

Controlling History;  
Framing the Debate on Ownership of the Past

By  
Cori Phillips  
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### *Introduction*

In July of 1992, Arthur J. Gerber was sentenced to a year in prison for removing archaeological artifacts from private property. A professional photographer living in Tell City, Indiana, Gerber's true passion was learning about Native American culture. At the time of his conviction, Gerber had an established reputation as a distinguished collector of Indian artifacts. He devoted over thirty years to this pastime, and his collection was renowned throughout the Midwest. Gerber was known as a respectable collector who did not deal in artifacts. The items in his collection were his prized possessions, not a source of income. Gerber was also very prominent in the local amateur archaeological community; he served a term as the president of the Indiana Archaeological Society and had been editor in chief of their journal. Gerber was even featured in volume two of a book entitled *Who's Who in Indian Relics* as an acknowledgment of his contributions to amateur archaeology. Given Gerber's respectability, it came as a shock when he was convicted on criminal charges for participating in the very activity that had earned him his sterling reputation.

Technically, Gerber was convicted under the Archaeological Resources Protection Act (ARPA) for stealing and then transacting archaeological artifacts in interstate commerce. According to the District Court judge in his case Gerber's real crime was "stealing history."<sup>1</sup> Gerber, in contrast, claimed that he had saved history by extricating the artifacts from certain destruction. The contention in Gerber's case revolves around the highly debated question of who rightfully has the ability to own and possess objects created in the past. In the eyes of the Court, the artifacts taken by

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<sup>1</sup> EV 91-19-CR *Sentencing Hearing Transcripts* p. 259

Gerber belonged to society. Gerber however, believed that he had every right to personally possess the artifacts as long he preserved and protected them.

The dilemma presented in Gerber's case is pertinent to a wide variety of situations. For instance, in 1982, an ancient Aztec codex was stolen from the *Bibliothèque Nationale* in Paris and redistributed to the *Instituto Nacional de Antrología e Historia* in Mexico City.<sup>2</sup> Legally the codex belonged to the Parisian museum, but since the creators of the codex had lived in Mexico, many felt that the Mexican museum was a more fitting home for it. Another example of competing ownership claims is the ongoing debate over the most appropriate location for the Elgin marbles. The Greek government has on numerous occasions asked the British Museum to return these items originally from the Parthenon, but the museum insists its title over the marbles is valid and binding.<sup>3</sup> In Hawaii, ownership of the past was also called into question while deciding the fate of the Forbes Cave artifacts. The Hui Malama, an indigenous Hawaiian group, claimed that the items were created by their ancestors and requested their repatriation with the intention to rebury the collection. At the same time, other Native American groups, as well as archaeologists, were attempting to have the items placed in a museum where the public could enjoy and learn from them.<sup>4</sup> These scenarios demonstrate some of the complexities involved in determining ownership of the past. This issue has been widely disputed since the second half of the 20<sup>th</sup> century. Government officials, museum personnel,

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<sup>2</sup>Barkan, Elazar. "Amending Historical Injustices: The Restitution of Cultural Property- An Overview." *Claiming the Stones, Naming the Bones*. Los Angeles: Getty Publications, 2002. pp.30-31

<sup>3</sup> Fitz Gibbon, Kate. "The Elgin Marbles: A Summary." *Who Owns the Past; Cultural Policy, Cultural Property, and the Law*. New Jersey: Rutgers University Press, 2005. p.113

<sup>4</sup> Lackey, Douglas P. . "Ethics and Native American Reburials: a Philosopher's View of Two Decades of NAGPRA ." *Archaeological Ethics*. Great Britain: Cambridge University Press, 2006. p.159

archaeologists, anthropologists, indigenous peoples, art dealers and private collectors have all contributed to this discussion. Who owns the past is a practical question, the answer to which decides who controls where these objects are kept in addition to how they are used and interpreted.

Posing the question of ownership automatically implies that items from the past *can* be owned by someone; be it an individual, a culture, a nation or all of humanity. In reality, the matter at hand is not about ownership so much as control.<sup>5</sup> The real issue in the debate is how archaeological artifacts *should* be used, if they should be displayed in museums, studied in universities, reburied, sold on eBay or preserved in private collections. In contemporary society, this power to control the use of an object is invested in its legal owner. It can be theorized that objects from the past should not have traditional owners the same way furniture, cars and houses do. It can also be argued that objects from the past should simply be left undisturbed. These arguments are quite idealistic. Legal ownership must be determined or *defacto* ownership will be declared. It is naive to think that people who happen upon objects from the past will just leave them as they are. Almost every country in the world has passed some form of antiquities legislation as a direct response to disturbances of historical and ancient sites. Establishing legal ownership over archaeological artifacts is therefore unavoidable. What is in question is who should legally be entitled to that ownership.

This thesis will discuss three main standpoints regarding ownership of objects from the past: that these items rightfully belong to humanity, to the culture that

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<sup>5</sup> McBryde, Isabel. *Who Owns the Past; Papers from the Annual Symposium of the Australian Academy of the Humanities*. Melbourne: Oxford University Press, 1985. p.2

created them or to individuals. These perspectives are not absolute. Aspects of one are often employed with elements of another. These categories are only used to serve as a framework through which the debate on ownership of the past can be better understood.

The idea that objects from the past belong to all of humanity is often held by archaeologists, historians and museum curators. It is grounded in the belief that items from the past constitute our common heritage, since they are products of our mutual history. Part of this perspective is the idea that artifacts, and archaeological sites, can provide information on the past that cannot be obtained from historical documents, even in the case of historical sites. Since objects from the past are seen as belonging to everyone, the humanity perspective also holds that everyone has a right to learn about the history of the human past through these objects.

The second perspective on ownership of the past is that artifacts belong to the descendants of the culture that created them. Advocates from this perspective are usually responsible for requests made for the repatriation of artifacts. Belief in the cultural perspective is usually based upon the goal of strengthening a national identity, or rectifying a history of oppression and persecution. One consistency in the cultural perspective is that it always implies continuity between a culture of the past and a present one, and uses this connection to claim title to the objects in question.

The final perspective on ownership of the past holds that artifacts may be privately owned. This point of view has been widely contested and as the case of Arthur Gerber demonstrates, has even been criminalized in some countries. Supporters of this standpoint can be anyone from hobbyists and collectors to art

dealers and museum officials. Advocates of this standpoint tend to value the physical artifact more than its potential to contribute to our knowledge of the past. However, those who support private ownership of artifacts do not appreciate these items any less than supporters of the other two perspectives.

Advocates from each of the three ownership standpoints would argue that their opinion is the only one that is morally and ethically correct. It follows that each of these perspectives has their own conception of what constitutes a moral or ethical action. This thesis will attempt to accurately frame the debate on ownership of the past. This task requires being as objective as possible. Therefore, this thesis will not take a position on who should own the past, but will instead focus more closely on the formulation and interaction of the three perspectives.

Each perspective on ownership has its own vocabulary. For example, there exists no universally accepted term for objects from the past. Proponents of the humanity perspective use a variety of terms including “artifact,” “archaeological resource,” “cultural resource,” “cultural property” and “cultural heritage.” Those who believe that objects from the past belong to the culture that created them tend to dislike the terms “artifact,” and “archaeological resource,” when used in reference to human remains and burial goods because they dehumanize both the bones and the objects. Proponents of the cultural perspective often use the terms “cultural resource” and “cultural heritage.” The term “sacred object” is also often employed by supporters of the cultural perspective to describe items discovered at burial or other sacred sites. Advocates of private ownership will also use the term “artifact,” but will additionally use the terms “relic,” “antique” and “antiquity” to describe these controversial items.

Since one of the objectives of this thesis is to present these three standpoints as objectively as possible, the language used will reflect the perspective being discussed.

In order to thoroughly understand each standpoint, the first three chapters of this thesis will look at each of the three views on ownership in detail, examining the complexities of each. The following chapter will then investigate how these perspectives have been reflected in U.S. laws. The final chapter will return to Arthur Gerber, using his experience as a case study in which conflicting standpoints interact. Although the issue at hand is one that has been debated around the world, this discussion will focus specifically on how the debate has played out in the United States.

## ***Chapter One: The Humanity Perspective***

The first of the three ownership perspectives to be discussed is the belief that the past rightfully belongs to all of humankind. People who favor this viewpoint tend to believe that archaeological artifacts have some unique attribute that should be shared with the public. Most commonly this quality is either the particular aesthetic of the artifact, or its capacity to provide information concerning the past. This standpoint is most frequently adopted by archaeologists, museum curators and politicians. Although the majority of humanity ownership supporters promote the same basic concept, each person who adopts the argument gives it a slightly different form. In order to study the numerous rationales used to promote the humanity perspective, this chapter will discuss these variations in terms of the aforementioned professions that most frequently support this point of view. This method of segmentation will be used to frame this perspective because people in similar professions have similar relationships with the past and therefore often modify the humanity ownership argument in analogous ways. Nevertheless, it is important to keep in mind that each discipline is not homogeneous, and encompasses a wide range of opinions. The groupings used in this chapter are only meant to function as an apparatus with which to understand the complexities of the arguments used in favor of the humanity perspective.

### **Archaeologists and humanity ownership**

Archaeology is generally defined as “the study of the human past through its material remains.”<sup>6</sup> In contemporary archaeology, the focus is more on the knowledge

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<sup>6</sup> Sharer, Robert J., and Ashmore Wendy. *Archaeology; Discovering Our Past, Third Edition* New York: McGraw Hill Companies Inc., 2003 p. 15



that can be gained through studying material remains than on the physical details of the artifacts themselves. Archaeologists can only generate information about the past if they know the context or location of an artifact. The term context specifically indicates the “interpretation of the significance of an artifact’s deposition in terms of its matrix, provenience and association--that is, where it is and how it got there.”<sup>7</sup> Context is not simply the particular site at which an artifact was found, but also what other artifacts it was found near, how many centimeters into the earth it was, its stratigraphic layer (if the site has clear stratigraphy), and whether or not there were any animal bones, charcoal, botanical, or other organic remains found in association with that particular artifact. Archaeologists argue that artifacts lacking contextual information “do not contribute to our knowledge of the past; indeed they are parasitic upon that knowledge”[since] “it is only through the proper study of the context of archaeological finds that it is possible to begin the task of their interpretation.”<sup>8</sup> In the eyes of an archaeologist every time an uncontrolled excavation occurs or an artifact is picked up off the ground, knowledge about the past is destroyed. Archaeologists only have one time to get it right, so excavations must be perfectly executed. Only trained archaeologists should be considered eligible to perform excavations because of the precision required to accurately obtain contextual information. One can view the influence of this emphasis on context in the ethics of archaeological organizations, particularly in the U.S.

In the U.S., the most prominent professional archaeological organization is the Society for American Archaeology (SAA). Given its position, the SAA is able to set

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<sup>7</sup> Sharer and Ashmore p. 132

<sup>8</sup> Renfrew, Colin. *Loot, Legitimacy and Ownership*. London: Duckworth, 2000. p.22

the standards for professional behavior by requiring its members to follow its by-laws and Code of Ethics. The first provision of the organization's ethical code reflects the importance of context in archaeology by stating that "in situ archaeological material and sites, archaeological collections, records and reports, [are] irreplaceable," and as such the role of the archaeologist is to "work for the long-term conservation and protection of the archaeological record by practicing and promoting stewardship of the archaeological record."<sup>9</sup> This first principle also identifies archaeologists not as owners of the past, but as "stewards" who are "both caretakers of and advocates for the archaeological record."<sup>10</sup> The remainder of the SAA's ethical principles outline that as stewards of the past, archaeologists have a duty to educate the public on the importance of archaeology, to record all relevant information when conducting excavations, and to report any obtained knowledge in reports.<sup>11</sup> All of these ethical standards clearly strive towards the goal of producing knowledge about the past and then protecting, preserving and promoting the dispersal of that knowledge for the benefit of present and future generations. Implicit in this goal is the assumption that the archaeological record belongs to humankind as a whole.<sup>12</sup> The SAA states that archaeologists must preserve artifacts and be publicly accountable because as stewards they have been given the phenomenal responsibility of caring for humanity's common past.

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<sup>9</sup> Kintigh, Keith W. . "SAA Principles of Archaeological Ethics." Society for American Archaeology. <<http://www.saa.org/Publications/SAAbulletin/14-3/SAA9.html>>.

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Watkins, Joe. "Archaeological Ethics and American Indians ." *Ethical Issues in Archaeology*. Walnut Creek, CA: Alta Mira Press, 2003. p.132

One major point of concern for archaeologists is the world wide destruction of archaeological context by people who buy, sell and collect artifacts. Archaeologists have given the somewhat demonized title of “looters” to people who engage in these activities. Looters can be anyone from the casual farmer who picks objects off the ground, (surface hunters), to someone who routinely digs at archaeological sites for objects to sell in the art market. Archaeologists consider looting to be a very serious problem. Despite legislative attempts by almost every nation to preserve archaeological context, this practice has continued unabated. Statistics even show that between 80-90% of all U.S. archaeological sites have been “intentionally disturbed or destroyed.”<sup>13</sup>

In general, professional archaeologists oppose private ownership of artifacts because it contributes to the destruction incurred by looting. There is a strong association between private ownership of artifacts and looting. Most looters either individually own the artifacts that they find or sell them to others. In fact, up to 90% or more of the artifacts sold in the antiquities market have been proven to come from illicit excavations.<sup>14</sup> This association between looting and private ownership can be cited as the reason why some professional archaeological organizations, including the SAA, forbid the “buying and selling of objects out of archaeological context.”<sup>15</sup> As a result, archaeologists participating in these organizations must favor either the humanity or culture standpoints.

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<sup>13</sup> Hollowell-Zimmer, Julie. “Digging in the Dirt-Ethics and “Low End ‘Looting’.” *Ethical Issues in Archaeology*. Walnut Creek, CA: Alta Mira Press, 2003. p.47

<sup>14</sup> Ibid. p.47

<sup>15</sup> Kintigh, Keith W. . “SAA Principles of Archaeological Ethics.” Society for American Archaeology. <<http://www.saa.org/Publications/SAAbulletin/14-3/SAA9.html>>.

Archaeologists employ variations of the humanity perspective that are often influenced by the importance of context, the idea of archaeologists as stewards and their opposition to looting. Although discussed in terms of the SAA and American archaeology, these factors have had an impact on both American and non American archaeologists. In fact, non-American archaeologists have made some of the more explicit arguments in favor of the humanity perspective. The following examination of archaeological modifications on the humanity perspective will therefore strongly represent non-American opinions. American support for humanity ownership will be reflected as well, but will be more thoroughly demonstrated during later discussions of NAGPRA and Kennewick Man (see chapters 4 and 6).

The belief that there is only one human past, and that the remnants of that past belong to humankind, lies at the heart of archaeological support for the humanity perspective. In his book *Loot Legitimacy and Ownership*, British archaeologist, Colin Renfrew, argues that through “the proper study of the context of archaeological finds” modern day people are able to access the history of the human past. Renfrew also claims that “this human history is part of the heritage of humankind, and it can be argued that the prehistory and history of every part of the world is our common heritage.”<sup>16</sup> Renfrew’s depiction of the archaeological record as the “heritage of humankind” explains the commitment of the SAA to educate and be accountable to the public; the past belongs to the public because it was created by their ancestors. Renfrew’s argument is the root of archaeological belief in the humanity perspective. For archaeologists the past belongs to humanity because humankind mutually created it.

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<sup>16</sup> Renfrew p.19

One modification of Renfrew's argument that is used by archaeologists to promote humanity ownership claims that artifacts constitute a "nonrenewable and fragile resource whose physical integrity can easily be compromised."<sup>17</sup> This modification of the perspective holds that vandalism, destruction, and looting of archaeological sites destroy the capacity of these resources to provide knowledge of the past, and thus the heritage of the world is being annihilated.<sup>18</sup> In addition, this rationale also notes that "the cultural heritage and natural heritage are among the priceless and irreplaceable possessions not only of each nation, but of mankind as a whole," therefore "the deterioration or disappearance of any of these most prized possessions constitutes an impoverishment of the heritage of all the people in the world."<sup>19</sup> Thus, for an archaeologist the destruction of that context equals the destruction of history.

A second variation on the humanity perspective focuses on the concept of stewardship and argues that where the archaeological record is concerned the concept of ownership should be abolished all together. People who support this point of view feel it is inevitable that objects owned by humankind cannot be typical pieces of property. Property is an exclusionary term, if a group or person "owns" something, it is because they have a right to that object that no one else does. Thus, something owned by everyone cannot be a piece of property; it must instead be a public good. In an article entitled "A Plea for Responsibility Towards the Common Heritage of

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<sup>17</sup> Jameson Jr., John H. . "Purveyors of the Past: Education and Outreach as Ethical Imperatives in Archaeology." *Ethical Issues in Archaeology*. Walnut Creek, CA: Alta Mira Press, 2003. p.153

<sup>18</sup> Renfrew, p. 9

<sup>19</sup> Conningham, Robin, Cooper Rachel and Pollard Mark. "What Value a Unicorn's Horn; A Study of Archaeological Uniqueness and Value." *The Ethics of Archaeology; Philosophical Perspectives on Archaeological Practice*. Great Britain: Cambridge University Press, 2006. p.260

Mankind,” Sandra M. Dingli reiterates the idea that the past is a public resource. As such, our relationship to world heritage objects appears to be “more like that of a steward, custodian, guardian conservator or trustee than of a property owner....Their protection and preservation is a collective responsibility of all of us as stewards.”<sup>20</sup>

In his article “Purveyors of the Past: Education and Outreach as Ethical Imperatives in Archaeology,” American archaeologist, John H. Jameson also states that the archaeological record is a “public resource” that must be taken care of for the benefit of humanity.<sup>21</sup> However, Jameson feels that only archaeologists in particular are to act as stewards because “professional archaeologists are the experts and purveyors of the rich diversity of a shared cultural heritage.”<sup>22</sup>

The last archaeological version of the humanity perspective promotes the position that legally treating the archaeological record as a common heritage would have positive effects worldwide. Dingli argues that viewing archaeological resources as the “common heritage of humankind” could “reduce ideological and political motivations,” lead to “economic development and a better quality of life,” and create a “shift in mentality from global village to global humanity.”<sup>23</sup> In his article “The Ethics of the World Heritage Concept,” Artle Omland notes that the idea of a world heritage is connected with the hope that “globalization would encourage the progressive unification of human interests,” and therefore “archaeological resources

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<sup>20</sup> Dingli, Sandra M. . “A Plea for Responsibility Towards the Common Heritage of Mankind.” *The Ethics of Archaeology; Philosophical Perspectives on Archaeological Practice*. Great Britain: Cambridge University Press, 2006. p. 232

<sup>21</sup> Jameson, *Ethical Issues in Archaeology* p.160

<sup>22</sup> Ibid p.160

<sup>23</sup> Dingli, *The Ethics of Archaeology; Philosophical Perspectives on Archaeological Practice* pp.236-238

should serve as symbols not of nations, but of the common human interest.”<sup>24</sup>

Omland’s and Dingli’s arguments view the idea of a world heritage as a method of creating a universal mindset of a human past which hopefully will lead to the creation of a global family with a global interest.

Although many archaeologists do support a humanity ownership perspective on cultural resources, there are many who believe that objects from the past should belong to the culture that created them. This is particularly the case in the U.S. where the rise in concern for Native American rights, particularly with the passage of the Native American Graves Protection and Repatriation Act (NAGPRA), has led to an increase in the commitment of many archaeologists to the descendants of those who created the material culture being studied. NAGPRA is a piece of legislation which gives American Indian groups property rights to human remains and associated funerary objects proven to be culturally affiliated to present day tribes. In addition, NAGPRA provides for the repatriation of those objects and remains from federally funded institutions to Native American tribes. Many archaeologists support this shift towards cultural ownership of the past. In fact, several scholarly organizations, including the SAA, advocated the passage of NAGPRA. This does not mean that all American archaeologists feel that NAGPRA is a positive law. Many archaeologists have harshly criticized NAGPRA and feel that the archaeological record should continue to be studied and used for the benefit of the larger public regardless of cultural affiliation. Thus the passage of NAGPRA does not signify a widespread shift

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<sup>24</sup> Omland, Artle. “The Ethics of the World Heritage Concept.” *The Ethics of Archaeology; Philosophical Perspectives on Archaeological Practice*. Great Britain: Cambridge University Press, 2006. pp. 236-238

in archaeological views on ownership so much as it symbolizes the diversification of opinion within the discipline.

### **Museums and humanity ownership**

Many museum curators also support the idea that cultural heritage objects are invaluable to humanity and should therefore be used for the public good. In its code of ethics, the American Association of Museums describes itself as a nonprofit organization “dedicated to the public good” that strives to be “accountable to the public, transparent in its operations, responsible in its stewardship of resources, and committed to excellence.”<sup>25</sup> The AAM has several goals in common with the SAA. Both organizations pledge to be stewards of their resources in addition to always acting in the best interest of the public. The AAM reference to stewardship indicates that American museums, like archaeologists, do not view themselves as the owners of the objects they possess, but instead as their caretakers. Both groups undertake the role of stewards whose goal is to preserve and protect art and artifacts for humanity. The main distinction between archaeologists and museums is that museums do not emphasize context in the same way as archaeologists. AAM’s code of ethics states that its “board, staff and volunteers comply with all applicable laws, regulations, and international conventions,”<sup>26</sup> but does not mention any special commitment to ensuring that its collections come from professional archaeological excavations. This difference in goals means that museums are not likely to be convinced by the argument that the archaeological record is a diminishing “nonrenewable resource.”

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<sup>25</sup> AAM Board of Directors, “Code of Ethics for AAM.” American Association of Museums. <<http://www.aam-us.org/aboutaam/coe.cfm>>.

<sup>26</sup> Ibid



Instead museums have other motivations for endorsing the humanity ownership argument.

Many museum curators feel that the best way to enable artifacts to enrich present and future generations is to allow them to travel internationally. In his article, “Whose Culture is it?” Philippe de Montebello, the current director of the Metropolitan Museum of Art in New York, entreated the public to “recognize that a great deal of knowledge, cross-fertilization and exchange can come from objects moving across borders.”<sup>27</sup> Moreover, he claimed that the best we can do “is to monitor our own practices and be sure they are as ethical as possible.”<sup>28</sup> Montebello’s support for the mobilization of archaeological artifacts is based on a belief that simply seeing these objects can create “knowledge” and “cross fertilization.” For Montebello, a museum setting allows an observer to see “an object’s multiple contexts,” since “the Greekness of Greek art” is only apparent when “the art of Egypt and Sumer are available just ten steps away for comparison.”<sup>29</sup> James Cuno, the director of the Art Institute of Chicago, also postulates that archaeological artifacts should be allowed to move internationally and be held by museums not located in their countries of origin. Cuno argues that “laws meant to keep artifacts in the countries where they’re found are wrongheaded and counterproductive,” because they limit the “number of people who can see the objects” and threaten “great encyclopedic museums like the MFA or Metropolitan Museum,” which “provide a unique opportunity to see the full breadth and diversity of the world’s cultural history

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<sup>27</sup> Montebello, Philippe de, “Whose Culture is It?” *The Berlin Journal*, Vol. 15, Fall 2007

<sup>28</sup> Ibid

<sup>29</sup> Ibid

in one place.”<sup>30</sup> Such arguments clearly reflect a humanity perspective on cultural resource ownership since they contain the inherent assumption that ancient art should be used to promote the enlightenment and enjoyment of as many people possible. The objectives of these two museum directors are the preservation of the artifacts themselves and the creation of comprehensive collections. It is therefore quite sensible that these men would support the mobilization and foreign ownership of cultural resources.

A second version of the humanity perspective employed by museum curators uses the concept of a world heritage to promote a free trade market in antiquities. The proponents of this argument claim that “nations should not hoard [antiquities] and forbid exports” of artifacts since by doing so these countries “deny themselves an important trade resource and inhibit the cultural improvement in other parts of the world.”<sup>31</sup> This rationale is responsible for the majority of the ancient art and artifacts that are currently housed in American museums. Prior to the 1970s, the U.S. employed free trade policies in the arts to fill its museums. The product of these policies was that “in the short space of a century the United States has filled an empty continent with people and empty galleries with art. It has achieved both results by means of liberal immigration policies.”<sup>32</sup> The application of the idea that cultural heritage should be used to benefit humanity as a support for private ownership of the past demonstrates how blurry the lines between the humanity, culture, and individual perspectives actually are.

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<sup>30</sup> Bennett, Drake, “Finders Keepers,” *Boston Sunday Globe*, February 10, 2008

<sup>31</sup> Barkan, *Claiming the Stones, Naming the Bones, Cultural Property and the Negotiation of National and Ethnic Identity*. p.31

<sup>32</sup> Meyer, Karl E. . *The Plundered Past*. New York: Atheneum, 1973. p. 76

A line of reasoning that also merges the humanity and individual perspectives argues that not only should free trade in archaeological artifacts be allowed, but the licit trade in antiquities should be expanded. This argument is supported by people in the museum world, but has also been voiced by those in the archaeological world as well. Cuno suggests that “source countries could arrange to set aside some portion of the artifacts unearthed on archeological digs for sale, or they could bar only those antiquities they were willing to buy from the owner from leaving the country.”<sup>33</sup> Cuno argues that as this legitimate market in properly excavated antiquities grew, the black market would fade out. Thomas F. King, a cultural resource management archaeologist, voices a similar opinion in his article “Some Dimensions of the Pothunting Problem.”<sup>34</sup> King contends that private ownership of artifacts produced by properly conducted archaeological excavations should be allowed, and as a result, it would be regarded as inappropriate “for private parties to own artifacts that have been recovered in any other way.”<sup>35</sup> Like Cuno, King sees legitimate sale and private ownership of archaeological artifacts as the pathway to stopping the ever menacing problem of looting. These arguments for a free and legitimate artifact trade are infused with the ideas associated with the humanity perspective, yet are fundamentally in favor of individual ownership of the past. The degree to which these assertions have combined the two points of view exemplifies how the three discussed perspective are intertwined and can be employed together as well as separately.

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<sup>33</sup> Ibid p.76

<sup>34</sup> King, Thomas F. . “Some Dimensions of the Pothunting Problem .” *Protecting the Past*. CRC Press, 1991 p.91

<sup>35</sup> Ibid p.91

### **The humanity perspective and nationalism**

Politicians often claim that nations should rightfully own the cultural resources found within a country's boundaries. This variation of the humanity perspective could be treated either as its own standpoint or as a subset of the cultural standpoint. It will be discussed in terms of both the humanity and cultural points of view because it is a mixture of the two. In China, England and Scotland the government claims automatic ownership over all found artifacts on the basis that their preservation is in the interest of the country as a whole.<sup>36</sup> In these countries, the government asserts possession of its cultural heritage because it is a "non renewable resource" that embodies the "group identity which belongs to future generations."<sup>37</sup> The emphasis in this argument on the embodiment of group identity is quite close to the cultural perspective. However, the concept of protecting a "nonrenewable resource" so that it may be preserved for the benefit of "future generations" is very reminiscent of the humanity perspective. Thus, the nationalist argument combines the mentality of both the humanist and cultural points of view.

The 1970 UNESCO convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is one example of nationalism operating as part of the humanity perspective. The convention is designed to promote the legal exchange of artifacts as well as to stop the looting of archaeological sites. The convention has been ratified by 114 states; making it the

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<sup>36</sup> Layton, Robert and Wallace, Gillian. "Is Culture a Commodity?" *The Ethics of Archaeology, Philosophical Perspectives on Archaeological Practice*. Cambridge: Cambridge University Press, 2006. p. 61 and Tong, Enzheng. "Thirty Years of Chinese Archaeology (1949-1979)." *Nationalism, Politics, and the Practice of Archaeology*. Cambridge: Cambridge University Press, 1995. p.177

<sup>37</sup> Barkan, *Claiming the Stones, Naming the Bones, Cultural Property and the Negotiation of National and Ethnic Identity* p.33

most widely used and implemented international agreement concerning the control and ownership of cultural resources. The convention acknowledges the premise of archaeological context stating that the true value of an object “can be appreciated only in relation to the fullest possible information regarding its origin, history, and traditional setting.”<sup>38</sup> In addition the convention partially acknowledges the position of museums that the interchange of cultural property among nations is positive and “increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.”<sup>39</sup> The convention’s recognition of the importance of archaeological context and the emphasis on the “civilization of Man,” clearly reflect the humanity perspective. Nonetheless, the document goes on to proclaim that cultural property “constitutes one of the basic elements” of both “civilization and national culture.”<sup>40</sup> The convention also vests several of the crucial regulation responsibilities in national governments including the right to determine what constitutes cultural property.<sup>41</sup> Given the prominence of humanity ownership rhetoric in the convention’s preamble, this switch to nationalist ownership can seem odd. However, the UNESCO convention is an international agreement that needed to be endorsed by countries in order to take effect, thus explaining the convention’s use of humanity perspective rhetoric in a nationalist framework.

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<sup>38</sup> “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property .” United Nations Educational Scientific and Cultural Organization. <<http://exchanges.state.gov/culprop/unesco01.html>>.

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Ibid

## Critiques of Humanity Ownership

The humanity standpoint on the ownership of cultural heritage is not without critique. One complaint is that such broad universalism is actually comparable to neo-colonialism or an imperialist archaeology.<sup>42</sup> During the colonial period the collection of cultural resources became a point of imperialist pride, with “British, French and German travelers compet[ing] for national glory by hauling away Greek, Egyptian, African and other Antiquities.”<sup>43</sup> Colonizers would use world heritage rhetoric to persuade local people that they should part with their cultural belongings in order to fuel the competition between nations. Critics of the humanity perspective have used this history to reject the perspective on the grounds that utilizes a neocolonialist morality that should be definitively abandoned.

A second common critique of the humanity perspective is that it is not a legally useful categorization. This line of reasoning argues that if objects from the past belong to everyone one then no one can possess them individually. Stewardship is not a valid solution because it still does not determine who gets legal control of these items. In an article entitled “Cultures and the Ownership of Archaeological Finds,” James Young asserts that humanity ownership has very little practical value because “we are seeking guidance in answering questions about who ought to possess artefacts that cannot be possessed by everyone” and “the proposition that something is the patrimony of all does not assist us in answering this question.”<sup>44</sup> For Young and

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<sup>42</sup> Barkan, *Claiming the Stones, Naming the Bones, Cultural Property and the Negotiation of National and Ethnic Identity* p. 19

<sup>43</sup> Ibid p.23

<sup>44</sup> Young, James O. . “Cultures and the Ownership of Archaeological Finds.” *The Ethics of Archaeology; Philosophical Perspectives on Archaeological Practice*: Great Britain, Cambridge University Press, 2006. p.16

others that may agree with him, humanity ownership is too idealistic. It does not solve the practical problem of who *will* get to possess and control the treatment of objects from the past even if it answers who *should* own the past.

### **Conclusion**

Supporters of the humanity perspective believe that cultural heritage objects rightfully belong to humankind. As a result, we should mutually value and protect all knowledge and remnants of our shared history. There are numerous rationales that can be used to justify this position. Since several of these rationales are derived from ethics, for many of its proponents, the perspective itself comes to be perceived as ethical. As a result, protecting archaeological context and preserving artifacts are seen as the right course of action because these objects belong to the present and future generations of humankind.

### *Chapter Two: The Cultural Perspective*

The second popular position in the debate on ownership of the past holds that cultural heritage objects should belong to the descendants of the people that created them. Those who adhere to this belief feel that cultural descendants have the only legitimate claim over ancient and historical objects on the grounds that “it is our past, our culture, and heritage, forms of our present life.”<sup>45</sup> Advocates of this perspective do not believe in one world heritage or a common human past, but in separate cultural histories. Likewise, people with this belief tend not to feel that the objects from their past need to be used for the benefit of anyone, but their own people.

There are two distinct sets of motivations that are often used to support the cultural perspective. Since requests for repatriation are almost exclusively made by cultural ownership advocates, examining these requests is the best way to reveal this distinction. In Greece, the appeal for Britain to return the Elgin Marbles rests on the idea that these magnificent ancient artifacts are a part of Greece’s cultural identity, its cultural past, and its national pride. Similarly, many other claims of international repatriation are based on assertions of national pride. Some such examples include a request from the Edo people of Nigeria for Britain to loan them a fifteenth century ivory mask from their own region, and the demands of Scottish nationalists for London to return their ancient Coronation stone.<sup>46</sup> In contrast, Native American calls for repatriation are more grounded in histories of oppression and violations of religious beliefs than they are in cultural pride. Comparably, the Australian aborigines

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<sup>45</sup> Quote from Ros Langford found in McBryde p. 8

<sup>46</sup> Barkan, *Claiming the Stones, Naming the Bones, Cultural Property and the Negotiation of National and Ethnic Identity*. pp. 30-31



and the San people of Southern Africa have requested the repatriation of human remains and associated items as a form of compensation for past mistreatment of their people by colonizing influences.<sup>47</sup> These two applications of the cultural perspective are not always mutually exclusive. In some African countries like Zimbabwe both nationalist sentiments and memories of oppressive regimes can fuel requests for repatriation.<sup>48</sup> When used separately, these two rationales have the potential to conflict and undermine each other as is the case in the U.S. where nationalist laws claiming federal ownership over all archaeological resources conflict with Native American requests for repatriation.

In the U.S., the cultural perspective can manifest itself in the form of nationalism as well as in the form of retribution for past wrongdoings. Nonetheless, the two applications do not exist simultaneously. Although the U.S. is a much younger nation than Spain or Greece, there still exists a national pride in the material culture connected with early America. In fact, it can be argued that for some Americans, “archaeological finds from Mount Vernon or Monticello may...have no less emotional impact or political utility than the Tomb of Philip for a modern Greek Macedonian politician, or a neo-Babylonian palace for a modern middle eastern chief of state.”<sup>49</sup> It is certainly true that many U.S. historic sites and objects are venerated, protected, and kept for public appreciation. The liberty bell, the U.S.S. Constitution, and Bunker Hill are all meticulously maintained by the government so that they might

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<sup>47</sup> Hitchcock, Robert K.. “Repatriation, Indigenous peoples, and Development Lessons from Africa, North America, and Australia.” *Botswana Journal of African Studies*. Vol.16, No. 1, 2002: 57-66.

<sup>48</sup> Kohl, Philip L.. “Nationalism and Archaeology: On the Constructions of Nations and the Reconstructions of the Remote Past.” *Annual Review of Anthropology* 1998:

<sup>49</sup> Silberman, Neil Asher. “Promised Lands and Chosen Peoples; the Politics and Poetics and Archaeological Narrative.” *Nationalism, Politics and Practice of Archaeology*. Great Britain: Cambridge University Press, 1995. p. 249

inspire and unite Americans citizens around one national identity rooted in the fight for liberty and justice for all. Even though American historical sites can possess the same type of nationalist power as the Parthenon does for Greece, there is also a very different interpretation of the cultural perspective present in the United States. A large portion of the archaeological sites in the U.S. are Native American. Native Americans often do not feel that they are part of the United States and therefore request that the remains and objects of their ancestors be left to them to deal with how they see fit.

### **Nationalism and the cultural perspective**

As discussed in the previous chapter, the concept of national ownership can be used to support either a cultural or a humanity perspective. Which perspective is favored in a particular manifestation of the concept usually corresponds to whether or not those in power can claim to be part of the ancient culture which created the cultural heritage in question. For instance, in the U.S., laws that view objects from the past as part of a “national heritage” tend to rely heavily on the ideas used by the humanity perspective. This tendency results from the fact that prehistoric objects found in America were not created by the European ancestors of those in power, but by the ancestors of Native Americans. Therefore, in order for the U.S. government to claim that these prehistoric Native American objects constitute an American national heritage, it must partially rely on the idea that there is common national past that supersedes the differences in cultural pasts.

In some countries, nationalist sentiments are more closely tied to a cultural perspective because they can help to build support for the modern nation. In her request to Britain to have the marbles returned, Melina Mericouri, the former Greek Minister of Culture, stated that “the marbles [were] part of a monument to Greek identity, part of the deepest consciousness of the Greek people: our roots our continuity, our soul..... The Parthenon is like our flag.”<sup>50</sup> It is clear in this remark that the Parthenon and its marbles represent a vital aspect of Greek identity; a link between past and present that allows the Greek people to fully acknowledge who they are. What is remarkable in Mericouri’s comment is the way she does not distinguish between Greek cultural identity and Greek national identity. To state that modern Greece is in some way a “continuity” of the ancient empire is to imply that contemporary culture is simply an evolved version of the magnificent culture of the past. But Mericouri also mentions that the “Parthenon is like our flag,” which simultaneously invokes images of Greece as a culture and a nation. Therefore, by equating the glory of the past to the reality of the present, Mericouri has invested these ancient objects with the power to unite and inspire the modern country of Greece. These glorious remnants of ancient times can only truly evidence the continuity between past and present if they are situated in their countries of origin. As a result, nations like Greece tend to promote the cultural perspective.

In addition to enhancing patriotism, nationalist attitudes towards ownership of the past can help to validate the identities of modern day peoples. In his book *Between Past and Present*, Neil Asher Silberman uses the example of contrasting interpretations of Macedonian sites to illustrate this point. At the time of his writing,

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<sup>50</sup> Quote from Melina Mericouri, found in McBryde p.8

ancient Macedonia was located in three neighboring countries; Yugoslavia, Greece and Bulgaria. Silberman describes his visit to the great Macedonian city of Stobi which was located in Yugoslavia. There, Silberman spoke to a young archaeologist who had recently made discoveries that proved Stobi to be “an important religious, economic and cultural capital,” created by a “lively mix of peoples,” long after the legendary era of Alexander the Great.<sup>51</sup> Silberman notes that this description “of social change and regional culture in ancient Macedonia,” was essentially a “metaphorical portrait of [the archaeologist’s] Macedonia today.”<sup>52</sup> In Silberman’s opinion, this young archaeologist was excited to discover that an ancient Macedonian city could have a story similar to his own.

For contrast, Silberman then discusses his visit to the “Tomb of Philip,” (the father of Alexander the Great), located in Greece. At this site, Silberman found the archaeologists to be equally enthralled with the potential “Greekness,” of the legendary ancient people. Silberman mentions how Georghis, the archaeologist showing him around, was particularly excited about a set of tombs near the great “Tomb of Philip,” where the stones were clearly carved in Greek. Silberman notes that “for Georghis Macedonia was no melting pot. Not now and not in the past.”<sup>53</sup> According to Silberman, Georghis, like the young archaeologist in Macedonia, interpreted this ancient culture in a way that appropriately reflected his own experience. Although perhaps unintentional, these two archaeologists used their conclusions about the past to validate their identities and their present way of life. This example demonstrates another reason why the cultural ownership argument

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<sup>51</sup> Silberman, Neil Asher. *Between Past and Present*. New York: Henry Holt and Company, 1989. p.20

<sup>52</sup> Ibid p.20

<sup>53</sup> Ibid p.28

might be adopted. For these artifacts to belong to one culture is to prove the continuation of that culture between past and present. Having this continuity can allow modern day peoples to feel legitimated on the basis that their way of life is analogous to that of legendary ancient peoples.

Due to this capacity of ancient objects to unify nations and validate modern identities, the discipline of archaeology has often been adopted by political movements to build power and momentum. In Spain, exist four nationalist movements; Spanish, Catalan, Basque and Galican. Each of these movements has at one time attempted to use archaeology as a way to establish a history of the past that was “directed at legitimizing the existence of a nation, and therefore, its right to constitute an independent state.”<sup>54</sup> In Spanish archaeology, nationalist ideologies are evidenced by the way the language of publishes archaeological articles vary depending on the geographical location. The use of languages that might officially be considered dialects in published archaeological texts, indicates that the region sees itself as a separate nation with its own language and history. In addition, nationalist sentiments are sometimes apparent in exhibitions as well as in the decisions made by archaeologists determining areas of study.<sup>55</sup>

Spain is not alone in using a nationalist archaeology to legitimize the existence of a movement or nation. In Nazi Germany, archaeology was adopted as a tool for rallying people to their cause. Despite general ambivalence toward archaeology, the Nazi party could hardly ignore the propaganda value “of an academic discipline which advertised its ability to identify ethnic boundaries on the

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<sup>54</sup> Diaz-Andreu, Maragarita. “Archaeology and Nationalism in Spain.” *Nationalism, Politics, and the Practice of Archaeology* . Great Britain : Cambridge University Press, 1995. p.54

<sup>55</sup> Ibid p.55

basis of material culture remains.”<sup>56</sup> The regime even used prehistoric symbols such as the swastika to strengthen their movement.<sup>57</sup> At the time, German archaeology benefited from this use of the discipline as propaganda. The patronage of the Nazi party allowed German prehistoric archaeology to become prestigious and well endowed. After World War II, many archaeologists tried to distance themselves from ideology and politicization because of the discipline’s role in the atrocities incurred by the Nazi party.<sup>58</sup> However, as archaeologists have increasingly lost interest in nationalist interpretations, politicians have tended to become less interested in archaeological research.<sup>59</sup>

Archaeology can only be a useful political tool if a cultural perspective on ownership is adopted. Citizens will not be easily convinced to support a nation or movement due to the continuity between past and present if the objects that symbolize that connection are either privately owned, or being shipped overseas for the enjoyment of other peoples. Therefore, for governments to use the past as a method of inspiring nationalism, they must advocate for its cultural ownership.

### **A brief history of the treatment of Native Americans in the United States**

Since the arrival of Europeans on the Continent, Native Americans have endured various injustices and religious violations. This environment of racism and oppression has led Native Americans to be generally suspicious of both the federal

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<sup>56</sup> Arnold, Bettina and Hassmann, Henning. “Archaeology in Nazi Germany: the Legacy of the Faustian Bargain.” *Nationalism, Politics, and the Practice of Archaeology*. Great Britain: Cambridge University Press, 1995. p.77

<sup>57</sup> Ibid p.77

<sup>58</sup> Kohl, Philip and Fawcett, Clare. “Archaeology in the Service of the State: Theoretical Considerations.” *Nationalism, Politics, and the Practice of Archaeology*. Great Britain: Cambridge University Press, 1995. p.15

<sup>59</sup> Diaz-Andreu, *Nationalism, Politics, and the Practice of Archaeology* p..55

government and archaeologists. This history of mistreatment has strongly influenced Native American conceptions of cultural heritage ownership. Thus in order to better comprehend American Indian viewpoints on ownership of the past it is necessary to examine the history of Native American treatment in the U.S. as well as the history of the relationship between archaeologists and these groups.

The first attempt to define the relationship between the U.S. and Native Americans occurs in the Constitution. Both Article 1 Section 2 and the Fourteenth amendment mention that Indians are “excluded from official population enumerations for determining congressional representative.”<sup>60</sup> The exclusion of Indian tribes from state population counts reflects the opinion of the founding fathers that Indians were not to be considered citizens of the U.S. In the Commerce clause Indians are once again described as entities external to the U.S. government. Article 1, Section 8 of the Constitution gives Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>61</sup> By endowing Congress with the power to regulate trade with the Indian tribes, the Constitution acknowledges them as beyond the immediate jurisdiction of the United States. Indian tribes are clearly not considered to be part of a state, since if that were the case then commerce with them would be regulated by the individual states and not the federal government. Nonetheless, the Constitution does not regard Indian tribes to be separate nations either. Instead it singles them out as their own unique category. Thus in the Constitution, American Indians are established as unique extraconstitutional entities.

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<sup>60</sup> Wilkins, David E. . *American Indian Sovereignty and the U.S Supreme Court*. Austin: University of Texas Press, 1997. p. 23

<sup>61</sup> United States Constitution, Article 1, Section 8

They are neither citizens, nor a state, nor a foreign nation, but yet, are still groups with which the U.S. must interact.

The failure of the Constitution to further define the extraconstitutional nature of tribes has made it difficult for the Courts and Congress to determine how to treat American Indian tribes. Early American courts were faced with the question of whether a “tribe of Indians residing without the limits of any one of the States, but within the territory of the United States [could] be recognized as a distinctive polity.”<sup>62</sup> In *United States v. Rogers*, (1845), the Supreme Court decided that Native Americans were under the authority of the United States because they “hold and occupy [their land] with the assent of the United States and under their authority.”<sup>63</sup> However four years later in *Parks v. Ross*, (1849), the Court found that American Indian tribes were “foreign and independent nation[s],” since “they are governed by their own laws and officers, chosen by themselves.”<sup>64</sup> It is clear from the contrast in these decisions that the Supreme Court was not entirely sure how to handle American Indian tribes since the Constitution did not explicitly lay out what their relationship was supposed to be. As a result, the Federal government and the Supreme Court were given the power to determine the amount of autonomy Native Americans were to be allowed.

Since the founding of the American government, the extraconstitutional status of American Indian tribes has been used as a tool with which to disregard and mistreat them. American Indians occupied desirable lands and were viewed as a savage and unwelcome presence in burgeoning American communities. As a result,

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<sup>62</sup> Wilkins p. 42

<sup>63</sup> *United States v. Rogers* decision, found in Wilkins p. 43

<sup>64</sup> *Parks v. Ross* decision, found in Wilkins p. 49



the U.S. government often used the ambiguity of the Constitution to take advantage of American Indians. In fact, because the tribes were explicitly excluded from citizenship in the U.S. founding document, scholars and governmental officials have often argued that American Indians do not have constitutional rights.<sup>65</sup> The rationale for this is that “the Constitution was an instrument framed for a nation of independent freemen, who had religious convictions worth protecting...To suppose that the framers of the Constitution intended to secure to the Indians the rights and privileges which they valued as Englishmen is to misconceive the spirit of their age, and to impute to it an expansive benevolence which it did not possess.”<sup>66</sup> Thus, the externality of American Indians was viewed as a legitimate reason not to grant them the rights and protections of an American citizen. However, American Indians still resided on what the Federal government considered to be U.S. soil, meaning that the government could still make laws concerning Native Americans without having to take citizen rights and liberties into consideration.

Until the early 1900s, the Federal government attempted to deal with American Indians through policies of either assimilation or extermination. Both of America’s first two presidents believed that the best way to deal with Native Americans was to assimilate them into American culture. For President Washington, this sentiment was quite expansive; he felt that all immigrants to the United States should come ready to be “assimilated to our customs, measures and laws: in a word, soon become one people.”<sup>67</sup> Jefferson’s assimilation policy was more specific to

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<sup>65</sup> Wilkins p. 65

<sup>66</sup> Quote from George Canfield, “The Legal Position of the Indian” *American Law Review*, January 1881 found in Wilkins p.65

<sup>67</sup> Found in Thomas, David Hurst. *Skull Wars*. New York: Basic Books, 2000, p. 17

Native Americans. He felt that unlike the “Negro,” the Indian was “in body and mind, equal to the white man”<sup>68</sup> and should therefore be treated like a brother and welcomed into American society. On several occasions Jefferson publicly attempted to persuade Native Americans to abandon their paganism, their tribal order, and their communal ownership of land in favor of American ways. When Jefferson’s policy was unsuccessful, his image of the Indian as equal to the white man became replaced by the idea that “Indians were children”<sup>69</sup> that needed to be punished and manipulated. The failure of Jefferson’s assimilation policy led the U.S. to adopt a stricter policy of “territorial consolidation”<sup>70</sup> which ultimately resulted in the Indian wars.

Assimilation policies resurfaced in 1887 in the form of the Dawes Severalty Act. The goal of the Dawes Act was to assimilate Native Americans into society by transforming them into “civilized,” “farmers,” and “participants in government.”<sup>71</sup> In order to accomplish this task the act divided Indian country into approximately 160 acre units to be given to each Native American family. The Dawes Act was not a successful endeavor for Native Americans; the allotted land often ended up in the hands of non-Indians after attempts at farming failed. In fact, during the fifty years following the law’s passage, American Indians lost 90 out of their 138 million acres of reservation land.<sup>72</sup> The failure of the Dawes Act demonstrates how assimilation

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<sup>68</sup> Ibid p.17

<sup>69</sup>Ibid, p. 18

<sup>70</sup> Ibid p.19

<sup>71</sup> Ibid p. 67

<sup>72</sup> Evans, Sterling. *American Indians in American History 1870-2001 A Companion Reader*. Westport, CT: Praeger Publishers, 2002. p.35

policies were not only ineffective, but also extremely detrimental to Native Americans.

Similar to assimilation policies, extermination policies were also harmful and ineffective. During the War of 1812, many American Indian tribes chose to ally themselves with the British, which angered Americans and destroyed any remnants of the image of the “brotherly Indian” that Jefferson had promoted. The treaty which ended the war provided that American Indians would regain the same political status they had held before the war. Unfortunately, the treaty was not able to mandate the renewal of American sympathies towards the American Indian. As a result, the following period was dotted with policies attempting to remove Native Americans from their lands.

In 1824, President James Monroe announced his plan to have the Indians voluntarily move across the Mississippi where they would then be instructed in the “arts of civilized life and make them a civilized people.”<sup>73</sup> Unsurprisingly, the involved tribes declined to participate and the plan failed. Determined to remove Native Americans from their current lands, President Andrew Jackson passed the Indian Removal Act in 1830. This act was a more aggressive form of Monroe’s initiative which called for the removal of several Native American groups to Oklahoma. This move is commonly referred to as the Trail of Tears during which hundreds of American Indians lost their lives.<sup>74</sup> The disappearance of Native American lands both by assimilation and removal as well as the forced renunciation

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<sup>73</sup> Found in Thomas p. 20

<sup>74</sup> Echo-Hawk, Walter and Echo-Hawk, Roger. “Repatriation, Reburial and Religious Rights.” *American Indians in American History, 1870-2001, A Companion Reader*. Westport, CT: Praeger Publishers, 2002. p.183

of American Indian religions had negative ramifications on the relationship between the Federal government and Native Americans. After this wonderful myriad of policies, Native Americans were not inclined to trust the U.S. government or attempt to be part of American culture.

### **The impact of racism on American archaeology**

Although archaeologists were not directly involved in these oppressive governmental policies, early American archaeologists were certainly a product of their environment. In fact, the first American archaeologist was none other than Thomas Jefferson. Jefferson “pioneered the basics of modern archaeology,” by “defining his hypothesis beforehand, exposing and recording his finds in meticulous detail, and ultimately publishing all for scrutiny by interested scholars.”<sup>75</sup> Jefferson was particularly fascinated by the Native American connection with nature and began to view them more as part of natural history than of human history.<sup>76</sup> Jefferson’s equation of Native Americans to nature remained popular throughout the nineteenth century. Museums often displayed Native American “material culture alongside collections of rocks and stuffed animals rather than in museums of fine arts.”<sup>77</sup> By placing Native Americans objects in museums of natural history, scholars stripped American Indians of their humanity and transformed them into animals in the eyes of the American public.

An additional racist influence on American archaeology was the work of Samuel George Morton. Morton was the pioneer of craniometry – the study of human

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<sup>75</sup> Ibid, p.34

<sup>76</sup> Ibid p. 35

<sup>77</sup> Trigger, Bruce. “The Past as Power; Anthropology and the North American Indian.” *Who Owns the Past, Papers from the annual symposium of the Australian Academy of the Humanities*. Melbourne: Oxford University Press, 1985. p.21

skulls. His theory was that a person's race was correlated with both the size of their skull and their level of intelligence. Morton's study revealed that the "structure of [the Indian mind]" was "different from that of the white man," and as a result the two could not "harmonize in their social relationships except on the most limited scale."<sup>78</sup> This discovery justified racist practices in the United States. Americans no longer had to feel guilty about the treatment inflicted on Native Americans through assimilation and extermination policies because they were an inferior race. Morton's work also resulted in the use of skulls as an integral element of scientific study. Morton personally comprised an impressive collection of skulls numbering over 1,000 by the end of his lifetime.<sup>79</sup>

Both Morton and Jefferson's ideas of Native Americans became very popular in the U.S. The result was that the collection of human remains became an acceptable part of pursuing the discipline not of anthropology or archaeology, but of natural history. In the mid 1800s, several newly established natural history museums began assembling inventories by both acquiring already established collections and by creating new ones. The creation of new collections inevitably required scientists and their assistants to dig American Indian graves to acquire skeletons. The race for collections was so pervasive that it resulted in the establishment of a market in human skulls. This practice was condoned by the federal government, as is evidenced by the order made by Surgeon General William Hammond in 1865 for all medical officers to collect American Indian skeletons to help furnish these budding collections.<sup>80</sup> By the

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<sup>78</sup> Found in Thomas p.41

<sup>79</sup> Thomas p. 40

<sup>80</sup> Thomas p. 55

1980s, thousands of American Indian human remains had museums, universities and historical societies as their ultimate resting places.

Due to the use of Native American human remains in natural history collections, American Indian grave sites also became admissible locations for scientific study and exposition. Until 1992, the Dickson Mounds museum in Illinois allowed visitors to view open graves of Native Americans while being lectured on the archaeology of the site and the information it provided on Native American culture. Comparably, a Kansas family turned an American Indian burial pit into a roadside attraction to which they charged admission.<sup>81</sup>

Archaeologists treated Native Americans as less than human by collecting their dead and categorizing them as part of natural history. These racist conceptions of Native Americans became embedded in American archaeology and accepted as respectable parts of the discipline. Many Native Americans considered the use of the remains of their ancestors to be particularly abhorrent because it was a violation of their religious beliefs, which stress the importance of internment for the spiritual journey of the dead (see chapter 4). The result of the racism ingrained in early American archaeologists is that most Native Americans trust archaeologists no more than they trust the U.S. government. In their eyes, both entities have harmed them and treated them as unequal to the rest of the American population.

### **Native Americans and Archaeologists**

Given this context of severe mistreatment, it is to be expected that Native Americans would not be particularly susceptible to archaeological appeals concerning

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<sup>81</sup> Riffe, Jeff "Who Owns the Past? The American Indian Struggle for Control of their Ancestral Remains." Video, 2001

the value of world heritage for all of humankind. Many Native Americans feel that science is only ever used as a “justification for theft and stalling tactics to keep museums filled with the spoils of war.”<sup>82</sup> Native Americans who adhere to this belief also often feel that “science and religion have always been available as apologists for the majority who wished to dehumanize minorities for commercial and political purposes.”<sup>83</sup> Since, science has always been used against them; many Native Americans do not see the potential gain of scientific knowledge as a credible reason for keeping their remains and objects in museums and universities. Those Native Americans that do believe that knowledge of the past could help their case often feel that “there is nothing to be learned that can undo the rest of what has occurred to them since well before the nineteenth century.”<sup>84</sup> For these people, memories of past injustices overshadow any good that could possibly be done as a result of archaeology.

Many Native Americans advocate the cultural perspective because they feel that scientists have used their cultural heritage to strip them of their humanity in the eyes of the American public. Well known Native American activist Suzan Shown Harjo once claimed that “it’s still in the hearts and minds of archaeologists and physical anthropologists that we are their property, we are their collections, like the butterflies and the stamps.”<sup>85</sup> Harjo’s statement reflects the idea that archaeologists do not see Native Americans as people, but instead as specimens. Another vocal Native American activist, Vine Deloria Jr., voiced a similar opinion of the discipline,

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<sup>82</sup> Fine Dare, Kathleen. *Grave Injustice*. London: University of Nebraska Press, 2002. p.42

<sup>83</sup> Deloria Jr., Vine. “A Simple Question of Humanity: The Moral Dimensions of the Reburial Issue.” *For This Land; Writings on Religion in America*. New York: Routledge, 1999. p.191

<sup>84</sup> Ibid p.191

<sup>85</sup> Riffe 2001

stating that “some anthropologists, museum directors and National Park Service officials insist that while the dead of other races merit respect, American Indian remains are more properly described as resources which belong in display cases, exhibits and scientific labs.”<sup>86</sup> For such activists, archaeology is a discipline that has repeatedly denied the humanity of American Indians by treating their bones and their objects as archaeological resources and databases. Due to this interpreted dehumanization, these activists and others who share their opinion don’t see the endeavors of archaeology as being either respectful or worthwhile.

Native Americans cite religious violations as one reason why they should have possession over their cultural heritage. Given the importance of permanent internment of the dead in many Native American cultures, grave desecration is considered a grievous offense with serious spiritual ramifications. Archaeological excavations of gravesites can therefore be considered a crime. As a result, “some Native Americans take the absolute position that any form of archaeological study at any site constitutes desecration.”<sup>87</sup> Due to this view of archaeologists as grave desecrators it is not surprising that many Native Americans are not particularly willing to aid archaeological endeavors.

Some Native Americans advocate for cultural ownership of the past because they do not accept the premise that the study of cultural heritage can contribute to knowledge about the past. Many Native Americans feel that their oral stories and religious beliefs provide the answers to many of the questions asked by

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<sup>86</sup>“ Deloria Jr., Vine. “A Simple Question of Humanity: The Moral Dimensions of the Reburial Issue.” *For This Land; Writings on Religion in America*. New York : Routledge, 1999. p.188

<sup>87</sup> Marsh, Gene. “Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items.” *Arizona Law Journal* Spring 1992, Volume 24, No.1: 81-131



archaeologists.<sup>88</sup> Furthermore, some more liberal Native American activists even feel that the knowledge generated by archaeology is intended to further oppress and destroy American Indians. Deloria Jr. has claimed that these motives lie behind the theory of migration to the U.S. via a land bridge. He claims that “by making us immigrants to North America, they [scientists] are able to deny the fact that we were the full, complete and total owners of this continent. They are able to see us simply as earlier interlopers and therefore throw back at us the accusation that we had simply found North America a little earlier than they had.”<sup>89</sup> This Native American conviction that their past is already known further explains why many American Indians support the cultural perspective; cultural heritage objects do not need to be kept for study because all of the answers are already known.

### **Conclusion**

In both the United States and abroad there are groups and people who strongly believe that items from the past should belong to the descendants of the people that created them. In countries such as Spain, Greece, Germany and the former Yugoslavia, nationalism is the most common motive for supporting a cultural ownership perspective. Nationalist ideologies are appealing to many countries because they have the potential to strengthen political regimes, validate citizens’ identities and enforce patriotic sentiments. In contrast, American Indians tend to support a cultural ownership perspective because of their history of mistreatment. Throughout the history of the United States, American Indians have always been treated differently than American citizens. This separate treatment took the form of

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<sup>88</sup> Bray, Tamara L. *Future of the Past*. New York : Garland Publishing, 2001. p. 42

<sup>89</sup> Found in Watkins, Joe. “Beyond the Margin: American Indians, First Nations and Archaeology in North America.” *American Antiquity* 68(2) 2003: 273-285.

religious oppression, land confiscation and denial of civil liberties. As a product of its surroundings, American archaeology also saw Native Americans as separate from themselves, and instead closer to nature. In the 1980s many of these unfair practices still remained present in archaeology. The result of these practices has been unwillingness on the part of Native Americans to cooperate with archaeological claims of public benefit.

### *Chapter Three: The Individual Perspective*

The third and final perspective on ownership of the past maintains that artifacts can be privately owned. This point of view is most commonly supported by art and artifact dealers, hobbyists, collectors and museum officials. As with the other two standpoints, there is an array of reasons that are often cited in arguments for private ownership of the past. This list tends to include a passion for collecting, a desire to protect the past, the thrilling search for prestige, and a love of money. In a similar fashion to the humanity perspective, the particular rationale adopted by a person tends to correspond with their relationship to the past.

Although there is a lot of support for private ownership in the U.S., this perspective is the least vocal of the three. This is due in part to the attempts of the other two perspectives to label supporters of private ownership as “looters” and “grave robbers.” These attempts have been partially successful and the ability to individually own artifacts has become increasingly restricted in the U.S. over the past 50 years (see chapter 4). More importantly this tension between the individual perspective and its two counterparts has made it difficult for those who support private ownership to publish articles in established journals and newspapers thus, to an extent, the individual perspective has been removed from the mainstream. In addition, those venues that do publish the opinions of private ownership supporters tend to be difficult to access. State archaeological societies, organizations for metal detectorists, and other small associations often do not have websites or formal publications. As a result, this chapter’s discussion of the arguments used in defense of the private ownership may be incomplete.

The individual perspective tends to employ different vocabulary than the other two standpoints. Words that are used frequently include “antique,” “antiquity,” and “relic.” Each of these terms is subtly differentiated. According to the American Heritage College Dictionary, the word “antique” implicates an object is “belonging to, made in, or typical of an earlier period.”<sup>90</sup> It can also be used to describe an object that is “esteemed for its age.”<sup>91</sup> The word “antique” can therefore be used in reference to any object from the past. In contrast, an “antiquity” is more specifically defined as an object from “ancient times,” or the “times preceding the Middle Ages.”<sup>92</sup> This means that the term “antique” can always be used in replacement for “antiquity,” but “antiquity,” does not always mean “antique.” Like the first two terms, “relic” also implies an object “cherished for its age,” but also can imply “an object or a custom whose original culture has disappeared.”<sup>93</sup> This definition is intriguing because the idiom “relic” is most commonly used when describing a Native American object. It can therefore be assumed that this usage of “relic” reflects the incorrect belief that Native American cultures are either dying or already extinct. These three terms are used almost exclusively by supporters of the individual perspective. They are favored because they emphasize the age of an object which is what makes it unique and appealing to buy, sell and preserve for future generations.

### **Serious collectors and the individual perspective**

One argument in favor of the individual perspective holds that private ownership is a successful method of preserving artifacts for posterity. This logic is

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<sup>90</sup> Costello, Robert B.. *American Heritage College Dictionary, Third Edition*. Boston & New York: Houghton Mifflin, 2000. p.60

<sup>91</sup> Ibid p. 60

<sup>92</sup> Ibid p. 60

<sup>93</sup> Ibid p.1152

most commonly expressed by those who consider themselves to be “serious collectors.” In his article “Collecting Pre-Columbian Art” Gillet G. Griffin outlines what he as a self identified “serious collector,” believes are the goals of his community. He feels that he “is not the owner, but the custodian of the works which [he has] assembled and [his] goal has been to pass them on to the world in an ordered way, so that they will add to the knowledge of present and future generations.”<sup>94</sup>

Griffin also states that he envisions the true aim of a collector as being to “assemble disparate works of art, put them in meaningful order and to bring to the attention of the world the beauty and integrity of the art of civilizations which we are just beginning through archaeology, iconography and epigraphy to understand.”<sup>95</sup>

Griffin’s description of a collector’s mission to “add to the knowledge of present and future generations,” is surprisingly close to the goals of archaeology as named by the SAA principles of ethics. Both the SAA and Griffin pledge to be stewards of the past and work to add to the public knowledge of the past. In an article entitled “Can Anyone Just Tell the Truth,” Thomas Browner reinforces this idea that archaeologists and collectors have similar goals and argues that the two should work together.

Browner theorizes that in an ideal world “collectors would be the eyes, ears, finance and back of the professional agenda,” and “professionals would seek out amateur collectors and view their collections, marking site maps and taking notes.”<sup>96</sup>

Browner’s and Griffin’s articles demonstrate that collectors and archaeologists can be

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<sup>94</sup> Griffin, Gillet G. . “Collecting Pre-Columbian Art.” *The Ethics of Collecting Cultural Property, Whose Property? Whose Culture? Second Edition*, New Mexico: University of New Mexico Press, 1999. p.114

<sup>95</sup> Ibid p.114

<sup>96</sup> Browner, Thomas. “Can Anyone Just Tell the Truth?” Illinois State Archaeological Society. Accessed 3/18/08 <[http://www.fittedshoe.com/ARCHAEOLOGY/truth article.htm](http://www.fittedshoe.com/ARCHAEOLOGY/truth%20article.htm)>.

construed to both be working towards the same end of preserving the past for the future.

In addition to believing that collecting and archaeology have the same mission, many collectors also feel that the activity of collecting is undertaken in the best interest of the public. As mentioned during the discussion of the humanity perspective, many archaeologists have accused those who support private ownership of being “looters” who are destroying the past. Serious collectors deny this claim. Many argue that “they are helping to save what otherwise would be destroyed.”<sup>97</sup> These collectors claim that they are rescuing “much of humankind’s heritage from certain doom by extricating it from inimical surroundings of decay, neglect, instability and poverty.”<sup>98</sup> This argument that collecting is merely a form of salvage archaeology further stresses the connection between archaeology and collecting. In the eyes of these “serious collectors,” collecting artifacts is neither an effort to destroy the past or archaeology, but to aid the preservation of both.

The collection of ancient art has a longstanding tradition that can be traced back to the Greeks and Romans and it is this practice that has provided us with many works of art from early periods.<sup>99</sup> In fifteenth century Europe, collecting was particularly fashionable because the “possession of classical items and ruins reinforced the importance of a person or a locality.”<sup>100</sup> In contrast, throughout

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<sup>97</sup> Early, Ann M. . “Profiteers and Public Archaeology: Antiquities Trafficking in Arkansas.” *The Ethics of Collecting Cultural Property; Whose Property? Whose Culture? Second Edition*. New Mexico: University of New Mexico Press, 1999. p.44

<sup>98</sup> Pendergast, David M and Graham Elizabeth. . “The Battle for the Maya Past: The Effects of International Looting and Collecting in Belize.” *The Ethics of Collecting Cultural Property; Whose Culture? Whose Property? Second Edition*. New Mexico: University of New Mexico Press, 1999. p.70

<sup>99</sup> Mayo, Margaret Ellen “Collecting Ancient Art, A Historical Perspective.” *Who Owns the Past, Cultural Policy, Cultural Property and the Law*. New Jersey: Rutgers University Press, 2005. p.131

<sup>100</sup> Diaz-Andreu, *Nationalism, Politics, and the Practice of Archaeology*. p.42

American history, collecting has been a conventional part of rural life. In his article “Memoir of an Avocational Archaeologist,” Harold Mohrman provides a glimpse of the early American tradition of collecting. Mohrman talks about how both his father and grandfather collected “Indian rocks” that they found on their land in Illinois during the plowing season. Mohrman also recounts how as a child he also would gather objects from his own field, but “quickly found that neighboring fields also had some rewarding sites,” and that “many of these neighbors had a cigar box of flints and an ax or two that I was sometimes able to acquire by begging or buying.”<sup>101</sup> Mohrman’s childhood memory of neighbors and relatives with shoeboxes of Native American artifacts kept “as curiosities” was not unusual in the first half of the twentieth century. As noted by archaeologist Julie Hollowell-Zimmer, “as late as the 1950s, pothunting was regarded as an admirable pastime in the United States, worthy of a ribbon at many county fairs.”<sup>102</sup> Collecting was not merely an established part of society, it was a time honored tradition.

In the U.S., the development of archaeology was shaped by the pervasive nature of collecting. Early archaeology was thus barely discernible from looting to the point that “most early archaeologists would be considered looters by today’s standards.”<sup>103</sup> Gregory Perino, an amateur archaeologist who eventually became a professional has also described archaeology in America as an inclusive activity. He describes how he would get volunteers to help him dig. Among these volunteers “were women who got their children out of school and the dads off of work to spend

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<sup>101</sup> Mohrman, Harold “Memoir of an Avocational Archaeologist.” *American Antiquity* Vol.50, No.1, January 1985 p.237

<sup>102</sup> Hollowell-Zimmer. *Ethical Issues in Archaeology*. p.50

<sup>103</sup> *Ibid* p.50

the day trowelling and exposing features we wanted to photograph. Around 3'o clock they would all go home and prepare supper for their families.... They were a credit to American Archaeology.”<sup>104</sup> This depiction of women and children as an integral element of early excavations demonstrates the degree to which archaeology and artifact collecting were intertwined. This representation of an America as a place where digging for and collecting artifacts was a standard part of life also explains the similarities between contemporary “serious collectors,” and archaeologists; the two groups had the same origins.

Despite the connections between archaeology and collecting the two entities are definitively distinct. Most collectors do not value or even acknowledge the importance of archaeological context in the creation of knowledge of the past and instead focus on the artifact itself. In the words of one collector “it’s through art that you can look into the minds and hearts and souls of other people....If you look at the Mona Lisa what other information do you need?”<sup>105</sup> Comparably, in the previously mentioned article by Thomas Browner he asserts that archaeologists have likened collecting to “tearing a page out of the history book,” but argues that “they ignore the fact that the artifact once broken is like forever burning the page.”<sup>106</sup> This idea that the physical artifact is what allows people to acquire information on the past is the fundamental difference between contemporary archaeology and collecting. In the words of one archaeologist; “archaeologists do not do archaeology for the things, they

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<sup>104</sup> Edited and assembled by Farnsworth, Kenneth, and Wiant Michael D. . *Illinois Hopewell and Late Woodland Mounds; The Excavations of Gregory Perino 1950-1975*. Champaign: University of Illinois at Urbana, 2006. p. 4

<sup>105</sup> Found in Early, *The Ethics of Collecting Cultural Property; Whose Property? Whose Culture? Second Edition* p.44

<sup>106</sup> Browner, Thomas. “Can Anyone Just Tell the Truth?” Illinois State Archaeological Society. Accessed 3/18/08 <[http://www.fittedshoe.com/ARCHAEOLOGY/truth article.htm](http://www.fittedshoe.com/ARCHAEOLOGY/truth%20article.htm)>.



do it for the understanding of the past. There is a vast difference between love of things and love of learning.”<sup>107</sup> This is in fact the distinction between contemporary collectors and archaeologists; collectors feel that preserving an artifact is synonymous with preserving knowledge of the past, whereas an archaeologist feels that the context of the object must be conserved in order to truly gain knowledge of the past. Both groups feel the object is important because of the knowledge it can provide, but they differ on how that knowledge can be produced.

This distinction between “love of things and love of learning,” can also be seen as the reason why collectors support private ownership of the past while archaeologists do not. Since a collector sees the actual artifact as having the ability to provide information on the past, private ownership is quite logical since it can allow for a more secure setting. Returning to Griffin’s article on pre-Columbian art, he describes how several months after the opening of the new Museum of Anthropology and Archaeology in Mexico, it was discovered that several of the donated artifacts in the new museum’s collection had been stolen from the old museum a couple years earlier. Griffin uses this example to question the quality custodianship of museums particularly in the third world. He also implies that museums may not be the safest location for artifacts, thus lending legitimacy to the idea of private ownership. Griffin’s concern with inadequacies in stewardship reflects his opinion that possessing artifacts is synonymous with possessing knowledge of the past. For an archaeologist such a theft would surely be berated and bemoaned, but would not necessarily indicate a loss of part of the history of the human past. If archaeologists

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<sup>107</sup> Fox, Greg. “To Dig or Not to Dig; Is it Really a Question for an MAS Member?.” *MAS Quarterly* 8(1):6 1991:

possessed the contextual information of a stolen artifact that object would still be considered to have contributed to the knowledge of the past. In this way the focus on the artifact instead of on “learning,” can be viewed as one of the reasons why collectors support private ownership of the past despite having many goals in common with archaeologists.

### **Art dealers, museums and the individual perspective**

In contrast to collectors, some proponents of the individual perspective do not care about the preservation of the past, but are more focused on an item’s commercial and aesthetic value as well as its potential to bring prestige. Many objects from the past are quite stunning and their age makes them a limited resource. As such, artifacts can be very marketable. Many supporters of private ownership of the past reason that since these objects can be sold for high prices, there is no reason not to take advantage of the situation and exploit the grandeur of the art. This particular rationale is most commonly employed by art dealers and museums. One such artifact dealer, Ed Merrin, exclaimed in an interview with the *New York Times* concerning a Greek Cycladic head that “it’s just wonderful to be the dealer who handles the great object,” because “the idea of holding that Cycladic head, of seeing it without a piece of glass in front of it - most people who work in museums their whole lives have never held anything of this wonder. And I had a chance to do it.”<sup>108</sup> For Merrin, the joy of artifact dealing lies in the unique opportunity to see one of the world’s magnificent works of art up close and personal. However, this special experience of Merrin’s did not come easily; he won the Cycladic head in a Sotheby’s auction for \$2.09 million

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<sup>108</sup> Grimes, William. “Antiquities Boom: Who Pays the Price?.” *New York Times* July 16, 1989:

dollars and later sold it for over 3 million dollars.<sup>109</sup> In the interview with the New York Times, Merrin does not attempt to justify his right to be an artifact dealer, but he does mention that he is not interested in anything illegal. Merrin also mentions that he loves artifact dealing because it is a “game of wits and a game of eye.”<sup>110</sup> This remark is most likely a reference to both the presence of forgeries in the artifact market as well as the necessity to compete against other dealers to obtain a particularly fantastic work. For Merrin the appeal of privately owning artifacts is both the thrill of the hunt and the desire to have the exclusive opportunity to be in the presence of one of the world’s greatest works of art.

Although not in the same line of work as Merrin, museum professionals have also expressed opinions that artifact collecting and ownership can be competitive and thrilling. In an interview with *Newsweek*, the former director of the Metropolitan Museum of Art, Thomas P. Hoving, attributed his success as director to his instincts as a collector: “When I see something I want, I do everything I can to get it. I’ve bought \$300 million worth of stuff since I’ve been here, and I’ve never made a mistake. What other museum, what other city in the world has gotten these things? I’m proud that I’ve gotten the greatest objects in the world, in my time here.”<sup>111</sup> Hoving’s statement emphasizes the degree to which his passion for his job as director was fueled by the thrill of acquiring some of the most spectacular objects the world has to offer. In this way Hoving’s comment is reminiscent of the sentiments expressed by Merrin since both men appear to have a fascination with the prestige of the items. Another, unnamed museum professional, reiterated Hoving’s attitude

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<sup>109</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> Meyer, p.196

saying that “when he directed a museum with modest purchase funds it was easy to be on the side of virtue and goodness, but now that he has several million dollars a year for the purchase of art, it has become impossible to ignore tempting objects of all sorts.”<sup>112</sup> This museum director goes on to add that this desire to purchase a splendid artifact regardless of whether or not there are any records of its provenance, can be the result of pressure from the museums trustees upon whom the job of a museum director relies. This means that even if a director or curator isn’t personally enthralled with the potential to acquire prestige for their institution, they are pressured to act in accordance with this mantra in order to secure their jobs. For those that nurture this attachment to the purchasing and selling of artifacts, the thrill of the antiquities market does not lie in the extreme prices of the objects in question, but in the sheer ability to acquire something fantastic. In fact, the potential status of the items as part of the world’s heritage is precisely what seems to make these antiquities so valuable and enticing.

### **The art market and the individual perspective**

Even though many advocates of the individual ownership of objects from the past claim to do so for reasons other than profit, many of these proponents do buy and sell parts of their collections for money. In the case of Merrin and Hoving, it is apparent that money is involved in their transactions. However, the artifact market thrives on a smaller level as well. It is not difficult to find small web sites on the

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<sup>112</sup> Shestack, Alan. “The Museum and Cultural Property: The Transformation of Institutional Ethics.” *The Ethics of Collecting Cultural Property; Whose Culture? Whose Property? Second Edition*. New Mexico: University of New Mexico Press, 1999. p.98

internet that sell Native American artifacts ranging from spear points to pottery.<sup>113</sup> One such site named “Ken’s relics,” uses the slogan “honest relics, honest prices.”<sup>114</sup> The site says that the creator has been collecting and studying Native American artifacts for over 40 years and over this period has owned and appraised over half a million relics. The site sells pottery, spear points and other assorted artifacts that are given dates as old as 11,000 B.P. The asking prices for a single spear point range between \$35 and \$4,500.<sup>115</sup> This site also offers authentication services and promises that “every effort will be attempted to provide a smooth, satisfactory, authentic, and reasonably priced transaction for collectors to add quality artifacts to their collection.”<sup>116</sup> This site is not unusual, “Paleo-Enterprises,” also offers artifacts from a variety of time periods and guarantees that all artifacts on the site “are genuinely old, authentic and made by prehistoric peoples.”<sup>117</sup> Furthermore, American Indian spear points can be found for sale on eBay from \$5 to \$1,000. Looking at these websites provides a glimpse into the more economic side of private ownership of the past. People who participate in these sites are not millionaire collectors, exorbitantly rich art dealers or prestigious museum officials. Instead the participants are more likely to be small scale private collectors, or the previously discussed “serious collectors.” Regardless of the rhetoric that might be used, private ownership of artifacts allows for these objects to be bought and sold like stamps, bottle caps and any other collectible item.

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<sup>113</sup> See [paleoenterprises.com/arta-general.htm](http://paleoenterprises.com/arta-general.htm), <http://www.caddotc.com/> and <http://kensrelics.com/home/>

<sup>114</sup> Terrell, Jerry . “Kens Relics.” Accessed 3/18/08 <<http://kensrelics.com>>.

<sup>115</sup> Ibid

<sup>116</sup> Ibid

<sup>117</sup> “Paleo Enterprises .” Accessed 3/18/08 <[paleoenterprises.com/arta-general.htm](http://paleoenterprises.com/arta-general.htm)>.

Due to the potential for profit involved in the sale of objects from the past, there are people who have attempted to access the market through forgeries. In his book *Plundered Past*, Karl Meyer describes a forger who he calls Alfred Kappa.<sup>118</sup> Kappa was an accomplished artist who made forgeries of Etruscan art. In order to convince dealers to purchase his works, Kappa fabricated his own Etruscan site and would cover all of his art in the soil found at his fake site. Kappa would escort dealers into his Etruscan site and show them the forgeries in their “original context.” Before the advent of thermoluminescence testing, Kappa was very successful at convincing the world of his authenticity. Many of his works ended up in museums and would appear on the covers of books and magazines. Kappa’s work demonstrates the degree to which the art market has been taken advantage of. Furthermore, forgers like Kappa exhibit the way in which the claim that individuals can own the past can be perverted and exploited for monetary gain.

Unsurprisingly, many participants of the art market have decried the presence of forgeries. Museums and individual collectors alike have resented this infiltration into the trade. One museum official once went as far to claim that “all forgeries are like vampires. They should have knives driven through their hearts.”<sup>119</sup> Forgeries are just as pressing an issue with Native American spear points as they are with glamorous Etruscan pots. The Central States Archaeological Society has undertaken the task of trying to rid the Indian artifact market of forgeries. The society’s website offers a service that offers a tax reduction in exchange for the donation of a reproduction relic. The purpose of this is to “remove from circulation fake prehistoric

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<sup>118</sup> Meyer, pp.111-113

<sup>119</sup> Meyer, p.116

relics intended to defraud individuals when sold as authentic prehistoric relics.”<sup>120</sup>

The society’s effort is clearly intended to ensure that collectors and other avocational archaeologists could safely engage in the artifact market without risk of wasting money on an item that was not “genuinely old.” The site also mentions that all donated replicas will be “included in the fake collection and educational display.”

This intention is interesting because it indicates that for many collectors, the authentic artifact can be kept in private collections and transacted whereas the replicas are best used to promote education.

## **Conclusion**

Those who advocate individual ownership of archaeological artifacts employ a variety of rationales to justify their positions. Collectors often feel that they are preserving humanity’s past, dealers often see objects as unique opportunities, and museums can see artifacts as potential for prestige and renown. Despite this diversity of opinions, most proponents of the individual perspective value artifacts primarily for their physical attributes. This does not mean that supporters of this perspective value artifacts any less than the other two perspectives. On the contrary, individual ownership is just a different method of appreciation of these magnificent objects.

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<sup>120</sup> Anderson and Associates, “Central States Archaeological Society Website.” Central States Archaeological Society. Accessed 3/18/08 <<http://csasi.org/index.htm>>.

#### ***Chapter Four: A History of American Cultural Resource Legislation***

The humanity, cultural and individual perspectives each constitute a theoretical position on who *should* own the past. The answer to this question is subjective. As shown by the discussion the three standpoints how this question is answered tends to vary depending on an individual's relationship with the past and their personal beliefs and values. However, the question of who *does* own the past is a more objective inquiry. Ownership is a legal concept reliant on the current laws of a particular country. This chapter will examine this history of cultural resource laws in the U.S. with the goal of discovering who the past and present owners of cultural heritage object have been in America.

Before the passage of NAGPRA in 1991, U.S. archaeological resource laws were entrenched in the rhetoric of the humanity perspective. Regardless, none of these laws actually endowed ownership of the past exclusively in humanity. Prior to the passage of NAGPRA private property was unconditionally exempted from cultural resource legislation. Considering that the majority of archaeological sites in the U.S. are located on private land, this prioritization of the rights of landowners greatly limited the possible effects of any law.<sup>121</sup> NAGPRA introduced some regulations on private ownership of cultural resources in the U.S., but these restrictions only concern Native American human remains and associated funerary objects. The U.S. is one of the only countries in which landowners have the liberty to

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<sup>121</sup> United States. Cong. House *The destruction of America's Archaeological Heritage; "Looting" and Vandalism of Indian Archaeological sites in the Four Corner States of the Southwest, An Investigative Report*, Subcommittee on General Oversight and Investigations of the Committee on Interior and Insular Affairs of the U.S House of Representatives, 100<sup>th</sup> Congress, 2<sup>nd</sup> Sess. Washington: GPO 1988 p. 66



determine the fate of artifacts found on their land. They may keep the item, sell it, or destroy it. In other nations such as Scotland, Northern Ireland, Denmark and Mexico, all archaeological artifacts are considered the automatic property of the federal government, regardless of where they were found. Similarly, in England and Wales artifacts are considered public goods, but landowners and finders receive a monetary equivalent to the market price of the found object.<sup>122</sup> Unlike the U.S., these countries prioritize the right of their citizens to understand the past, over the right of the individual to have complete control over his/her own property. This high regard for the sanctity of private property is the product of the valued position property rights occupy in this nation's ideals and values. Indeed, it is quite unlikely that cultural resources will ever become an unconditional public good in the U.S., given the "strong feeling most Americans have about private property."<sup>123</sup> In order to fully understand why private property rights have been so influential on cultural resource legislation in the U.S., it is necessary examine the origin of this value.

### **Colonial America and private property**

The concern Americans have for economic safeguards and protection of private property can be traced back to the Colonial period. The colonists viewed the Magna Carta and its protection of "the rights of owners against deprivation of property without due process of the law," as part of their birthright as Englishmen.<sup>124</sup> After the Stuart Restoration in 1660, the Crown implemented policies that treated the

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<sup>122</sup> Layton and Wallace. *The Ethics of Archaeology, Philosophical Perspectives on Archaeological Practice*. Cambridge: Cambridge University Press, 2006. p. 61

<sup>123</sup> Ibid p.61

<sup>124</sup> Ely, James, *Guardian of Every Other Right*, New York, Oxford University Press, 1992, p. 13

colonies “as mere possessions of the crown.”<sup>125</sup> When the Stuart monarchy was overthrown in 1689, colonists in Massachusetts responded in kind by overthrowing the royally appointed governor who had restricted their property rights. Their violent action was undertaken in the name of protecting their “English nations liberties and properties.”<sup>126</sup> Given the strength of this reaction to the oppression of their liberties, it is not surprising that the colonists reacted poorly when the British parliament tried to strengthen its control by imposing taxes on the Americas in 1763. Both “No Taxation without Representation” and “Liberty and Property,” were mottos of the American Revolution that reflected the importance of private property during the colonial period.<sup>127</sup> Many of the nation’s founders believed that securing property was one of the “great objects[s] of government.”<sup>128</sup> In 1790, John Adams declared that “property must be secured, or liberty cannot exist,”<sup>129</sup> expressing the general sentiment that security of private property was a guarantor of liberty in a free society.

The emphasis the colonists put on private property was in part due to the influence of English Enlightenment thinkers. The writings of political philosopher John Locke were particularly significant in Colonial America. In his *Second Treatise on Government*, Locke describes the State of Nature in which there is no organized government, but yet, is still ruled over by certain “God given” natural rights. Locke names property as one such natural right. In Locke’s State of Nature the acquisition of property occurs whenever someone “removes out of the state that Nature hath

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<sup>125</sup> Ibid p. 14

<sup>126</sup> Ibid pp.14-15

<sup>127</sup> Ibid p.25 and p.43

<sup>128</sup> Farrand, Max ed. *The Records of the Federal Convention of 1787*. rev.ed., 5 vols. (New Haven, Conn.: Yale University Press, 1937), Vol 1, p.534. Found in Ely p. 43

<sup>129</sup> “Discourses on Davlia,” in Adams, Charles Francis, ed., *The Works of John Adams* 10 vols., (Boston: Little, Brown 1851). Found in Ely, p.43

provided and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.”<sup>130</sup> Despite the presence of property in Locke’s State of Nature, protection of this property is not provided. Therefore, the motivation for entering into civil society is an individual’s desire to secure “their lives, liberties, and estates.”<sup>131</sup> This role of property protection as one of the main incentives for the creation of organized government was very influential on the founding fathers and is partially responsible for the elevated status of private property rights in the Constitution and American society.

Property is the only right the framers of the Constitution honored with a place in the actual text of the founding document instead of in the amendments. Article 1, Section 10 of the Constitution prohibits the impairment of contracts, ensuring that legally owned possessions cannot be confiscated. Directly following the ratification of the Constitution, Federalists pushed for as broad an interpretation of the contracts clause as possible.<sup>132</sup> Federal judges adopted this broad interpretation in order to promote the doctrine of vested rights, which held that property was a fundamental right and that all “laws that disturbed such rights were void because they violated the general principles limiting all constitutional governments.”<sup>133</sup> The doctrine of vested rights was exercised in the cases of *Vanhorne’s Lessee v. Dorrance* (1795) in which Judge Patterson proclaimed that “the right of acquiring and possessing property is one of the natural, inherent and inalienable rights of man.”<sup>134</sup> The vested rights doctrine

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<sup>130</sup> Locke, John. *Two Treatises of Government; Edited with Introduction and Notes by Peter Laslett*. Cambridge: Cambridge University Press, 1988. p. 288

<sup>131</sup> Found in Ely p. 17

<sup>132</sup> Ibid p. 57

<sup>133</sup> Ibid p. 63

<sup>134</sup> Justia & Oyez & Forms Work Flow, “VANHORNE’S LESSEE v. DORRANCE, 2 U.S. 304 (1795).” Justia U.S. Supreme Court Center. 3/05/08 <<http://supreme.justia.com/us/2/304/case.html>>.

appeared again in the case of *Calder v. Bull* (1798), in which Justice Chase proclaimed that property was one of the “vital principles in our free republican governments,” that could not be violated by the legislature without destroying the purpose of republican government in itself.<sup>135</sup> Although the vested rights doctrine became significantly less popular over time, these early cases demonstrate the degree to which early Americans valued private property.

The primacy of place given to private property had a considerable impact on the treatment of archaeological resources in early America. In Locke’s state of nature, appropriation is equitable to ownership, and since many of the nation’s cultural objects are found in what appears to be a state of nature, the person who finds an object has often been presumed to be the owner. Prior to 1906, the U.S. did not have any official laws concerning cultural heritage objects. Instead, cases concerning ownership of prehistoric artifacts were decided by a mixture of precedent from English case law and common law. The most commonly used precedent was a case decided in 1722 by the English court of King’s Bench, entitled *Armory v. Delamairie*. The case involved a boy who had discovered a valuable jewel in an unknown location. When he took it to a pawn shop for appraisal the clerk confiscated it from him. The court decided in favor of the boy on the grounds that the “finder of the jewel though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner.”<sup>136</sup>

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<sup>135</sup> Found in Kommers, Donald P., John E. Finn, and Jacobson Gary J.. *American Constitutional Law; Essays, Cases and Comparative Notes, Second Edition*. Oxford: Rowman & Littlefield Publishers, Inc., 2004. p.519

<sup>136</sup> 1 Strange 505 93 Eng. Rep 664 Smiths L.C. 151, found in Cunningham, Richard. “The Twilight of the Treasure Trove.” *Legal Perspectives on Cultural Resources*. Walnut Creek, CA: Rowan Alta Mira, 2004. p.39

Another legal tool used in finder's cases was the "treasure trove rule."<sup>137</sup> This rule gave the finder ownership rights for every case in which "any gold or silver, in coin or bullion, found concealed in the earth or in a house or other private place, but not lying on the ground, the owner of the treasure being unknown."<sup>138</sup> The elevation of the rights of the finder over anyone other than the true owner prevailed in a 1904 Oregon case and again in a 1908 case in Maine , both involving buried gold on private land, and in both cases the courts decided to award the gold to the finders on the basis of finder's rights and treasure trove rules.<sup>139</sup>

Early American cases regarding found items on private lands also favored an elevated position for private property. In the 1886 case of *Elwes v. Brigg Gas Company*, a prehistoric boat was found by the gas company in the course of "erecting a gasholder," on Elwes property. Elwes demanded that the boat be returned to him, but the company refused. The case was decided in favor of Elwes on the basis that, as owner of the property "he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth and consequently in possession of the boat."<sup>140</sup> This case was one of the important precedents for the next century of archaeological legislation. The foundation laid by the founders and early Supreme Court Justices in favor of property rights has proven incredibly difficult to erode. Private property is no longer viewed as a God given inalienable right, but it has not lost all of its significance. In terms of cultural

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<sup>137</sup> Ibid p.39

<sup>138</sup> Ibid p.39

<sup>139</sup> Ibid p. 48

<sup>140</sup> *Elwes v. Brigg Gas Company*, 1886, E. 589, Judge Chitty

resources, private property owners still enjoy power over most of what is found on their land, with the exception of those items affected by NAGPRA.

### **The birth of American cultural resource legislation: the Antiquities Act**

In 1906 the U.S. finally took an official position on found prehistoric objects by enacting the Antiquities Act. The act was sponsored by several archaeologists, in particular Edgar Hewett and Charles Lummis, who were both prominent in the Archaeological Institute of America. The purpose of the bill was to stop vandalism occurring on archaeological sites in the Southwest, which the Federal government had been powerless to stop.<sup>141</sup> In pursuit of this goal, the act prohibited the taking or destruction of any “historic or prehistoric ruin or monument, or any object of antiquity”<sup>142</sup> found on public land and made doing so a criminal offense. The act further attempts to prevent undocumented digging by requiring a government issued permit to be obtained before the “examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity.”<sup>143</sup> The law also specifies that such permits will only be given to those whose efforts are undertaken for “the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings be made for permanent preservation in public museums.”<sup>144</sup> The final provision of the law seems unrelated to its original purpose since it is not actively related to stopping looting, but instead allows the president to

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<sup>141</sup> Righter, Robert W. . “National Monuments to National Parks: The Use of the Antiquities Act of 1906.” National Park Service. Accessed 2/15/08  
<<http://www.nps.gov/history/history/hisnps/npshistory/righter.htm>>.

<sup>142</sup> Antiquities Act, Section 1

<sup>143</sup> Antiquities Act, Section 3

<sup>144</sup> Ibid

create national monuments out of anything “of historic or scientific interest,” often resulting in the president using this power to create de facto national parks in cases in which Congress was too slow or unwilling.<sup>145</sup>

As the first cultural resource legislation in the U.S., the Antiquities Act set the tone for future legislation by clearly putting ownership of archaeological resources on public lands in the hands of the government. By prohibiting others from taking or destroying archaeological sites and requiring permits for excavation and collection, the U.S. government claimed possession over any cultural heritage items, or archaeological sites found on public lands. The language used in this act made it appear to be a U.S. initiative to establish an American national heritage.

Furthermore, humanity perspective rhetoric is abundant in this legislation. The act discusses “increasing the knowledge of such objects,” and aiming for their “permanent preservation in public museums.”<sup>146</sup> These phrases directly reflect the opinion that gathering knowledge of America’s past and preserving the country’s national heritage are in the best interest of the nation and humanity. Regardless of the impression given by the law, it remained consistent with the previously discussed ideas of private property. The U.S. may have claimed ownership over archaeological resources for the benefits of its citizens, but it only claimed those objects found on government land. Therefore, the Antiquities Act only gave the U.S. government the rights of any other private land owner.

Although the Antiquities Act was a breakthrough for U.S. protection of archaeological resources, it was not as successful as its framers might have hoped.

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<sup>145</sup> Antiquities Act, Section 2

<sup>146</sup> Antiquities Act, Section 3

Ironically, the only provision of the 1906 law that remains untouched is the power of the president to create national monuments. The last usage of this provision was in February 2006, when President George W. Bush designated the African Burial Ground in New York City a national monument.<sup>147</sup> The law did not stop or reduce the amount of “looting” and destruction of archaeological sites in the Southwest. In the sixty-three years that the anti-looting provisions were in effect, less than twenty individuals were prosecuted for violations of the Antiquities Act.<sup>148</sup> The downfall of the statute came in 1974 when the 9<sup>th</sup> Circuit Court of Appeals declared it unconstitutionally vague in the case of *U.S. vs. Diaz*. The court found the law to be inadequate because of its failure to specify how old an artifact had to be to qualify as an “object of antiquity.”<sup>149</sup> Nonetheless, the downfall of the Antiquities Act provided archaeologists with an opportunity to push for better, up-to-date cultural resource legislation, which led to the passage of the Archaeological Resources Protection Act (ARPA) in 1979.

### **The onset of cultural resource management (CRM)**

Between the passage of the Antiquities Act and that of ARPA, several smaller bills were passed that began to establish an organized system of cultural resource management. The first in this series was the 1935 Historic Sites Act. The main purpose of this law was to authorize the Secretary of the Interior to use various methods to “preserve for public use historic sites, buildings and objects of national

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<sup>147</sup> Ramirez, Anthony, “Site of African Burial Ground Gets Recognition and Money.” *New York Times*, March 6, 2006

<sup>148</sup> Olson Rogers, Kristine and Grant, Elizabeth. “Model State/Tribal Legislation and Jury Education Co-Venturing to Combat Cultural Resource Crime.” *Protecting the Past*. CRC Press, 1991. p.48

<sup>149</sup> King, Thomas F. *Cultural Resource Laws and Practice, An Introductory Guide, Second Edition*. Walnut Creek, California: Alta Mira Press, 2004 p. 27



significance for the inspiration and benefit of the people of the United States,<sup>150</sup> and to make this goal a national policy. This provision can be seen as the logical extension of the principles behind the executive power given in the Antiquities Act to create national monuments. The Historic Sites Act was not a particularly groundbreaking piece of legislation. It did not alter the perspective on cultural resource ownership in U.S. legislation. However, the act did make it a national policy to preserve remains from the past for “the benefit of the people of the United States.” By doing so, the Historic Sites Act further cemented the idea that cultural resources could and should be used, for the greatest advantage of the American public.

During the 1960s, public concern heightened for the preservation of the environment and the conservation of the nation’s natural resources. The result of this increased awareness was the passage of the National Historic Preservation Act (NHPA) in 1966 and the National Environmental Policy Act in 1969. Neither of these laws were drafted with the specific goal of protecting archaeological resources, but over time NHPA proved to be very useful for this purpose. NHPA provided for several new additions to cultural resource regulation including the authorization of the National Park Service to “expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering and culture.”<sup>151</sup> Additional provisions in the law created an “Advisory Council on Historic preservation to advise the president and Congress on historic preservation matters,” as well as “grants to states to assist them in historic preservation to be administered by State Liaison

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<sup>150</sup> Historic Sites Act, Section 1

<sup>151</sup> NHPA Section 101 (a) (1) (A)

officers.”<sup>152</sup> The most influential provision in NHPA was section 106. This section requires that “prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license, as the case may be,” the head of a federal agency must “take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register.”<sup>153</sup> These Section 106 requirements laid the foundation for American Cultural Resource Management (CRM) by ensuring that the federal government was unable to commence projects in areas where archaeological sites might be destroyed. Under the contemporary version of Section 106, an archaeological survey must be conducted before a federal project begins, and if sites are found the potential adverse effects must be mitigated.<sup>154</sup> Through section 106 as well as the creation of the National Historic Sites Register, NHPA sets up a solid, somewhat bureaucratic framework for the regulation and preservation of America’s cultural resources.

In its original form, NHPA was not as monumental for historic preservation as it is today. Section 106 initially only required agencies to take into account the effects of federal projects on monuments already in the National Register for Historic Places. This proved to be ineffective since the National Register was also created by NHPA, and therefore comprised a very limited list. The result was that “all an agency had to avoid dealing with impacts on historic properties was to keep them from being

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<sup>152</sup> King, p. 22

<sup>153</sup> NHPA, Section 106

<sup>154</sup> “Section 106 Regulations Summary.” Advisory Council on Historic Preservation.  
<<http://www.achp.gov/106summary.html>>.

nominated.”<sup>155</sup> Since federal agencies could so easily avoid Section 106, historic preservation was pushed to the sidelines. This changed in 1972 when President Nixon issued Executive Order 11593, which directed federal agencies to take into consideration the effects of federally funded projects on any site that could be eligible for the National Register. Nixon’s order also commanded the National Park Service to establish a set of procedures for determining eligibility to the National Register. This amended version of Section 106 is what made historic preservation an unavoidable priority of the law and instigated the establishment of the CRM profession as it stands today.

The language in NHPA furthers the establishment of federal ownership over cultural resources. The first section of the act states that the “historical and cultural foundations of the Nation should be preserved as a living part of our community life and development.”<sup>156</sup> This assertion clarifies that the law assumes that the “historical and cultural foundations of the nation,” are part of the heritage of America. The act then states that “historic properties significant to the Nation’s heritage are being lost or substantially altered.”<sup>157</sup> The introduction of the law also states that the preservation of “this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, economic and energy benefits will be maintained and enriched for future generations of Americans.”<sup>158</sup> The commencement of NHPA makes it clear that the law has been enacted with the purpose of preserving

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<sup>155</sup> King, p.24

<sup>156</sup> NHPA, Section 1(b)

<sup>157</sup> Ibid

<sup>158</sup> Ibid

resources which constitute the Nation's cultural heritage so that the various benefits may be "maintained and enriched for future generations of Americans."<sup>159</sup>

Despite the presence of humanity perspective rhetoric in NHPA, the law still maintains private property rights. NHPA only mandates archaeological surveys before a project is commenced if the work is federally funded. The control being exercised by the federal government through NHPA is solely monetary. If the project isn't federally funded, the government has no power to determine the procedures undertaken. With federal projects, the government has control since any failure to follow the correct protocol could result in the loss of funding. Since NHPA only gives the federal government the power to protect archaeological resources through funding, all private projects on private lands are completely unaffected by this law. As a result, both the humanity and individual perspectives on ownership prevail in this piece of legislation.

Although NHPA is currently crucial to Cultural Resource Management, it originally pertained strictly to the environment and conservation. Despite growing awareness and concern that "the effect[s] of modern progress on the archaeological resource base"<sup>160</sup> required legislative regulation, archaeologists were not particularly involved in either the conception or the passage of NHPA. Several archaeologists decided to pressure Congress to present a bill that would rectify this problem. The result was the passage of the Moss Bennett Act or the Archaeological and Historic Data Preservation Act of 1974 (ADPA). Under ADPA all agencies are required to report to the Secretary of the Interior if an undertaken project has the potential to

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<sup>159</sup> Ibid

<sup>160</sup> McGimsey, Charles R. . "This Too Will Pass: Moss Bennett in Perspective." *American Antiquity* Vol. 50, No.1, January 1985: 326-331.

damage or destroy any “significant scientific, prehistorical, historical or archaeological data.”<sup>161</sup> If any objects that match the aforementioned description are found, agencies have the choice to recover them themselves or ask the Department of the Interior to come in and do it for them. If an agency does decide to have the Interior department recover the resources, they may transfer up to 1% of the cost of the salvage work to “Interior.”<sup>162</sup> ADPA does not include any significant language that directly reflects a particular ownership perspective, but its endowment of the federal government with the power to regulate these resources does indicate that the U.S. government has a direct responsibility to these items.

Federal requirements and increased awareness of the importance of archaeological resources resulted produced by ADPA led to a sharp increase in funding for archaeological research.<sup>163</sup> Regardless of this success, ADPA is not utilized as much as its predecessor NHPA due to its redundancy.<sup>164</sup> The most frequent contemporary usage of ADPA is as a justification for the funding of data recovery from National Register eligible sites. The production of an annual report to Congress on the status of the “National Archaeological Program” is also an application of ADPA.<sup>165</sup> Although ADPA is not currently a particularly prominent piece of legislation, this law, along with NHPA, represents the decision of the Federal government to ensure that no federally funded action will destroy the national heritage of America.

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<sup>161</sup> ADPA Section 469 a-1

<sup>162</sup> King, pp.255-256

<sup>163</sup> McGimsey, Charles R. . “This Too Will Pass: Moss Bennett in Perspective.” *American Antiquity* Vol. 50, No.1, January 1985: 326-331.

<sup>164</sup> King, pp.255-256

<sup>165</sup> Ibid pp. 255-256

## **The Archaeological Resources Protection Act**

In 1979, the U.S. reinforced its cultural resource policy by passing the Archaeological Resources Protection Act. Unlike the resource management laws, ARPA attempted to reduce threats to archaeological resources by targeting the activity of looting instead of by regulating the destruction incurred by federal work projects. In this way, ARPA was an extension and continuation of the general sentiments laid out in the Antiquities Act. The stated goal of ARPA was to “secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public and Indian lands,” as well as “to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before...the date of the enactment of this act.”<sup>166</sup> Unlike the vagueness inherent in the Antiquities Act, the goal of ARPA is straightforward and explicit as to its intent to protect the nation’s archaeological resources. In addition, ARPA is a more complex, but more specific piece of legislation than the succinct Antiquities Act. The law defines all of its terms including the categorization of archaeological resource as “any material remains of past human life or activities which are of archaeological interest.”<sup>167</sup> Furthermore, the new law revised the provisions created in the Antiquities Act by creating a new system of excavation permits, as well as a more complete set of criminal offenses and punishment guidelines. These offenses include a rewording of the 1906 prohibition against “appropriation, excavation, injury, or

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<sup>166</sup> ARPA Section 2(b)

<sup>167</sup> ARPA Section 3(a)

destruction,”<sup>168</sup> of archaeological resources and more severe punishments for violating the law. The act also prohibits any person “to sell, purchase, exchange, transport, receive or offer to sell purchase or exchange any archaeological resource,”<sup>169</sup> that was obtained in violation of other sections of ARPA or to exchange any illegally obtained artifacts in interstate commerce. These new trafficking provisions were attempts to “focus on the organizers and dealers in stolen antiquities, not on the ‘diggers,’ who tended to be impoverished workers trying to earn extra income”<sup>170</sup> Thus ARPA intended to stop the looting of archaeological sites by aiming at prominent collectors and dealers.

Similar to the previously discussed acts, ARPA also uses language that is sympathetic to the goals of archaeology and a humanity perspective on ownership of the past. The act uses characteristic phrases such as the “nation’s heritage,”<sup>171</sup> in addition to mentioning that this heritage should be protected for the “present and future benefit of the American people.”<sup>172</sup> This type of language is a clear indication that Congress feels that the archaeological resources found on U.S. soil should belong to the nation for the benefit and education of the American people. Nonetheless, ARPA, like all of its predecessors is only applicable to public and Indian lands and therefore can only be seen as a continuation of the balance between humanity ownership rhetoric and private property rights that has characterized the majority of American cultural resource legislation.<sup>173</sup>

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<sup>168</sup> Antiquities Act Section 1

<sup>169</sup> ARPA Section 6 (b)

<sup>170</sup> US 92-2741 Brief of Plaintiff Appellee, p.38

<sup>171</sup> ARPA Section 2 (a-1)

<sup>172</sup> ARBA Section 2 (b)

<sup>173</sup>The only exception to this rule is section 6(c) of ARPA which can under certain conditions apply to private property. See Chapter 5.

One of the stated goals of ARPA is to “foster cooperation” amongst “governmental authorities, the professional archaeological community and private individuals.” It is reflective of the attitudes of the time period that the law fails to include Native Americans in this list of interested parties to be consulted in the process of excavation or the treatment of artifacts. Native Americans are mentioned in ARPA. The law does require that Indian tribes be notified if excavation is to occur on a Native American “religious or cultural site,” as determined by a Federal land manager.<sup>174</sup> The law also does not require Native Americans to obtain a permit in order to access cultural heritage on Indian land.<sup>175</sup> This provision could be construed as an acknowledgement by Congress that Native Americans do have a right to their own heritage that supersedes the interests of the American people. However, it is highly unlikely that this was the intended interpretation given that Native Americans are only exempted from the permit requirement in terms of objects found on their own lands. As a result, ARPA could be seen as further perpetuating American ideals of private property by giving American Indians the rights invested in every other landowner. This is also not accurate since Native Americans are actually given significantly less power over their property than the average land owner. Native Americans might be exempt from having to obtain a permit, but they do not control who else receives a permit. This power is still held by the U.S. government.<sup>176</sup> An American landowner would never be subjected to this kind of interference with their property. The permit provisions in ARPA can therefore be seen as a reflection of the unique relationship between Native Americans and the federal government. Native

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<sup>174</sup> ARPA Section 4(c )

<sup>175</sup> ARPA Section 4(g)

<sup>176</sup> ARPA Section 4(a)



Americans are extraconstitutional; they are an entity apart from the United States so they do not merit the rights and liberties attributed to American citizens, but yet they are not independent nations (see chapter two). This relationship is evident in ARPA's treatment of Native Americans, they are singled out as separate and therefore exempt from certain rules, but this very exemption allows them to be subject to other restrictions that would never be leveled upon an American citizen.

Although ARPA was a huge victory for supporters of archaeological site preservation, it was not successful in reducing the rates of vandalism, looting, and destruction on public and Indian lands. Between 1985 and 1987, the number of reported incidents on archaeological sites increased by 51%, with an estimate that only around 25% of actual occurrences had been reported.<sup>177</sup> Looting on Navajo lands actually increased by 100%, demonstrating that increased enforcement on public lands only pushed looters to Indian lands.<sup>178</sup> It is likely that these statistics only represent a small fraction of the overall number of occurrences since they only take incidents on public and Indian lands into consideration, and most of the archaeological sites in the U.S. are located on private property.<sup>179</sup>

One reason ARPA was unsuccessful in stopping looting was the infrequency with which it was used as a protection tool. Many lawyers would not even attempt to prosecute under the law, but would instead use laws prohibiting the theft and destruction of federal property. The reason for this, as one Arizona lawyer explained,

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<sup>177</sup> McAllister, Martin E. . "Looting and Vandalism of Archaeological Resources on Federal and Indians Lands in the United States." *Protecting the Past*. CRC Press, 1991, p. 93

<sup>178</sup> Ibid p.93

<sup>179</sup> United States. Cong. House *The destruction of America's Archaeological Heritage; "Looting" and Vandalism of Indian Archaeological sites in the Four Corner States of the Southwest, An Investigative Report*, Subcommittee on General Oversight and Investigations of the Committee on Interior and Insular Affairs of the U.S House of Representatives, 100<sup>th</sup> Congress, 2<sup>nd</sup> Sess. Washington: GPO 1988 p.10

is that “lay persons, especially juries, understand that it is wrong to steal, and destroy property, but do not appreciate the sometimes technical and scientific provisions specifically governing archaeological resources within ARPA. In short, it is much more persuasive to call a thief a thief.”<sup>180</sup> This quotation exemplifies how cultural resources have been viewed as private property, be it the private property of an individual landowner, or the private property of the federal government. In addition, the ease with which the importance of cultural heritage items have been comprehended under the label of property highlights the difficulties involved in creating cultural resource protection laws. Both ARPA and the Antiquities Act directly reflect the opinions and input of the archaeologists who worked for their passage. As such, it is not surprising that the law encounters the same problem that archaeology often does as a discipline; the ordinary citizen does not understand why it is, or why it should be, important.<sup>181</sup> As a result, the familiar concept of private property and that seems to consistently win out against the idea that knowledge of the past is beneficial to humanity.

### **The Abandoned Shipwrecks Act**

During the time the flaws of ARPA were being explored, the U.S. passed another, unrelated cultural resource law, the Abandoned Shipwrecks Act of 1987. In itself, the law is fairly straightforward. Similar to the resource protection acts passed before it, this legislation claims any abandoned shipwreck found in the “submerged

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<sup>180</sup> Prepared testimony of Stephen M. McNamee, United States Attorney, District of Arizona, before the Subcommittee on General Oversight and Investigations, October 19, 1987 found in United States. Cong. House *The destruction of America’s Archaeological Heritage; “Looting” and Vandalism of Indian Archaeological sites in the Four Corner States of the Southwest, An Investigative Report*, Subcommittee on General Oversight and Investigations of the Committee on Interior and Insular Affairs of the U.S House of Representatives, 100<sup>th</sup> Congress, 2<sup>nd</sup> Sess. Washington: GPO 1988. p.15

<sup>181</sup> Pokotylo, David L and Mason, Andrew R.. “Public Attitudes Towards Archaeological Resources and their Management” *Protecting the Past*. CRC Press, 1991.p.9

lands of a State,” or “corralline formation protected by the state on submerged lands,” to be the property of the United States government. Likewise, ownership of shipwrecks found in private waters is endowed in the landowner. The act also acknowledges “any abandoned shipwreck in or on any Indian lands,” to be “the property of the Indian tribe owning such lands.” This is consistent with the similar provision in ARPA; it both honors the extra constitutional status of Native Americans as well as establishing them as conditional owner over the items found on own private property.

The Abandoned Shipwrecks Act deals with a unique realm of cultural resources. Since shipwrecks are not located on U.S. soil they are much more difficult for the government to claim jurisdiction over than items found underneath the ground. The precarious nature of the location of shipwrecks also makes them more difficult to protect. Shipwrecks are extremely vulnerable to looting since they often possess seemingly unclaimed valuables. Oftentimes, these looters claim that they are salvaging artifacts instead of destroying archaeological context. This assertion has little validity because although objects found underwater are often in relatively good condition, they deteriorate or corrode when they are exposed to air unless properly preserved.<sup>182</sup> Given the fragile condition of underwater remains, it is to be anticipated that the U.S. government, under the advice of archaeologists, would attempt to protect these resources and claim them as national property.

It can be argued that the categorization of shipwrecks as part of the American national heritage is more credible than making the same claim to prehistoric objects

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<sup>182</sup>U.S Office of Technology Assessment, *Technologies for Underwater Archaeology & Maritime Preservation Background Paper*. OTA-BP-E-37 Washington: U.S Government Printing Office, Sept 1987 p.3

found on U.S. soil. Shipwrecks constitute historical archaeological artifacts, or objects created and deposited during the period from which we have written sources. Likewise, prehistoric artifacts were deposited either during a period or a culture that didn't produce written works. In the U.S., the vast majority of prehistoric objects were created by American Indian groups whereas historical items are more likely to be traced to a European ancestor or another immigrant group. It can be argued that the U.S. has a more legitimate claim to historical objects such as shipwrecks because they were created by the ancestors of the people who are currently in power. These objects actually constitute U.S. history, whereas prehistoric objects constitute Native American history which American citizens are not necessarily part of. Nonetheless, at the time the Shipwrecks Act was enacted, the U.S. was not especially concerned with the ownership claims of Native Americans. This means that the Shipwrecks Act was yet another cultural resource law that advocated a balance between the humanity and individual perspectives on ownership of the past.

### **The Native American Graves Protection and Repatriation Act**

In all of the previously discussed legislation, cultural heritage items were viewed as either the property of the U.S. federal government or of a private landowner. None of these laws are particularly concerned with the wishes of Native Americans nor do they really consider that Native American groups may have a stronger claim to these items than the American people. In the 1960s and 70s the tide began to change and it became increasingly difficult for the federal government to ignore Native Americans. The Civil Rights Movement inspired the Red Power movement in which Native Americans began to voice their discontent

with the U.S. government. Native Americans felt that they had been denied their civil rights and began fighting to regain their land and to obtain the rights that all other Americans could take for granted, including the permanent interment of their dead. As discussed in chapter three, early American archaeology was strongly influenced by racist attitudes towards American Indians. Scholars viewed human remains as crucial to anthropological and archaeological studies, but yet “when human remains [were] in museums or historical societies, it [was] never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It [was] Indian remains.”<sup>183</sup> During the time of the Red Power Movement this discrepancy in the treatment of human remains began to be openly decried as racist. Ultimately, the perceived racist character inherent in the study of human remains led Native Americans and their supporters to insist that the practice was a violation of Equal Protection as given by the Fourteenth amendment.

Many American Indian groups also regarded the study of their ancestor’s remains as a violation of their right to religious freedom.<sup>184</sup> Several Native American religions hold that the disinterment of human remains “stops the spiritual journey of the dead causing the affected spirits to wander aimlessly in limbo.”<sup>185</sup> The affected spirits are said to “wreak havoc among the living, bringing sickness, emotional distress and even death.”<sup>186</sup> The emphasis put on the

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<sup>183</sup> Quote from Senator Daniel Inouye, in Trope, Jack F and Echo-Hawk, Walter .. “The Native American Graves Protection and Repatriation Act: Background and Legislative History.” *Arizona State Law Journal* Vol.24, No,1, Spring 1992: p. 59

<sup>184</sup> Trope and Echo Hawk, p. 49

<sup>185</sup> Riding In, James. “Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians.” *Arizona State Law Journal* Vol.24, No,1, Spring 1992: p.13

<sup>186</sup> *Ibid* p.13

perpetual internment of the dead in these faiths does indeed seem to make the study of those dead for scientific reasons to be a violation of religious freedom. In addition, the nature of the belief concerning disinterred remains allows for repatriation and reburial of those remains as the only possible method of rectifying the violation.

By the mid 1980s the Native American outcry for repatriation of human remains was a hot button issue amongst legislators and archaeologists across the country. In May of 1986, the Society for American Archaeology finally decided upon an official position in favor of a federal repatriation bill in its *Statement Concerning the Treatment of Human Remains*. The statement was a conciliatory motion in that it encouraged “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.”<sup>187</sup> In addition the SAA statement acknowledged “both scientific and traditional interests in human remains,” as well as acknowledging that “individuals and cultural groups have legitimate concerns derived from cultural and religious beliefs about the treatment and disposition of remains in their ancestors or members that may conflict with legitimate scientific interests in those remains.” The SAA statement takes a distinctly moderate stance on repatriation. Although it does allow for repatriation to occur, it only approves of this option if “remains can be identified as that of a known individual for whom specific biological descendants can be traced, the disposition of those remains,

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<sup>187</sup> “Statement Concerning the Treatment of Human Remains.” *Society for American Archaeology*, adopted by the SAA board in May 1986, reaffirmed, March 1999

including possible burial, should be determined by the closest living relatives.”<sup>188</sup>

The tone of the SAA statement makes it very clear that the organization is willing to work with Native Americans, but still has science and research as its first priority.

The statement opens by quoting the bylaws of the organization stating that “it is the ethical responsibility of archaeologists “to advocate and to aid in the conservation of archaeological data,” including human remains. The SAA uses this claim to establish that the priority of the archaeological community is the scientific study and preservation of those remains. The statement strongly upholds the right and necessity of the archaeologist to study human remains and outright opposes the universal reburial of all human remains. Thus the statement is a step in the direction of compromise, but still holds firm to the principles of archaeology and the ability to do scientific research.

A few months after the SAA issued its Statement on the Treatment of Human remains, a bill entitled the Native American Cultural Preservation Act was introduced into the Senate. The bill was referred to committee and never made it to the House, but it was the first in a series of fourteen bills that were introduced over the next four years in attempts to give Native American’s more control over their human remains and sacred objects. Only two of these bills became law. The first was the National American Indian Museum Act, introduced into Congress by Senator Daniel Inouye on May 11<sup>th</sup>, 1989. This law provided the first step towards repatriation by requiring all Smithsonian museums to “inventory, identify, and consider for return—if requested by a Native community or individual—American Indian, Alaska Native, and Native

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<sup>188</sup> Ibid

Hawaiian human remains and funerary objects.”<sup>189</sup> Furthermore, the law created a National museum of the American Indian in association with the Smithsonian and transferred to it the stewardship of more than 800,000 objects from the George Gustav Heye collection previously held at the Museum of the American Indian in New York City.<sup>190</sup> Although this law does not deal with the removal of Native American remains or sacred objects from the ground, it does lay the framework for such a law by creating regulations for national museums.

The second and final law to pass in this series of attempted repatriation bills was the monumental Native American Graves Protection and Repatriation Act, which was introduced to Congress in October of 1990. The bill utilized the language that had been approved by the SAA as well as the Native American Rights Fund and the Association on American Indian Affairs, two major American Indian rights advocacy organizations.<sup>191</sup> The final bill was supported by these three organizations as well as the National Congress of American Indians, the American Association of Museums, the American Anthropological Association, the Archaeological Institute of America, the National Conference of State Historic Preservation Officers, the National Trust for Historic Preservation, Preservation Action, the Society for Historical Archaeology and the Society of Professional Archaeologists. These groups sent a letter to President George H.W. Bush, urging him to sign the bill on the grounds that “we believe that the bill will create a workable framework fostering sensitivity and cooperation in

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<sup>189</sup> “Repatriation.” National Museum of the American Indian. Accessed 2/23/08  
<<http://www.nmai.si.edu/subpage.cfm?subpage=collaboration&second=repatriation>>.

<sup>190</sup> Ibid.

<sup>191</sup> Lovis, William A., Kittigh, Keith W., Steponaitis, Jennifer R., and Goldstein, Lynne G., “Archaeological Perspectives on the NAGPRA, Underlying Principles, Legislative History and Current Issues.” *Legal Perspectives on Cultural Resources*. Alta Mira Press, 2004. p.171



achieving the appropriate repatriation of Native American human remains and cultural objects.”<sup>192</sup> NAGPRA was therefore the product of cooperation between museums, archaeologists, and Native Americans who collectively transformed legal ownership of cultural resources in the United States.

NAGPRA did not mandate the repatriation of all Native American objects, but it did establish a system in which repatriation of human remains and associated funerary objects could occur. Within five years of NAGPRA’s enactment, all federal agencies and museums that had “possession or control over holding or collections of Native American human remains and associated funerary objects,” were required to compile an inventory of such items complete with identifications of “the geographical and cultural affiliation,” of each item.<sup>193</sup> These inventories were then to be made available to the NAGPRA review committee and the involved Native American tribes. Repatriation of an item must then occur if an item is requested by a tribe from the inventory. If the items are not requested, it is not necessary for a museum or institution to return them. In a fashion similar to NHPA, this system of inventories and repatriation requests is only compulsory for institutions receiving federal funding. Any institution not receiving federal funding is not obligated to comply with repatriation requests or compile an inventory. Therefore, private property rights do exist under NAGPRA, but to a much more limited extent than in the past.

Although NAGPRA maintains the permit provision given in ARPA, it establishes new criminal violations. Using almost identical language to ARPA, NAGPRA prohibits trafficking in human remains or cultural items under the

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<sup>192</sup> Ibid p.171

<sup>193</sup> NAGPRA Section 5(a)

condition that the person is “without the right of possession to those remains as provided in the Native American Graves Repatriation Act.”<sup>194</sup> The difference between this provision and the one given in ARPA is that it is no longer necessary for the objects to have been taken from public and Indian lands or for it to have been in violation of a state statute. For the first time in a federal law, objects on private lands are subject to the same rules as those on public lands. Thus NAGPRA revokes landowners of the right to sell any human remains or funerary objects that may be on their land. This does not mean that landowners have completely lost their Fifth Amendment right to “life, liberty and property,” since NAGPRA does not require landowners not receiving federal funds to return objects on their land it simply prohibits the sale of one category of objects.

In order for a request to be considered valid, the tribe in question must prove its “cultural affiliation,” with the object either through proof of “a known lineal descendant of the Native American or tribe,”<sup>195</sup> or “by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”<sup>196</sup> There are problems with cultural affiliation as the primary barometer for repatriation. For one, the definition of cultural affiliation is quite loose since there is no absolute way for a tribe to prove that a skeleton or object that is hundreds of years old was directly related to them. In addition, because some of the objects are so old, it is perfectly possible for more than one tribe to establish a credible case for cultural affiliation. NAGPRA, unfortunately, does not provide a

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<sup>194</sup> NAGPRA Section 4(a)

<sup>195</sup> NAGPRA Section 5 (b-2)

<sup>196</sup> Ibid

resolution for cases with competing claims. As a result, repatriation through NAGPRA may not always be a smooth or accurate process.

The difficulties in using cultural affiliation as a tool for repatriation are indicative of a larger issue within NAGPRA. It can be argued that the law creates a “Native National religion,”<sup>197</sup> because it legally condones a particular faith in addition to treating Native Americans as one group instead of different tribes with distinct histories and religious beliefs. Some critics have claimed that this federal recognition of Native American religions is an unconstitutional violation of the separation of church and state because the government is taking “an active role in promoting the spiritual values of a certain cultural group.”<sup>198</sup> To date, the Supreme Court has not had the opportunity to rule on the constitutionality of NAGPRA. It is quite possible that the law would not survive a constitutional challenge of this nature because it provides federal protection for a particular religion.

NAGPRA can also be criticized for its failure to acknowledge differences among tribal religions. The arguments surrounding the passage of NAGPRA including the language used in the legislation, give the impression that every Native American tribe believes that disinterment of graves is a serious crime. This is actually not the case. For example, after the passage of NAGPRA both the Zuni and the Nambe denied offers from museums for the repatriation of human remains. In the case of the Nambe, the remains in question “were 800 years old and held little direct significance to the

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<sup>197</sup> Browner, Thomas. “Can Anyone Just Tell the Truth?” Illinois State Archaeological Society. Accessed 3/18/08 <[http://www.fittedshoe.com/ARCHAEOLOGY/truth article.htm](http://www.fittedshoe.com/ARCHAEOLOGY/truth%20article.htm)>.

<sup>198</sup> Vincent, Steven. “Indian Givers.” *Who Owns the Past, Cultural Policy, Cultural Property and the Law*. New Jersey: Rutgers University Press, 2005. p.33

present Nambe tribe.”<sup>199</sup> Instead the Nambe asked the museum to keep the remains for curatorial care. The Nambe’s refusal to accept human remains demonstrates that NAGPRA is not necessarily a law that reflects the opinions of all Native Americans. Rather, the law is the product of the wishes of those groups who were the most offended by the situation and therefore the most vocal.

In addition to creating a systematic approach to repatriation, NAGPRA also transformed the face of legal ownership of cultural heritage items in the United States. As previously discussed, prior to NAGPRA, U.S. legislation clearly outlined that any cultural heritage items found on public lands were the property of the government. Items found on private land unconditionally belonged to the landowner. NAGPRA abolishes this careful balance between the humanity and individual perspectives by investing “ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands,” in either the “lineal descendants of the Native American,” whose remains are found or in “the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered,” as well as “in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered.”<sup>200</sup> This allocation of ownership to Native American tribes can be seen as a retreat from the idea that cultural heritage items are an irreplaceable part of the Nation’s heritage, by admitting that the Nation might not be the rightful owner of these objects. Additional evidence of this shift can be found in the expansive definition of “cultural affiliation.” Although the law is mainly targeted at human remains and affiliated sacred objects, the ownership clauses of the law refer to all

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<sup>199</sup> Livesay, Thomas A. . “The Impact of the Federal Repatriation Act on State-Operated Museums.” *Arizona State Law Journal*. Vol. 24, No.1, Spring 1992: p.298

<sup>200</sup> Ibid p.298

“Native American cultural items”<sup>201</sup> and “objects of cultural patrimony,”<sup>202</sup> which are established by cultural affiliation. It is of note that although the law does define “cultural patrimony” to be “an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself”<sup>203</sup> it leaves the determination of such importance up to the word of the Native American group itself. Therefore, it seems that NAGPRA gives Native Americans an unconditional right to claim whatever they want as long as some sort of cultural affiliation can be proved, thus inhibiting all archaeological research and secluding those items from every other American.

Despite the clear change in ownership perspectives represented in NAGPRA, the law does not actually abandon the interests of science and archaeology. Archaeological excavation of Native American sites is still allowed under the permit provision of ARPA, the only change being that human remains are no longer allowed to be disinterred and unconditionally kept for academic study. Furthermore, NAGPRA does provide for the suspension of a valid repatriation request under the condition that “such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States.”<sup>204</sup> However, the law does limit the time frame on these studies stating that “such items shall be returned by no later than 90 days after the date on which the scientific study is completed.”<sup>205</sup> The presence of this provision in NAGPRA reflects the influence of museums and archaeologists on the law. It also indicates that although the U.S. government has

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<sup>201</sup> NAGPRA, Section 3 (a)

<sup>202</sup> NAGPRA, Section 3 (a-2)

<sup>203</sup> NAGPRA Section 2 (d)

<sup>204</sup> NAGPRA Section 7 (b)

<sup>205</sup> Ibid

acknowledged the validity in the Native American cultural ownership claim it has not dismissed the ability of archaeological studies to contribute to the Nation's understanding of its past. Therefore, NAGPRA strikes an interesting compromise between the different views of cultural heritage item ownership. For the most part it adopts a cultural perspective, but does not dismiss the humanity ownership perspective. Furthermore, like every other piece of cultural resource legislation, NAGPRA's ability to regulate objects on private lands or in private collections is severely limited. Thus the current view of the U.S. government on cultural heritage items ownership is a complex combination of the aforementioned perspectives.

After surveying the history of significant cultural resource legislation in the U.S. it is evident that ownership of the past has shifted over the past two hundred years. The U.S. like many other countries, has attempted to claim its national patrimony for the benefit and enlightenment of its people. However, the U.S. has the problem that the artifacts on its land were not necessarily produced by the ancestors of its citizens, but by Native Americans with whom the government does not have the most equitable past relationship. Furthermore, private property protection is often viewed as one of the tenets of American democracy, meaning that compromising that right for the sake of archaeological resources or Native American remains is not a popular concept. As a result, American laws concerning cultural resources must aim to strike a balance between all of the ownership standpoints to satisfy the interests of everyone living inside the country's boundaries, but this effort is likely to be futile.

Using this legislative history as a framework, the following chapter will use the criminal case of the *U.S. vs. Arthur J. Gerber* as an example of an instance in

which perspectives on ownership of the past conflict. Although this chapter has discussed cultural resource law through NAGPRA, Gerber's crime occurred in 1988 and was thus prosecuted under ARPA. Despite being a bit dated, Gerber's case was selected for this study because there are very few other scenarios that illustrate the interplay of conflicting ownership perspectives as well as *Gerber*. Gerber's case also provides a unique opportunity to study the arguments made by advocates of the individual perspective which are often difficult to access. To make up for this discrepancy between the time period of *Gerber* and the present, the concluding chapter of this thesis speculate as to how the dynamics of the case would have been altered under NAGPRA.

### *Chapter Five: The Case of Arthur Gerber*

Arthur Gerber had been a prestigious collector of Native American artifacts for over thirty years when he was convicted in 1988. His crime was selling artifacts in interstate commerce that had been illegally obtained from private property. Gerber's case received national attention because it was the first time that ARPA was used to prevent the removal of artifacts from private land. For Gerber's supporters, his conviction signified the potential destruction of a long standing tradition in American culture. In rural America, collecting Native American spear points and pottery was a time honored tradition. Collecting and selling these objects was simply an accepted part of life. However, Gerber was a "serious collector." He was motivated by the desire to preserve and protect these remnants of great Native American civilizations. For those in the collecting community, Gerber's conviction signified the encroaching monopolization of the study of material culture by professional archaeologists. Gerber's conviction was viewed as a violation of their right to private property because it represented a restriction on what they could own.

The case of *U.S. vs. Arthur J. Gerber* is intriguing because it represents a microcosm of all of the previously discussed perspectives on cultural heritage ownership. As a collector, Arthur Gerber and his lawyers were determined to prove that he was legally entitled to engage in his favorite hobby. In the process, the defense crafted a detailed argument in favor of the right of the individual to own relics. In turn, it became the task of the prosecutor to display the gravity of Gerber's crime by using the rhetoric associated with the humanity and nationalistic ownership claims to cultural heritage. The hearings for Gerber's case did not call any supporters



of the cultural perspective as witnesses, but Native Americans were very involved in the aftermath of the trials. Gerber's case was groundbreaking because it was the first to involve an ARPA conviction for an offense committed on private land. As a result, the case received national attention and angered people from every ownership standpoint. Arthur Gerber's demise demonstrates first hand the complications and tensions that are involved in the debate on cultural heritage ownership. To further illustrate the complexities of the ownership discussion, this chapter will explore Gerber's predicament and the discourse it entreated.

### **The Facts of the Case**

The artifacts taken by Gerber were found in the depths of a hill situated on the property of General Electric Plastics in Posey County, Indiana. During the course of the trial archaeologists identified the site as a likely Hopewell ceremonial or burial mound. Between 100 BC and 400 AD, there was a widespread cultural phenomenon across Northeastern America called Hopewell. This phenomenon consisted of “flamboyant burial customs,” and “complex trade networks.”<sup>206</sup> One of the telltale traits of Hopewell was its system of symbols and ceremonialism, traces of which can be found in various locations across eastern North America. One manifestation of this ceremonialism was the creation of mounds through community participation in heaping basketfuls of dirt upon each other. These mounds were often tombs, but they were also the site of several other ceremonial activities including feasting, artifact manufacture, and the ceremonial destruction of the same objects. Thus, all of the artifacts present in such a mound are the material product of prehistoric activities that were important to people living in the Middle Woodland period and could provide

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<sup>206</sup> Fagan, Brain. *Ancient North America*. New York: Thames and Hudson, 2000 p. 436

information on what life was like in the Hopewell culture. The mound in question has been stipulated to be “one of the very largest Hopewell mounds ever constructed,”<sup>207</sup> and thousands of artifacts were found buried within it. Later professional excavation of the mound also revealed that the site contained the remains of at least two people, indicating that it was in fact a Native American burial site.<sup>208</sup>

The destruction of the site at GE did not begin with Gerber, but instead with improper execution of federal law. During the summer of 1988, a federally funded highway was being constructed near the GE property. In accordance with section 106 of the National Historic Preservation Act, the area had been surveyed by professional archaeologists using “a standard procedure of shovel probes aligned on a grid,”<sup>209</sup> but the mound was not identified as artificial. This oversight was perhaps due to the surrounding hilly terrain, as the mound appeared to be more like “one of the nearby natural knolls, than a mound.”<sup>210</sup> After the survey was conducted GE was advised to immediately alert archaeologists if artifacts were found. Artifacts were indeed found on the site by a bulldozer operator named John William Way, who also happened to be an avid artifact collector. On one occasion, the highway project required extra dirt and Way was instructed to transport some soil from the mound to the construction site. While carrying out his instructions, Way managed to unearth several artifacts. In full knowledge that any artifacts were to be reported if found, Way removed the hundreds of artifacts to his home in Grayville, IL without notifying either General

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<sup>207</sup> EV 91-19-CR *Sentencing Hearing Transcripts* p. 11

<sup>208</sup> Tomak, Curtis. “The Mount Vernon Site; Remarkable Hopewell Mound in Posey County, Indiana.” *Archaeology of Eastern North America* Vol.22 1994: 1-46, p.1

<sup>209</sup> Munson, Cheryl Ann, Melvin Jones, Marjorie, and Fry, Robert E. “The GE Mound: An ARPA Case Study.” *American Antiquity*, Vol. 60 No. 1, 1995 p. 133

<sup>210</sup> Munson, Jones and Fry p158

Electric or the proper authorities.<sup>211</sup> Once Way had opened the mound, looters and collectors flocked to it in hopes of finding artifacts of value and significance.

Gerber's involvement with the GE mound began shortly after Way discovered its artificial nature. The two men had not been previously acquainted, but a friend of Way's had informed him that Gerber might be interested in purchasing Way's newly acquired collection. Way gave photographs of the GE artifacts to this friend who then passed them on to Gerber. A few days later, Gerber called Way inquiring as to when he could see the collection. The viewing occurred at Way's home, where Gerber identified the artifacts as belonging to the Middle Woodland/ Hopewell period. He was quite impressed by the collection.

Gerber made several visits to Way's home. On the first occasion he took photographs of the objects and made Way an offer of \$6,000 for the lot and disclosure of the original locale of the artifacts. On the second visit, Way received his payment and escorted Gerber to the mound.<sup>212</sup> According to Gerber, the collector's first visit to GE property occurred at night. Gerber also claimed that upon their arrival the mound was so covered in collectors and looters that it resembled a "bombed out battle zone."<sup>213</sup> Although Gerber claimed to have been afraid that it was too late to obtain anything of importance from the mound, he returned to GE on several occasions. In his subsequent visits Gerber brought along two of his collecting buddies; John Towrey and Danny Glover. On each visit the three would dig and Gerber would take

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<sup>211</sup> US EV 91-019-CR, *Government's Santiago Proffer and Supporting Memorandum of Law*, p. 11

<sup>212</sup> *Ibid* p.11

<sup>213</sup> EV 91-19 CR, *Sentencing Hearing Transcripts* p.201

photographs.<sup>214</sup> Over the course of their visits to the mound the three men removed hundreds of artifacts from the property including “copper celts, copper pin and plate, earspools made from copper and/or copper and silver, bear and other canine teeth, pearl and marine shell beads, mica, leather, bifaces or blanks made from obsidian, flint...quartz...cannel coal effigy fragments, silver covered hemispheres, [and] artifacts made from human or animal bones.”<sup>215</sup> On August 1<sup>st</sup>, 1988, Gerber and Glover returned to the mound without Towrey and were noticed by GE security guards. The guards took the men’s names and license plate information and then promptly told them to leave. It was through this information that Gerber and his friends were traced to the destruction of the mound.<sup>216</sup>

After the men were ejected from the site at GE they decided to sell some of the artifacts at the Indian Relic Show annually hosted by Gerber in Owensboro, Kentucky. The men sold several of the flint bifaces, raking in over \$400. Although the companions had agreed to share the artifacts equally amongst themselves, Gerber ultimately purchased the remaining artifacts from the others, driving between Indiana and Kentucky to finalize the sales.

In the fall of 1988, local newspapers began to publish reports remarking on the looting at GE and the commencement of a federal criminal investigation. Upon seeing these reports, Gerber contacted Way and Glover and told them not to inform

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<sup>214</sup> Although Gerber did testify that several others were present at the mound the first time he set foot on GE Property, and returned later to dig this was opposed by Way in a separate testimony. Way claimed that on that particular day no one else was present at the mound and before he left Gerber, Towrey and Glover had already begun to dig. US EV 91-019-CR, *Government’s Santiago Proffer and Supporting Memorandum of Law*, p. 12

<sup>215</sup> EV 91-19-CR, *Transcript of Guilty Plea*, p.8

<sup>216</sup> EV 91-019-CR *Government’s Santiago Proffer and Supporting Memorandum of Law*, p. 15

any federal officials of his role in the looting.<sup>217</sup> In late 1989 Gerber was subpoenaed by a federal grand jury to produce “any and all photographs of artifacts which he had obtained during the summer of 1988.”<sup>218</sup> Afraid of being incriminated, Gerber not only refused to comply, but also destroyed several of the photographs. Ultimately, Gerber was taken to court on charges of violating the Archaeological Resources Protection Act (ARPA).

As mentioned earlier, Gerber’s conviction received a lot of attention from the media because it was the first application of ARPA to an offense committed on private lands. Gerber was accused of violating section 6c of the statute which states that “no person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange in interstate or foreign commerce, any archaeological resources, excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance or permit in effect under State or local law.”<sup>219</sup> The reasoning behind the indictment was that Gerber had violated state trespassing and theft laws in the process of obtaining the artifacts from GE. As a result, the artifacts that he had bought in interstate commerce had been obtained in violation of a “provision, rule, regulation, ordinance or permit in effect under State or local law.” The conviction was controversial because ARPA also explicitly states that “nothing in this act shall be construed to affect any land other than public land or Indian land or to affect the lawful recovery, collection or sale of archaeological resources from land other than public or Indian land.”<sup>220</sup> However, the

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<sup>217</sup> EV 91-19 CR *Stipulated Facts*, p. 8

<sup>218</sup> *Ibid* p.8

<sup>219</sup> ARPA Section 6 (c)

<sup>220</sup> ARPA Section 12 (c)

outcome of the case demonstrates that the violation of state law did make Gerber eligible for conviction under ARPA even though his offense had occurred on private land.

Gerber was not the only person arrested for the “looting” at GE, but he did receive the most severe punishment. This is in part because Gerber was the only person to have transported the artifacts across state lines.<sup>221</sup> As a federal statute, ARPA’s trafficking provisions are only applicable to interstate transactions, since the Constitution only gives Congress the power to regulate commerce among several states. If Congress were to pass a law prohibiting the trafficking of artifacts within a single state the law would be an unconstitutional infringement on the sovereign rights of states and not within each one.<sup>222</sup> The first arrest made for looting at GE was of a man named Kirby Wilson who was charged under state trespass violations. Wilson had not transported the artifacts across state lines and was thus had not been convicted under ARPA.<sup>223</sup> Towery, Glover, Way and a man by the name of Randall R. Hansen were all charged with violations of the federal law. Way, Towrey and Glover all pleaded guilty to one misdemeanor count under ARPA and Hansen pleaded guilty to two counts. All artifacts taken from GE were returned. Each of these men convicted under ARPA were fined, put on probation and assigned varying amounts of work release.<sup>224</sup>

Arthur Gerber was charged with five misdemeanor counts under ARPA and pleaded guilty to three of these counts on April 17<sup>th</sup> of 1992. He was later sentenced

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<sup>221</sup> Munson, Jones and Fry, p. 135

<sup>222</sup> United States Constitution, Article 1, Section 8.

<sup>223</sup> Munson, Jones and Fry, p. 135

<sup>224</sup> Ibid pp.134-136

to 12 months in prison for each violation, fined \$5,000, and given supervised release during which he was prohibited from engaging in any activity possibly associated with the purchase, sale, or trade of any archaeological artifact.<sup>225</sup> Gerber appealed his conviction to the 7<sup>th</sup> Circuit Court of Appeals, claiming that the charges encompassed an improper application of ARPA to private lands. Due to the appeal, Gerber was allowed to hold his annual Indian Relic show in Owensboro, Kentucky, in 1993. However, unfortunately for Gerber, the 7<sup>th</sup> Circuit Court upheld the decision of the District Court, declaring that it was indeed an appropriate usage of ARPA. In one last effort, Gerber appealed the decision to the U.S. Supreme Court, but on January 18<sup>th</sup>, 1994, his petition was denied. After his failure to defeat his convictions, Gerber filed several motions in an effort to be exempted from his prison sentence on the grounds that his medical conditions were too severe to serve the time in prison. Gerber was again unsuccessful and told to report to the Federal Correction Institute in Fort Worth, Texas, on May 24<sup>th</sup>, 1994.<sup>226</sup>

As part of his sentence, Gerber was required to return all of the artifacts removed from the mound to their rightful owner, General Electric Plastics.<sup>227</sup> Now fully aware of the complexity of the issue at hand, General Electric intended to donate the collection to the University of Southern Indiana's Native American museum in New Harmony, Indiana.<sup>228</sup> However, local American Indian groups insisted that the artifacts be returned to them as the descendants of the Hopewell. In the end, GE decided to give the artifacts to the Native Americans after they had been studied.

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<sup>225</sup> Ibid p. 135

<sup>226</sup> Ibid p. 142

<sup>227</sup> US 92-2741 *Brief of Amicus Curiae in Support of the United States of America* p.13

<sup>228</sup> Wersich, Carol. "Future of Sacred Burial Sites Rests on Appeal in Gerber Case." *Evansville Courier & Press*, May 21, 1992:

Much to the dismay of several of the involved archaeologists, the Native American groups decided to rebury the entire collection of artifacts in order to restore the disturbed graves to the best degree possible.

### **The humanity perspective in the form of the prosecution**

Gerber's conviction and sentence hinged on the fact that ARPA was intended to support the point of view that the past belongs to humanity, or at least to the nation. The prosecution successfully persuaded the District Court that the federal law in question was both appropriately used and crafted with the goal of minimizing looting in mind. The government began to establish its argument by calling as expert witness archaeologist Mark Seeman during Gerber's sentencing hearing.<sup>229</sup> At the time of his testimony on July 8, 1992, Seeman had been employed as a professor of Anthropology at Kent State University since 1976. His specialty was the area of Hopewell archaeology as it pertains to the Ohio Valley.<sup>230</sup> At the request of the government, Seeman had conducted a study of the site at GE and come to the conclusion "that it was indeed an incredibly important archaeological site from the standpoint of understanding the culture of these people nearly two thousand years ago."<sup>231</sup> Throughout his testimony, Seeman repetitively emphasizes how much could have been learned from the site if only it had been properly excavated. Seeman carefully lays out for the judge the methodological difference between Gerber's digging style and what a professional excavation staff would have executed.

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<sup>229</sup> Gerber's sentencing hearing was actually quite similar to a trial with the government calling Mr. Seeman as a witness and the defense calling several character witnesses. At the time, Gerber was already convicted, the hearing was to determine the gravity of his crime and how severely he was to be punished.

<sup>230</sup> EV91-19-CR, *Sentencing Hearing Transcripts*, p. 7

<sup>231</sup> *Ibid* p. 11



Stressing the importance of context, Seeman drives home the archaeological standpoint that a “real story with real information of social scientific value” can only be obtained through proper documentation and study.<sup>232</sup> He describes the small artifacts recovered by the archaeologist Curtis Tomak who went to GE to clean up the holes left by the looters. Seeman describes how Tomak found small flint flakes that indicated that artifact manufacture had taken place on site. Seeman stresses the importance of this information in terms of enlightening us on the lifestyle of the Hopewell, and makes the point that collectors would never have obtained such information because it was generated by small broken objects that were not of any commercial value. In this way, Seeman attempts to instill his audience with the ethical principle that archaeological artifacts can only provide a pathway to the past through cautious professional excavation.

After laying out the basis for most archaeological adaptations of the humanity perspective, Seeman topped off his testimony with grand rhetoric of a similar theme. He asserts that since “irreparable damage” was done to the GE site a “part of the human story,” had been “taken from us.”<sup>233</sup> Seeman also refers to the site as not simply a “cultural resource,” but as “our cultural heritage.”<sup>234</sup> It is of note that Seeman does not specify who the “us” is when he mentions “our cultural heritage,” but it can be assumed that he means either the American people or humankind. Seeman was the only witness called by the prosecution during Gerber’s sentencing hearing. The government’s entire argument was embodied by in this portrayal of Gerber’s crime as the theft of a chapter of the “human story,” and mutual cultural

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<sup>232</sup> Ibid p.19

<sup>233</sup> Ibid p. 32

<sup>234</sup> Ibid p.32

heritage. Clearly, the government council believed that the priceless and irreplaceable nature of cultural resources as a public good would be enough to convince the judge of the gravity of Gerber's crime.

Luckily for the prosecution, their presumption was correct. Judge Gene E. Brooks decided that Gerber had committed a terrible crime and could not be let off easily. In his remarks, Judge Brooks lets it be known that he does not sympathize with Gerber. He tells Mr. Gerber that he perceives collecting to be a "vicious circle."<sup>235</sup> Judge Brooks even mentions the "irreplaceable"<sup>236</sup> nature of the knowledge that can be derived from the context of artifacts. The reasoning behind this argument is that the looting of archaeological sites occurs so that collectors like Gerber can purchase the artifacts produced from them. Therefore if collectors were to stop collecting, our nonrenewable resources would stop disappearing. Judge Brooks' employment of the language used by archaeological advocates of the humanity perspective, also gives the impression that he has chosen to sympathize with the academics. However, this is only partially true. The judge mentions that although he agrees with archaeologists and anthropologists in some respects, they tend to have a "different focus on things," and he doesn't seem to feel that Gerber in himself was as big a deal as the academic world had made him out to be.<sup>237</sup>

In the end, Judge Brooks does emphasize the gravity of Gerber's crime in terms of the humanity perspective. Judge Brooks chastises Gerber for not being able to acknowledge that he has done anything wrong. Brooks even implies that Gerber's

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<sup>235</sup> Ibid p.240

<sup>236</sup> Ibid p. 255

<sup>237</sup> Ibid p. 257

actions have not just been “legally wrong,”<sup>238</sup> but also perhaps morally wrong. Judge Brooks defines Mr. Gerber’s true offence as “stealing history.”<sup>239</sup> This is quite extreme terminology, framing Gerber not only as a criminal, but as the perpetrator of a crime infinitely more terrible than that of the average thief. Brooks states that every criminal case has victims, and this particular crime had multiple victims including the academics, Native Americans, landowners and, most importantly, society.<sup>240</sup> This mention of society as a victim of the crime of “looting” indicates that the Court favors a humanity or nationalist perspective on cultural resource ownership. According to the Court, Gerber’s crime is serious and deserves grave punishment because it is not simply an ordinary theft, or a normal instance of trespass. Gerber has taken something much more valuable from not just one person, or a group of persons, but from all of humanity.

*Highlighting the humanity perspective in ARPA*

Arthur Gerber appealed his conviction to the 7<sup>th</sup> Circuit Court of Appeals on the basis that he did not believe that his case was a proper application of ARPA. In order to combat his complaint the government counsel filed several briefs delineating the argument that ARPA did apply to private lands in this circumstance. Several groups including the SAA, the Society of Professional Archaeologists, the Illinois Archaeological Survey, the Kentucky Organization of Professional Archaeologists, the Archaeological Society of Indianapolis, the National Trust for Historic Preservation in the United States, the Wabash Valley Archaeological Society and the

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<sup>238</sup> Ibid p. 258

<sup>239</sup> Ibid p. 259

<sup>240</sup> Ibid p. 259

Council for the Conservation of Indiana Archaeology filed an amicus curiae brief in support of the government argument.

When the briefs were filed, the District Court had already established that Gerber was guilty because he had stolen history. The aim of these briefs is to prove that ARPA is, and was intended to be, applicable to private property. During this discussion, the prosecution highlights the presence of the humanity perspective in the federal law. The legal argument for the prosecution in the appellate case consists of three main points: ARPA was indeed applicable to Gerber's case, ARPA was drafted in an attempt to stop looting and that there is no constitutional right to loot.

Gerber was accused of violating section 6c of ARPA which states that "no person may sell, purchase, exchange, transport, receive, or offer to sell, purchase or exchange in interstate or foreign commerce, any archaeological resources excavated removed, sold purchased exchanged, transported, or received in violation of any provision, rule, regulation, ordinance or permit in effect under State or local law."<sup>241</sup> According to government counsel, Gerber was convicted because he transacted in interstate commerce archaeological artifacts that had been obtained "in violation of a state highway permit, and in violation of Indiana's criminal trespass and criminal conversion statutes."<sup>242</sup> Therefore, despite ARPA's explicit statement that "nothing in this act shall be construed to affect any land other than public land or Indian land"<sup>243</sup> government counsel argued the federal statute was still appropriate for Gerber's situation because he had obtained the artifacts in violation of state law.

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<sup>241</sup> ARPA, Section 6 (c)

<sup>242</sup> US 92-2741 *Brief of Plaintiff-Appellee*, p. 19

<sup>243</sup> ARPA Section 12 (c)

The prosecution cites scholarly opinion to prove that ARPA was meant to apply to private property. The brief quotes Federal Preservation Officer Annetta Cheek's assertion that section 6(c) "essentially makes it an ARPA violation to transport across state lines any artifacts stolen from a state park or even private land."<sup>244</sup> Similarly Arizona Supreme Court Judge Sherry Hutt is quoted as saying that "in subsection (c), ARPA protects private lands where owners' rights have been violated and state or local public lands that would not otherwise come under ARPA."<sup>245</sup> By referencing scholars who acknowledged the potential breadth of ARPA, the prosecution builds the foundation for the argument that the law was designed to protect the nation's resources.

The prosecution reinforces its effort to convince the court of ARPA's applicability to private lands by discussing the hearings leading up to the law's passage. The government brief discusses a comment made by Senator DeConcini at an ARPA hearing in which he states that his intent "in sponsoring this legislation [is] to provide a workable enforcement system to protect our resources from those who knowingly and willfully steal from the public lands, or trade in stolen artifacts, for personal profit."<sup>246</sup> The government counsel takes Senator DeConcini's reference to "trade in stolen artifacts" to indicate that the law was intended to deter dealers and collectors such as Gerber.<sup>247</sup> Citing similar instances, the Amicus Curiae brief for the prosecution asserts that "it was clearly the intent of Congress that the trade in archaeological resources in interstate commerce was to be criminalized where those

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<sup>244</sup> US 92-2741, *Brief of Plaintiff-Appellee* p. 33

<sup>245</sup> *Ibid* p.33

<sup>246</sup> *Ibid* p. 39

<sup>247</sup> *Ibid* p. 40

resources were unlawfully obtained in violation of state or local law.”<sup>248</sup> The Amicus Curiae brief further argues that the language of section 6c is very clear and the legislative history does not indicate that ARPA “has a secret or hidden meaning that is not disclosed in the plain language of the statute.”<sup>249</sup> Through this analysis of the history of ARPA, the prosecution is able to demonstrate that the federal law was designed to protect “our resources” against collectors and looters “such as Gerber.” This argument that ARPA was intended to be as pervasive as possible emphasizes the goal of the law to preserve these resources for “the present and future benefit of the American people.”<sup>250</sup>

One of the main complaints made by Gerber against his conviction was that it was a violation of his rights. In the government’s sentencing memorandum, this claim is countered by reminding the Court that Gerber is a thief. The memorandum notes that Gerber’s offense was to “enter property without permission, and to remove, carry away, and sell valuable property that did not belong to themselves,” and the idea that “these acts were criminal is hardly novel.”<sup>251</sup> This point is reiterated several times; Gerber was a thief. The amicus curiae brief emphasizes this fact, stating that “there is no such thing as a constitutional right to enter upon the lands of another without permission, for the purposes of one’s own hobby or collection, however benign one’s intent may otherwise be.”<sup>252</sup> Throughout the briefs to the Appellate Court, the prosecution tries to demonstrate that ARPA was designed to protect against

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<sup>248</sup> US 92-2741 *Brief of Amicus Curiae in Support of the United States of America*, p. 7

<sup>249</sup> *Ibid* p.7

<sup>250</sup> ARPA Section 2 (b)

<sup>251</sup> EV 91-19-CR *Sentencing Memorandum* p. 3

<sup>252</sup> US 92-2741 *Brief of Amicus Curiae in Support of the United States of America* p. 10

looters like Gerber. In the process, the government paints an image of Gerber as a trespasser and a thief of our nation's resources.

### **The individual perspective in the form of the defense**

#### *Gerber as a "serious collector"*

During the sentencing hearing, the strategy of the defense was to call on as many character witnesses as possible in an attempt to demonstrate that Gerber did not commit a serious offense. One tactic used by the defense was to establish Gerber as a reputable collector who was truly interested in learning about the past and not in profit. To establish this point the defense called John Philip Baldwin, an acquaintance of Gerber's who identified himself to the court as both a dealer and a collector. Baldwin testified that he knew Art to be "strictly a collector."<sup>253</sup> Baldwin was particularly convinced that Gerber was not interested in profit since Gerber had refused to sell Baldwin an enticing item from his collection.

Baldwin's remarks were supported by another witness by the name of Richard J. Coulter. Coulter was a collector and a member of the Ohio Archaeological Society who had known Gerber for almost 5 years. Coulter identified Gerber as an advanced collector who had developed a "greater than average knowledge of archaeology, archaeological artifacts, the significance of artifacts, the period and dating of artifacts as it relates to typing and classification and [had] an above average knowledge of collecting persuasion."<sup>254</sup> Continuing in this direction, Coulter added that Gerber was considered one of the "old time collectors" who was "truly dedicated to the

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<sup>253</sup> Ibid p. 86

<sup>254</sup> Ibid p. 141

preservation of the artifacts.”<sup>255</sup> Coulter also categorized Gerber as the type of collector who was committed to publishing articles and making the artifacts available so that “others can benefit from the collections that [he has] developed.”<sup>256</sup> The picture of Gerber created by Baldwin and Coulter is reminiscent of Gillett G. Griffin’s description of a serious collector as someone who acts “as the custodian of the works which he [has] assembled” so that they might “add to the knowledge of present and future generations.”<sup>257</sup> Given this similarity it is likely that “old time collector” and “serious collector” are equivalent terms. As a result Gerber’s supposed dedication to preserving artifacts “so that other can benefit” from them can be viewed in context with the goals of serious collectors (see chapter 3).

In his own testimony Gerber also stresses his commitment to educating the public on the past. Gerber tells the Court that not only was he seen as a legitimate presence on GE property, which was evidence by the fact that afterwards an employee of the company contacted him for guidance on the situation. Gerber claims that in December of 1988 Richard Haywood called him in his capacity as a public relations representative for GE because they were looking for a way to approach the problem created by the appearance of artifacts on their property. Apparently Haywood called Gerber because “if anybody would know the skinny on what was going on,” it would be Gerber.<sup>258</sup> In addition, Gerber asserts that he had told Haywood that he believed the mound to be a “monumentally important site” and as

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<sup>255</sup> Ibid p. 144

<sup>256</sup> Ibid p.144

<sup>257</sup> Griffin, *The Ethics of Collecting Cultural Property, Whose Property? Whose Culture? Second Edition*. p.114

<sup>258</sup> Ibid p. 216



such it would be beneficial to the public to establish an on site museum.<sup>259</sup> Gerber claims that he had offered to bring collectors and archaeologists together for this project and that he “could have the collectors bring their artifacts in as a P.R. thing for General Electric.”<sup>260</sup> Furthermore, Gerber declares that Haywood and his local contact at GE had loved the idea and even discussed the possibility of bringing Gerber in as a consultant to help “develop this into a positive thing for General Electric.”<sup>261</sup> Later on in the testimony, the prosecution presents two exhibits to the Court which state that Richard Haywood never represented GE.<sup>262</sup> Nonetheless, Gerber’s testimony makes it clear that not only did he see his actions as valid and approved by GE, but he also had the company and the public’s best interest in mind. His offer to consult for an on site museum seems to represent an interest in educating the public on the past. In this way Gerber’s testimony seems to bring out the characteristics of a “serious collectors” who is genuinely interested in preserving the knowledge produced by these wonderful objects.

Although Gerber may have sought to give the impression that he was collecting for a greater good, he does not deny or hide his attachment to the objects. At one point, Judge Brooks reminds Gerber of an artifact that he had purchased from someone who had obtained permission to be on the GE mound. Gerber agrees that he would turn over this artifact if necessary, but emphasizes that for this artifact “the title is free and clear.”<sup>263</sup> Gerber’s insistence that he has a valid claim over this object makes it evident that he still sees no problem with privately owning an archaeological

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<sup>259</sup> Ibid p. 217

<sup>260</sup> Ibid p.217

<sup>261</sup> Ibid p.2.17

<sup>262</sup> Ibid p. 224

<sup>263</sup> Ibid p. 214

artifact. Gerber does conclude that he feels it would be better to give the artifacts to a museum, but he also admits that “it is pretty hard,” for him to concede this point. Mr. Lantz describes the “3-4 minutes of silence in the courtroom (so silent you could hear a pin drop) and the look of pain and internal struggle” as Gerber decided whether or not he would willingly give back the artifacts.<sup>264</sup> Lantz attributes this pain to the “true lifetime love and passion,” that Gerber had for collecting and claims that “Gerber’s going to the mound was not a pre-conceived act, but, one which only a true fellow collector of anything has when he discovers a lead that may direct him toward the treasure he seeks.”<sup>265</sup> By underlining Gerber’s passion for collecting his attorney tries to demonstrate that Gerber has a significant attachment to the artifacts in his possession and is not a looter, in it for the money. Gerber and his attorney make it clear that he is not an artifact dealer; he collects because he has a passion for finding and taking care of American Indian objects. In the process, the defense unintentionally highlights the distinction between Gerber and an archaeologist; Gerber loves the artifacts, not the learning process.

#### *Gerber and salvage archaeology*

In addition to establishing Gerber as a serious and devoted collector the defense argues that Gerber was saving history, not destroying it. In his testimony, Charles S. Wagers, a professional engineer who collected artifacts, stated that he did not think that Art Gerber had done anything wrong at all, and certainly wasn’t guilty of a serious federal offense.<sup>266</sup> Wagers asserted that he believed that the road construction at GE had been destroying the archaeological site and Gerber had actually “saved

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<sup>264</sup> EV 91-19-CR-01 *Motion Pursuant to Rule 35(c) To Correct Sentence Imposed on July 8, 1992*

<sup>265</sup> *Ibid.*

<sup>266</sup> EV 91-19-CR *Sentencing Hearing Transcripts* p. 75

some artifacts that would have been destroyed.”<sup>267</sup> Wagers was not the only witness who believed that Gerber was actually saving history rather than destroying it. Don Carl Miller, a professional engineer who was also a collector and Vice President of the Indiana Archeological Society, also told the Court that Gerber was doing “recovery archaeology.”<sup>268</sup>

Later on in the hearing, the defense called a second professional archaeologist by the name of Richard Gramly who agreed with Seeman that the site never should have been opened. However Gramly attributed the destruction of the site to the deficiency of the legislative system put in place to protect such monuments and not to Gerber’s actions. Although Gramly doesn’t specifically mention Gerber, he asserts that artifact collecting “is a question of naturally the greater good....If it meant there were no artifacts to have been salvaged from this, I suppose, and that no information would have ever been put on record about this site, then I would be thankful that someone went on it.”<sup>269</sup> To a degree, Gramly is agreeing with Wagers and Miller; Gerber was not guilty because it was not him who had committed the crime. All three of these men believe that the real offense was perpetrated by the construction company; they were the ones that were going to obliterate these remnants of the past. If Gerber hadn’t taken them, the artifacts would have been lost forever. This argument is common among those who consider themselves to be serious collectors (see chapter 3). This line of reasoning operates under the assumption the key to preserving history is to preserve the material products of that history. Thus, rescuing

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<sup>267</sup> Ibid p.75

<sup>268</sup> Ibid p. 110

<sup>269</sup> EV 91-19-CR *Sentencing Hearing Transcripts* p. 168

artifacts from “decay, neglect, instability and poverty”<sup>270</sup> is an integral part of protecting knowledge of the past.

Gerber also gives the Court the impression that he did not want to see the site unearthed improperly any more than Seeman or Gramly did. Early on in his testimony Gerber describes the GE mound to look like “a bombed out battle zone,”<sup>271</sup> the first time he arrived, indicating that several other collectors had already been to the mound. Later on, Gerber mentions to the Court that although he was remorseful of his actions he did not feel that he was fully responsible for what had happened. Instead he tells the Court that he believes that GE was also at fault for the collecting that went on by him and the others as well.<sup>272</sup> Here, Gerber is making the same insinuation as Gramly; that the proper procedure was not followed upon the discovery of an archaeological site. Both men seem to feel that if archaeologists had been alerted when material culture was first found, Gerber would not have been present at the site nor would his presence have been warranted. Although Gerber did not explicitly say it, this claim and the earlier reference to the state of the site before he began digging seems to imply that Gerber felt he was rescuing the objects from the mound.

#### *Gerber and the tradition of collecting*

Throughout the case, the prosecution did its best to emphasize the fact that Gerber had been trespassing and stealing, since it was those acts that made him eligible to be convicted under ARPA. As a response, the defense called witnesses

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<sup>270</sup> Pendergast and Graham *The Ethics of Collecting Cultural Property; Whose Culture? Whose Property? Second Edition*. p.70

<sup>271</sup> EV 91-19-CR *Sentencing Hearing Transcripts* p. 201

<sup>272</sup> *Ibid* p. 232

that downplayed the criminality of Gerber's actions against GE. The testimony of Pandall Hansen, another collector who had also been digging at GE, told the Court that they had been under the impression that officials knew they were there. He states that on the very first day two of the security guards waved at them on the mound giving the collectors a "standard ' how are you doing,'" and afterwards Hansen and his friends had assumed that it was okay for them to be there.<sup>273</sup> Hansen's testimony attempted to demonstrate that the collectors thought they had permission to be there and so were not aware that they were trespassing on private property. Hansen admitted that neither he nor any of the other collectors ever explicitly asked GE if their activities were acceptable, but maintained that the nearby security personnel seemed to not have had a problem with their presence.

This attempt to minimize Gerber's crime of trespassing is even more pronounced in the testimony of Max Heath. Heath was a friend of Gerber's who had known him as a professional photographer and was not a fellow collector. During his testimony, Heath was asked if the knowledge that Gerber had previously been charged with two counts of trespassing with the intent of taking artifacts, would affect his opinion of him. Heath responded that it would not, because in "collecting is not, in [his] view, a crime."<sup>274</sup> Heath's point is quite interesting, because he attempts to create a separate category for the act of collecting. The defense uses Heath as a witness because for him collecting is not a criminal act regardless of what laws are broken in the process of obtaining artifacts. The exceptions that Heath and Hansen are willing to make for

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<sup>273</sup> Ibid p. 122

<sup>274</sup> Ibid p. 102

collecting are possibly a reflection of the degree to which the activity was regarded as a standard part of rural life in America.

In the wake of his sentence, Gerber tried to frame his conviction in such a way that would inspire outrage in his community. In order to raise money and awareness for his defense, Gerber started an organization called the ARPA Defense Fund. He distributed fliers depicting a set of handcuffed hands holding an arrowhead with the caption “Collector or Criminal.”<sup>275</sup> The ARPA defense fund also dispensed pamphlets to all subscribers of the Central States Archaeological Journal claiming that “Congress intended for APRA to regulate collecting, not to destroy it,” and that Gerber’s pending case could possibly “eliminate your hobby.”<sup>276</sup> The pamphlets also asserted that the Fund did support ARPA as a law “for prosecuting looters on Federal and Indian lands,” but was concerned that the “current case makes all of us appear to be looters, and sets the stage for others.... like you... to be prosecuted!”<sup>277</sup> The pamphlet was also accompanied by a small, three panel cartoon which depicts a house surrounded by police officers holding guns, telling the inhabitant to “come out with your hands up.”<sup>278</sup> The last frame shows two men watching the homeowner be taken away by the police. One of the men says to the other “my god! That man must be a murderer or a rapist,” and the other responds that it was “worse than that! He was reported picking up an arrowhead.”<sup>279</sup> All of the propaganda from the ARPA defense fund is very clearly formulated to make the case against Gerber seem extreme and absurd. It is also significant that Gerber makes a very clear distinction between

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<sup>275</sup> EV 91-19-CR Exhibit One

<sup>276</sup> Ibid

<sup>277</sup> Ibid

<sup>278</sup> Ibid

<sup>279</sup> Ibid

looters who are clearly people to be stopped, and collectors who are people like you and me. Gerber's fundraising efforts are clearly designed to make his conviction seem outrageous to an audience that had accepted collecting as a respected part of life.

In response to Gerber's sentencing, several letters were written to Judge Brooks in support of Gerber's case that also reflected this sentiment that Gerber was just pursuing a time honored hobby. Alan Banks who was at the time the Editor in Chief of the Central States Archaeological Journal wrote that he believed Gerber to be "a collector who appreciates and is seriously interested in Indian artifacts and the history they represent."<sup>280</sup> Banks also emphasized that Gerber was not a looter or a dealer, but was motivated simply by a desire to "acquire fascinating artifacts for his personal collection, as is the motive of thousands of other collectors."<sup>281</sup> Other letters stressed the fact that ARPA had never before been applied in this fashion and that "Gerber is only one of thousands of collectors, archaeologists, hobbyists, and others who thought that ARPA did not apply to private property."<sup>282</sup> One letter even made the appeal that Gerber was simply the "victim of jealous professional archaeologists and misled Indians."<sup>283</sup> All of these letters try to portray Gerber as an ordinary person who had demonstrated a commitment to an activity that was supported by a larger, reputable community.

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<sup>280</sup> EV 91-19-CR Exhibits in Support of Motion for the Insertion Pursuant to Title 18, United States Code Section 3621 (b) (4) (B) Of Language that Would Allow the Defendant, If Determined By the Bureau of Prisons to Be a Candidate For Community Corrections To Be Placed There and The Cost of Such Placement Be Paid By The Defendant p. 1

<sup>281</sup> Ibid p. 7

<sup>282</sup> Ibid p. 3

<sup>283</sup> Ibid p. 2

*Highlighting private property rights in ARPA*

Just as the prosecution sought to emphasize the presence of the humanity perspective in ARPA, the defense attempted to highlight the private property protections present in the law. The main strategy undertaken by the defense was to deny the applicability of ARPA to private land. In the motion to dismiss the charges against Gerber, the memorandum of the law concentrates on the reiteration in APRA that it was only supposed to apply to public or Indian lands. The defense argues that the clause in section 6c that prohibits the trafficking of any artifacts obtained in violation of “any provision, rule, regulation, ordinance, or permit in effect under State or local law,” is not relevant to trespassing and theft. Instead Mr. Lantz writes that the “criminal provisions in ARPA are narrowly designed to be resources specific.”<sup>284</sup> In other words, according to the defense, trespassing laws are not meant to be included in section 6c because they are not cultural resource laws.

The motion for dismissal also argues that it was never the intent of Congress to pass a federal law that would regulate the behavior occurring on private property. The document cites several quotes from the House Congressional Record of July 9<sup>th</sup>, 1979, which state that ARPA was meant to prevent “the wanton destruction of archaeological sites and resources located on the public domain or on Indian lands,” and that it strictly does not apply to “any lands other than the public lands of the United States and lands held in trust by United States or individual Indian allottees.”<sup>285</sup> The defense reasons that this legislative history leads to the conclusion that Congress in fact intended ARPA to be an “enforcement provision.” As such the

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<sup>284</sup> EV 91-19-CR *Motion to Dismiss* p. 7

<sup>285</sup> *Ibid* p.7



federal statute would aim to “assist states which have resource protection statutes,” by “enforcing violations of those statutes wherein the archaeological resources are carried beyond states borders thereby making State enforcement difficult or impossible.”<sup>286</sup> This method of argument is an elaborate attempt on the part of the defense to convince the judge that Congress did not intend to intrude on private property rights in the drafting of ARPA. Instead the impression the Court gains from this document is that ARPA was meant to simply fill in some small holes left by previous legislation and as such to have very limited applicability.

The motion to dismiss not only argues that section 6c was meant to apply to cultural resource law alone, but also that if it had intended to include trespassing and theft laws it would have explicitly stated so in the text of the statute. Furthermore, Gerber’s counsel argues that if the section was created with these criminal laws in mind, it would have been a repetitive act of legislation since it “could hardly be considered groundbreaking if it were simply meant to again punish stolen property put into the stream of interstate commerce, as the Government in this case is attempting to do.”<sup>287</sup> The National Stolen Property Act does in fact already provide prohibitions against trafficking stolen property. The motion to dismiss further decries the deficiency of ARPA if given the interpretation attempted by the prosecution to the point of questioning its constitutionality. The defense even proclaims that “Gerber’s limiting interpretation placed upon the reach of 470ee (c) is required to avoid unconstitutionality [of the statute] for vagueness.”<sup>288</sup> The evidence for this is that “470ee(c) fails to give notice of the proscription of any definite act or acts, and is

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<sup>286</sup> Ibid p. 9

<sup>287</sup> Ibid p. 11

<sup>288</sup> Ibid p. 14

susceptible to more than one construction.”<sup>289</sup> However, the motion does not assert that ARPA is unconstitutional, but argues that because of this possibility to become so it is necessary that it not be given a broad interpretation.

To conclude his claims against ARPA, Gerber declares that the statute violates his rights to Equal Protection under the Fourteenth Amendment. The rationale provided for this declaration is that the statute creates “arbitrary classifications represented by those who may have violated ARPA provisions in 470ee (a) and (b), relating to Federal and Indian lands, and those who may have violated 470ee (c) relating to State or local resource laws.”<sup>290</sup> If a person is convicted under section 6(a) or 6 (b) of ARPA they are “entitled to be considered by Federal Land Managers for civil penalties,”<sup>291</sup> whereas someone indicted under 6(c) does not have this opportunity because Federal Land managers do not oversee state or local resource laws. The defense does not see a reason for 6(c ) to randomly require more severe punishment. It is interesting that Gerber does not entertain the possibility that the difference in the punishment is supposed to reflect the severity of the crime. Neither section 6 (a) or 6 (b) pertain to interstate commerce as 6 (c) does. In fact this discrepancy in the classification system could almost be used to pursue the opposite argument that Congress intended to deter those engaging in any sort of widespread artifact collecting or dealing. Regardless of any possible contradictions, the defense uses the motion to dismiss as an opportunity to argue that ARPA was never intended to enter upon the realm of private property.

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<sup>289</sup> Ibid p. 18

<sup>290</sup> Ibid p. 22

<sup>291</sup> Ibid p.22

### **The absence of the cultural perspective in the *U.S. vs. Arthur Gerber***

In the case of Arthur Gerber, the prosecution and the defense articulate opposing views on the ownership of cultural resources and demonstrate how their respective views are reflected in ARPA. The government holds that such history belongs to society and to the nation, while Gerber and his friends argue that people have the right to collect artifacts as part of a healthy and respectable hobby. What is sorely missing from this legal debate is the perspective that the objects found at the GE site belong to the culture that produced them. This point of view is not lacking from the case of the *U.S. vs. Arthur Gerber* because it simply did not affect anyone who might voice it. Not only is the site at GE an American Indian one, but the archaeological reports prove that it was a burial site. Gerber was convicted of a crime that occurred in 1988 so he could not have been prosecuted under NAGPRA. However, the trial proceedings took place in 1992, meaning that the Court should have been aware of the importance of burial sites to many Native American cultures.

In all of the records filed for the case of the *U.S. vs. Arthur J. Gerber*, contemporary American Indian groups are only mentioned on one occasion; in the ending comments of Judge Brooks at the sentencing hearing. The Judge mentions that “the Court has received letters from native Americans, who are naturally concerned that you are disturbing, number one, a site that even if you just have possession of this property-that is important to them.”<sup>292</sup> He goes on to discuss that even though he does not know much about Native American history what he does know is that “they don’t want [graves] disturbed, and you wouldn’t want them

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<sup>292</sup> EV 91-19-CR *Sentencing Hearing Transcripts* p. 254

disturbed and I would not want them disturbed.”<sup>293</sup> Judge Brooks also later lists Native Americans as certain victims in Gerber’s crime.<sup>294</sup> The Court does seem to sympathize with the American Indians, and attempts to bring them into the discussion as an additional reason as to why Gerber’s offense was so serious. Nonetheless, the Court does not entertain the possibility that the objects taken from GE rightfully belong to those Native American groups that were so victimized by Gerber’s crime. This omission is a telling reflection of the ownership perspective on cultural resources of the American legal system under ARPA; private claims were considered, as were the assertions of archaeologists on behalf of society, but the claims of Native Americans were not important enough to even gain them access to the courtroom.

Although Native American voices may have been minimized in *Gerber*, they were not inactive and received plenty of attention in the local press. Needless to say, Gerber was not discussed fondly by Native Americans. Local Native American leaders decried Gerber as a “major grave robber,” known for his grave desecration all over the world.<sup>295</sup> Tom Montezuma, the chairman of Indiana’s Native American Indian Council was particularly vocal throughout the entire affair on the severity of Gerber’s crime. Montezuma derided Gerber’s supposed love for Indian history and Indian ways saying that if that was true he would know that “Indians believe the spirit journeys through this world and beyond after death and that the desecration of graves disrupts that journey.”<sup>296</sup> Montezuma was very vocal about the hurt associated with seeing ancestral tombs desecrated describing the reaction as being “automatic,” when

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<sup>293</sup> Ibid p.254

<sup>294</sup> Ibid p.254

<sup>295</sup> Rathel, Tom. “Man Charged with Looting Burial Ground Blasted by Two Indian Leaders in Court.” *Evansville Courier & Press* July, 18, 1991

<sup>296</sup> Ibid

“you walk up on something like that and there is a hatred you feel. You just want to catch somebody in the act and punish them.”<sup>297</sup> Montezuma also did not hesitate to focus this hatred at Gerber stating publicly that “I hope they hang him to be blunt about it.”<sup>298</sup>

The anger that Montezuma and other Native Americans felt towards Gerber intensified when he was allowed to host his annual Indian Relic Show in Owensboro despite his conviction. Gerber’s show was met by a group of protesters organized by Tom Pearce, the executive director of the Kentuckiana Native American support group, who felt that “for them to say it’s OK to have this show where they our selling our people’s belongings is repulsive.”<sup>299</sup> Montezuma also criticized the ability of the show to go on saying “Owensboro ought to be ashamed of being known as the grave goods capital of the world.”<sup>300</sup> On the day of the show one surprised Native American family that had been participating in it, walked out when they realized that it was not an all Indian art show. They felt uncomfortable seeing “all these whites selling what we consider sacred.”<sup>301</sup> However, the collectors at the show defended themselves with similar arguments to Gerber’s claiming that so called sacred objects were “collected in good faith because I love the pieces,” and even going so far as to declare that “people like us have done more to preserve the Native American culture

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<sup>297</sup> Lewis, Bob. “Case Seen As Crucial Battle in Relics Fight.” *Evansville Courier & Press* December 22, 1991:

<sup>298</sup> Rathel, Tom. “Man Charged with “looting” Burial Ground Blasted by Two Indian Leaders in Court.” *The Evansville Courier & Press* July, 18, 1991

<sup>299</sup> Gray, Bruce. “Indians Aim Their Criticism at Owensboro, Green for Allowing Artifacts Show to Go On.” *Evansville Courier & Press* August 3rd, 1991:

<sup>300</sup> Ibid

<sup>301</sup> Gray, Bruce. “Indian Family Protests Art Show It Came To Attend.” *Evansville Courier & Press* August 4, 1991:

than most Native Americans.”<sup>302</sup> This conflict between local American Indian groups and Gerber’s supporters is interesting because it represents a battle larger than simple ownership. For these Native American groups, “grave robbing” is a violation of their religion and their right to freely practice it. To collectors, leaving these beautiful objects in the ground to disintegrate and disappear is a crime unto itself. Therefore, the true discrepancy between these two opinions is not so much who should own them as it is a cultural difference in regards to how these items would best be served.

Although the local Native American tribes and archaeologists agreed that Gerber should be made an example for looters everywhere,<sup>303</sup> these two groups also entertained a contention almost identical to the one between the collectors and the Native American groups. After the appellate court denied Gerber’s appeal and his Supreme Court petition was dismissed, the collection of artifacts was returned to their rightful legal owner; General Electric Plastics. Originally GE intended to comply with archaeological requests and donate the collection to the University of Southern Indiana’s Native American museum in New Harmony, Indiana.<sup>304</sup> However, the Native American community voiced its malcontent with this plan reiterating that the longer the objects remained above ground the longer the souls of their ancestors would not be allowed to continue on their journey.<sup>305</sup>

Much to the dismay of the involved archaeologists, GE was persuaded by the arguments of the American Indian groups and handed the collection over to them for

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<sup>302</sup> Ibid

<sup>303</sup> Rathel, Tom. “Charges in Grave “looting” Case Applauded.” *Evansville Courier & Press* July 13, 1991:

<sup>304</sup> Werisch, Carol. “Future of Sacred Burial Sites Rests on Appeal in Gerber Case.” *Evansville Courier & Press* May 21, 1992:

<sup>305</sup> Ibid

reburial after only two years of scientific study. Seeman, the expert witness for the prosecution in Gerber's case, protested this action claiming that "this is an unprecedented discovery and merits serious scientific attention," and that he was "very concerned now that it will not receive that."<sup>306</sup> Native American's were not concerned by this sort of archaeological outcry. In a meeting with archaeologists, Montezuma informed them that "I don't care about your science,"<sup>307</sup> and on another occasion explained that in his eyes the situation was "one thief fighting another thief for something that they stole."<sup>308</sup> Although it is an exaggeration to put archaeologists and collectors in the same category, Montezuma has a point in that both groups have essentially the same argument with Native Americans. Both archaeologists and collectors would like to see the objects remain above ground even when they were produced from a burial which ultimately contradicts the Native American belief that doing so disrupts the spiritual journey of the dead. This surprising unity of archaeologists and collectors against Native Americans makes it even more significant that Native Americans were not included in the legal discussion of Gerber's case. A third and crucial point of view was left out, and so although Gerber's conviction and trial provides a very interesting case study, it is missing a piece of the puzzle.

## **Conclusion**

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<sup>306</sup> DeWitte, Dave. "Indians to Rebury Artifacts Archaeologists' Outcry Rejected ." *Evansville Courier & Press* April 29,1994:

<sup>307</sup> The Associated Press, "Artifact Reburial Divides Council" *Evansville Courier & Press* August 9,1994:

<sup>308</sup> Raithel, Tom. " Archaeologists, American Indians Make Case for Artifacts Relics at GE Argued Before Hoosier Panel" *Evansville Courier and Press* May 10, 1994

In the case of the *U.S. vs. Arthur J. Gerber*, the prosecution won and Gerber went to jail. However, in terms of ownership perspectives on cultural property discovering the true winner is more complex than simply who won the trial. In its argument as the prosecution, the government employed much of the rhetoric associated with the humanity ownership perspective. The comments of Judge Brooks indicate that it was, in fact, this rhetoric that “society,” was being harmed and history was being stolen that convinced the Court of the gravity of Gerber’s crime. The irony in this is that in the end the artifacts did not go to a museum or a university for study so that they could contribute to the knowledge base of the public. The artifacts went back to General Electric Plastics. Despite the hyperbole used by the prosecution, Gerber was convicted because he had stolen property from private land in violation of state laws. In this way the outcome of *Gerber* precisely emulates the balance between the humanity and individual perspectives represented in the text of ARPA; humanity perspective rhetoric is pervasive, but private property remains sacrosanct. *Gerber* can thus be viewed as a testament to the power of legislation in the debate on ownership of the past. Regardless of the various arguments concerning who *should* own the past, who *does* own the past will always be a direct reflection of what perspectives are currently enacted into law.



### ***Chapter Six: Conclusion***

When NAGPRA was passed in 1990, the legal environment that produced the seemingly contradictory decision in *Gerber* was completely transfigured. All of a sudden, Native Americans were not only included in the discussion on ownership of the past, but they had become the legal owners of many culturally affiliated human remains and sacred objects. If Gerber had committed his crime a mere two years later, the discourse in his case would have taken a very different tone. It is unlikely that Gerber's case would have been as controversial if he had been convicted under NAGPRA. *Gerber* attracted national attention because it was seen as a federal intrusion on private property that was intended to maliciously attack the time honored tradition of collecting. Under NAGPRA, the applicability of the law to Gerber's actions would have been much less debatable, since provisions in NAGPRA clearly prohibit the trafficking of Native American burial goods without a legitimate title to them.<sup>309</sup> As result, Gerber's conviction would not have been seen as an attack on collecting and his defense would not have aimed its argument at proving the value and integrity of "serious collectors." The competition between the aims of archaeologists and those of collectors which characterize *Gerber* would have been eliminated. Under NAGPRA, Gerber's case would have been a more straightforward, criminal trial. Most importantly, if Gerber had been prosecuted under NAGPRA, it is

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<sup>309</sup> NAGPRA, Section 4 (a)

likely that his crime would not have been characterized as “stealing history,” but instead as grave robbing.

*Bonnichsen et al vs. U.S.* or the Kennewick Man case provides a prime example of the way NAGPRA altered the dynamic of interactions between conflicting ownership perspectives. The term “Kennewick man,” refers to the skeleton found by two teenagers on federal property controlled by the Army Corps, in Kennewick, Washington in July of 1996. Although originally thought to be an early European settler, radiocarbon dating determined Kennewick Man to be between 8,340 and 9,200 years old, clearly making this diagnosis impossible.<sup>310</sup> When the age of Kennewick man was publicly released, a group of local American Indian tribes led by the Umatilla requested the return of the remains under NAGPRA. The Army Corps, feeling that they were accurately executing the federal law, seized the skeleton on September 10<sup>th</sup>, 1996, with the intent to deliver it to the Tribal Claimants.<sup>311</sup> In October of 1996, the anthropologists and archaeologists who had been involved with the remains filed suit with the United States District Court for the District of Washington to obtain rights to study the skeleton.<sup>312</sup> The District Court denied the scientists’ petition. However, in 2002 this decision was overturned by the Court of Appeals and the scientists were granted study rights.<sup>313</sup> This decision was upheld in 2004, and the skeleton is currently held at the Burke Museum of Natural History and Culture in Washington.<sup>314</sup>

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<sup>310</sup> *Bonnichsen et al v. U.S.* 357F. 3d 962

<sup>311</sup> *Bonnichsen et al v. U.S.* 357F. 3d 962

<sup>312</sup> *Ibid*

<sup>313</sup> *Ibid*

<sup>314</sup> University of Washington , “Kennewick Man on Trial.” Burke Museum of Natural History and Culture. Accessed 4/10/08 <<http://www.washington.edu/burkemuseum/kman/>>.

In *Bonnichsen et al vs. U.S.*, the humanity perspective is strongly advocated by the scientists. As one of the oldest and most complete skeletons ever found in North America, the scientists believed that Kennewick man had the potential to provide an extraordinary amount of information about the earliest inhabitants of the Continent. The plaintiffs felt that they should be permitted to study Kennewick Man because the skeleton did not resemble modern Native Americans meaning that cultural affiliation should be declared unclear. The scientists were particularly adamant that the age of the skeleton should not be enough to establish cultural affiliation. If all prehistoric skeletons were assumed to be affiliated to contemporary Native Americans, any new discoveries on the early inhabitants of the nation would be prohibited. Such a precedent would greatly hinder the ability of the public to learn as much as possible about the common heritage of humankind. As one scientist argued, "I feel that a clear and accurate understanding of the ancient past is something that the American public has a right to know about."<sup>315</sup>

In contrast, the Native Americans involved in the Kennewick case argued for cultural ownership of the remains. The tribal claimants felt that NAGPRA gave them the title to the remains of their ancestors. A representative for the involved Umatilla tribe stated that the action undertaken by the plaintiffs was simply "an effort by scientists to lay claim to materials which Congress did not intend them to have."<sup>316</sup> Furthermore, the prolonged disinterment of Kennewick's remains violated the Umatilla's religious beliefs since they held that "when a body goes into the ground, it

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<sup>315</sup> Davis, Mark. "Mystery of the First Americans." A NOVA production by MDTV productions for WGBH Boston. WGBH Educational Foundations, 2000

<sup>316</sup> Owsley, Douglas W. and Jantz, Richard L. "Kennewick Man- A Kin ? Too Distant?" Barkan, Elazar , and Bush Ronald. *Claiming the Stones, Naming the Bones, Cultural Property and the Negotiation of National and Ethnic Identity*. Los Angeles: Getty Research, 2002, p.145

is meant to stay there until the end of time,” and if the bones remain above ground the “spirits are at unrest.”<sup>317</sup> For the Umatilla, discovering who the first Americans were was not an issue. A spokesperson from one of the tribes involved in the case asserted that “if this individual is truly over 9,000 years old, that only substantiates our belief that he is Native American. From our oral histories, we know that our people have been of this land since the beginning of time. We do not believe that our people migrated here from another continent as the scientists do.”<sup>318</sup> This quotation represents the belief systems of many Native Americans, who contend that their ancestors originated in America. For many of these Native Americans, any scientific evidence of migration is merely another attack on Native American religions and land claims. As such, any new scientific discoveries could be viewed as subsequent injustices done to Native Americans by the White colonists.

The case of Kennewick man illustrates how NAGPRA introduced a new series of quandaries into the debate on ownership of the past. Under NAGPRA ownership of Native American remains and objects is reliant upon the qualifier of cultural affiliation. *Bonnichsen* examines the validity of cultural affiliation as a means of determining repatriation eligibility. With skeletons as old as Kennewick, it is uncertain whether science can ever prove it to be positively affiliated to any modern peoples.<sup>319</sup> As a result, the question arises if it is appropriate for cultural affiliation to be categorically used to determine ownership? Furthermore, can remains and objects of this age really be seen as comprising a culture continuous with those of contemporary Native American tribes? These questions brought up by Kennewick,

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<sup>317</sup> *Bonnichsen et al v. U.S.* 357F. 3d 962

<sup>318</sup> Owsley and Jantz.p.143

<sup>319</sup> Davis, 2000

demonstrate how the American conversation on ownership of the past has transformed under NAGPRA into a competition for control between Native Americans and the archaeological community.

Both *Bonnichsen* and the *Gerber* provide examples of court cases in which contrasting views on ownership of the past came into contact. Both cases are significant because they intend to determine, under the enacted U.S. law, precisely who has legal ownership and entitlement to different materials from the past. However, these two cases represent different eras in American resource legislation. Without the presence of NAGPRA, the conversation in *Gerber* navigates between the rights of landowners, the passion of a collector, and the pursuits of science. In *Bonnichsen* case the conversation centers around the federal government's attempt to perform a balancing act between the wishes of Native Americans and those of scientists. What changes between *Gerber* and *Bonnichsen* is the simultaneous restriction of the influence of the individual perspective and increase of that of the cultural perspective.<sup>320</sup>

The contrast between the cases of *Gerber* and *Bonnichsen* demonstrates the degree to which power and legitimacy in the debate on ownership of the past can shift with the change in legislation. In the U.S., each perspective on ownership has at one point been favored by law. Before the passage of the Antiquities Act, artifacts were

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<sup>320</sup> Even though Kennewick was found on public property, this is a fair comparison because the passage of the federal law resulted in many more expansive State laws. In Washington, the state law requires that any accidentally disturbed Native American grave must be immediately reburied under the supervision of the local tribes. If a grave is purposely disturbed it is considered a felony and the perpetrator will go to prison. Thus if Kennewick had been found on private land in Washington the private owner still would not have had a role in the discussion on the fate of the remains due to the state law. See "Survey of State Statutes." *Arizona State Law Journal*, Volume 24, Spring 1992, No. 1, pp.420-432

unconditionally considered private possessions. From 1906 to 1990, American cultural resource laws maintained a careful balance between preserving archaeological resources for the benefit of the nation and protecting private property rights. Similarly, NAGPRA contains provisions to support the wishes of both Native Americans and scientists, but does not endow the powers of ownership in Native Americans. In this complex debate on ownership of the past, each of the three perspectives on ownership is equally convinced that their beliefs are correct and ethically just. This indicates that the question of who *should* own the past is entirely subjective. The shifts in who *has* owned the past can thus be viewed as reflections of the transformations in the values of both the federal government, and the American people.