THE ETHICS OF ARCHAEOLOGY

PHILOSOPHICAL PERSPECTIVES ON ARCHAEOLOGICAL PRACTICE

EDITED BY
CHRIS SCARRE AND
GEOFFREY SCARRE

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The question of ethics and its role in archaeology has stimulated one of the discipline's liveliest debates in recent years. In this collection of essays, an international team of archaeologists, anthropologists and philosophers explore the ethical issues archaeology needs to address. Marrying the skills and expertise of practitioners from different disciplines, the collection produces fresh insights into many of the ethical dilemmas facing archaeology today. Topics discussed include relations with indigenous peoples; the professional standards and responsibilities of researchers; the role of ethical codes; the notion of value in archaeology; concepts of stewardship and custodianship; the meaning and moral implications of 'heritage'; the question of who 'owns' the past or the interpretation of it; the trade in antiquities; the repatriation of skeletal material; and treatment of the dead. This important and timely collection is essential reading for all those working in the field of archaeology, be they scholars or practitioners.

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CHRIS SCARRE,
GEOFFREY SCARRE

CHAPTER 1

Introduction

Chris Scarre and Geoffrey Scarre

This book aims to promote dialogue between archaeologists, anthropologists and philosophers on significant ethical issues raised by the contemporary practice of archaeology. We believe that it represents the first attempt at an intellectual interchange between philosophically minded archaeologists and anthropologists, and philosophers with an interest in archaeology. But we do not think, in view of the growing sense of the importance of archaeological ethics and of the difficulty of many of the issues, that it will be the last.

The twenty-one authors of the chapters that follow comprise ten archaeologists, four anthropologists and seven philosophers. The two editors are an archaeologist and a philosopher. Since the 1980s there has been much good and innovative writing on the ethics of their discipline by archaeologists themselves and a number of substantial anthologies on the subject have appeared in print. That is just as it should be, since ethical problems in archaeology are the problems of archaeologists. It is researchers in the field who encounter the problems at first hand, and their reflections carry the authority of experience. To have to deal with a moral dilemma is a very different thing from abstractly theorising about it in one's study, and can involve a much steeper learning curve.

But whilst archaeologists may have the advantage of relevant experience, few are also trained moral philosophers, with the conceptual tools and analytical skills that have been developed within that tradition over centuries. Ethical thinkers in the west have been wrestling for more than two millennia with deep and difficult questions about what sort of people we should be, what kinds of acts we should perform or avoid, and how we should treat our fellow human beings. In recent years much attention has been devoted by the philosophical community to moral problems arising within such special contexts as the law, medical treatment and research, genetic engineering, business and the commercial world, and the management of the environment. Cooperation between philosophers and professionals in these and other areas has produced new insights and understanding that would otherwise have remained elusive. It is our conviction that similar happy results will flow from a pooling of their efforts by archaeologists, anthropologists and philosophers.

Whilst this book does not purport to cover every theoretically or practically important ethical question that faces archaeologists, or those with an interest in the subject, its scope is broad. Among the topics addressed are: archaeologists' relations with indigenous peoples; the virtues, professional standards and responsibilities of researchers; the role of ethical codes; the notion of value in archaeology; concepts of stewardship and custodianship; the meaning and moral implications of 'heritage', local and universal; the question of who 'owns' the past or has a right to interpret it; the problem of 'looting' and the trade in antiquities; the repatriation of skeletal material and culturally significant artefacts; and archaeologists' treatment of the dead.

A major purpose of the book is to show how important moral questions such as these can be approached in a more appropriate analytical manner than they sometimes have been. Thus the editors do not share the view expressed by Karen Vitelli, in the introduction to her 1996 collection *Archaeological Ethics*, that 'One need not be trained in philosophy, an expert in cultural property law, or even have followed closely the fast-growing body of literature on the subject, to be qualified to teach a course on archaeological ethics.' Vitelli rightly remarks that 'Any serious and conscientious archaeologist will discover that she or he harbours a wealth of relevant experience' (Vitelli 1996b: 21). But it would be naïve to think that experience, taken raw, can provide all the moral answers. One may be a serious and conscientious researcher, and a decent human being to boot, without necessarily finding it easy to appraise moral claims, weigh up and decide between conflicting interests, or determine the dutiful or virtuous thing to do – still less deliver a course on archaeological ethics. In our view, good intentions are not enough and any worthwhile writing in this area needs to be both well informed and philosophically rigorous. The experts we have invited to contribute to this collection approach their topics from a variety of perspectives but are all, we believe, well able to meet these exacting standards.

Ethics is concerned with the critical appraisal of human conduct and character. Moral judgements are sharply distinct in kind from factual ones. In the words of J. H. Muirhead, everything can be looked at from two points of view: 'We may take it simply as it is, seeking to discover how it came to be the thing it is, and how it is related to other things; or we may compare it with some ideal of what it ought to be' (Muirhead 1912: 414). We can say what a person is doing (description) or we can judge whether she ought to be doing it or how creditable her performance is (evaluation). Sometimes ethics is presented as if it were chiefly concerned with dampers on action: dos and don'ts, rules, limits and constraints. But that is a distorted image. Ethics is also about positive and attractive springs of action: values, goals and ideals, aspirations, and personal and social fulfilment. The subject of perhaps the greatest of all ethical treatises, Aristotle's *Nicomachean Ethics*, is the living of a human life in its best possible form. For Aristotle, ethics is about locating and attaining the highest goods available to us (identified by him with excellences of mind and character). People who keep their moral hands clean and satisfy the bare requirements of acceptable behaviour may be described as minimally ethical agents. In contrast, those who follow a more inspiring view of the ethical life not merely avoid the bad but energetically pursue the good.

These ideas carry over into professional ethics, though with an important caveat. Archaeologists should be seeking to realise the highest goods of their profession, whatever these may be. Deciding what they are is one important part of archaeological ethics; determining how they may *legitimately* be achieved is another. This second clause is the one that conveys the caveat. The problem is that the highest goods for the archaeological profession may not always be compatible with the highest goods for other groups of people. Thus, to take an obvious example, an ancient cemetery whose excavation would yield rich archaeological data may be a sacred site for an indigenous community. The archaeologists' end of knowledge is at odds with the local people's end of preserving and respecting the remains of the ancestors. Once upon a time – and not so many years ago – researchers too often assumed that the interests of science trumped all other interests. A classic instance is the series of excavations carried out by the cultural anthropologist Alěs Hrdlička in Larsen Bay, Alaska, in the early 1930s, in which several hundreds of skeletons and many thousands of mortuary items and other artefacts were removed to the Smithsonian Institution in the face of vehement and sustained objections by the local population. As Randall McGuire has remarked, for anthropologists and archaeologists of Hrdlička's stamp, the objects they uncovered 'were data, not mothers, fathers, aunts, and uncles' (McGuire 1994b: 182). Small wonder then that, in the words of another recent scholar, Hrdlička displayed 'a gruff and belligerent manner of dealing with native peoples who appeared at the dig site to protest the disturbance of their ancestors' (FitzHugh 1994: viii).

The ethics of any profession cannot be conceived in isolation from ethics in general. Moreover we should be good persons before being good archaeologists, philosophers, politicians or bus-drivers. No doubt a researcher like Hrdlička had a clear view of the goods he was seeking. He was also *right* to think that the knowledge and understanding he sought were goods worth having. But Hrdlička's was also a striking case of moral tunnel vision. His brusque, not to say brutal, treatment of the local protesters reflected not only a disproportionate weighting of his own goals but also, one suspects, his unquestioning belief in the racial superiority of whites to Indians and the consequent right of the former to exploit the latter. Such blatant racism amongst archaeologists and anthropologists is happily now a thing of the past. Yet we should beware of resting on our laurels, however enlightened and egalitarian we believe ourselves. As several of the writers in this book remind us, it is easy even for well-intentioned researchers, through ignorance or inadvertence, to show insufficient respect for native people and their traditions.

Attempts by archaeologists to formulate principles of ethics to guide their practice have by and large recognised the importance of accommodating the goals of the profession to broader moral requirements. Whilst doubts are sometimes expressed as to whether archaeological ethics can be satisfactorily reduced to a neat system of general principles (see, e.g., Hamilton 1995; Tarlow 2001b), codes such as that propounded by the Society for American Archaeology in 1994 at least provoke thought on the relations between archaeologists' goals and the morally significant interests of those whom their activities affect. They also afford an opportunity to reflect on the points of possible intersection or convergence of the interests of archaeologists and others. For example, the fourth principle of the SAA's code is headed 'Public education and outreach' and encourages archaeologists to disseminate their findings to all who are interested in the preservation and interpretation of the past, 'including students, teachers, lawmakers, Native Americans, government officials, environmentalists, service organizations, retirees, reporters, and journalists' (Lynott and Wylie 1995: 23). The praiseworthy intention behind this provision is to lessen the sense of an 'us and them' divide between archaeologists and other constituencies, and to emphasise that the goods of archaeologists are by no means exclusive to them.

We have divided the chapters in this volume into four sections, although many of the themes intersect and overlap and these divisions are to some extent arbitrary. Nor do all the authors find themselves in agreement on key issues. The emphasis throughout is on the obligations of archaeologists as practising professionals, though several of the chapters seek to balance these against the rights and obligations of other interest groups.

We begin with a group of papers focusing on the ownership of cultural objects. The very term 'cultural' implies that these objects possess a special status which removes them from the ordinary and everyday, and raises the question how 'ownership' in such objects is to be assigned and understood. James Young identifies four categories of potential owner for archaeological finds (excluding remains of the dead). These may be individuals (including both collectors and museums on the one hand, and the finders or archaeologists on the other); or some larger grouping such as a culture, a nation, or indeed humanity as a whole. He supports the claim of 'cultures' but not on the basis that any group inherits rights to objects which may be centuries or millennia old; cultural, ethnic, social and religious change make any such claim difficult to accept as a universal. Instead, he takes the view that no one has inherited a claim to many archaeological finds but that the ownership question should focus on the current value of those finds for living communities. This may in the case of specially significant objects mean indigenous or other special interest groups, though he argues that many finds might more properly remain with their discoverers. Furthermore, other principles must be invoked, including the need in most cases to ensure the preservation or conservation of an object, the desirability of public access, and the principle that separated parts of cultural property ought to be reunited. Where Young differs from some of the other contributors to this volume is in denying the utility of the concept that archaeological finds are the common heritage of all humanity. As he observes, although we may wonder whether archaeological finds should be 'owned' in the same way as ordinary personal property, at the end of the day decisions have to be made about who ought to hold such objects. The 'common heritage' question is none the less an important principle to which we return in the final section of this volume.

Oliver Leaman contrasts the legal ownership of cultural artefacts with the moral or political criteria that might be cited to justify such ownership. If cultural artefacts belong in some way to the wider community, legal ownership can never be absolute. At the same time, Leaman contests the view that ownership should be decided simply or largely on moral criteria of desert. He argues for the parallel between care of artefacts and care of children; parents are allowed freedom to bring up their children in a diversity of different ways, and other authorities only intervene in cases of neglect or abuse. In the case of artefacts, this would require some definition of the public good against which the proper care of artefacts could be measured. The difficulty of defining such a 'public good' leads Leaman to argue that if we were to contemplate removing an object from its owner then we would need to show not only that it would do better elsewhere than with its present owner, but that its present owner may represent a danger to the object's future. He cites various ways in which different kinds of ownership might be beneficial (for instance in spreading the products of different cultures around the world and placing monetary value on their survival) and concludes that a diversity in the ownership of artefacts is ultimately the best state of affairs.

The concept of cultural artefacts as private property to be bought and sold raises the key issue of commodification. This is addressed directly by Robert Layton and Gillian Wallace, who begin by defining cultural property as artefacts and buildings that embody the values and traditions of a community such that concern about their fate transcends legal ownership. Layton and Wallace hence agree with Leaman that ownership of cultural objects cannot be or should not be determined merely on the basis of modern Western concepts of private property. From an anthropological perspective, concepts of ownership vary considerably from culture to culture. Traditional societies may consider certain cultural objects as simply inalienable, their ownership vested not in an individual but in the wider community or clan. Furthermore, such 'ownership' may extend beyond physical objects to include oral performances or religious practices and beliefs. Here there is potential for conflict with Western principles such as copyright, which rely upon the existence of a durable object albeit one that may be a transcript or recording. At the same time, indigenous and other local communities may manage and benefit from the commodification of their culture and traditions through practices such as eco-tourism. The looting of archaeological sites by local communities could be considered in the same way: as the financial exploitation of a group's ancestral capital. As Layton and Wallace illustrate, the role of archaeologists in all this is ambiguous; they may sometimes be called in to provide evidence in support of local land claims, though by its nature archaeological evidence is rarely conclusive, and most archaeologists feel uncomfortable about the use of excavation to help resolve political disputes such as that surrounding the destruction of the Ayodhya mosque.

The final chapter in this first group considers the problematic issue of the looting of sites by local communities. Julie Hollowell examines the conflicting ethics of archaeologists seeking to preserve and manage archaeological resources for the future, and the needs of local communities to gain a livelihood. She calls the latter 'subsistence digging' and questions an archaeological ethic which may place the preservation of archaeological remains above the survival of (often impoverished) local people. The issue focuses once again on the ownership of archaeological materials, and on who has the right to control and exploit them. Hollowell warns against the sometimes distant and alienating stance taken by archaeologists, and stresses the need to pay much greater concern to the local communities who may consider archaeological sites as legitimate resources, left them by their ancestors, to be mined for profit. 'Subsistence digging' declines significantly where other sources of income and employment are available. The solution, she suggests, is for archaeologists to involve local communities much more closely in their work, and as far as possible to make the archaeological heritage the basis for the sustainable employment of local people.

The second part of this volume concerns the responsibilities of archaeologists towards other interest groups, including (though not restricted to) indigenous peoples and local communities. Jeffrey Bendremer and Kenneth Richman advocate the extension of human subjects reviews to archaeological projects. They accept that anthropologists generally approach their work with a desire to benefit the host communities, but observe that considerable harm has none the less resulted in many cases, owing to a lack of mutual understanding. Human subjects reviews (as used in regard to biomedical projects in the United States) would address the problem by requiring formal consent from the local community or the descendants of the people being studied before an archaeological project was given clearance to proceed. The basis for the approach lies in the ethical principles enshrined in the Belmont Report produced by the US National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research in 1979 to guide biomedical research. This arose from discussions at a seminar held at the Smithsonian Institution Belmont Conference Center three years earlier. The key ethical principles recognised in the Belmont Report comprise respect for persons; beneficence; and justice. Bendremer and Richman also advocate involving local communities not only in negotiating the ways that archaeological projects may be carried out but also in the choice of research questions to be addressed by those projects. These proposals have particular resonance in a North American or colonial context, but could be applied more widely, wherever local communities can be involved in the planning and execution of archaeological fieldwork.

Bendremer and Richman focus on the practical mechanisms which might be installed to ensure that archaeological work conforms to ethical standards; Chip Colwell-Chanthaphonh and T. J. Ferguson take a different line, considering not the rules and procedures but the ethical basis for archaeologists' obligations towards both living and dead communities. They propose Virtue Ethics as the basis for these relationships. Virtue Ethics revolve around questions of character and trust, and place emphasis not on codes of practice or regulations but on the subjectivities of social interactions. Establishing mutual relations of trust between archaeologists and local or indigenous communities here again emerges as a key objective; but Colwell-Chanthaphonh and Ferguson argue that this can be extended to the dead, with whom we also have a relationship which leads us to cultivate respect for their remains and to treat them with dignity. The principle that archaeologists have direct obligations towards the deceased (not merely through the medium of their living descendants) opens the much wider issue of the appropriate treatment of human remains, to which we return in a later section of this volume.

Archaeologists have a growing awareness of the need to respect the wishes of indigenous communities amongst whom they work. This is borne out in most recent codes of ethics and in national legislation such as NAGPRA in the United States. As David E. Cooper argues, however, archaeologists have responsibilities which extend beyond these considerations, to professional integrity and 'truthfulness'. The desire for epistemic inclusion – the acceptance that archaeologists do not have the sole authority in dealing with and interpreting the past – may sometimes result in conflict between the results of archaeological work and the beliefs of local or indigenous communities. Cooper observes that the willingness by archaeologists to relinquish control over remains of the past (e.g. by returning the dead for reburial by descendent communities) must be carefully distinguished from the abandonment of archaeological interpretations in favour of a particular community's mythical beliefs about the past. The latter would be to abrogate the virtue of truthfulness. Respect for indigenous beliefs and interpretations should not lead archaeologists to abandon their archaeological understanding of the material they uncover.

The background to the NAGPRA legislation, and its implications, run through several of these chapters. Douglas Lackey addresses the issue head on, examining the ethical principles behind the aims and operation of the Act. Like Cooper, he argues that respect for indigenous beliefs and practices must be viewed alongside considerations of other and equally legitimate demands, including those arising from science and aesthetics. He questions whether the claims of indigenous communities to possess and perhaps rebury or destroy human remains or cultural objects should in ethical terms outweigh the desire to study or inspect (have access to) those remains. NAGPRA makes no reference to the competing demands of science or aesthetics, but simply seeks to return objects to their rightful owners. Lackey concludes that the ethical argument is not so simple, and that, on ethical grounds, competing claims cannot always be so easily dismissed.

The recurrent contention that archaeological or cultural remains cannot be owned absolutely in the same way as most other private property leads to the concept of 'stewardship': that archaeologists or others who possess these remains hold them in trust for the wider community. Attractive though this idea might be, Leo Groarke and Gary Warrick demonstrate its inadequacies, for 'stewardship' is exercised on behalf of another, but in this case that 'other' is hard to identify. Not only is the concept of stewardship vague, but it is impracticable, since it assumes that it is possible to manage the archaeological resource in the interests of all stakeholders, whereas in reality many of those will make conflicting demands (for preservation, ownership, redevelopment, etc.). It may be more appropriate to regard the archaeological profession as only one among several interest groups whose competing claims might more appropriately be decided in the political arena; archaeologists cannot at one and the same time be advocates for the archaeological resources and adjudicators in disputes about them. Furthermore, Groarke and Warrick argue that there is more to ethics than stewardship and that archaeologists' ethical obligations go much further than this and include commitments to honesty, openness and professional standards. They propose that the principle of stewardship should be coupled with a principle of archaeological professionalism.

Many see the ethics of dealing with the remains of the past as focused on the claims and obligations of living communities. An alternative view, however, argues that we also have obligations towards the dead themselves. This is the view taken by Colwell-Chanthaphonh and Ferguson in the context of Virtue Ethics, as we have seen. It is developed further in the two contributions to the third section of this volume. Geoffrey Scarre draws attention to the second principle of the Vermillion Accord, which requires respect for the wishes of the dead concerning the disposition of their remains, wherever those wishes are known or can be reasonably inferred. Archaeologists whose work disturbs remains of the dead frequently try to act with great sensitivity towards the feelings of descendent communities. It is a very different thing to claim that the wishes of the dead in their own right should be respected. Scarre argues that although we may believe that death is an end to existence, in another sense people can be injured after death if their posthumous wishes or desires are not respected. Dead people remain in many respects interest-holders, and their memory or reputation may be harmed by things which happen after their death. This does not mean that the interests of living archaeologists (or developers) may not often override the claims of the dead, but it raises an issue that requires further debate.

Sarah Tarlow also argues that dead people may be harmed by activities in the present, and emphasises the need for research on human remains (as in the sphere of medical research) to be justified by a demonstrably beneficial consequence. She furthermore points to the special responsibility that archaeologists have in interpreting or reconstructing the lives or physical appearance of dead individuals. Is it ethical to construct unflattering depictions of the humans who are being studied? The question is not simply one of honesty and accuracy (principles to which all archaeologists should subscribe) but concerns the dilemma posed by hypotheses or interpretations which may be more loosely tied to the archaeological evidence. Tarlow also observes that however much archaeologists seek to operate sensitively with regard to others, conflict is almost inevitable when dealing with people whose ethics are differently constructed from our own; that, in essence, there can be no absolute set of ethical principles that we can expect everybody to accept.

The final trio of chapters in this volume address the idea that cultural and archaeological remains cannot belong to private owners, local communities or interest groups in any absolute way since they must be considered the common heritage of humankind. Some forty years ago the Government of Malta proposed to the United Nations that the oceans should be regarded as the common heritage of everyone, and the concept has been applied to other extraterritorial entities such as outer space or Antarctica. Sandra M. Dingli argues that the same rationale should apply to archaeology, on the basis that the past belongs to no one, but is instead the shared cultural heritage of everyone, including future generations. This leads her to three important consequences: that the past must be managed for the benefit of all humankind; that it must be conserved for future generations; and (perhaps more controversially) that it should be used for exclusively peaceful purposes. She suggests that such an approach would also produce an enhanced understanding of archaeological sites and remains, leading away from politically motivated or trivialised interpretations to a more sophisticated reading of the past. It would also raise international awareness of the need to safeguard the cultural heritage against chronic problems of damage and destruction.

Atle Omland explores the same question of 'common heritage' through the medium of the UNESCO World Heritage concept and the designation of sites as part of that World Heritage. Despite various objections that have been raised against the World Heritage Convention, he argues that it provides a global ethical solution to the worldwide destruction of sites by establishing an international fund for their protection and by encouraging respect for the cultural heritage of others. Like Dingli, he sees World Heritage as an instrument for peace, and urges that cultural heritage be depoliticised to avoid its abuse by nationalist interests. Such an approach does not exclude the use of cultural heritage by local groups such as indigenous peoples seeking to maintain their identities, but Omland observes the dangers of 'essentialist' notions of culture and the exclusion of 'strangers' – refugees, stateless people and immigrants – that current approaches generally entail. A more inclusive understanding of the global cultural heritage would overcome these restrictions.

The final chapter considers in detail the criteria used for selecting cultural and archaeological sites for inclusion in lists of places or monuments to be protected and preserved. Robin Coningham, Rachel Cooper and Mark Pollard observe that one criterion that is frequently cited is that certain sites are 'unique' or 'valuable' in some special sense that sets them apart from the rest. The concept of uniqueness is particularly problematic and open to a wide diversity of interpretations; the 1980 ruling that Mohenjodaro and Harappa were not sufficiently different from each other for both to merit inclusion in the World Heritage list strikes many archaeologists as absurd. The preservation of the 'unique' timber circle of Seahenge by the removal and conservation of its timbers elsewhere raises further questions about the values and criteria (here academic rather than symbolic or aesthetic) that drive decisions about the archaeological heritage. The chapter returns us to the practical difficulties that lie behind the implementation of any ethical code for the ownership and protection of archaeological remains.

We expect that readers of this volume will be left not with solutions but with a series of questions. Although the chapters do not provide tailor-made answers or quick fixes to specific problems about archaeological practice, we hope that they will stimulate wider reflection on the key issues they raise. Do archaeologists have some privileged status in dealing with the remains of the past or deriving meanings therefrom? For what reasons should we consider cultural and archaeological remains to be different from other kinds of material product or possession? Do we have obligations to the dead themselves, and not just to their living descendants? Do the past and its remains belong to anyone (everyone?), or do they have a value which transcends ordinary concepts of property? Is it ethically acceptable to use the archaeological record to support particular ideas of identity or belonging? These are just a few of the questions that are raised in the chapters that follow. We hope that readers will find many of their conventional notions challenged, and be inspired to seek new and deeper meanings for an ethics of archaeology.

PART I

The ownership of cultural objects

CHAPTER 2

Cultures and the ownership of archaeological finds

James O. Young

The question of who ought to own the artefacts archaeologists find has generated a vast literature. Lawyers, archaeologists, anthropologists, museum curators, aboriginal rights activists and others have written extensively on the question of who has a right to archaeological finds.[1] This literature has been part of the larger literature concerned with cultural appropriation. With very few exceptions, philosophers have had nothing to say about the appropriation of archaeological finds.[2] This is unfortunate since ethical questions lie at the root of the legal and public policy debates about ownership of archaeological finds. This chapter is designed to provide the ethical framework required for the resolution of some of these debates. I am particularly interested in the suggestion that a culture can have a claim on archaeological finds. My hypothesis is that, some of the time, a culture has a rightful claim on archaeological finds.

CANDIDATE OWNERS

At least four types of candidates can be identified as possible rightful owners of archaeological finds. The first possible owners of find are individuals. These individuals could be either individual people or institutions such as museums. Individual owners could be those who have found artefacts or those who have fairly acquired them from the individuals who have. Alternatively, a find might be owned by a culture. So, for example, one might hold that some find belongs to the members of Greek culture. One also hears the suggestion that archaeological finds are part of the patrimony of a nation. This is the view adopted by the Government of Mexico, which claims ownership of all pre-Columbian artefacts in the country. Similarly, in Scotland and Denmark all archaeological finds belong to the Crown (Gerstenblith 1995a). The same view is implicit in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property. Finally, certain pieces of tangible cultural property are held to be the common inheritance of all humanity. This is the view adopted in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Preamble to this document refers to some cultural property (which will include certain archaeological finds) as 'the cultural heritage of all mankind'.[3] The 1972 UNESCO Convention for the Protection of World Cultural and Natural Heritage takes a similar stand. It classifies certain items of tangible cultural property as 'the heritage of all the nations of the world'.[4]

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[1] In addition to works cited below, some of the most noteworthy contributions to the literature include Battiste and Henderson 2000, Brown 1998, Handler 1991, and Nason 1997. Two law reviews have devoted entire issues to the ownership of tangible cultural property, including archaeological finds. See *Arizona State Law Journal* 24 (1992), 1–562 and a Special Issue of *University of British Columbia Law Review* 29 (1995), 1–345.

[2] The exceptions: Dummett 1986, Thompson 2003, and Warren 1999. See also Wylie 1995.

Let me begin by discounting the suggestion that the whole of humanity is the rightful owner of archaeological finds. I am not unsympathetic to this suggestion. As we will see, it will often be difficult to identify an individual who has, or group of individuals who have, a clear claim to have inherited certain archaeological finds. In such instances we may want to say that everyone has as good a claim as anyone else. If everyone has an equal claim on some item, we may say that it belongs to everyone or, alternatively, to no one. The trouble with this suggestion is that it has, in practice, very little value. We are seeking guidance in answering questions about who ought to possess artefacts that cannot be possessed by everyone. The proposition that something is the patrimony of all does not assist us in answering this question. Although one can wonder whether archaeological finds are owned in the same way as ordinary personal property is owned, at the end of the day we have to determine who ought to have them. The people who ought to have them might as well be called the owners. (Notice that artefacts are different from items of intellectual property. All of humanity can possess some item of intellectual property in a way that they cannot possess some amphora or a stele.)

Although I will defend the suggestion that cultures own some archaeological finds, I do not want to deny that individuals and nations can also own them. Sometimes, I think, an individual can acquire a right to archaeological finds simply by appropriating them from a state of nature.

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[3] Found at http://www.icomos.org/hague/HaguePreamble.html.

[4] Found at http://sedac/ciesin.org/pidb/texts/world.heritage.1972.html.

At the same time, I will attempt to establish the limits on this right. The suggestion that a nation is the rightful owner of certain archaeological finds can also be defended in some contexts. Sometimes, however, it seems that a culture will have a stronger claim on finds than a nation. Consider Mexico's claim to own all of the pre-Columbian artefacts within its borders. Mexico, like many nations, is a multicultural state. It is composed of the descendants of the conquistadors as well as the descendants of the indigenous population. One of the indigenous cultures within Mexico may have much better claim on certain pre-Columbian artefacts than does the nation as a whole. A similar point can be made about the US, Canada and many other nations. An aboriginal culture in one of these countries may have a stronger claim on a find than the nation as a whole. (In the case of culturally homogenous nations, the situation will be different.) The principal aim of this chapter is to establish when and on what basis a culture has a legitimate claim on particular articles of cultural property, including archaeological finds.

Before going any further, a preliminary point needs to be addressed. I have spoken of cultures, but one might wonder about how a culture is to be defined. One might even wonder about whether the concept of, say, Greek culture can be defined. I certainly assume the concept of some specified culture can be defined. I need to assume this because a definition of some culture specifies membership in the culture and thus identifies the people who may have a claim on some archaeological find. I do not believe, however, that a culture can be defined by giving necessary and sufficient conditions. That is, I do not believe that necessary and sufficient conditions can be given for membership in a given culture. (So I am not an 'essentialist' about cultures.) Rather, I believe that a concept such as the concept of Greek culture is (in Wittgenstein's sense of the word) a family resemblance concept. Someone is a member of a culture who has enough of an amorphous set of cultural traits. So, for example, one cannot define Canadian culture in terms of some shared set of beliefs, practices, customs and values. Rather, someone belongs to Canadian culture who has enough of a pool of traits: fanaticism about ice hockey, commitment to universal health care, suspicion about American foreign policy, and so on. Of course, matters are more complex than this picture indicates. People can belong to more than one culture at a time. So, for example, someone might belong to Western culture, Greek culture, Cretan culture, Christian culture, and so on. I cannot here do justice to all of the issues raised in this paragraph. I will simply assume that it is possible to identify the members of a culture who are supposed to own some archaeological find.

TWO BASES FOR A CULTURE'S CLAIM ON ARCHAEOLOGICAL FINDS

We need to begin by asking what gives a culture a claim on archaeological finds. Let me begin by stating the obvious. Cultures do not make archaeological discoveries. Individuals or groups of individuals do. So it is hard to see how a culture can claim to have appropriated artefacts that exist in a state of nature. That being the case, it seems to me that two basic approaches are available.

The first sort of approach reflects on the history of some recovered artefact and comes to the conclusion that we can trace ownership of an artefact from its original owners to the members of some contemporary culture. This approach says that a culture inherits a right to certain artefacts from those who produced them or who were otherwise the last rightful owners.

The second sort of approach to the ownership of archaeological finds takes as its starting point the claim that the archaeological record of the past has value for all of humanity. On this view, no one has inherited a claim to many archaeological finds. Instead, we should focus on the current value of archaeological finds. The second approach encourages us to ask how finds can have the greatest value for all of humanity. Sometimes, at least, the answer to this question will be that a culture ought to have certain finds, usually one with certain affinities to the culture which produced the found artefacts. In my view, the second approach is the best. Many archaeological finds are in a state of nature and without owners. Nevertheless, since they often have great value for all of humanity, it is wrong to say that they can be appropriated by whoever finds them. Since not everyone can possess finds, we need to ask pragmatic questions. We need to know who will benefit most from possession of a given artefact.

My strategy will be to examine critically the suggestion that cultures inherit a right to certain archaeological finds. I will then explain why I believe that it is more fruitful to focus on the value that certain finds have for particular cultures. I will call the first approach the *inheritance approach.* The second I will call the *cultural value approach.*

THE CONCEPT OF INHERITANCE DOES NOT APPLY

The first problem with the inheritance approach is that it employs a concept, that of inheritance, that it has no application in the present context. Central to the concept of inheritance is the notion of respect for the final testamentary wishes of property owners. In contexts where the testamentary wishes of owners cannot be known or do not exist, the concept of inheritance does not apply. I suggest that archaeological finds often exist in such contexts.

Archaeological finds typically did not begin their lives as the property of a culture. Most of the things archaeologists dig up were the property of an individual person, a family, a clan, a religious community or a state. Generally, we can have no idea what their testamentary wishes might be. When we do not know the testamentary wishes of the last owners, they are in a position similar to that of people who die intestate. When people die intestate, certain procedures for deciding who inherits are followed. These procedures make counterfactual presumptions about who the beneficiaries would have been, had a last testament been formulated and recorded. It is highly unlikely that the intended beneficiaries of the last owners were the members of a culture as a whole. On the contrary, it is likely that an individual would have intended that property remain within his family. Probably this would be so, even when family members do not share his culture. I know that I would like my children to inherit my estate, even if they should move to Chad, profess Islam and speak Arabic. Religious communities would have liked to retain ownership within the communion and so on. A Greek from ancient Sparta would probably be horrified by the prospect of his property going to modern Athens, even if that is the seat of the closest surviving culture.

A culture might be thought to be the beneficiary of last resort. Archaeological finds often originate in the remote past. Consequently, it is often impossible to identify an individual owner's next of kin. Frequently states, clans and religious communions have ceased to exist. Consequently, none of these can be a beneficiary. This being the case, it might seem reasonable to adopt the counterfactual that original owners would have wanted a culture to inherit their property. This strikes me as groundless speculation. It seems just as likely that some individuals in the remote past would have wished their artefacts to be possessed by the wealthiest and most powerful people in the present. Perhaps they would have hoped that their property would be possessed by people who can ensure that it receives a wide audience. Perhaps the ancient Irish would have wished that archaeological finds go to America, where a majority of their descendants lives. There is no way to know which of these counterfactuals, or any of an array of others, is true. Indeed, according to some philosophers of language, one can reasonably doubt whether any of them is true. The situation is complicated further by the fact that we have no reason to believe that all members of a past culture would have the same default testamentary wishes. I conclude that cultures cannot inherit rights to archaeological finds.

CULTURAL CHANGE AND CLAIMS TO FINDS

Even if we grant that the concept of inheritance could play a role in grounding a culture's claim to archaeological finds, problems remain with the inheritance approach. In this section I identify a problem that arises since cultures evolve and change through time. It is not clear that a culture has a claim on any past culture to which it is not identical.

Cultures are constantly in flux. This partly explains why giving necessary and sufficient conditions for the identity of a culture through time is probably impossible. Nevertheless, it seems clear that after a sufficient degree of cultural change has occurred, one culture has ceased to exist and a numerically distinct one has come into existence. Consider, for example, the culture of the Greeks. There is no obvious sense in which modern Greeks share a culture with their ancient ancestors. Ancient and modern Greeks do not share a religion, a mutually intelligible language, economic activities or, for the most part, cultural practices. Certainly, cultural identity is not the same as ethnic identity. Even if it were, ethnicity is as fluid and easily blurred as cultural identity.

To complicate matters further, cultures can both merge and diverge. That is, two quite distinct cultures can have a common root while a single culture can have multiple origins. When cultures have diverged, a question will arise about which of the cultures has a better claim on artefacts produced by the original culture. Arguably, ancient Greek cultures have diverged into a variety of European cultures, giving many different cultures a claim on the cultural property of ancient Greece. When cultures merge other questions arise. Perhaps, for example, a modern Greek culture may be identified but ancient Greek culture was not unified. One may wonder about whether a composite culture inherits rights to the cultural property of all of its component cultures or none of them. In all probability, the ancient Athenians would have found anathema the suggestion that non-Attic Greeks had any claim on cultural property produced in Athens.

Since cultures can change, merge and diverge, the inheritance approach to cultural ownership faces another difficulty. Imagine that, contrary to what I think likely, some people or institutions in the past would have wished their property to be inherited by the people who share their culture. The trouble is now that it will often be difficult to identify a