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FROM DYSFUNCTION AND POLARIZATION TO LEGISLATION: NATIVE AMERICAN RELIGIOUS FREEDOM RIGHTS AND MINNESOTA AUTOPSY LAW

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PREFACE

In October of 2015, Hamline University School of Law's Dispute Resolution Institute held a Symposium titled, *An Intentional Conversation About Public Engagement and Decision-Making: Moving from Dysfunction and Polarization to Dialogue and Understanding*. The focus was on Minnesota as a microcosm of the larger national conversation. Earlier that same year, Minnesotans saw a drama unfold that resulted from an egregious absence of conversation,

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dialogue, and understanding between the governmental and medical establishments of the State and its indigenous people. The misunderstandings were especially prevalent in county governments near reservations in greater Minnesota. From February through May of 2015, the dysfunction that resulted from the failure of the counties to communicate or understand another culture played out in courts and finally the legislature. For the Indian people involved, the polarization could only be quelled, and dignity restored, by a change in the laws of Minnesota. This chapter was closed when the Governor signed a new law. However, the entire situation itself demonstrates the dire need for an ongoing, meaningful dialogue between State officials at all levels and Minnesota's Native American citizens, as well as a better understanding of Minnesota's seven Anishinabe and four Dakota reservations.

Prof. Tadd Johnson, Esq., Symposium Participant

I. INTRODUCTION

In 2015, the Minnesota legislature amended its autopsy statute to allow for objections to autopsies based upon religious beliefs and practices.[1] Minnesota was not the first state to allow for religious objection to autopsies,[2] but what may have been unique in this instance was that the cases that inspired the law came from Native American families practicing a religion that pre-dates 1492, rather than the standard origin of such laws—the Judeo-Christian tradition.

The traditional religion practiced by many Anishinabe (Ojibwe/Chippewa) in east-central and northern Minnesota[3] is not

1. S.F. 1694, 89th Leg., Reg. Sess. (Minn. 2015) (codified as amended at MINN. STAT. § 390.11, subdiv. 2(b) (2015)).

2. New Mexico provides a robust Native American religious exemption from routine autopsies. Its statute requires the state medical examiner (ME) to make reasonable efforts to determine if the deceased is a member of a federally-recognized tribe. Once identified, the ME may not perform an autopsy unless legally required to do so, typically determined by the circumstances of the death. If an autopsy is required, the ME is further required to attempt notification of the next of kin prior to the procedure and must provide details upon request of the procedure to the same. N.M. STAT. ANN. § 24-11-6.1 (West 2016); *see also* N.J. STAT. ANN. § 52:17B-88.2 (West 2015); 23 R.I. GEN. LAWS ANN. § 23-4-4.1 (West 2016).

3. CHRISTOPHER VECSEY, TRADITIONAL OJIBWA RELIGION AND ITS HISTORICAL CHANGES 174 (4th prtg. 1993).

known to most Minnesotans, and the families' objections to autopsies caused great skepticism among some state officials. The county governments of Minnesota, as well as the contracted medical examiner serving both Carlton and St. Louis County, were uncertain how to react to the objections of American Indians.[4]

Even after a local judge signed ex parte court orders demanding the release of the remains to the families' relatives,[5] the county attorneys, sheriffs, and especially the medical examiner were uncertain the court order applied, at least in part, because the existing statute had no provision for religious objections.[6] The legislature eventually dealt with the law's vagueness by amending the statute to allow for a judicial proceeding in which families could object to autopsies on religious grounds.[7]

One fundamental problem in the underlying cases is a failure of the government and medical examiner to attempt to speak with the families or properly address their concerns.[8] It was an example of how failure to communicate, and later the failure of the medical examiner to consider that cultural practices previously unknown to him may still constitute sincerely held religious beliefs, required a change in law and policy. In addition to allowing an objection to an autopsy and a court proceeding, the law now requires

4. Tadd Johnson Aff. ¶¶ 2–5, Apr. 9, 2016 (on file with author) (noting that the ME would not release the body despite a proffered court order to do so); Rebecca George Aff. ¶ 4, Apr. 12, 2016 (on file with author) (noting that the county attorneys were unsure whether the statute allowed a judge to order the ME to release a body to a family for religious reasons); *see* Emily Segar-Johnson Aff. ¶ 4, Apr. 11, 2016 (on file with author) (reassuring that the body must be released).

5. Order and Memorandum of Law from Honorable Robert E. Macaulay, Family of Mushkoob [sic] Steve Aubid v. State, No. CV-15-4 at 1 (Minn. Dist. Ct. Feb. 23, 2015) (on file with author) [hereinafter Aubid Order and Memorandum]; Order and Memorandum of Law from Honorable Robert E. Macaulay, Family of Autumn Marie Martineau v. State of Minnesota, No. CV-15-4 (Minn. Dist. Ct. Feb. 23, 2015) (on file with author) [hereinafter Martineau Order and Memorandum].

6. MINN. STAT. § 390.11 (2014).

7. MINN. STAT. § 390.11, subdiv. 2(b) (2015); S.F. 1694, 89th Leg., Reg. Sess. (Minn. 2015).

8. *Testimony on H.F. 1935, Before Minn. H. Comm. Pub. Safety & Crime Prevention Policy & Fin.*, 89th Leg., at 1:34:22 (Mar. 26, 2015) [hereinafter LaPrairie Statement], http://ww2.house.leg.state.mn.us/audio/mp3ls89/pub032615.mp3 (statement of Winnie LaPrairie addressing concerns of families of deceased).

communication between medical examiners and the families of the deceased.[9]

II. TWO DEATHS, TWO COURT ORDERS

Mushkooub Aubid was a sixty-five-year-old Native American man who was under the care of a cardiologist for heart-related symptoms.[10] He died in a single-vehicle accident on Highway 210 in Carlton County, Minnesota.[11] Witnesses said his vehicle slowly drifted across the centerline, gradually going off the road until it hit a utility pole.[12] First responders were unsuccessful in reviving Mr. Aubid.[13] Family was told that he did not appear to have sustained any obvious outwardly visible signs of serious injury, which led the family to conclude that he likely experienced a medical event while driving.[14] Coincidentally, his father, who experienced similar heart-related symptoms at the same age, also passed away very suddenly at age sixty-five, and at that time his sons ensured that their father's Midewiwin beliefs were respected.[15]

The state patrol did not request an autopsy because they did not believe Mushkooub Aubid's death was related to his automobile accident.[16] However, the medical examiner for Carlton County insisted on an autopsy without speaking to the family, despite repeated requests by the widow to hospital staff and the police that she be allowed to speak with the medical examiner.[17] Rather than attempting to speak with the family as they requested,[18]

9. MINN. STAT. § 390.11, subdiv. 2(b) (2015).

10. Aubid Order and Memorandum, *supra* note 5, at 2.

11. Tom Olsen, *Body of Mille Lacs Spiritual Leader Released to Family*, DULUTH NEWS TRIB. (Feb. 9, 2015), http://www.duluthnewstribune.com/news/3674763-body-mille-lacs-spiritual-leader-released-family.

12. Officer Erick Sjodin, Accident Report (Minn. Dep't Pub. Safety, St. Patrol, Case File No. U15270280 Feb. 8, 2015) (on file with author).

13. *Id.*

14. Olsen, *Body of Mille Lacs Spiritual Leader Released to Family*, *supra* note 11.

15. Susan Stanich, *Chippewas Lay to Rest a Leader of Legal Battles*, WASH. POST, Aug. 19, 1990, at A1.

16. Tadd Johnson Aff., *supra* note 4, ¶ 6.

17. Emily Segar-Johnson Aff., *supra* note 4, ¶ 2 (noting that the deceased's widow made multiple requests to speak with the ME, to no avail).

18. *Common Questions*, ST. LOUIS CTY., MINN., http://www.stlouiscountymn.gov/LAWPUBLICSAFETY/MedicalExaminer/CommonQuestions.aspx (last visited Aug. 12, 2016). At the time of this incident, the St. Louis County Medical Examiner's website contained information for families who may object to the

the medical examiner's staff appeared to avoid interactions or conversations with the family altogether.[19]

In an apparent effort to avoid having to speak with or have contact with the family, the medical examiner's staff went so far as to initiate a 911 call Sunday morning, requesting the presence of law enforcement at the hospital as they prepared to transport the decedent to morgue space which the Medical Examiner rented from the School of Medicine on the campus of the University of Minnesota Duluth (UMD) in St. Louis County.[20] With police standing by, the decedent's body was taken from the examining room. While transporting the decedent, a nurse handed the widow a post-it-note with the name and phone number of an unidentified person from a 507 area code.[21] No further information was provided, although the family learned later in the day that this person was a field investigator for the medical examiner.[22]

If the medical examiner or his staff had attempted to speak with the family, they would have learned that the family objected to an autopsy because Mr. Aubid was a fervent believer in the Midewiwin spirituality, the ancient religion of the Anishinabe. Followers of the Midewiwin believe that any cuts or lacerations into a body after death is a desecration that can impede the person's journey into the spirit world.[23] The family's beliefs also required that they: (1) wash the decedent's body in cedar water within twenty-four hours after the death; (2) feast and pray at sunset in close proximity to the body every evening until burial; and (3) keep a spirit fire burning near the body so the decedent's spirit can

performance of an autopsy. It stated, "we recognize that your family beliefs may be contrary to an autopsy. We are open to discussion to try to accommodate your wishes as long as we can fulfill the legal obligation presented by your loved ones' death." For a cached version of the website, see *Common Questions*, ST. LOUIS CITY, MINN., INTERNET ARCHIVE WAYBACK MACHINE (Feb. 16, 2015), https://web.archive.org/web/20150216004010/http://www.stlouiscountymn.gov/LAWPUBLICSAFETY/MedicalExaminer/CommonQuestions.aspx.

19. Emily Segar-Johnson Aff., *supra* note 4, ¶ 2 (noting that other family members, including Winnie and Candy, asked multiple times to speak with the ME).

20. *Id.* ¶ 7 (confirming that the ME's staff had called 911 for a police presence).

21. *Id.* ¶ 2.

22. *Id.*

23. David "Niib" Aubid Aff. ¶¶ 6–8, Family of Mushkoob [sic] Steve Aubid v. State, No. CV-15-4 (6th Minn. Dist. Ct. Feb. 8, 2015).

rejoin the family every evening for the feast.[24] These beliefs also require the family to remain in very close proximity to the body.[25]

The family followed the van transporting the decedent into St. Louis County to the loading dock of the Medical School on the UMD campus where the morgue was located.[26] The family was met by more law enforcement officers at UMD.[27] In the midst of a snowstorm, the family would remain in the parking lot outside this loading dock for another twenty-four hours in order to practice their religious beliefs.[28]

At approximately noon on Sunday, February 8, the family learned from third parties that an autopsy was to be performed on Mr. Aubid at 3:00 PM that same day.[29] Tribal and family advocates spent the morning attempting to establish contact with the medical examiner.[30] After contact was made, the family made multiple requests that the medical examiner at least allow them access to the body to perform the ceremonial washing of the body in cedar water.[31] These requests were denied by the medical examiner.[32] Later that afternoon, at the request of third parties, the medical examiner agreed to delay the autopsy until Tuesday.[33]

At 11:00 pm Sunday night, counsel for the family obtained a court order requiring the body of Mushkooub Aubid to be released immediately to the family.[34] The order was premised on the Minnesota Constitution, which has a strong statement regarding the free exercise of religion.[35] In addition, case law has created a balancing test between the interests of the state versus the religious

24. Tom Olsen, *Mille Lacs Band Members Protest Planned Autopsy*, DULUTH NEWS TRIB. (Feb. 8, 2015), http://www.duluthnewstribune.com/news/3674578-mille-lacs-band-members-protest-planned-autopsy.

25. Aubid Order and Memorandum, *supra* note 5, at 3.

26. Olsen, *Mille Lacs Band Members Protest Planned Autopsy*, *supra* note 24.

27. Emily Segar-Johnson Aff., *supra* note 4, ¶ 7.

28. LaPrairie Statement, *supra* note 8.

29. Aubid Order and Memorandum, *supra* note 5, at 2.

30. Emily Segar-Johnson Aff., *supra* note 4, ¶ 7.

31. Rebecca George Aff., *supra* note 4, ¶ 3 (stating that Rebecca requested the body to be bathed in cedar water); Emily Segar-Johnson Aff., *supra* note 4, ¶ 6 (stating "that ceremonial washing of the body could only be done with a written directive").

32. Rebecca George, *supra* note 4, ¶ 2; Emily Segar-Johnson, *supra* note 4, ¶ 3.

33. Olsen, *Mille Lacs Band Members Protest Planned Autopsy*, *supra* note 24.

34. Olsen, *Body of Mille Lacs Spiritual Leader Released to Family*, *supra* note 11.

35. MINN. CONST. art. I, § 16.

freedom rights of Minnesota citizens.[36] The family argued that the balance weighed in favor of the family and religious freedom, and that the state lacked a compelling state interest to merit an autopsy.[37] In the memorandum of law, which was incorporated into the order, the family argued against the autopsy based upon their Midewiwin beliefs.[38] They submitted a supporting affidavit from Mr. Aubid's brother that provided an explanation of their beliefs and reasons for opposing an autopsy.[39]

The body of Mr. Aubid was taken to Duluth in St. Louis County, Minnesota.[40] After the signed ex parte court order was presented to the medical examiner's staff representative by speakerphone, the staff representative refused to comply and would not release the body. Later, in a phone conversation with the medical examiner, he also refused to comply.[41] The following morning, counsel met with the St. Louis County attorney, who acted as a mediator and called the Carlton County attorney.[42] Counsel for the family fully expected that the Carlton County attorney would require the matter to go back before the Judge on a motion to reconsider.[43] Instead, the two county attorneys called the medical examiner and talked him into releasing the body.[44]

In subsequent conversations with the county sheriff and county attorneys it became clear to counsel for the families that the Minnesota autopsy law was too vague.[45] The county government officials believed that the law provided that once the medical

36. State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990).

37. Aubid Order and Memorandum, *supra* note 5, at 4–5.

38. *Id.*

39. David "Niib" Aubid Aff., *supra* note 23, ¶¶ 6–11 (stating that an autopsy is against his family's religious beliefs).

40. Olsen, *Body of Mille Lacs Spiritual Leader Released to Family*, *supra* note 11.

41. *Id.*

42. *Id.*

43. Author, Tadd Johnson, who also served as counsel for the family of Mushkooub, anticipated additional legal maneuvering by the county attorney. Instead, the county attorney assisted in the ultimate release of Mushkooub's body to the family.

44. Olsen, *Body of Mille Lacs Spiritual Leader Released to Family*, *supra* note 11.

45. Emily Segar-Johnson Aff., *supra* note 4, ¶ 6 (reporting the family's opinion that the law should accommodate spiritual beliefs); Tadd Johnson Aff., *supra* note 4, ¶ 5 (stating that the law is too vague and should be changed); Rebecca George Aff., *supra* note 4, ¶¶ 5–7 (affirming the strain placed on Native American families when attempting to follow religious convictions for burial procedures).

examiner had a body, it was the medical examiner's decision regarding what to do with that body.[46] It was not clear to the officials whether any court order could apply.[47] In spite of this apparent lack of clarity, the county attorney chose not to reenter court on a motion to reconsider.

On Tuesday, February 10, approximately twenty-four hours after Mr. Aubid's body was released to his family, a similar incident tragically occurred near the Fond du Lac Reservation in Carlton County. Twenty-four-year-old Autumn Martineau of the Fond du Lac Band of Lake Superior Chippewa died in an automobile accident.[48] Her family objected to an autopsy based on their Midewiwin beliefs.[49]

The parties involved in Ms. Martineau's case were the same county attorney and medical examiner as Mr. Aubid's case.[50] Again, the medical examiner did not consult the family.[51] As the medical examiner's assistants were taking the body, Ms. Martineau's grief-stricken family begged them to tell them where they were taking her.[52] Eventually a police officer intervened and convinced the medical examiner's representatives that the family had a right to know where the body was being transported.[53] It turns out that the body was transported to Hibbing, which is seventy miles away, despite the fact that the morgue facility in Duluth was much closer. In the midst of a snowstorm, the family was told by the medical examiner staff they had one hour to get a court order to stop the autopsy or it would begin as soon as the body reached Hibbing.[54]

Much like the Aubid family, the Martineau family was devastated. A court order was obtained from Judge Macaulay who reiterated again that the religious freedom rights of the deceased and the right of the family to mourn in its traditional way outweighed the state's interest in conducting an autopsy.[55] Yet

46. Rebecca George Aff., *supra* note 4, ¶ 4.
47. Tadd Johnson Aff., *supra* note 4, ¶ 4.
48. Martineau Order and Memorandum, *supra* note 5, at 2.
49. *Id.*
50. *Id.*
51. Rebecca George Aff., *supra* note 4, ¶ 5 (stating that the ME did not consult with the family regarding the body).
52. *Id.*
53. *Id.*
54. Martineau Order and Memorandum, *supra* note 5, at 2.
55. *Id.* at 1.

again, the medical examiner was reluctant to follow the order.[56] In response, the county attorney chose not to go back to court on a reconsideration motion, but rather the County Attorneys from St. Louis and Carlton Counties again talked the Medical Examiner into turning the body over to the family; this time in a meeting at the Carlton County Courthouse on Wednesday, February 11, that included Fond du Lac Chairwoman Karen Diver in addition to the same counsel and advocates who worked on the Aubid matter.[57]

In sum, with both incidents, the medical examiner requested police assistance, did not attempt to speak with the family, and refused to follow the court order. However, the county attorney decided not to take the matter back to court and convinced the medical examiner to follow the court order. Also in both incidents, law enforcement officers, county attorneys, and the medical examiner questioned whether the court order required them to return a body to a family.

The Midewiwin religion is not well known.[58] It went underground when federal policy did not allow American Indians to practice their indigenous religions or speak their native languages.[59] The medical examiner, who provided services at the time to both St. Louis County and Carlton County, asserted that he had not heard of the Midewiwin religion.[60] But, whether or not the medical examiner believed in the existence of the Midewiwin religion was irrelevant when attorneys obtained a court order that required the body to be returned to the family. However, even the sheriff and the county attorneys were not sure what to do because

56. Tom Olsen, *Compromise Reached in Autopsy Dispute, but Concerns Linger in the Native American Community*, DULUTH NEWS TRIB. (Feb. 11, 2015), http://www.duluthnewstribune.com/news/3676955-compromise-reached-autopsy-dispute-concerns-linger-native-american-community.

57. Tadd Johnson Aff., *supra* note 4, ¶ 5.

58. VECSEY, *supra* note 3.

59. 1-14 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03, at 947 (2012 ed. 1940).

60. Letter from Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe Indians, to Frank Jewel, St. Louis Cty. Comm'r, and Ross Litman, St. Louis Cty. Sheriff (Feb. 13, 2015) (on file with author); *Duluth Medical Examiner Defends Motives in Conflicts Over Autopsies*, ST. PAUL PIONEER PRESS (July 12, 2015), http://www.twincities.com/2015/07/12/duluth-medical-examiner-defends-motives-in-conflicts-over-autopsies/.

of the vagueness of the law.[61] That was the problem, and it was clear to the Indian tribes of Minnesota that the law needed to be fixed.

Whether a family is Jewish, Christian Scientist, or Midewiwin, all Minnesota citizens should have the right to the free exercise of religion.[62] Anyone should be able to make a request to the court, based on their religious belief, to have the body of a loved one returned so that they can mourn in their traditional way. The court should then apply a balancing test to weigh the religious rights of the family and the deceased against a compelling reason the state might have for conducting an autopsy.[63]

III. WHY TRIBAL RELIGIONS WENT UNDERGROUND

In both of these instances, the Carlton County medical examiner asserted that he had not encountered the Midewiwin spirituality before, and specifically its prohibition on autopsies.[64] However, funeral home directors, law enforcement agents, and medical examiners who work closely with the Mille Lacs Anishinabe community in east-central Minnesota are well acquainted with these religious beliefs and traditions, and regularly work with families to accommodate their religious beliefs.[65] Asserting one's own standards in determining whether this religion was a sincerely held religious belief or not is ethnocentric monoculturalism[66] at its worst.

American Indian religions went underground for several reasons. During the Grant Administration (1869–1877), a number of Christian faiths were asked to work with the federal government to create boarding schools for Indians.[67] They were to Christianize

61. Tadd Johnson Aff., *supra* note 4, ¶¶ 3–4; Rebecca George Aff., *supra* note 4, ¶ 4.

62. MINN. CONST. art. I, § 16.

63. *See Hershberger*, 462 N.W.2d at 399 (holding that "[t]o infringe upon religious freedoms which this state has traditionally revered, the state must demonstrate that public safety [interests] cannot be achieved through reasonable alternative means.").

64. *Duluth Medical Examiner Defends Motives in Conflicts Over Autopsies*, *supra* note 60.

65. Emily Segar-Johnson Aff., *supra* note 4, ¶ 5.

66. Ethnocentric monoculturalism refers to a dominant culture views of another's culture as inferior or not worthy of validation. *See* Hannibal Travis, *The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq*, 15 TEX. WESLEYAN L. REV. 415, 422 n.16 (2009).

67. COHEN, *supra* note 59; *see also* Allison M. Dussias, *Ghost Dance and Holy*

and "civilize" Native Americans, thus assimilating them into the mainstream of society.[68] The idea behind the American Indian boarding school system was best expressed by Captain Richard Pratt who founded the Carlisle School in Pennsylvania, under the motto, "kill the Indian, save the man."[69]

In order to achieve the goal of assimilating Indians into mainstream society, Indian children were forbidden from practicing their traditional systems' tribal culture.[70] The penalty for violating these rules was frequently some form of severe corporal punishment.[71]

In the 1880s, the Bureau of Indian Affairs promulgated the Code of Indian Offenses.[72] Among other things, the Code strictly prohibited Indians from practicing tribal religions on their own lands.[73] One religious ceremony that was specifically banned was the traditional Sun Dance, a vitally important ceremony in the Lakota and Dakota religious belief systems.[74]

These prohibitions contributed to an incident in Wounded Knee, South Dakota, in December of 1890.[75] A Paiute Indian named Wovoka preached the merits of wearing specific garments and conducting a specific dance. Wovoka's followers believed that the garments were impervious to bullets, and that the dance would eventually bring the return of the thousands who had died in the genocide of American Indians, which began with the incursion of Europeans in 1492.[76]

In late December of 1890, several tribal elders, men, women, and children participated in the Ghost Dance taught to them by

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Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases, 49 STAN. L. REV. 773 (1997).

68. *See* COHEN, *supra* note 59, § 1.04, at 75; *see also* Dussias, *supra* note 67.

69. *See* COHEN, *supra* note 59, § 1.04, at 76.

70. *Id.*

71. *Id.* at 77.

72. *Id.* at 75.

73. HENRY TELLER, "COURTS OF INDIAN OFFENSES," ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR (Nov. 1, 1883), *excerpted in* AMERICANIZING INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1990, at 295–98 (Francis Paul Prucha ed., Harv. Univ. Press 1973), *noted in* COHEN, *supra* note 59, § 1.04, at 75–76 n.18.

74. Dussias, *supra* note 67, at 788 (discussing federal Christianization policies and Native American Free Exercise cases).

75. *Id.* at 790–99.

76. *Id.* at 790.

Wovoka. The Army opened fire; nearly three hundred Lakota were murdered for practicing their religious beliefs.[77]

In Indian country, a phenomenon known as the "moccasin telegraph" is simply the word of mouth passage from tribe to tribe of information and respect for one another; and there is close familial and friendship ties between many tribes.[78] An example of this is the ceremonial drums gifted by the Lakota to the Mille Lacs Anishinabe in the late 1800's that are still used in Midewiwin ceremonies at Mille Lacs today.[79] The moccasin telegraph was particularly strong between these communities. They, along with Indians in surrounding states, fully understood that they needed to take their traditional beliefs underground as a matter of survival, which is what they did. Traditional ceremonies and beliefs were not discussed in front of non-Indians (or Indians that were deemed too assimilated to trust) and most were held in secret for years.[80]

In the early 1960s Congress discovered, to its horror, when the Supreme Court of the United States decided the 1896 case of *Talton v. Mayes*[81] that the bill of rights did not apply on Indian reservations.[82] In 1968, Congress passed the Indian Civil Rights Act (ICRA).[83] ICRA included language similar, but not identical to, the First Amendment and other provisions in the Bill of Rights.[84] The free exercise of religion clause, but not the establishment clause, was included in ICRA.[85]

The 1978 passage of the American Indian Religious Freedom Act (AIRFA) signaled additional change in federal policy and it further acknowledged the protection of the free exercise of religion in Indian country.[86] In spite of this positive policy

77. *Id.* at 799.

78. *Culture & Traditions*, MILLE LACS BAND OF OJIBWE INDIANS, http://millelacsband.com/mille-lacs-band-ojibwe/culture-traditions/ (last visited Aug. 12, 2016).

79. Jim Clark, *Cultures and Traditions*, MILLE LACS BAND OF OJIBWE INDIANS, http://archive.millelacsband.com/Page_culture.aspx?id=129 (last visited Aug. 12, 2016).

80. VECSEY, *supra* note 3, at 190.

81. Talton v. Mayes, 163 U.S. 376 (1896).

82. *Id.* at 384–85.

83. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (2015)).

84. 25 U.S.C. §§ 1302–1303 (2015).

85. *Id.* § 1302(a)(1).

86. American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92

statement of Congressional protection of the unique religious practices of American Indians, these practices were not well protected by the new law.[87]

Many Native American religions are site-specific and involve access to sites of religious importance. Tribes in California attempted to use AIRFA to stop a road from being built through sacred grounds.[88] In *Lyng v. Northwest Cemetery Association* (or the "Go Road" case as it is commonly known), the U.S. Supreme Court noted that AIRFA did not create a cause of action to stop the road from being built.[89] Even Congressman Morris K. Udall, who played a key role in the passage of AIRFA, noted that the law "had no teeth."[90] AIRFA merely set forth a policy,[91] but it was an important step forward for Native Americans. Later, Executive Orders would provide for federal agencies to allow some tribal people to access sacred sites on federal lands,[92] but, in general, the well-intentioned AIRFA did little to stop an autopsy in Minnesota.

In the late 1980s and early 1990s Congress continued to deal with the lack of respect the United States has historically shown to tribal spiritual beliefs. In its decision to build the National Museum of the American Indian (NMAI)[93] in Washington, D.C., Congress discovered that the Smithsonian Institution possessed the human remains of nearly 34,000 American Indians.[94] At one point in United States history it was the policy of the military to take the bodies of American Indians from their traditional burial sites. [95] Along with the bodies, the military frequently took sacred funerary objects and other objects of importance to tribes, known as objects of "cultural patrimony."[96]

Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996 (1994)).

87. *See id.*

88. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

89. *Id.* at 455.

90. *Id.* (citing 124 Cong. Rec. 21444–21445 (1978)).

91. *See* 42 U.S.C. § 1996 (2015).

92. Exec. Order No. 13007, 61 Fed. Reg. 26,771 (May 29, 1996).

93. National American Indian Museum Act, Pub. L. No. 101-185, §§ 2(b), 11(a), 103 Stat. 1366 (1989) (codified at 20 U.S.C. § 80q (1990)).

94. Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation,* 25 J. LAND RESOURCES & ENVTL. L. 259, 266 (2005) (discussing history leading the passage of the Native American Grave Protection and Repatriation Act).

95. *Id.* at 260.

96. National American Indian Museum Act, §§ 2(b), 11(a).

Under the Act creating NMAI, the Smithsonian was required to return American Indian human remains to the appropriate Indian tribes.[97] This was only the tip of the iceberg; Native American human remains were located at other museums across the United States, not to mention the vast collections of cultural patrimony that these repositories also possessed.[98] In 1990, Congress passed the Native American Graves Protection and Repatriation Act,[99] requiring museums that received federal funds, which included most museums, to return the remains and the objects in their possession to the proper Indian tribe.[100]

The U.S. government, as well as many state governments, was finally coming to terms with its history of disrespect for Native American spirituality and the rights of Native people to conduct ceremonial burial rites associated with the deceased.[101] In Minnesota, the law concerning burials is intended to "accord[] equal treatment and respect for human dignity" to both Indian and non-Indian burial grounds.[102]

IV. THE LAW IN MINNESOTA

One provision in Minnesota law that may have allowed for families to wash the bodies[103] was not followed because the families were not allowed access to the bodies.[104] Later, one of the county attorneys noted, incorrectly, that such a washing likely required a written directive.[105] Even if that were true, the Midewiwin followers would not have written such matters down due to their general rule of keeping their beliefs and practices secret.[106] In their belief system, the bodies were to be bathed in cedar water on the first

97. Yasaitis, *supra* note 94, at 265.

98. *Id.* at 267.

99. Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. § 3001 (1990)).

100. *Id.* § 7.

101. Yasaitis, *supra* note 94, at 259.

102. MINN. STAT. § 307.08, subdiv. 1 (2014).

103. MINN. STAT. § 149A.91, subdiv. 2 (2014).

104. Rebecca George Aff., *supra* note 4, ¶ 2; Emily Segar-Johnson Aff., *supra* note 4, ¶ 3.

105. Tadd Johnson Aff., *supra* note 4, ¶ 5; Emily Segar-Johnson Aff., *supra* note 4, ¶ 6; Rebecca George Afff., *supra* note 4, ¶ 7.

106. VECSEY, *supra* note 3, at 190.

night of their journey, and a Midewiwin ceremony should be conducted in the Ojibwe language by a tribal spiritual leader.[107]

The tribal leaders from the Mille Lacs Band of Ojibwe—Mushkooub Aubid's tribe—and the Fond du Lac Band of Chippewa—Autumn Martineau's tribe—published an opinion-editorial in the *Star Tribune*, Minnesota's most widely read newspaper.[108] The article called for a change in the law allowing for families to object to state-mandated autopsies on the basis of religious freedom beliefs.[109]

One funeral director, stating that he had been in the business for thirty years, responded to the piece by stating that he provided Indian bodies with tobacco, a feather, and allowed "chanters" into the funeral home.[110] These were not practices of the Midewiwin belief systems any more than Tonto was a key figure in American Indian history.[111] However, the article was instrumental in drawing statewide attention. Within days of the opinion piece in the *Star Tribune*, State Senator Tony Lourey of Kerrick (District 11) introduced a bill[112] to allow for objections of autopsies primarily by utilizing a balancing test.[113]

The U.S. Supreme Court had utilized this test in case law for several decades and mandated the strong protection of all free exercise of religious freedom by imposing upon the government a "strict scrutiny" test.[114] In essence, in order to stop persons from

107. Aubid Order and Memorandum, *supra* note 5, at 2.

108. Melanie Benjamin & Karen Diver, *A Wake-Up Call on Tribal Autopsies*, STAR TRIB. (Feb. 18, 2015), http://m.startribune.com/a-wake-up-call-on-tribal-autopsies/292500341.

109. *Id.*

110. "Ddougherty," Comment, *A Wake-Up Call on Tribal Autopsies*, STAR TRIB. (Feb. 19, 2015), http://m.startribune.com/a-wake-up-call-on-tribal-autopsies/292500341 (click "View Comments" at the bottom of the web page) (demonstrating a foisting of his views on mourning Indian families).

111. *See generally* Meghan Basham, *Unmasking Tonto: Can Title VII "Make It" to Hollywood*, 37 AM. INDIAN. L. REV. 549, 562 (1993) (exploring legal scholarship on claims of discrimination in the context Title VII of the Civil Rights Act of 1964).

112. S.J., 89th Leg., Leg. Day 27, Reg. Sess., at 779 (Minn. Mar. 12, 2015), http://www.senate.leg.state.mn.us/journals/2015-2016/20150312027.pdf; S.F. 1694, 89th Leg., Reg. Sess. (Minn. 2015).

113. S.F. 1694, 89th Leg., Reg. Sess., § 3, subdiv. 2b(2) (Minn. 2015).

114. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 681 (1977) (defining strict scrutiny as a two-part test requiring (1) a compelling state interest with (2) regulations narrowly tailored to affect only those interests); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987) (stating

exercising their religion freely, the state or the federal government must demonstrate a "compelling governmental interest."[115] The person exercising the religion had to be exercising their religious freedom in a manner that required governmental intervention to stop an especially egregious harm. Hence, the free exercise of religion was guarded by the Supreme Court with the highest standard they imposed.[116] The religion had to be doing something awful, something so awful the government needed to stop it. The interest of the state or the federal government had to be "compelling" to stop the free exercise of religion.

By a purely bizarre coincidence, the "compelling state interest" requirement was removed as a test by the Supreme Court in a case related to American Indians.[117] In *Employment Division v. Smith*, the Supreme Court lowered the standard from "strict scrutiny" down to a "rational basis" test.[118] In short, Congress or a legislature merely had to demonstrate that it had a reasonable or rational basis to preclude a religious freedom right following the *Smith* case. That case dealt with the sacramental use of peyote.[119]

After *Smith*, several religious faiths converged on Capitol Hill to reinstate the "compelling state interest" standard.[120] Shortly after, Congress passed the Religious Freedom Restoration Act (RFRA),[121]

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that "such infringements [on the free exercise of religion] must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest").

115. *See Hershberger*, 462 N.W.2d at 398 (stating "[t]his court has long recognized that individual liberties under the state constitution may deserve greater protection than those under the broadly worded federal constitution").

116. *See* Nordlinger v. Hahn, 505 U.S. 1, 10, (1992) (stating that legislatures presumptively act within their constitutional authority, therefore, "unless . . . [the action] warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest").

117. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990).

118. *Id.* at 873 (stating "[t]he test is inapplicable to an across-the-board criminal prohibition on a particular form of conduct.").

119. *Id.* at 890.

120. Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410, 1411 (1998) (describing Congressional hearings following *Smith* as being inspired by "religionists").

121. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (1994)).

which changed the Supreme Court test back to the highest level, or "strict scrutiny," and once again the government—state or federal—must demonstrate a compelling interest in order to interfere with any religious freedom as opposed to simply a "rational" interest.[122]

The Act, however, ignored the peyote portion of the case, so tribes lobbied the Indian committees in the Senate and House to amend AIRFA so that the sacramental use of peyote would be once again allowed.[123] The Drug Enforcement Division of the Justice Department testified that the Native American Church—the primary entity utilizing the sacramental use of peyote—had been following the regulations promulgated by the Justice Department on its use for years.[124] The Justice Department noted that it has not had a problem with the Native American Church and their compliance with strict regulations regarding the sacramental use of peyote.[125] Ultimately, the peyote provision was added to AIRFA and became the one portion of the law with "teeth."[126]

The federal RFRA did not have the luck that the tribes had in amending AIRFA with a peyote provision. The U.S. Supreme Court later struck down RFRA as it applies to the states.[127] Thus it was up to the courts and laws of each state to determine whether a court needed to have a "compelling interest" or a "rational basis" for striking down a religious freedom law.

For Minnesota, the Amish *Hershberger* case provided the test, "compelling state interest" rather than "rational basis." After *Smith,* the Minnesota Supreme Court was required to take another look at *Hershberger*. However, the court stuck with the compelling interest test, which also conforms with the firm language of the Minnesota State Constitution when it comes to the state's protection of the free exercise of religion.

122. *Id.* § 3(b).

123. American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, § 2, 92 Stat. 469(1994) (codified as amended at 42 U.S.C. § 1996a (1994)).

124. H. REP. No. 103-675, at 4 (1994), https://coast.noaa.gov/data/Documents/OceanLawSearch/House%20Report%20No.%20103-675.pdf.

125. *Id.*

126. *See Nw. Indian Cemetery Protective Ass'n*, 485 U.S. at 439 (citing 124 CONG. REC. 21444–21445 (1978)).

127. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

At one point, attorneys for tribes contemplated taking the litigation route toward establishing the right to object to autopsies,[128] but ultimately opted for the legislative route as momentum had already built up. Later in the process, when a number of compromises were made, the tribal attorneys again reconsidered whether litigation would have been a better route because, as with all legislation, there must be bending and compromising.

V. THE LEGISLATIVE PROCESS

Senator Lourey's original bill took the purist approach in attempting to enact the *Hershberger* test into state law.[129] The bill would have created a cause of action, wherein, parties could object to autopsies based upon religious freedom principles. Representative Steve Green introduced a similar bill on the House side.[130]

In order to get the bill through the first hearing, the tribes had to accept three amendments from the Minnesota Department of Health.[131] These were broad statements as to what constituted a compelling state interest such as in cases of threats to public health and public safety, and in cases of children who died.[132] Medical examiners came in opposed to the bill and were joined by county attorneys and sheriffs of the state.[133] However, even over these

128. Conversation among authors, Tadd Johnson, counsel for family of Mushkooub Steve Aubid, Rebecca St. George, Staff Attorney, Fond du Lac Band of Lake Superior Chippewa, Emily Segar-Johnson, Office of the Chief Executive, Mille Lacs Band of Ojibwe Indians, and Gail Kulick, attorney, in St. Paul, Minnesota (Mar. 17, 2015).

129. Tom Olsen, *Family Seeks Autopsy Reform in Memory of Deceased Fond du Lac Women*, DULUTH NEWS TRIB. (Mar. 18, 2015), http://www.duluthnewstribune.com/news/politics/3710274-family-seeks-autopsy-reform-memory-deceased-fond-du-lac-woman.

130. H.F. 1935, 89th Leg., Reg. Sess. (Minn. 2015).

131. S.F. 1694, 89th Leg., Reg. Sess. (Minn. 2015); E-mail from Tadd M. Johnson, Dir. of Am. Indian Studies Dep't, Univ. Minn. Duluth, to Tribal Representatives, Mille Lacs Band of Ojibwe Indians (Mar. 17, 2015) (on file with author).

132. S.J., 89th Leg., Leg. Day No. 30, Reg. Sess., at 938–39 (Minn. Mar. 18, 2015), http://www.senate.leg.state.mn.us/journals/2015-2016/20150318030.pdf#page=24.

133. E-mail from Emily Segar-Johnson, Office of the Chief Exec., Mille Lacs Band of Ojibwe Indians, to Mark Rubin, St. Louis Cty. Att'y., (Feb. 27, 2015) (on

objections, the bill passed the first committee.[134] The tribes were advised to sit down with the medical examiners, and a meeting between medical examiners and tribal representatives on the legislation took place at the Hennepin County morgue.[135] At several meetings with medical examiners in this process, it became clear that calling the police was an extraordinary measure, and none of the other medical examiners in this process had ever done so. It also became clear that the medical examiners involved in the legislative process had never neglected to or refused to speak to the family of the deceased. All of the medical examiners said they would have followed a court order if one were presented to them.[136]

The bill authors and advocates were extremely straightforward and transparent about their intent from the very start, informing all stakeholders, especially those who had reason to oppose the bill, even before the initial drafting was completed. [137] Senator Lourey included all stakeholders at every meeting in order to address legitimate concerns.[138] The goal of finding compromise was necessary in order to make its final passage.[139]

Of all the amendments put in the first night, one was of key importance to both groups and both groups seemed to support it. It was a simple requirement that medical examiners talk to families.[140] While this point seemed obvious to the medical

file with author); *Our View: Legislation Not Needed for Autopsy Compromise*, DULUTH NEWS TRIB. (Mar. 23, 2015), http://www.duluthnewstribune.com/opinion/our-view/3706288-our-view-legislation-not-needed-autopsy-compromise.

134. S.J., 89th Leg., Leg. Day No. 30, Reg. Sess., at 939 (Minn. Mar. 18, 2015), http://www.senate.leg.state.mn.us/journals/2015-2016/20150318030 .pdf#page=24.

135. Tadd Johnson Aff., *supra* note 4, ¶ 6 (noting that a meeting between himself, the attorneys representing the tribes, and ME took place on March 17, 2015); Gail Kulick Aff. ¶ 3 Apr. 11, 2016 (on file with author).

136. Tadd Johnson Aff., *supra* note 4, ¶ 6; Gail Kulick Aff., *supra* note 135, ¶ 5.

137. *Testimony on H.F. 1935, Before Minn. H. Comm. Pub. Safety & Crime Prevention Policy & Fin.*, 89th Leg., at 1:44:08 (Mar. 26, 2015) [hereinafter Baker Testimony], http://ww2.house.leg.state.mn.us/audio/mp3ls89/pub032615.mp3 (statement of Andrew Baker, Minn. Chief Med. Exam'r Ass'n); *id.* at 1:46:05 (statement of Robert Small, Minn. Cty. Att'y Ass'n).

138. *Testimony on H.F. 1935, Before Minn. H. Comm. Pub. Safety & Crime Prevention Policy & Fin.*, 89th Leg., at 1:31:40 (Mar. 26, 2015), http://ww2.house .leg.state.mn.us/audio/mp3ls89/pub032615.mp3.

139. *Id.*

140. S.J., 89th Leg., Leg. Day No. 30, Reg. Sess., at 939 (Minn. Mar. 18, 2015), http://www.senate.leg.state.mn.us/journals/2015-2016/20150318030

examiners in the Twin Cities, it was clearly a provision needed in Northern Minnesota with medical examiners, sheriffs, and county attorneys dealing with the Native American communities.[141] This failure to communicate spurred all the events previously discussed and was a key reason the case law and legislative process were set in motion.

The following day, the medical examiners met with the tribal representatives.[142] The medical examiners provided a list of instances wherein they felt strongly that a compelling interest for autopsies existed. Many of these were from a list of protocols as prescribed by national medical examiner's best practices.[143] The list was sifted through slowly and methodically with the examiners explaining that unexplained drowning, electrocution, and a score of other specific tragic deaths merited a compelling interest and an autopsy. In the spirit of moving the legislation along, the tribes accepted most of the requested changes.[144]

The Indian tribes were not alone in their lobbying efforts. The Joint Religious Legislative Coalition, an association of several religious groups, joined the tribes in supporting and advocating for the bill.[145] At one point, an attorney for the Catholic Church testified in favor of the measure.[146] As the bill moved forward, through negotiations, the other groups continued to support the outcome.[147]

In further hearings, additional amendments would be made tinkering with language, but keeping the principle idea that an objection could still be made if a person made an objection to an

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141. Don Davis, *Families Would Gain Religious Right to Prevent Autopsies under Bill*, DULUTH NEWS TRIB. (Mar. 20, 2015), http://www.duluthnewstribune.com/news/3705048-families-would-gain-religious-right-prevent-autopsies-under-bill.

142. Baker Testimony, *supra* note 137.

143. NAT'L ASS'N MED. EXAMINERS, FORENSIC AUTOPSY PERFORMANCE STANDARDS, Sec. B, Standard B3, at 9 (Oct. 16, 2006), https://netforum.avectra.com/public/temp/ClientImages/NAME/56572359-cd17-42f9-9213-10cb190ec95f.pdf.

144. Tom Olsen, *Minnesota Legislature on the Cusp of Approving Autopsy Reform Bill*, DULUTH NEWS TRIB. (May 15, 2015), http://www.duluthnewstribune.com/news/3746182-minnesota-legislature-cusp-approving-autopsy-reform-bill.

145. Davis, *supra* note 141.

146. *2015 Legislative Session*, JOINT RELIGIOUS LEGISLATIVE COAL. (May 20, 2015), http://www.jrlc.org/2015-session-summary.

147. Davis, *supra* note at 141.

autopsy based upon a religious freedom belief.[148] If the state provided a compelling interest to conduct an autopsy, a state court judge could rule on the matter.[149]

What also came out at hearings surprised legislators and the members of the public who attended the proceedings.[150] In the Carlton County cases, involving Native American families, police were called in both instances. When asked if they would ever not follow a court order, the head of the Minnesota Medical Examiner's Association stated that he could not imagine a scenario under which he would not follow a court order.[151] In both instances in Carlton County, the medical examiner had refused to follow the court order until persuaded to do so by the county attorney.

When asked if they had ever not talked to a family, the medical examiners asserted that they always talked to families and viewed that as a key part of their job. In both cases in Carlton County, the medical examiner did not talk to the family. At many points, legislators expressed frustration because they were required to pass legislation largely because of the actions of one medical examiner in the Northern part of the state, i.e., Carlton County. However, the other religions weighed in with their religious freedom concerns.

Another interesting matter came out at these hearings as well as in a later newspaper. The medical examiner in Carlton County was paid by-the-body; the contract included a monthly stipend and a per body charge.[152] Thus, there was an implied financial incentive

148. MINN. STAT. § 390.11, subdiv. 2b(d) (2015).

149. *Id.* at subdiv. 2b(a)(1).

150. *Testimony on H.F. 1935, Before Minn. H. Comm. Pub. Safety & Crime Prevention Policy & Fin.*, 89th Leg., at 1:54:22, 1:57:45, 2:00:25, 2:00:45 (Mar. 26, 2015), http://ww2.house.leg.state.mn.us/audio/mp3ls89/pub032615.mp3.

151. In testimony, Dr. Baker, head of the Minnesota Medical Examiner's Association, said what had happened in the two cases out of Carlton County never needed to happen. He emphasized that there is always a way to ensure families know they are being heard and the deceased wishes are respected because there is likely common ground to be found. He also expressed in credulity at the idea of ignoring a judge's order. Baker Testimony, *supra* note 137; *Band Leading Charge for New Legislation on Autopsy Objections*, MILLE LACS BAND OF OJIBWE (Apr. 1, 2015), http://millelacsband.com/district_news/band-leading-charge-new-legislation-autopsy-objections/.

152. Agreement for Medical Examiner Services Jan. 1, 2012–Dec. 31, 2014, Ex. A, Carlton Cty (Jan. 2012) (on file with Carlton County); *see Duluth Medical Examiner Defends Motives in Conflicts over Autopsies,* ST. PAUL PIONEER PRESS (July 12, 2015), http://www.twincities.com/2015/07/12/duluth-medical-examiner-defends-motives-in-conflicts-over-autopsies/.

for each autopsy performed. In St. Louis County, which has a larger population, the same medical examiner's office was also paid-by-the-body and was compensated at $618,234 from that one County in one year.[153]

Of particular poignancy was the testimony of the widow of Mushkooub Aubid in which she expressed her feelings of powerlessness, injustice, and racial discrimination.[154] Many legislators were moved to tears in her testimony, and few objections were raised by legislators in subsequent committee hearings after her brave statement.[155]

VI. AFTERMATH

Governor Dayton signed the bill into law and later conducted a signing ceremony for tribal members.[156] St. Louis County did not renew its contract with the medical examiner,[157] but Carlton County did.[158] Interestingly enough, Carlton County is where the incidents that drove the legislative reform occurred.[159]

Although the tribal attorneys may have balked at the number of compromise measures which they had to accept to get the bill through the process, in the end, all the parties got what they wanted thanks to one tribal family's sacrifice—the night Mushkooub Aubid's body lay away from his family as they were

153. John Myers, *St. Louis County Medical Examiner to Resign,* DULUTH NEWS TRIB. (Mar. 10, 2015), http://www.duluthnewstribune.com/news/st-louis-county/3696300-st-louis-county-medical-examiner-resign. St. Louis County did not renew the medical examiners contract for ongoing medical examiner services. *Id.* It has since negotiated an agreement with a subsequent medical examiner for a flat $500,000 annual fee. *Id.*

154. LaPrairie Statement, *supra* note 8.

155. *Id.* In her statement, Winnie LaPrairie focused on the events surrounding the evening the Court Order was obtained to release her husband's body. She expressed her feelings of stunned disbelief, defeat, and injustice when the Medical Examiner refused to follow the Court Order.

156. MINN. STAT. § 390.11 subdiv. 2(b) (2015); S.F. 1694, 89th Leg., Reg. Sess. (Minn. 2015) (enacted).

157. Myers, *supra* note 153.

158. *Id.*; *but cf.* Jamie Lund, *County Board Moves To Hire New Medical Examiner*, PINE J. (Apr. 18, 2016), http://www.pinejournal.com/news/government/4009688-county-board-moves-hire-new-medical-examiner (noting that after these two extremely controversial decisions Carlton County has since "decided to 'opt out' of its contract with Dr. Thomas Uncini").

159. Lund, *supra* note 158.

forced to perform Midewiwin ceremonies in the parking lot of the morgue.[160] Now, everyone will get the opportunity to have their day in court when they have a sincerely held religious objection to an autopsy.[161] Judges will now perform the compelling interest balancing test as set forth in statutory and common law.[162] Medical examiners have specific instances regarding when there is a compelling state interest to conduct an autopsy built into the law.[163] Finally, people of all faiths in Minnesota, seeking the right to mourn and the right of the deceased to pass out of this world as they choose, can get in front of the judge and make their case for their religious freedom rights.

Possibly the most important aspect of this legislation has been understated and downplayed. That is to say, now in Minnesota, medical examiners must talk to families.[164] This simple act of kindness, courtesy, common sense, and "Minnesota niceness" was absent in the two cases involving Native American families in Northern Minnesota. This simple act needed to be legislated. In retrospect, had a kind word gone to the families in the winter of 2015, the law may not have been changed. Nevertheless, the vagueness in the law required clarification, and obviously the state officials needed a clear direction written into the law. As James Madison once said, "If all men were angels, government would not be necessary."[165] But clearly neither all men, nor all women, nor even all medical examiners, are angels.

160. Olsen, *Mille Lacs Band Members Protest Planned Autopsy, supra* note 24.
161. MINN. STAT. § 390.11, subdiv. 2(b) (2015).
162. *Id.* at subdiv. 2(g).
163. *Id.* at subdiv. 2(e).
164. *Id.* at subdiv. 2(b).
165. THE FEDERALIST NO. 51 (James Madison).

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