

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, etc., et al.,

CASE NO. 07-0507

Plaintiffs-Respondents,

vs.

BRIAN TREON, M.D., et al.

On certified question of state law from the
United States District Court, Southern
District of Ohio, Western Division
Case No. 1:06-CV-00274

Defendants-Petitioners.

**BRIEF OF *AMICUS CURIAE* OF CATHOLIC LEAGUE AND
BRUNNER FUNERAL HOMES IN SUPPORT OF
PLAINTIFFS-RESPONDENTS MARK ALBRECHT, et al.**

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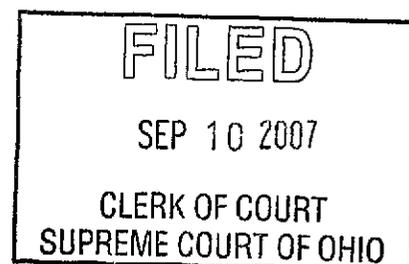


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STATEMENT OF THE CASE AND THE FACTS

The *amicus* adopts the statement of the case and of the facts submitted by the Plaintiffs-Petitioners.

INTRODUCTION

The question certified in this case deals with the interest of the next-of-kin to determine the disposition of the organs of a deceased loved one after autopsy is completed.

The briefing of the Defendants-Respondents and their supporters presents the issue as a balancing, or even battle, between the loved ones and the needs of conducting an autopsy.

It is not. The interests presented of the next-of-kin do not arise until after the autopsy is fully completed. The interests presented do not affect in any way or even question the government's superior right to perform the autopsy to full completion, including examination of all necessary body parts.

Rather, this case deals with the rights of the loved ones to determine the disposition of the organs of their deceased family member when the autopsy is over and the government concedes it has no further need or interest.

The lead brief by the Plaintiffs-Respondents sets forth the multiple parts of Ohio statutory law and case law which expressly grant this right to the next-of-kin.

To understand that right in context, however, it is both important and helpful to look at where the right originated historically, and the public interests and concerns which motivated us to establish that right in policy, custom and law.

This Brief respectfully provides the court that information. Perhaps the most interesting aspect of this Brief is two-fold. First, it is the scope of persons and interests whose sensibilities are demeaned by the approach taken by the Defendants-Respondents that remains and parts of

the deceased are merely a "dead carcass." Adherents of Catholicism. Of other Christian faiths. Of Judaism. Of Muslim beliefs. Military personnel. Families and friends of persons fallen in disasters and tragedies such as the World Trade Center. Veterans organizations. POW and MIA groups. Native American groups. Each of these place the highest intrinsic value on the complete remains of someone who has died in peace or battle, in serenity or tragedy. This premium goes so far in our society as the core ethic which motivates us to spend hundreds of thousands of dollars to search disaster sites, fires, and plane crashes, not only to recover intact bodies but individual parts. It is manifest in military personnel going back into the zone of fire, into hostile jungles, and into other places at risk of life, to recover the rest (limbs and other parts) of fallen comrades whose bodies were already taken from the field of battle.

Individual interests must frequently yield to the greater needs of government and society. Where the interests of both, however, easily and comfortably coexist, it is entirely unreasonable to do otherwise. It is an unreasonable demand by the government in this case to deny the rights of the next-of-kin to determine the disposition of the organs of their deceased loved ones when no longer needed for autopsy. That argument is contrary to several Ohio statutes which expressly give the next-of-kin the right of disposition. It is contrary to Ohio case law which, in each decision, has recognized and protected the next-of-kin's right in sepulcher and non-disturbance of a loved one's complete remains. It is contrary to established custom and usage in Ohio, and throughout history, to protect the rights of the next-of-kin to disposition of the bodies of their loved ones in the most complete form possible.

The certified question should be answered in the affirmative.

INTEREST OF AMICI CURIAE

A. The Catholic League

The Catholic League is the nation's largest Catholic civil rights organization. It defends the right of Catholics to participate in American public life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League works to safeguard both the religious freedom rights and the free speech rights of Catholics whenever and wherever they are threatened.

One such right the League believes in is the ability of persons to be able to determine the respectful disposition of the remains of their loved ones consistent with their religious beliefs. The position of the Petitioners and their *Amici* is contrary to this right. Thus, the Catholic League submits this *Amicus* Brief in support of the Respondents and urges this court to answer the certified question in the affirmative.

B. Brunner Funeral Home

Brunner Funeral Home has been helping families provide meaningful services for their loved ones since 1949. Brunner is committed to maintaining the high ethical standards of their profession. Legal developments relating to the field of death and dying are thus of direct interest to Brunner. The ability to determine the respectful disposition of the remains of a loved one is perhaps the most fundamental aspect of insuring that the wishes of the next-of-kin are carried out. The outcome urged in this litigation by the defense of denying the next-of-kin a protected right to direct the respectful disposition of all body parts after the entire autopsy process is concluded is contrary to this goal.

ARGUMENT

“We still endow a lifeless corpse with the capacity for feeling hurt and the expectation of respect. All forms of defilement of the dead, especially the thefts or mutilation of corpses, are regarded by the majority as deeply distasteful.”¹

No culture has ever actively condoned the state or its agents, or anyone else for that matter, taking body parts from deceased people unless the seizure was punishment for a crime. Cultures, governments and religions throughout history have maintained that human remains are sacred and not subject to the whims of anyone, under color of authority or not, nor should body parts be removed without consent. Many hold that body parts should not be removed, period, with or without consent.

Throughout history, governments, religions and cultures have recognized that individuals and family members have an interest in the remains of the deceased. In America, the rights of the family, either immediate or extended, can and do trump the rights of any other group to remains. Except in instances where the punishment for a crime was the disembowelment of the body, cultures reject the idea that bodies can be violated and body parts taken from the deceased without permission. Indeed, such actions have been illegal in many governments and, for a long time, were cause for excommunication in the Catholic Church, regardless of benign motivation.

ANCIENT HISTORY

“If anything is sacred, the human body is sacred...” Walt Whitman, “I Sing the Body Electric”²

¹ Robert Wilkins, *The Bedside Book of Death: Macabre Tales of our Final Passage*, as quoted in Quigley, *supra* note 4, at 277.

² As quoted in Michael Sledge, *Soldier Dead*, 8 (Columbia University Press 2005).

Four hundred and five years ago, a young woman named Ophelia drowned. Since she was insane, it was unclear whether her death was a suicide or an accident. However, as she was somewhat wealthy, powerful and very well-connected, the King and Queen of Denmark pressured the “crowner” (an early English word which gives us “Coroner”) to give her a Christian burial. As the graveyard was full, the gravediggers were instructed to dig up graves and toss the old bones and decayed body parts out to make room for Ophelia.

Prince Hamlet came upon the scene and, in his revulsion at how the bones of the dead were treated, cried out:

Did these bones cost no more the breeding, but to play at loggats
with ‘em? Mine ache to think on’t.

The bodies of the dead and their parts—regardless of the person’s station in life—were far too important to be disturbed. In these two short lines, Shakespeare summed up the feelings of people and cultures throughout history toward the dead: all of a person’s remains are sacred and must be treated with care and respect.

Ancient Egyptians agreed. “The Egyptian belief system held that without an intact body, the soul would have no vessel in the afterlife.”³ To Egyptians, the physical body was one of six important “aspects” essential for a human being, which was why such emphasis was placed on preserving the bodies of the powerful through mummification, and why the bodies were heavily protected inside pyramids. Even the bodies of the poor were prepared and preserved to ensure that the deceased would be able to enjoy the afterlife. Having an intact body ensured the safety of the soul.

³ Cartage.org.lb/en/themes/mainpage.htm

Coming slightly later, Confucius forbid any dissection of bodies after death as it was a defilement of the body.⁴ This doctrine influenced thousands of years of Chinese and Asian thought, emphasizing that bodies should not be even cut open.

The Greeks likewise highly valued the bodies of their deceased, and sought to have control over the bodies of the deceased at all costs.⁵ “The strong desire to retain possession of the remains of dead comrades is reflected in classical mythology. In *The Iliad*, Patroclus kills Hector’s chariot driver, Cebriones, and the two of them fight over the body ‘like a couple of lions on the mountain heights, each as hungry and high-mettled as the other, disputing the dead body of a stag.’ ... And later, when Patroclus is killed, Menelaus says

‘Come forward, each of you, without being named and think it infamy that the dogs of Ilium should have Patroclus for a toy.’”⁶

The Judaic tradition similarly emphasized that the body must be whole when buried. Some believe that not only organs but even blood and fingernail clippings must be buried with the deceased.⁷ “Burial is not considered complete unless it contains the entire body, even those parts discarded during life.”⁸ In Jewish burials, the body is thoroughly cleansed of dirt, body fluids and solids, and anything else that might be on the skin so that it is presented in as perfect and complete a state as possible.⁹ The body is treated with utmost respect, because “the Hebrews believed that if a corpse was hurt in any way, the soul suffered.”¹⁰

⁴ Mary Roach, *Stiff*, 52 (Norton Paperback 2004) (2003).

⁵ This attitude was a precursor to American military attitudes toward fallen soldiers, discussed below.

⁶ Sledge, *supra* note 1, at 20-21.

⁷ Christine Quigley, *The Corpse*, 86 (McFarland & Company 1996)

⁸ *Id.*

⁹ Wikipedia.org, Bereavement in Judaism, http://en.wikipedia.org/wiki/Bereavement_in_judaism (last visited August 26, 2007).

¹⁰ Quigley, *supra* note 4, at 17.

Catholics and Protestants continued this tradition for two thousand years. First, the Catechism of the Catholic Church, The Fifth Commandment, 2300 states that, “The bodies of the dead must be treated with respect and charity, in faith and hope of the Resurrection. The burial of the dead is a corporal work of mercy; it honors the children of God, who are temples of the Holy Spirit.” The importance of the phrase “in faith and hope of the Resurrection” has been described thus: “Among believers in the Last Judgment, the corpse, while initially an empty shell, holds the promise of being reunited with the soul in an incorruptible form.”¹¹ Thus, even though the soul is considered the most important part of a human being, the body must be whole in anticipation of reunion with the soul.

For most of the history of the Catholic Church, this has been interpreted to mean that all bodies should be buried whole, and there was great debate about whether even autopsies could be performed on Catholics. In 1300, Pope Boniface VIII put the issue temporarily to rest by issuing a papal bull declaring “that anyone who cut up or boiled a human body would be excommunicated.”¹² Bodies were to be buried whole under penalty of damnation.

The Fifth Commandment, 2301 clarified the issue, stating that, “Autopsies can be morally permitted for legal inquests or scientific research. The free gift of organs after death is legitimate and can be meritorious. The church permits cremation, provided that it does not demonstrate a denial of faith in the resurrection of the body.” Cremation was only officially sanctioned in 1963; however, the “norm of the Church for dealing with human corpses remains burial.”¹³ Even with cremation, the bishops of the United States direct that, “The cremated remains of a body should be treated with the same respect given to the human body from which

¹¹ Quigley, *supra* note 4, at 11.

¹² Quigley, *supra* note 4, at 82.

¹³ Andrew J. Sodergren, M.S., Hope for Healing, <http://www.christendom-awake.org/pages/may/hopeforhealing.htm> (last visited August 26, 2007).

they come.”¹⁴ The ashes must be kept together; scattering of a cremated person is considered a sin.¹⁵ The Congregation for Divine Worship and the Discipline of the Sacraments states, “The faithful should be exhorted not to keep the ashes of the dead in their homes, but to bury them in the usual manner, until God shall raise up those who rest in the earth, and until the sea gives up its dead.”¹⁶

This goes to the core Catholic belief of the “inherent value of the human body... Even at death, i.e. the separation of the soul and body, the human body is to be treated with respect.”¹⁷ Upon resurrection, the body and soul will be reunited so it is vital that the body be whole. Again, only in the last fifty years of the Church’s two thousand year history has even organ donation to save the lives of others been acceptable.

Other historically Christian societies have the same teachings. When the United States was being formed, British society—the most important cultural influence on our country—echoed the sentiments of earlier civilizations: “In eighteenth- and nineteenth-century Britain... no one donated his body to science. The churchgoing masses believed in a literal, corporal rising from the grave, and dissection was thought of as pretty much spoiling your chances of resurrection: Who’s going to open the gates of heaven to some slob with his entrails all hanging out and dripping on the carpeting?... For this reason, anatomists came to occupy the same terrain, in the public’s mind, as executioners. Worse, even, for dissection was thought of, literally, as a punishment worse than death.”¹⁸

¹⁴ *Id.*

¹⁵ Roach, *supra* note 3, at 275.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Roach, *supra* note 3, at 40-41.

Muslims similarly place heavy importance on the way that burials are conducted, and there is a great desire for bodies to be intact when they are buried.¹⁹ In many Muslim countries, Muslims still cannot legally give their bodies to science. The result of this is that the only cadavers available for anatomy lessons in medical schools are those of non-Muslims.²⁰ In Afghanistan, the Taliban took this general rule and banned all bodies from being used for science, regardless of whether the deceased was Muslim or non-Muslim.

MISTREATMENT OF THE DEAD AS PUNISHMENT

Other cultures provide insight into the importance of the completeness of dead bodies by the ways in which they treated criminals' bodies. These cultures believed that by abusing the criminals' bodies after death, they were punishing them in even worse ways than by killing them. "The far-reaching consequences of crimes, even those against oneself, were meant to be borne in mind *before* illegal acts were carried out."²¹

In Rome, for example, "The goal of Roman crucifixion was not just to kill the criminal, but also to mutilate and dishonour the body of the condemned. In ancient tradition, an honourable death required burial; leaving a body on the cross, so as to mutilate it and prevent its burial, was a grave dishonour...control of one's body was vital in the ancient world. Capital punishment took away control over one's own body, thereby implying a loss of status and honour."²²

¹⁹ Roach, *supra* note 3, at 41.

²⁰ Roach, *supra* note 3, at 42.

²¹ Quigley, *supra* note 4, at 282.

²² Wikipedia.org, Crucifixion, <http://en.wikipedia.org/wiki/Crucifixion> (last viewed August 26, 2007).

Not letting the body rest whole has been considered a form of punishment. “The corpses of criminals have been denied burial, dissected, or dismembered as part of their lawful sentence... Religious entities have been burned, captives have been skinned, and the graves of the disliked have been desecrated... The dismemberment of the corpse was often explicitly directed in the legal death sentence. In English law under Edward III, those convicted of high treason were half-hanged, after which their entrails were removed and burnt before them, their heads severed, and their bodies quartered.”²³

MODERN ATTITUDES

WORLD TRADE CENTER FAMILIES FOR PROPER BURIAL

The importance that societies have placed on the remains of loved ones is not an antiquated view of how people view the non-preservation of all body parts after death. This same sentiment is now being expressed by the World Trade Center Families for Proper Burial (WTCFPB). This group is made up of friends and families of victims of the terrorist attacks of September 11, 2001. After September 11, the wreckage of the World Trade Center (WTC) was taken to the Fresh Kills Landfill and sorted to recover visually identifiable body parts and personal effects. These included “human tissue, bone fragments and cremated remains,”²⁴ which are technically called “fines.” Upon recovery, the fines were supposed to be given proper burial, but instead were bulldozed into the garbage dump and covered with fill dirt.

²³ Quigley, *supra* note 4, at 281.

²⁴ Catholic League for Religious and Civil Rights, WTC Families for Proper Burial, Inc., <http://www.catholicleague.org/linked%20docs/911burial.htm> (last viewed August 26, 2007).

WTCTFB organized to demand that these body parts—which, again, are rarely more than slivers of bone and muscle—be given proper interment in graves, or, if identifiable, be returned to the families.

The families of these 2,749 victims do not see the completeness of their loved ones' remains as minor importance, nor did the following groups and individuals (among others who supported WTCTFB):

Catholic League for Religious and Civil Rights
Roman Catholic Archdiocese of Newark, New Jersey
Roman Catholic Diocese of Metuchen, New Jersey
Chancery, Roman Catholic Diocese of New York, NY
Former New York Governor Pataki
The New Jersey State Assembly (unanimous vote)
New Jersey State Senate
Former New Jersey Governor McGreevey
New Jersey Patrolman's Benevolent Association
New Jersey Veterans of Foreign Wars
Coalition of 9/11 Families
New Jersey Knights of Columbus
The National Convention of the Episcopal Church
The United Church of Christ
The Communication Workers of America²⁵

As one author wrote, "A pile of decaying human flesh contains much more import than its physical properties."²⁶ The individuals and groups who have joined with the WTCTFB demand that the entire body, even parts of a human being, must be preserved and given a proper burial.

THE MILITARY

The United States Military offers another glimpse into how modern Americans view the importance of completeness of the body and all of its parts. First, the creeds by which our

²⁵*Id.*

²⁶ Sledge, *supra* note 1, at 63.

nation's military govern themselves all include references to not leaving a fallen comrade behind.²⁷ This extends to whether the comrade is dead or alive, and regardless of the danger that might accompany a recovery mission. Soldiers believe this is important because they know that if they are injured or die, other soldiers will come to either rescue them or reclaim their bodies. Such strong trust acts as a major morale boost in the military.

Occasionally, however, it is impossible to immediately reclaim a soldier's remains, either because of the intensity of the fighting, or because the entire unit is killed, or in the event that a soldier dies and nobody is initially able to locate some or all of the remains. In such cases, tremendous energy and expense is used to later locate and reclaim all parts of the body. The search for bodies and body parts is expensive. For example, one author calculated that the historical cost of recovering bodies and parts from the Vietnam War was slightly over \$1.2 million dollars per identified set of remains.²⁸ Upon hearing that, Lt. Col. Gerald O'Hara exclaimed, "God, what a wonderful country—that we can do that!"²⁹ The tally does not include the unidentifiable bone fragments found. "In one case in 1973, a search conducted off the coast of Vietnam cost \$830,000 and yielded only a few unidentifiable bone fragments. In another case in May 1973, the JCRC removed approximately 200,000 pounds of sand—some 60,000 or 70,000 shovels full—while looking for the remains of the pilot of an observation craft that had been shot down on a beach near Tuy Hoa."³⁰

The expense in time, manpower and money is justified to all three primary groups: the soldiers, the families and the country as a whole.

²⁷ This is a historical truth, back at early as the Civil War.

²⁸ Sledge, *supra*, at 93.

²⁹ Sledge, *supra* note 1, at 93.

³⁰ Sledge, *supra* note 1, at 83.

EFFECT ON TROOP MORALE

“The dead can be made to mean what we wish, and control over them translates into influence over the living. Thomas Mann’s words, ‘A man’s dying is more the survivor’s affair than his own,’ continues to ring true.”³¹

While the value of reclaiming remains has been debated,³² the effect that it has on troop morale is great.³³ This is because when going into battle, troops want to know that if they die or are injured their broken body or its remains will be secured by their comrades, and that the same is expected of them if a fellow soldier falls. “During an interview at CILHI with Sgt. 1st Cl. Habibah Prevost, in which I asked her about the sacrifices she made in spending time away from her family to bring back the mere bone fragments of the dead, she said, ‘Yes, it is worth it. If it happened to me, if I were killed out on the battlefield, the guy to my left and to my right, I *know* they would come and get me; I know they would want to.’”³⁴

IMPORTANCE OF MOURNING FOR FAMILIES

“They themselves were fully at rest, they suffer’d not,
The living remain’d and suffer’d, the mother suffer’d,
And the wife and the child and the musing comrade suffer’d.”

Walt Whitman, “When lilacs last in the dooryard bloom’d”

When a soldier dies away from home, the natural initial instinct is disbelief without further proof of death. “The process of grieving is highly culturally specific, and in the United States there is a general concensus about the steps required to work toward resolution of the death of a loved one. The first is acceptance of the reality of death. Obviously, the presence of a

³¹ Sledge, *supra* note 1, at 202-203.

³² Joe Light, *Defending “Leave No Man Behind” Policy*, *The Yale Herald* (Apr. 5, 2002).

³³ *Id.*

³⁴ Sledge, *supra* note 1, at 62-63 (emphasis in original).

properly identified set of remains is final proof. J.W. Worden, quoted in *Beyond the Body*, says, ‘Seeing the body of the deceased helps to bring home the reality and finality of death.’³⁵ “Humans want to see their dead, if at all possible. Only then is the passing of a loved one real.”³⁶ Having a dead body, or its remains, helps survivors come to terms with loss. “Proper burial of the dead, accompanied by a degree of formalized mourning, is as necessary for those who die in battle as it is for those who perish in more peaceful circumstances. Having some sort of focus for mourning is useful for the dead soldier’s comrades.”³⁷

When entire bodies cannot be recovered, body parts and even personal effects can be just as important for families of our deceased soldiers in order to help them accept their loss. “Body parts, even ashes, can substitute for the complete corpse in fulfilling the role assigned to it in our formal social process regarding death: certification, preparation, eulogy, burial, all of which are designed to give the dead a new social presence. And when remains are nonexistent, cannot be found, or have deteriorated, personal effects can stand in their place and be returned to family members.”³⁸ Regardless of how much of the body is found, in a time of acute and great grief, it is important to give as much of the deceased as possible – every shard of bone, sliver of flesh and personal belonging – to the loved ones of the deceased. Holding back, or not telling the full truth, only causes more pain than it alleviates, causing families to distrust the government and the military. As one commentator noted, “This is when your troubles begin.”³⁹

³⁵ Sledge, *supra* note 1, at 23.

³⁶ Sledge, *supra* note 1, at 28.

³⁷ Richard Holmes, *Acts of War: The Behavior of Men in Battle*, quoted in Sledge, *supra* note 1, at 17.

³⁸ Sledge, *supra* note 1, at 25.

³⁹ Paul Sledzik, former anthropologist at the National Museum of Health and Medicine at the Armed Forces Institute of Pathology, as quoted in Sledge, *supra* note 1, at 286.

FACILITATING THE RECOVERY PROCESS

Strong public policy has led to families having great power in how the military handles the nation's war dead. In World War I, soldiers' remains were collected and buried in groups. If their remains were to remain in Europe, they would be buried in a permanent cemetery closest to where their remains were concentrated with the remains of others. However, some families wished to have relatives buried close to each other. "Recognizing that family desires were of extreme importance," the policy was changed to accommodate family wishes.⁴⁰ In World War II, Korea and Vietnam, families were given the decision of how to deal with the dead: either they could have them buried where they fell or have the bodies transported back to America for burial.

The military recognizes that families – not coroners, medical examiners, forensic pathologists or other government agents – are in the best position to decide what happens to the remains of the nation's war dead. This is apparent in the government's specific procedures for dealing with treatment and recovery when a soldier's remains are found. These procedures apply to address separate body parts which are recovered *after* burial of the person's body. There are three options:

1. Disinter the interred remains, place the additional portions in the casket with the principal remains, and re-inter them;
2. Place the portions in an appropriate container and inter in the same grave site above the casket with the principal remains;
3. Dispose of the portions by complete incineration.

If the fragments of several soldiers are found, Casualty Affairs Officers will ask the family members if they want unidentified remains to be buried in a group or incinerated. If all

⁴⁰ Sledge, *supra* note 1, at 203.

the families agree to have the body parts incinerated, they will be incinerated. However, if any family member wants a burial, all of the remains will be buried as a group.⁴¹

FOR THE COUNTRY

The symbolism of recovery of all of a soldier's remains is important to the country as a whole. "A country may win a battle or even a war, but if the adversary possesses its soldiers' remains, it is a constant reminder and certain acknowledgment that, at some point, the enemy controlled not only the field of battle but also some of the victor's might." *Soldier Dead*, P. 26

The responsibility to the dead who served our country also impacts American society as a whole. "When family and military members are hurt by the death of a loved one or their comrades, these wounds are not localized – they extend into the body of the nation... faith is lost when mishandling occurs and misinformation is disseminated. A nation can survive physical damage to its property and people; much more damaging are the scars on its psyche that come from not honoring its obligations to the dead and their families. No one wants to accept a check drawn on a morally bankrupt account."⁴² Thus, if a soldier's remains are mishandled, the public will lose faith and trust in the government charged with the soldier's care.

"The flesh and bones of *Soldier Dead* were the former homes of whatever spirit may have inhabited them, and we retain a residual appreciation of their social identity and treat the remains with dignity and respect."⁴³

⁴¹ Sledge, *supra* note 1, at 221-222.

⁴² Sledge, *supra* note 1, at 292.

⁴³ Sledge, *supra* note 1, at 217.

NATIVE AMERICAN REMAINS

“Nobody in their right mind - except for a morbid infatuation - would keep human remains in a box...without knowing that that person at one time was a living soul.”⁴⁴ Wilson Wewa, Northern Paiute spiritual leader

As of November, 2006, a group of persons was convicted for being part of a ring which dug up Native American skeletons and sold them on the black market. This was a particular affront to Native Americans, since Native Americans feel disturbing a person’s body disturbs their soul in the afterlife. Many still require that bodies are buried intact, and, similar to some Orthodox Jews, include hair that has fallen out and fingernail clippings to be buried with the corpse.⁴⁵ In describing the outrage that Native Americans feel when their ancestors’ bodies are desecrated, the US Attorney for the District of Oregon said, “this case is also about the theft of really the spirit of Native Americans, through the theft of human remains. That is something that is so deep to the core of their spirituality that it really hits them in their very heart.”⁴⁶

What to do with the remains of Native Americans has been a particularly contentious and vibrant issue for as long as Native Americans and non-Native Americans have coexisted in the Americas. Early physical anthropologists in America were “virulent racists” who seized the body parts of Native Americans in order to try to prove the superiority of the white race.⁴⁷ Thus, the Smithsonian Museum, among others, has a collection of thousands of Native American body parts from battles in the Great Plains which were collected by the Surgeon General in order to

⁴⁴ Wilson Wewa, Northern Paiute spiritual leader, <http://www.npr.org/templates/story/story.php?storyId=6422726> (last viewed August 26, 2007).

⁴⁵ Quigley, *supra* note 4, at 86.

⁴⁶ Karin Immergut, US Attorney, District of Oregon, <http://www.npr.org/templates/story/story.php?storyId=6422726> (last viewed August 26, 2007).

⁴⁷ This practice was consistent with the view of white superiority in other contexts of dealing with Native Americans.

prove that Native Americans were inferior to Caucasians. Throughout American history, when state statutes prohibiting the removal of body parts from the ground were written, Native American remains were not included in the statutes' protections. This was changed in 1990 by the passage of the national Native American Graves Protection and Repatriation Act (NAGPRA), but recent debates have highlighted the pervasive and lingering problems that Native Americans must go through in order to obtain the rights to their ancestors' remains. NAGPRA requires organizations which receive federal funding to return remains, including parts, to the tribe of origin. These remains are not to be kept as trophies or for any use that the government may desire. Rather, federal law dictates that the next of kin, even several generations down through tribal lineage, has the ability to dictate what happens to the remains.

For example, at Yale University, Native Americans have been attempting to get the secret society Skull and Bones to return what is believed to be Geronimo's skull.⁴⁸ The skull was reported to be dug up by Skull and Bones members and the fraternity has repeatedly resisted attempts to reclaim and rebury it. Because Skull and Bones does not receive federal funding, the Apache can not use NAGPRA to reclaim the remains.

More recently, at University of California, Berkeley, protesters recently sat in trees to oppose the destruction of not only the trees but what they believe may be a Native American burial site.⁴⁹ The sacredness of the site has led to protests in order to preserve the land.

The law, as it stands, dictates that the ancestor tribes must be given the opportunity to obtain not merely intact bodies but also parts, including bones, and re-inter them according to the requirements of the tribe's religious beliefs. Thus, the family members in the tribe—the putative

⁴⁸ Noam Rudnick, Of skulls and bones: More secrets of the tomb, *The Yale Herald*, <http://www.yaleherald.com/article.php?Article=2523> (last viewed August 26, 2007).

⁴⁹ Carolyn Jones, Tree-sitters say site might be burial ground, *San Francisco Chronicle*, February 21, 2007, at B-1.

descendants—are given the right to decide what to do with their ancestors’ remains. As the State Attorney General for Nebraska put it, the “interests of relatives or other interested persons” must be observed, and the “scientific, educational, religious, and cultural interest in the remains of our ancestors should be served.”⁵⁰

PECULIAR SCIENTIFIC NOTIONS OF THE DEAD

This is distinguished from the peculiar notion scientists have of human remains. As Mary Roach noted in her award-winning book *Stiff*, “One’s own dead are more than cadavers, they are place holders for the living. They are a focus, a receptacle, for emotions that no longer have one. The dead of science are always strangers.” *Stiff*, p. 12. The survivors do not look at the deceased as a scientist might—as little more than a collection of tissues worthy of study—but as important and worthy of dignified treatment.

The history of science has put scientists, and coroners, consistently at odds with the public and the law. Starting with English grave robbers in the 18th and 19th centuries and continuing today with medical students in Afghanistan, scientists have often ignored the wishes of the deceased and their families as to what should be done with bodies and body parts.

“What really shows the human being’s consideration for the dead is the care we take, not with the bodies of friends, but with the bodies of strangers.” Greg Palmer, *Death: The Trip of a Lifetime*, p. 283.

⁵⁰ Jon Bruning, Attorney General of Nebraska, *Whether the general statutes of Nebraska pertaining to the treatment and disposition of dead bodies and cemeteries prohibit the reburial of Native American skeletal remains*, <http://ago.nol.org/local/opinion/index.html?topic=details&id=2034> (last viewed August 26, 2007).

“Rather than another demonstration of the human’s ability to emotionally complicate the simplest matters, I think the way we get rid of the bodies of our fellow citizens is a unique demonstration of our humanity. We take great care with the bodies we know, and our grief at death is often exaggerated when there is no body.” Greg Palmer, *Death: The Trip of a Lifetime*, p. 284.

CONCLUSION

Taking body parts from a dead person’s body without telling the decedent or their family or having the basic human decency to ask permission goes against thousands of years of cultures and traditions. The present case does not involve government need or interest. The practice in question involves throwing away the brain of a deceased loved one, instead of deferring to the reasonable request of the next-of-kin, even though the government’s interest in and need for the brain has admittedly ended. This practice is anathema. No culture has condoned anyone to take body parts. Such behavior is so abhorrent that, in fact, it has been used as punishment against the deceased and their families.

The certified question should be answered in the affirmative.

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of *Amicus Curiae* in Support of Appellants Mark Albrecht, et al was sent by regular U.S. mail this 10th day of September, 2007 to:

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