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# The Public Interest in Cultural Property

John Henry Merryman†

*How will we know it's us without our past?*

—John Steinbeck<sup>1</sup>

*Antiques are all we have. They're all we can depend on and the only things mankind can look forward to. They deserve protection.*

—Jonathan Gash<sup>2</sup>

*Adieu le passé, c'est aussi adieu la postérité.*

—Jules Michelet<sup>3</sup>

*I say to people: "You want your children to be educated. You don't want them to go around in loin cloths and rediscover the wheel. Take it another level. There are certain things from the past that ought to be maintained in order to know where we've come from and to give us an idea where we're going."*

—Marvin Schneider<sup>4</sup>

## INTRODUCTION

Public questions affecting cultural property frequently arise: Should an old building be preserved? (Many are, pursuant to "historic preservation" laws.) Should the Crown of St. Stephen be returned to Hungary? (We did return it, over the protests of Hungarian emigres and a number of prominent public figures, including Senator Robert Dole.) Should the United States become a party to the 1970 UNESCO Convention<sup>5</sup> or the

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This Article is part of a work in progress on cultural property law and policy. I am grateful to Mauro Cappelletti, Wanda Corn, Albert E. Elsen, Daniel A. Farber, Marc Franklin, Lawrence Friedlan, Robert W. Gordon, Hermann Knott, Randall R. Lee, Jody Maxmin, John Meyer, Diane Middlebrook, P.J. O'Keefe, Nancy Packer, Antony Raubitschek, Peter Stansky, Rennard Strickland, and Richard Terdiman for criticisms and suggestions and to David Chow and Mary White for research assistance. Errors of fact, judgment, and taste are of course mine.

1. J. STEINBECK, *THE GRAPES OF WRATH* 114 (Penguin Books ed. 1976).
2. J. GASH, *PEARLHANGER* 2 (1985).
3. *Quoted in* Lachs, *The Defenses of Culture*, 37 *MUSEUM* 167, 168 (1985) ["Farewell to the past is also farewell to posterity." Ed.].
4. *Quoted in* Dunlap, *Whodunit (and a Howdidtheydoit?) on Broadway*, *N.Y. Times*, Aug. 23, 1988, at B3, col. 2.
5. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import,

1954 Hague Convention?<sup>6</sup> (We did join UNESCO 1970 but not, to our discredit, Hague 1954.) Should we attempt, as do most other nations, to control the export of cultural property? (Cultural objects, other than those illegally removed from federal or Indian lands, still are freely exportable from the United States.) Should "military necessity" justify the destruction of irreplaceable cultural monuments in time of war? (It does, under contemporary rules of international law.) How seriously should we take the practice of counterfeiting cultural objects? (At present we do not take it very seriously.) The answers to these and many other questions, taken together, express a policy toward cultural property.

Since the late 1960s, governments and international organizations have made an increasing number and variety of decisions about cultural property. As such decisions accumulate, assumptions harden, preferences achieve consensus, and policies are born. The various policies—local, national, and international—differ. Some have grown by accretion, guided by adventitious events and ad hoc interests. Others, like the 1970 UNESCO Convention, are the result of a deliberative process, one heavily conditioned by source-nation/market-nation,<sup>7</sup> Third World/First World, and East Bloc/West Bloc politics. Differences in professional outlook further complicate matters; the attitudes and agenda of archaeologists and anthropologists, historians, museum professionals, dealers and collectors, and politicians often diverge. The resulting policies are both incomplete and incoherent, providing an inadequate, substantively dubious basis for public action. This Article is part of an effort to develop and clarify the bases for an appropriate public policy toward cultural property.<sup>8</sup>

We cannot resolve cultural policy questions on rational grounds

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Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO 1970].

6. UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague 1954].

7. These terms have their obvious connotations. The source nations are the ones that have the cultural property—e.g. China, Indonesia, Italy, Mexico—and the market nations are the ones to which, if the traffic in cultural property were unimpeded by export controls, such objects would tend to flow—e.g. Japan, Switzerland, the United States. As Japan illustrates, a nation can be both a source and a market.

8. Previously published pieces of this effort include Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477 (1988) [hereinafter Merryman, *Cultural Property*]; Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986) [hereinafter Merryman, *Two Ways*]; and Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1880 (1985) [hereinafter Merryman, *Elgin Marbles*].

Cultural property policy formation is a new and underdeveloped topic, and there is little cultural property law. Although a number of writers touch on aspects of cultural property law and policy, there is no comprehensive treatment of the topic and no accepted (or acceptable) intellectual structure within which to discuss it. These lacunae necessitate two ungraceful practices. One is the

alone. As the discussion below shows, cultural objects have a variety of expressive effects that can be described, but not fully captured, in logical terms. The phenomenon is familiar enough: No one has yet adequately explained what there is about a piece of music or a poem or a painting that produces its expressive effect—that makes it “move” the listener or reader or viewer.<sup>9</sup> But the important questions can be better understood, and the arguments advanced by interested people can be more accurately evaluated, if we establish a framework for thinking about cultural property. Some prior understanding of the sources of public interest in cultural property is necessary to establish such a framework.

By “cultural property” I mean objects that embody the culture—principally archaeological, ethnographical and historical objects, works of art, and architecture; but the category can be expanded to include almost anything made or changed by man. We need no tighter definition here, but a look at a more expansive definition is instructive. Thus, the 1970 UNESCO Convention defines cultural property to include:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history . . . ; (c) products of archaeological excavations . . . ; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest . . . ; (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . . ; (i) postage, revenue and similar stamps . . . ; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.<sup>10</sup>

In some nations cultural objects and environmental treasures (including natural and artificial landscapes, ecological areas, urban structures, and panoramas) are treated as fundamentally related to each

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repetition of basic ideas from one of my articles to the next. The other is a certain amount of autocitation. I beg the reader's indulgence for both.

For other discussions that bear on the topic, see Glasier, *Cultural Resource Preservation: A Consideration before Mineral Development*, 28 ROCKY MTN. MIN. L. INST. 635 (1982); Note, *The Protection of American Antiquities: 1906-1981*, 21 NAT. RESOURCES J. 935 (1981) (authored by Sandra Kemrer); *Symposium on the Public Benefits of the Arts and Humanities*, 9 COLUM. J. ART & L. 123 (1985); Stover, *A Public Interest in Art—Its Recognition and Stewardship*, 14 J. ARTS MGMT. & L. 5 (Fall 1984); Comment, *Protecting the Public Interest in Art*, 91 YALE L.J. 121 (1981).

9. For discussions that distinguish the “erotic” and the “logical” lives of things, see L. HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* (1983); Mauss, *Essai sur le Don: Forme et Raison de L'échange dans les Sociétés Archaiques*, 1 L'ANNÉE SOCIOLOGIQUE 30 (1923-24).

10. UNESCO 1970, *supra* note 5, at 234, 236. An expansive view of cultural property might include forms of expression not conventionally considered “property.” See, e.g., the discussion of folklore as cultural property in Glassie, *Archaeology and Folklore: Common Anxieties, Common Hopes*, in *HISTORICAL ARCHAEOLOGY AND THE IMPORTANCE OF MATERIAL THINGS* 23 (L. Ferguson ed. 1977).

other.<sup>11</sup> There are obvious affinities between concerns for cultural objects and for the natural environment. Both emphasize conservation, and much of the appeal in each is based on expressive values.<sup>12</sup> In addition, people and the environment affect each other, and such concepts as "environment" and "wilderness" are human constructs.<sup>13</sup>

The differences, however, are substantial. Cultural objects are human artifacts; environmentalists seek to protect what is nature-made, all the better if untouched by people. Cultural objects most often end up in museums and private collections; environmentalists want their treasured objects kept out of museums and private collections, in their natural state. Most fundamentally, the cultural object is an approach to the study of humanity, of ourselves; the environment is a separate part of reality, something outside of ourselves.

How universal is the regard for cultural objects? What is perceived as culturally valuable, and by whom, clearly varies to some extent with time and place. Thus many Americans care about the Liberty Bell, while most foreigners do not. Only a few enthusiasts really care much about the preservation of Art Deco architecture. The measures taken to express collective attachment by the Kom people in Cameroon to the Afo-A-Kom<sup>14</sup> are different from those taken by the Italians for a Renaissance painting. Things that we treat as culturally precious might have little appeal for people outside the West, and vice versa. Consider modern Western art, for example. Unless influenced by Western values or aware of the market, would a Japanese or Chinese viewer respond to a cubist painting by Braque? The answer is not obvious, since many Westerners themselves would be repelled, baffled, or merely unimpressed by the same Braque. But how about an educated Chinese (somehow insulated up to this point against Western culture), knowledgeable about and

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11. See T. ALIBRANDI & P. FERRI, *I BENI CULTURALI E AMBIENTALI* (1985); cf. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 40 U.N.T.S. 151 (recognizing that "parts of the cultural or natural heritage . . . need to be preserved as part of the world heritage of mankind as a whole").

12. On environmental values, see in particular Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337; Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974); Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

13. For a discussion of perspectives on wilderness management, see J. HENDEE, G. STANKEY, & R. LUCAS, *WILDERNESS MANAGEMENT* 10-22, 137-47 (Forest Service Misc. Pub. No. 1365, 1978).

14. The Afo-A-Kom, a statue of central spiritual importance to the Kom, mysteriously disappeared from its ritual place in the Kom territory and appeared on the New York art market, where it quickly became the center of impassioned discussion and threatened litigation. The Afo-A-Kom was returned to the Kom and subsequently became part of a travelling exhibition, "Art of the Cameroons," that was shown in several American museums. See F. FERRETTI, *AFO-A-KOM: SACRED ART OF CAMEROON* (1975). For a brief discussion of the episode, see J. MERRYMAN & A. ELSEN, *LAW, ETHICS AND THE VISUAL ARTS* 54, 56-58 (2d ed. 1987).

interested in art; would he respond to the *quality*, the intrinsic artistic merit, of such a work?

Jacques Maquet, quoting the generalization that "Everyman is like all other men, like some other men, like no other man,"<sup>15</sup> states: "We may use the same framework for distinguishing in any . . . artifact a human, a cultural, and a singular component."<sup>16</sup> This sensible idea supports the conclusion that an object valued by people in one culture may be valued by those in others who respond to the object's "human component," even though they are not drawn to its specific cultural value.<sup>17</sup> Thus, despite cultural variations, people in most (all?) places care in special ways about objects that evoke or embody or express their own and other people's cultures.

The empirical evidence that people care about cultural objects is imposing: The existence of thousands of museums, tens of thousands of dealers, hundreds of thousands of collectors, millions of museum visitors; brisk markets in art and antiquities; university departments of art, archaeology, and ethnology; historic preservation laws;<sup>18</sup> elaborate legislative schemes controlling cultural property in Italy, France, and most other source nations;<sup>19</sup> public agencies with substantial budgets, like the National Endowment for the Arts in the United States and arts ministries in other nations; laws controlling archaeological excavations; laws limiting the export of cultural property;<sup>20</sup> international conventions controlling the traffic in cultural property<sup>21</sup> and protecting cultural property in war,<sup>22</sup> all demonstrate that people care about cultural property.

"Moral right" laws in some nations and "art preservation" laws in California and Massachusetts give further evidence of the public interest in cultural property. These laws commonly have dual purposes: to

15. J. MAQUET, *THE AESTHETIC EXPERIENCE: AN ANTHROPOLOGIST LOOKS AT THE VISUAL ARTS* 169 (1986) (quoting Kluckhohn & Murray, *Personality Formation: The Determinants*, in *PERSONALITY IN NATURE, SOCIETY AND CULTURE* 35, 46 (1948).

16. *Id.*

17. Consider the statement in the Preamble to Hague 1954, *supra* note 6 at 240, that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."

18. For discussions of the public interest in historic preservation, see Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *STAN. L. REV.* 473 (1981); Stipe, *Why Preserve?*, *Preservation News*, July 1972, at 5, col. 2, *reprinted in* 11 *N.C. CENT. L.J.* 211 (1980). For a general discussion of aesthetic issues applicable to historic preservation, see Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 *MICH. L. REV.* 355 (1982).

19. For collections of national legislation, see B. BURNHAM, *THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATIONAL LEGISLATIONS* (B. Burnham ed. 1974); UNESCO, *THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS* (2 vols., 1984); 1 L. PROTTE & P. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* (1984).

20. The national cultural property laws cited in the previous footnote usually control archaeological excavations and include export controls.

21. In particular, see UNESCO 1970, *supra* note 5.

22. See especially Hague 1954, *supra* note 6.

protect the artist against alteration of the work of art and to protect the public against alteration or destruction of the culture. The California statutes, for example, provide that "there is a public interest in preserving the integrity of cultural and artistic creations"<sup>23</sup> and give "[a]n organization acting in the public interest" the right to "injunctive relief to preserve or restore the integrity of a work of fine art"<sup>24</sup> from alteration or destruction. Massachusetts has a generally comparable provision.<sup>25</sup> New York also enacted a "moral right" law, in 1983, but provided a remedy only for the aggrieved artist; the law does not recognize or protect a public right of integrity.<sup>26</sup>

A great deal of public, corporate, and individual time, effort, and money are spent in making, finding, acquiring, preserving, studying, exhibiting, interpreting, and enjoying cultural objects, more in some times and places than in others, but imposing amounts in all. Human beings are the only animals that make, collect, preserve, study, and display such objects. The practice is very old, originating long before the modern state or earlier forms of political organization.

In the beginning, it is said, was the "word." But the archaeological record of the Old Stone Age or Paleolithic period is silent. What one finds instead in the soil is the *image*. . . .

. . . .

. . . What we see today in the images of so-called primitive peoples or vanished civilizations and cultures as "art" is essentially the images of storied and mythologized frames of reference. . . .

. . . .

The presence of dozens of image and symbol systems in ice age Europe suggests the presence of a developed culture in which the many recognized processes of the hunter's world were noted, marked,

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23. California Cultural and Artistic Creations Preservation Act, CAL. CIV. CODE § 989(a) (Deering Supp. 1988); see also California Art Preservation Act, CAL. CIV. CODE § 987(a) (Deering Supp. 1988).

24. CAL. CIV. CODE § 989(c) (Deering Supp. 1988).

25. MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1988). The Massachusetts statute provides a remedy to the artist and to "any bona fide union or other artists' organization authorized in writing by the artist." *Id.* § 85S(e). California, by comparison, provides a remedy to the artist and to any "organization acting in the public interest." See *supra* note 24 and accompanying text.

26. Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW §§ 14.51-14.59 (McKinney 1984). The Louisiana Artists' Authorship Rights Act, LA. REV. STAT. ANN. § 51:2151-2156 (West 1987), follows the New York statute in protecting only the artist's right. See also Fine Arts Preservation Act, PA. CONS. STAT. ANN. tit. 73, §§ 2101-2110 (Purdon Supp. 1988). Although Pennsylvania seeks to "preserve art for the benefit and enjoyment of the public," (*id.* § 2101(4)) it provides a remedy only to the artist. *Id.* §§ 2105, 2107.

European moral right laws also vary in the extent of recognition of a public right; for example, Italy recognizes it, but Germany does not. However, most European nations have separate statutory schemes for the protection of cultural property, independent of the moral right. For materials on the moral right, see J. MERRYMAN & A. ELSEN, *supra* note 14, at 143-74; Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

symbolized, talked about and mythologized.<sup>27</sup>

We deal here with a basic human activity that goes on in all times and places, though with variations in style and prevalence from culture to culture. If we were to characterize the forces that hold groups of people together with such terms as "political," "social," or "economic," then "cultural" would chronologically precede the others (with the possible exception of the core family) and might, in the long run, outlast them all.<sup>28</sup>

It is abundantly clear that people care a great deal about cultural property. The interesting question is "Why?" An answer to that question will help both to define the public interest in and to indicate the elements of a responsive public policy toward cultural property. In what follows, I first examine the sources of the public interest, dividing the discussion into three parts: the expressive value, the politics and religion, and the utility of cultural property. I then introduce three considerations that seem central to the development of cultural property policy: preservation, truth, and access.

## I

### SOURCES OF THE PUBLIC INTEREST IN CULTURAL PROPERTY

#### A. *The Expressive Value of Cultural Property*

*[L]e monument . . . exprime la psychologie profonde des générations.*

—Pierre de la Garde<sup>29</sup>

*Saraceni went on, serenely. "The modern passion for the art of the past is part of this terrible yearning for certainty. The past is at least done with, and anything that we can recover from it is solid goods. Why do rich Americans pay monstrous prices for paintings by Old Masters which they may, or may not, understand and love, if it is not to import into their country the certainty I am talking about? Their public life is a circus, but in the National Gallery at Washington something of God, and something of the comfort of God's splendour, may be entombed. It is a great cathedral, that gallery . . ."*

—Robertson Davies<sup>30</sup>

*Antiquities have been around a long time.*

—Jody Maxmin

27. Marshack, *Reading Before Writing*, N.Y. Times, Apr. 6, 1986, § 7 (Book Review) at 1, 41.

28. On cultural objects and human culture in prehistory, see the proceedings of the 1979 Valcamonica Seminar, published as *INTELLECTUAL EXPRESSIONS OF PRE-HISTORIC MAN: ART AND RELIGION* (1983).

29. P. DE LAGARDE, *LA MÉMOIRE DES PIERRES* 11 (1979) ["The monument . . . expresses the profound psychology of generations." Ed.].

30. R. DAVIES, *WHAT'S BRED IN THE BONE* 335 (1985).



*Truth and Certainty:* There is truth in objects. We yearn for the authentic, for the work as it left the hand of the artist or artisan. In the quotation above, Robertson Davies speaks of the work of art as a source of certainty. It is also possible to talk of "getting it right," of the concern for truth in the sense of accuracy. Truth, certainty, and accuracy are closely related and may express the same fundamental need. When we stand before the authentic Domesday Book in the Public Record Office in London or the manuscript of Justinian's Digest in the Gregorian Library in Florence, we feel a sense of satisfaction. This is the real thing, speaking truly of its time. When we discover that the original of the Digest manuscript is kept elsewhere for protection and we have actually been looking at a reproduction, we feel cheated, no matter how accurate the reproduction might be. In part we resent having been fooled, but there is more: The magic that only the authentic object can work is dissipated. There seems to be something paradoxical about a reproduction of a genuine, unique artifact, whether it is a painting, a manuscript, or a funerary figure. The truth, the certainty, the authenticity, seem to inhere in the original. "Copies are always second best . . . ." <sup>31</sup>

The Robertson Davies quotation mentions another kind of certainty: "The past is at least done with, and anything that we can recover from it is solid goods." Others make a similar observation:

The past is appreciated because it is over; what happened in it has ended. Termination gives it a sense of completion, of stability, of permanence lacking in the ongoing present. Nothing more can happen to the past; it is safe from the unexpected and the untoward, from accident or betrayal. Because it is over, the past can be ordered and domesticated, given a coherence foreign to the chaotic and shifting present. Nothing in the past can now go wrong . . . . <sup>32</sup>

*Morality:* Cultural objects embody and express moral attitudes. This is most obviously true of religious objects:

For all peoples the forms, vehicles, and objects of worship are suffused with an aura of deep moral seriousness. The holy bears within it everywhere a sense of intrinsic obligation: it not only encourages devotion, it demands it; it not only induces intellectual assent, it enforces emotional commitment. Whether it be formulated as *mana*, as *Brahma*, or as the Holy Trinity, that which is set apart as more than mundane is inevitably considered to have far-reaching implications for the direction of human

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31. Marianne Bro-Jorgenson, *in* INTERNATIONAL COUNCIL OF MUSEUMS, INTERNATIONAL COMMITTEE FOR MUSEOLOGY SYMPOSIUM: ORIGINALS AND SUBSTITUTES IN MUSEUMS 157 (ICOFOM Study Series No. 8, 1985). This volume contains a number of interesting comments on substitutes and originals, a topic that I will discuss at greater length in another article.

32. D. LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* 62 (1985). Though not discussed by Professor Lowenthal, fakes are a constant hazard in dealing with cultural property. Fakes introduce an untoward and accidental factor, deprive the past of the sense of stability, cause chaos, and *betray* the past. The fake problem is discussed further below.

conduct. . . . The powerfully coercive "ought" is felt to grow out of a comprehensive factual "is," . . . .

. . . .  
 . . . [M]eanings can only be "stored" in symbols. . . . Sacred symbols thus relate an ontology and a cosmology to an aesthetics and a morality: their peculiar power comes from their presumed ability to identify fact with value at the most fundamental level, to give to what is otherwise merely actual, a comprehensive normative import.<sup>33</sup>

But lay objects often display their own moral content. In the choice of materials, of methods of work, of subject-matter, of style, of care in execution and quality of finish, the artist or artisan or architect must make many decisions. Such choices are objectively conditioned to some extent by limitations of time and energy and by the realities of the market, but the maker sets against them a sense of obligation to those who may use the object and the personal determination to make the thing "right." The maker chooses whether to settle for something that is "good enough" or strive for something better. Every such choice embodies a moral decision, and that morality is communicated, more or less perfectly, to the viewer who confronts or the scholar who studies the object. "[T]he morality of art consists in the perfect use of an imperfect medium."<sup>34</sup>

*Memory:* Cultural objects are the basis of cultural memory: "*Comme si l'humanité dans le tréfonds de son inconscient réalisait enfin qu'une de ses richesses essentielles était menacée: à savoir, sa mémoire.*"<sup>35</sup> In a society characterized by mass production, mass media, and mass markets, we place a special value on hand-made objects: the painting that is the work of one artist's hand or the piece of furniture made by an artisan. But in the short time since the Industrial Revolution began, machine-made objects and the artifacts of mass merchandising have also become cultural property. Obvious examples of such treasured objects are stamps and coins, but what of vintage automobiles, the contents of railroad museums and of museums of science and industry? Consider the collectors of posters, of fruit box labels, of perfume bottles. Why do they care about such things? Although there are other explanations, at the center is the desire to remember, and to be remembered. We instinctively act to preserve, to forestall "the eternal silence created by the destruction of culture."<sup>36</sup>

*Survival:* Cultural objects are survivors:

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33. C. GEERTZ, *THE INTERPRETATION OF CULTURES* 126-27 (1973). Professor Geertz's interest is in religious symbols, but his ideas apply as well to symbols of other kinds.

34. O. WILDE, *THE PICTURE OF DORIAN GRAY* 3 (Preface) (D. Lawler ed. 1988).

35. P. DE LAGARDE, *supra* note 29, at 11 ["as if mankind in the depths of its unconsciousness at last realized that one of its essential riches was threatened: namely, its memory." Ed.].

36. Lachs, *supra* note 3, at 168.

This virtue in art is shown by its survival value. . . . Cities and fertile lands disappear, but buried in their ruins, in tombs and sanctuaries, we find a vase, a jewel, a few coins, made by the artists of those days, which speak to us in clear language and tell us of the status and character of that lost civilization.<sup>37</sup>

Life may be short, but art is long. The object that endures is humanity's mark on eternity. We cherish cultural objects as intimations of immortality, of the defeat of time. The stone age cave paintings, the pyramids, the Dead Sea Scrolls, by their continued existence, encourage further human effort to create something that will endure, to hold back the night of oblivion. "Time is vanquished by the images that human hands created to defy it."<sup>38</sup>

*Pathos*: Relics excite a special emotion, even when they have no religious significance. There is a pathos in objects. They evoke nostalgia for the people, events, and cultures that produced them. To have survived at all gives the relic special importance, but for only one or a few isolated objects to survive of all the hopes, ambitions, labor, and love that were spent in that remote time and place is profoundly sad. It reminds us that we, too, are transitory and that our works, like those of Ozymandias in Shelley's familiar poem, will fade and crumble:

I met a traveller from an antique land  
 Who said: Two vast and trunkless legs of stone  
 Stand in the desert . . . Near them, on the sand,  
 Half sunk, a shattered visage lies, whose frown,  
 And wrinkled lip, and sneer of cold command,  
 Tell that its sculptor well those passions read  
 Which yet survive, stamped on these lifeless things,  
 The hand that mocked them, and the heart that fed:  
 And on the pedestal these words appear:  
 'My name is Ozymandias, king of kings:  
 Look on my works, ye Mighty, and despair!  
 Nothing beside remains. Round the decay  
 Of that colossal wreck, boundless and bare  
 The lone and level sands stretch far away.'<sup>39</sup>

Compare with Shelley the following lines from an unknown Chinese poet:

What monarch once had this palace built, of which there only remain ruins on a mountain side? . . . The owner of this palace had beautiful dancers, who are to-day one with the cold dust. He had chariots, and warriors. Of all this pomp, of all this glory, what remains? A marble horse lying in the grass. I should like to express my great sadness in an

37. H. READ, *TO HELL WITH CULTURE* 172 (1963).

38. A. MALRAUX, *THE METAMORPHOSIS OF THE GODS* 35 (S. Gilbert trans. 1960).

39. Shelley, *Ozymandias*, in *THE COMPLETE POETICAL WORKS OF PERCY BYSSHE SHELLEY* 550 (T. Hutchinson ed. 1933).

enduring poem, but I weep, and my pencil trembles.<sup>40</sup>

Relics excite a special emotion, give perspective, awaken the sleeping philosopher in us, reduce the preoccupations of the busy present to a more appropriate scale.

*Identity:* An art historian explains that works of art and, by extension, other cultural objects, “tell[ ] us who we are and where we came from.”<sup>41</sup> The need for cultural identity, for a sense of significance, for reassurance about one’s place in the scheme of things, for a “legible” past, for answers to the great existential questions about our nature and our fate—for all these things, cultural objects provide partial answers. When war or natural disaster or vandalism destroys cultural objects, we feel a sense of loss. What is lost is the opportunity to connect with others and to find our place in the grand design.

*Community:* Cultural objects nourish a sense of community, of participation in a common human enterprise.<sup>42</sup> Even a single object—a painting, say, or a lamp or a pot—illustrates humanity’s social nature. The painting was made to be seen, the lamp and the pot to be used, by others. The social functions of objects testify to our common humanity. They illustrate one’s connection with others, express a shared human sensibility and purpose, communicate across time and distance, dispel the feeling that one is lost and alone: “People of all lands, hardly aware of what it is they have in common, seem to be asking of the art of all time to fill a void they dimly sense within them.”<sup>43</sup>

### B. *The Politics and Religion of Cultural Property*

*This is our history, this is our soul.*

—Melina Mercouri,  
Greek Minister of Culture  
(speaking of the Elgin Marbles)<sup>44</sup>

*[T]hey are the symbol and the blood and the soul of the Greek people. . . .  
[W]e have fought and died for the Parthenon and the Acropolis. . . .*

40. R. MACAULAY, *PLEASURE OF RUINS* 3 (1953) (quoting 170 CHINESE POEMS (A. Waley trans. 1923)). The Macaulay book eloquently describes the reflective melancholy (and other emotions, including a possibly perverse pleasure) derived from the contemplation of ruins.

41. Elsen, *Introduction: Why Do We Care About Art?*, 27 *HASTINGS L.J.* 951, 952 (1976); see also A. ELSÉN, *PURPOSES OF ART* vi-vii (4th ed. 1981).

42. M. CSIKSZENTMIHALYI & E. ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* (1981); cf. *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* (A. Appadurai ed. 1986) (which, despite its promising title, deals only inferentially with this idea).

43. A. MALRAUX, *supra* note 38, at 34.

44. S.F. Chronicle, May 26, 1983, at 26, col. 1.

*[W]hen we are born, they talk to us about all this great history that makes Greekness.*

—Melina Mercouri<sup>45</sup>

*And these Nazis are ready to swap splendid Italian masters for acres of German pictures, because they want to make manifest on the walls of their Führermuseum the past of their race, and so give substance to the present of their race, and provide some assurance of the future of their race.*

—Robertson Davies<sup>46</sup>

*When my ancestors made this. . . .*

—Greek guide speaking to foreign tourists at Delphi

Cultural property is put to a variety of political uses in a variety of political contexts—ethnic, regional, and national. The National Museum of Anthropology in Mexico City is an example of an extraordinarily sophisticated and effective use of cultural property to instill a sense of national identity and national pride. Like other culturally diverse nations, Mexico has found it difficult to resolve nation-building problems. Many Mexicans speak indigenous languages and relate more strongly to ethnic or regional identities than to the Mexican nation. Others are lost between cultures, confused about their identities. The Museum attempts to show the Mexican viewer that he is part of a great nation in which elements of native pre-Columbian and introduced European cultures have been combined to produce something important that is uniquely Mexican. Mexicans from remote villages grow perceptibly in stature as they move from room to room in the Museum, particularly on the upper floor, where the visual anthem to nationalism reaches a crescendo.

Although cultural objects are used throughout the world to build and maintain the national idea,<sup>47</sup> cultural objects sometimes seem to hinder nation-building. For example, when the Afo-A-Kom was offered for sale in New York, the resulting outcry hardly mentioned the nation of Cameroon.<sup>48</sup> Instead, the emphasis was on the importance of the sculpture to the Kom, one of the many indigenous cultural groups that make up Cameroon's population. This point was made, perhaps unintention-

45. *Q & A: Melina Mercouri: Greece's Claim to the Elgin Marbles*, N.Y. Times, Mar. 4, 1984, at E9, col. 1.

46. R. DAVIES, *supra* note 30, at 335.

47. The concern for nation building is an artifact of the relatively late appearance of the nation-state as a major player in world affairs and of the dissolution of colonial empires in this century. But independent of nations, cultural objects are important to the construction of society: "Human societies exist in the last resort because their members are aware of belonging to them, and a major factor in this is a consciousness of sharing a common past." G. CLARK, *ARCHAEOLOGY AND SOCIETY* 255 (1960). For an interesting discussion of "Art as a Product of Society" and "Society as a Product of Art," see A. HAUSER, *THE SOCIOLOGY OF ART* chs. 5-6 (1982).

48. See *supra* note 14 and accompanying text.

ally, in an eloquent statement by the First Secretary of the Cameroon Embassy in Washington:

It is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together.<sup>49</sup>

While the publicity and ceremony surrounding the statue's return enhanced the Kom culture, to Cameroonians concerned with nation-building, the Afo-A-Koin episode was at best an awkward event.

Cultural property lends itself to many political uses. When the United States returned the Crown of St. Stephen to Hungary in 1977, everyone concerned recognized that the transfer strengthened the claim of the Hungarian socialist government to legitimacy. The return was opposed by expatriate Hungarians and by prominent U.S. politicians on political grounds. When the Netherlands returned cultural property to Indonesia, there were political consequences at every level: personal gains for the politicians who could claim credit for the event; partisan gains for the political group in power in Indonesia at the time; a stronger cultural property base for nation-building in Indonesia, and so on. A Greek politician who could procure the return of the Elgin Marbles to Greece would be an immediate and enduring national hero. The current movement for repatriation of cultural property to source nations<sup>50</sup> probably derives most of its power from politics, although other terms are normally used in the public discussion. The very term "repatriation" is political; it assumes that cultural objects have a *patria*, a national character and a national homeland. Each nation makes a special claim to cultural objects associated with its people or territory—to its "national cultural patrimony."

Cultural nationalism of this kind is a major force in shaping the international law of cultural property. The key instrument is the 1970 UNESCO Convention.<sup>51</sup> Its primary purpose is to provide international enforcement of national cultural property retention laws, and the operative legal concept throughout the Convention is that of national cultural "heritage" or "patrimony" (both terms appear in the English text of the Convention).<sup>52</sup> A second major development was the establishment, again by UNESCO, of an Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its

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49. N.Y. Times, Oct. 25, 1973, at 41, col. 6.

50. See Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT'L L. & POL. 789 (1983).

51. UNESCO 1970, *supra* note 5. For a discussion describing and contrasting cultural nationalism, exemplified by UNESCO 1970, *supra* note 5, and cultural internationalism, exemplified by Hague 1954, *supra* note 6, see Merryman, *Two Ways*, *supra* note 8. There is a brief description of the modern origins of cultural nationalism and of the English poet Byron's role in fostering it in Merryman, *Elgin Marbles*, *supra* note 8, at 1903-06, 1911-16.

52. UNESCO 1970, *supra* note 5, at 234, 238, 242.

Restitution in Case of Illicit Appropriation.<sup>53</sup> Cultural nationalism has also had an interesting, one-sided effect on United States policy. Most cultural property may be freely exported; we do not attempt to retain it. But in controlling imports, the U.S. is one of the strongest enforcers of foreign retention schemes.<sup>54</sup>

Like art and politics, art and religion nourish each other in all cultures. The intensity of the art-religion relationship varies with time and place, and seems to be particularly tenuous in contemporary Western culture. Indeed, some claim that "[w]hat we call the Modern period can be described as the replacement of religion by culture."<sup>55</sup> But if one puts the present moment in historical perspective, the intensity of the art-religion relation seems incontestable.<sup>56</sup> Much of what we value today as cultural property originally had a religious function, was produced for a religious patron, expressed a religious inspiration, or bore a religious message. Religious architecture, art, and artifacts still serve these purposes. They attract attention—"Religion needs art to be impressive, to get a hearing."<sup>57</sup> They impress, instruct, and inspire the faithful. On a different level, religious objects seek to express the ineffable, to convey a message that is beyond words. "[A]rt can express religious emotion more truly than any sermon."<sup>58</sup>

Much cultural property has been destroyed for political and religious reasons. As with politics, so with religion: What is useful and acceptable is encouraged, preserved, and exploited. What is uncongenial is discouraged and repressed.<sup>59</sup> The political and religious authorities who destroyed or condoned the destruction of cultural objects (the Iconoclasts; the zealots who destroyed the Aztec codexes; Julius Caesar's troops who, whether by accident or design, burned the Alexandrian Library;<sup>60</sup> the military authorities who took bronzes to make cannon; the

53. For a description of the Committee's history, see *A Brief History of the Creation by UNESCO of an Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in Case of Illicit Appropriation*, 31 MUSEUM 59 (1979). Its operation is described in Nafziger, *supra* note 50, at 801-02.

54. For an overview of United States support of foreign cultural property retention laws and restitution requests, see Merryman, *Two Ways*, *supra* note 8, at 849-52. For integrated discussions of the international and United States responses to the problem, see Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982); Merryman with Elsen, *Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects*, 12 J. ARTS MGMT. & L., Fall 1982, at 5, reprinted in *The Penal Protection of Works of Art*, QUADERNI DI SCIENZE CRIMINALI 151 (1983); J. MERRYMAN & A. ELSÉN, *supra* note 14, at ch. 2.

55. Finkelkraut, *What is Europe?*, N.Y. Review of Books, Dec. 5, 1985, at 10.

56. See generally V. VOGT, ART & RELIGION (1921); A. ELSÉN, *supra* note 41, at chs. 3-6.

57. V. VOGT, *supra* note 56, at 51.

58. E. SPENCER, *Introduction*, THE LIGHT IN THE PIAZZA xviii (1986).

59. This point, which extends far beyond the reach of this Article, will be developed in another place.

60. The Library's destruction is discussed in P. FRASER, PTOLEMAIC ALEXANDRIA 334-35 (1972). Professor Fraser calls the burning accidental. *Id.* at 334.

British who destroyed monasteries and their contents in the sixteenth and seventeenth centuries;<sup>61</sup> the French revolutionaries who burned and defaced works of art and other relics of the old regime;<sup>62</sup> among many others) are the villains of cultural history.<sup>63</sup>

### C. *The Utility of Cultural Property*

[A] study of objects is really a study of man. . . .

—Milton Glaser<sup>64</sup>

[M]an drew pictures long before he could write books, or carve inscriptions. . . . That art was one of the earliest forms in which man expressed himself, and that it long antedated writing, is incontestable.

—S.G.F. Brandon<sup>65</sup>

Cultural objects embody and preserve information. They are a source of knowledge and wisdom. This is most obviously true of manuscripts and inscriptions—for example, the Year Books or the Rosetta Stone—but is also the case with works of art and architecture and objects (furniture, apparel, implements) of daily or ceremonial use. They communicate to us directly, without the intervention of words. Their study tells us about how people lived their lives and ordered their values. Every human society manages to place its unique stamp on its artifacts and, in this way, to reveal something essential about itself:

[E]verything that is created reveals its creator's aesthetic . . . there cannot be an absence of style: even a smooth ceiling is part of an aesthetic impulse.<sup>66</sup>

The museum is a place to learn about, and from, the past. Cultural property provides the base of much of what we know and believe. The study of newly discovered objects (such as the Dead Sea Scrolls) and the restudy of known objects (such as the work of the Rembrandt Study Project) constantly change the corpus of human knowledge and belief.

Art historians teach us that art comes from art (as well as from

61. See M. BRIGGS, *GOths AND VANDALS: A STUDY OF THE DESTRUCTION, NEGLECT AND PRESERVATION OF HISTORICAL BUILDINGS IN ENGLAND 16-35* (1952).

62. See Idzerda, *Iconoclasm During the French Revolution*, 60 *AM. HIST. REV.* 13 (1954).

63. The iconoclasts are alive and well today. On January 11, 1983, the *San Francisco Chronicle* carried an Associated Press story headlined *Wealthy Christian Smashes 'Pagan' Treasures to Bits*. The story told how businessman Cullen Davis, a born-again Christian, destroyed his collection of gold, silver, jade, and ivory art objects "because they were associated with Eastern religions." Evangelist James Robinson said that he and Davis used hammers to smash the carvings after recalling a verse in Deuteronomy about "graven images," adding that he considered Davis' actions "a good testimony for his Christian faith." *S.F. Chronicle*, Jan. 11, 1983, at 3, col. 4.

64. Glaser, *Preface* to K. BAYNES, *ART IN SOCIETY* (1975).

65. S. BRANDON, *MAN AND GOD IN ART AND RITUAL* 3-4 (1975).

66. Glaser, *supra* note 64, at 6. As another commentator has observed, "Historically speaking, we cannot distinguish a civilization except by its art. At any rate, the more a civilization is subjected to the test of time, the more it is reduced to its works of art. The rest rots away." H. READ, *supra* note 37, at 172.



social, political, and cultural forces acting on the artist). Today's artists learn from, and are inspired to new creativity by, or in reaction against, the work of their predecessors. The point can be generalized beyond art to other kinds of human activity. Santayana's aphorism that "[t]hose who cannot remember the past are condemned to repeat it"<sup>67</sup> implies that those who do learn from the past can advance beyond it. Cultural property is, in this sense, a base from which progress in cultural achievement becomes possible.

Much cultural property gives pleasure and enriches life. Great works of art and architecture (the Parthenon sculptures, the great Temple of Abu Simbel, the complexes of Angkor Wat and Borobudur, the Pyramid at Chichen Itza) move us with their power and beauty. The works of artisans impress us with their quality of design and workmanship. "[E]very human society manages to stamp some esthetic value on the implements that pass through its hands."<sup>68</sup> The people who make such things want them to be good to look at, and we respond. Sometimes the encounter with cultural objects is initially unpleasant. Artifacts from unfamiliar cultures or works by avant-garde artists may at first repel or challenge viewers, forcing us to extend our conceptions of beauty and style. If we overcome our initial revulsion and rise to the challenge, we broaden our vision and enrich our potential for enjoyment.

Cultural property is also valuable; it is a form of wealth.<sup>69</sup> For the expressive, political, religious, and utilitarian reasons already discussed, there is a substantial market for cultural objects. The demand among collectors and museums is enormous, served by a large network of dealers and auction houses. Although fashions change, the market for cultural property steadily expands. More objects from more cultures attract the attention of collectors and museums; the numbers of collectors and museums grow; their acquisition funds increase; market price levels

67. 1 G. SANTAYANA, *THE LIFE OF REASON* 284 (1905-06).

68. Schier, *Why Things Look Good*, N.Y. Times, Apr. 6, 1986, § 7 (Book Review), at 29 (reviewing J. MAQUET, *THE AESTHETIC EXPERIENCE* (1986)).

69. Most, perhaps all, value is attributed rather than intrinsic, and the value attributed to a given object is itself a cultural expression. The point is elegantly developed by Michael Thompson: An object—say an automobile—may begin with a new car value ("transient value") which declines as it ages and wears out to become a wreck ("rubbish"), only to be transformed into a vintage automobile (with "durable value") by changes in taste. M. THOMPSON, *RUBBISH THEORY: THE CREATION AND DESTRUCTION OF VALUE* 7-9 (1979). Once in the "durable" category, such objects tend to have "an increasing aesthetic value." *Id.* at 32.

The exact form which these manifestations of increasing aesthetic value take will vary . . . . For example, among buildings it is expressed first by inclusion on the Supplementary List, and then by promotion through the grades of historic buildings and perhaps, eventually, acquisition by the National Trust. Other . . . indicators of this increasing economic and aesthetic value are the first reproduction, the first fake, the first planned robbery, the first dealers' ring, and the first refusal of an export license.

*Id.* (footnote omitted).

rise.<sup>70</sup> At this writing, million-dollar prices for paintings at auction have become common; an unidentified buyer paid nearly \$54 million for a van Gogh painting sold at Sotheby's in New York in November 1987. Most cultural objects bring lower prices than that, but the total trade in cultural property is in the billions of dollars a year. In these terms the contents of major museums are incredibly valuable. It is not wholly idle to speculate about the price the Parthenon metope in the Louvre might bring if placed on the market. How much would the Mona Lisa bring at a public auction? What about other works in the Louvre, the Hermitage, the National Gallery, and so on? Such questions are important because cultural property in many source nations is a resource that could, like other resources, be developed, managed, and exploited.

Cultural property has another kind of economic value: It attracts viewers and is good for the tourist industry. People travel to Greece, India, Italy, and Japan to visit sites, buildings, and museums—to enjoy the wealth of cultural property these nations contain. Promotional travel literature dwells on the pleasure of ruins, the glory of churches and temples, the charm of old buildings and quarters, the wealth of museums, and the spell of monuments. Chambers of commerce, national and local tourist offices, associations of hoteliers and restaurateurs, and travel agents all exploit the attractions of cultural property.

## II

### THE ELEMENTS OF A CULTURAL PROPERTY POLICY

All of the reasons why people care about cultural objects, taken together, imply a set of fundamental, related, yet sometimes conflicting, considerations that seem central to the development of cultural property policy. They can be considered under three headings: Preservation, Truth, and Access.

#### *Preservation*

The essential ingredient of any cultural property policy is that the object itself be physically preserved. The point is too obvious to need elaboration; if it is lost or destroyed, the Etruscan sarcophagus or the Peruvian textile or the Chinese pot cannot be studied, enjoyed, or used. Everything else depends on the physical survival of the cultural artifact itself. Indeed, from a certain point of view the observation is tautological; if we don't care about its preservation, it isn't, for us, a cultural object.

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70. On the remarkable growth in the art market, see, e.g., *L.A. at Center: Museum Mania Grips the Globe*, L.A. Times, May 23, 1986, Part 1, at 1, col. 1; *The Art Boom Sets Off a Museum Building Spree*, N.Y. Times, June 23, 1985, § 2, at 1, col. 5.

The fundamental importance of preservation is clear, but it raises some problems. Some objects of the kind that Western collectors and museums preserve were created with the intention that they be consumed, or allowed to deteriorate through exposure, or deliberately destroyed after ceremonial use. Other objects are secret in nature, intended to be seen only by a restricted group of people at particular times or exposed only in a specific place. When a museum preserves and displays such objects, a clear culture conflict results. All of the reasons why we want to preserve and display such objects are present, but they conflict with the reasons why their creators want them to be consumed or destroyed or hidden.<sup>71</sup>

This kind of conflict is common. Much of what remains to us from ancient cultures was found in graves and tombs, placed there with the intention that it remain with the dead. Every removal of such an object for a private collection, or even for a museum or for scholarly purposes, violates the source culture's intentions. Where that culture is itself dead, the conflict has been resolved—the violation justified—in favor of collection and preservation; but where the source culture is alive and aware, the matter is not so easily settled. To its maker, proper treatment of the object may be essential to life or status; to the culture, the violation may be a spiritual disaster that threatens drastic consequences for the group.<sup>72</sup>

Physical preservation of discrete objects themselves may not be enough. Every cultural object is to some extent a part of a larger context from which it draws, and to which it adds, meaning. Separated from its context, "decontextualized," the object and the context both lose significance. At the extreme the object becomes anonymous, an orphan without reliable indication of its origin, its significance, its place and function as a part of something else. A stele sawed, pried, and stolen by *huaqueros* from the facade of a Mayan temple in Guatemala is an example. Unless the stele's original location was carefully documented before removal, with photographs, measurements, and drawings, both the stele and the temple have lost meaning.<sup>73</sup> For example, Mayan writing is still

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71. See, e.g., Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines For Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986).

72. For discussions see Cheek & Keel, *Value Conflicts in Osteo-Archaeology*; Meighan, *Archaeology: Science or Sacrilege?*; Ferguson, *Archaeological Ethics and Values in a Tribal Cultural Resource Management Program at the Pueblo of Zuni*; and Adams, *Archaeology and the Native American: A Case at Hopi*, in ETHICS AND VALUES IN ARCHAEOLOGY 194, 208, 224, 236 (E. Green ed. 1984). For further reading, see the works cited in SMITHSONIAN INSTITUTION, AMERICAN INDIAN PROGRAM, AMERICAN INDIAN SACRED OBJECTS, SKELETAL REMAINS, REPATRIATION AND REBURIAL: A RESOURCE LIST (1988).

73. Careful documentation of threatened sites not only preserves valuable information, it can have significant legal consequences. In *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), Hollinshead was prosecuted for removing a stele from Machiquila, a Mayan site in Guatemala,

largely undecipherable, except when it accompanies images that illustrate its meaning.<sup>74</sup> Since, in surreptitiously removing steles, *huaqueros* destroy or leave behind much of the accompanying matter in the process of "thinning" the stone slabs for easier shipment, this essential propinquity is lost, perhaps forever.

Separation of the parts can also impair the beauty and power of the intact work. Apart, the pieces add up to less than the integrated whole. Thus the leaves of the Van Eyck altarpiece would be better recombined.<sup>75</sup> The panel of the Annunciation from the pulpit of San Leonardo in Arcetri would be better rejoined with its fellows.<sup>76</sup> If conditions permitted, the Elgin Marbles would be better reinstalled on the Parthenon;<sup>77</sup> and so on.

The notion of preservation of context can be pressed to the point of exaggeration. Removal of a painting from the church for which it was commissioned arguably takes it out of context, depriving it, in a rarified sense, of meaning and expressive power. At a more extreme level, removal of a Poussin painting from France decontextualizes it, since it was painted in France by a Frenchman, perhaps with the expectation that it would be seen and enjoyed by a French audience. To remove it from France, according to this view, detaches it from its cultural context, with the attendant loss of cultural value. In that sense, most of the contents of the world's great museums suffer from decontextualization: Every export is an amputation.

Although it would be wrong to dismiss such claims as insincere, they express values that seem marginal and ephemeral. In most cases they merely paraphrase Byronism—the sentimental notion that the object *belongs* somewhere because that is where it was made, or where it was first discovered, or where the cultural descendants of its makers now

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contrary to Guatemalan law, and bringing it to the U.S., where he tried to sell it. His conviction under the Federal Stolen Property Act, 18 U.S.C. § 2314 (1952), was made possible only because the archaeologist Ian Graham, who has spent much of his career documenting Mayan sites in Mexico and Central America, had drawn and photographed the Machiquila ruins before the stele's removal, clearly showing it in place on a critical date (after enactment of a crucial Guatemalan law). See Bator, *supra* note 54, at 345-46 & nn. 121, 125.

74. "Texts not accompanied by an image directly related in content would not be decipherable." L. SCHELE & M. MILLER, *THE BLOOD OF KINGS: DYNASTY AND RITUAL IN MAYA ART* 324 (1986).

75. For the history of this much-dismembered masterpiece, see E. DHANENS, *VAN EYCK: THE GHENT ALTARPIECE* 127-37 (1973). For a survey of the problem of dismembered artworks and a discussion of some major examples, see Failing, *The Case of the Dismembered Masterpieces*, *ARTNEWS*, Sept. 1980, at 68.

76. The relief, one of seven (the other six remain in place on the pulpit) figures in an episode in T. HOVING, *KING OF THE CONFESSORS* 76-88 (1981), in which the former Director of the Metropolitan Museum describes, and disingenuously justifies, its acquisition for the Museum in conscious violation of Italian law.

77. See Merryman, *Elgin Marbles*, *supra* note 8.

live.<sup>78</sup> Such an argument seems to stretch the notion of context too far. There must be a point at which the degree of decontextualization becomes too trivial to have significant policy consequences. That is particularly true of objects that are movable without significant damage or loss of explanatory power or aesthetic value: manuscripts, coins, pots, freestanding paintings and sculpture, articles of furniture, and many others.<sup>79</sup>

Consider the Elgin Marbles. If atmospheric conditions permitted and the parties were willing, the Marbles might be recombined with the Parthenon, to their mutual benefit. Both would be more imposing and provide more enjoyment if they were recombined. (At least, that is the generally accepted position. It might be argued, however, that the frieze, in particular, is almost impossible to view in place on the temple because of its height and position, and is better seen and studied at a more human level. Similar comments could be made, though with decreasing force, about the metopes and the pedimental sculptures.) Atmospheric conditions in Athens, however, make such a project unacceptable because exposure would be fatal to the marbles. Those that were left on the temple, and the structure of the temple itself, are rapidly disintegrating in the Athenian smog, which ferociously attacks marble. The Greek government does not propose that the sculptures be returned to the Parthenon, but to a museum on the Acropolis, where they would be near the temple and protected in a controlled atmosphere. That clearly falls short of anything like full "recontextualization." The difference between installation on the temple and mere installation in an adjacent museum seems significant, perhaps critical.<sup>80</sup>

True physical and contextual integrity, however, affect meaning and beauty, and their loss produces consequences analogous to those that follow from destruction. We care about context for the same reasons that we care about the objects themselves. The significant difference is that mere decontextualization may be reversible; destruction seldom is.

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78. Byronism, a product of early nineteenth Century Romanticism, is the unexamined premise that supports cultural nationalism today. I discuss Byronism and cultural nationalism in greater detail in Merryman, *Cultural Property*, *supra* note 8, at 489-98; cf. Merryman, *Elgin Marbles*, *supra* note 8, at 1903-10 (discussing whether removal of the Elgin Marbles was immoral). The contrast between cultural nationalism and the attitude that cultural objects are "the cultural heritage of all mankind" as stated in the Preamble to Hague 1954, *supra* note 6, at 240, is explored in Merryman, *Two Ways*, *supra* note 8.

79. This point is made at greater length in Merryman, *Cultural Property*, *supra* note 8.

80. In discussing the proposal to return the Elgin Marbles to Athens, Mary Lefkowitz states: "But such an arrangement would merely transfer the sculptures from one museum to another. Onlookers would still need to transfer them in imagination to their original setting. . . . What, then, would be gained by their return? From the point of view of the art historian, relatively little . . ." Lefkowitz, *An Outstanding Debt* (Book Review), *Times Literary Supplement* (London), Aug. 14, 1987, at 865. There are, of course, other arguments for return of the Marbles to Athens, even if only to a museum. They are considered in Merryman, *Elgin Marbles*, *supra* note 8, at 1911-21.

*Truth*

I use the term "truth" to sum up the shared concerns for accuracy, probity, and validity that, when combined with industry, insight, and imagination, produce good science and good scholarship. The basic concern is for authenticity and is fundamental to most of the reasons why we care about cultural property. Is this a genuine relic, speaking truly of its time? Does it embody the moral decisions made by its purported creator? Is it a true ingredient of cultural memory, genuinely evoking the pathos of a people whose works have largely vanished from the earth? Is it a reliable indicator of who we are and where we come from, an authentic survivor? And so on. Everything significant about cultural objects flows from authenticity.

Society makes a substantial investment in the quest for cultural truth: the thousands of museums and libraries in which cultural objects are preserved, studied, verified, attributed, and interpreted; the university departments of anthropology, archaeology, art and history, and the imposing body of scholarship that they produce about, or based on, cultural objects. Consider the market consequences of authenticity, where something deemed authentic may be worth millions but if found to be a fake, or merely reattributed to a different source or period, may have little market value. Truth about the culture is, in its way, as important to humanity as truth of other kinds—as scientific truth, for example.

The impediments to truth about cultural property come from two principal sources. One is simple lack of information: We may not know enough to attribute and interpret the object accurately. This sort of ignorance can be induced by decontextualization—for example, taking the Mayan stele from the temple separates it from the associated glyphs and images that are essential to its proper interpretation. More generally, every loss of cultural property through erosion, destruction, careless removal, or improper conservation measures impairs the quest for cultural truth. Every lost opportunity for further discovery and study of cultural objects retards the growth of knowledge about ourselves. More extensive preservation laws (and more effective enforcement mechanisms), advances in conservation technology, expanded support of field research and scholarship and increased resources for conservation and exposition, will improve the availability and accuracy of information about the culture.

Second, counterfeits pollute the stream of information about cultural objects. They falsify history, misrepresent the culture, distort the human record. Fakes and forgeries are themselves authentic cultural objects whose study can tell us something about their producers and about ourselves. But until they are correctly identified and labeled, they can only mislead. That is their purpose; by their nature, counterfeits

seek to falsify, to misrepresent, to guide us away from, rather than toward, the truth.

Public opinion about cultural counterfeiters is often ambiguous; a faker who can deceive the experts is a perverse kind of culture hero.<sup>81</sup> The wealthy collector who gets fooled is hardly a tragic figure. The Dutch art forger Han van Meegeren arguably performed a patriotic act when he sold a fake Vermeer to Hermann Goering while the Netherlands were under Nazi occupation.<sup>82</sup> But the romantic view of the counterfeiter ignores two important facts. First, innocent people who are not experts or wealthy collectors or Nazis also get defrauded. Second, those who make counterfeit cultural objects impair humanity's search for truth. They are cultural vandals. Still, our law deals more harshly with the counterfeiter of \$100 bills than it does with the counterfeiter of paintings or of Greek pots, though the latter arguably does greater social and economic mischief.<sup>83</sup>

### *Access*

The study of cultural objects requires that they be accessible to scholars; their enjoyment requires that they be accessible to the relevant public. These truisms conceal a number of interesting problems. Suppose the interests of scholars and the viewing public diverge, as they often do? What does "accessible" mean, and what is the "relevant public"? We have emphasized the importance of preservation, and preservation often is related to location. This creates interesting conflicts between the goals of preservation and access. For example, a Kwakiutl painted door or totem pole will, if left in place where it is accessible to the Kwakiutl, eventually be destroyed by the elements; if moved to a protected location, however, it could be preserved and made accessible to a wider public. The Elgin Marbles have been better preserved in the British Museum than the sculptures left in place on the Parthenon, but moving them to London made them less accessible to Greeks. Examples could easily be multiplied.

Although legitimate concerns affecting access lead in different

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81. One indicator of our fascination with forgers is the apparently inexhaustible market for books by and about them. See, e.g., C. IRVING, *FAKE!* (1969); T. KEATING, F. NORMAN, & G. NORMAN, *THE FAKE'S PROGRESS* (1977) (Mr. Keating is a self-confessed art faker); A. STEIN, *THREE PICASSOS BEFORE BREAKFAST* (1973) (describing the exploits of convicted faker David Stein). The Irving book is a special case: Mr. Irving was the author of a fake Howard Hughes biography. He wrote this book about Elmyr de Hory, an art faker—a book by a faker about a faker. It sold a lot of copies. Consider also the title of a book by C. HAMILTON, *GREAT FORGERS AND FAMOUS FAKES* (1980). "Great"?

82. For accounts of van Meegeren's sensational career, see S. SCHÜLLER, *FORGERS, DEALERS, EXPERTS* 95-105 (1960); H. WERNES, *HAN VAN MEEGEREN Fecit*, in *THE FORGER'S ART* 1 (D. Dutton ed. 1983).

83. I will discuss this topic in more detail in another article.

directions, the object in question can only be in one place. (Actually, there are many cultural objects for which this is not a problem. Source nations frequently have multiple examples of objects which, though each at some level of interest unique, are for other purposes fungible. For instance, one Mayan Chac-Mool may often be very like another, as may the many preserved examples of a certain kind of pot or coin.) That makes it necessary, and challenging, to deal in some way with the conflict, to establish criteria to guide access policy.

One plausible solution begins by arranging preservation, truth, and access in declining order of importance, with the corollary that where they conflict the higher controls. For example, although something important was lost, it was right for the Greeks to remove the Caryatids from the Erechtheion on the Acropolis, where they were under attack by the polluted atmosphere of Athens, and place them in a protected museum environment. The reproductions that replaced them at the site of the temple may be excellent, but they are not the real thing; the integrity of the temple has been compromised in the interest of preservation. Until something dramatic happens to the Athenian atmosphere, or until the structures on the Acropolis can be protected from it *in situ*, that seems to be the best solution. Few would question an art museum curator's decision to keep water colors and pastels, which are damaged by exposure to light, in cabinets or darkened rooms rather than on gallery walls, thereby limiting access in favor of preservation. Most would think it reasonable if extremely delicate works were made available only to scholars under controlled conditions, with access to them completely denied to the general public.

### *Cultural Nationalism*

As a persuasive framework for policymaking about cultural property, the ordered triad of preservation, truth, and access is consistent with the reasons why people care about cultural objects, and it reflects the way informed people generally act toward them. But in the international arena, the claims of cultural nationalism<sup>84</sup> become an important additional consideration. "National cultural heritage," broadly defined, is the basic legitimating concept. The *Grundnorm* is that objects forming part of the cultural heritage should remain in or be returned to the national territory. This principle dominates the policy process in contemporary international fora, such as the United Nations General Assembly, UNESCO, and the Council of Europe, and in the laws and policies of many nations.<sup>85</sup> Ideally, there would be no conflict, but where

84. Cultural nationalism is discussed briefly *supra* at notes 41-63 and accompanying text. For a more extended discussion, see Merryman, *Cultural Property*, *supra* note 8, at 489-95.

85. Cultural nationalism also dominates the scholarship on the international movement of



it is necessary to choose, the national interest in retention routinely prevails over concerns about preservation, truth, and access.

News reports indicate, for example, that much cultural property retained in source nations is lost each year through inadequate protection and care.<sup>86</sup> When a South American nation fails to care adequately for textiles from early Andean cultures, something irreplaceable is lost. In the prevailing nationalist view, however, the only acceptable remedy is to persuade and help that nation to improve its preservation facilities and correct its practices. The suggestion that neglect of cultural objects weakens a nation's claim to exclusive sovereignty over them does not arise in international cultural property discussions. No such proposal seems to have been advanced in or to have received serious consideration by UNESCO or other concerned bodies. While the various UNESCO Conventions and Recommendations on the topic<sup>87</sup> frequently call for implementation of the values summed up in the triad of preservation, truth, and access, they concede the primacy of cultural nationalism. They seek to control illegal excavations, the amputation of monuments, and smuggling. These are all deplorable and lead to terrible damage. But although hard data are unavailable, few would doubt that the loss of the common cultural heritage through neglect far exceeds the damage done to it by the combined efforts of all the *huaqueros*, *tombaroli*, and their equivalents in other nations.

Cultural nationalism contrasts sharply with the idea of a "common cultural heritage" that has appeared in recent international legislation

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cultural property, where its legitimacy and primacy are usually assumed, and the discussions focus on ways of enforcing its implications. See, e.g., R. FRAOUA, *LE TRAFFIC ILLICITE DES BIENS CULTURELS ET LEUR RESTITUTION* (1985); M. FRIGO, *LA PROTEZIONE DEI BENI CULTURALI NEL DIRITTO INTERNAZIONALE* (1986); L. PROTT & P. O'KEEFE, *supra* note 19; L. PROTT & P. O'KEEFE, *NATIONAL LEGAL CONTROL OF ILLICIT TRAFFIC IN CULTURAL PROPERTY* 138-40 (UNESCO 1983); S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY* (1978) ("protection" given one kind of meaning in discussing domestic problems and damage or destruction by acts of war; meaning of "protection" shifts to national retention in discussing international movement of cultural objects); Galenskaya, *International Cooperation in Cultural Affairs*, 198 *RECUEIL DES COURS* 265 (1986). Of the leading authors, only Professor Bator attempts to reduce cultural nationalism to more manageable proportions. See Bator, *supra* note 54, at 302-10; see also Merryman with Elsen, *supra* note 54; Merryman, *Two Ways*, *supra* note 8; J. MERRYMAN & A. ELSÉN, *supra* note 14, at 50-76.

86. See Brooke, *African Museums Fight to Save Art*, N.Y. Times, Mar. 12, 1987, at C14, col. 4; Hazarika, *Historic Delhi Losing Race with Decay*, N.Y. Times, Mar. 12, 1987, at A7, col. 1; Schumacher, *Peru's Rich Antiquities Crumbling in Museums*, N.Y. Times, Aug. 15, 1983, at C14, col. 1.

87. UNESCO Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage of 1972, UNESCO Doc. 17/C/107 (1972); UNESCO Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 11; UNESCO Recommendation for the Protection of Movable Cultural Property of 1978, in 1 UNESCO, *supra* note 19, at 386.

affecting cultural objects. Consider, for example, the following language from the Preamble to Hague 1954:

[D]amage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world . . . .<sup>88</sup>

The striking prominence commonly given to the claims of cultural nationalism in international cultural property discussions, recommendations, and legislation clearly conflicts with this recent emphasis on a more general international interest.<sup>89</sup> This situation invites further investigation. How can the appropriate balance be struck between national retention/repatriation claims, on one side, and the general interest in preservation of, truth about, and access to cultural property, on the other? How far can nations be permitted to control the "cultural heritage of all mankind"? Those are the major cultural property policy issues facing the international community as this is written. In my own view, more fully explained elsewhere,<sup>90</sup> contemporary cultural nationalism is (1) a relic of 19th century Romanticism that (2) has a superficial sentimental appeal that (3) gives it disproportionate influence in cultural policy determinations.

#### CONCLUSION

My main purpose in this Article is to explain that there is a *public* interest in cultural property because people care deeply about it for a variety of natural and laudable reasons. Since there is such a degree of public interest, and cultural property touches on so many public concerns, the development of some kind of public policy toward cultural objects is both desirable and unavoidable. All would, of course, prefer a policy that is sensitive to the public interest and, where appropriate, actively protects and advances it.

To translate awareness of a public interest in cultural property into a substantively responsive public policy draws attention, as we have seen, to the general goals of preservation, truth, and access. People may perceive and weigh these goals differently, and in practice the goals can often conflict. The deference still routinely given to state claims to their "national cultural patrimony" in international affairs adds a complicating factor. As a result, one who approaches the enterprise of cultural property policy formation must expect to deal with complexity and to encounter controversy. Among knowledgeable people there can be little

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88. Preamble, Hague 1954, *supra* note 6, at 240; see also sources cited *supra* note 87 (emphasizing the notion of a "cultural heritage of mankind").

89. The contrast is explored in Merryman, *Two Ways*, *supra* note 8.

90. See, in particular, Merryman, *Two Ways*, *supra* note 8; Merryman, *Cultural Property*, *supra* note 8; Merryman with Elsen, *supra* note 54.

argument in principle about the public importance of cultural property, but the process of translating that consensus into responsive, workable policies has only begun. I will address that process in other articles.