization of these heritage laws (especially Section 106 of the National Historic Preservation Act and the Native American Grave Protection and Repatriation Act) by sovereign American Indian tribes represents a major challenge to the discipline of physical anthropology, increasing by orders of magnitude as more federally recognized tribes form their own Tribal Historic Preservation Offices and wield growing authority over their own cultural, historical, and biological landscapes.

Many anthropologists have realized that "the very future of anthropological research in North America will be determined primarily by the Tribes rather than by anthropologists" (Deward E. Walker, Jr. paraphrased in PBS 2001), but many biological anthropologists may not be cognizant of the reach and power exerted tribally, publicly, or politically, nor of the subtle shaping of their own disciplines by new tribal imperatives.

Within the next few decades of the new millennium, however, bioarchaeologists will be forced to confront these challenges in ways that will unavoidably alter and redefine the discipline as it is practiced in North America (Watkins et al. 2000).

The impression most American Indians maintain concerning bioarchaeologists and their research agendas is largely negative, forged by attitudes of colonialism, racism, and moral neutrality over the collection and study of their dead. These attitudes are built on a foundation of historical events, ones ranging from the first Europeans to make landfall in the New World to the long-standing practices of American anthropologists who studied American Indians as relics of the past.

Although many tribes such as the Eastern Band of Cherokee Indians are not currently receptive to osteological studies due to cultural and traditional restrictions, other Indian groups are interested in archaeological and bioarchaeological studies of their ancestors. Many examples of tribes and anthropologists collaborating together exist, addressing tribal issues such as Federal recognition procedures and clarification of tribal land claims (i.e. Paredes 1992). In the American West, the Chumash, Zuñi and Hopi tribes accept and are receptive in many cases to bioarchaeological non-destructive analysis of inadvertently discovered or museum curated human skeletal remains (Adams 1984, Anyon and Ferguson 1995, Anyon and Zunie 1989, Dongoske 1996, Dongoske et al. 1997, Walker 2000), while in the Arctic progress among the Inuit has been achieved with the inclusion of indigenous ethnoscience (Bielawski 1992; 1994). Among the Navajo, anthropologists have had both a constructive and tenuous relationship (Begay 1997, Klesert 1992, Klesert and Andrews 1988, Klesert and Downer 1990, Martin 1997).

With the authority and enforceability of cultural resource laws, under the new rules of engagement it will now be the burden of bioarchaeologists to prove the relevance of

their work to others outside of academia. They must convince American Indian tribal members of the value of continuing research on their ancestral dead beyond traditional ontological and epistemological appeals to knowledge acquisition and scientific curiosity.

Paradigm Shift: On the Eve of a Scientific Revolution?

Kuhn argues that scientific revolutions are a consequence of the replacement of ingrained paradigms as a result of new discoveries, new categories of data, new scientific philosophies, and testable new hypotheses. As Kuhn states, "scientific revolutions...need seem revolutionary only to those whose paradigms are affected by them. To outsiders they may...seem normal parts of the developmental process" (Kuhn 1970:92-93). American bioarchaeology does not appear to be undergoing a scientific revolution as a result of new discoveries or expected internal forces, but rather from outside forces exerting pressure within. Whether this results in a paradigm shift in bioarchaeology or the continuance of current practice is largely a decision of its practitioners and their students.

Anthropologists have always labored under a strong presumption of entitlement when it comes to the study of the dead of North American Indian tribes. The mantle of science and a self-imposed duty to knowledge are heavy yokes to cast off in light of American Indian appeals to such non-quantifiable factors as religion, morality, ethics, and decency.

It is difficult to remember that the very essence of science is that it is an endeavor done by degrees; a slow and steady accumulation of parts that when added to the whole gives us that much more insight than we had before. As Walker notes,

> When skeletal collections are lost owing to our inability to find equitable solutions that balance the concerns of modern descendants against the need to preserve collections so that future generations will have substantive information about the past, it is perhaps of some solace to remember that we live in an entropic world in which the natural processes of decay and disintegration and the economic and social realities of modern life continuously conspire to destroy the faint traces our ancestors have left for us in the archaeological record (Walker 2000:31).

Physical anthropologists tend to react defensively when the moral dimension of their research with American Indian dead is questioned. A constructive response by bioarchaeologists will involve acknowledging the missteps of the past and anticipating the potential for new collaboration with living American Indians. A less constructive tactic utilized by some anthropologists is to label those who question the ethics of studying American Indian skeletal remains as reflective of the agendas of anti-intellectual, anti-science, anti-colonialist, post-modernist, and anti-positivist proponents. This is not a productive approach to employ with legal, political, and public pressure mounting, and it does nothing to elevate the debate within the discipline beyond framing it as a matter of science versus religion, of academic theory versus academic theory. Bioarchaeological methodology would not be weakened by the inclusion and integration of an ethical component. To the contrary, the addition of a moral dimension would humanize the discipline, make it relevant to living Indian communities, and strengthen its contributions to interpreting the prehistory of North America.

Operationalizing Bioarchaeology: Suggestions for Future Praxis

1) *"American archaeology is anthropology or it is nothing," Willey and Phillips (1958:2) once said, ushering in the new age of processual archaeology. To paraphrase their dictum, American bioarchaeology is anthropology or it is nothing. Bioarchaeologists must consider the living as they study the dead, lest they become solely data miners and statistical technicians.*

There is often a disconnect between the aims of anthropology and the concerns of living American Indians. In the illustration provided in this study via the Eastern Band of Cherokee Indians, there are strong cultural, traditional, and moral prohibitions against contact with, and exposure to, the dead. Physical anthropologists contend that science has a responsibility beyond the Cherokee worldview to the greater public good in studying their human remains, yet numerous examples have been provided in this work demonstrating that anthropological science has in many instances promoted agendas and policies counter to the public interest of American Indians. Bioarchaeologists must depend on their skills as holistic anthropologists to appeal to American Indians who have no obligation to science, do not require that their history be traced through scientific methods, and have not been shown how research on their ancestral dead can prove useful to them.

Practitioners of medical and cultural anthropology have found viable methods of conducting research with the Eastern Band of Cherokee Indians which both enhances the lives of Cherokees today while contributing to anthropological knowledge. An example of this type of research by Lefler has shown the efficacy of integrating aspects of traditional American Indian culture in modern Eastern Band alcohol rehabilitation and mentoring programs (Lefler 1996; 2001).

As discussed in Chapter Five, archaeological research on the Qualla Boundary conducted by Riggs showcases another applied use of anthropological research that intrigued both the scientific and tribal community. Working with Cherokee potters, the archaeologist analyzed styles of proto-historic and historic Qualla pottery which were no longer produced by the Cherokee. This endeavor lead to a revitalization in modern Cherokee ceramics manufacture, resulting in the re-emergence of the Qualla pottery style among the Cherokee today.

Bioarchaeologists must also consider applied uses of their research in much the same manner; incorporating dual agendas reflective of both community needs and scholarly interests.

2) *The future of American bioarchaeology can no longer be exclusive of contemporary American Indian involvement. Bioarchaeological method and theory must be reshaped and re-tooled to conform to the new mandates of NAGPRA and cultural resource laws in ways that are sensitive to the needs of American Indians, while at the same time strengthening the discipline's contribution to science and understanding. Academic agendas must now reflect questions that American Indian communities are interested in posing.*

Many American Indians argue that they are wholly in possession of their own histories through cultural traditions, religious practices, oral accounts, and memory. They are offended by the implication that it is only through anthropological research that they can know their own past. This backlash towards a Western interpretation of their history also has its roots in the proliferation of negative American Indian stereotypes (Hoxie 1985). Reaction against this lack of a native viewpoint has resulted in a number of novel approaches to native histories, including museums, educational programs, and cultural centers created and run by American Indian tribal groups to promote their own cultures. Bioarchaeologists have an opportunity to contribute to these interpretations, but increasingly, legislative articles like NAGPRA and Section 106 ensure it will be tribes that decide how and to what degree.

The Eastern Band of Cherokee Indians have not been receptive to osteological research as it has thus far been conducted. However, opportunities for bioarchaeological investigation are occasionally presented (i.e., inadvertent discoveries of Cherokee skeletal

remains during construction, NAGPRA-mandated inventories of Cherokee affiliated skeletons in museum collections, etc.), and perhaps a research design can be developed which interests both the tribe and the bioarchaeologist (i.e., Rodning 2001).

For example, the Cherokee may be interested in the question presented in Chapter Five regarding the antiquity of their habitation in the region. While the Cherokee themselves are certain of their continuous occupation in the region, there is debate among archaeologists concerning whether the Cherokee are an *in situ* culture or if they represent a relatively new population migration to the area. If bioarchaeological research can be utilized to show biological and osteological evidence of cultural continuity and long occupation in the region by Cherokee antecedents, this may be of interest to the tribe and could represent a new research avenue for bioarchaeologists to collaboratively and successfully pursue with the Eastern Band of Cherokee Indians.

Another potential bioarchaeological avenue to pursue may be an oblique approach stressing the advantages of proper diet and nutrition via insights gained from osteological studies. Skeletal data on the effects of pre- and post-European contact subsistence regimes (also focusing on the adoption of maize agriculture) may be explored, demonstrating the relative health benefits of a pre-maize, low carbohydrate diet (Hamilton 1998). Working in conjunction with dieticians and nutritionists in existing health programs on the Qualla Boundary, perhaps bioarchaeologists can assist in the creation of nutritional curriculum materials for schools and community centers. Stressing the value of "prehistoric" diets and activity patterns from the past, bioarchaeologists may be able to provide contextual information to integrate into modern dietary and exercise programs targeted towards preventing common nutrition-related problems such as obesity, diabetes, osteoarthritis, and heart disease based on osteological insights provided by prehistoric Cherokee ancestors.

3) *New guidelines in the training of biological anthropologists must be developed, including the development of ethics statements addressing research with American Indian skeletal remains, additions to graduate physical anthropology curricula focusing on cultural resource legislation, the invitation and participation of tribal members in skeletal biology courses, and the active recruitment of American Indian students to anthropological careers. New avenues for partnerships in bioarchaeological investigations must be identified, including innovative methodologies, non-destructive techniques, synthetic approaches, interdisciplinary collaborations, and cooperative research projects under the aegis of tribal authorities.*

As discussed in the beginning of Chapter Seven, the lack of anticipated ethical guidelines for physical anthropologists will likely be detrimental to the discipline owing to the complexities linking American Indians and bioarchaeologists. In the absence of professional and academic impetus to develop and implement ethical human remains policies, perhaps an alternative avenue may be for state and/or Federal agencies such as the State Historic Preservation Office to advance ethics statements addressing human remains which bioarchaeologists must also adhere to (Michael Logan, personal communication 2004).

Graduate training programs in biological anthropology should include instruction on critical issues such as tribal relations, NAGPRA, bioarchaeological ethics, and the impact of cultural resource laws on the discipline. It will be crucial for students to be exposed to the new realities facing them once they become professional biological anthropologists who anticipate working with American Indian skeletal materials.

The forging of collaborative relationships with American Indian communities will be central to the discipline of bioarchaeology in the new millennium. This will require that bioarchaeologists refine their holistic anthropological skills and demonstrate the value

of knowledge gained from osteological studies of American Indian remains. One approach to consider is the invitation of tribal members to lecture to skeletal biology classes. Exposure of bioarchaeology students to living American Indians will no doubt lead to increased consideration, deliberation, and potential solution from all sides of the debate. Another side-effect of this increased exposure of American Indians to bioarchaeologists may be an increased awareness and understanding of the discipline by tribal communities, and a willingness to encourage tribal members to consider careers in anthropology. In order to attract American Indian students, anthropology departments may consider offering incentives in the form of scholarships, tuition waivers, and internships for Indian students who are interested in pursuing anthropological careers.

Lastly, bioarchaeologists must realize that NAGPRA is a mandate for them as well. It is their obligation and responsibility to quickly inventory and analyze existing American Indian skeletal collections (Rose et al. 1996). Both traditional and innovative non-destructive analytical methods such as three dimensional imaging, dental and skeletal casting, and standardized radiography should be considered. This must be accomplished before repatriation demands by affiliated tribes are granted and these human remains are returned to their descendants to once again become part of the past.

These suggestions for adapting the discipline to the post-NAGPRA environment are small steps that can be instituted now. Eventually, new directions for future research and enhanced theoretical frameworks must be created, including tribally-initiated research programs and the potential establishment of new scientific paradigms in bioarchaeology with the inclusion of American Indian knowledge, tradition, and guidance. The reality of the situation is summed up by Sockbeson:

> Federal laws empower tribes and, for the first time, permit tribes rather than academics to determine the ultimate disposition of Native American human remains. A policy decision has been made by Congress to place tribal social values over the interests of science...it is not necessary to balance scientific and public interests in human remains with tribes. Federal law has decided how these interests will be balanced and tribal concerns now outweigh those of the general public and the scientific community (Sockbeson 1994:158, 160).

The onus is now firmly on the practitioners of bioarchaeology to be flexible and demonstrate adaptive capabilities in order to avoid significant impairment of the discipline. The realities of tribal sovereignty, legal declaration, and public opinion in the new millennium dictate that there simply is no other option.

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APPENDICES

APPENDIX A: Text of NAGPRA

Native American Grave Protection and Repatriation Act

101ST CONGRESS, HOUSE OF REPRESENTATIVES REPORT, 2d Session, 101-877

PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES, AND FOR OTHER PURPOSES, OCTOBER 15, 1990.

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following REPORT [To accompany H.R. 5237] [Including cost estimate of the Congressional Budget Office].

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 5237) to provide for the protection of Native American graves, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

SECTION 1. SHORT TITLE.
This Act may be cited as the "Native American Grave Protection and Repatriation Act".

SEC. 2. DEFINITIONS.
For purposes of this Act, the term

(1) "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) "cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) "cultural items" means human remains and (A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. (B) "unassociated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular

Indian tribe, (C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and (D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) "Federal agency" means any department, agency, or instrumentality of the United States and shall include, except as may be inconsistent with the provisions of P.L. 101-185, the Smithsonian Institution.

(5) "Federal lands" means any land other than tribal lands which are controlled or owned by the United States.

(6) "Hui Malama I Na Kupuna O Hawai'i Nei" means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) "Indian tribe" shall have the meaning given such term in section 4 of the Indian Self Determination and Education Assistance Act (25 U.S.C. 450b).

(8) "museum" means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items, but does not include any Federal agency.

(9) "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) "Native Hawaiian organization" means any organization which (A) serves and represents the interests of Native Hawaiians, (B) has a primary and stated purpose the provision of services to Native Hawaiians, and (C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) "Office of Hawaiian Affairs" means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.
(13) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American funerary object, sacred object, or object of cultural patrimony from an Indian

tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object. The original acquisition of Native American human remains which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains. Nothing in this paragraph shall affect the application of relevant State law to the right of ownership of unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(14) "Secretary" means the Secretary of the Interior.

(15) "tribal land" means (A) all lands within the exterior boundaries of any Indian reservation; (B) all dependent Indian communities; (C) lands conveyed to, or subject to an interim conveyance of, Native Corporations pursuant to the Alaska Native Claims Settlement Act; and (D) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

SEC. 3. OWNERSHIP.
(a) NATIVE AMERICAN HUMAN REMAINS AND OBJECTS. The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act shall be (with priority given in the order listed)

(l) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgement of the Indian Claims Commission as the aboriginal land of some Indian tribe

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization

specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

(b) UNCLAIMED NATIVE AMERICAN HUMAN REMAINS AND OBJECTS. Native American cultural items not claimed under subsection (a) shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8, Native American groups, representatives of museums and the scientific community.

(c) INTENTIONAL EXCAVATION AND REMOVAL OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS. The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 721; 16 U.S.C. 470aa et seq.) which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and

(4) proof of consultation or consent under paragraph (2) is shown.

(d) INADVERTENT DISCOVERY OF NATIVE AMERICAN REMAINS AND OBJECTS. (1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of enactment of this Act shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. The activity may resume after a reasonable amount of time and following notification under this subsection.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) RELINQUISHMENT. Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

SEC. 4. ILLEGAL TRAFFICKING.
(a) ILLEGAL TRAFFICKING. Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section: SEC. 1170. ILLEGAL TRAFFICKING IN NATIVE AMERICAN HUMAN REMAINS AND CULTURAL ITEMS

"(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

"(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both."

(b) TABLE OF CONTENTS. The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"1170. Illegal Trafficking in Native American Human Remains and Cultural Items.".

SECTION. 5. INVENTORY FOR HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS.
(a) IN GENERAL. Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or federal agency, identify the geographical and cultural affiliation of such item.

(b) REQUIREMENTS. (1) The inventories and identifications required under subsection (a) shall be
(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after the date of enactment of this Act, and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term "documentation" means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) EXTENSION OF TIME FOR INVENTORY. Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B). The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d) NOTIFICATION. (1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information

(A) which identifies each Native Amrican human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.
(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) INVENTORY. For the purposes of this section, the term "inventory" means a simple itemized list that summarizes the information called for by this section.

SEC. 6. SUMMARY FOR UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY.
(a) IN GENERAL. Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects,

or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b) REQUIREMENTS. (1) The summary required under subsection (a) shall be

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

(C) completed by not later than the date that is 3 years after the date of enactment of this Act.

(2) Upon request, Indian tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

SEC. 7. REPATRIATION.
(a) REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS. (1) If, pursuant to section 5, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or oranization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5 or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence

based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e), sacred objects and objects of cultural patrimony shall be expeditiously returned where

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

(b) SCIENTIFIC STUDY. If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

(c) STANDARD OF REPATRIATION. If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or musuem did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) SHARING OF INFORMATION BY FEDERAL AGENCIES AND MUSEUMS. Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) COMPETING CLAIMS. Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

(f) MUSEUM OBLIGATION. Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of

breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

SEC. 8 REVIEW COMMITTEE.
(a) ESTABLISHMENT. Within 120 days after the date of enactment of this Act, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7.

(b) MEMBERSHIP. (1) The Committee established under subsection (a) shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) shall serve without pay but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(c) RESPONSIBILITIES. The committee established under subsection (a) shall be responsible for

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) reviewing upon the request of any affected party and finding relating to

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;

(6) consulting with Idian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

(d) RECOMMENDATIONS AND REPORT. The committee shall make the recommendations under paragraph (c)(5) in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(e) ACCESS. The Secretary shall ensure that the committee established under subsection (a) and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

(f) DUTIES OF SECRETARY. The Secretary shall
(1) establish such rules and regulations for the committee as may be necessary, and

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.
(g) ANNUAL REPORT. The committee established under subsection (a) shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(h) TERMINATION. The committee established under subsection (a) shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

SEC. 9. PENALTY.
(a) PENALTY. (1) Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the secretaryof Interior pursuant to procedures established by the Secretary through regulation. No penalty may be assessed under this subsection unless such museum is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense.

(2) The amount of such penalty shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors

(A) the archeological, historical or commercial value of the item involved;

(B) the damages suffered, both economic and non-economic, by an aggrieved party;

(C) the number of violations that have occurred.

(3) Any museum aggrieved by an order assessing a civil penalty under this subsection may file a petition of judicial review of such order with the United States District Court for the District of Columbia or for any other district in which the museum is located. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued. The court shall hear such action on the administrative record and sustain the imposition of the penalty if it is supported by substantial evidence on the record considered as a whole.

(4) If any museum fails to pay an assessment of a civil penalty after a final administrative order has been issued and not appealed or after a final judgement has been rendered, the Attorney General may institute a civil action in a district court of the United States for any district in which such museum is located to collect the penalty and such court shall have jurisdiction to hear and decide such action. In such action, the validity and amount of such penalty shall not be subject to review.

(5) Hearings held during proceedings for the assessment of civil penalties authorized by this subsection shall be conducted in accordance with section 554 of Title 5. Subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books and documents. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In the case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is located, resides or transacts business, upon application by the United States and after notice to such person shall have jurisdiction to issue an order requiring such person to appear and give testimony or produce documents, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

SEC. 10. GRANTS.
(a) INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS. The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) MUSEUMS. The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6.

SEC. 11. SAVINGS PROVISIONS.
Noting in this Act shall be construed to

(1) limit the authority of any Federal agency or museum to

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of control over items covered by this Act;

(2) delay actions on repatriation requests that are pending on the date of enactment of this Act;

(3) deny or otherwise affect access to any court;

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.

SEC. 12. SPECIAL RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND INDIAN TRIBES.
This Act reflects the unique relationship between the Federal government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

SEC. 13. REGULATIONS.
The Secretary shall promulgate regulations to carry out this Act within 12 months of enactment.

SEC. 14. AUTHORIZATION OF APPROPRIATIONS.
There is authorized to be appropriated such sums as may be necessary to carry out this Act.

PURPOSE
The purpose of H.R. 5237 is to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands. The Act also sets up a process by which Federal agencies and museums receiving federal funds will inventory holdings of such remains and objects and work with appropriate Indian tribes and Native Hawaiian organizations to reach agreement on repatriation or other disposition of these remains and objects.

BRIEF SUMMARY
H.R. 5237, the Native American Grave Protection and Repatriation Act, achieves two main objectives. The first objective deals with Native American human remains, funerary objects, sacred objects and objects of cultural patrimony which are excavated or removed from Federal or tribal lands after the enactment of the Act.

The Act calls for any persons who wish to excavate such items or other archeological items to do so only after receiving a permit pursuant to the Archeological Resources Protection Act (P.L 96-96). If any of such remains or objects are found on Federal Lands and it is

known which tribe is closely related to them, that tribe is given the opportunity to reclaim the remains or objects. If the tribe does not want to take possession of the remains or objects, the Secretary of the Interior will determine the disposition of the remains or objects in consultation with Native American, scientific and museum groups.

The Act also addresses those cases involving the incidental discovery of such items on Federal land by persons engaged in other activities such as mining, construction, logging or other similar endeavors. When one or more of these items are found in this manner, the activity must temporarily cease and a reasonable effort must be made to protect the item. Written notification must be made to the Federal land manager in charge and notification must also be given to the appropriate tribe or Native Hawaiian organization if known or easily ascertainable. Penalties are included for selling, or otherwise profiting from, any Native American human remains, funerary objects, sacred objects or objects of cultural patrimony acquired in violation of this Act.

The second main objective addressed in this Act deals with collections of Native American human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony currently held or controlled by Federal agencies and museums. Within 5 years of enactment, all Federal agencies and all museums which receive federal funds, which have possession of, or control over, any Native American human remains or associated funerary object (items which are found with a specific body), are to compile an inventory of such remains or objects and, with the use of available information they have, attempt to identify them as to geographical and cultural affiliation. Upon completion of the inventory, the appropriate tribe or Native Hawaiian organization is to be contacted. If it is clear which tribe or Native Hawaiian organization is related to the remains or objects and that tribe or organization wishes the return of the items, they are to be returned.

Instead of an object-by-object inventory, a written summary of unassociated funerary objects (those items which are known to be funerary objects but are not connected to a specific body), sacred objects, and objects of cultural patrimony which are controlled by a Federal agency or museum is to be completed. The summary is to describe the collection, the number of objects in it, and roughly how, when, and from where the collection was received. Following the summary, the appropriate Indian tribe or Native Hawaiian organization is to be contacted and the two sides are to meet to discuss the future disposition of the items in question. This Act allows for the repatriation of culturally affiliated items as well as any other agreement for disposition or caretaking which may be mutually agreed upon by involved parties.

BACKGROUND

Digging and removing the contents of Native American graves for reasons of profit or curiosity has been common practice. These activities were at their peak during the last century and the early part of this century. In 1868, the Surgeon General issued an order to all Army field officers to send him Indian skeletons. This was done so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian's cranium. This action, along with an attitude that accepted the desecration of countless Native American burial sites, resulted in hundreds of thousands Native American human remains and funerary objects being sold or housed in museums and educational institutions around the country.

For many years, Indian tribes have attempted to have the remains and funerary objects of their ancestors returned to them. This effort has touched off an often heated debate on the rights of the Indian versus the importance to museums of the retention of their collections and the scientific value of the items.

NATIONAL DIALOGUE ON MUSEUM/NATIVE AMERICAN RELATIONS

In 1988, the Senate Select Committee on Indian Affairs held a hearing on legislation which provided a process for the repatriation of Native American human remains. Several witnesses requested that the Committee postpone further action on the bill to allow the museum community and the Native American community to have an opportunity to enter into a dialogue on repatriation issues. The Committee agreed and, during 1989, the Barry M. Goldwater Center of Cross Cultural Communication of the Heard Museum in Phoenix, Arizona sponsored the Panel of National Dialogue on Museum-Native American Relations. Several museum professionals, college professors (including archaeologists and anthropologists), and Indian representatives (including tribal and religious leaders) met and discussed various issues surrounding repatriation during this year-long dialogue. The panel issued a report citing its findings and recommendations. The panel was not unanimous on all recommendations, but all members did agree that much was gained in understanding the views of others. The panel recommended that all resolutions be governed by respect for the human rights of Native Americans and the value of scientific study and education. The majority believed that "Respect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made. . ."

The Panel was split on what to do about human remains which are not culturally identifiable. Some maintained that a system should be developed for repatriation while others believed that the scientific and educational needs should predominate. The report strongly supported dialogue between museums and Indian tribes during all aspects of both the acquisition of sensitive materials, and repatriation requests. The Panel concluded that Federal legislation on this matter was needed.

NATIONAL MUSEUM OF THE AMERICAN INDIAN ACT

On November 28, 1989, the President signed into Public Law 101-185, the National Museum of the American Indian Act. This law established a museum for the American Indian to be built as part of the Smithsonian Institution. Testimony received during consideration of this legislation revealed that the Smithsonian Institution held thousands of Native American human remains and funerary objects. Several tribes and Native Hawaiians having cultural and historical affiliation with these remains stressed their great desire to have the remains of their ancestors returned to them. After long negotiations between interested parties, provisions were included in the legislation which authorized the repatriation of identifiable remains and funerary objects.

H.R. 1381 NATIVE AMERICAN BURIAL SITE PRESERVATION ACT OF 1989

On March 14, 1989, Representative Charles Bennett introduced H.R. 1381, the Native American Burial Site Preservation Act of 1989. This bill would prohibit excavations or removal of any content from any Native American burial site without a State permit. The bill provides penalties for violation with fines of not more than $10,000 per violation. The bill provided that anything taken in violation of the legislation would become the property of the United States.

H.R. 1646 NATIVE AMERICAN GRAVE AND BURIAL PROTECTION ACT
On March 23, 1989, Representative Morris Udall introduced H.R. 1646, the Native American Grave and Burial Protection Act. This bill would make it illegal to sell, profit, or transport across state lines any Native American skeletal remains without written consent of the lineal descendants or of the governing body of the culturally affiliated tribe. Penalties of fines of not more than $10,000 per violation would be assessed.

The bill would require all Federal agencies and instrumentalities to list and identify, within 2 years, all Native American skeletal remains and sacred ceremonial objects in their possession or control. Within 3 years, all agencies would notify appropriate tribes of their findings and, within 1 year of notification, the concerned tribe would decide whether or not it wanted the remains or objects returned. If the items were not acquired with the consent of the tribe or legitimate owner and the item is not needed for a scientific study the outcome of which would be of major benefit to the United States, the items are to be returned. Any museum not in compliance would not be eligible for further Federal funding.

H.R. 5237 NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT
After the negotiations by the museum, Indian and scientific communities were completed, Representative Morris Udall introduced H.R 5237, the Native American Grave Protection and Repatriation Act, on July 10, 1990. As introduced, this bill states that any Native American human remains, funerary objects, sacred objects, and objects of inalienable communal property that are found on Federal or tribal lands after the date of enactment would be considered owned or controlled by (in this order) lineal descendants, the tribe on whose land it was found, the tribe having the closest cultural affiliation with the item, or the tribe which aboriginally occupied the area.

Anyone who discovered any of the items covered by the provisions of the bill accidentally or through activities such as mining, logging, or construction would have to cease the activity, notify the Federal land manager responsible and the appropriate tribe, if known, and make a reasonable effort to protect the items before continuing the activity. Anyone who profited in violation of the provisions of the bill would be fined in accordance with title 18, United States Code, imprisoned not more than one year, or both, with the penalty increasing to 5 years for a second violation.

All Federal agencies and museums receiving Federal funds which have control over any of the items covered in the bill would, within 5 years, have to inventory and identify the items, notify the affected tribes and make arrangements to return such items if the appropriate tribe made a request. If the Federal agency or museum shows that the item was acquired with the consent of the tribe or if the item was part of a scientific study which was expected to be of major benefit to the country, the request for repatriation could be denied.

As introduced, this bill established a review committee to be composed of 7 members, 4 of whom were to be from nominations made to the Secretary of the Interior from Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders. The committee's responsibilities would be to monitor the inventory and repatriation

activities, review any questions as to the identity or return of any items, arbitrate among tribes any disputes relating to this Act, and compile an inventory of unidentifiable remains and recommend action for disposition of such remains. Grants were made available to tribes to assist in the repatriation process and to museums to assist in the inventory and identification process.

LEGISLATIVE HEARING

On July 17, 1990, the Committee held a hearing on H.R. 1381, the Native American Burial Site Preservation Act of 1989; H.R 1646, the Native American Grave and Burial Protection Act; and H.R. 5237, the Native American Grave Protection and Repatriation Act.

Testimony was presented by professional scientific and museum associations, archaeologists, representatives of individual museums, Indian organizations, Tribal religious leaders, Native Hawaiian representatives, and private art dealers.

Much of the Indian testimony revolved around their rights to the remains and objects held by the museums and the information surrounding the acquisition of such items. Some Indian representatives testified that the spirits of their ancestors would not rest until they are returned to their homeland and that these beliefs have been generally ignored by the museums which house the remains and objects. There was testimony that non-Indian remains which are unearthed are treated much different than those of Indians. The non-Indian remains tend to be quickly studied and then reburied while so many Indian remains are sent to museums and curated.

Testimony received from the scientific community stressed the importance of human remains to scientific study and the need to learn for the future from the past. They expressed concern that if remains are reburied now they will be lost to science forever and not reachable when future study techniques are developed. Most testimony indicated the need for strong legislation to protect burial sites from being looted or desecrated in the future.

Testimony from the museum community stressed the responsibilities which museums have to maintain their collections and concern for liability surrounding repatriation. One witness described a situation where a museum returned Wampum Belts to a tribe. After long negotiations, a mutually agreed upon compromise was implemented whereby the tribe received the belts back to continue their ceremonies and the museum maintained access to the belts for legitimate study and educational purposes. Most agreed that museums needed to become more sensitive to the needs and desires of Native Americans whose remains and objects they house.

Witnesses representing private art dealers testified that Native Americans should not be the sole conservators of their cultural items because all Americans have a right to their history. The Art dealers present denied dealing in human remains per se but did admit that a war shirt in very good condition containing scalp locks could be sold for $200,000 on the open market.

Discussion and testimony received by the Committee indicated that a process was needed by which Native Americans could gain access to collections housed in museums and Federal agencies.

COMMITTEE AMENDMENT
House Report 101-877
The Committee adopted an amendment in the nature of a substitute for H.R 5237. The substitute was developed on the basis of issues and concerns expressed by witnesses at the Committee hearing, questions and positions of Committee Members, correspondence from concerned representatives of the Indian community, the museum and scientific community and the general public, and meetings with Administration officials and other interested parties. A detailed explanation of the substitute is contained in the Section-by-Section Analysis portion of this report. Certain major substantive changes effected by the substitute are discussed below.

DEFINITIONS
Definitions of several key terms used in the legislation were changed to tighten and clarify their meaning.

In the definition of "cultural affiliation", the requirement that a tribe show a "shared group identity which can be reasonably traced historically or prehistorically" is intended to ensure that the claimant has a reasonable connection with the materials. Where human remains and associated funerary objects are concerned, the committee is aware that it may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

The definition of "sacred objects" is intended to include both objects needed for ceremonies currently practiced by traditional Native American religious practitioners and objects needed to renew ceremonies that are part of traditional religions. the operative part of the definition is that there must be "present day adherents" in either instance. In addition to ongoing ceremonies, the Committee recognizes that the practice of some ceremonies has been interrupted because of governmental coercion, adverse societal conditions or the loss of certain objects through means beyond the control of the tribe at the time. It is the intent of the Committee to permit traditional Native American religious leaders to obtain such objects as are needed for the renewal of ceremonies that are part of their religions.

The definition of "Federal agency" includes the Smithsonian Institution "except as may be inconsistent with the provisions of Public Law 100-185". Public Law 100-185 refers to the Act authorizing the addition of the Museum of the American Indian to the Smithsonian Institution. The Committee does not wish to change the agreements reached under the Museum of the American Indian Act with respect to the inventory and repatriation of native American human remains and funerary objects, but does intend that the

Smithsonian fulfill the obligations stipulated in H.R. 5237 regarding sacred objects and objects of cultural patrimony. The Committee further intends for the Smithsonian Institution to comply with obligations stipulated in H.R. 5237 with respect to unassociated funerary objects insofar as such obligations do not weaken those stipulated in Public Law 100-185.

The definition of "right of possession" in section 2(13) of the bill was amended to include language providing that nothing in the paragraph is intended to affect the application of relevant State law to the right of ownership of unassociated funerary objects, sacred objects or objects of cultural patrimony. The language was adopted to meet the concerns of the Justice Department about the possibility of a 5th amendment taking of the private property of museums through the application of the terms of the Act. While the Committee did not feel that implementation of the Act would give rise to such a taking, the language was accepted to make clear its intention. The language is not jurisdictional in nature. It does not confer or detract from the existing jurisdiction to determine ownership of an item covered by this Act. Depending upon the circumstances involved, the law which would be applicable by the court of competent jurisdiction could be Federal, State, or tribal. The definition of the right of possession will supplement any existing law in that respect.

The term "tribal land", as defined in section 2(15), is for purposes of this Act only and may be inapplicable in other circumstances. The Committee does not intend that the definition will be determinative of the status of land owned by Native Corporations pursuant to the Alaska Native Claims Settlement Act for any other purposes than for this Act.

OWNERSHIP. Section 3(d) refers to the inadvertent discovery of Native American remains and objects by persons engaged in an otherwise unrelated activity. Section 3(d)(1) states that, after there has been compliance with the other requirements of the subsection, "The activity may resume after a reasonable amount of time". Although a specific time limit was not added here, the Committee does intend to protect the remains and objects found and does not intend to weaken any provisions of other laws, such as Archeological Resources Protection Act, regarding similar situations.

INVENTORY. Section 5(d) refers to notification of Indian tribes and Native Hawaiian organizations no later than 6 months after completion of the inventory requirements. The Committee intends that tribes and organizations be notified as soon as possible after an inventory is completed. The allowance of 6 months to make the notification was added to assist small museums with very limited staffs.

SUMMARY. Due to the possible high number of unassociated funerary objects, sacred objects, and objects of cultural patrimony, this section is intended to make it easier for the Federal agencies, museums, and institutions of higher education to compile and survey the objects they have in their possession or under their control. It is also intended that there be a shorter time frame for completion of the summary (3 years) than for the item-by-item inventory to permit earlier contact with the appropriate tribe so open discussions can begin.

REPATRIATION. Section 7(b) refers to scientific studies the outcome of which would be of major benefit to the United States. The Committee recognizes the importance of scientific studies and urges the scientific community to enter into mutually agreeable situations with culturally affiliated tribes in such matters.

SHARING OF INFORMATION. Section 7(d) refers to the sharing of information following the preparation of the initial inventory or summary. Any tribe which may have a cultural affiliation with certain items may request any additional available information needed to pursue a claim under the Act.

All tribes which receive notice pursuant to the inventory process or those that should have received notice because of a potential cultural affiliation (regardless of whether the showing of such affiliation would be based upon museum records or non-museum sources) would have standing to request such information.
REVIEW COMMITTEE. One of the responsibilities of the Review Committee is to compile an inventory of culturally unidentifiable human remains and develop a process for their disposition. There is general disagreement on the proper disposition of such unidentifiable remains. Some believe that they should be left solely to science while others contend that, since they are not identifiable, they would be of little use to science and should be buried and laid to rest. The Committee looks forward to the Review Committees recommendations in this area. The Committee concurs with the Justice Department comments that section 7 does not accord binding legal force to the Review Committee's actions. As such, the bill did not have to be amended to conform the appointments procedures for the committee to the Constitution's appointments clause.

PENALTY. The penalty provision of section 9 is not meant to be an exclusive remedy for any disputes which may arise from the implementation or interpretation of the terms of the Act nor to preclude resort of any of the parties to remedies which may be available under other existing law.

SAVINGS PROVISIONS. Section 11(1)(B) preserves the right of all parties to enter into other mutually agreeable arrangements than those provided for in this Act. The Committee encourages all sides to negotiate in good faith and attempt to come to agreements, where possible, which would keep certain items available to all those with legitimate interests.

CONSULTATION. The term "consultation", wherever it appears in the bill, means a process involving the open discussion and joint deliberations with respect to potential issues, changes, or actions by all interested parties.

SECTION-BY-SECTION ANALYSIS

Section 1. This section cites this Act as the "Native American Grave Protection and Repatriation Act".
Section 2. This section contains definitions of various terms used in the legislation.

Section 3. Subsection (a) provides that the ownership or right of control of any Native American human remains, funerary objects, sacred objects or objects of cultural patrimony

found on Federal or tribal land after the date of enactment will be under the control of (in this order) lineal descendants, the tribe or Native Hawaiian organization on whose land the item was found, the tribe or Native Hawaiian organization which is the most closely affiliated with the item, or with the tribe or Native Hawaiian organization which is recognized by the Indian Claims Commission as having aboriginally occupied the area.

Subsection (b) provides that the ownership of any item covered under this Act which is not claimed under subsection (a) will be determined by regulations established by the Secretary of Interior after consultation with the review committee established in section 8 of this Act, Native American groups, representatives of museums and the scientific community. Subsection (c) provides that items covered by this Act can be excavated from Federal or tribal lands if proof exists that a permit has been acquired in accordance with section 4 of the Archaeological Resources Protection Act, that the appropriate tribe or Native Hawaiian organization has been consulted or (in the case of tribal land) consents to the excavation, and if it is agreed that the right of control of any item covered by this Act which is unearthed will be determined in accordance with subsection (a) and (b).

Subsection (d) provides that anyone who discovers any item covered by this Act accidentally, or by an otherwise unrelated activity, on Federal or tribal land shall notify the head of the Federal entity having primary jurisdiction over the land in question and any appropriate tribe or Native Hawaiian organization if known or easily ascertainable. If the item was discovered during an activity such as logging, mining, or construction, the activity must stop and a reasonable effort must be made to protect the item before resuming the activity. This subsection further provides that, if the Federal land managers involved agree, the Secretary of Interior can be delegated the responsibility of such managers with respect to this Act.

Subsection (e) provides that nothing in this section will prevent the governing body of any tribe or Native Hawaiian organization from giving up their rights to any Native American human remains, funerary object or sacred object.

Section 4. Subsection (a) amends chapter 53 of title 18 of the United States Code by adding a new section at the end thereof as follows:Subsection (a) of the new section provides that any person who knowingly sells, purchases, uses for profit, or transports for sale or profit the human remains of a Native American without the right of possession, as defined in the Native American Grave Protection and Repatriation Act, shall be fined in accordance with title 18 or imprisoned for not more than 12 months or both and, for subsequent violations, fined in accordance with title 18 or imprisoned for not more than 5 years or both.

Subsection (b) of the new section provides any person who similarly deals in Native American cultural items in violation of the Native American Grave Protection and Repatriation Act shall be liable to fines and prison terms similar to those provided in subsection (a). Subsection (b) of section 4 of the bill amends chapter 53 to add the new section title, "Illegal Trafficking in Native American Human Remains and Cultural Items" to the chapter table of contents.

Section 5. Subsection (a) provides that any Federal agency or museum which has possession of, or control over, any Native American human remains or associated funerary objects is to inventory the items and list the geographic and cultural identity of each.

Subsection (b) provides that the inventory in subsection (a) shall be completed, after consultation with tribal and Native Hawaiian organizational officials and traditional religious leaders within 5 years and shall be made available to the review committee established in section 8. This subsection also uses and defines the term "documentation".

Subsection (c) provides for an extension of time for the inventory deadline if good faith can be shown by a museum.

Subsection (d) provides that, following completion of the inventory, all Federal agencies and museums shall notify the affected tribes or Native Hawaiian organizations of any determinations of cultural affiliation within 6 months. The notice shall include how each item was acquired, a list of the human remains and associated funerary objects which are clearly identifiable, and a list of the tribal origin all items which cannot be positively identified, but, given all information available, can be identified by a reasonable belief. This subsection further stipulates that all notices be sent to the Secretary of the Interior and published in the Federal Register.

Subsection (e) provides a definition of the term "inventory" which is used in this section.

Section 6. Subsection (a) provides that all Federal agencies and museums which possess, or have control over, any Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of the objects.

Subsection (b) provides that the summary be done in lieu of the item- by-item inventory of Section 5 and that it be followed by consultation with tribal and Native Hawaiian officials. The summary is to be completed within 3 years of the date of enactment of this Act.

Section 7. Subsection (a) provides for the return of human remains, associated funerary objects, unassociated funerary objects, sacred objects and objects of cultural patrimony which were identified pursuant to sections 5 and 6. It further calls for all returns to be completed in consultation with the requesting descendent, tribe or Native Hawaiian organization.

Subsection (b) provides that, if an item covered in this Act is needed for a specific scientific study the outcome of which would be of major benefit to the United States, the item may be kept for the duration of the study and returned within 90 days of completion.

Subsection (c) provides that, if a request is made for the return of an unassociated funerary object, sacred object or object of cultural patrimony, the requesting tribe or organization must first make a showing that the Federal agency or museum does not have a right of possession to that item. If this showing is made, the burden shifts to the agency or museum to show that it does have a right of possession to the object.

Subsection (d) provides that the Federal agency or museum shall share its information with the requesting descendant, tribe or Native Hawaiian organization to assist in making a claim under this section.

Subsection (e) provides that, where there are legitimate competing claims for any cultural item, the Federal agency or museum can retain the item until the requesting parties or the courts decide which requesting party is the appropriate claimant.
Subsection (f) provides that any museum which repatriates items in good faith will not be liable for any claims because of that repatriation.

Section 8. Subsection (a) provides for the establishment, by the Secretary of the Interior, of a committee to monitor and review the implementation of the provisions of this Act.

Subsection (b) provides that the committee shall have seven members, three of whom are to be from nominations submitted to the Secretary of Interior by tribes, Native Hawaiian organizations, and traditional Native American religious leaders with two of those being traditional religious leaders. Three are to be from nominations submitted to the Secretary by national museum organizations and scientific organizations and one who shall be appointed with the consent of the other six. It also provides that the members shall serve without pay but shall be eligible for reimbursement for expenses.

Subsection (c) provides for the responsibilities of the committee which shall be: to choose a chairperson; to monitor the inventory process; to review upon request any findings relating to the identification or return of any items covered by this Act; to facilitate the resolution of any disputes among or between tribes, Native Hawaiian organizations, lineal descendants, Federal agencies, or museums; to compile an inventory of unidentifiable human remains and recommend actions for their disposition; to consult with tribes and Native Hawaiian organizations on anything that affects them; to consult with the Secretary of the Interior in developing regulations to carry out this Act; and to make appropriate recommendations regarding the future care of cultural items to be repatriated.

Subsection (d) provides that the committee shall make its recommendations regarding unidentifiable human remains in consultation with tribes, Native Hawaiian organizations, and museum and scientific groups.

Subsection (e) provides that the Secretary of the Interior will ensure that committee members have reasonable access to the items under review and all relevant materials.

Subsection (f) provides that the Secretary of the Interior shall establish rules and provide staff for the committee.

Subsection (g) provides that the committee submit an annual report to Congress.

Subsection (h) provides for the termination of the committee following certification to Congress by the Secretary of the Interior that its work is finished.
Section 9. Subsection (a), paragraph (1), provides that any museum that fails to comply with the requirements of the Act shall be assessed a civil penalty by the Secretary. No such penalty is to be assessed unless the museum has been given adequate notice and

opportunity for hearing and each violation is to be a separate offense. Paragraph (2) provides that the penalty to be assessed shall be determined by regulations promulgated under this Act taking into consideration the value of the item involved, damages suffered, and the number of violations. Paragraph (3) authorizes the judicial review of any penalty assessed under this subsection by the Federal district courts. Paragraph (4) provides that, if any museum fails to pay such a penalty after final administrative or judicial action, the Attorney General may initiate appropriate action to collect such penalty. Paragraph (5) establishes powers and procedures for administrative actions to determine, assess and collect such penalties.

Section 10. Subsection (a) provides for grants to tribes and Native Hawaiian organizations to assist in the return of items covered in thisAct.

Subsection (b) provides for grants to museums to assist in the inventory and summary requirements in this Act.

Section 11. Section 11 provides that nothing in this Act should be understood as limiting the authority of any Federal agency or museum to return any items covered in this Act or to stop or limit any other agreements which can be made regarding the disposition of such items. It further provides that this Act should not delay any current actions regarding the return of items. This section provides that this Act does not intend to restrict access to any court or limit any rights of individuals, Indian tribes, or Native Hawaiian organizations. It also states that it is not meant to limit the application of any State or Federal law pertaining to theft or stolen property.

Section 12. Section 12 recognizes the special relationship between the Federal government and Indian tribes and Native Hawaiian organizations.

Section 13. Section 13 provides that the Secretary of the Interior shall promulgate regulations to carry out this Act within 12 months.

Section 14. Section 14 appropriates such sums as may be necessary to carry out this Act.

CHANGES IN EXISTING LAW
In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

CHAPTER 53. INDIANS

Section 1151. Indian country defined

Illegal Trafficking in Native American Human Remains and Cultural Items
(a) Whoever knowingly sells, purchases, used for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains, as

provided in the Native American Grave Protection and Repatriation Act, shall be fined in accordance with this title, or imprisoned not more than 12 months, both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.

APPENDIX B: EBCI THPO General Guidelines

EBCI General Guidelines for the Re-Interment of Native American Remains

First, with regard to where the reburial should occur, it is the traditional belief of the Eastern Band of Cherokee Indians (EBCI) that reburial should occur as close to the original interment as physically and logistically possible, and that the reburial be within line of sight to the original interment location.

Secondly, with regard to the layout of the new interments, it is the belief of the EBCI that reburials should mirror the original interments. Therefore, if the individuals were originally buried separately, then the new interments should reflect this pattern and bury the individuals within their own grave shafts. The same would apply to a group/mass grave situation. The spacing of the burials should reflect, to as close as logistically possible, the original spacing, as well.

Thirdly, in reference to the individuals themselves, they should be oriented directionally and physically to mirror the original interment (Ex: If they were buried facing east, this pattern should be followed. Also, if they were found in a flexed position, this pattern should be replicated.) Additionally, any and all artifacts found in association with the original interment (funerary objects) and any of the original burial matrix should be reburied with the individual. All funerary objects should be oriented with the individual and the grave shaft to replicate the original interment.

Fourthly, the EBCI does indeed perform a ceremony for reburials. As no tribe, of course, has a traditional reburial ceremony, this ceremony mostly consists of prayers and blessings for the individual. Typically, the reburial of individuals only requires the presence of two to three members of the EBCI with the knowledge and approval of the tribe to conduct such ceremonies/rites. This ceremony is to be conducted at the darkest moments just before dawn and is to only be witnessed by the EBCI members conducting the ceremony. We also typically do not require the presence of archaeologists or agency personnel to do the proper ceremonies. In most cases, within just a day (24 hours) prior to the ceremonies occurring, the new grave shafts are to be prepared and all individuals and funerary objects are to be placed in the open shafts as described above. From the moment that the individuals are removed from the repository until the time that the reburial is completed, the individuals and funerary objects are to be closely monitored and protected by an agency staff member and member(s) of the tribe(s) performing the ceremonies. At no time should the remains or funerary objects be left out of the sight, possession, and care of the assigned personnel/tribal members. Immediately following the ceremony, crews hired or agency staff assigned to complete the burials (filling in the grave shafts with archaeologically sterile soil) should begin their work and complete it within the day. The EBCI does not allow any media or cameras present during the preparation of the reburial area or during the ceremonies. Moreover, it is our preference that the entire reburial process from proposal to completion not become a topic for media coverage.

Lastly, it is imperative to the EBCI that the individuals be protected for the long-term by placing the individuals in an area that can be designated as a non-contaminated, no-ground disturbance and no-build area. Furthermore, while this may most efficiently be

done by regarding this area as a cemetery and referring to it as such within agency documents, the EBCI often deems it inappropriate to mark the burials with any kind of individual or group markers or to make the presence of the cemetery known to the public. Such markings and dissemination of this information often leads to unwanted and damaging forms of attention from the public such as the creation of a shrine or pilgrimage area, vandalism, and looting.

That being said, we realize that several other federally-recognized Native American tribes are often contacted regarding the same set of human remains and their proposed reburial. As many of the areas within Cherokee aboriginal territory were shared by many different people throughout time, overlap in tribal interests/needs should not be surprising, and, in our opinion, should not be cause for alarm or concern, either. The EBCI has always been accommodating and open to the idea of joint reburials and to the deferment of reburial to a particular "lead tribe(s)" that all consulting parties can agree to.

APPENDIX C: Cherokee Code Chapter 70

The Cherokee Code, Chapter 70: Skeletal Remains and Burial Site Preservation

Published by Order of the Tribal Council of the Eastern Band of Cherokee Indians
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ARTICLE I. IN GENERAL

Sec. 70-1. Excavation of skeletal remains.

(a) The graves of Cherokee people and their ancestors are sacred and shall not be disturbed or excavated.

(b) In the event skeletal remains of a Cherokee are excavated, such remains shall be reburied, together with all associated grave artifacts as soon as shall be reasonable possible. All such remains disinterred outside Cherokee trust lands shall be reburied in a manner consistent with procedures set forth by the NAGPRA Committee with the procedures being first approved by the Tribal Council of the Eastern Band of Cherokee Indians.

(c) The remains of Cherokee people shall not be subjected to destructive skeletal analysis.

(d) All unassociated funerary objects shall be treated in a manner consistent with procedures set forth by the NAGPRA Committee with the procedures being first approved by the Tribal Council of the Eastern Band of Cherokee Indians.

(Res. No. 92, 1-30-1983; Ord. No. 57, 2-1-1996)

Sec. 70-2. Sanctity of ancestors who are buried throughout the aboriginal Cherokee lands.

The joint policy of the Tribal Council of the Cherokee Nation and the Eastern Band of Cherokee is as follows:

(a) The graves of our ancestors are sacred and we desire that they not be disturbed.

(b) In the event the remains of Cherokee ancestors are excavated, such remains shall be reburied together with all associated grave artifacts, as soon as shall be reasonable.

(c) The remains of Cherokee ancestors should not be subjected to destructive skeletal analysis.

(d) The remains of Cherokee ancestors and associated grave artifacts which have been disinterred and are now in possession of museums, universities, federal agencies or other institutions and persons, should be returned to the proper tribes for reburial.

(e) Such remains should be buried at the original site where possible.
(Res. No. 121, 4-5-1990; Res. No. 301, 5-29-1991)

Sec. 70-3. Historic preservation of skeletal remains.

(a) All persons or institutions who seek to conduct study or research on the people or institutions of the Eastern Band of Cherokee Indians, including but not limited to Tribal members, Tribal organizations, Tribal government and Tribal lands and natural resources shall be required to obtain approval from the Eastern Band of Cherokee Indians prior to conducting such research on Cherokee trust lands.

(b) All persons or institutions seeking to conduct a study or research on Cherokee Indian trust lands shall submit a written request to the Office of the Principal Chief, with the request describing the nature and purpose of the proposed study or research. The written request shall be forwarded by the Office of the Principal Chief to the Tribal Research Committee for review and approval. The Research Committee shall give written authorization only after reviewing the proposal.

(c) As a condition of receiving written authorization from the Committee, all persons or institutions must agree, in writing, to provide to the Tribe, at the conclusion of the study or research, a copy of all collected data, completed reports or publications, including copies of audio or video tapes or recordings obtained in the course of such study or research.

(d) Unless otherwise provided for by the Tribal Council, all such data, reports, publications, video or audio tapes or recordings shall be deposited for permanent storage with the Museum of the Cherokee Indian.

(e) This section shall become effective upon ratification by the Principal Chief.

(Ord. No. 176, 7-9-1992)

Secs. 70-4--70-100. Reserved.

ARTICLE II. BURIAL SITES PRESERVATION
DIVISION 1. GENERALLY

Sec. 70-101. Title.

The title of this article shall be the Burial Sites Preservation Code.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-102. Purpose.

The purpose of this article is to amend this chapter 70, Skeletal Remains, adopted on April 5, 1990, and amended on May 29, 1991, rescind any portions of this chapter which are inconsistent with this article; and to establish a registry providing for the recording and cataloging of burial sites of Tribal members and to preserve and protect such sites from disturbance, disinterment, or other destructive activities.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-103. Authority.

This article is enacted pursuant to section 23 of the Tribe's Charter and Governing Document.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-104. Effective date.

This article shall take effect on the day following adoption by the Cherokee Tribal Council.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-105. Abrogation and greater restriction.

Where this article imposes greater restrictions than those contained in other ordinances, codes, or resolutions of the Tribe, as well as relevant federal laws and regulations, this article shall govern.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-106. Interpretation.

In the interpretation and application of the provisions of this article, said provisions shall be held to the minimum requirements and shall be liberally construed in favor of the Tribe and shall not be deemed a limitation or repeal of any other power or authority of the Tribe.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-107. Nonliability and severability.

If any section, provision, or portion of this article is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this article shall not be affected thereby. The Tribe declares there is no liability on the part of the Tribe, its agencies, or employees that may occur as a result of reliance upon the conformance with this article.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-108. Sovereign immunity.

This article shall not be construed as a waiver, limited or otherwise, of the Tribe's sovereign immunity.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-109. Applicability.

The policies in this article shall apply to all members and employees of the Tribe, all activities on lands owned by the Tribe or held in trust by the United States for the benefit of the Tribe, all individuals occupying Tribal lands, and all lands owned in fee by the Tribe or a member of the Tribe within the boundaries of the Tribe's Reservation.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-110. Definitions.

(1) *Agricultural or silvicultural activities* means those normal agricultural or silvicultural practices that do not disturb the human remains in a burial site or the surface characteristics of a burial site.

(2) *Burial site* means any place of interment, by any means, natural or a physically prepared location, whether originally below, on, or above the surface of the earth, where human remains or associated funerary objects are deposited, as part of the death rites or ceremonies of the Tribe.

(3) *Cemetery* means a burial site in which two or more individuals were interred.

(4) *Cultural patrimony* is defined as an object having ongoing historical, traditional, or cultural importance central to the Tribe or its culture.

(5) *Duly authorized law enforcement official* means any law enforcement personnel of the Cherokee Police Department or any law enforcement officer delegated authority to enforce the laws of the Tribe pursuant to chapter 15, section 3, "Cooperative Law Enforcement Arrangements."

(6) *Disturb* includes defacing, mutilating, injuring, exposing, removing, destroying, desecrating, or molesting in any way.

(7) *Grave goods* means objects, that as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later.

(8) *Human remains* means any part of the body or deceased person in any stage of decomposition.

(9) *Person* means any individual or entity, including a governmental operation or political subdivision of a state or Tribe, or any interstate body and shall include each department, agency, and instrumentality of the United States.

(10) *THPO* means the Tribal Historic Preservation Officer.

(Ord. No. 345-A, 10-13-1998)

Secs. 70-111--70-200. Reserved.

DIVISION 2. TRIBAL HISTORIC PRESERVATION OFFICE

Sec. 70-201. Generally.

(a) A Tribal Historic Preservation Office shall be established to increase efforts in the location, documentation and evaluation of ancient, cultural, and historic properties. This information will provide a record of the past for future generations of the Tribe and shall

be incorporated into the Tribe's planning and development approval process.

(b) A Tribal Historic Preservation Officer shall be appointed to develop a file of identified historic properties within the exterior boundaries of the Eastern Band of Cherokees. This file will also contain a history of areas that have been surveyed and found not to comprise historical or cultural properties. The Tribal Historic Preservation Officer shall be solely responsible for the active collection and cataloging of known historic properties, surveyed areas and the locations of potential archaeological sites.

(c) The Tribal Historic Preservation Officer shall be responsible for the issuance of Permits to Proceed with Ground Disturbing Activities on Tribal Lands (see division 4 of this article).
(Ord. No. 345-A, 10-13-1998)

Sec. 70-202. Registry.

From the file of identified historic properties under section 70-201(b), the Tribal Historic Preservation Office shall establish a Registry for any Tribal member to view. Any information in the Registry related to the location of any burial site, the disclosure of which would be likely to result in a disturbance of the burial site, is not subject to disclosure under this section.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-203. Repository.

The Museum of the Cherokee Indian shall be the permanent repository for any items of cultural patrimony discovered on Tribal lands that the Tribe decides not to reinter. Access to, and the use of, such materials collected for educational and research purposes shall be controlled by the Board of Directors (or whichever body is delegated this responsibility) under policies and procedures it shall develop, subject to the approval of the Cherokee Tribal Council.
(Ord. No. 345-A, 10-13-1998)

Secs. 70-204--70-300. Reserved.

DIVISION 3. BURIAL SITES AND TREATMENT OF HUMAN REMAINS

Sec. 70-301. Nondisturbance of burial sites, cemeteries, human remains, and grave goods.

No person shall knowingly excavate or disturb a burial site, cemetery, human remains, or grave goods. No person may intentionally cause or permit the disturbance of a burial site or cataloged land contiguous to a cataloged burial site. A person shall immediately notify the Historic Preservation Office if the person knows or has reasonable grounds to believe that a burial site or the cataloged land contiguous to a cataloged burial site is being disturbed or may be disturbed contrary to this article. This article does not prohibit agricultural or silvicultural activities.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-302. Permitted removal and disturbance to burial sites, cemeteries, human remains, and grave goods.

(a) Only in the extreme cases of imminent destruction or accidental discovery may burial sites, cemeteries, human remains or grave goods be approved for intentional disturbance. When disturbance is found to be necessary, Tribal spiritual leaders and the Tribal Council and individuals approved to conduct the excavation or exposure will discuss the importance of what is being contemplated and agree to a procedure in writing under which the disturbance shall be carried out.

(b) At all times during the process of disturbing any human remains, a representative of the Tribe shall be available on-site to assist and ensure that the parties employed to remove or expose any human remains or grave goods carry out the procedure along the guidelines set forth in the consultation meeting as required in section 70-302(a).

(Ord. No. 345-A, 10-13-1998)

Sec. 70-303. Burial and scientific analysis.

Reserved for discussion and/or future use.
(Ord. No. 345-A, 10-13-1998)

Secs. 70-304--70-400. Reserved.

DIVISION 4. PERMITS TO PROCEED WITH GROUND DISTURBING ACTIVITIES ON TRIBAL LANDS AND WATERS

Sec. 70-401. Permit requirements.

Prior to beginning any ground disturbing activities on Tribal lands and waters, all Tribal members, Tribal employees, lessees, individuals and organizations contracting with the Tribe, and individuals representing government agencies shall have a signed permit to proceed from the Tribal Historic Preservation Office.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-402. Procedures for obtaining a permit to proceed.

(a) *Submission of application for permit to proceed.* Prior to beginning any ground disturbing activities on Tribal lands and waters, all Tribal members, Tribal employees, lessees, individuals and organizations contracting with the Tribe, and individuals representing government agencies shall complete and submit an application form for a permit to proceed from the Tribal Historic Preservation Officer. The Tribal Historic Preservation Officer shall review the application, and determine, following a review of the existing Tribal Historic Preservation Office files covering that area, if an archaeological field investigation will be required. The THPO shall notify the applicant within 30 days of a decision to deny such permit.

(b) *Archaeological review.* All areas on Tribal lands and waters to undergo earth disturbing

activities, not specifically excluded below under section 70-404, and not previously investigated for the presence of archaeological, historical, or cultural remains, shall be subject to the archaeological review process to determine the presence of such remains as part of the application for a Permit to Proceed. The THPO shall notify the applicant within 30 days of any decision to deny such a permit. The archaeological review consists of the following:

(1) *File search.* Prefield investigations--THPO staff check files and atlas recording the locations of identified historic properties and the locations of areas previously investigated.

(2) *Field archaeology.* The project area presented in the permit application is investigated by a qualified archaeologist to record and describe any identified historic properties.

(c) *Permit contingencies.* Based on the results of the archaeological review, the Tribal Historic Preservation Officer will determine whether or not a Permit to Proceed will be granted for the commencement of the ground disturbances related to the project being considered. The Tribal Historic Preservation Officer shall determine:

(1) Permit to Proceed granted, no contingencies;

(2) Permit to Proceed granted, with contingencies;

(3) Permit to Proceed not granted, project may not proceed following plans presented to the Tribal Historic Preservation Officer.

The permit applicant may resubmit a new application based upon changes made in consultation with the THPO to remove or minimize any impacts to identified historic properties.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-403. Appeal of denied permits to proceed.

Any denied permits may be appealed by the applicant by requesting a hearing in writing within 14 days to the Tribal Council. Said determination from the Tribal Council shall be final.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-404. Tribal lands and waters that may be excluded from field archaeology investigation.

The Tribal Historic Preservation Officer may permit the following areas to be excluded from field archaeology investigations:
1. Garden construction and gardening in general.

2. Projects less than one square meter in size (i.e., digging postholes, planting trees).

3. Projects that will not disturb the ground (i.e., mowing lawn, winter logging with snow coverage).

4. Swampy areas or areas with mucky soils.

5. Locations directly on slopes which would prohibit construction of dwellings or settlements.

6. Maintenance activities including, but not limited to: basic road maintenance, grading and snowplowing.

7. Areas already disturbed to a depth greater than three feet (i.e., gravel pits).

8. Any area that has previously undergone an archaeological survey the result of which no cultural materials were found.

(Ord. No. 345-A, 10-13-1998)

Sec. 70-405. Payment for field archaeology surveys of Tribal lands leased by Tribal members.

Required Field Archaeological Surveys of individual or business leases held by Tribal members shall be paid for by the developer, to be arranged by the Tribal Historic Preservation Officer. Projects receiving funding from federal agencies are not covered by this Tribal resolution and must provide the cost of required field archaeology surveys independently.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-406. Requirement of qualified archaeologist.

Archaeological surveys shall be completed by an archaeologist meeting the Department of Interior's Standards for Archaeologists, or by a Tribal Archaeology Para-Professional under the supervision of a qualified archaeologist.
(Ord. No. 345-A, 10-13-1998)

Secs. 70-407--70-500. Reserved.

DIVISION 5. PERMITS TO CONDUCT ARCHAEOLOGICAL INVESTIGATIONS

Sec. 70-501. Required.

All individuals intending to conduct archaeological investigations or engaging in the excavation or removal of archeological materials from Tribal lands must have a Permit to Conduct Archaeological Investigations signed by the Tribal Historic Preservation Officer. In addition to requesting and acquiring a Permit to Conduct Archaeological Investigations, the individual(s) must follow the process outlined in division 4 of this article titled, "Permits to Proceed with Ground Disturbing Activities on Tribal Lands and Waters."
(Ord. No. 345-A, 10-13-1998)

Sec. 70-502. ARPA permits for nonTribal members.

Any individual that is not a Tribal member must have a valid ARPA permit signed by the Area Director of the BIA-MAO as required in 25 C.F.R. § 262.4.
(Ord. No. 345-A, 10-13-1998)

Sec. 70-503. Permits to conduct field archaeology on fee land within the exterior boundaries of the Reservation (if applicable).

Any individual wishing to conduct field archaeology on fee land within the boundaries of the Reservation should contact the Office of the State Archaeologist of North Carolina to determine the need for and process of applying for a state permit or license to conduct field archaeology and provide notice to the Eastern Band of Cherokee Tribal Historic Preservation Office of project plans and location of ground disturbing activities.
(Ord. No. 345-A, 10-13-1998)

Secs. 70-504--70-600. Reserved.

DIVISION 6. ENFORCEMENT AND PENALTIES

Secs. 70-601--70-603. Reserved.

Sec. 70-604. Penalties.

(1) Any person who fails to report the disturbance of a burial site or the cataloged land contiguous to a cataloged burial site as required under subsection (3) shall forfeit not less than $100.00 nor more than $1,000.00.

(2) Any person who intentionally disturbs a burial site which is not cataloged without the authorization of the Tribe shall forfeit not less than $500.00 nor more than $2,000.00.

(3) Any owner who intentionally causes or permits any activity which disturbs a burial site after receiving notice from the Tribe without the authorization shall forfeit not less than $1,000.00 nor more than $5,000.00.

(4) Any person who disturbs a burial site for commercial gain not related to the use of the land where a burial site is located or who disturbs a cataloged burial site for commercial gain related to use of the land where a burial site is located in violation of this article may be fined not to exceed two times the gross value gained or two times the gross loss caused by the disturbance, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.
(Ord. No. 345-A, 10-13-1998)

APPENDIX D: EBCI THPO Treatment Guidelines

EBCI Treatment Guidelines for Human Remains and Funerary Objects (Survey, Excavation, Laboratory/Analysis, and Curation Guidelines)

It is the wish of the EBCI that whenever possible, human interments be left in situ, unstudied, and protected from current and future disturbance. However, when these parameters cannot be met, the following guidance shall apply:

Archeological Surveys: The EBCI requests that in the event human remains, funerary objects, sacred objects, or objects of cultural patrimony are encountered, no photographs of such items be taken. Detailed drawings are permissible, however.

Excavations: The EBCI requests that in the event human remains, funerary objects, sacred objects, or objects of cultural patrimony are encountered, no photographs of such items be taken. Detailed drawings are permissible, however. Also, if after consultation with the SHPO and culturally affiliated, federally recognized tribes, the lead agency determines that the excavation of these items is required, the EBCI requests that only the lead archaeologist and a physical anthropologist participate in the removal of these items. The EBCI also requests that, in the case of full excavation of human remains, the entire burial matrix be removed and curated for future reburial. Lastly, EBCI requests to be sent the proposals and research designs that will be provided to the SHPO and State Archaeologist for review and approval prior to the initiation of any excavation activities.

Laboratory Treatment/Analysis: The EBCI requests that any human remains, funerary objects, sacred objects, and/or objects of cultural patrimony not be unnecessarily washed or cleaned, and that only dry brushing be consistently used. Again, we request that no photographs be taken of such objects for documentation or curation purposes, however detailed drawings are acceptable. Furthermore, in terms of human remains, we require that no destructive analyses be permitted, and we would like to have discussions and agreements about the kind of analyses, if any, that will be permitted.

Curation: The EBCI requests that in all cases where it is remotely feasible, that human remains, associated funerary objects, and the burial matrix be stored together. Furthermore, we ask that these type of objects, as well as sacred objects and objects of cultural patrimony, be removed from public viewing or public handling and that researchers not automatically be granted access to such items. Research requests should be submitted to the EBCI Cultural Resources office in the event someone wishes to study such items.

Avoidance/Preservation in Place/Excavation/Reburial: Remember, our preference is always avoidance/preservation in place. Unless there are very good reasons as to why this is not possible, we will not immediately enter into discussions of excavation, removal, study, reburial, etc. That being said, if remains must be moved, it is always our preference that they be out of the ground for only as long as it takes to move them to their new resting place, which should be as close to the original resting place as possible (within line of sight). Sometimes, we do allow minimal study of the remains, especially if it can be done with the remains in situ. If longer study is needed, we prefer a field lab to sending them off some

distance to be studied in a lab. The bottom line is that the less time they are exposed to the air, the better it is for the people involved and the Tribe. If reburial is the only option, the most efficient/time sensitive reburial process is preferred. Also, capping of the burials is not typically problematic, especially if there is ample fill dirt between the individual and the foreign capping material.

VITA

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