

Brian Schrag's Commentary on "With Bones in Contention: Repatriation of Human Remains"

Commentary On

With Bones in Contention: Repatriation of Human Remains

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Two sets of issues run through these cases and raise ethical issues at the very core of the research activity of archaeologists and physical anthropologists as well as those of museum archaeologists and physical anthropologists. The first is whether anthropologists and archaeologists in the United States should comply with the Native American Grave Protection and Repatriation Act (NAGPRA). The act places conditions on the intentional excavation and removal of Native American human remains and sacred objects found on federal or tribal lands as well as the handling of remains in cases of inadvertent discovery. It also requires the repatriation of such materials already held in collections controlled by federal agencies and museums. Should scientists and museums comply with a law that arguably interferes with the world's acquisition of knowledge of the development of Native Americans and their

societies and more generally of humans, human societies and their place in the world? If one acknowledges that the law is morally justified, shouldn't scientists simply accept that and immediately begin to comply fully until the law is changed? On the other hand, one might argue that scientists should not comply with such a law if the law is morally unjustified. This argument raises the prospect of civil disobedience by scientists to protest a morally unjustified law that impedes legitimate scientific activity.

The larger and prior issue, therefore, is whether such a law is morally justified. The law appeals to certain general moral considerations for its justification. If those general moral justifications stand, they may have implications for the ethical conduct of archaeologists, anthropologists and museums all over the world, whether laws similar to NAGPRA exist or not. This is part of the point raised in Case 6. (Indeed, such moral justifications have been invoked from South Africa to Australia to Israel to restrict the work of scientists who deal with ancient human remains.) On the other hand, if those general moral considerations are not sufficient to justify such laws, that fact undermines the laws' moral justification and moral claims made for restrictions on scientific activity in parts of the world where no such laws exist. I will focus my comments on the moral considerations raised by scientific research on human remains.

If one can establish that such laws lack moral warrant, that has implications for many of the particular ethical issues raised in this set of cases: 1) Should Justus comply with NAGPRA? 2) Should she challenge Dr. Hops for not doing so? 3) Should she reveal to others Dr. Hops' intent to thwart immediate and full compliance with NAGPRA? 4) Does Justus escape her ethical research responsibilities by moving to France, where NAGPRA does not apply? In this commentary I shall focus on these fundamental issues, rather than particular ethical issues raised in these cases and primarily on the moral guidelines for dealing with human remains.

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The scientific value in studying human remains

How should scientists regard and treat human remains? This question goes to the

heart of the scientific activity of archaeologists and physical anthropologists since ancient human remains are a fundamental source of research data. We recognize that the study of human remains -- whether recent or ancient -- can have great scientific research value. Medical schools' use of cadavers has been essential for the training of physicians and scientists. Autopsies are invaluable in understanding disease processes in humans and in some cases important for forensic science. The study of skeletal and mummified remains has sometimes led to a better understanding of human health. More broadly, the study of fossilized human remains can yield important knowledge about the development of humans and human societies and the place of humans in the world of living things. The study of the remains of people of a particular culture and especially the study of human remains in the context of burial sites can help us understand the history and development of that culture and its relation to other cultures and can advance our understanding of the development of human societies. In some instances, we learn lessons from earlier cultures that are important for future generations.

For all these reasons, the study of human remains can increase our understanding of what it is to be human and the place of humans in the world in general and in our culture in particular. That knowledge has both intrinsic and instrumental value. All humans can benefit from it, and in that sense, all humans have a stake in its acquisition.

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Essential techniques for scientific study

However, consideration of the value of such study, particularly in physical anthropology and archaeology, cannot be divorced from the scientific processes and techniques required to acquire that knowledge. There is a need to maintain permanent collections of remains that can be regularly studied by the scientists and their students. Techniques of statistical research require as large a sample as possible. Bones once studied may be needed again when new analytic techniques become available, e.g., for the dating of bones or extracting of antibodies or genetic material to trace the evolution of specific diseases. Good science would require the preservation of evidence to allow other researchers to reexamine the evidence to check for misinterpretations, inaccuracies and bias of the researcher. (Meighan, 1994, 1992)

Recognizing the value of scientific knowledge and the necessary conditions for acquiring it, however, does not establish that its value is trump and that it automatically overrides other conflicting values and other ethical considerations. The value of the acquisition of knowledge from the study of human remains can conflict with an obligation to show basic respect for human remains, for the wishes of the dead **or** direct descendants and for a community's religious or cultural traditions, and a sensitivity to the historical context in which human remains have been acquired.

The principles of ethical research on humans and the moral status of human remains

How should human remains be regarded? Should they be viewed solely as artifacts that are a means to important knowledge? As such, are human remains morally indistinguishable from, say, geological samples of metamorphic rock or marine fossils embedded in limestone? Is the notion of desecration of human remains based on anything other than the notion that the remains are human? Should the fact that they are human remains require that they be viewed with a respect that derives from the respect we accord humans? If so, they deserve treatment that in some ways is different from that of a sample of marine fossils. For the same reason, the moral status of human remains differ from the status of funerary objects buried

with them.

In experimental research on living human subjects and animals, we have gradually recognized the fact that the value of scientific knowledge does not automatically override other ethical considerations. It is instructive to consider what principles we have come to accept in guiding research on human subjects that might be usefully extended to research on human remains. (See, for example, other cases in this collection that deal with research on humans and human tissues.)

We believe that humans deserve to be treated with special respect as living, rational, autonomous beings. Some would say that, at death, the body loses most of what commands our respect; what is essentially human is now gone. The body is no longer a living human capable of rational volition. The respect we owe human remains is simply a kind of penumbra effect, derivative of the respect we owe living humans and including an obligation to respect the wishes of individuals regarding their remains or the wishes of those who legitimately speak for them. When dealing with cadavers or subjects of autopsies, for example, we believe we have a duty to treat them as recently deceased humans and an obligation to respect any known wishes they expressed when alive regarding the treatment of their bodies. Thus, if we know that persons have explicitly expressed the desire not to have an autopsy or that their bodies not be used in medical research or medical education, then we believe those wishes ought to be respected. If next of kin make similar requests, we think we ought to respect those wishes as well. (On the other hand, when we find the unidentified body of a person we suspect may have been the victim of foul play, we think we "owe" it to the victim to use scientific study of the body to try to identify it, notify the next of kin and let the body "tell its story" in the interests of justice.)

More generally, we presume that we ought to obtain advanced consent from persons while they are living or from relatives or guardians after their deaths before we use their bodily organs, perform autopsies or use their bodies for scientific research or medical education. There is a parallel here with the ethical guidelines we now embrace regarding experimental research on living humans. In general, we think that it is morally required to obtain informed consent from subjects before engaging in nontherapeutic research on them; if they are not in a position to give their consent, we think we are obliged to obtain proxy consent from next of kin or guardians who can speak for them. For all these reasons, we think it inappropriate to simply "harvest" bodies of the recently deceased from hospitals, funeral homes

or the local graveyard, even though the practice may advance the cause of science. The principle is that we have a *prima facie* obligation to give greater weight to respect for the wishes of the deceased or their next of kin over the value of the advancement of scientific knowledge.

Perhaps that obligation of respect "wears off" with time when the possibility of obtaining direct or legitimate proxy consent disappears. Should our view of human remains be a function of the age of the remains or of the possibility establishing legitimate relational connections? Should that view change as the age of the remains increases and any wishes of the deceased or of close relatives are lost in the mists of time? "Ought implies can," and saying that one ought to obtain the consent of the deceased or relatives presupposes that is possible. In instances in which such consent is not possible, it may be acceptable to use the remains as the subject of scientific investigation and view them much as we might view any object of the natural world worthy of scientific investigation. Thus it is not wrong to study the remains of the 5,300-year-old "ice man" recently discovered in the Tyrolean Alps. (Incidentally, we can reasonably infer the wishes of the deceased, even for ancient human remains in some instances. The Pharaohs of Egypt, for example, went to extraordinary lengths to try to prevent their remains from being disturbed. It is unlikely that they would have given their consent, had they been asked if it would be acceptable after 3000 years, say, to disturb their burial chambers, remove their mummified remains and make them the subject of study and exhibition.) In many instances, however, one cannot infer the wishes of the deceased, and no living person can legitimately claim to speak for the dead.

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Human remains as property

The debate on how to view and treat human remains is sometimes cast in terms of the notion of property. People claim to "own" the remains of other humans. There are arguments over who "owns" the dead: scientists, museums or descendants; or more generally, who "owns" the past. (Messenger, 1989; McBride, 1983) People may assert their ownership of human remains in virtue of the fact that they are next of kin, the only living relative, a direct descendant or a "cultural descendant" of the person whose remains are in question. Some who have discovered remains claim to "own" them by virtue of having "mixed their labor" with them in the process of

discovering them. Others claim that the remains of the dead belong to the living human race and that museums are, appropriately, the custodians of the remains on behalf of the human race.

I believe it is a mistake to cast the issue in terms of ownership. Are human remains the sort of things that should ever be viewed as property? Some economists and social philosophers to the contrary, it is not obvious that every material thing in this world is properly classified as potential or actual property.[\(14\)](#) It may be the case that no one "owns" human remains and to argue over *who* owns them is to beg that question. Familiar and decisive moral arguments have been made against the claim that humans can be justifiably viewed as property and owned by other persons. Why should we assume that no one can, with moral justification, claim to own a human being but can be morally justified in claiming to own the remains of that human being? I believe that the familiar arguments for respect of humans create a presumption against the notion of ownership of human remains. Rather than debate that issue or beg the issue of whether human remains can be owned, it may be more useful to focus on the point of asserting ownership.

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Custodial responsibility for human remains

Some assert an "ownership" over human remains when what they really wish to assert is that they should have "exclusive trustee or custodial responsibility" for those remains -- that is, that one person, group of persons or corporate entity has exclusive power to decide what happens to particular human remains. That is a weaker, more restrictive notion than ownership since it does not entail that trustees or custodians could simply do anything they wish with the remains, including selling them. This sense of custodial responsibility may, for example, describe the role of a Christian church in the maintenance of relics of saints. Cultural groups may see themselves as acting on behalf of the remains of ancestors but would never consider that they have ownership rights in the sense that they could dispose of the remains in any way they pleased. Museums may view themselves as acting as custodians for remains on behalf of the general public, and scientists may claim the same role on behalf of the scientific community.

Sometimes the notion of "ownership" of human remains is invoked by someone or some group to assert an even weaker claim. They do not argue that they should have exclusive custody, but that they should have *some* say in what should be done with particular human remains; they assert that they are entitled to be involved in negotiations regarding the disposition of remains.[\(15\)](#)

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Moral justification of custodial claims

What justifies a moral claim to be the sole custodian or trustee for particular human remains? I want to consider several criteria that have been put forward.

1. Acting as proxies for wishes of the dead

Based on the arguments above, the strongest case for an assertion of exclusive custody would involve circumstances in which the deceased person's wishes concerning the disposition of remains is clear. A paradigm case of justification would be the instance in which individuals, before they die, freely and explicitly entrust another person or institution with their remains. Absent such an explicit directive, the presumption is that next of kin or direct descendants have the strongest claim to assume and maintain custody of human remains on the ground that they are best positioned to speak as proxies for the dead. The argument is

based partly on a claim they best understand the religious and other cultural beliefs likely to shape the wishes of the deceased. Distant relatives, friends and members of the community in which the person actually lived have a weaker custodial claim. As the relational bonds become weaker, the presumption of a custodial claim also becomes weaker.

A graphic illustration of the violation of this presumption was the action of the U.S. Surgeon General in 1868, ordering all Army field officers to "harvest" Native American bodies from the battlefields and ship them to Washington. The remains were used for studies of Indian craniums to determine whether the Native American was intellectually inferior to the white man. The Smithsonian has custody of more than 2300 Native American skeletons obtained in this way.[\(16\)](#)

This action clearly violated respect for the wishes of the dead, their next of kin and their tribes. For these considerations, the initial collection of these human remains by U. S. officials cannot be morally justified and undercuts any custodial claim the Smithsonian has for retaining these remains. (Although the Smithsonian is subject to repatriation laws separate from NAGPRA, nevertheless, the moral point remains the same.)

2. Acting as guardians of the dead

Sometimes the claim to custodianship is legitimately based not on the wishes of the dead or persons reasonably positioned to speak on behalf of the dead, but rather on an appeal to respect for the moral or religious obligations of the living. In certain circumstances, the living, in virtue of their relation to the dead or because of cultural or religious beliefs, perceive an obligation to act as guardians of the remains of the dead or observe taboos that forbid the disturbing of the ancestral dead. Here the ground of the moral obligation shifts from a respect for the dead to a respect for the obligations of the living. In certain circumstances it is legitimately thought to be morally wrong to interfere with or to coerce persons to prevent them from carrying out what they perceive to be their moral obligations. If it is a part of one's familial or cultural tradition that the living have a role as guardians of the remains of their ancestors, that creates an additional legitimate claim for the custodial role.

In Case 1 in this set of cases, human remains of the Macaque band were intentionally excavated from the reservation of the Macaque tribe and deposited at

the Museum of the High Plains. No one disputes that these remains were ancestors to living members of the band. Presumably the excavations were done without the consent and against the wishes of the band at the time. Although the living members of the band may not have personally known the deceased, they may legitimately claim to be their descendants and to be tied to them by religious and cultural traditions as well. They have a strong claim to be able to speak as proxies for the dead and to act as guardians of the dead. In such circumstances, it is reasonable to conclude that the claimed scientific value of research on these remains does not outweigh the custodial claims of the tribe. Hence, there was no moral justification for the original excavation of the remains, and there is no moral justification for the museum's continued custody of the material without the consent of the Macaque tribe.

The notion of desecration of grave sites and of human remains, it seems to me, is best understood from this perspective. The disturbing of remains and associated funerary objects is not so much a moral violation of the dead as of the religious beliefs of the living. On this analysis, the "harvesting" of Native Americans from the battlefields was also a violation of the religious beliefs of the living; it prevented them from discharging their obligations in caring for the dead. In Case 1, the initial excavation of the burial site was a desecration because of the sense of interference with the guardianship role of the current tribe members rather than the fact that the remains were in some sense violated. It is not clear that all acts of excavation of human remains automatically fail to treat human remains with respect any more than it is clear that all autopsies fail to treat human remains with respect. To the extent that an excavation fails to treat human remains with respect (for example, the looting of a grave site strictly for the purpose of recovering treasure or to sell the bones), that may be viewed as desecration. The notion of desecration, however, carries no moral weight over and above the moral concerns for violating the wishes of the dead or interfering with the guardianship obligations of the living.

In contrast to the paradigm case of justified custody, there are also paradigm cases in which it is no longer rational to assert a claim of moral privilege in assuming custody of human remains based on considerations of wishes of the dead or legitimate guardianship. The "ice man" mentioned above, it seems to me, is such a case. We know nothing of the "ice man's" wishes in this regard; no one can reasonably be said to speak for the remains or legitimately claim a religious obligation of guardianship for the remains.

3. Having the closest cultural affiliation to the remains

It is sometimes claimed that an existing cultural group possessing the closest cultural affiliation to the remains thereby has a morally relevant ground for asserting custodial rights to remains. (This notion is in fact included in the Native American Grave Protection and Reparation Act as part of the criteria of ownership or control of human remains.) That is a much weaker moral claim.

Presumably the assumption is that proximity of cultural affiliation indicates that the current cultural group shares with that earlier culture a set of beliefs (including religious beliefs and beliefs about the treatment of human remains) that reasonably warrant the current culture's acting as proxies for the wishes of the deceased. However, even if one can establish that a certain group is culturally closer to the remains than any other group, why should that be considered morally relevant? "The closest" may not be close at all. A group may be the closest to the culture of the remains and yet may not in fact share a significant set of beliefs or practices with the culture of the deceased. Unless one can show fairly definitively that the cultural connections are sufficiently close to justify the claim that the existing cultural group can speak for the dead, such consideration is morally irrelevant.

One cannot assume that all peoples have held the view that human remains are sacred and are not to be disturbed. It is not sufficient to note that humans have been buried with ritual in order to infer anything about their beliefs regarding how human remains are to be treated or if it would be wrong to disturb them. Some Christians, for example, would not view mortal remains as sacred or hold that disturbing them is a desecration.

Even if one could establish a direct cultural affiliation, it is not clear what moral weight that ought to carry. Suppose, for example, one discovers a burial site containing human remains that were clearly those of sacrificial victims. (Consider

the findings at Cahokia, near St. Louis, for example. [Iseminger, 1996]) It is possible that the victims shared the culture of the descendants and submitted to voluntary sacrifice. It is also possible that they were members of a rival and unrelated cultural tribe and were sacrificed involuntarily (murdered). In the latter case, it is not at all clear why any current cultural group that may be related to the culture at Cahokia has any moral claim to decide the disposal of the remains. Why should the descendants of those who murdered the victims have a moral claim on the custody of their remains? It may be as reasonable to think that these victims would prefer someone other than the murderer's descendants to make the decision, just as today, murder victims might well want a forensic anthropologist to examine their remains and "tell their story."

Sometimes the assertion is not that proximity in cultural affiliation allows one to act as proxy for the wishes of the dead but that current members of a cultural group own their culture and have exclusive claim to the custody of that culture. Only such members can decide to share the culture and cultural artifacts with the rest of the world. Native American heritage and its culture belongs to native Americans, and it is up to Native Americans to share that knowledge with others on their own terms. Consequently, excavation and study of human remains of the culture cannot be justified on the grounds that the world has a right to this knowledge. Nor can it be justified on the grounds that scientific study provides more reliable or accurate understanding of Native American culture than that embodied in the oral and nonverbal formulations of Native American cultures. (See Zimmerman, 1994)

4. Owning the tribal land on which remains have been discovered

NAGPRA suggests still another criterion that might have moral weight in determining who should have custody of human remains: If the remains are discovered on the tribal ground of a cultural group, then that group should have custody.

But suppose human remains that are carbon dated to be 10,000 years old are found on tribal ground, although the tribe has been known to occupy the land for no more than 1000 years. Consider, for example, a case in 1991 in which a road crew in Idaho found a skeleton on ancestral ground of the Shoshone tribe that turned out to be carbon dated at 10,600 years. It was immediately confiscated by the State of Idaho and returned to the Shoshone tribe, which has not been in Idaho for longer than 1,000 years. In a similar case, in 1988, an 8,000-year-old skeleton was

discovered on grounds occupied for only the past 500 years by southern Utes, who allowed DNA testing on the remains. It was impossible to establish that the skeleton was related to any modern tribe. Nevertheless, the remains were turned over to the tribe in 1993. (*New York Times*, September 30, 1996, A12 1-6; *New York Times*, October 22, 1996, A1)

In an even more dramatic case in August 1996, an 8,400-year-old skeleton was discovered in Kennewick, Washington. It appears to have Caucasian features, and archaeological analysis indicates it does not match any Native American tribes. This may be an extremely important set of remains for understanding the development of humans in North America. Nevertheless, the Umatilla tribe, under NAGPRA guidelines, can and has claimed the skeleton for immediate reburial. DNA testing of remains has been halted, and the disposition of the remains is unresolved at this writing. ("Science Scope," 1996; Slayman, 1997)

Although the tribe in each of these cases may have legal standing under state or federal reparation laws, it is not clear why that tribe has a stronger moral claim to those remains than anyone else. At some point, the rational connection between an ethnic group and human remains is too faint and distant to have any moral standing.

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The moral yardstick

One might reasonably argue therefore that the moral justification for custody claims for human remains is to be found on a continuum. At the one extreme, the wishes of the deceased, if known, or of next of kin or direct descendants, justifiably take precedence over the promotion of scientific knowledge. The same holds true for the respect for the religious or cultural beliefs of persons with clear and close cultural or religious connections to the person whose remains are in question. Here the guidelines of NAGPRA seem reasonable and justified. At the other extreme, human remains whose ethnic connections are lost in the mists of time are more reasonably viewed as "citizens of the world," and the presumption for custody favors scientists rather than any contemporary cultural group. Here the NAGPRA guidelines seem unwarranted and unsupported by the moral arguments. If I am right, then some parts of NAGPRA that assign "custody" of human remains are morally warranted and some are not.[\(17\)](#)

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Conflicts of self-interest

It is important to recognize that the issues here are not solely about the moral status of human remains or high-minded arguments over moral obligations to the dead or the living. Disputes couched in terms of the moral issues are sometimes really about the self-interest of the parties involved. Scientists who have trained for long years to practice their profession may see their careers disrupted if they cannot gain access to the materials that are central to their work. On the other hand, the claims of Native American groups may sometimes have less to do with respect for the dead than with establishing claims to land. Thus the Hopi and Zuni describe as "cultural thievery" recent claims of the Navajo to be descendants of the Anasazi and thus to have a claim to collections of human remains in various museums in the United States. They suggest the real motive of the Navajo is to reclaim almost 2 million acres of land given to the Hopi and Zuni by the federal government. (*Archeology, 1996*)

Application to Cases

What are the implication for these considerations for the cases? I will mention only

a few.

Case 1

It is reasonable to assume that the bones Justus is working on are, as they appear to be, clearly associated with the Macaques Tribe, and indeed the current members may be lineal descendants of the persons whose remains are in question. The law requires return of the bones, and the moral justification for custody clearly lies on the side of the Macaques. Possession here is not nine-tenths of the law. Morally speaking, it is no more up to Justus or Dr. Hops to decide when or whether to return the bones than it is up to a person who has stolen a car or knowingly received stolen goods to determine when or if to return them. Whether or not additional work on the bones constitutes further desecration is morally irrelevant. Even if it does not, that is no justification for delay. Additional work with the bones may increase our scientific understanding of the Plains tribes. But that fact, by itself, no more justifies continuing to retain and work on the materials against the will and without the consent of the current tribe than the possible benefit of research on syphilis justified continued research on black subjects in the Tuskegee experiment without the informed consent of the subjects. The fact that returning the remains interferes with the career development of Justus or Dr. Hops is also morally irrelevant.

Unfortunately for science, Justus should stop work and return the remains to the Macaques unless she can win their cooperation to allow further work. There are indeed instances of collaboration between archaeologists and native cultures in which reasonable agreements have been reached respecting the concerns of the culture and still allowing scientific work to be done. (See *Archeology*, 1995) If properly approached, the Macaque band might recognize the value of learning more about their cultural inheritance. (In this case, the way the Macaque band has been treated since 1934 may have hopelessly poisoned the situation.) If Justus' right to continue the research cannot be morally defended, then no funder could morally justify funding the research.

Notice how different the situation is morally if the remains are 10,000 years old and are being claimed, legally under NAGPRA, by a group that is known to have occupied the area for only 1,000 years. The moral claim to return the bones is much weaker (although not the legal claim.)

Case 2

Dr. Hops is in violation of the law here. If, as we have argued, she does not have the moral justification for custody on her side in this case, she cannot make a legitimate case for disobeying the law or for some sort of civil disobedience. Her actions cannot be morally defended; in this case, moral grounds are not sufficient to justify delaying reporting about the museum's collection or repatriation. This situation does raise ethical issues for Justus. What are her moral obligations to report a mentor who is in violation of a federal law? Would Justus be justified in revealing -- or is she obliged to reveal -- this secret to the Macaques? (See Bok, 1989)

Case 4

One of the consequences of a practice of disobeying the law is the encouragement of others to adopt the practice as well. If archaeologists develop a practice of violating the law whenever they think disobedience is justified by the importance of scientific research, then they should not be surprised if that encourages others to violate the law, particularly those who think the archaeologists' disrespect for the law justifies their own violation of the law, as in the case of Ten Killer's action. Archaeologists who behave in this way undercut their own appeals to respect for the law when, for example, they attempt to stop looters who rob grave sites and archaeological sites for the treasure and who destroy the archaeological evidence in the process.

Case 6

If we have argued correctly, Justus and all archaeologists have an overriding moral obligation to respect the custody claims of Native Americans in the kinds of cases we indicated and a much weaker moral obligation in cases of the sort where claims to speak for the dead or act as guardian for the remains are much less legitimate. One cannot escape a moral obligation simply because no parallel law legally requires it. Moving to France may help Justus avoid a legal prohibition, but her moral obligations remain unchanged.

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- (14)What I have in mind here are the arguments over the moral acceptability of selling human blood or other body parts from either the living or the dead.
- (15)See for example the Vermillion Accord on Human Remains, adopted at the World Archaeological Congress in 1989, which recognizes the legitimacy of the need for respect for human remains, for the wishes of the dead, for the wishes of the local community and relatives and guardians of the dead, for the scientific research value of skeletal, mummified and other human remains when such value is demonstrated to exist. It further recognizes that agreement on disposition of human remains shall be reached by negotiation on the basis of mutual respect for the legitimate concerns of communities of the descendants as well as the legitimate concerns of the scientific and educational communities.
- (16)See the Background section of the North American Grave Protection and Repatriation Act, Report 2nd Session.

- (17)NAGPRA, Section 3, Ownership, states: "The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act shall be (with priority given in the order listed) (1) in the case of Native American human remains and associated funerary objects, in lineal descendants of the Native American; or (2) in any case in which such lineal descendants of the Native American cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony: (A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered; (B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, state a claim for such remains or objects; (C) if the cultural objects cannot reasonably be ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission as the aboriginal land of some tribe (1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or (2) if it can be shown by a preponderance of evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects." What I have argued is that the moral justification for sections 2 (A), (B), and (C) is much weaker than for section 1.