

Fordham International Law Journal

Volume 31, Issue 3

2007

Article 3

Introduction: New Dimensions of Cultural Property

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Introduction: New Dimensions of Cultural Property

Susan Scafidi

Abstract

The articles in this symposium, and the scholars, practitioners, and passionately committed individuals who came together at the invitation of the Fordham International Law Journal to discuss current issues in cultural property law, represent important and diverse perspectives. Their work is a significant contribution to the growing body of scholarship on ownership of culture and offers a glimpse into the future of the field.

SYMPOSIUM: PERSPECTIVES ON CULTURAL PROPERTY & THE LAW

INTRODUCTION: NEW DIMENSIONS OF CULTURAL PROPERTY

*Susan Scafidi**

Cultural property does not consist solely of art, although some works of art are cultural properties. Cultural property is not limited to antiquities, nor even to artifacts crafted by human hands. Indeed, cultural property need not consist of physical objects at all.

Cultural property, whether ancient or modern, fashioned or found, tangible or intangible, is characterized by its association with a particular cultural group. Like intellectual property, which embodies the creative idea of an individual or individuals, cultural property is imbued with and represents the spirit of a people or even, arguably, of all humankind.¹

Unlike real, personal, or intellectual property, however, cultural property is a descriptor or a valence rather than an exclusive label. Property belonging to any other established category can concurrently be cultural, and its status as cultural property can develop or fade over time. Similarly, property can have cultural significance whether it is privately or publicly owned or even part of the public domain; for better or worse, determination of legal title to property is often independent of its relationship to a source community. Nevertheless, in some disputed cases political pressure and moral persuasion have been effective in restoring property to claimants offering superior cultural ar-

* Visiting Professor, Fordham Law School; Associate Professor of Law and Adjunct Professor of History, Southern Methodist University; author of *WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW* (2005). Professor Scafidi wishes to recognize the vision and dedication of the staff of the *Fordham International Law Journal* in organizing the symposium, in particular the efforts of Jennifer Morton, Brendan Driscoll, Aoife Meehan, and Michael Siudzinski, and to thank all of those who participated in the event.

1. See generally John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986) (describing "national" and "international" conceptions of cultural property ownership).

guments.² In addition, while legal concepts of ownership and the desire to promote stewardship of cultural property are imperfectly correlated,³ the increasing recognition of cultural property as a legal category offers promise for its future preservation and protection.

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In *New Ways of Thinking About Cultural Property*, Alexander Bauer examines the fundamental assumptions embedded in both sides of the antiquities trade debate. Rather than taking their claims at face value, Bauer contends that current thinking has settled into a stalemate, with “arguments . . . repeated wholesale as sets of memes or interrelated talking points that do little to advance productive policy.”⁴

Bauer classifies the components of the major arguments of each side into three main categories: self-deluding *a priori* assumptions; contradictions and inconsistencies; and complicating factors. The chief self-delusion of archaeologists and critics of the antiquities trade, Bauer asserts, is the utopian belief that trade can be stopped.⁵ Instead, Bauer argues, “the commodification of culture is unavoidable, particularly in a global economy driven largely by markets, competition, and distinction.”⁶

2. The Metropolitan Museum of Art’s return of the Euphronios krater to Italy is the result of extensive negotiation rather than litigation. See Randy Kennedy & Hugh Eakin, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, at A1. In the case of the Parthenon or Elgin marbles, however, diplomatic efforts have been insufficient to persuade the British Museum to return the sculptures to Greece. See CHRISTOPHER HITCHENS, *THE ELGIN MARBLES: SHOULD THEY BE RETURNED TO GREECE?* (1997).

3. See generally Sarah Harding, *Defining Traditional Knowledge: Lessons from Cultural Property*, 11 CARDOZO J. INT’L & COMP. L. 511 (2003) (offering a cautionary analysis of the language of “cultural property” and “traditional knowledge”); Lyndel V. Pratt & Patrick J. O’Keefe, *Cultural Heritage or Cultural Property*, 1 INT’L J. CULTURAL PROP. 307 (1992) (examining the limitations of the term “cultural property”).

4. Alexander A. Bauer, *New Ways of Thinking about Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT’L L.J. 690, 694 (2008).

5. See *id.*

6. *Id.* at 697.

On the other side, Bauer claims, collectors and supporters of the antiquities trade are blinded by their own self-delusion: namely, a naive belief that looting and the antiquities trade are distinct issues.⁷ Demand drives supply; time and again, Bauer observes, looting increases in response to a new exhibit or highly publicized discovery.⁸

Bauer's analysis of contradictions and inconsistencies highlights how the particular goals of the interested parties are in conflict with their own stated positions. Archaeologists, museums, collectors, dealers, national governments and local communities all manifest a common tendency to hold to aims and assumptions that fail to address the situation's innate complexity.

Next, Bauer explains how various complicating factors keep both sides of the debate stuck in their respective polarized positions, regardless of any private admissions that a different course of action might be preferable. Among these complicating factors are issues no doubt familiar to anyone active in the field, such as the political interests of host countries, the risk of alienating donors and a pervasive fear of change.

What, then, should be done? Bauer concludes by citing the potential benefits of a legal but regulated antiquities trade in both serving the interests of groups on each side.⁹ "[B]y identifying the points of intersection among the various parties and seeing which values are not so much in conflict but complementary," he suggests, "we can find agreement and therefore a positive policy direction."¹⁰

Colonel Matthew Bogdanos' *Thieves of Baghdad*, an update of his groundbreaking book by the same name, provides an insider's view on the trafficking of looted Iraqi antiquities.¹¹ While serving with the Marine Corps in Iraq, Col. Bogdanos expanded his unit's mission beyond counterterrorism to tracking down objects stolen from the Iraq Museum.

Col. Bogdanos argues that the line between Iraqi looters and the art community is thin indeed; as he and his team learned in Baghdad, "the genteel patina covering the world of

7. *See id.* at 698.

8. *See id.*

9. *See id.* at 724.

10. *Id.*

11. Col. Matthew Bogdanos, *Thieves of Baghdad: Combating Global Traffic in Stolen Iraqi Antiquities*, 31 *FORDHAM INT'L L.J.* 725 (2008).

antiquities rests atop a solid base of criminal activity.”¹² To protect the cultural heritage embodied in world antiquities, Col. Bogdanos proposes that our first course of action should be round-the-clock protection for archaeological sites. For Iraq, this would entail the adoption of specific sites by other countries under United Nations (“U.N.”) or North Atlantic Treaty Organization (“NATO”) oversight.

As the next step, Col. Bogdanos proposes a five-point action plan. His first priority is to educate the general public on the value of cultural property and the severity of the looting crisis, so as to create a consensus in condemning undocumented antiquities traffic. Other elements of the plan include an increase in funding for antiquities task forces, the international coordination of law-enforcement efforts, the establishment of a code of conduct in antiquities trading and increased cooperation between law enforcement and the cultural heritage community.

Col. Bogdanos concludes by urging U.S. military leaders to incorporate the protection of antiquities into their wartime plans. Although, he concedes, it is an issue that may never garner the same support as terrorism or narcotics, we should all fight to protect the artifacts that symbolize the civilization that our soldiers fight to preserve.

Lauren Redman’s article on the Foreign Sovereign Immunities Act (“FSIA”) examines the law that portends to make art and antiquities restitution claims “the tobacco litigation of this decade.”¹³ Redman’s analysis begins with an overview of the recent history of art and antiquities expropriation, from the catastrophic plundering in World War II to the reasons for the ongoing surge in litigation. Redman then moves to an examination of the act itself, highlighting in particular its significance in codifying commercial activities and expropriation exceptions to sovereign immunity. This leads to the central focus of Redman’s survey: an exploration of four major arts and antiquities cases that exemplify the trend toward an expansive reading of the FSIA.

Redman concludes by examining whether this narrowing of

12. *Id.* at 726.

13. Lauren Redman, *The Foreign Sovereign Immunities Act: Using a “Shield” Statute as a “Sword” for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 *FORDHAM INT’L L.J.* 781 (2008).

foreign sovereign immunity is appropriate and noting three legal doctrines that could provide a basis for limiting the exposure of foreign governments to trial in a U.S. federal court.

Saby Ghoshray offers an anti-colonialist perspective on issues pertaining to the repatriation of the Kohinoor Diamond. The article begins an account of the Kohinoor's history, explaining the origin of the name in the Persian phrase for "mountain of light."¹⁴ As Ghoshray notes, the roots of the current controversy lie in India's colonization by the British, when the Kohinoor was formally surrendered to the Queen in the 1849 Treaty of Lahore.

Ghoshray observes that recent years have given risen to claims for repatriation of the Kohinoor from several individuals and countries, including India, Pakistan and Afghanistan. In response to Britain's refusal to return the diamond, Ghoshray argues that "there is no place for the continuation of colonial blunders by refusing to repatriate cultural artifacts."¹⁵ Because the colonization of India was in violation of international law, Ghoshray asserts, any possessions removed from India must now be returned.

Beyond the issue of repatriation, however, the Kohinoor Diamond also serves an example of cultural property as a concept that defies limitation by fixed boundaries. While the diamond itself sits secured in the Tower of London, it has nonetheless been commodified in an array of media. Indian jewelers placed a replica of the Kohinoor on display in Mumbai;¹⁶ Agatha Christie made the Kohinoor the subject of a mystery novel;¹⁷ the diamond was even used to defeat an alien invader in an episode of the science-fiction series *Doctor Who*.¹⁸

Even if one were to conclude that the diamond itself belonged to one of the countries vying for ownership, that does not address the broader question of the diamond's commodification as a mass-market cultural product. The colonization of

14. Saby Ghoshray, *Repatriation of the Kohinoor Diamond: Expanding the Legal Paradigm for Cultural Heritage*, 31 *FORDHAM INT'L L.J.* 741, 746 (2008).

15. *Id.* at 745.

16. See Shashi Ashiwal, *Girl's Best Friend*, *HINDU BUS. LINE*, June 16, 2004, available at <http://www.thehindubusinessline.com/2004/06/16/stories/2004061600791900.htm>.

17. See generally AGATHA CHRISTIE, *THE SECRET OF CHIMNEYS* (1925).

18. See *Doctor Who: Tooth and Claw* (BBC television broadcast Apr. 22, 2006).

foreign countries by a Western superpower may now be universally condemned, but source communities continue to have little recourse when foreign countries profit from their artistic culture. Whether these communities will enjoy legal protections in peacetime akin to those now being sought for museums in war is an as yet unresolved question; what is clear is that our inquiry into new dimensions of cultural property has only just begun.