

AN EXAMINATION OF ARCHAEOLOGICAL ETHICS
AND THE REPATRIATION MOVEMENT RESPECTING
CULTURAL PROPERTY (PART ONE)

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Many social problems, ill feelings, misunderstandings and confusion are caused mainly because of the so-called scientific community, who come to our shores and pontificate on all the issues that they think are God-given and their understanding of mankind, and to my disappointment, their total ignorance of what has happened. – *Honorable Eni F.H. Faleomavaega, Committee Chair, Senate Select Committee on Indian Affairs*¹

Antiquity is a garden that belongs by natural right to those who cultivate and harvest its fruits. – *Captain de Verminac Saint-Maur, Commander of expedition that took Egyptian obelisk now in Paris*²

He removed statutes and ornaments from the city of the enemy which had been taken by force and valor, in accordance with the law of war and the right of a commander. – *Marcus Tullius Cicero, Roman statesman and orator (106-43 B.C.)*³

All seizure or destruction of, or willful damage to . . . works of art and science, is forbidden, and should be made the subject of legal proceedings. – *1907 Hague Convention*⁴

INTRODUCTION

A. *The Strange Pleasures of Archaeology*

Throughout the Cairo Museum there is an extraordinary range of artifacts from all periods of Egyptian antiquity. Yet feelings of ambivalence permeate a visit there. In a room on the upper floor of the museum, there is a unique morgue open to paying visitors. Here in the Mummy Room, as in a crowded triage of a war zone, lie the bandaged remains of nineteen Pharaohs and five of their Queens. Ramses II, a look of contentment embalmed on his face, sleeps regally as if he had died last week. In fact he was a contemporary of Moses, and his reign began before the fall of Troy. In the Mummy Room, people gawk at dead bodies. Outside the Mummy Room and down the hall is the stunning display of the funerary objects unearthed from King Tutankhamen's tomb in the 1920s. One cannot help but feel a strange sense of shame while marveling at their beauty: these objects were never intended to see

¹ Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs, 101st Cong. 60 (1990), at 135.

² Donald Malcolm Reid, *Whose Pharaohs? 1* (2002) (quoting de Verminac, *Voyage De Luxor* (1835)).

³ Hugo Grotius, II *THE LAW OF WAR AND PEACE* 550 (Francis W. Kelsey, trans., 1925) (1625).

⁴ Convention Respecting the Laws and Customs of War on Land (1907 Hague Convention IV), Oct. 18, 1907, Annex, 36 Stat. 2277, T.S. No. 539, 1 BEVANS 631.

the light of day. They were buried with a dead king, intended to remain there with him forever. One can visit the tombs of all the pharaohs buried in the Valley of Kings near Luxor, even that of Tutankhamen. The tombs are all empty because they have been excavated by archaeologists in modern times and were looted of artifacts in ancient times.

These and other objects are relegated to cramped, dusty quarters in a 100-year-old building with poor lighting and often no labeling or indication of provenance. The Egyptian collection of the British Museum stands in stark contrast to that of the Cairo Museum. The Egyptian collection in Britain, though not nearly as large, is impeccably displayed and curated. There are ready-at-hand narratives at every turn. Lighting, temperature — everything — is state of the art. Still, as this Article discusses, one has the awareness that many of these items were looted as war trophies in Napoleon's occupation of Egypt or collected by subsequent looting and smuggling on the black market.

Jeremy Bentham suggested that corpses, including his own, can be of use to society stuffed and displayed as "auto-icons" rather than buried in graves.⁵ Corpses, he said, can serve "moral, political, honorific, dehonorable, money-saving, money getting, commemorative, genealogical, architectural, theatrical, and phrenological" purposes.⁶ Emboldened by this utilitarian notion, I wondered if the trustees of Mount Vernon might unearth George Washington's body and study it. What was the cause of death? What was his diet like? Were there any broken bones? Was he buried with his dentures? What funerary artifacts were entombed with him? Surely a properly curated display of his body and funerary artifacts would draw many curiosity seekers to Mount Vernon and boost the rate of tourism. Why not disinter the elegant tomb of Mary, Queen of Scots, at Westminster Abbey, study the human remains, make some findings, and then put them on display? Was she buried with her head attached to her body after being beheaded by Queen Elizabeth? What is the condition of the funerary shroud? Wouldn't it be fascinating to examine the body of Queen Elizabeth I as well? Was she really a virgin? Could we collect a DNA sample and compare it to the remains of Sir Francis Bacon to finally resolve the mystery of whether she was, in fact, his mother? In the future, we might even clone her. Would the new Elizabeth lay claim to the throne?

The fact is that if these sites were investigated by archaeologists, if artifacts were taken for study from these sites, or if the dead bodies or funerary artifacts were put on public display, many would find this an

⁵ See HARVEY RACHLIN, *Lucy's Bones, Sacred Stones, and Einstein's Brain: The Remarkable Stories Behind The Great Objects and Artifacts of History, From Antiquity to the Modern Era*, 203-04 (1996).

⁶ *Id.* at 205 (quoting Jeremy Bentham).

intolerable violation of a people's cultural heritage, not to mention a violation of the expectations of the dead. However, many archaeologists have few qualms about digging up ancient graves, even those identified rather than unmarked. These abuses have in part spawned the repatriation movement, which this Article explores.

There have been efforts for some time, many of which were initiated by archaeologists, to transform the field. Certain archaeologists have long recognized that when they excavate the remains of ancient graves, there will likely be struggles with local indigenous groups that want the remains returned and scientists who want to study the remains and then perhaps conserve them for future generations in a museum. The ability to recognize the validity of these competing interests is essential to the success of any effort at reconciliation. Cultural groups understandably object to archaeological excavations in the first instance and demand and expect to engage in consultations beforehand. Scientists want to study the material and glean as much knowledge as possible from it. There are also market-driven interests which, although ethically indefensible, are nevertheless powerful and entrenched in the archaeological world. Given these realities, one is faced with a glaring and stark question: is reconciliation possible?

B. What Archaeology Is and Why It Is Important

Why should people today, living in what seems a golden age of scientific and technological advancement, care about archaeological ethics? Why should one be concerned with the treatment of antiquities or with the lifestyles of ancient peoples? Why do we need or want to know about the past? In what ways does archaeological knowledge about past cultures have intrinsic value? How do we balance the fact that the collection and preservation of artifacts serves substantial public interests with the reality that this very process robs communities, cultures and nations of their heritage — of their very sense of self?

First of all, "there seems to be a deep-seated human need to know about our predecessors and an innate curiosity about the past. It has been said that those who do not know or understand the past are doomed to repeat the mistakes of the past."⁷ Archaeology deals with such issues as locating, excavating and dating sites and their contents, as well as interpreting material culture. Archaeologists want to explain and describe developments in the lives of the people who produced and used excavated materials; in doing so, archaeologists seek to reconstruct past cultural, social and economic systems on a firm evidentiary basis. From the evidence they compile, archaeologists deepen and extend our under-

⁷ Charles R. McGimsey III, *The Value of Archaeology*, in *ETHICS AND VALUES IN ARCHAEOLOGY* 172 (Ernestene L. Green, ed. 1984).

standing of humanity. Archaeological discoveries enable us to gain some appreciation of the ways in which past humans lived. Through archaeology, we learn about types of social organization that flourished, settlement preferences, and economic orientations. Archaeologists want to understand how changes occurred, how humans developed agricultural subsistence patterns after being hunter-gatherers, and what contributed to the growth and subsequent decline of some of the great population centers. With modern scientific techniques, such as MRI scans and DNA analysis, it is possible to examine human remains in greater detail and learn a good deal more about past cultures than ever before.

The central concern of archaeology is that of understanding the past through material remains. Archaeology deals, in the simplest terms, with two classes of evidence: (1) artifacts (i.e., items made by human beings that can be taken back to the lab) together with features, or elements that normally are studied in the field; and (2) locations of artifacts and features, in the ground or in an underwater excavation site. These two classes of evidence — artifacts/features and locations — are the “stuff” that makes up archaeology. There are many questions about human behavior, interrelationships, and adaptations that we cannot answer without studying how past cultures lived. By examining the past, we increase the social scientist’s perspective to encompass thousands of years of human experience. This information cannot but aid social scientists to better understand the nature and direction of current and future human activity. Valid projections of future trends are dependent, in part, on information derived from study of the past. Archaeology is a meticulous, painstaking science. Only careful analysis of objects can lead to fruitful evidence about how past cultures lived. This requires the laborious and surgical excavation of a site, close attention to the exact context in which objects are found, examination of objects whenever possible *in situ*, laboratory decoding of materials, scholarly publication of findings, and curation of the objects or storage for future study. However, even when conducted with great care, archaeology may violate the beliefs and existence — the basic rights — of cultural, political and other descendant or related groups.

C. *Who Owns the Past?*

Ethics consists of standards applicable to members of a particular trade or professional group — for example, lawyers, doctors, scientists, parents, teachers, coaches, judges, or public officials — “by virtue of the special expertise, authority, powers, and responsibilities that characterize their status or role in society.”⁸ One of the central issues in modern ar-

⁸ Alison Wylie, *On Ethics*, in *ETHICAL ISSUES IN ARCHAEOLOGY* 3, 5. An ethical code contrasts with a moral code in that the latter “consists of a society’s most general

chaeology is the question: who owns the past? This question carries with it the notion that with any ancient site there are various stakeholders apart from the archaeologists. There are dealers, collectors and museums that wish to acquire artifacts. There are looters and smugglers who, in their own ways, consider themselves stakeholders. There are groups that have cultural links to archaeological sites and cultural property excavated from sites. And there are governments that have enacted laws to nationalize archaeological resources, prevent their exportation, and limit private ownership of excavated materials. One of the principal ethical dilemmas in archaeology is how to respond to the disparate concerns of those whose ancestors are buried in archaeological sites, those who object to excavations on religious, cultural, group identity, or other grounds, and those who wish to buy or sell archaeological materials.

When archaeologists excavated the Valley of Kings in the nineteenth century, the notion of archaeological ethics was just starting to emerge, with concern directed to the harm occasioned by the unscientific excavation of sites.⁹ The marketing of antiquities was not a question. Excavation of sites was clearly a commercial endeavor in which dealers and collectors competed to hire Egyptian laborers and enlist the support of various officials to help them recover artifacts for personal use or sale.¹⁰ In the first decades of the nineteenth century, many important archaeological monuments were unprofessionally removed from sites and shipped to museums and private collectors in Europe.¹¹

This Article explores archaeological ethics as applied to excavations on land and underwater. There are entirely different considerations associated with marine archaeology that make it difficult to apply land-based archaeological ethics in any rigid manner. Another principal concern in this Article is what has come to be called the repatriation movement respecting cultural property. What is this movement? How did the repatriation movement get started? Where is the repatriation movement headed? What has already been accomplished? What sorts of objects are susceptible to a claim of repatriation? What sorts of groups should be entitled to make claims of repatriation? To whom would the restitution of objects be made? The modern repatriation movement is exemplified by the Native American Graves Protection and Repatriation Act

standards . . . standards [that] apply to all people in society regardless of their professional or institutional roles." D.B. RESNICK, *THE ETHICS OF SCIENCE: AN INTRODUCTION* 15 (1998).

⁹ See Mark Lynott, *The Development of Ethics in Archaeology*, in *ETHICAL ISSUES IN ARCHAEOLOGY*, *supra* note 8, at 17.

¹⁰ See generally PETER FRANCE, *THE RAPE OF EGYPT: HOW THE EUROPEANS STRIPPED EGYPT OF ITS HERITAGE* 27-57 (1991).

¹¹ For example, Giovanni Battista Belzoni became well known as a plunderer of tombs and temples of ancient Egypt. See LYNOTT, *supra* note 9, at 18.

(NAGPRA),¹² which seeks to correct the unethical practices of the past by mandating repatriation of various archaeological materials and human remains to present-day claimants.

The property involved in claims of repatriation is what we call “cultural property.” For example, the Elgin Marbles, which were removed to Britain from the Parthenon under dubious circumstances in the 18th Century, are considered to be cultural property of the Greek people. The Greek national identity, cultural heritage, and group identity, are bound up in the objects themselves. The Statue of Liberty would be an example of an object of cultural property for the American people. Its loss, its destruction, its dismantling and carting off to foreign soil, or its exploitation would surely cause intolerable pain to Americans, pain that could only be remedied by the return of the property. This Article explores various features of cultural property, including the communal nature of these items, suggesting that they are inalienable from the groups to whom they were dedicated. What type of group might legitimately make a claim for repatriation of cultural property that had been looted or clandestinely excavated from its homeland in the distant past? What sorts of criteria go into evaluating whether a group has a shared cultural identity with an antecedent group? This Article explores these issues in detail. What is it about dead bodies and funerary artifacts that makes them important enough to supposedly justify excavating human remains? What is the legal status of human corpses in the ground? What is the legal status of funerary artifacts in the ground? What are the moral arguments against the excavation of human remains? This Article explores these concerns as well. In recent years, archaeological societies throughout the world have formulated codes of ethics that provide guidance to archaeologists in various degrees of specificity. This paper will also examine the strengths and weaknesses of these codes.

During the French Revolution, Napoleon’s army plundered a good deal of archaeological relics, particularly in Egypt. This occurred at a time when fundamental principles of the law of war were undergoing a paradigm shift. What is the status of these looted artifacts today? Were the objects seized during Napoleon’s occupation of Egypt pursuant to some plausible theory of a just war that allowed for the seizure of war booty? What was the law of war with respect to war booty? Did the seizure of “trophies of war” ever gain currency in the law of nations? Is it possible that Egypt could make a legitimate case today for repatriation of Napoleon’s plunder? These questions will be addressed in the second half of this article, to be published in the fall. One additional question is how the law of war developed following the French Revolution with re-

¹² Native American Graves Protection Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-13 (2004).

spect to the protection of cultural property from the ravages of war? Part Two of the Article traces the development of this subject to modern times, during which protections have been clearly codified in various international conventions.

The repatriation movement is also concerned that governments throughout the world have enacted laws that nationalize archaeological resources so that artifacts are deemed owned by the state, even before they are discovered or excavated. These laws prevent private individuals from openly marketing archaeological resources but also have the side effect of fueling the black market in looted artifacts, since the appetite of collectors and museums for antiquities is high, and there are plenty of subsistence looters in source nations. Underwater archaeology, which has become something of a glamorous enticement to investors, has developed state of the art technology to explore unprecedented depths and recover artifacts from ancient shipwrecks. As the commercialization of salvage operations has escalated, so has the enactment of regulations. To some extent, archaeological ethics has been dictated by the codification of laws that, in effect, mandate ethical norms, which are enforceable by the political and judicial arms of government. Part Two explores the scope of criminal prosecution for illegal trade in antiquities, civil remedies for aggrieved nations, and proposed solutions.

D. The Emergence of Archaeological Ethics

This Article is about the emergence of ethical standards and dispute resolution mechanisms in modern archaeology. The physical objects at issue represent the entire spectrum of cultures throughout history — shipwrecks to projectile points to human remains — and everything in between. These materials are commonly referred to as archaeological. The work of archaeology, however, encompasses several disciplines, each searching for and studying the remains of humanity in the academic or governmental or private context. Numerous other stakeholders also have an intense interest in these materials: descendant or related cultural groups, particular polities from the areas where materials are found, antiquities traders and marketers, even shipwreck salvage operators.

While it is difficult to cluster these often divergent and seemingly irreconcilable interests, some cataloguing is helpful. On a very basic level, the interests fit loosely into three categories: archaeological (scientific/academic), cultural (descendant/political), and economic (trade/marketing). Again, it is impossible to over-state the fractiousness that exists among and between the various groups and individuals that make up this corpus of interests. However, this Article attempts to articulate certain points of compromise — or at least of the initiation of compromise. Certain disputes are more intractable than others. The study of human re-

mains violates the interests of the dead and perhaps their descendants as well as related cultural groups. The emerging requirements for demonstrating valid cultural affiliation with ancient burials (as in the case of the Kennewick Man, section VIII *infra*), in order to establish a legally protected interest in the remains, is an equally harmful procedural reality imposed on cultural groups by the modern practice of archaeology. In an attempt to sketch the broad outlines of these tensions, this Article examines the values, methods, goals and ethics of archaeology as an academic discipline, and the competing interests and associated legal frameworks deployed by other stakeholders. If it is important to protect the remains and the interests of cultural groups as well as to advance the body of human knowledge and understanding gleaned through the scientific study of the past, then it is essential that we better understand the tensions and interrelationships that exist between the interests outlined in this paper.

Part One of this two-part paper explores archaeology proper by examining several areas of study. First, the Article considers the particular circumstances surrounding underwater archaeology: the study of shipwrecks. Second, the paper addresses the importance of cultural property and cultural groups — acknowledging, defining and supporting them and analyzing the manner in which material items are intertwined with the maintenance and integrity of a cultural group's identity. A complete discussion of cultural property requires a discussion of the special status of human remains. The third part of this first half of the Article considers the incredible complexities surrounding the study of human remains. There are emerging frameworks for determining legally defensible claims to the deceased where archaeologists and indigenous groups both claim an interest.

This Article relies on material and examples from across time and the globe to trace the broad outlines of the fractious realities of archaeology and attempt to frame certain starting points for reconciliation. While Part One of the paper lays out the claims of the basic interests, Part Two of the paper, to be published herein next fall, examines these issues in greater detail and within the context of the emerging international legal context. Part Two explores the range of measures for enforcing protection of antiquities, including remedies available to aggrieved parties. All of the competing interests and methodologies illustrate the need for careful scrutiny and comparison of the ethical frameworks that the international community puts in place for protecting and managing the remains of our ancestors.

I. THE ARCHAEOLOGICAL TROIKA: THREE PRINCIPLES OF ARCHAEOLOGICAL ETHICS

There are three overriding principles of archaeological ethics. First, archaeological sites should be professionally excavated and preserved as much as possible *in situ*, and if removed, excavated materials should be carefully conserved for future study.¹³ Second, recovered artifacts should not be sold.¹⁴ Third, relevant groups such as biological descendants should be consulted before excavating dead bodies, funerary objects, or ceremonial or sacred objects. Some archaeologists may be more extreme or inflexible in their views of these principles than others.¹⁵

A. *The Importance of Leaving Archaeological Materials "In Situ"*

The work of archaeology involves investigation of nonrenewable cultural resources. Original excavators can and do cause irreparable damage. However, if properly conducted and documented, the work of archaeology increases scientific and cultural knowledge about the human species. One of archaeology's basic principles is known as "superposition," allowing archaeologists to infer temporal arrangements of archaeological materials on the basis of their spatial arrangements. The nature of the evidence is crucial. Thus, archaeologists seek to study artifacts in their specific contexts in the ground in order to learn facts about past cultures. Data must be recovered and recorded in an appropriate manner by knowledgeable and discerning individuals. When cultural objects are removed from sites of origin, their archaeological integrity is tainted, and knowledge may be lost. When evidence is tainted, archaeological investigations resemble fanciful reconstructions more than scientific explanations.

Ideally, archaeological objects should be examined and studied *in situ* and remain where they were found for good. At one extreme of protectionism, some archaeologists object to removal of artifacts for study in the laboratory, even after a careful excavation of a site has occurred. In practice, however, archaeologists rarely end up leaving artifacts *in situ* but usually remove them to laboratories where they may remain in storage for many years or put them on display in museums.

Many archaeologists believe that it is better to leave objects and sites undiscovered and unexcavated rather than have them improperly

¹³ See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U.L. REV. 559, 564 (1995).

¹⁴ See Neil Brodie, *Introduction* to ILLICIT ANTIQUITIES 1, 5 (Neil Brodie & Kathryn Walker Tubb eds., 2002).

¹⁵ See Theresa A. Singleton & Charles E. Orser, Jr., *Descendant Communities: Linking People in the Present to the Past*, in ETHICAL ISSUES IN ARCHAEOLOGY, *supra* note 8 at 144-52.

excavated. Improper excavation can result in potentially valuable information being lost forever.¹⁶ For example, removal of a stela, a large sculptured stone column, does damage not only to the temple's structure but often additionally to the stela itself. Both the temple and the stela have suffered a loss of integrity and each has less archaeological value separated than as a unit. From this point of view, sites should be available for research and display but the entire assemblage should remain *in situ*.

[I]t is clear that excavation is often not in the best interests of most artifacts unless the environment in which they have been buried and with which they have reached equilibrium becomes threatened by development; anything from deep ploughing to road construction or chemical contamination through exposure to fertilizers. The stable conditions which enabled an object to survive burial for thousands of years are virtually impossible to provide out of a sealed context. The level of care needed to maintain preservation is high and must be accorded in perpetuity from generation to generation if an artifact is to survive. . . . Often the heirs [of private collections] have not shared an interest in the material which has languished neglected and been subjected to dispersal.¹⁷

To archaeologists, the value of an archaeological find has a gestalt quality. That is, the whole (the artifacts *in situ*) is greater than the sum of its parts (the artifacts separated from one another). On the other hand, since archaeologists are often specialized, they sometimes prefer to categorize objects at a site and parcel them out for different study projects. For archaeologists that specialize in identifying ancient foodstuffs, a pot might become the "whole" context, not the site itself, and its contents will be the principal concern. In that case, it will be necessary to extract materials from the pot and subject them to laboratory analysis, a job that cannot be done *in situ*. And it is often not possible to keep other objects *in situ* and also conduct a proper archaeological examination of them. For example, to the extent that archaeologists insist on examining mummies, these objects need to be scrutinized by technology such as SRI scans, carbon dating, and possibly DNA analysis, in a laboratory.

David Stuart of Harvard's Peabody Museum of Archaeology and Ethnology has said with regard to archaeological context that "[s]o-called dirt archaeologists do things like survey sites and study settlement patterns and ceramic chronology; they tend to see objects taken out of

¹⁶ See GERSTENBLITH, *supra* note 13.

¹⁷ Katherine Walker Tubb, *Thoughts in Response to the Draft Principles to Govern a Licit International Traffic in Cultural Property*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 241, 242 (John Henry Merryman ed. 2000).

context as useless. They're not aware of the intrinsic usefulness of visual material because they haven't been trained that way. They are different subcultures in the discipline, and that's where a lot of intellectual debate comes in."¹⁸ Ian Graham, Director of Harvard's Maya Corpus Program, presents a similar view: "However much I despise the trade in pottery and stelae, from the decipherment point of view, there's an enormous value to be got from a text, even if you have no idea where it comes from."¹⁹

B. Artifacts Should Not Be Sold

The commercial marketing of archaeological artifacts is ethically contentious. At first blush, this would hardly seem to be an ethical concern. After all, we live in an era of free trade, indeed, global free trade, and the sale of art and artifacts is a thriving international business, with details of each season's sales given extensive publicity in the worldwide media. However, archaeologists are nearly unanimous in their objection to the commercial marketing of archaeological artifacts and materials. Indeed, as noted above, some archaeologists take the extreme position that objects should never be removed from sites, not even for the purpose of putting them into museum collections. The Principles of Ethics in Archaeology of the Society for American Archaeology states: "The buying and selling of objects from archaeological contexts contributes to the destruction of the archaeological record. . . . Commercialization of these objects results in their unscientific removal from sites, destroying contextual information."²⁰ It seems that the principal objection by archaeologists to the sale of archaeological materials is that this contributes to the destruction or damage of archaeological sites. Those who are strict advocates of leaving archaeological materials *in situ* are also opposed to the donation of objects to museums. It is not likely, however, that this extreme position will ever garner significant public support.

Some archaeologists are principally interested in the conservation of antiquities for academic inquiry, regardless of who owns them. As one prominent archaeologist eloquently put it:

Frankly, my major concern has never been with who owns or possesses an archaeological object, where the object resides, or, for that matter, whether an object was traded licitly or illicitly. My real concern is with the information, which, for archaeological objects derives from their original context.²¹

¹⁸ See John Dorfman, *Getting Their Hands Dirty? Archaeologists and the Looting Trade*, 8 LINGUAFRANCA 28, 32 (1998).

¹⁹ See *id.* at 36.

²⁰ Reprinted in THINKING ABOUT THE ELGIN MARBLES, *supra* note 17, at 280.

²¹ *Id.* at 237.

International collectors and dealers typically believe that antiquities are something akin to the oceans — a common heritage that should be freely circulated throughout the world for all to enjoy as they will.²² And archaeologists' insistence that materials not be sold to collectors tends to fuel the international black market for looted or clandestinely excavated antiquities, as discussed in Part Two, to be published in the fall.

It seems to me that a balance can — and must — be struck. Archaeologists, for the most part, are not extremists, and merely wish to have objects properly excavated, studied initially *in situ*, and preserved at least for a reasonable period of time, perhaps decades, so that they and their colleagues can return with new questions and new techniques and thereby gain more knowledge of past cultures from these materials.

C. *The Special Problems of Funerary Artifacts and Sacred Objects*

Archaeology often involves working with cultural material in and to which other people have rights, interests and duties. Tombs and dead bodies present some of the most sensitive issues. Archaeologists tend to be obsessed with dead bodies. By excavating dead bodies, archaeologists can discover things that we might not otherwise know about the societies and times in which the person lived. But tombs were never intended to be rummaged through and taken apart, much less opened for the public to enter. Should the archaeologist's need for information outweigh the sanctity of ancient burial sites? Should ancient human remains be treated as "specimens" and "cultural resources" for scientific study and public display? Most, if not all, archaeological sites have a descendant community that has interests which may be at odds with those of archaeology. Are the practices of archaeologists important enough to outweigh society's interest in avoiding the desecration of gravesites that can cause spiritual trauma to cultural descendants? Is it acceptable that ancient human remains, funerary artifacts and ceremonial objects are treated as common property and traded in the marketplace? This Article delves into these issues, first turning to their application in the field of underwater archaeology, and then examining them in the larger context of land based archaeology.

²² See J.H. Merryman, *Illicit International Trade in Cultural Objects*, in LEGAL ASPECTS OF INTERNATIONAL TRADE IN ART, 3-46 (M. Briat & J.A. Freedberg, eds., 1996).

II. UNDERWATER ARCHAEOLOGY

A. *Underwater Archaeology Contrasted With Land-Based Archaeology*

The “troika” of archaeological concerns — examining materials *in situ*, objections to marketing of artifacts, and the special ethical issues pertaining to the treatment of human remains — are brought into sharp focus in a unique way in the field of underwater archaeology. In the context of salvage operations, these “troika” principles are difficult to apply in any rigid manner. As will be shown in this section, underwater archaeology differs substantially from land based archaeology in several respects. First, there are difficulties inherent in the excavation process that make it almost impossible to properly examine underwater sites *in situ*. Second, there are substantial costs associated with shipwreck archaeology. This is compounded by inevitable legal costs in litigating competing claims among commercial salvagers, owners of shipwrecks, governments, insurance underwriters and heirs of persons who perished in shipwrecks. In order to fund shipwreck salvage operations, private investors are needed, and there is the inescapable push by investors to make a profit by selling recovered artifacts. Third, there are usually no dead bodies or funerary artifacts recovered in the salvaging of ancient shipwrecks, but some people nonetheless claim that these sites are “underwater graves” and should not be disturbed.²³

Archaeologists take great interest in shipwrecks. Underwater sites are unique because, unlike land sites, they have generally not been touched or disturbed by human beings, and remain completely protected, resulting in “untouched storehouses of historical data.”²⁴ The lack of oxygen helps prevent deterioration of shipwrecks.²⁵ The excavation of historic shipwrecks provides special insight to the cultures of the past because a facet of life from a former time period has been completely preserved while submerged in the depths. Moreover, ships and their cargo are very complex artifacts. Ships contain in their construction important details that reveal information about large scale technical production skills of the past.

To the general public, underwater archaeology is fascinating because it is associated with the idea of treasure-hunting and its characteristic free-wheeling spirit of capitalism. Treasure-salvaging of deep-water shipwrecks is a relatively recent phenomenon. It was not until 1985, with the recovery of gold and porcelain from the wreck of the Dutch vessel

²³ Ole Varmer, *Non-Salvor Interests: The Case Against the “Salvage” of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 293 (1999).

²⁴ *Oceanograph Miscellaneous, Part I: Hearings before the Subcomm. on Oceanography, House Merchant Marine and Fisheries Comm.*, 99th Cong. 76 (1985).

²⁵ VARMER, *supra* note 23, at 280.

Geldermalson and gold and silver bullion from the wreck of the Spanish galleon *Nuestra Señora de Atocha*, both lying just outside territorial waters of the United States, that treasures were retrieved by searching the international seabed. Also in 1985, salvagers discovered the *Titanic* in 12,000 feet of water, and in 1987, a remotely operated submersible was instrumental in recovering \$1 million worth of gold bars from the wreck of the *Central America*, which had sunk in 1857 in 2,400 meters of water 420 kilometers off the coast of South Carolina.²⁶

B. *Legal Hurdles to Marine Archaeology*

A good starting point for understanding the complexities associated with the excavation of shipwrecks is an examination of the legal hurdles associated with such endeavors. Generally, the law governing the recovery of objects found in submerged water is a species of admiralty law involving the law of salvage and the law of finds.²⁷ Either the law of salvage or the law of finds will apply, depending on whether the owner of the ship intended to abandon it or not.²⁸ The law of salvage and the law of finds date back to at least the time of Hammurabi, and were established to provide incentives to salvage operators by offering compensation for their services. By sharing the spoils of salvage, both ship owners and salvagers profited.

Anyone who wishes to make a claim to a shipwreck and associated artifacts must file an *in rem* proceeding in a court having admiralty jurisdiction in the matter. This proceeding is necessary to establish rights the plaintiff may seek to perfect in a claim to the shipwreck and its artifacts. If the United States is the proper forum, action should be brought in the federal courts, which have traditionally determined the disposition of shipwrecks and associated objects.²⁹ A crucial threshold issue is whether

²⁶ See BRODIE, *supra* note 14, at 5.

²⁷ See *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed To Be the SB "Lady Elgin,"* 746 F.Supp. 1334, 1345 (N.D. Ill. 1990) (stating "the law of finds and the law of salvage are significant elements of traditional maritime law"), *rev'd on other grounds*, 941 F.2d 525 (7th Cir. 1991). Many shipwrecks are found in international waters and may be subject to international treaties and conventions regarding their disposition. For an analysis of international law concerning salvaging operations of shipwrecks, see Sara Dromgoole & Nicholas Gaskell, *Who Has a Right to Historic Wrecks and Wreckage?*, 2 INT'L J. CULTURAL PROP. 217 (1993).

²⁸ See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (rejecting application of law of finds and utilizing law of salvage because owner was determined not to abandon shipwreck), *cert denied*, 113 U.S. 1625 (1993).

²⁹ *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 566 (5th Cir. 1981) ("Claims arising out of salvage operations — efforts to rescue or recover ships disabled or abandoned at sea or to retrieve their cargo — are, unquestionably, within the admiralty jurisdiction of the federal courts.").

the ship owner has abandoned the ship and its contents, in which case the law of finds will apply.³⁰ Otherwise, the law of salvage will apply.³¹ The two bodies of law afford entirely different approaches to the disposition of shipwrecks and their cargo.

1. The Law of Finds

The preferred situation in commercial excavation operations is for the shipwreck to be adjudicated as abandoned, so that the law of finds will apply. A finding that a ship has been abandoned entitles the finder to gain full title to the booty, subject to other rights such as those of insurers of the cargo. The plaintiff in the *in rem* proceeding has the burden of proving that the ship has been abandoned, that is, that the owner has relinquished legal possession and title.³² If the shipwreck and cargo have in fact been abandoned, the first finder who lawfully establishes possession with the intention of acquiring ownership rights generally is entitled to gain title to the shipwreck.³³ If a ship is not abandoned, then under international law it cannot be salvaged without permission from the owner, which may often be a government entity. Many shipwrecks, particularly warships, galleons and government owned ships are deemed under maritime law to not be abandoned unless there is an express abandonment by the owners.

The plaintiff must, in the first instance, introduce evidence to prove possession of the shipwreck. This can be by way of actual or constructive possession of the shipwreck. This is a difficult task, and merely declaring a discovery is not sufficient.³⁴ Constructive possession may be shown where a finder is actively and ably engaged in efforts to reduce the wreck

³⁰ See *Columbus-America Discovery Group*, 974 F.2d at 461 (“Finds law is applied to previously owned sunken property only when that property has been abandoned by its previous owner.”).

³¹ *Id.* at 464 (“[W]hen sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds.”).

³² *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (questioning soundness of trying to prove intent of long-deceased owners and stating “[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.”).

³³ *Martha’s Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065-67 (1st Cir. 1987) (awarding primary claim to “the first finder lawfully to appropriate the abandoned artifacts, take dominion over them, and return them to land with aim of acquiring ownership rights”).

³⁴ See *Treasure Salvors*, 640 F.2d at 573 (noting mere discovery not enough to establish ownership because this “would provide little encouragement to the discoverer to pursue the often strenuous task of actually retrieving the property and returning it to a socially useful purposes and yet would bar others from attempting to do so”).

to possession. This is not always easy to show.³⁵ The doctrine of constructive possession requires that any temporary absence from the wreck site be consistent with the finder's attempt to reduce the property to actual possession, such as leaving the site in order to acquire necessary equipment.³⁶ However, if constructive or actual possession is established, the court will grant legal rights to the finder to complete recovery of the shipwreck.³⁷

Assuming possession of the shipwreck can be established, the finder must produce evidence that the owner has abandoned the ship. Abandonment can be shown in one of two ways: with proof of the express intent of the owner to abandon by a clear, affirmative act, such as explicit renunciation of title;³⁸ or by implied abandonment, with proof that the owner has failed to reclaim the ship or recovered objects or by inference of renunciation adduced from all surrounding circumstances.³⁹ Unless there is an explicit abandonment, proving implied abandonment is an inherently imprecise matter. The mere passage of time is not sufficient to establish implied abandonment. One cannot infer legal abandonment merely because the crew and passengers long ago vacated the site, or because the cargo of a shipwreck has been dispersed over an extended region.⁴⁰ Abandonment consists of more than the simple desertion of a ship. The mere lapse of time and nonuse of a ship are often insufficient to establish that abandonment has occurred.⁴¹ One case described implied abandonment this way: "By not taking any action after a wreck

³⁵ See Barlow Burke, Jr., *A Reprise of the Case of Eads v. Brazelton*, 44 ARK. L. REV. 425, 432-035 (1991) (discussing problems with establishing constructive possession of abandoned wreck and concluding possession requires intent and action).

³⁶ See *Rickard v. Pringle*, 293 F.Supp. 981, 984 (E.D.N.Y. 1968) (awarding original finder exclusive right to propeller of steamship because finder's departure from salvage site was for purpose of acquiring certain equipment necessary for salvage).

³⁷ *Treasure Salvors*, 640 F.2d at 572.

³⁸ See, e.g., *Nunley v. MV Dauntless Colocotronis*, 863 F.2d 1190, 1198 (5th Cir. 1989) (finding abandonment where owner of vessel had not searched for vessel for three years, called his insurance company, and declared ship a total loss); *Nippon Shosen Kaisha, K.K. v. United States*, 238 F.Supp. 55, 57-58 (N.D. Cal. 1964) (finding abandonment where owner and insurance company declared intent to abandon in correspondence); *Florida ex rel. Ervin v. Massachusetts Co.*, 95 So. 2d 902, 903 (Fla. 1957) (finding sunken battleship Massachusetts was abandoned based on evidence of telegram in which United States announced it had abandoned ship), *cert. denied*, 355 U.S. 881 (1957).

³⁹ *Columbus-America Discovery Group*, 974 F.2d at 461.

⁴⁰ *City of Birmingham v. Wood*, 54 F. 197, 200 (4th Cir. 1893) (addressing ship called "The Akaba" and holding: "When articles are lost at sea the title of the owner in them remains, even if they be found floating on the surface or cast upon shore.").

⁴¹ *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F.Supp. 452, 456 (E.D. Va. 1960) (stating that lapse of time and nonuse are by themselves insufficient to constitute abandonment, though they may be evidence tending to show abandonment).

incident either to mark and subsequently remove the wrecked vessel and its cargo or to provide legal notice of abandonment . . . an owner shows intent to give up title.”⁴² On the other hand, there is often little means of “marking” the site of a shipwreck, and the site may only be known approximately. Relinquishment of a ship to its insurer by the acceptance of the monetary value of the ship can be evidence of abandonment, although there remains a separate question of whether the insurer, as successor in interest, has relinquished ownership rights.⁴³ In a recent California case, the court held that even though an insurance company had paid a claim on a shipwreck and its cargo and had not undertaken any salvage efforts in more than 100 years since the ship sank, this was insufficient to establish that the vessel was legally abandoned because prior to modern improvements in sonar technology, salvage efforts would have had only minimal chance of success.⁴⁴

2. The Law of Salvage

If the court determines that a shipwreck has not been abandoned, the claimant will be considered a rescuer rather than a finder, and the law of salvage applies. This is a much less desirable situation for the claimant as there are many uncertainties associated with the status of a salvager. The salvage operator will be allowed a maritime lien against the salvaged property to ensure appropriate compensation⁴⁵ but will not have any claim superior to that of the owner.⁴⁶ If the owner files an objection to the salvager’s rescue of the ship, the court will not authorize the salvage operator to proceed with further operations, and the court

⁴² Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50116, 50120 (Dec. 4, 1990).

⁴³ See Mary Ann Becker, *Regulating the Business of Culture: The Abandoned Shipwreck Act — Can Preservationists, Salvors, and Divers Sail in Calmer Waters?*, 51 DEPAUL L. REV. 569, 609 (2001).

⁴⁴ See *Deep Sea Research, Inc. v. Brother Jonathan*, 883 F. Supp. 1323 (N.D. Cal. 1995), *aff’d* 89 F.3d 680, *amended and superseded on denial of rehearing*, 102 F.3d 379, *cert. granted*, 520 U.S. 1263, *stay denied*, 521 U.S. 1131, *aff’d in part, vacated in part*, 523 U.S. 491, *on remand* 143 F.3d 1299.

⁴⁵ See *Cobb Coin Co. v. Unidentified, Wrecked, and Abandoned Sailing Vessel*, 525 F.Supp. 186, 207 (S.D. Fla. 1981) (“Under traditional salvage rules, the salvor receives a lien against the salvaged property.”).

⁴⁶ See, e.g., *Hener*, 525 F.Supp. at 356 (“Salvage law specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of property (e.g., vessels, equipment, and cargo) for the purpose of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid.”).

may not even award costs associated with the operations theretofore undertaken.⁴⁷

If the owner files no objection to the salvage proceeding, the salvage operator must still show three elements to become entitled to a claim of salvage: (1) the existence of a maritime peril; (2) that the service offered is not required as an existing duty or pursuant to a special contract; and (3) that success has been achieved in whole or in part, and such success was a result of the salvagers efforts.⁴⁸ Courts liberally construe the question of whether maritime peril exists; this element will invariably be found to apply to shipwrecks that have sat safely at the bottom of the sea for hundreds of years.⁴⁹ The second element is usually satisfied unless the salvage operator is a member of the ship's crew or is under some other duty to save the ship.⁵⁰ The third element poses the greatest hurdle in that a salvage operator who has expended significant time and money towards a recovery operation may end up getting no compensation unless it can be shown that the project was successful, in whole or in part, on account of the salvage operator's efforts.⁵¹

If these elements are proven, the court will determine what reward the salvager is entitled to receive. The courts are not inclined to allow a reward *in specie* even though that is what commercial salvagers may prefer.⁵² Rather, monetary rewards are usually granted, the amount of which depends on many factors, including the labor expended in the service, the speed, skill and energy displayed in the operations, the danger incurred, the value of the property recovered, and other factors.⁵³ Because of the uncertainties and the high stakes of the law of salvage, commercial operators seeking to recover artifacts from shipwrecks invariably

⁴⁷ *Platoro Ltd. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 (5th Cir. 1983) (stating that "[a] salvage award may be denied if the salvor forces its services on a vessel despite rejection of them by a person with authority over the vessel.").

⁴⁸ *The Sabine*, 101 U.S. 384 (1879).

⁴⁹ See *Platoro*, 695 F.2d at n. 9 (deeming ship sealed under layer of sand to be in maritime peril because it was uncertain whether sand would provide adequate protection from "the various perils of the Gulf of Mexico"), *cert. denied*, 464 U.S. 818 (1983).

⁵⁰ See, e.g., *Danielson v. Libby, McNeill & Libby*, 195 P. 37, 38 (Wash. 1921) (rejecting claim by crew members for salvage award because "by their contract [they] engaged for the stipulated wages to render such services as were necessary in the ship's behalf").

⁵¹ See *Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, No. CIV.A.87-363-N, 1993 WLL 580990, at *11 (E.D. Va. Nov. 18, 1993) ("[V]olunteer salvors are to a great degree gamblers. They may incur substantial expenses and great risk of danger generally in hope of a substantial reward, but unless successful, there is no reward.").

⁵² See *Platoro*, 695 F.2d at 903-04 (noting that salvage awards are almost never in specie).

⁵³ *The Blackwall*, 77 U.S. 1, 13-14 (1869).

turn their attention to wrecks that are abandoned and which therefore fall under the law of finds.

3. The Abandoned Shipwreck Act (ASA)

A significant further legal complication may arise if the shipwreck happens to be embedded in government-owned submerged land. Many nations, including the United States, have complicated laws that regulate the exploration of underwater sites and declare abandoned shipwrecks in territorial waters escheat to the government. And courts invariably award these abandoned shipwrecks to the government.⁵⁴ In addition, some nations prohibit the sale of any artifact taken from its waters.⁵⁵

In the United States, the law of finds and the law of salvage have largely been superseded by the Abandoned Shipwreck Act of 1987.⁵⁶ The Act was designed to encourage the preservation of shipwrecks of historical and archaeological value, and to encourage the cooperation among various parties for the purpose of cultural resource management and salvage efforts.⁵⁷ Congress intended for the ASA to protect the cultural resources of the sea from the growing numbers of people gaining access to shipwrecks.⁵⁸ The Act declares that title to abandoned and embedded shipwrecks within the "submerged lands" of the various states vests with the United States.⁵⁹ In turn, the Act transfers title directly to the states in whose waters the wrecks are located. If a court determines that a ship was not abandoned, the ASA leaves it to the court to determine the proper claimant to title based on extant maritime law.⁶⁰ Each state administers its own law to regulate the private sector's access to abandoned shipwrecks in the submerged waters of the state. The practical result is that no one can legally explore or remove objects from abandoned shipwrecks without permission from the appropriate state agency.⁶¹

⁵⁴ See Klein, 758 F.2d at 1514 (awarding title to United States because ship was embedded in its land); *Chance*, 606 F.Supp. at 807 (granting title to state of Georgia to vessel partially embedded in Ogeechee River).

⁵⁵ See George F. Bass, *The Ethics of Shipwreck Archaeology*, in *ETHICAL ISSUES IN ARCHAEOLOGY*, *supra* note 8, at 61 (referring to law of Portugal).

⁵⁶ Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106 (1987).

⁵⁷ See 43 U.S.C. § 2104 (charging Secretary of Interior, through Director of National Park Service, with development of guidelines to achieve these goals).

⁵⁸ See BECKER, *supra* note 43, at 570.

⁵⁹ 43 U.S.C. § 2105(a). "Submerged lands" are deemed "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line" of each state. 43 U.S.C. §§ 2102(f)(1), 1301(a).

⁶⁰ See BECKER, *supra* note 43, at 570.

⁶¹ See GERSTENBLITH, *supra* note 13, at 620.

States take various positions regarding the granting of permits to explore or excavate sunken archaeological resources. Some states allow permits only if the exploration is in the best interest of the people of the state.⁶² Generally, state agencies will require commercial salvagers to submit a proposal for the protection and preservation of the sites and the materials removed, and to meet certain professional requirements in marine archaeology, as well as other criteria to insure that the team will conduct salvage operations properly.⁶³ Some statutes provide for either a division of the finds or some other method of compensating the finder for the value of recovered artifacts.⁶⁴

A special act of Congress makes the *Titanic*, well-preserved at 12,000 feet under the cold, oxygen-poor waters of the North Atlantic, off limits to further exploration or salvage activities. The R.M.S. Titanic Maritime Memorial Act of 1985⁶⁵ designates the site an international maritime memorial to the people who perished on her maiden voyage, after the ship struck an iceberg on April 14, 1912. The Act also seeks to garner international protection of the site. The Act directs the Administrator of the National Oceanic and Atmospheric Administration (NOAA) to develop international guidelines, in consultation with the United Kingdom, France, Canada and other interested nations, for research, exploration and possible salvage of the *Titanic*.⁶⁶ The Act expresses the "sense of" Congress that no one should physically alter, disturb or salvage the ship in any research or exploratory activities.⁶⁷

To archaeologists, these underwater artifact assemblages pose tremendous ethical issues. But the issues are of a different dimension and scope than the ethical issues pertaining to land archaeology. The following section analyzes the "troika" principles mentioned above with respect to underwater archaeology.

C. *Why Land-Based Archaeological Ethics Do Not Apply to Marine Archaeology*

1. The "In Situ" Dilemma

The concern over the professional manner of excavation of sites and documenting of information, and preference for *in situ* study of materials, while straightforward in land based archaeology, is difficult or impossible to apply in underwater archaeology. Archaeologists much prefer to study artifacts in the environment where they are found because remov-

⁶² See *id.* at 621.

⁶³ *Id.*

⁶⁴ See *id.* at 622.

⁶⁵ R.M.S. Titanic Maritime Memorial Act of 1985, 16 U.S.C. §§ 450rr-450rr-6.

⁶⁶ 16 U.S.C. § 450rr-3

⁶⁷ 16 U.S.C. § 450rr(b)(4).

ing artifacts results in a large loss of information.⁶⁸ It is just like a detective's job at a crime scene — only by carefully studying the positioning of objects can archaeologists develop theories about what happened. Once objects are moved, the true story of what happened is lost. But because shipwrecks are found in seabeds located at substantial depths, it is generally not technically possible, at best extremely dangerous, to examine artifacts *in situ* or to spend the sort of painstaking amount of time unearthing sites as archaeologists strive to achieve on land. Thus, excavation of underwater sites is inherently more destructive than land-based archaeology.⁶⁹ Even if done carefully, an excavation of a shipwreck changes the site forever and destroys the opportunity for collecting future materials. Archaeologists often complain that commercial salvage operators do not use archaeologically sensitive methods⁷⁰ and that this results in damage or destruction to historic shipwrecks and artifacts.⁷¹ Archaeologists are also leery of working with commercial salvage operations because of a perception that salvagers often renege on promises to do archaeological work in a scientifically and ethically sound manner.⁷² Commercial salvagers argue that it is impossible to conduct painstaking land-style archaeology recovery because divers cannot stay underwater very long and in many cases the sites are too deep to approach except by robotic controls.⁷³

There are matters to attend to immediately after the recovery of artifacts. With the exception of gold and gems, everything taken from underwater demands instant treatment to prevent disintegration.⁷⁴ Ceramics, metals, glass, ivory, bone, and other organic remains including wood must be desalinated to prevent later decay. In addition, most arti-

⁶⁸ See VARMER, *supra* note 23, at 287.

⁶⁹ See D.K. Abbas, *A Marine Archaeologist Looks at Treasure Salvage*, 30 J. MAR. L. & COM. 261, 261 (1999).

⁷⁰ See VARMER, *supra* note 23, at 295 (discussing cost-effective methods of commercial salvagers that compromise scientific, cultural, and historic value of shipwrecks); see also *Chance v. Certain Artifacts Found and Salvaged from the Nashville*, 606 F. Supp. 801, 809 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) (denying plaintiffs salvage award because they failed to conserve recovered artifacts; in fact, plaintiffs stored some items in their backyards, exposing artifacts to the elements).

⁷¹ Lawrence J. Kahn, Comment, *Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds*, 7 TUL. ENVTL. L.J. 595, 612-15 (1994) (detailing examples of lack of archaeological care on part of salvagers). For example, in the commercial salvage of the DeBraak, a Dutch cutter that sank in the Delaware River in 1798, the wreck was virtually destroyed when the salvagers raised the vessel, causing the loss of innumerable artifacts that fell from the wreck. *Id.* at 614. The salvagers of the DeBraak severely damaged "one of the most important underwater archaeological sites in the United States." *Id.*

⁷² See William J. Broad, *Salvagers Say a Shipwreck Trove Is Worth Millions*, N.Y. TIMES, Nov. 30, 2003, at A20.

⁷³ See *id.*

⁷⁴ *Id.*

facts require the mechanical removal of hard and often thick layers of calcium carbonate (“concretions”) that build up on objects in the sea. Many items require subsequent chemical treatment.⁷⁵ The recovery of artifacts from marine sites can reveal much about the past even if removed from the assemblage. And photography of artifacts as they appear *in situ* can help aid archaeological study. The argument of some archaeologists that underwater sites should be left untouched as *in situ* museums is, it seems to me, an “extreme form of preservation.”⁷⁶

Archaeologists typically need many years of year-round conservation before they can catalog and interpret all the finds of a major shipwreck.⁷⁷ There need to be more and better incentives to persuade commercial salvage operators to spend money and time on extensive conservation work. This has been achieved in several cases. For example, salvagers have cooperated with the conservation of King Henry VII’s sixteenth-century ship, *Mary Rose*, recovered at Portsmouth, England, in an expected 20-year effort, and the conservation of the *Bremen Cog* in Germany, which took about twenty years.⁷⁸ Five years of conservation were required after the recovery of a ship that sank around 300 B.C. off Kyrenia, Cyprus.⁷⁹ Conservation of twenty tons of Bronze Age artifacts raised from the Uluburun shipwreck — including objects of pottery, tin, copper, bronze, silver, glass, ivory, and bone — is taking decades.⁸⁰

2. The Commercial Aspects of Underwater Archaeology

Archaeologists seem to particularly object to the commercial marketing of underwater artifacts. Yet limiting the marketing of underwater archaeological materials would effectively put an end to shipwreck excavations, which require substantial private investor funds. Private investors expect returns. Salvage operators and investors need to be able to recoup their costs, and allowing archaeologists to conduct research for extended periods of time further increases costs. The potential for a significant financial reward is what fuels many of the efforts to salvage historic shipwrecks. This is the very thing that disturbs many archaeologists.⁸¹ But as one commentator has observed, “without private treasure hunters the sea will retain its ill-gotten bounty and the secrets of

⁷⁵ See BASS, *supra* note 55, at 66.

⁷⁶ Sean R. Nicholson, *Comment, Mutiny as to the Bounty: International Law’s Failing Preservation Efforts Regarding Shipwrecks and Their Artifacts Located in International Waters*, 66 UMKC L. REV. 135, 140 (1997).

⁷⁷ See BASS, *supra* note 55, at 60.

⁷⁸ See *id.* at 66.

⁷⁹ See *id.*

⁸⁰ *Id.*

⁸¹ Brendan I. Koerner, *The Race for Riches: Under the Sea, Treasure Hunters and Scientists Battle for History’s Bounty*, U.S. NEWS & WORLD REP., Oct. 4, 1999, at 44,

the ages past.”⁸² Unless “privateers” are allowed to proceed with salvage projects, no one else will, since archaeologists simply do not have the funds for such projects.

Archaeologists from a variety of backgrounds are critical of colleagues who work with commercial salvage operators in the excavation of shipwrecks because of concern that collections resulting from the excavations will be sold or dispersed to benefit investors in the venture.⁸³ Only a small minority of archaeologists are willing to work in the employ of treasure salvagers.⁸⁴ Virtually every archaeological association in the United States with published ethical guidelines has condemned professional archaeological involvement in treasure-hunting operations. The professional reputations of those few archaeologists who do work for salvagers for any length of time appear to suffer.⁸⁵

Gradually, an unspoken attitude has come to prevail that scientific archaeology and treasure salvage are simply incompatible, with totally different methods and objectives. This may be viewed either as a natural maturation of two divergent types of endeavor, or as polarized perspectives of either side of the same coin. It is perhaps indicative that salvage operations have begun to use scientific and archaeological terminology in their investment prospectuses and discussions with the media, but rarely publish even cursory descriptions of their wrecks in the popular or professional literature.⁸⁶

There are substantial legal hurdles to be overcome in laying claim to an underwater shipwreck, as discussed above, and these legal expenses entail substantial costs above and beyond the salvage operations. Salvage operators often work under financial pressure from investors to raise their sea booty as quickly and as efficiently as possible, with scientific information being a low priority. They will likely leave the vast majority of the concretions and wooden scraps at the site because they might not be monetarily valuable, while such items are precious to archaeologists trying to reconstruct the past. Why archaeologists should object to the selling of artifacts, once they have been studied, is not entirely clear. It seems that archaeologists feel that the pressure from commercial salvage operators to market artifacts creates a lack of due regard

47 (“Stories of wrecks mauled and artifacts destroyed [by salvors in their search for treasures] are legion in archaeological circles.”).

⁸² NICHOLSON, *supra* note 76, at 138.

⁸³ See, e.g., KOERNER, *supra* note 81, at 49 (“As soon as you start talking about selling objects, you enter the commercialization of the past . . . and that’s something that won’t be acceptable to archaeologists.”).

⁸⁴ See Paul Forsythe Johnston, *Treasure Salvage, Archaeological Ethics and Maritime Museums*, 22 INT’L J. NAUTICAL ARCHAEOLOGY 53, 53 (1993).

⁸⁵ See *id.* at 59.

⁸⁶ *Id.*

for the full historical and cultural record that objects and their original context can provide.⁸⁷ In addition, archaeologists object to marketing of artifacts because this removes the artifacts from a venue in which they can continue to be studied. Many think that there is professional jealousy on the part of archaeologists, who are unable to garner the kind of financial backing that commercial salvage operators are able to muster and are thus left to assert an “opportunity preservation,” which is no more than a “maneuver . . . to limit access to and competition over an item.”⁸⁸

Commercial salvagers justify the commercialization of underwater archaeology on several grounds. First, they claim that many shipwreck sites would remain completely unknown but for their efforts.⁸⁹ In some instances, they save shipwrecks from destruction by storms or other natural forces. Second, excavation of shipwrecks requires substantial and specialized skill, and it is a strenuous task to actually retrieve the property.⁹⁰ Third, commercial salvagers go to great expense hiring, outfitting and maintaining vessels with compressors, generators, underwater cameras, robotic submarines, recompression chambers, and sets of scuba gear.⁹¹ Only through sales of artifacts can the funds needed for underwater salvage be raised.

3. Shipwrecks As Underwater Cemeteries

The third issue involves the idea that shipwrecks are cemeteries. The concern is that shipwrecks ought not be salvaged at all because they are the burial grounds of human beings who died in the wrecks. Salvaging of shipwrecks “disturbs the final resting places of those who lost their lives in a shipwreck disaster.”⁹² Other stakeholders will often object to a commercial salvage operation based on this concern. For example, Spain, in challenging an *in rem* action by a commercial salvage firm to two historic galleons, argued that the shipwreck sites of the *Juno* and the *La Galga*, in which hundreds of lives were lost, were “military gravesites,

⁸⁷ See KAREN D. VITELLI, An Archaeologists Response to the Draft Principles to Govern a Licit International Traffic in Cultural Property, in THINKING ABOUT THE ELGIN MARBLES, *supra* note 17, at 238.

⁸⁸ Sabrina L. McLaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLA J.L. & ARTS 149, 189-92 (1995) (discussing conflicting views between salvagers and archaeologists, including both ethical and legal implications).

⁸⁹ See BASS, *supra* note 55, at 66.

⁹⁰ See *id.*

⁹¹ *Id.*

⁹² Ole Varmer, *Non-Salvor Interests: The Case Against the “Salvage” of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 293 (1999) (stating many deem salvage operations to be disrespectful and tantamount to grave robbing).

and anything that [was to be] done with them must respect those sensitivities.”⁹³

I would argue that shipwrecks are hardly cemeteries in the ordinary sense. A cemetery is the intended place of repose for the dead at a site selected by the deceased or representatives who carry out the wishes of family members. Those who perish in a shipwreck do not select the bottom of the sea as a repository for their human remains, but are unwittingly relegated to the site. Those who perish in shipwrecks do not “choose” their burial ground but are left there to the underwater elements. And by the time a salvage operation of an old shipwreck occurs, the bodies invariably will have been absorbed by the elements. The policy behind the ASA is to regard abandoned shipwrecks as “resources.”⁹⁴ The word “resources” is significant as it is inconsistent with a regard for such sites as cemeteries.⁹⁵ To treat shipwrecks as underwater cemeteries would be an “extreme form of preservation”⁹⁶ that would all but immobilize the archaeological quest for information contained in these sites.

Surely shipwreck sites in which there may be human remains need to be treated with dignity and respect. An example of how this can work was with the recovery of the *H.L. Hunley*, a Confederate submarine known to contain the remains of soldiers.⁹⁷ Upon recovery, the remains of the crew were studied by a forensic team and plans were made to rebury them in a military ceremony.⁹⁸ There is a bit of hypocrisy in archaeologists’ objections to underwater commercial salvage operations on the grounds that these sites are graves, especially in light of the alacrity with which archaeologists have excavated graves on land — graves voluntarily designated as such by people. Underwater graves are, as it

⁹³ KOERNER, *supra* note 81, at 50; *see* *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 692 (4th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001), (noting Spain’s argument that ship named “The *Juno*” should be designated grave site).

⁹⁴ *See* *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to Be the “Seabird,”* 941 F.2d 525, 529 (7th Cir. 1991) (discussing legislative history of ASA — specifically statements of its sponsor, Senator Bill Bradley, on “historical value of shipwrecks”). The ASA defines *shipwreck* as “a vessel or wreck, its cargo, and other contents.” 43 U.S.C. § 2102(d) (2004).

⁹⁵ *See* Anne M. Cottrell, *Comment, The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 *FORDHAM INT’L L.J.* 667, 667 (1994) (referring to shipwrecks as resources that should not be jeopardized). Webster’s defines “resources” as “available means (as of a country or business)[;] computable wealth (as in money, property, products)[; or] immediate and possible sources of revenue.” *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY* 1934 (1993).

⁹⁶ NICHOLSON, *supra* note 76, at 140.

⁹⁷ *See* Friends of the Hunley, official site, available at <http://www.hunley.org> (last visited Apr. 4, 2004).

⁹⁸ *See id.*

were, involuntary. Another example involved the human remains of "Dead Bob," discovered aboard *La Belle*, a 17th Century French shipwreck in the Gulf of Mexico. These remains were thoroughly examined by archaeologists and then given a "very honorable burial" in a steel container placed in a vault.⁹⁹ Before reburial, archaeologists used lasers and CT scans to compose a computer-generated face based on the structure of Dead Bob's skull. The skull was photographed and displayed. Efforts were made to extract DNA from his remains (unsuccessfully) to see if he was linked with ancestors in France. (The skeletal remains themselves had become the subject to a dispute as to who owns them.) A treaty enacted with France cedes ownership of the artifacts on the wreck as well as the remains of Dead Bob, to France.¹⁰⁰

D. Suggestions for Reconciling the Interests of Archaeologists and Salvagers

Modern salvage operations would be inconceivable without the aid of commercial investors. It thus seems essential that archaeologists and commercial salvagers work together in ways that are mutually acceptable so that scientific and commercial concerns can be respected. Compromise on both sides is required. Archaeologists can negotiate conditions with salvage operators that will enable them to work together successfully on a wreck site. Certain protocols can help fend off archaeological objections and help garner respectability and legitimacy in the field of underwater archaeology.¹⁰¹ This could help avoid negative publicity resulting from salvage operations and make it easier for salvagers to exhibit recovered artifacts with otherwise skeptical museums, as well as facilitate the marketing of artifacts from the wreck.¹⁰²

I would suggest some of the following conditions. First, salvage operations should retain qualified archaeologists who would have complete authority and control over the proper field recording and recovery of artifacts; the archaeologists must take into account the different protocols occasioned by the underwater terrain. There has emerged in recent years a legal standard enunciated in some court cases and referred to as

⁹⁹ See Scott Gold, *The End of a 300-Year Journey*, L.A. TIMES, Feb. 3, 2004, at A1.

¹⁰⁰ See *id.* at A10.

¹⁰¹ See McLAUGHLIN, *supra* note 88, at 189-90 (noting that even though many marine archaeologists have distanced themselves from commercial salvagers, archaeologists nonetheless recognize adeptness that salvagers demonstrate in recovery operations).

¹⁰² The Council of American Maritime Museums prohibits the exhibition of artifacts removed from commercial salvage sites. See McLAUGHLIN, *supra* note 88, at 191.

the “Archaeological Duty of Care” (ADC).¹⁰³ Under this principle, salvage operators are required to use archaeologically sensitive salvage methods in order to preserve and protect historic shipwrecks and artifacts.¹⁰⁴ The principle was expressed in *Marex International, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*,¹⁰⁵ in which the court said that the ADC may be imposed on finders and salvagers operating on “shipwrecks of historic or archaeological significance.”¹⁰⁶ The court said that finders and salvagers must “document to the court’s satisfaction the shipwreck’s archaeological ‘provenance data’ . . . by mapping or recording the location, depth and proximity of each artifact recovered in relation to the other artifacts.”¹⁰⁷ That means divers should be trained in archaeological methods of mapping, and that they should employ careful excavating techniques and conserve recovered artifacts in a laboratory, as well as hire experts to aid in evaluating and conserving the recovered artifacts.¹⁰⁸ A similar duty of care was set forth in *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*,¹⁰⁹ but in this case the court expanded the duty to ensure that salvage operators would adhere to these principles from the outset of their efforts, not just after they have won an *in rem* claim.

Second, salvagers must provide assurances that they are committed to completing the project rather than abandoning the ship after recovering the most desirable artifacts or after determining that perhaps, after all, the associated artifacts are of little monetary value. Archaeologists need to know that the salvor will be committed to the proper research and publication of the site. This commitment needs to be backed up by an adequate budget to conserve and recover materials, and signed acknowledgements from investors indicating they agree that the project should be completed.¹¹⁰

¹⁰³ See *Marex International, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 829 (S.D. Ga. 1997) (stating that courts can impose ADC on salvagers operating on wrecks of historic or archaeological value).

¹⁰⁴ See, e.g., *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (finding that salvage operator efforts to protect shipwreck’s historical and archaeological material is factor to weigh in determining salvage reward).

¹⁰⁵ *Marex International*, 952 F. Supp.

¹⁰⁶ *Id.* at 829.

¹⁰⁷ *Id.*

¹⁰⁸ See *id.* at 829 (noting how plaintiff salvager demonstrated due diligence by applying archaeological preservation measures).

¹⁰⁹ *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982).

¹¹⁰ This happened in Delaware with the wreck of the eighteenth-century British warship, *De Braak*, and in Massachusetts with the *General Arnold*, a Revolutionary-era ship. Salvagers abandoned the operations, leaving ownership of the wrecks to the respective states, which have been forced to manage these resources without dedicated funding or staffing commitments. See JOHNSTON, *supra* note 84, at 57.

Third, with regards to commercial exploitation of the find, commercial salvagers need to be mindful of the general archaeological desire for assemblages to be preserved intact, and for there to be a plan to make artifacts available to public and professional audiences. This entails endowing the collection with sufficient funding to ensure long-term survival. Investors may be persuaded to agree to establish a museum, although this may initially be unattractive to those who are interested in a quick turnaround on their money. Investors may be reluctant to commit capital to long-term ventures of this type when they can seek out salvage operators who offer the potential of more robust profits with the finding and commercial sale of "treasures." But investors can profit by creating museums, which can generate profits through traditional revenue sources (admissions, retail sales, restaurants). Replicas of various artifacts can be sold at the shop of the museum and via the Internet. All major museums, many cathedrals and many World Heritage sites have gift shops where one can purchase replicas of artifacts. This can be a lucrative source of revenue. A current example of this is Odyssey Marine Exploration of Tampa, Florida, a commercial salvage operator that is a public company that sells stock and hopes to make a profit by setting up shipwreck museums and selling coins.¹¹¹ The company believes that there should be no ethical problem in selling gold and silver coins retrieved from shipwrecks to help finance recoveries because such items have less archaeological value than cultural items such as ship parts and navigational gear.¹¹²

Fourth, salvagers should provide assurances that they will comply with the emerging ethical guidelines in their business. Salvagers have formed trade organizations that impose certain ethical guidelines upon members with respect to the treatment of shipwrecks, artifacts and the environment.¹¹³ The Professional Shipwreck Explorers Association (ProSEA) is an organization of salvage operators that has enacted a Code of Ethics¹¹⁴ which is a comprehensive framework for conducting professional excavations of historic shipwrecks. The ProSEA Code is to a commendable document. The Code requires its members to: (1) conduct themselves in a manner that respects all stakeholders in the shipwrecks, including archaeologists, divers, museums, and historians, among others; (2) establish and maintain professional standards while research-

¹¹¹ See William J. Broad, *Salvagers Say a Shipwreck Is Worth Millions*, N.Y. TIMES, Nov. 30, 2003, at A20.

¹¹² See *id.*

¹¹³ See KOERNER, *supra* note 81, at 49.

¹¹⁴ See THE PROFESSIONAL SHIPWRECK EXPLORERS ASSOCIATION, CODE OF ETHICS (1999), available at <http://www.prosea.org/about/codeethics.html> (last visited Apr. 17, 2004) (stating that association's members should work in harmony with archaeological community).

ing, excavating, or salvaging shipwrecks; (3) conduct operations in a way that recovers as much provenance data from the site as possible, and to provide public access to the data; (4) use the most current and accurate technology in salvaging shipwrecks; (5) employ a professional archaeologist, who will have reasonable control over excavation, documentation, and conservation of artifacts; (6) plan for the conservation and disposition of artifacts before they are recovered; (7) leave artifacts on site unless funds exist for their conservation, cataloging, and storage; (8) sell only those artifacts that have been made available to the scientific community for study; and (9) keep together in one collection all artifacts that are of irreplaceable archaeological value if they cannot be documented or replicated in a manner that allows for reasonable future study, or, in the alternative, disburse them only in a manner that allows them to be reconstituted for future study.¹¹⁵

Archaeologists may still not be satisfied with this code because it allows for the sale of recovered artifacts, which, as mentioned, is something many archaeologists simply view as contrary to their ethics and interests.¹¹⁶ Thus, Archaeologists may refuse to work with commercial operations unless they make a binding commitment that no commercial marketing of artifacts will occur.¹¹⁷ Apart from the marketing concern, some archaeological extremists might still object that salvaging of any shipwreck destroys archaeological information so that the project is doomed from the start. This form of archaeological extremism is unfortunate. Only with an experienced team of professional underwater archaeologists working with commercial salvagers can one expect to be able to recover the wealth of information that an important shipwreck offers.

Marine archaeology inherently requires tradeoffs and flexibility. Some sites may be best explored by work in saturation rather than a lift in operation, in which case at least some of the members of the recovery team need to be capable of deep saturation diving. An accurate excavation requires a long and costly mobilization of facilities specifically adapted to deep diving. The mobilization of a single saturation diving ship costs about \$60,000 per day, to which must be added costs of gas and on-site operation costs. In other cases a shipwreck can be transported to more shallow waters, where underwater archaeologists can systematically excavate it in an easier way, but moving a shipwreck to a lesser depth is a

¹¹⁵ See *id.*

¹¹⁶ See KOERNER, *supra* note 81, at 46, 49 (reporting that archaeologists will not compromise with salvagers because they are opposed to commercializing the past by selling recovered artifacts).

¹¹⁷ See McLAUGHLIN, *supra* note 88, at 190 (noting that archaeologists tend to shun colleagues who work with commercial salvage operators).

costly and difficult matter.¹¹⁸ The advantage is that once a shipwreck is in more accessible waters, the costs of exploration are reduced from that point on, and scientific results are more likely to be ensured.

Marine archaeology has become a cooperative endeavor with various state governments, partly due to the ASA. All 50 states now include underwater resources in their state historic plans, and there are 579 sites listed as underwater parks.¹¹⁹ For example, Florida has developed a shipwreck preservation program, which encourages state, county and local officials, organizations and individuals to work together to protect and interpret Florida's maritime history. The state has five underwater archaeological preserve sites that offer a unique opportunity for divers to experience history firsthand in a natural setting. The sites consist of the SS *Copenhagen*, a British steamship that ran aground and sank off Pompano Beach in 1900, the *Urca de Lima*, a Spanish galleon off Ft. Pierce, the *San Pedro*, another galleon near Islamorada, the *City of Hawkinsville*, a sunken steamboat in the Suwannee River, and the USS *Massachusetts*, one of the oldest American battleships at Pensacola. These shipwrecks have been turned into state preserves so that the sites can be more accessible and better interpreted, with signs, underwater maps, mooring systems and land-based exhibits. They have even published waterproof color field guides to help divers conduct self-guided underwater tours, and provided additional buoys to facilitate boat moorings and to protect the sites from anchor damage. None of these sites would have been accessible without the dedication of commercial salvagers, who have helped to foster a preservation ethic and, at the same time, have shared in revenue derived from programming, exhibits and publications.¹²⁰

III. IDENTIFYING STAKEHOLDERS: CULTURAL PROPERTY AND CULTURAL GROUPS

A. *The Relevance of Cultural Property and Associated Group Rights*

As noted in the discussion above regarding underwater archaeology, there can be numerous stakeholders with respect to a single shipwreck. The same can be said with land-based archaeology. This section of the

¹¹⁸ The process involves digging a deep trench around the hull, provided that can be done without disturbing the integrity of the site. One might use efficient industrial equipment to remove the soil. Once this has been done, it is necessary to dig several tunnels underneath the wreck which are wide enough for straps to support the wreck. Then the wreck can be temporarily lifted and placed into a cradle, then moved to an accessible depth.

¹¹⁹ See Anne G. Giesecke, *The Abandoned Shipwreck Act Through the Eyes of its Drafter*, 30 J. MAR. L. & COM. 167, 168 (1999).

¹²⁰ See Fla. Div. of Hist. Resources, *Florida Underwater Archaeological Preserves*, available at <http://www.dhr.dos.state.fl.us/bar/uap> (last visited May 1, 2004).

Article focuses on a newly emergent set of stakeholders: indigenous and other groups with cultural linkages to a heritage that is the subject of archaeological examination. These groups may object to archaeological investigations because of concern that they will disturb ancient burial sites. They may object to the humiliating public display of dead bodies or, worse, the sale of these human remains. They may wish to have these remains repatriated if they have been excavated. A further objection is that the recovery of certain artifacts and their attendant study, display and marketing, usurps an important part of cultural heritage. In examining these issues, I will first explore the concept of "cultural property," and then relate this to group rights in connection with cultural property.

Let us approach the idea of cultural property from two main perspectives, *a priori* and *a posteriori*. The first involves archaeological ethical considerations before excavation of sites occurs. Archaeologists are driven to excavate dead bodies and objects of cultural property from out of scientific curiosity, to examine, study, write about, display, and preserve them, while cultural groups may seek to prevent such excavation in order to preserve their heritage out of respect for their past and as a totem representing their very identity. These groups may regard interference with ancient graves or the excavation of certain cultural property as "off limits" to archaeologists, while to archaeologists these items are considered very valuable resources for study. The second main area, *a posteriori*, involves the repatriation movement with respect to human remains and cultural property that have already been excavated, looted, or taken as war trophies from the countries of origin. In the repatriation movement, nations and groups are seeking the return of artifacts that have been unlawfully removed from the source nation, sometimes many years or even centuries ago. In some instances, artifacts were excavated without violating any laws at the time, and in other cases the items were looted in violation of a country's patrimony laws or, in the case of war trophies, seized in violation of international law. In either case, the kind of property that is likely to provoke a call for archaeological constraints or repatriation to the source nation is, in the first instance, an object of "cultural property." A later section of this Article explores the status of dead bodies, grave sites, and funerary artifacts; dead bodies are a separate category of concern for stakeholders, not as cultural property, but with respect to other interests, as discussed below. This section examines two interrelated concepts: the notion of cultural property and the notion of group identity.

Cultural property is a category of property that has importance of varying degrees to groups associated with such property. In archaeology, cultural property consists of various types of ancestral materials. Some objects may be funerary; some may be sacred, ceremonial or other ritual. Objects may be so closely associated with the identity of a group or na-

tion that their excavation, removal or exploitation will truly impair the well-being of the group.

Are we referring to civic, social, ethnic or political groups, or some other type of group? What features make it the case that members of a relevant group actually identify themselves as sharing a group identity? What is it about a contemporary group that entitles it to be a stakeholder linked to the cultural property of an antecedent group? Are we more concerned with biological relatedness, or are there other relevant criteria that link a present group to an antecedent group? How far into the past does a contemporary group's interest go with respect to ancestral cultural property? The two concepts, cultural property and groups, are interrelated; they simply cannot be understood without reference to the other.

B. *What Is Cultural Property?*

1. General Conceptions of Cultural Property

There is no universally accepted definition of what constitutes "cultural property."¹²¹ Many of the various definitions — such as those used at the 1954 Hague Convention and at conventions hosted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the 1970s — are divergent and contradictory.¹²² This Article brings together three related elements that apply to cultural property and differentiate it from other types of property. The first element is that the property embodies some feature of a group's cultural identity.¹²³ It does this by representing an important feature of the group's heritage,¹²⁴ by celebrating the customs, practices, or beliefs

¹²¹ See JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 252-53 (1989). For a review of this book, see John H. Merryman, *Book Review*, 85 AM. J. INT'L L. 737 (1991).

¹²² See General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Protection of Cultural Property in the Event of Armed Conflict, available at <http://www.icomos.org/hague/hague.convention.html> (last visited May 4, 2004) (commonly referred to as "The Hague Convention") (using term "cultural property"); see also UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [hereinafter 1970 UNESCO Convention], available at http://www.unesco.org/culture/laws/1970/html_eng/page1.shtml (last visited May 4, 2004) (also using term "cultural property"); Cf. UNESCO 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage [hereinafter 1972 UNESCO Convention], available at http://whc.unesco.org/world_he.htm (last visited May 4, 2004) (using term "cultural heritage").

¹²³ See Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, in *AFTER IDENTITY* 262 (Dan Danielson & Karen Engle eds., 1995).

¹²⁴ See *id.* at 262.

that are common to the group.¹²⁵ The second element involves the function of the property for the group.¹²⁶ The property objects serve as the group's cultural patrimony.¹²⁷ The objects help foster and reinforce the group's shared values¹²⁸ and are regarded "as the authentic works of a distinct collectivity, integral to the harmonious life of an a-historical community."¹²⁹ Cultural property is thus critical "to the esteem that people hold for themselves"¹³⁰ and helps to foster unity and bonding.¹³¹ The third element is that cultural property¹³² represents "the authentic works of a distinct collectivity, as integral to the harmonious life of an a-historical community and incomprehensible outside of 'cultural context' . . ."¹³³ That is, only by considering the object in the context of the culture of origin, interpreting its meaning in view of the group's beliefs and norms, can we fully and properly understand the object.¹³⁴ Of course, today, many icons of cultural property are so well understood that they seem to be readily perceived without regard to their cultural context. The Statue of Liberty, surely an item of cultural property for America, Stonehenge to the British, and the Giza Pyramids to the Egyptians — are in fact respected and comprehensible as cultural property on an international scale without regard for the specific culture of origin. Cultural property may consist of lands or of artifacts and other materials excavated from lands. Cultural property objects may or may not be works of art in their own right. And cultural property can vary widely in type, from an archival manuscript to a monument. For present purposes, this Article will focus on the types of cultural property commonly found in archaeological excavations.

¹²⁵ See Antonia M. De Meo, *More Effective Protection for Native American Cultural Property Through Regulation of Export*, 19 AM. INDIAN L. REV. 1, 2-4 (1994).

¹²⁶ See, e.g., Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1039 (1992-1993).

¹²⁷ See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 347-48 (1989).

¹²⁸ See COOMBE, *supra* note 123, at 257.

¹²⁹ *Id.* at 257.

¹³⁰ MASTALIR, *supra* note 126, at 1093.

¹³¹ See 3 LYNDEL V. PROTTE & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE MOVEMENT* 23-24 (1989).

¹³² See, e.g., Jonathan Drimmer, *Hate Property: A Substantive Limitation for America's Cultural Property Laws*, 65 TENN. L. REV. 691, 701 (1998).

¹³³ COOMBE, *supra* note 123, at 257.

¹³⁴ See MERRYMAN, *supra* note 127, at 356-57; see also M. Catherina Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 449 (1994) (stating that "a basic principle of cultural property preservation is that cultural objects, as basic elements of civilization and national culture, only can be fully appreciated in close connection with accurate information as to their origin, history, and traditional status.")

Broadly construed, cultural property refers to any item that may be regarded "as being of importance for archaeology, prehistory, history, literature, art or science" on "religious or secular grounds."¹³⁵ Cultural property generally includes art, artifacts, antiques, historical monuments, rare collections and religious objects¹³⁶ that are of particular importance to the cultural identity of a people and which represent important historical, artistic and social accomplishments.¹³⁷ Cultural property is the type of property that enhances a group's identity, understanding and appreciation of its culture. The cultural object is something that defines and embodies a key expression of the group's identity. The object serves this function even though it may or may not have aesthetic appeal beyond the group.

Cultural property objects remain associated with their particular culture throughout the passage of time, wherever the objects may be located. How a group treats its cultural property reflects different traditions, thoughts and ideals. How a group treats and regards these objects is a measure of its own cultural identity. Cultural property links group members not only to each other but to their ancestors and to future generations. It "speaks directly to the inner consciousness within which we resolve whether we do really feel a sense of belonging to a group or community."¹³⁸ Moreover, "[t]he existence and awareness of a common artistic heritage can make a powerful contribution to the consciousness of the relationship between self and community."¹³⁹ These objects have historical importance to past, present and future generations. Future generations deserve to derive the same benefits from cultural property that earlier generations did. Such property often can help a group perpetuate its norms and beliefs for future generations.¹⁴⁰ Without adequate protections, future generations may lose the important sense of being part of a greater good. The idea is that a group's identity is so tied up with the objects that they should be treated as inalienable from the

¹³⁵ Convention on Stolen or Illegally Exported Cultural Objects [hereinafter "UNIDROIT Convention"], June 24, 1995, art. 2, 34 I.L.M. 1332, 1331.

¹³⁶ See Vivek K. Hatti, *Note: India's Right to Reclaim Cultural and Art Treasures From Britain Under International Law*, 32 GEO. WASH. J. INT'L L. & ECON. 465, 466 (2000).

¹³⁷ See PROTTE & O'KEEFE, *supra* note 131, at 838-43.

¹³⁸ Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN L. REV. 275, 305 (1982).

¹³⁹ See *id.* at 305.

¹⁴⁰ See John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1912-13 (1985).

group “because future generations are unable to consent to transactions that threaten their existence as a group.”¹⁴¹

The intergenerational interest in cultural property creates an ongoing interaction between the cultural group and the property. Burke wrote in a well known passage that society “is a partnership with the dead, the living, and the unborn.”¹⁴² Perhaps the greatest obligation that one generation has to the future is the duty to transmit a heritage and memory from which descendants can learn and in which they can take pride. Cultural property objects remain with groups throughout the passage of time. Cultural property “tells people who they are and where they come from.”¹⁴³ Denying a group access to its cultural property can, over time, “threaten drastic consequences for the group.”¹⁴⁴ Cutting off access to such items also “threatens to dispossess individual members of their birthright to a sense of connection, meaning, and socially defined identity with a cultural group.”¹⁴⁵ “The ways in which people view their past are to a considerable extent reflected in those objects they choose to preserve as reminders of themselves.”¹⁴⁶ Furthermore, “[c]ertain objects tell people who they are and what they have in common; a cultural heritage helps to develop and satisfy a people’s need for identity.”¹⁴⁷

Linked to the notion of cultural property is the idea of “cultural heritage.”¹⁴⁸ The idea is that a group’s identity is tied up with its cultural heritage; the group will want to protect and preserve certain objects designated as cultural property because these objects are so closely associated with its cultural heritage. That is, a group will naturally protect those elements of its past that it values and that are associated with its identity. Some archaeologists prefer the term “cultural heritage” to “cultural property.” The latter term is shunned by those who feel it implies that cultural objects are things to be owned, bought and sold, or that such

¹⁴¹ Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 *CANADIAN J.L. & JURISPRUDENCE* 249, 263 (1993).

¹⁴² R. NISBET, *COMMUNITY AND POWER* 25 (1962). “Mutilate the roots of society and tradition, and the result must inevitably be the isolation of a generation from its heritage, the isolation of individuals from their fellow men, and the creation of the sprawling faceless masses.” *Id.*

¹⁴³ Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 *TRANSNAT’L LAW* 235, 242 (1996).

¹⁴⁴ MERRYMAN, *supra* note 127, at 356.

¹⁴⁵ Jonathan Drimmer, *Hate Property: A Substantive Limitation for America’s Cultural Property Laws*, 65 *TENN. L. REV.* 691, 704 (1998).

¹⁴⁶ B. Smith, *Art Object and Historic Usage*, in *WHO OWNS THE PAST?* 87 (I. McBryde, ed. 1985).

¹⁴⁷ Lawrence J. Persick, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 *DICK. J. INT’L L.* 89, 92 (1985).

¹⁴⁸ See GREENFIELD, *supra* note 121, at 254.

items belong to particular political powers. The former term connotes something that is to be shared and conserved by all the people of the world.¹⁴⁹ Neil Brodie, a noted commentator on the subject, suggests that preferences for the different terms represent different world-views.¹⁵⁰ How groups treat cultural property reflects different traditions, thoughts and ideals; how a group treats and regards these objects is a measure of its own cultural identity.

2. Particularity of Place

It is under-inclusive to suggest that cultural property consists of archaeological materials, artifacts, ceremonial or sacred objects and other objects. A *place* can carry a sense of cultural identity and can convey a sense of community to relevant groups. Some sites are regarded as sacred by relevant groups. There are many examples of this in every country. The Gettysburg Battlefield is one of many historical sites dedicated to the public.¹⁵¹ This kind of public land constitutes a unique cultural property that fosters a sense of community in Americans who visit it or contemplate what happened there. There are thousands of other sites around the world that carry with them special cultural significance, and are often given special protection by governments because they represent unique cultural heritage. Such sites are regarded by relevant groups as sacred, hallowed grounds, which must never be desecrated, alienated or converted, for example, into a shopping center. To the extent that archaeology is allowed to go on in these venues at all, there must be strict controls. In addition, architectural monuments are often deeply associated with the cultural identity of a group. For example, as I was writing this Article, the enormous mud brick fortress in the ancient Iranian city of Bam collapsed in an earthquake. A typical comment from Iranians was: "It's part of our life, our character, and when something like this is destroyed, you lose a little piece of your character as well."¹⁵²

¹⁴⁹ See L.V. Prott & P.J. O'Keefe, "Cultural Heritage" Or "Cultural Property"? 1 INT'L J. CULTURAL PROP. 307 (1992).

¹⁵⁰ See Brodie, *supra* note 14, at 10. See also *supra* note 122. Brodie notes the shift toward the term "cultural heritage" in comparing the 1954 Hague Convention and the 1970 UNESCO Convention, which use the term "cultural property," with the 1972 UNESCO Convention, which uses the term "cultural heritage." Brodie also notes the shift in terminology from J.H. Merryman, whose 1989 book, *THE ETHICS OF COLLECTING CULTURAL PROPERTY*, used the term "cultural property" but who writes in a 1999 epilogue to his second edition that he would now prefer to use the term "cultural heritage."

¹⁵¹ See GERSTENBLITH, *supra* note 13, at 576.

¹⁵² See Neil MacFarquhar, *Amid Heartbreak, City in Iran Starts Task of Beginning Over*, N.Y. TIMES, Dec. 30, 2003, at A6 (quoting Behzad Torkizadeh, Iranian relief worker).

3. The Communal Quality

The kinds of property interests that a group has in its cultural property pertain to the group's cultural identity and heritage and are different from the interests associated with individual property rights. Cultural property is different from property based on legal right of ownership or possession. Private ownership of property emphasizes "the idea of one person being in charge of a resource and free to use or dispose of it as she pleases,"¹⁵³ while cultural property is viewed in a different social context, as related to a distinct cultural heritage. An individual is not the owner of a group's cultural heritage. Cultural property is communal; it is owned by the group collectively.¹⁵⁴ No individual has a private right to it and the community holds it in trust for itself.¹⁵⁵ A description of the unique communal property feature associated with cultural property was stated in *Journeycake v. Cherokee Nation*, in which the United States Court of Claims found that communal ownership of cultural property has the following characteristics:

[When] every member of the community is an owner . . . [h]e does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet has a right of property . . . as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.¹⁵⁶

Thus, group ownership creates collective possessory and use rights.¹⁵⁷ These rights are usufructuary in the sense that the individual member in the culture has a right to engage with the property, subject to the rights of other members, in the present and the future. There is no individual right to alienate an item belonging equally to all group members.¹⁵⁸ Commentator John Moustakas has explored the idea of group rights in a vein similar to that taken by the *Journeycake* court.

The notion that groups have intrinsic rights to exist, develop, flourish, and perpetuate themselves, and that these rights often are intertwined with groups' relations to history and ob-

¹⁵³ MASTALIR, *supra* note 126, at 1037-39 (discussing tangible and cultural aspects of cultural property).

¹⁵⁴ Christopher S. Byrne, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENVTL. L. & LITIG. 109, 118 (1993) (declaring that tribal art is especially suited to be regarded as tribal property).

¹⁵⁵ See John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1195 (1989).

¹⁵⁶ *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893).

¹⁵⁷ See GERSTENBLITH, *supra* note 13, at 571-72.

¹⁵⁸ See FELIX COHEN, *THE HANDBOOK OF FEDERAL INDIAN LAW* 472 (1982 ed.).

jects, justifies both creating a category of property which promotes grouphood and distinguishing between that property and merely fungible property.¹⁵⁹

Thus, communal property "promotes grouphood" and is distinguished from property that is "merely fungible." Cultural property cannot be bought, sold, devised, or otherwise transferred by individual members.¹⁶⁰ The property is considered inalienable unless the whole group consents to convey it, and in some cases the property may be considered inalienable even if the entire group wants to convey it.¹⁶¹ One cannot inherit or purchase the group's cultural property, and upon death one's interest in cultural property does not descend to one's heirs. Many cultures, such as Native Americans, have traditionally recognized communal property over private property. If one leaves the community, one's interest in cultural property does not lapse. One's ability to enjoy cultural property is not only tangible but exists when one emigrates to another country; one's heritage is still enjoyed, remembered and in some real sense is inextricable from the indices of cultural property that remain in one's ancestral lands.

By its very nature, tribal art may have important communal features that represent the cultural connection between the artist and tribal peers and descendents. In Alaska, for example, the Chilkat Indians regard certain carved wooden posts decorated with clan crests representing familial ties and relationships as irreplaceable artifacts that bear on their cultural heritage and help maintain cultural identity.

Simply stated, the posts and rainscreen are integral to the Tlingit cultural, spiritual, and social worlds. Culturally, the ceremonial posts and rainscreen serve as a means of passing cultural and spiritual beliefs from one generation to the next. Socially, the posts and rainscreen embody the identity of the Ganaxtedi Clan membership and play a critical role in determining the social structure of the Chilkat Indian tribe.¹⁶²

Thus, the commodification of certain native artifacts erodes a group's cultural identity¹⁶³ because an object like this is viewed "as a living thing which enables [groups] to achieve confidence in themselves

¹⁵⁹ MOUSTAKAS, *supra* note 155, at 1185.

¹⁶⁰ See COHEN, *supra* note 158, at 472, 605-06.

¹⁶¹ See *id.*

¹⁶² Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 5-6, *Chilkat Indian Village v. Johnson*, 634 F.Supp. 535 (D. Alaska 1986), *aff'd*, 870 F.2d 1469 (9th Cir. 1989).

¹⁶³ See Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, in *AFTER IDENTITY* 251, 261 (Dan Danielson & Karen Engle eds., 1995).

and, thus, able to imagine their future.”¹⁶⁴ “[P]roperty for grouphood expresses something about the group’s relationship to certain property . . . essential to the preservation of group identity”¹⁶⁵ Some scholars further argue that cultural property should not be sold because of an inherent market failure reflected in the intergenerational costs associated with the loss of access to the object.¹⁶⁶ This occurs “[b]ecause the aggregate cost through time, from generation to generation, is likely to outweigh the purchase price, [so] sale, while rational for the seller, is irrational when all present and future costs are included.”¹⁶⁷

While archaeologists are opposed to the marketing of cultural property for one set of reasons, as discussed above, cultural groups have a separate set of reasons why they oppose the divestiture of such objects. The commodification of objects of cultural heritage not only infringes the well-being of cultural groups, it also violates a group’s deepest understanding of what it is to be a community. Cultural properties are non-replenishable resources. The loss or divestiture of these resources tears the fabric of a group’s cultural identity. Such a loss can only be mended if the objects are returned.

4. The Importance of Group Identity

Cultural property is often vested with emotional and spiritual as well as cultural qualities that bind it to a group’s identity. This creates what one might call a sense of “cultural nationalism”¹⁶⁸ associated with a group’s interest in its cultural property. Of course, there must be more than a mere assertion that an icon is bound up with a group’s identity. Something about an object needs to be so closely associated with national or group identity that its destruction or theft would truly impair that identity; there needs to be something more to a claim that an item of cultural property is intertwined with group identity than the mere fact that it originated with the group asserting the claim.

“Cultural objects nourish a sense of community, of participation in a common human enterprise.”¹⁶⁹ Cultural property cannot be easily replaced; it may be considered irreplaceable. Certain cultural property objects may be essential to the preservation of a people’s identity and self-esteem. The loss of property that is closely tied to a group’s cultural

¹⁶⁴ MOUSTAKAS, *supra* note 155, at 1195 (quoting JOHN HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS AND THE VISUAL ARTS* 54 (1987)).

¹⁶⁵ MOUSTAKAS, *supra* note 155, at 1184.

¹⁶⁶ See PROTT & O’KEEFE, *supra* note 131, at 27.

¹⁶⁷ Jonathan Drimmer, *Hate Property: A Substantive Limitation for America’s Cultural Property Laws*, 65 TENN. L. REV. 691, 737 (1998).

¹⁶⁸ See John Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 489-93 (1988).

¹⁶⁹ MERRYMAN, *supra* note 127, at 349.

identity "causes pain that cannot be relieved by the object's replacement,"¹⁷⁰ but only by its restoration. Cultural property has intrinsic value to the group such that its loss, destruction, sale, or improper use by outsiders harms the group in a way that is not monetarily compensable. The only way to restore the status quo is with the return of the cultural property to the group. In contrast, damage or loss of fungible property can be compensated by payment of money or obtainment of a substitute object.

Certain ceremonial objects regarded as sacred to a group may be central to the group's belief systems and rituals so that if these objects fall into the wrong hands, their absence would be intolerable. If sacred objects belonging to a group's predecessors are recovered from archaeological sites, the group will likely argue that the objects be repatriated to them rather than removed, studied, displayed, or sold. An example of cultural objects serving significant talismanic functions essential to the spiritual welfare of a group are sculptures of the Maori people of New Zealand. Modern day Maori people believe that the spirits of their ancestors dwell in the sculptures; requests for placing the objects on loan in foreign exhibitions must be approved by tribal councils.¹⁷¹ Another example of a cultural property item that is "bound up" with a group's identity is the original Declaration of Independence. Many Americans regard this document as almost a part of themselves. The document is closely linked to individual American's sense of national identity, so that its exploitation or loss would be intensely painful, and its "replacement" with a copy would not appease the loss. Another example might be Stonehenge. If the British Parliament decided to allow pothunters to obtain permits and scavenge the field of Stonehenge, many would find this to be an intolerable encroachment of cultural heritage.

5. UNESCO Definitions of Cultural Property

Items that constitute cultural property are broadly enumerated by the UNESCO Convention of 1970 as follows: (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, ranging from the history of science, technology, military, social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations or discoveries; (d) elements of artistic or historical monuments, or dismembered archaeological sites; (e) antiquities more than one hundred years old, such as inscriptions, coins, and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as (i) pictures, paintings

¹⁷⁰ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

¹⁷¹ See MERRYMAN, *supra* note 168, at 496 n. 60.

and drawings produced entirely by hand on any support and on any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; and (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.), singly or in collections; (i) postage, revenue or similar stamps, singly or in collections; (j) archives, including sound, photographic, and cinematographic archives; (k) articles of furniture more than one hundred years old, and old musical instruments.¹⁷²

Geoffrey Lewis, the director of Museum Studies at Leicester University, has offered another definition:

Cultural property represents in tangible form some of the evidence of man's origins and development, his traditions, artistic and scientific achievements and generally the milieu of which he is a part. The fact that this material has the ability to communicate, either directly or by association, an aspect of reality which transcends time or space gives it special significance and is therefore something to be sought after and protected.¹⁷³

C. *Cultural Groups as Stakeholders*

1. Definitions of Group Identity

A cultural group has "a distinct existence apart from its members" and the "identity and well-being of the members and the group are linked."¹⁷⁴ A group has the gestalt quality of being greater than the sum of its parts, more than a mere collection of individuals. Members of a group derive their identity from membership; their well-being and status often depends in large part on the well-being and status of the group. This may partly explain why members of various ethnic or minority groups are so vigilant in insisting that their groups be accorded equal protection under the law as well as in the hearts and minds of others. The rationale here is that if the group has a certain status in the minds of others outside the group, this enhances the group's sense of self-esteem. If, on the other hand, a group is viewed with contempt by those not part of the group, members of the group suffer a loss of self-esteem. Identifying the existence of a non-cultural group for purposes of analyzing an associated group identity is usually a straightforward matter. However,

¹⁷² See 1970 UNESCO Convention, *supra* note 122.

¹⁷³ Proceedings, J. ROYAL SOCIETY OF ARTS, June 1981, at 436.

¹⁷⁴ Owen M. Fiss, *Groups and The Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148 (1976).

the type of groups we are concerned with here are *cultural* groups. Certain groups clearly fall outside the definition. Religious cults (rather than distinct, established religious groups), terrorist cells, guerrilla groups, political parties, special interests, social groups, and others do not qualify as cultural groups in the sense intended here.

There are several general features that I think are common to cultural groups. First, there should be a significant population in the group, consisting of separate family units rather than one large interrelated clan. There may or may not be a significant degree of biological relatedness among group members. They may or may not have a common ethnic identity. Some cultural groups share a somewhat homogeneous biological bloodline, such as the Kurds in Northern Iraq. Other groups, such as the monks at the 13th Century Danilov Monastery in Moscow, share a common faith but have diverse ethnic backgrounds. Still other groups, such as Native American tribes, have intermixed with other groups over the years but still may possess a cultural group identity. Americans arguably share a common political identity but lack ethnic homogeneity. Many Americans may also belong to multiple cultural groups. Ethnic identity is an increasingly elusive notion in an era of egalitarianism, intermarriage, migration and globalism. One's ethnic identity within a group may be both felt and practiced with more or less fervor or identification. At times, the ethnic identity of a group may be predicated more on shared ideologies and practices than anything else. And again, one's sense of kinship, attachment, and identification with one's group may vary depending on the individual.

Second, the group should be one that has remained relatively intact through the years. This simply means that cultural property cannot develop quickly with relatively transitory groups. Examples of such transitory groups might include temporary political factions or individual college classes that may share in the school culture but do not have *distinct* cultural property.

Third, members of the group should perceive themselves as part of the group and function as such. Members should also be more or less indigenous to a geographic region. However, numerous valid cultural groups may have dispersed, with members living throughout the world. A cultural group need not have independent status as a sovereign nation.¹⁷⁵ A group may be coterminous in a specific country, or it may be a subgroup within a larger ethnic population, such as the Kurds in North-

¹⁷⁵ See *Greenland: Inuit Lose a 50-Year Court Battle*, N.Y. TIMES, NOV. 29, 2003, at A6. (describing Supreme Court of Denmark holding that group of 187 Inuit hunters were not entitled to compensation for loss of hunting and fishing grounds in connection with expansion of American base in Thule, because Thule tribe was not an independent entity, and therefore did not have sovereign rights).

ern Iraq. Fourth, members should share a significant range of common elements, such as language, religion, customs, traditions, morals, economy, material culture, arts, cuisine, and other cultural features. Fifth, members should have a common perspective on the world and the group's place within it.

2. The Importance of Grouphood

There is a kind of intrinsic value in cultural groups. Group cultural identity is important for several reasons. It helps individuals organize their understanding of the world,¹⁷⁶ and is related to "the need to create meanings: ways of organizing our perceptions into patterns we call reality. . . . To understand ourselves, to give shape to our lives, we need a community of meaning, a culture."¹⁷⁷ Additionally, the availability of a group cultural identity "provides patterns of values and standards in shaping motivational orientations and attitudes, and consequently in personality formation."¹⁷⁸ Finally, group cultural identity helps guide the moral actions of both individuals and societies.¹⁷⁹ "To rob existence of communality, of the communal celebratory process which forms the substance of much of our experience, would be to deny one ethical constituent of our humanity."¹⁸⁰

Cultural groups outlive their individual members. As such, the group constitutes an ongoing value scheme consisting of the group's collective expressions of its identity. The culture manifested by the group evolves so that the kinds of expression found in a culture shift over time. An individual member of the group develops a sense of community by contemplating, preserving, and having access to the group's common cultural heritage.

D. *Evaluating the Shared Cultural Identities of Modern and Antecedent Groups*

Once we have ascertained that a cultural group exists, we then need to know if the group is linked in some significant way to an antecedent group in order to justify a demand for archaeological constraints on certain cultural property, or to justify repatriation of cultural property, human remains or associated funerary artifacts. If a group is interested

¹⁷⁶ See DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST*, at 33 (1996); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 307 (1985-86).

¹⁷⁷ Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution*, at 21 (1989); See also Karst, *supra* note 176, at 309.

¹⁷⁸ Richard Colm, *The Change of Cultural Identity* 122 (1980).

¹⁷⁹ See Goldhagen, *supra* note 176, at 33.

¹⁸⁰ Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1001-02 (1983).

in laying claim to an archaeological site, there needs to be some linkage between the modern group and the site that will persuade archaeologists and the public that this group has a valid cultural interest in protecting the site. The most persuasive type of linkage is a showing that there is a significant degree of cultural identification between the present group and the antecedent group. This section discusses the criteria necessary to show a significant degree of cultural identity between the groups. In other words, how is the present group culturally affiliated with the antecedent group? There are different kinds of situations in which a group may feel they it shares a cultural identity with an antecedent group. It is important, therefore, to understand what sort of criteria may pass muster.

Generally, linkage with respect to cultural identification with the past becomes more and more difficult the farther back in time one goes. This difficulty arises from possible discontinuities over time in the people who inhabited a given region. I suggest several criteria which, balanced together, may be helpful in evaluating the strength of a modern cultural group's claim of cultural relatedness to an antecedent group. Individually, none of these criteria are dispositive; they need to be considered with respect to their cumulative effect in establishing a strong link between modern group members and their ancestors.

1. Biology

Biological relatedness is neither a necessary nor sufficient condition to establish cultural identification between a modern group and an ancient group. It is an oversimplification to think of cultural relatedness as being limited to the biological descendents of people who once lived in a region. It may be helpful to show that there is relatedness by blood, but other factors, discussed below, should also be considered. Of course, even with respect to ancient cultures, it is always possible to make a showing of cultural identity based upon biological relatedness. With the people of Egypt, for instance, there is a clear biological continuity with the ancient people who resided in the region and those who presently occupy the lands. However, many of us do not feel connected to our remote ancestors, who are nonetheless biologically related to us. Biological relatedness does not imply that the contemporary group actually *feels* a cultural identity with the antecedent group. The modern group may in fact have turned its back on the practices of the ancestral group. Major cultural changes often occur over time. Changes may pertain to housing, diet, trade, subsistence patterns, technology, projectile point styles, raw materials employed, mortuary rituals and religious practices. Modern Egyptians, for instance, no longer worship the religious pan-

theon of their ancestors, and for the most part have adopted the Muslim faith.

We often find situations where cultural groups, descended genetically from ancient people who have lived in a given region, have migrated away, perhaps far away, from where the ancestors lived, but still constitute a cohesive group that feels culturally related to the antecedent group. Their ancestors occupied the region at some point in the distant past and this may be sufficient to establish a group connection to the antecedent group's geographic location. However, inasmuch as migrations have occurred in many regions since ancient times, it can be quite difficult for some groups to trace connections to antecedent groups that may have occupied particular archaeological sites. But biological descendents of an antecedent group who have intermixed with other groups may feel that this does not negate or diminish their relationship with the historical group.¹⁸¹

As discussed below, a group may claim cultural continuity based on the fact that it has in the recent past occupied the lands that are subject to archaeological study. These people may or may not have a biological connection to the antecedent group. The local community may feel that they share cultural continuity with the antecedent group, while lacking a biological connection. The modern group may claim that they have a common cultural identity with the antecedent group that developed gradually over time. That relationship can be historical, cultural, symbolic, or may be based on some other significant factor.¹⁸²

2. Language

Evidence that a contemporary group uses a language related to an antecedent group can shed light on the cultural relatedness of the groups. Because languages often change over time, it may not always be possible to determine what the precursor language was or the language might be completely unrelated to that of the contemporary group. For example, the ancient Egyptians had a language somewhat distinct from the language spoken by contemporary Egyptians, who may nonetheless insist that they share cultural continuity with the ancients of the same region.

3. Oral Tradition

Oral traditions of a contemporary group may be evidence of a strong continuity with a past group. A group may feel tied to a past culture based not only on shared characteristics, but also on traditions that they share or on a strong sense of cultural relatedness, even in the

¹⁸¹ See *Charrier v. Bell*, 496 So. 2d 601, 604 (La. Ct. App. 1986).

¹⁸² See *Singleton & Orser, Jr.*, *supra* note 15, at 144.

absence of concrete proof of these claims. For instance, oral traditions may deny that there was any migration into or out of that area, and may affirm that the present culture has always inhabited the present area. It is important to exercise caution in analyzing the relative accuracy of the content of oral narratives. We have no way of knowing whether a narrative has been altered, intentionally or otherwise. It is equally difficult to discern the circumstances surrounding early recitations of the narrative. If an oral tradition is very old, it will have been conveyed through perhaps hundreds of intermediaries over thousands of years. The opportunity for error increases when information is relayed through multiple persons over time. Intervening changes in language may also alter the meaning of certain words or of the oral tradition itself. Narratives can also be influenced by political considerations or other biases and are often intertwined with spiritual beliefs. It is not always clear whether myths are being blurred with or even superseding historical facts. Narratives are thus of limited reliability in attempting to determine truly ancient events or linkages between present groups and the past.

4. Common Ideology

A group may feel ties to a past culture not because of heredity but because the groups share the same ideologies and practices, such as religion, language, and culture. A modern group may have long ago migrated to a region and adopted the practices, language, religion and culture of an antecedent group. The modern group may have so incorporated the rituals and practices of the antecedent group that its members have come to feel, over time, as if they are woven together or linked with the antecedent group.

5. Exclusive Use and Occupancy of Land

A group may feel that because it has lived on certain land for an extended period of time, it is indigenous to the land and cultural property and human remains found on the land are necessarily those of tribal ancestors. In some instances it may be reasonable to assume that items or remains found on the land are those of tribal ancestors, particularly if there is biological evidence of ancestral linkage. But there is often evidence that various groups occupied the land, perhaps over millennia. This may render unreasonable certain claims of indigeneity and perhaps even claims that found materials belonged to ancestors. It may be difficult to prove exclusive, continuous use and occupancy of lands as many areas are used by different groups that have traveled, gathered, hunted, fished and farmed — in short existed — in the same area for many years.

6. Diaspora

Throughout history people have moved away from their homelands, migrating in time of war, fleeing racial, ethnic or religious persecution, or leaving for other reasons, such as to avoid famine. Groups that no longer live in their original ancestral homeland may still have a collective identity associated with the homeland or with cultural objects located there. They may maintain a unique social identity that is linked with their ancestral homeland even though they have acculturated themselves to new lands or countries and perhaps even new citizenships. For instance, many French-Americans may feel a strong kinship with their homeland in France even though they are American citizens and no longer live in France. They may perceive the events of French history and its present political climate as profoundly meaningful. Thus, with respect to excavation of sites in France, they may, as a group, have a strong emotional concern for such projects. Another example would be members of the Buddhist religion and their interest in Buddhist statues, wherever they may be located. Buddhists have a shared group interest in what were the two tallest and some of the oldest statues of Buddha in the world, which the Taliban destroyed in 2002.

7. Stewardship

A present-day group that occupies a particular site may believe that the site is a shrine that must not be disturbed by archaeologists.¹⁸³ Members of the group may be opposed to archaeological work on the site regardless of whether they have any cultural connection to the group that occupied the site in the ancient past. The present-day group may view itself as a steward of the land and on that basis defend the resource. Some groups may consider themselves culturally related to cultures that are extinct¹⁸⁴ and may feel a cultural stake in the land as if they are real “tribal members” of the extinct group. This is not an unusual circumstance. Indigenous groups often have a role in approving or disapproving archaeological projects involving materials found on aboriginal lands regardless of whether the groups are ethnically, culturally or biologically related. For example, Native Americans attempted to stop archaeologists from examining a 12,000 year old European skeleton, known as the Kennewick Man, found on Native American land.¹⁸⁵ Experts unanimously agreed that the remains were not biologically or ethni-

¹⁸³ See Randall McGuire, *Comment on a Critical Archaeology Revisited*, 41 CURRENT ANTHROPOLOGY 766 (2000).

¹⁸⁴ See Clement W. Meighan, *Archaeology: Science or Sacrilege?*, in ETHICS AND VALUES IN ARCHAEOLOGY, at 210 (1984).

¹⁸⁵ See *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002).

cally related to the present day indigenous people.¹⁸⁶ While there was no evidence of a shared group identity, the claimants sought to stop the archaeologists from proceeding because they wanted to protect the site as a sacred site. However, they lost the case and the archaeological study was allowed to proceed.¹⁸⁷

IV. THE SPECIAL “NON-PROPERTY” STATUS OF HUMAN REMAINS

A. *The Importance of Human Corpses to Archaeology*

Human remains such as skeletons and mummies are indispensable for archaeological research. Remains, along with related mortuary evidence, provide a unique part of the archaeological record. Demography, ancient diets, disease pathologies, genetic patterns, and environmental adaptations are but a few of the research areas illuminated by study of osteological remains. Archaeologists argue that they need to have “collections of human remains available both for replicative research and research that addresses new questions or employs new analytical techniques.”¹⁸⁸ The general public also has an interest in the investigation of human remains as a means of increasing our knowledge of past cultures, behavioral norms, social structures, religious practices and ideologies.

Archaeologists never cease to be amazed at the new information gleaned from ancient human remains, particularly in places where written historical records are lacking. Recently, for instance, archaeologists excavated one thousand year-old mummies in a medieval Siberian graveyard near the Arctic Circle.¹⁸⁹ The mummies were clad in copper masks, hoops and plates — burial rites that archaeologists had never seen before.¹⁹⁰ Archaeologists think that these human remains were mummified by accident in the cold, dry permafrost, with their copper shrouds helping to prevent oxidation.¹⁹¹ Archaeologists were also fascinated to find that eleven of the thirty-four bodies had shattered or missing skulls and chopped skeletons. They deduced that this had been done as a burial ritual to protect the living from “mysterious spells believed to emanate from the deceased.”¹⁹² Archaeologists were further struck by leather

¹⁸⁶ *See id.*

¹⁸⁷ *See* Section VIII *infra*.

¹⁸⁸ *Society for American Archaeology Statement Concerning the Treatment of Human Remains*, available at http://www.saa.org/repatriation/repatriation_policy.html (last visited May 4, 2004).

¹⁸⁹ *See* Charles Q. Choi, *At Trading Crossroads, Permafrost Yields Siberian Secrets*, N.Y. TIMES, Jan. 6, 2004, at D3.

¹⁹⁰ *See id.*

¹⁹¹ *Id.*

¹⁹² *Id.* (quoting Dr. Natalia Fedorova of the Ural branch of the Russian Academy of Sciences).

straps wrapped tightly around the bodies, as well as beads or chains and humanlike or birdlike bronze figures broken into pieces at the time of burial, which were deemed to be evidence of “protective magic” practiced by the medieval culture in that region.¹⁹³ One body of a man in a wooden sarcophagus was covered chest to foot in a copper plate and laid out with an iron hatchet, well-preserved furs and a bronze bear’s head buckle.¹⁹⁴

Inevitably, archaeologists are going to dig up graves. Does this mean that archaeology is an immoral occupation? One of the more controversial ethical issues in archaeology, as well as with museum practices, pertains to the excavation, possession, study, curation and display of human remains. As discussed below, there are various stakeholders with legitimate interests in the human remains and associated funerary artifacts located at ancient sites. Archaeologists must be prepared to justify the excavation of human remains. In the United States, this concern has been raised by Native Americans and others, who have expressed outrage over the removal of skeletons from the ground and their display or storage in museums.¹⁹⁵ Throughout history, graves have been regarded as sacred sites, at least by the cultural groups associated with the graves.

Are there exceptions to the sanctity of the grave? Should this sanctity stand in the way of science? Are the dead wronged if we use their physical remains for archaeological study? Should even prehistoric graves be off limits for archaeologists to examine, regardless of age? Does it matter that some ancient graves no longer have stakeholders, such that there is no relevant class of persons having a present-day interest in preventing desecration? And what if remains are accidentally unearthed, or not intentionally placed but the product of a sudden death, such as with a shipwreck?

To some, interfering with a person’s buried remains is intrinsically bad, just as if one were to assault the person while alive. Archaeologist Geoffrey Scarre has noted that one school of thought believes the examination of a dead person negatively affects the deceased, and that “[r]emoving his bones to a laboratory or museum is positively harmful to his spirit.”¹⁹⁶ Only in recent years have archaeologists become more sensitive to concerns about the sanctity of graves and to cultural groups that wish to intervene or prevent the study of human remains. Archaeologists are now fully aware that such disturbances can outrage or distress the living.¹⁹⁷ But archaeologists still persist in the excavation of grave sites,

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Section VI *infra*.

¹⁹⁶ Geoffrey Scarre, *Archaeology and Respect for the Dead*, 20 J. APPLIED PHIL. 237, 239 (2003).

¹⁹⁷ See *id.* at 238.

justifying this with the scientific information they glean from them about past cultures.

B. Caring for the Dead

Caring for the dead and about the sensibilities of the living are universal values. There is a great diversity of cultural and religious values concerning the treatment of human remains. Different groups have different approaches to the treatment and disposition of the remains of ancestors. We have many forms of showing respect for the dead, ranging from the construction of elaborate mortuary monuments to commemorative ceremonies and prayers for the dead, to the protection of graves from desecration and looting. Virtually all religions provide rituals and standards for the care and treatment of cemeteries and human remains. These rituals often form an important part of the beliefs and tenets of these religions. There is also great variation among cultures about what is proper respect for the dead and what happens to the soul after death. But across many cultures there is a central concern that the bodies of the deceased have a certain status that must be respected.

The ancient Egyptians, for example, had special ceremonies, practices, mortuary traditions and customs concerning the dead. Objects buried with the dead had religious significance beyond their material value. They were essential implements to help the deceased in the afterlife. Before common law developed, in regions under Roman rule, once buried, bodies could not be removed except by permission of the Pontifical College or by the Governor of the province.¹⁹⁸ Under canon law, which prevailed in such matters in Europe, buried remains could not be removed without license from the ordinary.¹⁹⁹

Almost all civilizations recognize the place of interment as special or protected. In the old Saxon tongue the burial ground of the dead was "God's Acre."²⁰⁰ And Author Robert Pogue Harrison, in his book *The Dominion of the Dead*, notes that "[h]uman beings housed their dead before they housed themselves."²⁰¹ Many believe that the dead "perpetuate their afterlives and promote the interests of the unborn," and protect and guide the living.²⁰² Many believe that the dead in effect give shelter

¹⁹⁸ See *Anderson v. Acheson*, 110 N.W. 335, 336-37 (Iowa 1907).

¹⁹⁹ See *id.*

²⁰⁰ *Dwenger v. Geary* (Ind.) 14 N.E. 903, quoted in *Anderson*, at 337.

²⁰¹ Edward Rothstein, *Book Review: Looking to the Dead To Protect the Living*, N.Y. TIMES, Nov. 1, 2003, at A15 (quoting Robert Pogue Harrison's "The Dominion of the Dead").

²⁰² *Id.*

to the living.²⁰³ “It is impossible to overestimate how much human culture owes, in principle and in origin, to the corpse.”²⁰⁴

That these values are firmly engrained in the United States is reflected in American statutory laws strictly prohibiting mistreatment of the dead and protecting the sanctity of graves from unnecessary disturbance. The disinterment of a human body has been considered a crime since common law. State laws have long criminalized the desecration or interference with gravesites and cemeteries.²⁰⁵ Many states recognize “[t]he right to have the body in the condition in which it was left by death, without mutilation.”²⁰⁶ It is the public policy of states to protect and preserve burial grounds against interference, molestation or desecration.²⁰⁷ A typical statute protecting graves from desecration reads: “Every person is guilty of a misdemeanor . . . who unlawfully or without right willfully . . . [d]estroys, cuts, mutilates, effaces, or otherwise injures, tears down, or removes . . . any tomb . . . [or who] [o]bliterates any grave, vault, niche, or crypt.”²⁰⁸ It is well established in the law that “[p]hysical mutilation of remains may be expected to distress next of kin . . . [and] where they believe that the treatment will affect the afterlife of the deceased, the impact inevitably is greater.”²⁰⁹ Many laws make it illegal to engage in mining activities at cemeteries. For example, the Arkansas statute on this point reads: “It shall be unlawful . . . [to] [m]ine, extract, or remove coal or any other mineral or substance from under or beneath any cemetery, graveyard, or burying place in this state.”²¹⁰ Cemeteries are considered such hallowed ground that common and statutory law provide protection not only from desecration of tombs but also from willful injuries done to shrubs and plants, fences, railings, gates, doors, walls, posts, or other ornamentation.²¹¹ However, many American laws pertaining to the desecration of gravesites have been infrequently applied in the case of archaeological digs of Native American or other indigenous cultures.²¹²

C. *The Legal Status of Dead Bodies*

As we have seen above, there is the general view that human interments are fundamentally inviolate. The resting place of the dead has

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See GERSTENBLITH, *supra* note 13, at 624.

²⁰⁶ *Infield v. Cope*, 270 P.2d 716, 719 (N.M. 1954).

²⁰⁷ See, e.g., *Cal. Health & Safety Code §8101*; *Eden Memorial Park Association v. Superior Court*, 180 C.A.2d 421 (1961).

²⁰⁸ CAL. PENAL CODE § 594.35.

²⁰⁹ *Kohn v. United States*, 591 F. Supp. 568, 573 (E.D.N.Y. 1984).

²¹⁰ ARK. CODE ANN. § 5-39-211(a)(1) (1987).

²¹¹ See, e.g., *Anderson*, 110 N.W. at 339; see also CAL. PENAL CODE § 594.35.

²¹² See GERSTENBLITH, *supra* note 13, at 624.

been regarded throughout the ages as hallowed ground, not subject to the laws of ordinary property.²¹³ However, the precise nature of the property interest associated with human remains in the grave is not clear. "The peculiar use to which such property is dedicated, and the sentiment of sanctity with which mankind regards the burial place of the dead, furnish ample reason for declining to apply to it the ordinary rules of ownership and devolution."²¹⁴ According to Blackstone, human skeletal remains, or the ashes of dead bodies, are not subject to private ownership, apparently because human bodies are not considered to have any commercial or monetary value.²¹⁵ At common law there was no actionable interest for the violation of the repose of the deceased. Rather, an action in the case of grave vandalism would be recognized as an action for trespass to land.²¹⁶ A more modern view expressed by many courts is that there is a quasi-property right in a dead body that the deceased's next of kin can exercise to further the decedent's wishes.²¹⁷ This quasi-ownership right helps to ensure a proper burial and compliance with the funerary wishes of the decedent.

In modern times, the sanctity of gravesites has been construed by the courts as a principle of common law. One court observed: "The place where the dead are deposited all civilized nations, and many barbarous ones, regard, in some measure, at least, as consecrated ground."²¹⁸ Another court said: "[T]he ground once given for the interment of a body is appropriated forever to that body. . . . Nothing but the most pressing public necessity should ever cause the rest of the dead to be disturbed."²¹⁹ Today, the disinterment and disposition of human remains are governed strictly by statute, not common law. Still, there appears to be no modern law that abrogates the common law principle that one may not acquire title to interred human remains in any commercial sense. Human remains have rarely been viewed under the law as archaeological "resources" in the sense of constituting marketable property. In the United States, the heir or next of kin has traditionally not had a property right in the dead body but rather a right in the nature of a custodian to hold and protect the body until burial, to determine its disposition, to select the place and manner of burial and, in the case of expressed wishes stated in a will, the executor has the duty of complying with the deceased's wishes

²¹³ See *Anderson*, 110 N.W. at 339.

²¹⁴ *Id.* at 340.

²¹⁵ 2 WILLIAM BLACKSTONE, COMMENTARIES 429; see also 22 AM. JUR. 2d, *Dead Bodies* § 4 (1988).

²¹⁶ See BLACKSTONE, *supra* note 215; Cf. *Meagher v. Driscoll*, 96 Am.Dec. 759 (Mass. 1868).

²¹⁷ See *Brotherton v. Cleveland*, 923 F.2d 477, 482 (4th Cir. 1991).

²¹⁸ *Dwenger v. Geary*, 14 N.E. 903 (Ind. 1888).

²¹⁹ *Brendle v. Reformed Congregation*, 33 Pa. 414, *quoted in Anderson*, 110 N.W. at 339-40.

pertaining to manner of disposition of remains.²²⁰ At the time NAGPRA was enacted, the Justice Department²²¹ and numerous scholars²²² took the position that human remains and funerary objects are not subject to private ownership. Thus, museums do not have ownership rights in such remains and associated funerary objects; NAGPRA does not deny them any property rights, and there is no “taking” of property without just compensation under the Fifth Amendment’s Takings Clause.²²³

Today most states have laws regulating and restricting archaeological excavation of unmarked graves whether located on public or private property. These laws appear to be grounded in the public trust doctrine²²⁴ as well as motivated by the desire to provide for equality in the treatment of all human remains.²²⁵ The laws also seek to protect the interests of descendants and other interested parties in human remains found in unmarked burial sites.²²⁶ Even before NAGPRA, many states passed legislation designed to protect unmarked graves from unauthorized excavation or disturbance. Some states even passed laws to repatriate human remains and associated funerary remains to relevant groups.²²⁷ The policy rationale behind some of these laws is the balancing of the interests of archaeologists in gathering information and material from burial sites against the legal, moral and religious rights and interests of descendants and relevant groups.²²⁸ Upon discovery, citizens are required to report graves to appropriate authorities, such as medical examiners or state archaeologists.²²⁹ An appropriate government agent will examine the remains to determine if they are of historical or archaeological significance and whether they have a lineal relationship with any extant groups.²³⁰ Some of these laws prohibit any public display of human remains from an unmarked burial acquired at any time; others prohibit the display of skeletal remains that are reasonably identifiable as to fa-

²²⁰ See HUGH V. BERNARD, *The Law of Death and Disposal of the Dead* 15-17 (1979).

²²¹ See Leonard D. DuBoff, *Protecting Native American Cultures*, 53 OR. ST. B. BULL. 9, 11-13 (Nov. 1992).

²²² See MIKE PARKER PEARSON, *The Archaeology of Death and Burial*, 191 (2001).

²²³ See Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 436 (2003).

²²⁴ See Section VII *infra* (discussing public trust doctrine and its impact on archaeology ethics).

²²⁵ See GERSTENBLITH, *supra* note 13, at 632.

²²⁶ See *id.* at 632.

²²⁷ See, e.g., Robert M. Peregoy, *The Legal Basis, Legislative History, and Implementation of Nebraska’s Landmark Reburial Legislation*, 24 ARIZ. ST. L.J. 329 (1992).

²²⁸ See GERSTENBLITH, *supra* note 13, at 632.

²²⁹ See *id.* at 633.

²³⁰ *Id.*

milian or tribal origin.²³¹ Some laws require authorization from the state archaeologist or other state official for excavation of human remains from unmarked graves.²³² A requirement may be made to include a plan for notification and identification of lineal descendants.²³³ Most of these laws apply when old graves are found on private property and the cooperation of the private landowner is necessary to excavate the site.²³⁴ In some states, groups with demonstrated ethnic affinity with the remains must consent to archaeological examination and disposition of the remains, and if no agreement is reached, the human remains must be left *in situ*.²³⁵

Statutory law tends to respect the sanctity of the grave even when cemeteries are abandoned. Typically, statutory law requires that if a cemetery becomes abandoned, the local legal authority must comply with certain procedures to declare the cemetery abandoned and then dedicate the land as a memorial park.²³⁶ In such a case, the municipality becomes a trustee for the public for the lands dedicated as a cemetery.²³⁷ Other statutory provisions require that if a cemetery is adjudicated as abandoned and a landowner wishes to use the land for some other use, the remains of the deceased must be removed and reinterred.²³⁸ Statutes define "cemetery" only with respect to the minimum number of bodies that must be buried in one place; the age of the cemetery is not an issue.²³⁹ Thus, the central idea of the sanctity of the grave does not lose its significance merely because of the passage of time. In Britain, the government is reviewing burial laws as cemetery space is growing increasingly scarce.²⁴⁰ The Home Office, the British agency responsible for internal affairs, is asking religious faiths and the public for their opinions in a proposal to exhume and rebury bodies into deeper graves to allow other coffins to be laid on top, a method known as "lift and deepen."²⁴¹ An alternative proposal is to take ancient remains and move them to more distant sites.²⁴²

²³¹ See *id.* at 638.

²³² See *id.* at 634

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See *id.* at 635

²³⁶ See, e.g., CAL. HEALTH & SAFETY CODE §§ 8825, 8828

²³⁷ See 14 AM. JUR. 2d, *Cemeteries* § 24 (1964).

²³⁸ See *id.* at § 27.

²³⁹ See, e.g., CAL. HEALTH & SAFETY CODE § 7003 (defining a cemetery as, among other things, a place where six or more human bodies are buried).

²⁴⁰ See *Britain Here Lies, There Goes*, N.Y. TIMES, Jan. 16, 2004, at A8.

²⁴¹ See *id.*

²⁴² *Id.*

D. Arguments Against Excavating Human Remains

When archaeologists excavate the dead they act on the principle that the dead have no moral status and no rights. It can be argued that archaeological excavation of burial sites express this in three ways: (1) they violate the express or implied wishes of the deceased; (2) they treat the deceased with a lack of dignity; and (3) they treat human remains as things, as means rather than as ends in themselves. Let us explore each of these points.

1. Violating the Wishes of the Deceased

It is a fairly straightforward claim from the preceding discussion that those who place a corpse into the ground intend for it to remain there in perpetuity. In modern funeral contracts, we see language suggesting that the cemetery plot is to be cared for in perpetuity by the mortuary society in charge. Modern statutory law requires that cemeteries establish and fund perpetual or maintenance trust funds.²⁴³ When a cemetery company has dedicated land as a cemetery and has entered into arrangements with lot owners on the understanding that the entire cemetery will be forever maintained as such, each owner has an interest in the entire ground of the cemetery, to be maintained in its entirety.²⁴⁴

When we disturb the remains of the dead, we invariably flout the wishes the dead had while alive. This is not necessarily the case for those who have died in shipwrecks or in other unintended ways — they did not choose their gravesites nor did they or their next-of-kin place objects of ritual importance by their sides. For instance, the remains of the passengers and crew who lost their lives in the *Titanic* disaster “were eventually devoured by marine organisms. The only trace of human existence remaining today are shoes and other man-made items that litter the bottom.”²⁴⁵ Societies often go to great lengths to recover the dead bodies of those who die on the battlefield, in earthquakes, in airplane crashes, and so on, partly because next-of-kin want the remains of their loved ones to be voluntarily interred in a way appropriate to their custom or faith, rather than involuntarily interred at the site where the death occurred.

Those who have designated tombs for the repose of their remains would almost universally refuse to consent to the later disturbing or disinterment of their bodies. It is nearly impossible to imagine the Egyptian pharaohs acceding to the exhumation of their tombs or their bodies becoming the raw materials of science or being put on display in museums. For the ancient Egyptians, suitable burial preparations were a major con-

²⁴³ See 14 AM. JUR. 2d, *Cemeteries* § 7 (1964).

²⁴⁴ See *id.* § 24.

²⁴⁵ David G. Concannon, *R.M.S. Titanic The Legal Leviathan*, 17 DEL. LAWYER 25, 27 (1999).

cern to insure for success in the afterlife. Tomb-robbers invaded many tombs long before archaeologists came on the scene. While archaeologists may have purer motives than tomb-robbers, their encroachment is just as objectionable from the standpoint of the Egyptians or of Egyptian religion. By disturbing these sacred sites, archaeologists render null and void projects that mattered greatly to people during their lives. The decisions made by people in preparing for the afterlife can not be easily cast aside just because some archaeologists think that these decisions were based on an illusion. The decisions one makes about the afterlife are “matters involving the most intimate and personal choices a person may make in a lifetime, choices central to a person’s dignity and autonomy.”²⁴⁶

2. A Lack of Dignity

It is hard to imagine anything more “intimate and personal” than a choice about how one wishes to have one’s remains treated after death. To interfere with these wishes without an overriding justification is to ignore the dignity and autonomy of a rational, self-determining agent. As Kant pointed out, as rational, autonomous beings we possess an intrinsic worth or dignity that is affronted when others intentionally block our most intimate decisions.²⁴⁷ Apart from this, there is ample authority in law and in ethics supporting the principle that the dead retain a moral status that places constraints on what may ethically and legally be done to their remains. Geoffrey Scarre suggests the following Kantian argument:

Interred remains are not simply inanimate matter, like sticks and stones. They are the relics, whether whole, decayed or the skeletal residue, of human beings. Humanity deserves our respect wherever we find it. To treat human remains without due regard to who they once were is to show disrespect to those living persons, and to humanity itself.²⁴⁸

Archaeologists may argue that they take great pains to treat human remains with dignity and respect; they do not take human remains and use them as mantelpiece ornaments or turn skulls into drinking vessels. The archaeologists’ argument is that they treat human remains sensitively, with dignity, and research is conducted pursuant to valid scientific protocols. The problem is that regardless of the care with which archaeologists may handle ancient bones, they are still violating the cultural norms of many groups; opening and examining the remains of the deceased violates considerations of respect for the dead.²⁴⁹ “Since human

²⁴⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

²⁴⁷ See SCARRE, *supra* note 196, at 242-43.

²⁴⁸ SCARRE, *supra* note 196, at 243.

²⁴⁹ See Sarah Tarlow, *Decoding Ethics*, 1 *PUBLIC ARCHAEOLOGY* 249 (2001), cited by SCARRE, *supra* note 196, at n. 23.

beings are essentially embodied beings, it would be hard to show respect for other persons without showing respect for their bodies, living or dead.²⁵⁰

3. Treating Human Remains as Things

Some argue that by excavating, studying and curating human remains, archaeologists treat these relics as means to an end. This is objectionable from a Kantian standpoint in that we should always treat people as ends in themselves, and never merely as means.²⁵¹ Perhaps we should also accord the dead the status of ends-in-themselves. While many people donate their body or body parts to science, they clearly indicate their intentions in that regard. But there is no indication that the subjects being excavated by archaeologists had any such instrumental purpose in mind for their bodies. And archaeologists do not treat the relics they study as ends in themselves. "Archaeologists are generally more concerned with what rather than who their subjects were, and the remains they uncover are more often viewed as anonymous representatives of anthropological or social types than as distinct and distinctive individuals."²⁵² On the other hand, Kant did not claim that we should never treat others as means but rather that we should not treat others *solely* as means. Some may argue that archaeologists do not treat the dead *solely* as means since they provide revelations of the details of past lives, and offer to the living information about patterns of past cultures that might otherwise be entirely forgotten; this knowledge can be seen as a valuable good for all humanity.

Human beings have interests such as reputation, bodily integrity, privacy, and not having our remains desecrated. Many of us care deeply about aspects of our posthumous fate; we want to know that certain of our interests will survive our death. Death is not an absolute moral boundary that establishes when a person's legal interests cease to be of material concern. As noted above, many people plan their deaths with great detail — certainly the pharaohs of ancient Egypt did. To dig up a dead body and "recover" funerary objects or other ritual artifacts from a tomb impacts what is arguably the most important aspect of a person's life — death and the passage into the hereafter. To desecrate a tomb imposes a harm that is pregnant in its silence, for there is often no personal representative to come forward and obtain a cease and desist order on behalf of the long departed decedent.

I would suggest that historic burials with known, living relatives should be disturbed only if they are endangered. They should then be

²⁵⁰ SCARRE, *supra* note 196, at 243.

²⁵¹ IMMANUEL KANT, *Groundwork to the Metaphysics of Morals* (1785).

²⁵² SCARRE, *supra* note 196, at 244.

handled according to the wishes of the relatives. Historic burials with probable but unknown living descendants should be left buried unless their security is threatened. If they must be removed, the removal, study and further disposition of the remains should be negotiated with a group that has appropriate cultural linkage to the remains.

Human remains of greater antiquity with no demonstrated connections to a present group pose a special dilemma. Returning to the case of ancient Egyptian remains, the present population is overwhelmingly Muslim. There is arguably no contemporary Egyptian group with sufficient cultural linkage to the Pharaohs to make a legitimate objection that the disinterment of ancient remains and associated artifacts impinges on its cultural heritage. But does this mean that studying the remains is ethical, either because there is no indigenous population to whom the material might be handed over or because there is no cultural group that can validly stake an interest in the matter? There have already been many human remains excavated from the numerous periods of Egypt's ancient past, such that there may well be diminishing returns in examining newly found mummies. At any rate, if remains are exhumed for study and long-term curation, they deserve to be accorded respect. According respect to remains implies a preference for re-interment after the completion of studies.

It is important to not blame archaeologists for problems that are not primarily associated with archaeological responsibilities, such as the way human remains are stored in museums after they are collected. To the extent that museums store or display ancient human remains and refuse to reinter the bones or repatriate them to groups that claim an interest in them, there are two considerations that should guide the appropriate curation of these relics. First, human remains should be stored in protective containers and guarded against physical deterioration, theft, and malicious use. Second, remains should only be exhibited in a manner designed to further human understanding, housed in a proper environment and, whenever possible, casts should replace actual remains.²⁵³

E. The Quasi-Property Status of Funerary Materials

According to Blackstone, apart from the quasi-property status of human remains, the general proposition with regard to objects buried with remains is that such goods are generally deemed owned by the executor of the decedent's estate or whoever was in charge of the funeral.²⁵⁴ Similarly, *Haynes's Case*²⁵⁵ expressed the common law view that burial

²⁵³ See Richard I. Ford, *Ethics and the Museum Archaeologist*, in *ETHICS AND VALUES IN ARCHAEOLOGY* (Ernestene L. Green, ed. 1984).

²⁵⁴ 2 William Blackstone, *Commentaries* 429.

²⁵⁵ *The Haynes's Case*, 77 Eng. Reprint 1389 (1614).

shrouds and other objects in the grave are the property of those who placed them in the grave. It might be argued that burial artifacts are therefore property in a commercial sense. However, the court in *Haynes's Case* seemed to underscore the idea that objects buried with a corpse ought not be disturbed because doing so would disturb the repose of the deceased, and the public has an interest in the undisturbed right of sepulture — the right to inter the deceased. The ruling does not imply that funerary artifacts are property in a commercial sense, but rather confers what seems to be a quasi-property interest in those who placed the items into the grave and a trust relationship on those who might unearth the objects. As stated in another case, those who place objects into a grave intend “for a perpetual residence therein.”²⁵⁶ It seems that these courts felt that any other approach would promote commercial despoilment of burial grounds.

The public policy rationale behind the quasi-property principle with respect to funerary artifacts is the discouragement of vandalism of burial places. No marketable interest may be acquired with or conveyed to such objects. The *Haynes's Case* does not alter the conclusion that in the absence of a specific statute providing otherwise, the law recognizes no property in grave artifacts in any commercial sense.

At least one American court has asserted the view that a coffin and shroud, once interred, cease to be property for purposes of replevin.²⁵⁷ The implication is that, in the absence of a statute on the subject, the unauthorized looting of a coffin and funerary artifacts does not constitute theft. This “non property” principle would seem to work against claims of group rights for the repatriation — in effect, for the replevin — of objects that may have been excavated from ancient graves. However, this interpretation is not quite accurate. The funerary artifacts are no longer property and their relations with the living are at an end,²⁵⁸ but descendants of the deceased “may insist upon legal protection of the burial place from unnecessary disturbance or wanton violation.”²⁵⁹ Descendants are entitled to guard the last resting place of their dead ancestors. This privilege continues so long as the land is used as a cemetery.²⁶⁰ Moreover, just because a cemetery has become abandoned in the technical sense, so that the law no longer requires that the property be maintained as a cemetery or no longer enables relatives to obtain legal protection of the site as a burial place, does not mean that the burial

²⁵⁶ *Charrier*, 496 So. 2d at 605 (citing 13 C. Demolombe, *Cours de Code Napoleon* § 37, pp. 45-46 (2c ed. 1862)).

²⁵⁷ *Guthrie v. Weaver*, 1 Mo. App. 136, 141 (1876); see also *Anderson*, 110 N.W. at 336.

²⁵⁸ See *Guthrie*, 1 Mo. App.

²⁵⁹ See *Anderson*, 110 N.W.

²⁶⁰ See *id.* at 339.

place can be disturbed. “[T]he ground once given for the interment of a body is appropriate forever to that body. It is not only the *domus ultima*, but the *domus aeterna*, so far as the eternal can be applied to man or terrestrial thing. Nothing but the most pressing public necessity should ever cause the rest of the dead to be disturbed.”²⁶¹ Clearly, the peculiar use to which burial grounds are dedicated and the sentiment of sanctity with which people throughout history regard the burial place of the dead, furnish ample reason for objections to excavating dead bodies without a pressing need.

Archaeologists may argue that objects buried with the deceased in ancient graves are abandoned property and therefore *res nullius* until found and reduced to possession by a finder who then becomes the owner.²⁶² This is an incorrect claim. Like interred human remains, burial artifacts — especially artifacts impressed with religious significance to the decedent — present special cases that cannot properly be resolved by mechanical application of general rules relating to ordinary property. The nature of the interest in funerary artifacts buried with the dead is not that of goods of trade or commerce. Burial artifacts are interred deliberately, with the manifest purpose that they remain in the ground, undisturbed by other human beings and protected from the elements, in perpetuity. “The relinquishment of possession [of artifacts into a grave] normally serves some spiritual, moral, or religious purpose of the descendant/owner, but is not intended as a means of relinquishing ownership to a stranger.”²⁶³

Non-property status extends to unmarked graves discovered on private land, so that if remains happen to be buried there, the surface owner does not own the bodies or funerary objects buried within the soil. Conferring title to ancient burial goods on the tribal descendants of those who placed them in the grave is consistent with the seminal reasoning in *Haynes’s Case* — it makes sense and seems fair that objects interred in a human burial site remain the property of those who interred them. Additionally, a trust relationship exists in such cases. Since those who interred the objects no longer exist, and presumably it was their intention for the objects to remain in the grave in perpetuity, it would seem to be a matter of equity to impose a constructive trust on those into whose hands the objects might eventually fall. It follows that objects *not* buried in graves may indeed be abandoned property. In such cases the finder or real property owner becomes the owner of the property, unless some other law such as NAGPRA, intervenes.²⁶⁴

²⁶¹ *Brendle v. Reformed Congregation*, 33 Pa. 415, 422 (1859).

²⁶² *See Charrier*, 496 So. 2d at 603.

²⁶³ *Id.* at 605.

²⁶⁴ *See GERSTENBLITH, supra* note 13, at 646.

V. THE TREATMENT OF NATIVE AMERICANS AND THE
REPATRIATION MOVEMENT

There are several motivations behind the repatriation movement. Archaeologists have long studied Native American and other aboriginal civilizations, excavated their archaeological sites, and placed their material cultural remains, as well as their human remains, on exhibit in museums. Human remains, particularly Native American remains, were warehoused in museums for extended periods of time. In the eighteenth century, archaeologists and anthropologists regarded Native Americans as “‘noble savages,’ unspoiled examples of what mankind must have been like in its earliest days, before the Biblical Fall.”²⁶⁵ They were “materials” for study, holding valuable clues to past cultures.²⁶⁶ Under the American Antiquities Preservation Act of 1906,²⁶⁷ dead Indians were regarded as “archaeological resources” that became federal “property.”²⁶⁸ Under the Act, Indians could be dug up pursuant to federal permits, provided such “gatherings shall be made for permanent preservation in public museums.”²⁶⁹ When the 1906 Act was found to be unconstitutionally vague,²⁷⁰ Congress enacted the Archaeological Resource Protection Act of 1979,²⁷¹ reinforcing the view that Native American human and funerary remains were “archaeological resources”²⁷² that were converted into “the property of the United States.”²⁷³

According to one account presented before the U.S. Congress, the Smithsonian stored 19,000 specimens of Indian remains in cardboard boxes for over 100 years.²⁷⁴ According to another account, about 300,000 specimens of human remains had been stored in cardboard boxes, not even cataloged, and little research had been done on many of these collections despite scientific claims of the “unique scientific value” ascribed to Native American bones.²⁷⁵ In the 1930s, archaeologists from the Smithsonian dug up a Native Alaskan graveyard on Kodiak Island and

²⁶⁵ See JANE McINTOSH, *THE PRACTICAL ARCHEOLOGIST: HOW WE KNOW WHAT WE KNOW ABOUT THE PAST* 11 (1986).

²⁶⁶ See Gary D. Stumpf, *A Federal Land Management Perspective on Repatriation*, 24 ARIZ. ST. L.J. 303, 305 (1992).

²⁶⁷ *Id.*

²⁶⁸ Antiquities Act of 1906, 16 U.S.C. § 432.

²⁶⁹ 16 U.S.C. § 432.

²⁷⁰ See *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974).

²⁷¹ Archaeological Resource Protection Act of 1979, 16 U.S.C. § 470aa-11.

²⁷² 16 U.S.C. § 470bb(1).

²⁷³ *Id.* § 470cc(b)(3).

²⁷⁴ *Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 229 (1990) (comment of Eni F.H. Faleomavaega, presiding over Comm. on Interior and Insular Affairs).

²⁷⁵ See Dorthey Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J.L. & MED. 261, 283 (1998).

retrieved more than 400 bodies and skeletons, which were taken back to the Institute for study and retention.²⁷⁶ But if the retention of such items is supposedly based on the need for scientific study, how long should such studies be allowed to go on?

The repatriation movement in this country has been motivated in large part by the ongoing treatment of Native American human and funerary remains as "archaeological resources" susceptible to scientific research, and the display and trafficking of such remains. This has been a source of continuing upset and frustration for Native Americans, including the descendants of people whose bodies were viewed as federal "property."²⁷⁷ Some have argued that the proper treatment of ancient human burial remains and funerary objects is a fundamental human right.²⁷⁸ This human rights approach is expressed in the United Nations Draft Declaration on the Rights of Indigenous Peoples:

Indigenous People have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains. States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.²⁷⁹

The repatriation movement is based on the principle that a cultural group has the right of exclusive control over cultural objects the group deems important for its collective identity. This right supersedes the rights of archaeologists and the general public in the pursuit of knowledge and history by acquiring, studying, preserving and displaying items of cultural significance. In recent years, the idea of cultural property rights has been instrumental in the passing of Native American Graves Protection and Repatriation Act (NAGPRA), as discussed below.

There are numerous examples of the archaeological community bowing to the wishes of indigenous peoples and turning over important collections for reburial. In February 1990, the Murray Black Aboriginal skeleton collection, consisting of about 800 individuals, was reburied in

²⁷⁶ Native American Graves Protection and Repartition Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs, 101st Cong., 2d Sess. 294 (1990) (statement of Jack F. Trope, Ass'n on American Indian Affairs, Inc.).

²⁷⁷ See NELKIN & ANDREWS, *supra* note 275, at 271.

²⁷⁸ See, e.g., *Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 264 (1990) (testimony of Edward Kanahole).

²⁷⁹ U.N. DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, part III, art 13, U.N.Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

New South Wales.²⁸⁰ In the same year, the Museum of Victoria gave a collection of human remains dated between 9,500 and 13,000 BP (before present), to the Aboriginal community. That collection was the largest group of human remains from the late Pleistocene and early Holocene epochs excavated from a single locality anywhere in the world.²⁸¹ In 1981, the California Department of Parks and Recreation proposed the re-interment of remains from over 870 burials, many thousands of artifacts. The Director of the Department stated: "I feel that when the choice is between added information and a human or religious standpoint, we should do what is right; we should opt for the religious and human standpoint."²⁸² However, a private group of archaeologists and supporters obtained an injunction to prevent the Department from going forward with its plan on the ground that the decision of the state bureaucrats was an abuse of authority.²⁸³ In New York a few years ago, excavators for a federal office building came upon a huge Colonial-era cemetery and discovered about four hundred 300-year-old skeletons of free and enslaved African-Americans.²⁸⁴ These remains were removed and recently reburied in New York at a new burial site where a permanent memorial as well as an educational center is planned.²⁸⁵ Many African-Americans felt that the remains should not have been disturbed in the first place.²⁸⁶ Initially, the government proposed to exhume the remains and continue construction, but after protests from blacks and preservationists, a decision was made to reconfigure the plan for the building, and eliminate an underground parking garage and pavilion that was supposed to be built over the graves. Instead, the government agreed to preserve a portion of the cemetery and rebury the 419 sets of remains that had been discovered. Archaeologists from Howard University were given the task of examining more than 1.5 million artifacts, from pottery to glassware, tools and children's toys, that had been recovered at the site. Prior to the reburial, four sets of remains, those of a man, a woman, a boy and a girl, were sent through Washington, Baltimore, Wilmington, Philadelphia, Newark and New York for public display.²⁸⁷

²⁸⁰ See Claire Smith & Heather Burke, *In the Spirit of the Code*, in *ETHICAL ISSUES IN ARCHAEOLOGY* 187 (Larry J. Zimmerman et al., eds., 2003).

²⁸¹ See *id.*

²⁸² Meighan, *supra* note 184, at 211 (quoting statement of Peter Dangermond, Director of California Department of Parks and Recreation).

²⁸³ See *id.* at 221.

²⁸⁴ See Michael Luo, *In Manhattan, Another Burial For 400 Colonial-Era Blacks*, *N.Y. TIMES*, Oct. 2, 2003, at A1.

²⁸⁵ See *id.*

²⁸⁶ See *id.* (quoting Howard Dodson, director of Schomburg Center for Research in Black Culture).

²⁸⁷ See *id.*

In addition, various societies have taken a position in favor of re-interment. The Society for California Archaeology issued a resolution stating that "while scientific inquiry is legitimate, human dignity is of paramount importance."²⁸⁸ The Resolution also stated that if remains are excavated, any storage or study of them must be done in a "dignified and professional manner," that no human remains may be displayed, and that re-interment must be in "accordance with the wishes of the descendants."²⁸⁹ However, due to deep divisions on the subject, this resolution was later rescinded.²⁹⁰

*Onondago Nation v. Thacher*²⁹¹ dealt with the repatriation demands of Native Americans, who claimed communal rights to a collection of wampum belts of colored clam and conch shells that the New York State Museum had obtained. The claim was that these belts were tribal property used on ceremonial occasions, and commemorated important events, such as the making of treaties. The museum contended that it had legally acquired the items from the keeper of the wampums of the Onondago Tribe of the Iroquois. The tribe argued that the objects were communal in nature, that no one except the entire tribe had the right to divest title to the items, and that the sale was unauthorized. The court denied the tribe's claim. Later, in response to public sentiment in favor of the view that these artifacts constituted cultural objects important to the Iroquois' identity, legislators enacted a law for the repatriation of five belts on the condition that the Iroquois create a museum that would properly conserve them.²⁹²

As discussed below, during congressional debates preceding passage of NAGPRA, it was noted that there was little protection granted to the remains of Native Americans, and little recognition that these remains are part of a continuing extant cultural tradition. American Indians had long complained that archaeologists dig up only Indian graves and never the graves of their own ancestry. It seemed contrary to common sensibilities of the lawmakers to condone the idea of museum-goers gawking at the bones of ancient Native Americans, which, while a benefit for tourism, constitutes a blight on the moral treatment of human remains.

²⁸⁸ See Meighan, *supra* note 184, at 212 (quoting Resolution of Executive Board of Society of California Archaeology, Nov. 14, 1981).

²⁸⁹ See *id.*

²⁹⁰ *Id.*

²⁹¹ *Onodango Nation v. Thatcher*, 61 N.Y.S. 1027 (Sup. Ct. Onondago Country 1889).

²⁹² See Brown Blaim, *Indian Rights: Native Americans Versus American Museums: A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 126 (1979) (citing N.Y. Indian Law § 27).

There was concern about the way sacred items buried with ancestors have been unearthed, put on display, and stockpiled.²⁹³

Aside from concerns about disturbing the dead, tribal groups believe that collecting and displaying objects from prehistoric graves is dangerous; uncontrollable powers may be tampered with by persons ignorant of the correct religious and ceremonial procedures.²⁹⁴ Senator Daniel Inouye stated during debates on NAGPRA:

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.

In light of the important role that death and burial rites play in Native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century.²⁹⁵

And according to American Indians Against Desecration (AIAD), "[a]ny disruption, delay or halt in that journey [to the spirit world] is a violation of personal religious beliefs to that individual, to his descendants who incorporate and are responsible for his spirit in their daily lives and religious ceremonies, and to those of the present and the future who will embark on that journey."²⁹⁶

The long-standing common law principle disallowing ownership rights in human remains was echoed in hearings before the Senate Select Committee on Indian Affairs in connection with NAGPRA.²⁹⁷ Representatives of various Native American groups stated that under their religious beliefs, it is crucial to protect human remains, funerary objects and sacred implements so as to ensure that ancestors are properly taken care of with the dignity and respect they deserve. Native Americans view respect for human remains as important for the well-being of their ancestors as well as for the present and future members of the group. Indians have to know that their ancestors are "put back to rest so that

²⁹³ See generally *Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. (1990).

²⁹⁴ See Meighan, *supra* note 184, at 217.

²⁹⁵ 136 CONG REC. S17, 174 (daily ed. Oct. 26, 1990).

²⁹⁶ Jan Hammil & Robert Cruz, *Statement of American Indians Against Desecration before the World Archaeological Congress*, CONFLICT IN THE ARCHAEOLOGY OF LIVING TRADITIONS 195-6, (Robert Layton ed., Routledge); See SCARRE, *supra* note 196, at 239.

²⁹⁷ *Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 60 (1990).

their songs can continue to travel.”²⁹⁸ Otherwise, their ancestors are in limbo, “just traveling in space and they don’t appear to any of our youngsters to guide them in their futures.”²⁹⁹ “If they are put back in their final resting place, then the songs can travel further to our youngsters, to be their guide throughout their lives.”³⁰⁰

Bones and funerary artifacts are often considered to have ritual meaning, such that their excavation, study and display are sacrilegious and disrespectful of the dead. Many Native Americans believe it is important for their spiritual health to regain custody of these objects and take care of them, even if they do not re-inter the remains. “[D]isinterment stops the spiritual journey of the dead, causing the affected spirits to wander aimlessly in limbo. These affected spirits can wreak havoc among the living, bringing sickness, emotional distress, and even death.”³⁰¹ Based on these concerns, Native Americans have asked: “Were Native American remains more scientifically valuable than those of white Americans? Why was skeletal research necessary, proper or beneficial?”³⁰² The culture, religion and spiritual beliefs of many other groups similarly maintain that the body’s integrity is necessary for salvation in the afterlife.³⁰³ Native Hawaiians honor their ancestors by protecting their mana, or spiritual power, protecting their burial sites, and protecting their bones.³⁰⁴ They honor, treasure and guard the bones of their ancestors, sometimes exhuming and cleaning the bones, or even keeping them in the home at the bedside.

[W]ithin the bones of our ancestors we have this spiritual power which is essential for our life here on Earth and also for our afterlife. We believe that any disturbance of the bones, manipulation, handling, carrying, disturbs this and diminishes the spiritual force that lay in the bones. If this spiritual force is diminished, then we have the responsibility to protect those who have gone on into the world of the unseen.³⁰⁵

²⁹⁸ *Id.*, at 124 (testimony of Patrick Lefthand).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ James Riding In, *Without Ethics and Morality: Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ ST. L.J. 11, 13 (1992).

³⁰² See NELKIN & ANDREWS, *supra* note 275, at 271.

³⁰³ See Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 474 (1997).

³⁰⁴ *Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 261 (1990) (testimony of Edward Kanahahele).

³⁰⁵ *Id.*

VI. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA)

As mentioned above, NAGPRA was prompted in response to concerns about the massive desecration of Native American burial grounds and the excavation and marketing of Native American bones and artifacts. The Act was in part an effort to reverse past injustices towards indigenous minority cultures, particularly Native American tribes and native Hawaiian organizations.³⁰⁶ NAGPRA was enacted to provide a process for resolving the complex and potentially contentious issues surrounding the disposition of Native American human remains and cultural items excavated or discovered on federal or tribal lands³⁰⁷ as well as curated remains housed in museums or other institutional collections that receive federal funding.³⁰⁸ NAGPRA codified the concept of group ownership and inalienability with respect to certain cultural property.

NAGPRA mandates the repatriation of certain cultural items to Native Indian tribes, including human remains, funerary objects and sacred objects. These items can be claimed by lineal descendants or others who have a valid cultural connection. Under the Act, the Department of the Interior is to determine whether there is a cultural affiliation between skeletal remains and one or more contemporary American Indian tribes. "Cultural affiliation" is defined by the statute as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."³⁰⁹ The Act defines "funerary objects" as "objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later."³¹⁰ The Act defines "sacred objects" as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."³¹¹ NAGPRA identifies a range of evidence that may be used in evaluating cultural affiliation, including geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information, including expert opinion and analysis.³¹²

³⁰⁶ See Peter R. Afrasiabi, *Property Rights in Ancient Human Skeletal Remains*, 70 S. CAL. L. REV. 805, 810-12 (1997).

³⁰⁷ 25 U.S.C. § 3002.

³⁰⁸ 25 U.S.C. §§ 3003-08.

³⁰⁹ *Id.* § 3001(2).

³¹⁰ *Id.* § 3001(3)(A) ("associated funerary objects") and (B) ("unassociated funerary objects").

³¹¹ *Id.* § 3001(3)(C).

³¹² *Id.* § 3005(a)(4) (stating that "cultural affiliation" need not be established with scientific certainty). Gaps in the record of ownership or control do not in and of themselves contradict claims of cultural affiliation. H.R. REP. NO. 101-877, 101st

The most controversial part of NAGPRA applies to the repatriation of human remains and associated objects already part of museum collections. NAGPRA enables requesting Native Americans to reclaim cultural items³¹³ and family skeletal remains³¹⁴ that were discovered on federal or tribal lands and are now housed or displayed in federally funded institutions and museums. NAGPRA requires federal agencies, and all museums that receive federal funding, to prepare inventories of their human remains and associated funerary artifacts.³¹⁵ And the Act requires that notice of the inventories be sent to those Native American groups reasonably identified as culturally affiliated with the inventory items.³¹⁶

Museums or federal agencies that, in the process of compiling the mandated inventories,³¹⁷ identify a cultural affiliation must repatriate the relevant remains or objects in an expeditious manner.³¹⁸ Upon such a showing, repatriation will be required to the relevant group.³¹⁹ The Act acknowledges the communal nature of certain pieces of property called “cultural patrimony,” defined as:

[A]n object having an ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual . . . and such object shall have been considered inalienable by such Native

Cong., 2d Sess. 17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4373. If multiple parties claim the same item and the museum “cannot clearly determine which party is the most appropriate claimant,” restitution is not mandated until the requesting parties agree upon its disposition or the dispute is otherwise resolved. 25 U.S.C. at § 3005(e). If a cultural item is “indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States,” immediate restitution is not required. *Id.* § 3005(b).

³¹³ See Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 *IND. L.J.* 723, 723 (1997).

³¹⁴ See H.R. REP. NO. 101-340(I), at 9.

³¹⁵ 25 U.S.C. § 3003(a) (defining “museum” as an institution that receives federal funds, including universities; § 3001(8) defining “associated funerary objects” as “objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with the individual human remains either at the time of death or later, and both the human remains and associated objects are presently in the possession of the Federal agency or museum”; includes objects containing human remains).

³¹⁶ *Id.* § 3003(a) (setting forth general notice requirements, “cultural affiliation” is said to serve as proper basis for determining if claimant has reasonable connection to requested materials); H.R. REP. NO. 101-877, 101st Cong., 2d Sess. 17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4373.

³¹⁷ *Id.* § 3003(a).

³¹⁸ *Id.* § 3005(a)(1).

³¹⁹ *Id.* § 3005(a)(4).

American group at the time the object was separated from the group.³²⁰

These provisions apply to communal artifacts of Native American or Native Hawaiian groups.³²¹ As mentioned above, communal artifacts are inalienable; individual members of a group cannot convey title to them.³²² Thus, any individual who transferred such objects to third parties did not have the right to convey legal title, and the present holder of the property does not have the right of possession.³²³ This provision of NAGPRA means that if a museum has objects that are communal in nature — mainly ceremonial or sacred objects — the museum does not have valid title to them, and they must be repatriated. This provision also addresses a concern of museums that their trustees might be found in breach of their fiduciary duties if they de-accessed certain artifacts without receiving payment for them. NAGPRA establishes that there is no breach of fiduciary duty on the part of museum trustees when they agree to return communal objects to cultural groups without payment since the trustees do not possess legal title.³²⁴ With respect to the repatriation of human remains and associated funerary objects, museum trustees are similarly exempt from liability because ownership of such materials is not possible under common law principles, as discussed above. By preventing trade in deceased bodies and funerary artifacts, NAGPRA simply reapplies this well-established common law principle to Native American remains. NAGPRA does not provide for compensation for repatriated objects because these items are regarded as stolen, plundered or looted, and dead bodies and some associated funerary objects are not subject to ownership rights, as discussed above.³²⁵

³²⁰ *Id.* § 3001(3)(D).

³²¹ See Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 HAWAII L. REV. 261, 277 n. 128 (1998).

³²² See Section IV *supra*.

³²³ 25 U.S.C. § 3001(13) (defining "right of possession" as "possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would . . . result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 U.S.C. 1494 in which event the 'right of possession' shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.").

³²⁴ See GERSTENBLITH, *supra* note 223, at 434.

³²⁵ See *id.*

The legislative history of NAGPRA reveals that the definition of "sacred objects" includes not only those objects used for currently practiced ceremonies but also objects necessary to renew traditional religious ceremonies.³²⁶ This reflects the intention of Congress to support and foster traditional religious practices. "[T]he definition recognizes that the ultimate determination of continuing sacredness must be made by the Native American religious leaders themselves. . . . The definition will vary according to the traditions of the tribe or community."³²⁷ Group leaders are largely responsible for defining and determining the characteristics of their group's sacred communal property.

The provisions of NAGPRA dealing with sacred objects make it clear that such objects subject to repatriation should be actively employed *today* in religious, ceremonial or communal activities, or associated with such activities, as well as have been so employed in the past. These are objects that the group believes need to be physically present to fulfill their religious, ceremonial or communal needs. The absence of these objects leaves a cultural void that can only be filled by their return. This leaves open the question of whether all redundant objects of this type must be repatriated. If there are similar objects that the group actively employs in its ceremonies today, this may suggest that the absence of a particular object does not prevent the group from performing its ceremonies and fulfilling its cultural traditions.

It is important to distinguish the cases in which objects are necessary for religious, ceremonial or communal use by a present culture from the cases in which there is a more attenuated nexus to the group's identity. A claim to an object that a group says is sacred to its traditions need not always prevail. For instance, if the artifact in question plays only a marginal role in the traditions or ceremonies of the modern group, or if the modern group only very recently incorporated the object into their practices, the claim may lack validity. These questions need to be resolved according to the facts of each case. It is not known how many objects have been repatriated under NAGPRA. At least one commentator has suggested that the number is relatively small.³²⁸ However, it appears that the enactment of NAGPRA and comparable state laws has solidified a

³²⁶ H.R. REP. NO. 877, 101st Cong., 2d Sess. 14 (1990).

³²⁷ Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 66 (1992).

³²⁸ See GERSTENBLITH, *supra* note 223, at 430. The Smithsonian Museum of Natural History inventoried 250,000 artifacts for possible return to tribes, but only removed one object from public display. Other objects that were repatriated had been held in museum storage or in the museum's research archives. See also Mike Toner, *The Past in Peril: Coveting Thy Neighbor's Past*, ATLANTA J. & CONST. NOV. 7, 1999, at 1Q.

new ethical standard that supports correcting past abuses. NAGPRA represents a paradigm shift, requiring museums, collectors, archaeologists and the public at large to cultivate a greater sensitivity and understanding of Native American beliefs and practices.

There are certain similarities between the concerns of Native Americans that led to the enactment of NAGPRA and the situation facing modern day Egyptians. Congress acknowledged that Native Americans have special beliefs and ceremonies, practices, mortuary traditions, and customs concerning the dead.³²⁹ So did the ancient Egyptians. For Native Americans, objects buried with the dead have religious significance beyond their material value — they are essential implements to help the deceased in the afterlife. That is also the case for the ancient Egyptians. For both groups, the grounds on which the dead are buried are considered sacred, and the spirits of ancestors can be free only when their remains are laid to rest permanently in their homeland. The depth and importance of the interests in repatriation of these objects outweighs the interests supporting their removal. Scientific research, morbid curiosity and unbridled greed in the antiquities market do not outweigh repatriation interests.

With respect to funerary talismans from the graves of ancient Egyptians, clearly these objects have no contemporary religious, ceremonial or communal function, but the objects had great significance for those who were buried with them. People who live in Egypt today may nonetheless value these relics for other reasons. For a number of faiths, once a human leaves this world, their remains should never be disturbed.³³⁰ But few faiths have had the intense level of concern for the treatment of human remains and body parts possessed by the ancient Egyptians. Under the Christian faith, it is apparently not the case that the disinterment of body parts of the deceased saints poses any problem for their journey in the afterlife. In the Catholic faith, there is a long-standing tradition to allow for the display of relics of saints, not as objects of curiosity, but as sacred objects worthy of veneration. Body parts of many saints, ranging from fingers to arms to heads, bones, and teeth have routinely been removed and placed in far-flung churches, museums and monasteries all over the world for the faithful to come see and worship. There is even a term, *reliquary*, referring to a casket or other container into which to deposit and display relics for the public to view. For many Jews, however, the desecration of a deceased body is a grave matter. It is

³²⁹ *Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 49 (1990).

³³⁰ *Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 132 (1990) (testimony of Daniel Akaka).

forbidden to perform autopsies on dead bodies, much less to disinter the bodies or put them on public display.

VII. THE PUBLIC TRUST DOCTRINE AND ARCHAEOLOGICAL ETHICS

In Western culture, the predominant type of property is private property. However, the public trust doctrine, which governs state stewardship of trust interests, embodies the notion that certain interests and resources are necessarily held in trust for the benefit of the entire collective. The public trust doctrine derives from the ancient Roman legal concept of *res communis*. Certain properties are held in common and belong to the community. The enjoyment of such property by all is a natural right and must not be infringed or taken away.³³¹ The doctrine evolved in English common law, in which the courts held that all of a nation's public lands are held in trust by the government for the people of the entire country.³³² Under the public trust doctrine, the government has an ongoing affirmative duty to preserve and protect the nation's lands for the "public's common heritage."³³³ Effective implementation of the public trust doctrine requires preventive and remedial oversight as well as restorative responsibilities.³³⁴ Perhaps the most significant tenet of the public trust doctrine is that the state lacks the power to alienate public trust property.

The public trust doctrine is now understood as covering all kinds of property for which the state must exercise sovereign supervision and control.³³⁵ In its modern application, the public trust doctrine preserves the public right to make use of natural resources, particularly rivers, the sea, and the shore, for purposes such as recreation, navigation, and fishing.³³⁶ The doctrine has been recognized to extend to a wide range of natural resources, including public lands and open space, wildlife and habitats, aesthetic features of the natural environment,³³⁷ marine life, and rural parkland.³³⁸ Under the public trust doctrine, the state has a duty to pro-

³³¹ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

³³² *Light v. United States*, 220 U.S. 523, 537 (1911).

³³³ *Sierra Club v. Block*, 622 F. Supp. 842, 866 (D. Colo. 1985); See also *Massachusetts v. Andrus*, 594 F.2d 872, 890 (1st Cir. 1979).

³³⁴ See Peter Manus, *To A Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 318 (May 2000).

³³⁵ See, e.g., *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 33 Cal. 3d 419 (1983).

³³⁶ See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633-35 (1986).

³³⁷ S. M. Kelly, *The Public Trust and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia*, 75 VA. L. REV. 895 at 897 (1989).

³³⁸ See GERSTENBLITH, *supra* note 13, at 649.

tect the people's common heritage by preserving the ecological functioning of environments that provide food and habitat for wildlife and favorably affect scenery and climate.³³⁹ The public trust doctrine protects the interests of both present and future generations.³⁴⁰

The public trust doctrine contemplates that if harmful diversions or changes are proposed for property dedicated to the public interest, such arrangements violate the doctrine and must be enjoined by the courts.³⁴¹ The state must consider the public trust before approving the use of lands protected by it so as to avoid the diversion or destruction of public trust interests or resources.³⁴² The public trust doctrine "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."³⁴³

Does the public trust doctrine apply to archaeological resources as such, whether or not they are situated on public lands? The doctrine clearly extends to such resources if they are on public lands since the public lands and their associated resources are dedicated to the public interest. But there is a split of authority as to whether the public trust doctrine pertains to archaeological resources on private lands.³⁴⁴ Archaeological resources, wherever situated, arguably have many of the features of resources traditionally protected by the public trust doctrine, such as being nonrenewable and depletable. If the public trust doctrine applies to archaeological digs, even on private property, the state has a form of sovereignty over archaeological resources on private property, a kind of original ownership.³⁴⁵ The law appears to be moving in this direction. While the public trust doctrine initially functioned primarily as a restriction upon government action, in recent years it has been applied as a restraint upon other parties in their exercise of private property rights. The majority of public trust cases since 1970 fall into this category.³⁴⁶

In 1996, the Society for American Archaeology adopted the public trust doctrine as something of a maxim, issuing a "stewardship principle." According to this principle, archaeologists are responsible for preserving and protecting *in situ* materials along with collections and records, and for using their specialized knowledge to interpret records for the benefit of all and to promote public understanding and support for the long-term

³³⁹ *Marks v. Whitney*, 6 Cal. 3d 251 (1971) (holding that environmental preservation of tidelands in their natural state was encompassed by public trust).

³⁴⁰ See *SAX*, *supra* note 331, at 556-57.

³⁴¹ See, *Gould v. Greylock Reservation Community*, 215 N.E.2d 114 (1966).

³⁴² See *Nat'l Audubon Soc'y* 33 Cal 3d.

³⁴³ *Id.* at 421.

³⁴⁴ See *GERSTENBLITH*, *supra* note 13, at 649-51.

³⁴⁵ *MANUS*, *supra* note 334, at 324.

³⁴⁶ See *Lazarus*, *supra* note 336, at 631.

survival of these materials.³⁴⁷ This suggests that archaeologists are taking on the role of trustees of the world's nonrenewable archaeological resources.

The public trust doctrine has a meaningful role in balancing interrelated concerns in the management of archaeological resources and in requiring public accountability in the exploitation of archaeological resources, wherever situated. Under the public trust doctrine, the government imposes restrictions on excavations and requires developers to report archaeological findings, implement preservation protocols, and even repatriate certain artifacts.³⁴⁸ The second half of this Article, to be published herein this fall, explores the fact that many nations have enacted patrimony laws nationalizing all archaeological resources, even those located on private property.

The public trust doctrine is also expressed in the Abandoned Shipwreck Act of 1987, discussed in Section II *supra*, which was established in part "to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks."³⁴⁹ The Secretary of the Interior was required to publish guidelines which seek to: maximize the enhancement of cultural resources; foster partnerships among sport divers, fisherman, archaeologists, salvagers and others to manage shipwreck resources; facilitate access and utilization by recreational interests; and recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.³⁵⁰ The Abandoned Shipwreck Act also provides that state waters and shipwrecks are "irreplaceable" resources for tourism, biological sanctuary, and historical research.³⁵¹

The public trust doctrine is at play in the policy rationale behind laws such as NAGPRA that balance the interests of archaeologists against the legal, moral and religious rights of descendants and relevant groups. The public trust doctrine captures this stewardship principle in stressing the duty of all parties — the government, market participants and citizens at large — to compromise their interests in resource exploitation in order to protect public trust resources. The doctrine captures something of a democratic ideal, with individuals working for the greater good even as they strive to attain individual benefits.

³⁴⁷ See ETHICS IN AMERICAN ARCHAEOLOGY: CHALLENGES FOR THE 1990s 23-24 (Mark J. Lynott & Alison Wylie, eds.) (Washington, Society for American Archaeology, 1995), cited by SCARRE, *supra* note 196, at n. 31.

³⁴⁸ Manus, *supra* note 334, at 330.

³⁴⁹ 43 U.S.C. § 4104(a).

³⁵⁰ *Id.* § 4104(a)(1)-(4).

³⁵¹ *Id.* § 2103(a)(1).

VIII. THE KENNEWICK MAN

One of the issues pertaining to repatriation under NAGPRA is whether excavated materials are culturally affiliated with a contemporary Native American group. This becomes especially problematic in cases where human remains found in ancient graves are not shown to be associated with any living descendants. The remains of numerous ancient people may belong to a group or culture that vanished thousands of years ago.³⁵² Linking an individual who died long ago to a modern American Indian tribe, for example, can be difficult if there has been significant migration of the relevant American Indian group. Thus, contemporary American Indian populations in certain regions may not be descended from remains discovered on those lands.³⁵³

In a major case testing the scope of NAGPRA, archaeologists won the right to study an ancient skeleton over the objections of various Native American groups. The case, *Bonnichsen v. United States*, involved a 9,500 year-old skeleton found near Kennewick, Washington³⁵⁴ and was brought by various archaeologists and the Smithsonian Institution to prevent the Secretary of the Interior from repatriating the remains of the "Kennewick Man" to Indian claimants. The archaeologists argued that the Kennewick Man was an extremely rare find because it was so well-preserved and that they ought to be able to obtain as much data as possible from it. Local Indian tribes opposed the scientific study of the skeleton on religious grounds, and in a joint *amici* brief stated:

When a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest. . . . To put these spirits at ease, the remains must be returned to the ground as soon as possible.³⁵⁵

In response to arguments that scientific study could provide new information about the early history of people in the Americas, the tribes said that they already knew their history from oral tradition.³⁵⁶

The physical features of the Kennewick Man appeared to differ from modern American Indians. Evidence showed that the skeletal remains were unlike any known present-day population but had some resemblance to groups in Polynesia and Southern Asia. Some experts testified that even though the remains did not physically resemble present Indian

³⁵² *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1138 (D. Or. 2002). The Kennewick Man, discovered in Kennewick, Washington in 1996, had cranial measurements and features that closely resembled those of Polynesians and southern Asians but differed from those of any modern group living anywhere in the world today.

³⁵³ See SMITH & BURKE, *supra* note 280, at 180.

³⁵⁴ See *Bonnichsen*, 217 F. Supp. 2d.

³⁵⁵ *Id.* at 1121 (quoting from Joint Tribal Amici Memorandum).

³⁵⁶ *Id.*

people, they could not rule out the possibility that the skeleton was biologically related to the Indian claimants. The judge held that the American Indians did not make a sufficient showing of cultural affiliation as required to claim the remains, and ruled against repatriation of the Kennewick Man.³⁵⁷

The court felt that the Secretary of the Interior did not adequately determine “an identifiable earlier group” to which the Kennewick Man allegedly belonged, or even establish that he belonged to a particular group, and did not adequately address the requirement of a “shared group identity.”³⁵⁸ The Secretary of the Interior had adopted a policy stating that all remains found in the United States that predate 1492 are deemed to be Native American, and therefore are not open to archaeological study. The Secretary’s view implied that all remains and objects predating Columbus’s arrival in the Americas would be deemed Native American irrespective of when the ancestors had arrived in America and regardless of whether the individuals were in fact related to present-day American Indians. The court noted that under this definition, *all* pre-Columbian remains and other cultural items found in the United States would be deemed Native American and hence subject to repatriation under NAGPRA. The Secretary also argued that Native Americans could claim the remains of the Kennewick Man based on aboriginal occupation, irrespective of whether they were culturally affiliated or biologically related to the remains.³⁵⁹

The court noted that the term “Native American” in the statute requires some relationship between remains or other cultural items and an existing tribe, people, or culture. The court noted that the purpose of the Act is to allow tribes and individuals to protect and claim remains, graves, and cultural objects *to which they have some relationship*, but not to allow them to take custody of remains and cultural objects of persons to whom they are not related. The court said:

*All pre-Columbian people, no matter what group they belonged to, where they came from, how long they or their group survived, or how greatly they differed from the ancestors of present-day American Indians, would be arbitrarily classified as “Native American,” and their remains and artifacts could be placed totally off-limits to scientific study.*³⁶⁰

The opinion thus rejected the policy of the Secretary of the Interior that pre-1492 human remains would automatically be presumed to be the ancestors of contemporary Native Americans. The holding of this case means that human remains will not be assumed to be Native American

³⁵⁷ *Id.* at 1127.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 1130.

³⁶⁰ *Id.* at 1137.

under NAGPRA without affirmative evidence showing some biological or cultural affiliation.

IX. PRESENT-DAY ARCHAEOLOGICAL ETHICS

To archaeologists, studying dead bodies and funerary objects is crucial to understanding the death and burial practices of past cultures, and is important for scientific understanding of human culture. The problem facing archaeologists in light of the repatriation movement is that if they are confronted with extreme opposition to excavation, if there are overriding justifications that constrain them from excavating human remains and associated artifacts, this may put an end to a very important aspect of archaeology in a number of cases.

Alternatives are limited. Archaeological collections of human remains and anything else labeled sacred by the relevant cultural group may need to be reburied or otherwise dissipated after they are studied, rather than be preserved and properly curated in a museum. Archaeologists may have to adopt entirely different approaches, doing "sampling" or selecting archaeological research designs that will involve minimal excavation and avoid all mortuary data, collecting little or nothing from sites so that the problem of disposition of collections will not exist. Archaeologists may also avoid excavations whenever possible and adopt a "no collection" strategy in which research is done without collecting anything but rather involves examining excavated items *in situ* and then reburying everything as found. Would such an approach negatively impact archaeological research, resulting in trivial or minimal studies? Could this end archaeology altogether as a field of study? What about the ongoing problem of looters?

Does it matter how long in the past the remains have been buried? For archaeologists, it is difficult to accept the notion that the study, preservation and display of an ancient skeleton found at a Pleistocene fossil site is a form of exploitation and desecration of cultures that have lived in the past. Archaeologists typically evince a certain moral complacency with respect to the excavation of ancient human remains, particularly since the data available from such specimens is so exciting to the scientific community and the public. Archaeologists seem to believe that the older the remains, the less relevant are ethical objections to their examination. But the rationale for this is far from clear. Should the mere passage of time somehow override the sanctity of the grave and give way to the appetite of archaeologists for more materials to study? Is the position of archaeologists affected by the fact that older remains provide exponentially more exciting archaeological data about the way pre-historical inhabitants lived? Are ethical objections less relevant because there are no descendants to come forward, or because modern groups

have little stake in the matter or materials at issue? The ethical issue of cultural affiliation is particularly acute with very old human remains:

When we turn to the case of very ancient remains where no direct descendants can be established, no bias towards returning the material to indigenous groups exists. Material in this category is not left in a vacuum, but it receives less protection than material of known provenance. Where direct descendants are not identifiable, the interests of humanity in general should take precedence, and the remains should be made available for reputable scientific investigation. The lack of clear associations with the living also suggests that consent to undertake scientific study is of secondary importance, since what becomes pre-eminent is enhancing the material's ability to contribute to our understanding of human development and culture.³⁶¹

Under this view, ancient human remains become "materials" unless there are "direct descendants" who may object. Ancient remains are likely to be in unmarked graves so that the identity of the individuals cannot be ascertained. If there are any direct descendants today, it will not be possible to pinpoint who they are. More broadly, however, if a group claims cultural affiliation to the "materials," the group may be hard-pressed to convince archaeologists that their cultural affiliation has a sufficiently strong nexus to the remains because of migrations and the other problems discussed above.

Most archaeologists share the view that "[t]hose who are no longer living have no morally relevant interest in the contemporary polity."³⁶² Most archaeologists do not believe that the dead or their spirits can be harmed by the excavation, removal and study of their remains.³⁶³ They are inclined to be dismissive of the "myths" of people who believe that the unearthing of human remains is taboo because it interferes with the soul's destiny in the afterlife. Whatever the rationale, to most archaeologists, the beliefs of ancient and often modern stakeholders are difficult to accept as sufficient to override their scientific interest in excavating sites. To many archaeologists, it is superstitious to think that excavation of prehistoric graves may unleash demons or other dangerous entities, or that popular stories such as the "mummy's curse" about ancient Egypt are of any real concern.

While the Kennewick Man case places a significant burden on claimants who wish to interfere with the excavation of ancient remains, ethical

³⁶¹ D. Gareth Jones & Robyn J. Harris, *Archaeological Human Remains*, 39 *CURRENT ANTHROPOLOGY* 262 (1998), cited by Scarre, *supra* note 196, at 238.

³⁶² Tim Mulgan, *The Place of the Dead in Liberal Political Philosophy*, 7 *J. POL. PHIL.* 54 (1999).

³⁶³ See SCARRE, *supra* note 196, at 238 (2003).

questions remain. Archaeologists agree that known descendants should have some say in what happens to their ancestors' remains. However, there is little clarity on the extent of the import of such claims. Moreover, standards for tracing descent from prehistoric interments remains unclear. Some ethical guidance has been supplied by various archaeological societies, as discussed in the following section.

A. *Archaeological Codes of Ethics*

NAGPRA has helped correct some of the objectionable practices of archaeologists with respect to Native American and Hawaiian prehistoric burials. State statutes requiring repatriation of certain Native American objects and human remains have also had an impact.³⁶⁴ And ethical codes of various archaeological organizations offer standards that are markedly different and superior to those relied on in the past. The various archaeological codes of ethics express widely divergent values, each articulating the underlying assumptions and guiding principles of a particular association's membership. The code of the Archaeological Institute of America focuses on promoting the greater understanding of archaeology. The codes of the Society for American Archaeology (SAA) and the New Zealand Archaeological Association emphasize the stewardship of cultural heritage. The American Anthropological Association (AAA) emphasizes a paramount professional responsibility to those studied. And the codes of the Canadian Archaeological Association, World Archaeological Congress (WAC), and Australian Archaeological Association acknowledge the importance of indigenous cultural heritage and its survival.

Each code has been developed from the needs of a particular group at a particular time and place to address ethical dilemmas in different parts of the world. These codes offer different ethical views, favoring the rights of indigenous people to control their own material cultures on the one hand, or the scientific community's rights to access archaeological resources on the other.³⁶⁵ The different foundations of these codes mean that archaeological responses to ethical dilemmas could be vastly differ-

³⁶⁴ See, e.g., 1990 Ariz. Sess. Laws ch. 326 1 (codified at ARIZ. REV. STAT. ANN. 41-844) (requiring restitution of Native American materials in possession of state agencies before 1990); see also 1989 Neb. Laws LB 340 9-11 (codified at NEB. REV. STAT. 12-1209 to 12-1211) (requiring publicly funded or identified entities upon request to return any human skeletal remains or burial goods "of American Indian origin which are reasonably identifiable as to familial or tribal origin" to such relative or Indian tribe or to rebury remains within one year of request); see also California Native American Graves Protection and Repatriation Act, CAL. HEALTH & SAF. CODE, 8010-8020 (2002).

³⁶⁵ SMITH & BURKE, *supra* note 280, at 181-89.

ent. The outcome of an ethical dispute may likely depend on which code of ethics is observed.

The American Anthropological Association (AAA) established a formal Code of Ethics in June, 1998.³⁶⁶ This code describes a “responsibility to people and animals with whom anthropological researchers work and whose lives and cultures they study.” It goes on to say:

Anthropological researchers have primary ethical obligations to the people, species, and materials they study and to the people with whom they work. These obligations can supersede the goal of seeking new knowledge, and can lead to decisions not to undertake or to discontinue a research project when the primary obligation conflicts with other responsibilities, such as those owed to sponsors or clients.³⁶⁷

This Code expresses the importance of respecting the interests of a wide range of stakeholders, including animal species that may be impacted by a given project, sponsors, clients, co-workers, and the people being studied. It provides that there is a primary responsibility to the subjects of a study, and that this can trump the quest for new knowledge and scholarship. That is, the code suggests that ethical obligations to stakeholders “can supersede” the goals of a research project, but it offers no guidance on how to resolve ethical dilemmas when they arise. The Code does not indicate what degree of community objection would be sufficient to stop a project. What if a community objects because the project is likely to unearth human remains that the community thinks should be left in place? Clearly, this code places some importance on the concerns of indigenous peoples, but it does not mandate concession to their demands, and there is nothing here on the scale of NAGPRA that would mandate leaving remains undisturbed or delivering them to a particular group that has objected to archaeological study.

The Society for American Archaeology (SAA) was formed as “an international organization dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas.”³⁶⁸ In the 1990s, the organization began in earnest to formulate detailed ethical guidelines. The SAA Principles of Archaeological Ethics focus on professional standards and archaeological responsibilities of stewardship. In contrast to the guidelines of the AAA, the SAA principles give little consideration to the concerns of ethnic or indigenous groups.

³⁶⁶ It should be noted that archaeologists are trained as anthropologists and, as such, have two roles.

³⁶⁷ SMITH & BURKE, *supra* note 280, at 181 (citing American Anthropological Association Principles of Professional Responsibility).

³⁶⁸ *Id.* at 182.

Principle no. 1: Stewardship

The archaeological record — that is, in situ archaeological material and sites, archaeological collections, records and reports — is irreplaceable. It is the responsibility of all archaeologists to work for the long-term conservation and protection of the archaeological record by practicing and promoting stewardship of the archaeological record.

Stewards are both caretakers of and advocates for the archaeological record for the benefit of all people. As they investigate and interpret the record, they should use the specialized knowledge they gain to promote public understanding and support for its long-term preservation.

Principle no. 2: Accountability

Responsible archaeological research, including all levels of professional activity, requires an acknowledgement of public accountability and commitment to make every reasonable effort to consult actively and in good faith with affected group(s), with the goal of establishing a working relationship that can be beneficial to all parties involved.³⁶⁹

Here the emphasis is on stewardship of archaeological materials so that they can be preserved for scholarship and for the benefit of the public in general. That is, the focus is on archaeological *materials* rather than on living groups that may be affiliated with those materials. The SAA Code refers to “public accountability” and the “commitment” to “consult actively” with affected stakeholders in order to reach a result that will be beneficial to all parties involved.³⁷⁰ It is not at all clear what “consult actively” means. How much consultation, and with whom, is sufficient? Does “consult actively” mean asking people what their concerns are with the project but then going ahead with whatever the team had planned anyway? Or does it mean considering concerns and modifying the team’s agenda to accommodate the wishes of relevant stakeholders? What is meant by the phrase “beneficial to all parties involved”? What if the local group is completely opposed to the scientific study of human remains, so that from their perspective there can be no “working relationship” that will be beneficial to “all parties involved”?

The SAA “encourages close and effective communication between scholars engaged in the study of human remains and the communities that may have biological or cultural affinities to those remains. . . . [T]he protection of this record necessitates cooperation between archaeologists

³⁶⁹ See *id.* (citing Society for American Archaeology’s Principles of Archaeological Ethics).

³⁷⁰ *Id.*

and others who share that goal.”³⁷¹ By referring to “biological” and “cultural” affinities, this code recognizes that legitimate stakeholders can include biological descendants as well as those who are culturally affiliated to the human remains. Such affiliations could include groups who have occupied the site for an extended period of time or adopted a similar way of life as that embraced by the antecedent group. The code also emphasizes the importance of treating human remains with dignity:

Human skeletal materials must at all times be treated with dignity and respect. Commercial exploitation of ancient human remains is abhorrent. Whatever their ultimate disposition, all human remains should receive appropriate scientific study, should be responsibly and carefully conserved, and should be accessible only for legitimate scientific or educational purposes.³⁷²

The Code provides that conflicts regarding the proper treatment and disposition of human remains be resolved on a case-by-case basis “through consideration of the scientific importance of the material, the cultural and religious values of the interested individuals or groups, and the strength of their relationship to the remains in question.”³⁷³ The scientific importance can be determined, according to the SAA, by a professional analysis of the potential of particular remains to aid in present and future research.³⁷⁴ However, the SAA Code, like that of the AAA, provides little guidance in resolving ethical disputes. And, as mentioned, the SAA Code emphasizes the conservation of materials for study and for preservation in the future over the concerns of individual groups.

The SAA has instituted an editorial policy that prohibits publication of any studies that rely on materials “recovered in such a manner as to cause the unscientific destruction of sites or monuments; or that have been exported in violation of the national laws of their country of origin.”³⁷⁵ This raises the ethical issue of whether archaeologists should resist the temptation to study and write about artifacts that they know or suspect are products of looting. Since many looted archaeological artifacts are held in private collections or museums, this is a significant issue. If archaeologists study such artifacts and write about them in journals, these publications may confer on the collections unjustified provenance.

Those who object to a ban on such publications acknowledge that even though looted artifacts suffer from a loss of provenance and dimin-

³⁷¹ *Society for American Archaeology Statement Concerning the Treatment of Human Remains*, available at www.saa.org/repatriation/repatriation_policy.html (last visited May 4, 2004).

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ See WYLIE, *supra* note 8, at 14 n. 5.

ished evidentiary significance, archaeologists still have a primary responsibility to document and preserve whatever information does survive in the archaeological record in order to obtain knowledge about the cultural past. "It is tragic that looting takes place, and I know of no archaeologist who does not decry the loss of critical information that results. But to stand by when it is possible to make at least some record of whatever information can still be salvaged simply compounds the loss."³⁷⁶ Under this view, the research goals of archaeology are so intrinsically valuable as to outweigh all other interests or responsibilities pertaining to looted materials. On the other side is the argument that such practices undermine the integrity of archaeology as a whole because they aid and abet the illegal commercial trade in antiquities. Such practices arguably compromise the credibility of archaeologists who otherwise oppose the commercial exploitation of archaeological resources. Research goals are not sacrosanct and must be balanced against other professional and ethical obligations.

The World Archaeological Congress (WAC) is an international organization with elected representatives throughout the world. The WAC has a series of ethical codes that are specific to indigenous cultural heritage. These include the First Code of Ethics, the Vermillion Accord on Human Remains, and the Draft Code of Ethics for the Amazon Forest Peoples. WAC's interest in this area is evident from the following principles of its First Code of Ethics:

1. To acknowledge the importance of indigenous cultural heritage, including sites, places, objects, artifacts, and human remains, to the survival of indigenous cultures.
2. To acknowledge the importance of protecting indigenous cultural heritage to the well-being of indigenous peoples.
3. To acknowledge the special importance of indigenous ancestral human remains, and sites containing and/or associated with such remains, to indigenous peoples.
4. To acknowledge that the important relationship between indigenous peoples and their cultural heritage exists irrespective of legal ownership.
5. To acknowledge that the indigenous cultural heritage rightfully belongs to the indigenous descendants of that heritage.³⁷⁷

Thus, the WAC holds in high regard the interests of indigenous peoples in their cultural heritage. This Code suggests that archaeologists have an ethical duty to identify the interests of indigenous groups with respect to their cultural heritage, and to support those interests in a way that will ensure the survival of their cultures. This is in contrast to the ethical

³⁷⁶ *Id.* at 14, n. 6 (quoting Christopher B. Donnan).

³⁷⁷ See SMITH & BURKE, *supra* note 280, at 184.

position expressed by the SAA Code, which fails to recognize a link between cultural heritage of the past and indigenous cultures in the present.

The WAC adopted the Vermillion Accord on Human Remains in 1989. This Accord is unique among ethical codes in that it places a *priority* on respect for human remains, over and above their scientific value. It advises archaeologists to observe the wishes — expressed or inferred — of the dead concerning their remains as well as the wishes of the local community and relatives or guardians of the dead. This Accord seems to make no distinction based on the age of human remains, so that archaeologists are advised to treat ancient human remains in the same manner as more recent remains. The Accord makes it important to observe the wishes of a variety of stakeholders, including biological descendants, those in the present community who cannot establish a genetic relationship, and other groups who consider themselves guardians of the dead. Archaeologists may thus need to consider their own objectives as well as the divergent interests and goals of other groups. This Accord acknowledges that the relationship of a local group to human remains found on its lands may be important to the group whether or not the deceased person is directly related to them.³⁷⁸ That is, a local group may simply feel that since the ancient remains were buried with respect, this respectful treatment should not be violated, regardless of any hereditary connection to the remains in the archaeological past.

The Australian Archaeological Association has expressed this principle, stating: “We do not recognize that there are any circumstances where there is no community of concern.”³⁷⁹ The Code of Ethics of the Australian Archaeological Association also expresses a priority for the concerns of indigenous peoples. “Members shall ensure that . . . indigenous peoples . . . are kept informed during all stages of the investigation and are able to renegotiate or terminate the archaeological work being conducted at that site.”³⁸⁰ And the Ethical Code of the Australian Association of Consulting Archaeologists (AACAI) also addresses this public sphere. Its Code of Ethics outlines members’ duties when interacting with various interest groups. Under this Code, an archaeologist’s first duty is to the public: “A Member should take a responsible attitude to the archaeological resource base and to the best of her/his understanding ensure that this, as well as information derived from it, are used wisely and in the best interest of the public.”³⁸¹ This provision addresses the need for careful excavation and the importance of reporting and publish-

³⁷⁸ See *id.* at 187.

³⁷⁹ *Id.* at 188 (citing 1994 statement of Australian Archaeological Association).

³⁸⁰ *Id.* at 189 (citing Australian Archaeological Association 1994 Rule to Adhere To, no. 3).

³⁸¹ *Id.* (citing Code of Ethics of Australian Association of Consulting Archaeologists (AACAI)).

ing of archaeological research. The AACAI also formulated a specific policy statement to guide members when consulting with Aboriginal communities:

1. The Association recognizes that Aboriginal sites are of significance to Aboriginal people as part of their heritage and as part of their continuing culture and identity.
2. The Association recognizes that Aboriginal communities should be involved in decision-making concerning Aboriginal sites. Aboriginal opinions, concerns and management recommendations should be presented alongside those of the archaeological consultant.
3. The Association recognizes that Aboriginal people have a right to be consulted about the intention to undertake archaeological work, to be consulted about the progress and findings of this work, and to be consulted about any recommendations arising from this work.³⁸²

This is a policy statement and, as such, is less binding on a membership than a formal Code of Ethics.³⁸³ In fact, this policy statement and AACAI's Code of Ethics diverge in emphasis to a certain extent. The latter suggests that a member's primary duty is to the archaeological resource base so that the use of the information is in the best interest of the "public." It seems to emphasize the importance of competency in the scientific practices of archaeology, and the use of archaeological resources with the public interest in mind. It does not define "public" nor does it address how to determine what is in the public's "best interest." Presumably indigenous peoples are included in the "public" but one could interpret "public" as the dominant culture in the country rather than as a local group. In considering the interests of the public, how should one weigh competing public interests? Archaeologists may be tempted to interpret the best interests of the public, overall, as siding with science rather than with concerns that are of special significance to Aboriginal people.

In contrast, the AACAI policy document appears to emphasize the concerns and management recommendations of Aboriginal communities, with no emphasis given to the "interest of the public." Still, the policy statement does not ensure that Aboriginal concerns will carry much weight but only that they will be "presented alongside those of the archaeological consultant."³⁸⁴ The policy statement simply allows for indigenous peoples to be "consulted" about intended projects and about progress made on them. However, the language is a bit tentative and

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

does not suggest that the concerns of cultural identity will in any way actually change the course of a project.

The Standards of Research Performance of the Register of Professional Archaeologists (RPA) is similar to the AACAI's Code of Ethics, with an emphasis on the archaeological resource base. This document sets forth various archaeological responsibilities: ensuring competent protocols with respect to the demands of projects, complying with proper standards of collection and identification of specimens, recording uncollected entities accurately, keeping records that are intelligible to other archaeologists, respecting the interests of other researchers, proper analysis and storage of specimens and records in the laboratory, and so on. There are no guidelines governing consultation with indigenous peoples who may have concerns about a project, and there are no protocols pertaining to the excavation and handling of human remains or associated funerary materials.³⁸⁵

The AACAI and RPA show that there is an ethical polarization in this field. One side, represented by the WAC Code of Ethics, favors the notion that the well-being of contemporary groups relates to materials that are part of their cultural heritage and that ancient human remains should be respected even at the expense of scientific interests. On the other side is the more traditional scientific perspective, expressed in the SAA Code of Ethics, which regards human remains as part of the cultural heritage of all peoples, with archaeologists as self-appointed stewards of such materials. One side views human remains as ancestors that should not be objects of study; the other views the study of remains as having instrumental value for all of humanity.

Ethical codes are often deficient in terms of enforcement and adjudication of purported violations. The SAA Ethics Committee, for example, has no authority to investigate complaints of ethical violations. This is also the case with other organizations.³⁸⁶ Only a handful of organizations, such as the Register of Professional Archaeologists (RPA) in the United States and the Archaeological Institute of America, have a tribunal system that is empowered to deal with ethical violations.³⁸⁷

The fact that there are so many conflicting ethical codes means that archaeology does not have a common set of international ethical standards, except perhaps with regard to the most general manner of excavation and examination of sites. For archaeologists, there are several codes of ethics with different philosophies. An archaeologist could conceivably pick and choose what code to adopt by opting for one group affiliation

³⁸⁵ See *Standards of Research Performance of the Register of Professional Archaeologists*, available at <http://www.rpanet.org> (last visited May 4, 2004).

³⁸⁶ See SMITH & BURKE, *supra* note 280, at 192.

³⁸⁷ See *id.*

over another. Moreover, there is little information on how ethics actually influences the behavior of archaeologists. The divergent and even conflicting ethical codes around the world mean that American archaeologists, for instance, may have to undergo a significant shift in ethical practices when they embark on a project in Australia, where substantial control is given to indigenous peoples. Indeed, many Australian archaeologists feel ethically bound to submit drafts and photos of their studies to indigenous people for approval before publication.³⁸⁸

Archaeological ethics at times calls into question practices that are perfectly legal. For example, those who object to the commercial salvaging of shipwrecks claim that archaeologists have an ethical responsibility to protect underwater sites that goes well beyond anything currently specified in the law. They also argue that it is unethical for archaeologists to participate in salvage operations that are commercial in nature because of the push for marketing rather than the proper conservation, exhibition and study of the materials. Those who defend the collaboration between archaeologists and commercial salvage operators point to the legality of such operations. And there is nothing illegal involved if an archaeologist wishes to study and write about artifacts looted from a land site but there are serious ethical concerns because the archaeologist may be aiding and abetting dealers operating on the black market.

Codes of ethics should be treated as works in progress. That is, they are never final but rather evolve and are subject to ongoing assessment and fine-tuning. It should come as no surprise that changes in archaeological ethics occur in response to societal changes. Since ethical codes reflect the daily practices of a given profession, it makes sense that as human awareness and concerns evolve, as technology changes, as issues are raised for public debate, and as sensitivities grow, codes of ethics will necessarily also undergo change. For example, in the 1970s, as indigenous peoples around the world became more vocal about having influence on the study of their archaeological past, the public rallied behind the notion that native people should have control over the treatment of the graves and human remains of their ancestors. This movement led to the passage of NAGPRA. With any ethical code, behavior is judged not just by the letter of the law but also by the spirit in which the principles are stated. The attitude that it is legitimate to do anything that is not specifically prohibited by a code is wrong. A code sets forth the general spirit in which ethical dilemmas are to be analyzed and not every abstract principle guiding ethical behavior can be neatly set forth in a code.

Ethical codes often lack a certain degree of detail. We cannot assume, however, merely because a code of ethics is inexact, that ethical dilemmas are insoluble. As Aristotle wrote concerning ethical theories:

388 *Id.*

“It will be satisfactory if we can indicate the truth roughly and in outline.”³⁸⁹ Indeed, inexactness is a phenomenon in all areas outside of natural science. These codes, while vague, may well have a degree of precision that is appropriate to the inquiry. It may not be feasible to articulate a single, well-supported standard that will embrace all relevant factors. These codes are useful for the purpose of providing broad criteria that, balanced together, should help determine whether a certain activity poses an ethical concern.

B. The Ethical Duty to Protect the Interests of Cultural Groups

1. Group Consultation

Archaeologists have an ethical duty to identify and respect the interests of relevant groups whose cultural heritage is the subject of examination. This means that archaeologists should confer with relevant groups prior to proceeding with projects, not merely to hear what groups have to say and then continue with the project as originally planned but to plan a course of action that will take into account and respect the legitimate concerns expressed. The principal issues to address in consultation with relevant groups are: the extent to which group concerns ought to be considered, whether there is room for compromise, and whether there can be a “win-win” result. At issue is whether the group actually has a group consensus in the matter or whether only the leadership’s viewpoints are being articulated.

But how does one determine what groups are relevant stakeholders, as opposed to putative stakeholders, in a project? Are legitimate, affected parties limited to genetic descendants of those who inhabited the excavation site long ago? What if the present occupants of the land are not culturally affiliated with the remains? What if the real descendants have migrated to a different region or are no longer extant? What if an ancient, local community has migrated away from the region — is it important to consult such diasporic groups? The consultative process will help measure the level of a group’s concern in a project, the extent to which the group wishes to be involved, what objections might be identified, or whether or not the group is even interested in the project. Perhaps an indigenous local group has no interest other than curiosity about the research.

If there seems to be opposition to the project, further interaction will be needed. One group’s opposition does not necessarily represent the entire community’s attitude. This is always a theme in democratic decision-making. A vocal minority group may have a significant reason for opposing a measure, and may have a good deal at stake, while the

³⁸⁹ 1 ARISTOTLE, *Nicomachean Ethics* 3.

community at large may be in favor of the measure but not really have much at stake. Thus, one needs to weigh the concerns expressed and the relative degree of connection that disparate stakeholders actually have in the matter.

If a group does not want a project to go forward, it may not fully comprehend the project's significance. To many people, the idea of excavating sites to study cultures of the past is an odd idea; groups may not see any relevance or value in such an undertaking. Engaging in extensive dialogue will help to inform the group about the project and cultivate a sense of partnership in the project. The interest of local groups is not immutable. Relevant groups can be educated to recognize that archaeology can contribute to their own heritage and that this may justify support (or at least a restraint in opposition to) archaeological studies.

The components of archaeological projects may be separate. If this is the case, they should be addressed separately. Perhaps there is objection to the unearthing of human remains but the recovery of artifacts and other data is not a problem. Perhaps there would be no objections to the project if the human relics were re-interred after an agreed upon period of time; during the interim, archaeologists may study them and publish their findings. This could allow a limited scientific analysis of the remains, radiocarbon dating, and such study as may offer valuable insight into the lives and burial practices of the culture involved. Following a specified time frame, the remains would be returned to the community for disposition. In other cases, the concerns of the local group may simply be so strong that archaeologists will need to regroup and consider examining alternative sites.

The interests of relevant descendants and archaeologists do *not* invariably conflict. Nor are descendant/cultural and archaeological interests irreconcilable. Sometimes agreements can be reached with relevant groups such that only a small section of a site will be disturbed, under the supervision of community representatives. Archaeologists can restrain themselves from the temptation to excavate everything just because it is there. They can apply a principle of diminishing marginal returns by avoiding excavating a hundred skeletons when a dozen will be sufficient for study. There are practical benefits as well to consultations with local groups. Sometimes local groups can be helpful in providing information or identifying important features of the site. Local people can be a source of cherished myths or legends that may be worthy of further analysis in connection with sites. Such narratives may provide valuable insights on the way people lived in the past.

2. Developing Working Relationships With Cultural Groups

Some people may be very interested in local archaeological projects. Local people and groups may get excited about the prospect of establishing a museum or exhibition center in connection with the project. Sometimes an alliance can be developed with community organizers who have an interest in an exhibition project for artifacts recovered from the site. Perhaps there is an interest in constructing a model of the site for display at a museum that already exists in the community. Partnerships can then develop. Locals will need the archaeologists to ensure that the materials are properly stored and displayed once they have been studied. Locals may also want certain practices incorporated into a display of archaeological materials. The archaeologists will, in turn, likely want to have the local group agree that the artifacts will never be destroyed, dismantled, sold or otherwise transferred. The parties can thus agree on guidelines for access to the items for purposes of academic research.

It is understandable that archaeologists, whose main inclination is to promote the study and conservation of excavated materials, argue that consulting with indigenous people about research proposals does not mean engaging in a dialogue that opens them to the genuine possibility of terminating a project. However, there are many ways in which indigenous peoples can attempt to block projects. For instance, local groups can garner publicity favorable to their cause, gain the support of the broader public, and otherwise politicize the issue in ways that vilify the archaeologists and derail the scientific community's plans. There is no obvious method for weighing the interests of archaeologists against other stakeholders. How do we decide that an Egyptian pharaoh's interest in having his body left alone outweighs an archaeologist's interest in conducting a modern medical examination of his mummy? While there are no clear algorithmic solutions, there are, as discussed, some standards that may be helpful.

One example of a win-win situation occurred following the discovery of the "Lake Mungo Lady," a skeleton excavated in 1969 in Willandra Lakes, a semiarid region in western New South Wales, Australia. The skeleton is about 60,000 years old. After archaeologists completed their study of the skeleton, they turned it over to the local Aboriginal community, who placed the remains in a velvet-lined wooden box that now resides in a custom-made chest at the site of the excavation.³⁹⁰ The elders of the local community decided to place Lady Mungo at her original burial site but did not make the skeleton completely unavailable for possible examination in the future. The chest has two keys — one in possession of the archaeological community and the other kept by the

³⁹⁰ See SMITH & BURKE, *supra* note 280, at 185-86.

Aboriginal community — both of which are required to unlock it.³⁹¹ This illustrates how archaeologists can develop a working relationship with an indigenous group to work together to preserve and share valuable archaeological resources.

The careful excavation and imaginative display of both artifacts and sites themselves can also enhance tourism, benefiting nearby communities as well as national economies. For example, at Chiclayo, Peru, the nearest large town to the rich archaeological site of Sipan, the number of tourists grew from a negligible amount to between 40,000 and 70,000 a year in the years following the plunder and subsequent excavation of the site.³⁹² Today, the region realizes about \$14 million per year in tourist revenue.³⁹³ The Swedish Tourist Board estimates that the display of the salvaged 17th century battleship *Vasa* generates several hundred million dollars per year for the Swedish economy.³⁹⁴ On the other hand, revenues and the control of archaeological sites can lead to conflicts between indigenous peoples and national governments. Local communities would understandably prefer that money from entrance fees and other museum revenue be disbursed to them rather than to the national bureaucracy or to independent concerns hired to “administer” the exhibitions. Likewise, indigenous peoples would probably prefer to have their own members employed as much as possible in the day-to-day operations, curation and conservation of the displays.

CONCLUSION

The importance of protecting the remains and the interests of cultural groups as well as advancing human knowledge and understanding through scientific study of the past requires that societies develop a more complete understanding of the legal tensions and interrelationships between the interests discussed in this Article. Part One of this two-part paper has explored the need for and the emergence of archaeological ethics by examining underwater archaeology, cultural property and cultural groups, the special status of human remains, and the development of contrasting archaeological codes of ethics in various societies.

Both parts of this Article consider a range of material and subjects, outlining the competing and often conflicting interests surrounding archaeology and suggesting starting points for reconciliation. Part One of the paper has presented some of the basic interests and areas of conflict. Part II of the paper, to be published herein next fall, examines these issues in greater detail within the context of emerging international legal

³⁹¹ See *id.* at 186.

³⁹² See Brodie, *supra* note 14, at 14.

³⁹³ See *id.*

³⁹⁴ *Id.*

mechanisms. Part Two considers measures for protecting antiquities as well as relevant cultural groups, including potential remedies for aggrieved groups or individuals. As has been the case in Part One, the competing interests and methodologies presented in Part Two illustrate the need for ongoing careful scrutiny and comparison of the ethical frameworks that various members of the international community with archaeological interests are establishing to protect and manage the remains of our ancestors.