

THE ETHICS OF ARCHAEOLOGY

Philosophical Perspectives on Archaeological Practice

EDITED BY

CHRIS SCARRE AND GEOFFREY SCARRE



- NAGPRA presumes rights of Native Americans

- Lackey argues that there is a pluralism of rights & each case must be

CHAPTER 9

Ethics and Native American reburials: a philosopher's view of two decades of NAGPRA

Douglas P. Lackey

assessed on its merits

The social sciences were apparently conceived in sin: ethics demands that we treat people as subjects; social science requires that we view them as objects. No talk of *Verstehen*; no degree of sympathy, can close the gap, plaster over the chasm between observer and observed, between human beings willing their ends and human beings taken as means to knowledge. But for social scientists deep into their trade, the divide between knower and known becomes a piece of the landscape, part of the natural order. The observer looks, the observed is looked at. Nothing could be more surprising to seasoned social scientists than a contretemps in which the object of study looks the observer straight in the eye.

Yet this is precisely what happened in American archaeology in November of 1990, when George Bush I signed into law the Native American Graves Protection and Repatriation Act, NAGPRA. The specimen on the slide looked up through the microscope, stood up and shook a fist in the air. NAGPRA has no preamble. No statement is made about relations between archaeologists and Native Americans, between the curators and the tribes. But there is a presumption in the text, perhaps most evident in Section 7:

7(A) If the cultural affiliation of Native American remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum upon the request of a known lineal descendant of the Native American or of the tribe . . . shall expeditiously return such remains and associated funerary objects.

7(B) If the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects, or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization, shall expeditiously return such objects. . .

7(C) If a known lineal descendant of an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary

objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

There is no mistaking the implication: archaeologists or anthropologists, amateur collectors or museums curators, are body snatchers, grave robbers, culture vultures, art thieves, desecrators of sacred ground – unless proven otherwise. This is not a side effect of their work; it is the work itself that has made them so. By way of penance, almost all American museums, universities and institutes that have anything to do with Native American or indigenous Hawaiian cultures have devoted years of hard labour since 1990 to compiling inventories, notifying affiliated tribes, packing objects and returning human remains. Native Americans, forced now to bear the burdens of victory, have spent the corresponding years in patient attendance at NAGPRA meetings, budget-breaking travel to distant collections, tedious preparation of formal claims, and emotionally exhausting burial ceremonies. NAGPRA was an earthquake that transformed perception and memory. Current international covenants regarding cultural property address only present wrongs and present crimes. With NAGPRA, the whole history of relations between social scientists and American indigenous peoples is called into question. And the burden of proof, case by case, rests on the scientists to show they are in the right.

HOW THE CONFLICT WAS MISCONSTRUED: DEONTOLOGICAL ABSOLUTISM VERSUS ETHICAL RELATIVISM

The discussions leading up to NAGPRA dramatised the repatriation issue as a conflict between ethics and science. But which ethics, and which science? Native Americans argued that right is right, and science be damned. Here is Perry Tsiadiasi, a Zuni and elder brother Bow Priest:

I want my fathers back. As the elder brother Bow Priest, I support the statement of the Bear Clan leader about the need for our War Gods to return to Zuni country . . . We want our fathers to be returned to our land . . . For the good of the people, I want our fathers back. (Fine-Dare 2002: 94)

The claim is a simple, deontological one: these are *our* fathers; so we have a right to have them on *our* land. In this text and many others we have

possessive pronouns and an assertion of rights of ownership, or at least, of a right to stewardship. 'Who Owns American Indian Remains?', asks the title of the best anthology compiled about this subject (Mihesuah 2000). And indeed the text of NAGPRA works within the logic of ownership or stewardship: the guiding idea is that things should be returned to their rightful owners. The Zuni have a right to Zuni bones, and the curators who have them have a duty to return them. Loss of scientific knowledge does not figure in the argument, and no argument is given in NAGPRA that some compensating good will result from repatriation. Likewise the authors who have addressed repatriation as a basic human rights issue (Dombroski and Sider 2002: 189-96) have not specified any good that will come from repatriation, except the tautological good of rights-satisfaction. What is supposed to happen is the righting of past wrongs, the paying of debts to the dead, the establishment and maintenance of justice. **The bottom line is: do it, because it is right.**

Now, no doubt, in the particular case, we must do the right thing, because it is right. But laws and moral principles must have a rationale, and that rationale must be rooted in the good. There is no point to a law, no point to a moral principle, if adherence to it and connected principles does not, on the whole, serve the good and make people's lives go better. These rationales for law and moral principles must make sense. They must be consistently applied. They cannot themselves deploy only moral concepts, since these moral concepts would then need further justificatory rationales and we would have an infinite regress. **Some non-moral values, material, aesthetic, religious, cognitive, must be brought in.** The elder brother of the Bow acknowledges this when he says, 'For the good of the people, I want our fathers back.' What good is he talking about? And how is it served by repatriation of bones? The ethical argument based on ownership may not be invalid, but it is surely incomplete.

On 'their' side (the partition is artificial since there are many Native American scientists), the scientists argued that ethics is socially constructed and culturally relative, while science is fact-responsive and culturally transcendent. Here is Lynne Goldstein, Secretary of the Society for American Archaeology:

What are ethics? In general terms, ethics can be seen as a coherent system of values that specify a mode of conduct. The definition implies that there can be more than one system of ethics. A discussion of ethics is, by definition, a discussion of moral principles, with an underlying definition of Right and

WHAT MAKES IT RIGHT?

Wrong. Such definitions are cultural, all anthropologists know this. There are many examples that demonstrate this point: the death sentence passed upon Salman Rushdie for his blasphemous novel *The Satanic Verses*; the differing perspective on abortion, and witch trials in colonial America. All the instances present a conflict between two (or more) systems of ethics. The important point we wish to raise here is that no particular system of ethics can be said to be absolutely right or wrong. Ethics are a cultural construction.

(Goldstein and Kintigh 1990: 585-6)

As a philosopher, I am touched and appalled by this quaint evocation of positivism, killed off in my own field by Quine and Kuhn forty years ago. To set the record straight, it is simply not true that there is 'one' science and 'many' codes of ethics; Newton's theory of gravitation is still *science*, even if it fails to describe the facts fully, and it is still *science*, though Einstein's General Theory, which is also science, conflicts with it. On the current scene, there are string theorists and particle theorists each with competing theories of everything. The fact that people disagree about what is to be done with Salman Rushdie proves nothing about the subjectivity of ethics, since it has been reliably reported to me that scientists at professional meetings also disagree with each other, yet do not infer from this the subjectivity of science.

I refuse to declare, 'Science is itself a social construct', as the phrase 'social construct' has an uncanny power to paralyse the human mind. Let me say instead that science *is* a human activity, and human activities make sense – must make sense – to those who engage in them. If scientific activity makes sense, it too has a rationale, and the rationale must refer to the good, or else we should stop doing science. As with the rationales of law and morals, the rationale of science must be consistent and consistently applied. And when we articulate the rationale of science, it may turn out that there are particular cases of scientific work where the rationale is weak or fails to apply, or is trumped by competing values.

To construe the NAGPRA conflict between Native Americans and social scientists as a conflict between ethical objectivism and ethical subjectivism does not get things right. The parties allege this, but it is not so. The real conflict, on examination, turns out to be a tension between the various dimensions of human good: religious, political, cognitive, aesthetic, material. **Ethics is not a party to *this* conflict; rather it is above the conflict, arbitrating it.** This is why, when we reach a considered ethical judgement, we must follow it. To get to the judgement, we must survey everything in human life, and why it matters. Then, when the judgement comes in, there is nothing more to be said.

↳ this what Meighan
& Zimmerman have done?

↳ ETHICS requires
consideration
of ALL competing
values

A POOR ARGUMENT ON THE SCIENTIFIC SIDE

On 26 February 1993, the NAGPRA Review Committee held its fourth meeting in Honolulu, Oahu, Hawaii. One major question on the agenda was the disposition of human remains then in storage in the P. A. Hearst Museum of Anthropology, a part of the University of California at Berkeley. There was no dispute that the remains were exhumed in Hawaii in the 1880s, and subsequently transported to the museum. There was some question as to whether the remains were Native Hawaiian, or non-native Hawaiian, perhaps dead sailors, the museum said, washed up on the beach.

The museum was represented by Mike Smith, Assistant Chancellor of the University of California, Berkeley, and Tim White, Professor of Anthropology at Berkeley. When asked to articulate the museum's interest in these remains,

Mr. Smith responded that the Hearst was concerned about certain ambiguities in the law and did not want to violate the museum's mission by de-accessioning materials held in the public trust. . . Mr. White stated that the remains were important as part of the University's osteological collection. It was not so much that these remains would answer a specific research question, he continued, but rather the collection is important as a whole. He emphasized the need to keep the collection because research tools are constantly improving and thus important questions might be answered at a later date.

(NAGPRA Review Committee Minutes 1993: 4)

Smith's problem with repatriation involved concepts of property or stewardship. The museum, he says, is holding the remains 'in trust for the public'. But which public? The public of Berkeley, California? Surely that is too narrow, as obviously a wider public, including Native Hawaiians, has an interest in these remains. The American public? But the American public has already spoken through NAGPRA as regards the disposition of affiliated bones: they are to be returned to the indigenous peoples. *This* trust would not be violated by repatriation.

Professor White's argument refers to the scientific need to have a 'complete collection' of specimens for scientific study. But he does not indicate what studies are involved. If the studies are in that slightly crazed area of anthropology called craniotomy, then a replica of a skull will serve as well as the skull itself. If the studies are of disease patterns and transmissions, then often a replica of the bone will serve as well as the bone itself: the absence of evidence of rheumatoid arthritis in ancient human skeletons is as demonstrable from skeleton replicas as from the originals.

But now, what of chemical analysis? Here a replica won't do. But the original location of these remains was not known and without information about strata, chemical analysis will not provide the most useful form of data: that *these* chemicals were found at *this* spot at *this* time. Still, the chemical data might be of some limited significance. But if there are such data to be had, tests can be done *now*, the information recorded, and the specimen repatriated. Nothing in NAGPRA, the Review Committee noted, forbids the scientific study of remains, provided that such studies are not an excuse to delay repatriation.

We are left with Professor White's argument that there might be some *future* chemical test that will yield important data. Some dramatic improvement, for example, might be achieved in the dating of bones and artifacts. But improving precision in the dating of the remains will not help locate the original site, and knowledge of time will be debilitated by ignorance of place. The problem is widespread: the majority of remains in American collections were taken off the land as trophies, tossed up by farmer's ploughs, uncovered in floods. They are typically of unknown provenance, often delivered to bewildered curators in bags.

WHAT FORM OF SCIENCE ARE WE PROTECTING?

The difference between morphological and chemical analysis of specimens points up an ambiguity in the term 'science'. Science can refer either to scientific theory or to natural history. (The two areas sometimes overlap, as in contemporary cosmology, where the Big Bang Theory merges with the natural history of the early cosmos.) Scientific theories state laws which specify that a certain cluster of qualities is associated with some different cluster of qualities. There might, in fact, be no instance of either cluster: the law might say that resistance in a certain material will disappear at absolute zero, but neither zero temperature nor zero resistance is ever obtained. Natural history describes the particular events of the cosmos, notes their positions in space and time, and makes claims about causal relationships among the events. The two areas are parasitic on each other: without knowledge of particular events, theories cannot be confirmed, and without knowledge of general laws, no claim of causation between events can be sustained.

Nevertheless, there is a profound gap between the two. Though scientific theorising leans on particular events for confirmation, it uses particular events only as instances of *types* of events. Though natural history makes

causal claims, it construes causal relations as existing between particular events, tokens, not types. Thus natural history requires samples of particulars, but scientific theory needs only examples of types. The difference must be kept in mind as arguments swirl about the use of particular specimens. If theory is at issue, then no particular specimen is crucial, since the loss of one can be replaced by another of the same type. If natural history is at issue, then each specimen is useful, but only if provenance has been properly determined.

THE HAWAIIAN CASE, FROM THE RELIGIOUS SIDE

The same 1993 meeting addressed by Smith and White was attended by numerous members of Hui Malama I Na Kupuna O Hawai'i Nei, an organisation of Native Hawaiians dedicated to the preservation of tribal culture and particularly interested to the repatriation of human tribal remains. Edward Kanahale said that his organisation intended to rebury the remains in order to return the bones to the earth and to right spiritual and moral wrongs. According to Mr Kanahale, reburial strengthens the connection between present-day people and the ancestors by allowing the spiritual power, the *mana*, and the ancestral bones, to flow back to the earth. He explained the Hawaiian belief that the spiritual strength, or *mana*, in one's house can be taken away by evil or negative thoughts. Thus bones need to be protected so that the *mana* can flow back into the earth. The earth will then reciprocate and help the living people. 'We see this spiritual force as something that benefits everyone', Mr Ayau added, 'even if these remains are not our people, we would be paying them equal respect.' (NAGPRA Review Committee minutes, February 1993, p. 4.)

Even in these few sentences, the background religious narrative is clear. A human being is formed from the earth, at birth separates from it, borrowing from the earth the living force called *mana* that provides for motion and life. At death, the body must be restored to the earth, so that the force borrowed is returned, to be used again. Furthermore, the remains must be returned to the point of origin; Hawaiian bones must come to rest in Hawaiian earth.

Outside the Native Hawaiian form of life, we can ask, 'Why doesn't the force just return of itself?' The Hawaiian can answer, 'Why should it?' Outside the Native Hawaiian form of life, we can ask 'Why can't the force be returned by the proper incantation?' The Native Hawaiian can

answer, 'Why should it?' Given equal plausibility of available answers, the Hawaiian believes and acts according to the one that makes sense, and the one that makes sense in that culture, and many others, is that the force returns with the burial of the body.

But there are some questions that cannot be so easily fended off. If Native Hawaiian remains must be interred in Hawaiian ground (or else the *mana* will not return to the earth) then non-Native Hawaiians must be buried in non-Hawaiian ground, or else the *mana* will not return to the earth. Thus Mr Ayau is simply incorrect, relative to his own religious narrative, to say that everyone will benefit when non-Hawaiian remains are interred in Hawaiian ground. If this were true, then Hawaiian remains could return their *mana* by being buried in California.

Furthermore, the religious narrative is unspecific as to what parts of the deceased must be returned to the earth for the *mana* to be discharged. There seems to be no requirement that all hair, or all fingernails, grown in a lifetime be returned to the earth. Some pieces of a person do not get buried, and yet the *mana* is returned. But if not all pieces of the person need burial, then a small piece, perhaps smaller than a hair, could remain with the museum for future testing, without transgressing the logic of the narrative. NAGPRA does not permit this, but that is because NAGPRA works within the shallow framework of rights and not the deeper context of values.

The NAGPRA committee decided, and decided rightly, to repatriate the Hearst remains to Hawaii, where they were given into the custody of Hui Malama I Na Kupuna O Hawai'i Nei. But now we must refer not just to law, which is satisfied by repatriation, but to the rationale for the law, which is satisfied by reburial. Hui Malama I Na Kupuna O Hawai'i Nei is committed by its narrative to reburial, and there is no evidence that they have not done so. But there is also no evidence that they have, since all Hui Malama I Na Kupuna O Hawai'i Nei reburials have taken place in secret, in unmarked graves. Nothing in the narrative would imply that *mana* can be returned to the earth only by a secret burial. And if Hui Malama I Na Kupuna O Hawai'i Nei is concerned that the remains be undisturbed, having a public record of where they are will be helpful when locations are chosen for the Marriotts of the twenty-second century.

The 1993 Hearst/Native Hawaiian case is not a case of ethics versus science, but a case of religion versus science, where the religious case was strong and the scientific case was weak. The review committee hit the right ethical target, but it did not have a full ethical rationale for its

actions. Being only charged with applying a law, it reached the correct ethical decision by a kind of happy accident.

KENNEWICK MAN AND THE CASE FOR SCIENCE

The case for repatriation of the Hearst remains was strong. Now, what of Kennewick Man, the most celebrated of NAGPRA cases?

Kennewick Man was discovered on the banks of the Columbia River in July 1996. The remains, consisting of about 360 bone pieces forming 90 per cent of a complete skeleton, with a spear point lodged in the hip, were established by radiocarbon analysis to be about 11,000 years old, making Kennewick Man by far the most complete skeleton of such age found in North America.

Though the Kennewick site is near tribal areas, the Army Corps of Engineers took control of the Kennewick Man as the remains were found on a navigable waterway. Four Columbia Plateau tribes filed for repatriation of the bones under NAGPRA, and the Corps announced its intent to repatriate the remains in the fall of 1996. Eight prominent anthropologists filed suit against the Corps to block repatriation, and the remains, enjoined from study, were deposited in the Burke Museum. The court case, pitting the anthropologists against the United States, the Army Corps of Engineers and the four tribes filing as intervenors and appellants, ground forward for six years.

In the meantime, reports were leaked to the press that preliminary measurements had shown the skull was 'Caucasoid' in appearance. A facial reconstruction of the Kennewick Man, bearing an uncanny resemblance to Star Trek actor Patrick Stewart, was presented on public television. The Stewart face was reproduced on a number of white supremacist websites, sometimes with superadded red hair, in the manner of Kirk Douglas in the film *The Vikings*.

In 1998, the Army Corps of Engineers bulldozed the discovery site and covered it with concrete blocks, causing irretrievable loss of stratigraphic data. In 2001, the Secretary of the Interior, acting for the National Park Service and the Army Corps of Engineers, accepted arguments from the defendants that the Kennewick remains were 'culturally affiliated' with the four tribes. But in 2003, the District Court ruled in favour of the anthropologists. The defendants appealed, but in February 2004 the Circuit Court denied the appeal, Judge Gould ruling that appellants had failed to show that the Kennewick Man was the biological ancestor of any Native American now living, nor had they shown that

the Kennewick Man was 'affiliated' with any presently existing Native American tribe.

It is not possible here to review the opinions of the Circuit and District courts, which run to 105 pages. But I believe that the cases were wrongly decided. Nowhere in the decisions did the courts consider the implications of NAGPRA Section 7(C), quoted above, which places the burden of proof as regards cultural affiliation on those who oppose Native American claims. In short, the tribes did not have to show (beyond a *prima facie* case) that the Kennewick Man was culturally affiliated. The burden of the proof rested on the anthropologists to show that he was not. Recall that the Kennewick Man had a spear point lodged in his hip bone. This places the Kennewick Man in a culture much closer to the four tribes than to the anthropologists, who do not often use spears. The tribal elders could say, 'He was a spear user, like us.' They called him the Ancient One.

In addition to an argument for repatriation stemming from the NAGPRA 'tilt', in favour of Native Americans, a second legal argument could be generated from the developing body of federal administrative law regarding experimentation on human beings. Since 1976, the federal government has required all scientists conducting studies on human beings (in federally supported institutions) to obtain informed consent from their subjects, a process supervised and monitored by independent local review boards. In the 1990s, the law has been commonly interpreted to include specimens preserved post mortem, which cannot be studied unless consent is supplied either by the subject before decease or by legal representatives after death. (Consent forms supplied to American subjects now regularly include explicit provision about future DNA testing of specimens, by implication testing after the death of the subject.) It is now understood that scientific study of a person need not require the present existence of a person. The Kennewick Man did not give consent, nor is it likely that he would have given consent for the study of his skeleton. Nowhere in the Kennewick Man documents have I found that any of the eight anthropologists submitted a study protocol to their Institutional Review Board.

From the standpoint of rights, the Kennewick Man should have been repatriated and reburied. But what of the ethical case? Should the Kennewick Man be reburied, all things considered? The value of the knowledge to be obtained must be weighed against the religious and cultural significance of reburial. In some Native American discussions,

knowledge is 'useful' only if it helps solve current Native American problems. 'If the Society for American Archaeology ever gives a suitable answer as to the benefits for studying Indian skeletons, some tribes might be receptive to scholars who study remains' (Mihesuah 2000: 97). 'What have the anthropologists done for us?', Vine Deloria, Jr. was asking back in 1969.

By Deloria's and Mihesuah's standards, the anthropologists' case is weak. But the anthropologists are writing natural and human history, and their narrative is not just another religious story, one that happens to be told by white people. Religious narratives are concerned with significance and meaning. The scientific narrative is dedicated to separating fact from allegation, especially allegation tainted by hopes and wishes. This fact-allegation distinction is cross-cultural, since every culture distinguishes, at least in principle, 'he committed a murder' from 'people say he committed a murder'. The establishment of the basic scientific narrative is not theory free, but the descriptions generated are subjected to the discipline of historical method. They acquire from this discipline an objective character that the religious stories do not have. The objective narrative is valuable to all of us, immediately and emotionally, since emotions *demand* objectivity. One cannot be happy about so-and-so, unless so-and-so is the case.

On the religious side, the tribes presented oral histories to the court mentioning people that lived long before in the Pacific Northwest. But the narratives do not integrate anything like the Kennewick Man into a story of the universe in which the Tribes and the Man have related roles: they do not say, for example, that the Ancient Ones brought fire to the tribes. Of course, Native Americans believe, and rightly believe, that they had ancestors in 9000 BC. But so do all of us.

I conclude in the Kennewick Man case that the argument for science is strong and the argument for religion is weak. The scientific narrative has its own value, and scientific theory is more valuable still. To write, 'The fact that Indians exist allows these people [the anthropologists] to secure jobs tenure, promotion, merit increases, notoriety, and scholarly identity, all without giving anything back to Indian communities' (Mihesuah 2002: 97) is to lose sight of a fundamental human good. Native Americans at numerous NAGPRA Review Committee meetings have insisted on the value of 'spirituality', implying that there are more goods than material goods. One of those non-material goods is knowledge.

*This sounds like
utilitarianism
as an ethical paradigm is it?*

WEAK ARGUMENTS FOR REPATRIATING OBJECTS
OF CULTURAL PATRIMONY

The main focus of NAGPRA hearings, prior to passage of the law, was on the proper disposition of human remains. The retrieval of 'objects of cultural patrimony' snuck in almost as an afterthought. Nevertheless, some of the most contested NAGPRA cases have involved cultural objects. Here is the NAGPRA definition.

2(D) 'cultural patrimony' . . . shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

Given this definition, every object of any cultural importance not held by the tribes is not in the hands of its rightful owner, since by definition it could not have been rightfully sold or given away. And when one hears that items in current collections include trophies taken off Indian bodies after the massacre at Wounded Knee, the rights-based case for repatriation seems overwhelming. But let us ask again, what is the rationale for repatriation, beyond the issue of rights?

One argument is that the objects are necessary for the practice of Native American religion (Deloria 2000: 169–80). The freedom of religion argument was particularly pressed in the case for repatriation of the Zuni War Gods (Ferguson 1991). But it is scarcely credible that the Zuni, or any tribe, could not practise their religion without a particular material object, however vested the object might be with spiritual significance. Here is Professor Fine-Dare's account of the War Gods:

At winter solstice each year, when a new bow priest (also called a war chief) is initiated, leaders of the Deer Clan of the Zuni people carve and paint an image of the elder twin war god, Uyeyewi. Meanwhile, leaders of the Bear Clan carve Uyeyewi's younger brother, Ma'a'sewi, who, like his brother, is endowed with living powers that can be used to ensure safety, health, and success of the tribe by bringing rain or defending the Zunis against enemies or other trials.

(Fine-Dare 2002: 94)

It would appear that the *old* war god carvings are not part of the religion, as *new* ones must be carved each year. Religious rituals usually function

with types, not tokens, and new examples can be and often are produced at will, and the power invested in one object can be transferred or reinstated in the next.¹

The same argument about reproducibility of instances of types can be given in response to a related argument for repatriation of cultural objects, the argument that without repatriation of such objects the culture cannot survive. Consider the dispute between Hui Malama and the Providence (RI) Natural History Museum over the Native Hawaiian spear holder, given to the museum by retired sailors around 1810. The spear holder, 30 cm high and inlaid with mother-of-pearl, was claimed by Hui Malama under NAGPRA as a 'sacred object of cultural patrimony'. The attorney representing the museum replied, 'It is not a sacred item or item of cultural patrimony, but a utilitarian spear holder used by Native Hawaiian chieftains to hold spears on their canoes' (Smith 1998: A18). The NAGPRA review committee ruled in favour of Hui Malama, but the Providence Museum sued, arguing that repatriation of the item violated Fifth Amendment protection against 'uncompensated takings'.

That the spear holder is not a sacred object is clear, since Hawaiian chiefs had the power to dispense them as gifts. That these are products of this particular culture is clear, but whether they are 'central' items of cultural patrimony is not demonstrated. There were many such spear holders, and the Providence spear holder was not the first on which the rest were modelled, or a spear holder used in a historically significant battle. To say that Native Hawaiian culture, or any indigenous culture, cannot survive without these particular tokens is also not credible. Any culture that cannot survive without taking an object from a museum case is already dead.

The ethical resolution, then, turns not on religious or cultural grounds but simply on which group is likely to be the most responsible steward for the spear holder. In this case, both sides were manifestly irresponsible. The Providence Museum, it is credibly, or perhaps incredibly, reported, had a private offer of \$200,000 for the spear holder, and had decided to sell it in order to fund 'other projects'. Hui Malama, we noted previously, has a history of secret burials of repatriated objects. In 1998 the Office of Hawaiian Affairs, fearing that a collision between NAGPRA and the Fifth

¹ The exception, of course, is the sacred ground or the sacred mountain. In that case, only that very piece of ground will do. But the reclamation of sacred grounds is not part of the NAGPRA story, and I will not pursue the question of whether a sufficiently powerful priest can consecrate new ground.

Is this utilitarianism?

Amendment might destroy the entire NAGPRA regime, bought off the Providence Museum with a cash payment of \$150,000. The suit was withdrawn, and the spear holder was brought to Hawaii, where it was given to Hui Malama and promptly disappeared (*Honolulu Star-Bulletin*, 15 July, 1998). This, perhaps, is a good time to bring up the value of public access.

REPATRIATION, PUBLIC ACCESS AND ARTISTIC VALUE

In 1905, eighty-three Native Hawaiian objects were discovered in a cave on the Island of Hawaii. The items, now called the Forbes Cave Artifacts and worth several million dollars, were brought to Oahu and were given to the Bishop Museum, which houses the world's largest collection of Native Hawaiian artefacts. In 1994, Hui Malama applied under NAGPRA for repatriation of the objects, announcing their intention to rebury the collection. Despite the objections of several other Native Hawaiian organisations that the collection should be kept on view for educational purposes, the Bishop Museum 'loaned' the collection to Hui Malama in 2000, pending the outcome of several lawsuits regarding the objects. They have not been seen since.

I have already rejected the 'cultural survival' argument for the repatriation of such objects. What is seen under glass in a museum case is necessarily not part of any living culture. For educational presentations, in anthropology, replicas will serve as well as the originals. But the object in the museum case, or on the wall, can exhibit artistic value, and indeed presentation in a museum, with its dislocated context, encourages concentration on artistic features by the viewer, generating aesthetic experience and aesthetic appreciation. The aesthetic experience provoked by an object's artistic features, though generated within the culture, is available to people outside the culture and is important to people outside the culture. This is what is lost when such objects disappear from view. There is such a thing as the patrimony of humankind, as UNESCO puts it, a human cultural heritage. The actions of Hui Malama in the Forbes Cave Case, facilitated by NAGPRA, were viewed by many Native Hawaiians as an assault on their culture. That is too limited a charge. It is an assault on all of us.

I will expand on these points by answering objections from the other side.

(a) *The distinction between artistic objects and religious objects is artificial, or at least, specific to Western cultures.*

The distinction is real because some religious objects have no aesthetic features and some aesthetic objects have no religious features. But it is possible that the same object can have both aesthetic features and a religious function. No argument has been given that the aesthetic dimension is *less* important than the religious dimension. And no argument has been given that these objects can be restored to their religious function by burial in the ground.²

(b) *No non-Native Hawaiian can appreciate Native Hawaiian art. All aesthetic experience is an experience of meaning, which is available only to those who share the form of life.*

Understanding a culture not one's own is like understanding a second language: a difficult task but not an impossible one. The artistic features of a work of art result from intensifications of culturally specific experiences. They represent a cultural perspective. But to represent X from a perspective one necessarily transcends the perspective. Consider Constable's drawings, 'Salisbury Cathedral seen from the south' and 'Salisbury Cathedral seen from the west'. Each drawing is from a perspective. But that Salisbury Cathedral looked like this (to Constable) from the south is not a perspectival fact; it is an objective fact. Likewise that Salisbury Cathedral looked like this from the west (to Constable) is not a perspectival fact, but an objective fact. As objective facts, they are available to everyone, not just those who have seen Salisbury Cathedral from the west or from the south. Art objectifies as much as science does. The culture provides the perspective. The artist transcends it while incorporating it.

(c) *Aesthetic qualities are perceptual qualities, and the same perceptual qualities can be generated by good copies as by the originals. The museums should make perceptually indistinguishable copies, and return the originals to the tribes.*

Assume perceptually indistinguishable copies *can* be made. It seems inevitable that someday one will be able to travel to Orlando, Florida and enter a room perceptually indistinguishable from the Sistine Chapel.³ Would the aesthetic experience provided by a visit to Orlando lack anything that would be provided by a visit to the Vatican? Yes it would.

2 Some of the artefacts contained human teeth as ornaments. But if all human teeth require reburial, Hui Malama should be raiding dental offices in Honolulu.

3 Lest it appear that this is just an American trend: in Mantua work is underway to create a life-sized replica of Mantegna's Camera degli Sposi, to spare the original from damage caused by the toxic breath of tourist groups.

Consider simply the descriptions of the two experiences: 'I saw a replica of the Sistine Chapel' versus 'I saw the Sistine Chapel.'

Paintings, statues, carvings, are tokens, not types, particular continuants with unique origins in space and time, and unique causal histories. They are, in Nelson Goodman's phrase, autographic objects, causally connected to the artist (Goodman 1968: 113-16). To experience autographic works is to be causally connected to their creators and to their points of origin. It is to stand in their presence. When people travel to the Vatican to be blessed by the Pope, whatever they hope to obtain from the blessing will come only if the Pope himself appears at the window, not some look-alike dressed as the Pope. Likewise when people travel to the Vatican to see the Sistine ceiling, whatever they hope to experience will come only if they see that ceiling painted by Michelangelo, not one contrived by the Xerox Corporation. That is why the originals must be in museums, and the copies in the shop.

NAGPRA, SKULLS AND GENOCIDE

The history of relations between Native Americans and European settlers is often described as 'tragic', a term that connotes inevitability and spiritual depth. In fact, there is nothing inevitable and nothing deep in the treatment of Native Americans by white Americans: what we have is a succession of free and brutal choices, expressing the shallow, vicious and duplicitous side of human beings. Against this background, NAGPRA was a necessary response. When I read Devon Mihesuah's account of a display box of Indian handbones in the windowsill of the ladies room in an East Texas museum (Mihesuah 2000: 96), I can only be ashamed of the persisting insensitivity of my own white people. One could only imagine the reaction of Europeans if a 'Museum of the Jews' opened in Berlin, complete with display cases of skulls from Auschwitz. Yet for the world's indigenous peoples, it is Auschwitz every day.

What is the difference between the tourist viewing a display case of skulls and the anthropologist studying those same skulls? The tourist is encouraged by the display to assume an attitude of domination: I am alive, you are dead; I am victorious, you are defeated (Hinsley 2002). The scientist takes, must take, to do the work, an objective attitude: this is the size, this is the weight, this is the date, this is how this skull compares with others. The objective attitude, we noted at the outset, is not the moral attitude, but it is not an immoral attitude either. The scientist does not consider himself better than the skull.

What is the difference between a tourist viewing a display case of skulls, and a museum-goer looking at a Native American headdress? Once again, the tourist is caught up with thoughts of domination; the museum-goer, perhaps vaguely, can feel only admiration: that some person, utilising the unique experience and special material resources of this particular culture, created such a splendid and expressive thing. By seeing the headdress, the viewer is connected to the creator and the creative act.

The consensus in the United States, even among museum administrators, is that the NAGPRA experience has been positive on the whole. Many legitimate, religiously based demands of Native Americans have been satisfied by NAGPRA. They might never have been satisfied without this legal power. But in the Kennewick Man case, NAGPRA collided with legitimate demands of science, and in the Forbes Cave Case, NAGPRA collided with the legitimate demands of aesthetic life. There is no magic ethical formula for adjudicating the requirements of religion, art and science. My purpose has been to establish the equal legitimacy of diverse fundamental demands.

the arguments resolve, apparently,
w/ application of utilitarianism -
would a different rationale provide
a different outcome? does this
make it right? or settled?