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INTERNATIONAL CULTURAL PROPERTY: ANOTHER TRAGEDY OF THE COMMONS

Claudia Caruthers

Abstract: In-situ and intra-national preservation of cultural property is threatened by a highly remunerative international black market. Despite the existing nexus of both domestic and international laws drafted to halt illicit trafficking in cultural property, black markets, such as ones in Southeast Asian art and artifacts, are thriving. This Comment examines whether the existing web of laws and regulations serve, in fact, to foster, rather than discourage, the continuance and growth of the art black market. Likening the destruction of rare cultural resources to the destruction of scarce natural resources, this Comment uses Garrett Hardin's game theory tragedy of the commons scenario to illustrate the relational between art laws and the black market in cultural property. Finally, this Comment hypothesizes that the only workable solution may lie in declaring certain cultural property rights inalienable.

Keep Michael Jackson. Give us back Phanom Rung.
- lyric by Thai rock band Carabao¹

I. INTRODUCTION

In February 1988 the Bangkok Post advanced a dramatic theory to explain the disappearance in the early 1960s of a mammoth temple lintel² from Thailand.³ The piece was removed from the Phanom Rung Temple, an ancient Khmer religious site built under an incrementalist building project spanning the Ninth to Thirteenth Centuries. Dismembering the lintel from the temple proper and transporting it out of the temple compound must have been formidable tasks: the lintel weighs one ton and the temple is in a remote area along the Cambodian border. During the 1960s, the Thai living in the area did not possess the technological means either to dislodge or transport the lintel from the temple.

There is, however, an alternate candidate for removing the lintel. During the same period, American military were stationed in the area to provide logistical air support to U.S. troops engaged in the Vietnam War. It

¹ Sheila Tefft, *Plundering of Artifacts Sweeps Asia*, CHRISTIAN SCI. MONITOR, Oct. 15, 1992, at 12.

² "Lintel" is the architectural term for a weight-supporting horizontal crosspiece over an opening such as a doorway, window, etc.

³ Siriporn Buranaphan, *Thailand Seeks Return of Ancient Temple Sculpture From U.S.*, REUTERS LIBR. REP., Feb. 12, 1988.

is most probable that Americans, employing military equipment, used explosive devices to blast the lintel off of the temple body and then airlifted it out of the area by helicopter.⁴

James Alsdorf, then-Chairman of the Art Institute of Chicago (hereinafter the "AIC"), purchased the piece and in 1967 lent the lintel to the AIC. In 1971, Thailand, which had registered the temple as a national archeological site in 1935, initiated renovation and restoration of the temple. The Thai Embassy requested Alsdorf return the stolen piece but Alsdorf refused, demanding the Thai government produce evidence the lintel was indeed stolen. Alsdorf, apparently unconvinced by the Thai arguments, donated the work to the AIC in 1983. Finally, in 1988, when restoration of the temple was nearly complete and Thailand was preparing to re-open it for religious pilgrimages, the Thai government again approached the AIC about the lintel. This time, however, the Thai government altered its position from requesting the return of the lintel to demanding that the AIC repatriate the piece as stolen. The Thai government offered a "gift" to the AIC of some Ban Chiang pottery to help temper the museum's loss.

The AIC, claiming that this type of precedent would create a slippery slope of copycat claims from other nations, refused to return the lintel unless the Thai government "exchanged" the sculpture for another artifact of similar value.⁵ The Thai, insulted by this aggressive stance, withdrew their "gift" offer, stating "[t]he sculpture belongs to Thailand. The Institute has no right to bargain with us."⁶ Both sides became deadlocked. In 1988, the Elizabeth Cheney Foundation intervened in the dispute, providing the AIC with the capital to purchase another equivalent Thai piece to replace the lintel. The lintel, which had become the "toast of Thailand and an international cause celebre" has now been restored to the temple, where it is visited "daily" by "bus loads of tourists . . . and monks."⁷

This account may undoubtedly strike many readers as riddled with inequities. The Western legal tradition has a long history of securing near-

⁴ This account echoes the poignant contemporary testimony of a British observer who witnessed removal of the Elgin Marbles in 1803. The Elgin Marbles are a collection of marble figures and a frieze removed from the Parthenon and transported to England where they now remain, despite repeated requests by Greece for their repatriation. JOHN HENRY MERRYMAN & ALBERT E. ELSER, 1 LAW, ETHICS, AND THE VISUAL ARTS 4-14 (2d ed. 1987).

⁵ Buranaphan, *supra* note 3.

⁶ *Id.* The lintel and its repatriation galvanized widespread support among Thai as "emblem[s] of Thai cultural pride." Tefft, *supra* note 1, at 12.

⁷ Tefft, *supra* note 1, at 12.

absolute rights in property,⁸ and of frowning upon cases that lead to forfeitures, random redistributions and unequal exchanges. However, the Thai case perfectly personifies the stances often taken by parties in cultural property repatriation negotiations. The theft of religious art and wanton pillaging of temple sites, as well as the stealing of other artistic, historic and scientific treasures, is rampant in many of the less wealthy areas of the world.⁹ Many of the less affluent nations in the Asia-Pacific region are unique however because, in addition to being victims of a growing amount of illicit trade,¹⁰ they also contain some of the preeminent purchasing markets for stolen art.¹¹ Moreover, the market for Asian art is presently being promoted by art dealers, especially by art auction houses.¹² Within the Asian art market, "Southeast Asian art has finally overtaken Chinese paintings as the hottest acquisition among budding connoisseurs."¹³ Thus, the goal of halting the illicit traffic in cultural property is of keen importance for the Southeast Asian region.

This Comment will first present a brief background to the field of cultural property and broadly outline the framework of international and national laws and policies to protect and preserve that property. Acquisition policies among U.S. museums and art auction houses will also be briefly discussed. This Comment will then unpack the relationship between the

⁸ In 1762, Adam Smith stated: "Justice means [to] prevent the members of a society from encroaching on one another[s] property, or seizing [sic] what is not their own." ADAM SMITH, LECTURES ON JURISPRUDENCE 5 (R. Meek, et al. eds. 1978).

⁹ Paige L. Margules, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation and Solutions*, 15 SUFFOLK TRANSNAT'L L.J. 609 (1992); Robin Morris Collin, *The Law and Stolen Art, Artifact and Antiquities*, 36 HOW. L.J. 17 (1993); Jonathan Kandell, *Bare Ruined Choirs: A Western Hunger for Gothic Madonnas and Renaissance Angels Has Fueled the Sacking of Eastern European Churches and Limited Attempts to Save Them*, L.A. TIMES, Aug. 14, 1994, at 10.

¹⁰ There is "an accelerating trade in stolen artifacts sweeping Southeast Asia" according to Thai and Western art experts. Tefft, *supra* note 1, at 12.

¹¹ One salient example is Thailand. In spite of its high-minded stance regarding its own cultural property rights, Thailand presently hosts a thriving illicit trade in Cambodian and Burmese cultural property: "Political turmoil in Burma and years of war and upheaval in Cambodia have flooded the black market in the Thai capital of Bangkok with priceless artifacts plundered from Angkor Wat and other architectural jewels in the region." *Id.* "An increasingly affluent Asian middle class showed that it was timely for Christies to cater to the new and different tastes of collectors in the region." Michael Richardson, *Revived Self-Identity Spurs Art Sales*, INT'L HERALD TRIB., Dec. 10, 1996. See also Leong Weng Kam, *Indonesian Art Heads Home*, SINGAPORE STRAIT TIMES, Oct. 4, 1996, available in 1996 WL11725631.

¹² *Hammering Asia*, THE ECONOMIST, v.332, 95-96 n.7881, Sept. 17, 1994. See also Richardson, *supra* note 11.

¹³ Leong Weng Kam, *supra* note 11. "[T]he total value of South-east Asian artworks sold at auctions . . . is expected to cross the \$20 million mark easily by year's end—more than double last year's \$9.8 million." *Id.*

increasingly strict international regulatory regime and the exploding black market trade in antiquities. Specifically, it will assess these two apparently conflicting but, in reality, highly interdependent forces by using game theory analysis in combination with principles embedded in the theory of the "tragedy of the commons."¹⁴ This Comment will criticize the ideologies which are marbled through the current arenas of cultural property, its extra-national collection and the requests for its repatriation. Lastly, it proposes a radical reform regarding the liquidity and fungibility of cultural property, recommending that cultural property rights should be understood as inalienable.

II. BACKGROUND

A. *Defining Cultural Property*

Although the term "cultural property" usually evokes the visual arts—specifically, painting, sculpture and architectural elements—the legal definitions for cultural property are more broad and the trajectory is toward increasing liberality of meaning. Until 1995, the common definition for the term cultural property was found in the 1970 United Nations Educational, Scientific and Cultural Organizations (hereinafter "UNESCO") Convention on Cultural Property.¹⁵

More recently, the 1995 International Institute for the Unification of Private Law Convention (hereinafter "UNIDROIT"),¹⁶ motivated by concerns that the limited 1970 UNESCO Convention list might be interpreted as exhaustive, provided a more elastic definition. The 1995 UNIDROIT Convention relaxed the 1970 UNESCO Convention categories by requiring

¹⁴ WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 39-42 (2d ed., 1994) (discussing Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968)).

¹⁵ See the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231. In addition to regulating property of artistic interest, the Convention provisions also define cultural property as rare specimens or collections of fauna, flora, minerals, and anatomy; objects of paleontological interest; property of historical interest (with "history" encompassing scientific, technological, military and social histories); objects culled from archeological excavations; dismembered architectural elements; antiquities (defined as 100 or more years old); ethnological objects; rare manuscripts; books and publications; old postage; historical archives; and furniture and musical instruments 100 or more years old.

¹⁶ See Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 379 (1995).

only that cultural property have religious or secular significance and/or importance for archeology, prehistory, history, literature, art or science.¹⁷

Those who define cultural property tend to insinuate into its meaning a preferred doctrinal perspective. This tendency has led to “numerous and varied definitions given to cultural property . . . [and a] lack of uniformity . . .” in the literature.¹⁸ This Comment is no exception. For its purposes, the taxonomy of cultural property encompasses a wide range of human endeavors, allowing for diversity of form. That is, non-dimensional forms of cultural property—for example, the Japanese notion of artisans as “living national treasures” or the pan-indigenous notion that oral songs and non-notated music can be tribal/clan/individual property—are completely reasonable “entities” subject to cultural property rights and obligations. Similarly, ideological purchases on the reconfiguration and representation of “the past” also fall under the rubric of cultural property (noting that many traditional Native American tribal histories are very fluid, defying the dualistic categories of Western historicity.) The semiotic vehicles by which a culture’s heritage is transmitted—stories, information, etc.—are also sited in the signifiers of cultural property. The 1995 UNIDROIT Convention’s retirement of the 1970 UNESCO Convention requirement that a piece be “old” is also in accordance with the perspective of this Comment.

While this bias may appear overinclusive, it is helpful to recall that the morphology of traditional Western property theory reflects very abstract notions of property. Thus we find Lockean labor concepts, intellectual property notions regarding the creation of value, prime possessor norms and utilitarian concepts all competing, among others, for hegemony. Property eludes categorical or normative definition.

B. Controlling International Regulations on Cultural Property

1. The 1954 Hague Convention

Prior to World War II, recognition of the enormous illicit international movement in cultural property spawned a few multilateral regulatory agreements “adopted by almost all source nations and relatively few market

¹⁷ The 1995 UNIDROIT Convention’s definition of cultural property reflects recent jurisprudential arguments extolling the need for a more liberal understanding of cultural property. *See. id.*

¹⁸ Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 *TRANSNAT’L LAW* 235, 238 (1996).

nations.”¹⁹ Initially, these agreements were exclusively directed toward curbing the theft of cultural property during acts of belligerence or during temporary post-war occupations of defeated nations.²⁰

The experiences of WWII and the revelations of the Nuremberg Trial dramatically illustrated the inadequacy of the existing international codes and conventions to protect cultural property. Under international laws prior to 1954, punishment for treaty violations was merely a civil fine; not surprisingly, such flaccid treaty provisions were ignored by belligerents during World War II.²¹ The 1954 Hague Convention²² was designed to “add teeth” to the earlier incarnations of the Hague Convention by making violations war crimes, subject to criminal prosecution and punishment.²³ Although the 1954 Hague Convention has become an essentially mothball convention, it was invoked recently during international talks condemning Iraq’s destruction of cultural property in Iran during the Iraq-Iran War.²⁴

2. *The 1970 UNESCO Convention*

The drafters of the 1970 UNESCO Convention sought to remedy the limited reach of the 1954 Hague Convention. While the 1954 Hague Convention was notable as a flagship agreement, it was, by its own terms, limited to regulating illicit cultural property exchanges derived from acts of belligerence. The 1970 UNESCO Convention remedies this problem by imposing a regulatory regime over the export and import of cultural property during peacetime. Unfortunately, at ratification, the 1970 UNESCO Convention had 47 source nations as signatories and only three market nations.²⁵ Twenty-seven years later, the bulk of market nations have still not signed the Convention.²⁶ Additionally, the Convention embodies the civil law

¹⁹ *Id.* at 243.

²⁰ See M. Cherif Bassiouni, *Reflection on Criminal Jurisdiction in the International Protection of Cultural Property*, 10 SYRACUSE J. INT’L L. & COM. 281, 289 (1983).

²¹ The most egregious violations were committed by or in collusion with Nazi Germany, which instrumented the plundering of hundreds of private and public art collections during its hostile invasions and occupations in the European Theater. See *id.* at 292.

²² The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

²³ See Bassiouni, *supra* note 20, at 296.

²⁴ David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT’L L.J. 349, 371-77 (1993).

²⁵ The three market nations were the United States, Canada and Australia.

²⁶ Key nations that have not yet signed are England, Switzerland, Germany, Japan, the Netherlands, and France.

presumption that a bona fide purchaser obtains legal title even if the piece is later discovered to have been stolen.

3. *The 1995 UNIDROIT Convention*

In the 1980s, UNIDROIT²⁷ was requested by UNESCO to draft another multilateral treaty, one that might elicit signatures from the holdout market nations; the draft created was subsequently adopted in 1995.²⁸ In 1990, UNIDROIT presented to UNESCO the draft UNIDROIT Convention which was subsequently adopted in 1995. The 1995 UNIDROIT Convention abandons the civil law perspective of the 1970 UNESCO Convention that had given generous protection to "good faith purchasers." In its place, it grafts a common law approach on to international regulations, mandating repatriation of all stolen property, irrespective of whether the purchase was made in "good faith" or not.

C. *Controlling National Regulations on Cultural Property*

Source nations now protect their cultural resources through an expanding web of domestic national laws.²⁹ There are two key types of domestic laws designed to protect cultural property: laws to govern the illegal export of cultural property and laws to nationalize any significant cultural property still remaining within a country's borders. Source nations have expanded promulgation of such regulations as their leaders increasingly realize that, absent domestic controls, even the most comprehensive international conventions are ineffective in stemming the illicit trade in antiquities. In addition to these controls, art-rich nations must also attempt to

²⁷ UNIDROIT, the International Institute for the Unification of Private Law, is a consortium of 50 nations chartered with consolidating the private civil laws of separate nations into unified international codes.

²⁸ See Borodkin, *supra* note 16.

²⁹ Contemporary national laws often function both as prophylactic measures to prevent illegal exportation as well as preservation measures to ensure restoration. See Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT'L L.J.* 1033, 1034 (1993). For example, Indonesia has amended its national constitution to include an article on cultural resource management. Lee Siew Hua, *Saving Asia's Ancient Monuments*, *SINGAPORE STRAIT TIMES*, Jan. 29, 1995, at 1. The most up to date resource on national regulations of cultural property is Bonnie Burnham's compilation survey, which is more a manual than a synthetic study: *THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATIONAL LEGISLATION* (International Council of Museums: Paris, 1974).

control the formidable kleptocracy of peculators, art smugglers and traffickers within their own borders.³⁰

Since 1989, the number of nations with domestic export laws governing the movement of cultural property through outright export prohibitions or licensing provisions rose to 141.³¹ While protection of cultural property “successes are relatively few in a continent as rich in monuments as Asia . . . the number is on the rise.”³² Even very poor Asian nations—such as Laos, Vietnam, and Cambodia—have “made the preservation of selected monuments a high priority.”³³

Another protection method source nations are using is national and international art registries. These registries mandate the registration and recording of important cultural property in their databases.³⁴ Art thieves are reluctant to steal items that nations subsequently may be able to list in international registries or catalogues of missing art objects.³⁵ Art-possessing nations have been instituting on-site management and monitoring of artifact-rich locations,³⁶ not just in museums but at other sites where thefts are likely to occur.³⁷ For example, the 50,000 cliffside stone sculptures at Dazu in

³⁰ Combating the domestic black market is a frustrating mission, inasmuch as some state officials charged with protecting cultural property are often themselves part of the illegal network. See Borodkin, *supra* note 17, at 393; Mary Battiata, *Eastern Europe's Art Heritage is Ravaged by Thieves; Western Collectors Said to Buy Stolen Items*, WASH. POST., Feb. 27, 1992, available in 1992 WL 2202790; John Carvel, *Pillagers with an Eye for Profit Strip the Former Soviet Bloc of its Artistic Heritage as "Cultural Cleansing" Sweeps over Central and Eastern Europe*, THE GUARDIAN, Nov. 20, 1993, at 22, available in 1993 WL 4160370; Eddie Koch, *Greece: Deputy Police Chief Arrested in Art Theft Scandal*, Int'l Press Service, Nov. 4, 1993, available in 1993 WL 2534185. In Thailand, for example, a major smuggling ring in Chiang Mai is run by a former government minister, because of his entrenched political influence, police are powerless to halt his activities. See Tefft, *supra* note 1.

³¹ L. PROTT & P. O'KEEFE, NATIONAL LEGAL CONTROL OF ILLICIT TRAFFIC IN CULTURAL PROPERTY 2 at 484 (1983).

³² Lee Siew Hua, *supra* note 29.

³³ *Id.*

³⁴ Greater on-site security and “an inventory, preferably on an electronic database and online to Interpol . . . will be the best supporting safeguards.” Ooi Kok Chuen, *More Stringent Security is Needed in Region's Art Treasures*, NEW STRAITS TIMES, Apr. 12, 1997, available in 1997 WL 2956909. Computerized cataloging is gaining increasing reliance. See *Homecoming for Long-Lost Buddha Statue*, SINGAPORE STRAITS TIMES, Dec. 23, 1996, available in 1997 WL 14668801.

³⁵ In addition to domestic registries, both the International Art Loss Register and Lasernet Theft Line maintain computer databases of missing artworks. *Id.* See also, Kandell, *supra* note 9. The International Foundation for Art Research and the Stolen Art Registry are also helpful sources.

³⁶ Art traffickers steal both from sites where the artifacts are still in situ and also from museums. In 1992, Peru's National Museum of Archeology, Anthropology and History was hit twice by art thieves, with significant losses each time. Nathaniel C. Nash, *Erasing the Past: Looters Plunder Archeological Ruins, Leaving Little Cultural Heritage Behind*, N.Y. TIMES, Aug. 29, 1993, available in 1993 WL 9618112.

³⁷ See Kandell, *supra* note 9.

China now have continuous protection by both local volunteers and police patrols.³⁸ Asian countries are also devoting more of their scarce national resources to education in cultural property as “[s]pecialized training is . . . being pushed now in a host of countries, from Malaysia to Myanmar.”³⁹ Some nations have received international funds for these endeavors but response has been slow. For example, UNESCO has tried to deploy round-the-clock guards at Angkor Wat in Cambodia (an already mutilated site rapidly being depleted of its irreplaceable masterpieces) but donations have only trickled in.⁴⁰

D. *Museum and Auction House Rules on Acquisition*

1. *Museums*

Since nearly one-quarter of the world’s museums are in America,⁴¹ this Comment will present remarks about U.S. museum rules in order to provide a general background on in-house museum acquisition policies. Prior to 1970, the U.S. was infamous for turning a blind eye to the importation of cultural property and, not surprisingly, had the corollary reputation as the largest buyers’ market for illicitly-obtained cultural property.⁴² Consequently, a significant percentage of stolen cultural property is on display in America’s museums.⁴³

After 1970, U.S. museums began to adopt greater self-control in collection expansion.⁴⁴ For example, museums have recently become more cautious in collecting artifacts from Southeast Asia—due in part to the “embarrassment to the museum and the donor” in recent well-publicized repatriation cases.⁴⁵ The now-formalized acquisition policies generally require legal title, proof that the 1970 UNESCO Convention’s export

³⁸ Lee Siew Hua, *supra* note 29, at 5.

³⁹ *Id.*

⁴⁰ See Tefft, *supra* note 1.

⁴¹ JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 157 (1996).

⁴² In reference to the Metropolitan Museum of Art’s art acquisition policies in the 1960s, its then-Director, Thomas Hoving stated: “you did not ask anybody where [antiquities] came from. If you like (sic) them, you bought them.” *Collectors or Looters?*, *THE ECONOMIST* Oct. 17, 1987, at 117, 117-18.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Tefft, *supra* note 1. See also *supra* notes 1-7 and accompanying text.

program has been complied with, and information on provenance.⁴⁶ Although the 1970 UNESCO and 1995 UNIDROIT Convention mandates are binding in America only on federally-funded museums⁴⁷ (which constitute only a small percentage of U.S. museums),⁴⁸ there is pressure from pan-museum organizations such as the Council of the Archeological Institute of America, Council of the American Association of Museums, and the International Council of Museums⁴⁹ on private institutions to practice self-restraint in their accessioning policies. Moreover, museums have adopted more formal policies for the deaccessioning of pieces from their permanent collections. Again, this trend began in the post-1970 UNESCO Convention climate, resulting in “[i]ndividual museums voluntarily return[ing] illegally exported and stolen works to their countries of origin.”⁵⁰

However, despite the formalized recording of policies, the actual implementation of the policy provisions by a museum may fall short of its lofty avowed goals. For example, the AIC has adopted post-1970 UNESCO “Acquisitions Guidelines” which contain admirable language mandating the museum not violate any country of origin’s laws, assure valid title prior to acquisition and willingly return objects illegally-exported. However, as the Thai lintel case demonstrates, the AIC has not always followed these exhortations. The AIC Guidelines also carry a repatriation proviso that objects are to be returned “given adequate monetary reimbursement.” For less wealthy countries seeking repatriation, it is very difficult to meet the AIC’s requirement that the country of origin, in essence, purchase back, at current hammer price,⁵¹ its stolen cultural property.

2. *Auction Houses*

Auction houses impart what may be the most odious legacy of art collection.⁵² Unlike museums which have at least the stated goal of making

⁴⁶ GREENFIELD, *supra* note 41, at 157. “Provenance” of a piece refers to the documented origin or history of a piece; it is a term of art from the art dealing world and is not co-extensive with the term “legal title.”

⁴⁷ Such as the Library of Congress, the National Archives, the National Museum of Art and the Smithsonian.

⁴⁸ GREENFIELD, *supra* note 41, at 157.

⁴⁹ The AIA, CAAM, and ICOM, respectively.

⁵⁰ GREENFIELD, *supra* note 41, at 157.

⁵¹ The term “hammer price” refers to the price that an object would currently bring if sold by an art auction house.

⁵² Their legacy is an old one as well. Recently, Scottish curators, discussing Scotland’s exceptionally fine Asian art collection:

art accessible to the public, art houses function to remanage or reconceptualize art into a form of speculative investment; art is transmogrified through a "commercial or privatization phase, in which the historical or aesthetic values of art works are transformed by financial speculation."⁵³ Auction houses and collectors often repeat the worn and ultimately indefensible bromide that they are merely "caretakers" or "stewards" displaying artworks that would be poorly preserved in their nations of origin. In fact, stolen art work in private collections essentially "disappears for good"⁵⁴ from both the public and the producing culture once it leaves the auction room floor. More worrisome is that the survivability of art owned by private individuals is subject to the whims of the owner.⁵⁵

Moreover, the two best-known auction houses, Christies and Sotheby's do not simply shadow trends, they artificially create markets: "The Sotheby's approach is not to wait for trends but to develop them aggressively, stimulating new fields of interest . . ." ⁵⁶ The auction houses have recently been turning to Asian art as the newest "trend"⁵⁷ with "a considerable number of major works of art said to have come out of China."⁵⁸ Such artificially-created trends spur consumer demand which, in turn, feeds the growth of the black market.⁵⁹

The most deleterious effect art auction houses have on the integrity of cultural property is the houses' historical disregard for regulatory frameworks, national or international. Art auction houses are bound by the

acknowledge[d] that the volume and strength of the East Asian art in the National Museum of Scotland owe in part to the efforts of the French and British troops that sacked the Summer Palace in Beijing in 1860, and the consequent flooding of auction houses in Paris and London with imperial treasures.

Pilfered Gifts from Asia, THE DAILY YOMIURI, Jan. 19, 1997 (reviewing Jane Wilkerson & Nick Pearce, *Harmony & Contrast* (1996)).

⁵³ Carl Nagin, *The Politics of Plunder*, THE NEW ART EXAMINER, Nov. 1986, at 22, 26. Some critics recognize a similar alchemical function for museums. The writer Andre Malraux, whose own hands were sullied by questionable art acquisitions, was quite critical of the artificial ethos of museums, often crediting them as bastions of historical revisionism. See ANDRE MALRAUX, *LA MUSEE IMAGINAIRE DE LA SCULPTURE MONDIALE* (Paris, Gallimard, 1952-54).

⁵⁴ Gary Schwartz, *Ars Moriendi: The Mortality of Art*, ART IN AMERICA, Nov. 1996, at 28.

⁵⁵ *Id.* The late Ryoei Saito, former owner of Daishowa Paper Company, purchased a rare Van Gogh painting and a Renoir painting in 1990. Thereafter, Saito announced his intentions to destroy the paintings by burning them on his funeral pyre, following the traditional Japanese custom of incinerating objects dear to the deceased with the body. *Id.*

⁵⁶ See Meyer, *supra* note 24, at 379. "Among the auction houses, Christies was the first to bring in Indonesian paintings, about 2 1/2 years ago." Leong Weng Kam, *supra* note 11.

⁵⁷ *Hammering Asia*, *supra* note 12.

⁵⁸ GREENFIELD, *supra* note 41, at 214.

⁵⁹ See Carvel, *supra* note 30; Ooi Kok Chuen, *supra* note 34.

law of agency which permits auction houses to shirk any fiduciary obligations to the producing nation or the general public, incurring obligation only to the auction house's individual consignors.⁶⁰ One critique indicted auction houses with promoting "cultural property as a lucrative field for dishonest activities" by conducting their business with complete "exclusion of responsibility for . . . provenance."⁶¹

III. THE IDEOLOGIES UNDERGIRDING CULTURAL PROPERTY CLAIMS

A. *Cultural Internationalism*

National and international regulations reflect two essential modes for analyzing international law and the attendant duties and rights pertaining to cultural property. The international codes and conventions of the early 20th century together reflect a credo for cultural property called, variously, "cultural internationalism", "supranationalism", "meta-nationalism", or "cosmopolitanism."⁶² Under this analysis, cultural property and its legacy supersede the "arbitrary" boundaries of the producing nation and is celebrated as the cultural manifestation of a synoptic universalism, the product of the (fictionalized) artist-as-*human simpliciter*.

This ideology is best represented by the argument that the Elgin Marbles are now "the cultural heritage of all mankind"⁶³ and are as well-housed—some would argue, better-housed—in the British Museum as they would be in Athens. Indeed, the millions that wealthy nations assign to their museums dwarf the funds allocated for cultural property in poorer nations—

⁶⁰ Restatement (Second) of Agency, § 381, 384 (1957). See also, ROBERT A. WEINER, *THE LAW AND BUSINESS OF ART* 598 (1990). There is some indication that auction houses may be acting with greater social responsibility, despite the high financial gains. In 1996, "[t]he strong demand for Southeast Asian paintings became embarrassingly apparent . . . when Christies withdrew five Indonesian paintings after the National Museum in Jakarta saw them and recognized them as stolen." Richardson, *supra* note 11; see also Leong Weng Kam, *supra* note 11. "I think it is our duty to report if we know something . . . [but we] don't go out and look for lost paintings" (emphasis added), Ooi Kok Chuen quoting Christies' Singapore manager, *supra* note 34.

⁶¹ Lyndel V. Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYRACUSE J. INT'L L. & COM. 333, 345, 349 (1983).

⁶² John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 A.J.I.L. 831, 842 (1986).

⁶³ Cultural internationalism's catch-phrase is derivative from the Preamble to the 1954 Hague Convention. See *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 22. The phrase is parroted by the British Museum in frequent statements legitimating its continuing possession of the Elgin Marbles.

for example, in 1988, Nigeria's *annual* national budget earmarked only U.S. \$550 for protecting its cultural property.⁶⁴ Cultural internationalism, an expression of neo-libertarian rationalism, is generally espoused by museums or collectors located in market nations.⁶⁵ The utility of this ideology toward the acquisitive goals of individual and institutional collectors is patent.

While cultural internationalism's tenets contain some idealistic appeal, the stark reality is that these so-called custodians for "mankind's heritage" translate unilaterally into "the wealthy nations and their citizenry."⁶⁶ This patronage "intensif[ies] existing class and national differences in wealth and sophistication, distort[s] historical relationships, [and] fetishize[s] art objects."⁶⁷ This is achieved by wealthy collectors employing both value hierarchies based on spatial metaphors of preference and oppositional and exclusive disjunctions represented by value dualisms. Additionally, there is the self-deceptive and discretionary myth of "connoisseurship", touted as a near-metaphysical gift, rivaling Divine Inspiration in its mystery, born from "immediate deliverances of experience, not deliberated reflections upon it."⁶⁸ Hyperborean determination must also be made as to which artworks of the alien culture are deemed worthy of preservation by "mankind's collectors" and this implicates a host of oppressive maneuvers as wealthy collectors poach off other cultures: "Art historians and other professionals have shown themselves . . . to be perfectly capable of indulging in . . . iconoclasm, vandalism, political suppression, the targeting of enemy treasures, cultural genocide, illicit excavation, the removal of art works from public control,

⁶⁴ Schwartz, *supra* note 54. For a discussion on ways "ancient monuments in Asia can be saved without eating into the resources needed for present-day priorities like food and housing for the teeming millions in the region", see Lee Siew Hua, *supra* note 29.

⁶⁵ The tenor of attempts to legitimate, via this doctrine, the continuing possession of illegally-obtained art is predictably emotive: "[T]he spirit of magnificence that binds these works shreds in the final wash any sense of nationhood or proprietorship; just as the stolen object is transformed into a gift priceless beyond knowing, so it suggests that it really never had any owner—that the most the hands that hold it can hope for is interim custodianship." *Pilfered Gifts from Asia*, *supra* note 52. While this rhetoric waxes a great deal about the "ownershipeless" status of these pieces, the present owner—be it museum, auction house or collector—can, "in the final wash", become very possessive when suggestion is made for the art to be transferred to an alternate "interim custodian."

⁶⁶ *Id.* The resulting one-way cultural "dialogue" is unquestionably tilted toward the educational benefit of Western and wealthy nations. "The stolen objects became a gift, for they stimulated in many Westerners the desire to understand Chinese culture and aesthetics more deeply." *Id.* On who the lucky recipients and who the unlucky bestowers of these kinds of "gifts" are, see SALLY PRICE, *PRIMITIVE ART IN CIVILIZED PLACES*, (The University of Chicago Press 1991), especially Chapter 2.

⁶⁷ Schwartz, *supra* note 54.

⁶⁸ CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY* 75 (Basic Books 1983); see also Price, *supra* note 67.

deliberate neglect, and the application of artistic euthanasia to inconvenient possessions."⁶⁹

There are a horizon of legal doctrines invoked by cultural internationalists to justify the transfer of ownership from the source nation to the current or aspiring owner: possession, abandonment (*res derelictae*), conquest, adverse possession, laches, repose, a lack of clear ownership (*res nullius*), statutes of repose and limitation, and bona fide purchase. Protest over repatriation claims have also been couched in terms of wrongful "takings" of private property.⁷⁰

B. *Cultural Nationalism*

The alternative mode of thought underlying cultural property regulations which arose after 1970⁷¹ is echoed most often by artifact-rich source nations/peoples.⁷² Recognition of the need to protect and preserve cultural property in situ has become more acute as developing nations assert their rights regarding their historical legacies. This ideology is often termed "cultural nationalism", "national cultural patrimony" or "romantic Byronism."⁷³ This school of thought advocates the necessity of preserving cultural property in the producing culture and, by extension, repatriating removed property back to that source culture.

Post-1970 international and national statutes often acknowledge the legitimacy of cultural nationalism by allowing and encouraging preservation and repatriation schemes. Unfortunately, this perspective is supported by rather indeterminate, human rights-based appeals to notions of post-colonial self-determination and the retention of cultural diversity rather than to conventional legal justifications. Cultural nationalism can serve as an emblematic metaphor for these nations; behind the fig leaf of repatriation claims and export controls often lie plenary assertions about national autonomy and sovereignty.

⁶⁹ Schwartz, *supra* note 54.

⁷⁰ Stephanie D. Edelson, *Note, Concerted International Effort in the Trade of Cultural Property*, 16 L. & POL'Y INT'L BUS. 1249, 1250 (1984).

⁷¹ The 1970 UNESCO Convention is emblematic of this ideology. See notes 25-26 and accompanying text.

⁷² See Richardson, *supra* note 11.

⁷³ For the purposes of this Comment, "cultural patrimony" is the preferred term. For the meaning and use of the other terms, see John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1880, 1903-05 (1985). Cultural patrimony connotes that cultural property is so inalienably tied to the legacy of a certain group of people, that it is their unseverable birthright to possess it.

While source nations prefer to frame their arguments as moral imperatives, they most often, when forced to cabin their claims into more conventional legal arguments, pursue repatriation claims through civil actions in replevin.⁷⁴ However, both the U.S. and the U.K. adhere to the common law notion *neo dat quod non habet* (one cannot give better title than that which one has) which, in actions for replevin, defeats the concept of an "innocent purchaser."⁷⁵ While these national legal traditions would seem to favor the party seeking repatriation, the actual net effect is asymmetry and disharmony of laws on an international scale: "[b]ecause works of art are governed by conflicting commercial laws, the results reached in transnational litigation regarding stolen cultural property widely vary and are often unpredictable."⁷⁶ Moreover, for many poor nations the legal costs of battling the fantastically wealthy art auction houses, dealers and museums over ownership rights are prohibitive in themselves,⁷⁷ resulting in transactional costs that consume scarce national financial resources.⁷⁸

IV. ECONOMIC FORCES AND THE ILLICIT MOVEMENT OF CULTURAL PROPERTY

Lawrence Tribe has proposed that judicial disputes are not delimited to the facts and consequences of individual cases but, rather, are part of a larger narrative voice about social superstructures. Tribe cautions that law is constitutive in nature and must be carefully monitored to prevent an automaton subservience to rules that serve only the privileged.⁷⁹ Property

⁷⁴ "Once a stolen piece of art is located . . . the true owner's principle means of obtaining possession is through a civil action in replevin." Karen Theresa Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?*, 13 LOY. L.A. INT'L & COMP. L.J. 427, 429 (1990), citing Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitation*, 27 UCLA L. Rev. 1122, 1124-1125 (1980). See also, Collin, *supra* note 9, at 21-27.

⁷⁵ See *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F.Supp. 1374 (S.D. Ind. 1989), *aff'd* *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Arts*, 917 F.2d 278 (7th Cir. 1990).

⁷⁶ Burke, *supra* note 74, at 450.

⁷⁷ In 1996, Thailand had to borrow the U.S. \$280,000 "necessary" to "compensate" an American millionaire in possession of a stolen Thai Buddhist antiquity statue. "[H]undreds of Thais turned up at Bangkok's Don Muang airport late [at] . . . night to welcome home the statue, [stolen from a Sukhothai temple in 1977.]" *Homecoming for Long-Lost Buddha Statue*, *supra* note 34.

⁷⁸ "The transaction costs of antiquities suits are particularly wasteful when weighed against the paucity of resources available to protect antiquity in their countries of origin." Borodkin, *supra* note 17, at 399.

⁷⁹ Lawrence Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 593 (1985).

law in particular is a ready handmaiden to such reification. Carol M. Rose has noted this: "in defining the acts of possession that make up a claim to property, the law not only rewards the author of the 'text'; it also puts an imprimatur on a particular symbolic system and the audience that uses this system. Audiences that do not understand or accept the symbols are out of luck."⁸⁰ In the law surrounding the trade in cultural property, an enamel of symbolic ideation laminates over and semi-obscures the divisions of privilege involved, divisions riven by economic disparity and financial legerdemain.

A tremendous amount of money is at play in the illegal movement of cultural property.⁸¹ The lucrative black market in cultural property has not only survived the host of national and international regulations designed to choke it off, it is thriving under them both in Southeast Asia⁸² and globally.⁸³ It has been noted that "almost every antiquity that has arrived in America in the past ten to twenty years has broken the law of the country from which it came."⁸⁴ As regards profitability, the only rivals to the illicit cultural property market in terms of the volume of illegal revenue generated are the international narcotics market and the traffic in illegal arms sales.⁸⁵ Despite the comparable pecuniary benefits, the silk-collar criminals engaged in art trafficking face far less harsh penalties for art trafficking than they might from illegal arms or drug sales.⁸⁶ The combination of high profit⁸⁷ with low risks has proved an ideal crucible for fomenting very sophisticated smuggling networks which, in some nations, take the form of professional syndicates.⁸⁸

⁸⁰ Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 85 (1985).

⁸¹ Leong Weng Kam, *supra* note 11.

⁸² Tefft, *supra* note 1.

⁸³ See Forbes, *supra* note 18, at 236. See also Margules, *supra* note 9; Collin, *supra* note 9, at 18.

⁸⁴ Ricardo Elia, *Ricardo Elia Responds*, ARCHEOLOGY, May/June 1993 at 1, 17.

⁸⁵ Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does the Unidroit Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L. 469, 472-73 (1994).

⁸⁶ In 1987, an American smuggling U.S. \$288,000 worth of pre-Columbian artifacts was fined a mere U.S. \$1000 and his sentence was suspended to 200 hours of community service. *Collectors or Looters?*, *supra* note 42.

⁸⁷ The profit jump can be enormous, with an original finder usually garnering about 1% of the total amount realized through final sale: In 1989, a farmer in Turkey sold a Hellenistic marble frieze he had uncovered to an art trafficker for U.S. \$7,000. While this may have been a windfall for the farmer, the piece was later put up for sale on the illicit art market for U.S. \$850,000. Charles V. Bagli, *Hot Frieze, Missing Since 1989, Found in Madison's Fortuna Gallery*, N.Y. OBSERVER, Aug. 16 & 23, 1993, at 1, 22. Likewise, a New Mexico Mimbres pot that may be initially sold to a dealer for U.S. \$200-\$1000, could be resold in Europe for as much as U.S. \$400,000. John Neary, *Project Sting*, ARCHEOLOGY, Sept./Oct. 1993, at 52, 52-54.

⁸⁸ Thomas Hoving, *Turkish Delight*, ART & AUCTION June 1993, at 88. See also Koch, *supra* note 30.

Networks in the “enlightened and wealthy West”⁸⁹ are by far the most active agents:⁹⁰ “[i]n almost all of Western Europe, it is not an offence to import a work of art that has been illegally exported from another country.”⁹¹

Transmission patterns follow predictable paths because the unilateral movement of cultural property is routine. That movement can be analyzed using traditional capitalist modes for the trade flow of illegal goods: nations are parsed into source nations, transit or “laundering” nations,⁹² and market nations.⁹³ Applying this analysis to the cultural property black market, source nations are said to be “rich in cultural artifacts beyond any conceivable local use”⁹⁴ while market nations are poor in such resources. Consequently, the theory goes, the capitalist free market system encourages open and unrestricted exchanges between the supply and demand sides of this dyad. For some legal scholars, augmented value is the only privileged consideration in the competing ownership of scarce resources.⁹⁵

However, as a leading cultural property scholar noted, “Despite their enthusiasm for other kinds of export trade, most source nations vigorously oppose the export of cultural objects,”⁹⁶ concluding that this schismatic position must be due to those nations’ “lack of cultural expertise and organization to deal with cultural property as a resource, like other resources, to be managed and exploited.”⁹⁷ This explanation—that source countries have parochial notions of property and require tutelage in the “exploitation” of their culture as a market resource—is shockingly paternalistic; it is a

⁸⁹ Schwartz, *supra* note 54.

⁹⁰ Japan, which has transformed into an art-collecting nation, is an exception to this East/West binary.

⁹¹ Carvel, *supra* note 30.

⁹² “Laundering” nations are usually civil law nations in Western Europe; Switzerland being the most infamous art laundromat. An illegally obtained work of art is hidden in the country for the requisite amount of time needed to toll its statute of limitations under bona fide purchaser laws. The piece is then sold with a legal bill of sale with the work subsequently reemerging on the legal art market stage. Christies and Southeby’s accept such bills of sale as transferring good title. The purchaser at the end of this chain is insulated from exploring the pedigree of a piece: “When not directly involved, consciences are easily washed and a bank or businessman may find the purchase of an art object (the doubtful origin of which may have become quite remote in the long series of passages) legitimate....The purchaser is either unaware of the original provenance of the art work or he considers the matter to be of sole concern to the thief, intermediary, or re-seller.” Giuliana Luna, *The Protection of the Cultural Heritage: An Italian Perspective*, in *THE PROTECTION OF THE ARTISTIC AND ARCHEOLOGICAL HERITAGE: A VIEW FROM ITALY AND INDIA 180-81* (1976).

⁹³ Prott & O’Keefe, *supra* note 31.

⁹⁴ Merryman, *supra* note 62, at 832.

⁹⁵ Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978).

⁹⁶ Merryman, *supra* note 62, at 842.

⁹⁷ *Id.* at 833, n.5.

position, however, touted by almost all the leading market players in the field of cultural property. Source nations are criticized for not "exploiting" (read "selling") their cultural resources with greater abandon, echoing Western positions on source nations' natural resource management. For example, in 1992, when China, in an innovative move, held a government auction of some of its antiquities, it was criticized by Western dealers for offering less than the most rare of its cultural property for sale.⁹⁸

Despite the reluctance of cultural property scholars to assign workings of the black market in cultural property to purely economic machinations,⁹⁹ the relative wealth of nations animates the entire narrative of cultural property exchanges. It is duly noted by scholars in the field that, in cultural property exchanges, usually "the source nation is relatively poor and the market nation wealthy."¹⁰⁰ It is logical and not altogether unfruitful to generalize about the relations of source and market nations by arraying them along lines of industrialization, location along the West/East or North/South axes, residual effects of colonialism, etc. However, these binaries are neither neat nor true. For example, Asia encompasses nations that are hybrids of source and market nations: Thailand has become infamous for its recent art plunders upon its relatively much poorer neighbor, Cambodia. Thai smugglers have "flooded the black market in the Thai capital of Bangkok with priceless artifacts plundered from Angkor Wat and other architectural jewels in the region."¹⁰¹ Treasures from Angkor Wat are also readily available in Hanoi and Saigon shops, the booty of Vietnamese soldiers who withdrew in 1989 from Cambodia after 11 years of hostile occupation. And, "Singapore, which as a free port has no restrictions on the sale of stole art pieces, is luring treasures from as far away as China and Pakistan."¹⁰²

An alternative method for analyzing the market flow of cultural property could use the Marxist entities of "use value" versus "exchange value."¹⁰³ This paradigm is premised on the assumption that a system founded on absolute prohibition is impracticable and a system founded on absolute laissez-faire economics is unconscionable. Accordingly, it might be

⁹⁸ Tuyet Nguyet & John Cairns, '92 *Beijing International Auction and China Treasures '92 Shanghai*, ART OF ASIA, Jan-Feb 1993, 55, 58.

⁹⁹ In protesting the terms "market nation" and "source nation," one scholar has complained that "the terms result in 'political branding,' which portray collector nations as colonist-conquerors and source nations as exploited victims." Borodkin, *supra* note 17, at 385. However, this result does not seem untoward to me.

¹⁰⁰ *Id.* at 385-87.

¹⁰¹ Tefft, *supra* note 1.

¹⁰² *Id.*; See also Lee Siew Hua, *supra* note 29.

¹⁰³ Karl Marx, *Capital*, in THE MARX-ENGELS READER 351 (Robert C. Tucker ed. 1978).

proposed that artifact-rich nations defeat the black market through a co-optation maneuver: control the commodification of artifacts from their use value to their exchange value through the erection of a state auction house run by the artifact-rich nation. This nation can then use the funds raised to fulfill the "other noncultural needs" of their citizenry.¹⁰⁴

While this model has a certain overlay of reasonableness, at the end of the day, there is not much in the way of meaningful change. Looked at one way, this proposal aims to give the poorer, underdeveloped nations a mechanism by which, to assist in feeding their people, they can sell off their cultural heritage to wealthier, post-scarcity nations. Any leavening altruism in this model is limited to the notion that the largesse from such antiquity sales would now go directly to the source nations, thereby eliminating the role of both the black market and art dealing profiteers. However, this sole appealing aspect of the plan does not offset the lacerating transactional costs to the source nation, i.e., the loss of cultural patrimony. In practical terms, it is untenable to denude impoverished nations of a scarce and non-replenishable resource that might eventually serve to stimulate their economy (cultural property resources have provided a lucrative industry in nations where tourists visit the source nation directly to experience its intact cultural heritage.)¹⁰⁵ As Jeremy Bentham observed, property provides security¹⁰⁶ and predictability: "Property is nothing but the basis of expectation."¹⁰⁷ Property expectations typically manifest themselves as sacrosanct reifications modeling Hohfeldian legal relations.¹⁰⁸ This guiding principle of property law holds true for sovereign nations as well as private individuals.

Lastly, outright exploitation of non-renewable resources leads to a classic tragedy of the commons dilemma: the immediate relief of subsistence discomfort is purchased at a "high discount rate,"¹⁰⁹ i.e., with no consideration of its longitudinal effects on the people the remedy is to serve.

¹⁰⁴ Borodkin, *supra* note 17, at 411.

¹⁰⁵ "Thailand . . . provides a shining example—tourism is its best income earner." Lee Siew Hua, *supra* note 29.

¹⁰⁶ Jeremy Bentham, *Analysis of the Evils Which Result From Attacks Upon Property*, in THE THEORY OF LEGISLATION 70 (1931).

¹⁰⁷ Jeremy Bentham, *Security and Equality in Property*, in THE THEORY OF LEGISLATION, *supra* note 106, at 115.

¹⁰⁸ Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

¹⁰⁹ Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations and the Environment*, 46 VAND. L. REV. 167 (1993).

V. CULTURAL PROPERTY MOVEMENT AS TRAGEDY OF THE COMMONS

For reasons this Comment has adumbrated, it is helpful to view cultural property as a resource, not unlike a natural resource. The current cultural property market, fettered by international and national regulations, is a modern construct resulting from an environment in which resources are increasingly scarce. As one art historian aptly described it: "We are depleting our cultural resources as unrelentingly as our natural resources."¹¹⁰ "Cultural internationalism" presupposes cultural property to dwell in an ownerless commons,¹¹¹ allowing for a wide latitude of laxness in culling objects out of that commons. Increasing transaction costs in art collecting arise from the ignored deleterious externalities that unbridled thefts cause. Cultural property, in almost all instances, is a non-renewable, non-replenishable resource.

Like natural resources, cultural property also is suffering "large-scale depletion"; individual consumption of the resource (that is, art collecting) is no longer a solitary event but, rather, a synthetic activity with concrete impact upon the competing right of communities also to access a rare resource. Until relatively recently, it may have been argued with integrity that cultural property resources dwelt in an "ownerless" state, belonging to "the human heritage." However, as antiquities have become more scarce, the need to resolve ownership claims has also become more pivotal. Selecting responsible entities to be approved caretakers for these resources is a crucial aspect of cultural property jurisprudence.

Traditional Lockean notions of property ownership provide criterion to determine at what point property, formerly part of the commons, becomes vested with a private right of ownership.¹¹² Locke's purpose was to assist in securing private ownership claims that would withstand competing public ownership claims by the government for the same resource. Under Lockean analysis, competing rights are to be weighed according to the use the claimant makes of the disputed, hithertofore common, property. Ownership rights are to be bestowed on the claimant making the most aggressive use of the property resource.¹¹³

Unfortunately, classic Lockean property analysis does not graft well onto cultural property resource problems because determining "use rights" is

¹¹⁰ Schwartz, *supra* note 54.

¹¹¹ See generally Hardin, *supra* note 14.

¹¹² JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 15-16 (Tuttle 1990).

¹¹³ *Id.* at 22-24.

difficult. Cultural nationalists may make a legitimate Lockean claim that their "use" of the object within the cultural tradition that created it is sufficient to vest the superior property right with them. Cultural internationalists on the other hand might argue that their "use"—i.e., their superior collecting, preserving and displaying skills—demonstrate a greater "use" of cultural property, endowing them with a greater claim of ownership based on utilitarian principles of property. This analysis fails ultimately because it is more than an objective binary, it is a value dualism implicating an adversarial ranking, a hierarchical model, in which one use/claim is superordinate and the other use/claim subordinate. Given the significant polyvalence among factors at play with competing rights and claims, no such weighting is legitimately possible.

Because the competing concerns of cultural property use replicates that of scarce natural resources, it makes greater sense to extend the Lockean model of community rights versus private rights to the current arena of environmental resource law. Contemporary property rights can employ Lockean property consumption theory for the purpose of regulating environmental resource use under two criterion: exclusive consumption benefits and nonexclusive consumption benefits.¹¹⁴ Exclusive consumption benefits are received only by the private owner of the property—the general community receives virtually no benefit from the property and so has little rationale for dictating its use.¹¹⁵ Nonexclusive consumption benefits, however, are those that flow not only to the private property owner but also to the larger community.¹¹⁶ As nonexclusive consumption benefits begin to outpace the exclusive consumption benefits, the arguments for exclusive private control of that property begin to fragment.¹¹⁷

At this point the hithertofore inconclusive legal strata become more sharply defined and either side—the exclusive consumptive benefactor or the nonexclusive consumptive benefactor—may acquiesce use of the disputed resource if the external or transactional costs (such as those involved either in litigation over or policing of the resource)¹¹⁸ become too

¹¹⁴ Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 485 (1993).

¹¹⁵ *Id.*

¹¹⁶ *Id.* In fact, Sax uses as his example of a nonexclusive consumption benefit a type of cultural property: a historic building owned privately but which benefits the community in terms of architecture, history and culture. *Id.*

¹¹⁷ *Id.* at 486.

¹¹⁸ Stephen Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J.L. & ECON. 49, 64 (1970).

high. Carol Rose has observed that, in property disputes, the transactional costs may be so high that one side may rapidly fold to the demands of the other because the "conflict costs begin to outweigh the costs of taking [the resource] out of the commons and establishing clear property entitlements."¹¹⁹ However, for some exclusive consumption benefactors, the game *is* worth the candle: "What makes it worth it? Increasing scarcity of the resource . . ."¹²⁰ and its corollary rise in value.

When this impasse is reached—when a resource is so scarce that it possesses enough valuation to be the object of use claims under both the public domain and under private consumption—then use of the resource and its commodification may become prey to a tragedy of the commons scenario. This scenario illustrates the problem of allocating scarce resources among multiple claimants/users and is derived from Garrett Hardin's classic essay "The Tragedy of the Commons."¹²¹ Hardin demonstrated how self-maximizing, rationally-acting individual users tapping into a limited resource-support system will, over time, cause non-replenishable loss to that system and to the collective good, irrespective of how well-meaning each individual user's intentions are.¹²² Moreover, the total payoffs in equilibrium are unstable, constantly shifting in flux relative to definitions of social and personal optimality as well as pressures to engage in consensual bargaining.

The competing interests and choices in Hardin's tragedy of the commons analysis mirror the well-known game theory puzzle called prisoner's dilemma. The prisoner's dilemma formula has often been applied to environmental resource depletion situations because it perfectly encapsulates the benefits and detriments of cooperative maneuvers versus self-maximizing maneuvers. When all the players in a prisoner's dilemma act in their own interest, there emerges a classic tragedy of the commons conflict.

One of the solutions Hardin promoted to solve the prisoner's dilemma tension over private/public use of scarce environmental resources was either privatizing the resource (for example, privatizing the national and state park systems) and/or allocating the right to use the resource (visiting the park) based on such variables as wealth¹²³ or an auction system. This is not unlike the state cultural property auction system posited in the previous section

¹¹⁹ Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988).

¹²⁰ *Id.*

¹²¹ Hardin, *supra* note 14.

¹²² JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 187 (1989).

¹²³ Hardin in this instance is not too far afield from the classic Lockean prediction that money and markets would act as mechanisms against the over-consumption of public resources. Compare RODGERS, *supra*, note 14, at 40-41 (discussing Hardin) with LOCKE, *supra* note 112, at 20.

above. Hardin also considered the option of aggregating all parts of a certain scarce resource into one unified property whole, owned and regulated by a central government with the plenary power to force its user-citizens into self-restrained modes of individual or collective use.¹²⁴

Another of Hardin's answers to the puzzle of how to preserve sparse resources was to adopt methods of "mutual coercion mutually agreed upon"¹²⁵—very rigidified systems of regulated behavior. This type of solution is nothing novel, having been urged as axiomatic by law theorists from Blackstone¹²⁶ to Posner:¹²⁷ the law responds to decreasing availability of a resource by an attendant increasing ossification of the property rights appurtenant to that resource.¹²⁸ This approach is also said to promote free market exchange. Clifford Holderness, in writing about optimal means for advancing the efficient allocation of goods, has also promoted exacting, comprehensive entitlements over non-exclusive, inexact entitlements.¹²⁹ Holderness argues that such precise entitlements decreases the incidence of external transaction and information costs.¹³⁰

Indeed, the current nexus of ever-tightening international and national regulations on the transmission of cultural property mimics this so-called inevitable outcome. However, "the trouble with this 'scarcity story' is that things don't seem to work this way, or at least not all the time."¹³¹ For cultural property, these "things don't seem to work" because the paramount problem with the present coercive regulatory regime is that it has the unintended consequence of *promoting* the black market: "As in the narcotic context, stronger enforcement efforts do not necessarily yield better results, and can even lead to perverse side effects."¹³²

¹²⁴ ELINOR OSTROM, *GOVERNING THE COMMONS: EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 8-9 (1990).

¹²⁵ RODGERS, *supra* note 14 at 40 (quoting Hardin).

¹²⁶ W. BLACKSTONE, 2 *COMMENTARIES ON THE LAWS OF ENGLAND* 4 (University of Chicago Press 1979) (property rights in land established as agricultural use of land grew).

¹²⁷ RICHARD POSNER, *ETHICS, ECONOMICS AND THE LAW* 30 (3d ed. 1986).

¹²⁸ As Carol M. Rose has stated:

Economic thinkers have been telling us for at least two centuries that the more important a given kind of thing becomes for us, the more likely we are to have these hard-edged rules to manage it. We draw ever sharper lines around our entitlements so that we know who has what, and so that we can trade instead of getting into the confusion and disputes that would only escalate as the goods in question become scarcer and more highly valued.

Rose, *supra* note 119, at 577.

¹²⁹ Clifford Holderness, *A Legal Foundation for Exchange*, 14 *J. LEGAL STUD.* 321, 322 (1985).

¹³⁰ *Id.* at 322-26.

¹³¹ Rose, *supra* note 119, at 577.

¹³² See Borodkin, *supra* note 17, at 405.

The transmission of cultural property is permeated with implicit market mechanisms and aggregated economic incentives that promote illicit trade in stolen goods. These stimulants include the regulations: "Under present conditions, conflicting import and export regulations in the international legal framework act to permit laundering of smuggled artifacts."¹³³ Other contributors include the art auction houses and dealers: "[T]he idiosyncratic fine arts trade. . . provides ideal conditions for a black market in antiquities."¹³⁴ Additional stimulation is in the mechanisms of purchasing transactions:

[L]aws . . . assume that buyers are in an efficient position to investigate whether an item is stolen. This assumption fails to recognize the collective action problem inherent in the antiquities context: the complexity of the art market would make it extremely inefficient to require individual purchasers in each transaction to investigate [the pedigree of each piece].¹³⁵

The aggregate economic incentives, increasing scarcity of antiquities, conflicting regulations and high transactional costs for remedies combine together to produce the current conditions. These conditions aggravate depletion as the black market and tightening regulations feed off one another in a vicious circle. As one author characterized it: "[As] the demand for antiquities grows, the supply is cut off. As the value of the goods increases, so does the incidence of their illegal excavation, exportation and sale on the international black market [M]ore intense regulation drives the growth of clandestine excavations and the black markets."¹³⁶ Ironically, it is precisely the "strict laws" in combination with the "market for classical antiquities" that have "instigated an entire network of organized smugglers."¹³⁷

¹³³ *Id.* at 405-06.

¹³⁴ *Id.* at 405.

¹³⁵ *Id.* at 407.

¹³⁶ Michael J. Kelly, *Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio Animo Ferundi/Lucrandi*, 14 DICK. J. INT'L L. 31, 32 (1995).

¹³⁷ Margules, *supra* note 9, at 609.

VI. CONCLUSION: A COOPERATIVE NORM-BASED SOLUTION

Some scholars in group dynamics theory do not see a solution to classic tragedy-of-the commons dilemmas because they see individual actors always maneuvering toward self-serving ends.¹³⁸ Fortunately, some scholars have noted the success of group cooperative schemes in which cooperation and compliance work together to allow for both consumption *and* preservation of limited resources. These complex systems are usually “culturally derived, held in place by a network of customs, conventions, and commitments and involve ‘rich mixtures’ of public and private instrumentalities.”¹³⁹

Solutions of strong centripetal regulatory regimes and private commodification of scarce resources are not present in these working models: “The two solutions urged in the simple models—complete government control and untrammled privatization—are prominent only in the minds of the analysts.”¹⁴⁰ When facing a threat to a coveted resource, there are two neo-Malthusian corridors we can search in for remedy: natural restrictions or moral restraint. The latter choice must be the ground for assessing solutions to the rapid displacement of cultural property.

What works best long-term are norm-driven cooperative solutions that operate along both informal and quasi-formal methods of inducement. These models employ a strategy of ethical imperatives and exhortations. In the field of scarce environmental resources, this strategy “appeals to the goodwill and sense of common duty of the citizenry; exhortative control strategies ask the citizen to refrain from overuse of [scarce natural resources.]”¹⁴¹ While these models seem flaccid to adherents of Oliver Wendell Holmes’ “bad man” juridical theory—skeptics who believe that law “works” in norming pathological behavior primarily through draconian threats of punitive consequences—there is growing awareness that communitarian exhortations toward ethical conformity are equally potent. A split between the norms of moral responsibility theory reflect this binary. The consequentialist point of view of Holmes is mirrored in the utilitarianism of Jeremy Bentham and John

¹³⁸ “[U]nless there is coercion or some other device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve the common or group interest.” M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2* (1965).

¹³⁹ See RODGERS, *supra* note 14, at 41-42. See also R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

¹⁴⁰ RODGERS, *supra* note 14, at 42.

¹⁴¹ Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 30 (1991).

Stuart Mill. Under utilitarianism, an act's moral obligations are to be adjudged solely by the outcome resulting from performing the act. That is, one must evaluate whether the performance of an act or the obedience of a rule result in a higher net balance of right/pleasure over wrong/pain than would the alternate performance of a competing act or rule. In contrast, on the other side of the binary lies deontological ethics, as advanced by Aristotle and Immanuel Kant. Under deontological analysis, the benchmark for assessing the correctness or preferability of competing possible conducts is not in regards to the conduct's consequences but, rather, to objective, normative ethical criteria; the consequences are irrelevant. Most recently, the consequentialist point of view has been eroded by integrative solutions predicated upon deontological ethics.

Educative measures based on deontological ethics are necessary to transform the current acquisitive and commodifying taxonomy of cultural property into not only a socially unacceptable exercise but an irrational one as well. The root of the ethos surrounding the transfer of cultural property lies in a priori assumptions about property and its alienability. Inalienability is used elastically to refer to rights and entitlements which are non-fungible, which cannot be sold, transferred or marketed. The a priori assumptive nexus that links use of the term "alienability" to the term "right" is that the interests associated with the right cannot be removed or separated from the possessor of that right. For cultural property rights, there is an assumption of full alienability predicated on heterogeneity and fragmentation. However, even within the artificial construct of property rights, there is a recognized concept of "market inalienability."

Currently, the "property" aspect of "cultural property" has been the focus of legal attention to the exclusion of its corollary term "cultural." When one looks at a Thai Buddhist statue merely as a physical object and ignores its cultural dimensionality, it is easy to objectify the object, to commodify and market it. An education steeped in deontological ethics should equip one to comprehend cultural property as inexorably bound up within the agency of its seamless cultural web. This enterprise is the ability to intuit cultural property no longer as "raw" (that is, to assume that an art piece's meaning is severable from its producing culture) but as "cooked" per Claude Lévi-Strauss' classic treatise on the necessary cultural conveyance of meaning in art.¹⁴² When this is achieved, then the statute is constitutive of cultural achievement and

¹⁴² CLAUDE LÉVI-STRAUSS, *THE RAW AND THE COOKED: INTRODUCTION TO THE SCIENCE OF MYTHOLOGY I* (John & Doreen Weightman trans., Harper & Row 1969).

relationships; indeed, it *is* the culture. This associative process places the immediately-accessible and thereby objectifiable art piece within the framework of the non-dimensional and inter-subjective field of social and human environment.

Stephen Greenblatt, in his "abjurations" for cultural understanding put it succinctly: "There can be no expression without an origin and an object, a *from* and a *for*."¹⁴³ With such perspective, it is as antipathetic to think of "owning" a Thai Buddhist statue as it would be to think of "owning" the Thai culture. Likewise, an alien "using" of such art becomes conceptually unworkable and problematized. This perspective has been achieved to an inspiring extent with natural resources: an individuated resource (for example, old-growth timber) is now located or fully situated as an extricable part of its producing environment (the forest ecosystem.) Without the part, the whole ceases to be; without the whole, the part has no meaning. It is time to nurture this understanding toward the creations that comprise cultural property and to their intrinsic role in cultural and social flourishing.

¹⁴³ Stephen Greenblatt, *Towards a Poetics of Culture, in THE NEW HISTORICISM 12* (H. Aram Veveser ed. 1989).

