

# *Fordham International Law Journal*

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*Volume 31, Issue 3*

2007

*Article 4*

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## New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates

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## **Abstract**

In debates over the trade in archaeological objects or antiquities, on one end are those who believe that everyone has a shared interest in and claim to the common heritage of humanity, and thus support a vibrant and legal trade in cultural materials. On the other end are those who believe that cultural objects have special significance for specific groups and thus support the efforts of such groups to regulate their trade and seek their repatriation. The aim of this Essay is to critically examine the components of each group's arguments—their goals, assumptions, and inconsistencies—and try, where possible, to identify what implicit concerns may be driving their current stances in the debate. For it is only when we unpack the individual positions and arguments of the different stakeholders in the antiquities debates that we may move the discussion forward from its current stalemate and develop more nuanced policies, which not only may represent pragmatic solutions, but might better satisfy the many interests involved.

## ESSAYS

# NEW WAYS OF THINKING ABOUT CULTURAL PROPERTY: A CRITICAL APPRAISAL OF THE ANTIQUITIES TRADE DEBATES

*Alexander A. Bauer\**

### INTRODUCTION

Debates over the trade in archaeological objects or antiquities are contentious, emotional, and often contain not-so-subtle claims about the relative morality of its interlocutors. At one end are those who believe that everyone has a shared interest in and claim to the common heritage of humanity, and thus support a vibrant and legal trade in cultural materials. On the other end are those who believe that cultural objects have special significance for specific groups and thus support the efforts of such groups to regulate their trade and seek their repatriation. The overall classification of the various voices in the debate into these two polarized positions, however, has resulted in a distillation of a complex web of both convergent and divergent interests into little more than a set of talking points and assumptions that are uncritically grouped together.

The aim of this Essay is to critically examine the components of each group's arguments—their goals, assumptions, and inconsistencies—and try, where possible, to identify what implicit concerns may be driving their current stances in the debate. For it is only when we unpack the individual positions and arguments of the different stakeholders in the antiquities debates that we may move the discussion forward from its current

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stalemate and develop more nuanced policies, which not only may represent pragmatic solutions, but might better satisfy the many interests involved.

### I. THE PROBLEM

Cultural property issues have been in the news a lot lately. In February of 2006, the Metropolitan Museum of Art (the "Met") agreed to return a host of important works, the legality of whose purchase had long been questioned, including the famed "Euphronios Krater" as well as the cache of Hellenistic silver vessels believed to have been looted from Morgantina in Sicily, Italy.<sup>1</sup> Similar agreements have been made or attempted with a host of other museums, including the Museum of Fine Arts in Boston, Massachusetts, and the Getty Museum in Malibu, California.<sup>2</sup> At the same time, Italy has cracked down on those who loot and traffic in cultural property within and across its borders, and these efforts have led to the trial of the well-known art dealer Robert Hecht, and even a prominent curator at the Getty Museum, Marion True.<sup>3</sup>

The United States assists Italy and several other nations with their efforts to fight the antiquities trade by helping them enforce their laws forbidding the export of antiquities. In January 2006, the United States agreed to renew its bilateral agreement with Italy, in which U.S. customs authorities will prohibit the import of any cultural objects from Italy dating between the Ninth Century B.C. and the Fourth Century A.D. for an additional five years, until 2011.<sup>4</sup> Since that renewed agreement, similar five-year extensions have been granted to Bolivia (December 2006), Peru (June 2007), Cyprus (July 2007), Mali (September 2007),

1. *The Metropolitan Museum of Art-Republic of Italy Agreement of February 21, 2006, reprinted in* 13 INT'L J. CULTURAL PROP. 427, 427-34 (2006) [hereinafter *Met-Italy Agreement*].

2. See, e.g., David Gill & Christopher Chippendale, *From Malibu to Rome: Further Reflections on Returning Antiquities*, 14 INT'L J. CULTURAL PROP. 205 (2007); David Gill & Christopher Chippendale, *From Boston to Rome: Reflections on Returning Antiquities*, 13 INT'L J. CULTURAL PROP. 311 (2006).

3. See Elisabetta Povoledo, *Antiquities Trial Fixes on Collectors' Role*, N.Y. TIMES, JUNE 9, 2007, at B9.

4. See Press Release, Office of the Spokesman, U.S. Dep't of State, United States Extends Agreement Protecting Italy's Archaeological Materials Representing the Preclassical, Classical and Imperial Roman Periods (Jan. 19, 2006), available at <http://www.state.gov/r/pa/prs/ps/2006/59402.htm>.

and Guatemala (September 2007).<sup>5</sup>

None of this has happened without a good deal of debate and disagreement, however. Given the United States' longstanding policy of minimally regulating the trade in cultural objects, many in the museum and collecting communities, who enjoy the benefits of a largely unfettered trade, do not welcome the prospect of increased controls. On the other hand, the increasing looting and destruction of sites worldwide does call for something to be done. But the passage of the Convention on Cultural Property Implementation Act ("CCPIA") in 1983 represented a rare compromise in what has been more usually a vitriolic debate among the various parties involved.<sup>6</sup> This rift has only expanded in recent years due to the actions of Italy, the renewal of its bilateral agreement with the United Nations, the expansion of the U.S.-Cyprus agreement to include coins, and the recent request from China under the CCPIA to restrict the import of all Chinese materials dating between the Paleolithic period and the Qing Dynasty, which ended in 1911, a request many critics felt was overly broad and against the spirit of the Act.<sup>7</sup>

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5. See Chart of Emergency Actions & Bilateral Agreements, <http://exchanges.state.gov/culprop/chart.html> (last visited Jan. 10, 2008). These agreements are made possible by the United States' ratification and subsequent implementation of the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") convention on cultural property. See generally Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 21 U.S.T. 2517, 823 U.N.T.S. 231. This is the world's first multilateral treaty aimed at protecting cultural property by limiting the movement of works that had been illegally exported or stolen. The treaty is not self-executing; it requires the adoption of legislation in each state party to give effect to its provisions. For example, although the United States ratified the treaty in 1972, Congress could not reach a compromise on enabling legislation until 1983. See generally Convention on Cultural Property Implementation Act ("CCPIA"), 19 U.S.C. § 2601 (2006). Under the CCPIA, other countries petition the United States to place import restrictions on certain classes of cultural items that are under threat in part because of their trade. The United States currently has bilateral agreements with eleven nations, including the ones mentioned in the text. Note that a generation after its implementation, the Convention has had perhaps a greater impact on the practice of dealers and collectors, including museums, than it has had in courts of law. Nevertheless, its ratification and implementation by more than one hundred nations, including an increasing number of "market" nations, mark a major shift in international attitudes towards the movement of stolen and illegally exported cultural property.

6. See generally 19 U.S.C. § 2601.

7. See Press Release, Office of the Spokesman, *supra* note 4; Press Release, Office of the Spokesman, U.S. Dep't of State, U.S. and Cyprus Extend Agreement to Protect Archaeological and Ethnological Heritage of Cyprus (July 20, 2007), available at <http://>

Import laws and treaties are not the only sources of contention fanning the flames of polarized discourse. Also in the news recently were the statements of several scholars of antiquity regarding what they felt were the overly restrictive positions of scholarly societies such as the Archaeological Institute of America and the Society for American Archaeology, prohibiting the publication of objects with an unknown history of ownership—known as “provenance.”<sup>8</sup> Such objects are thought to be immediately suspect as being recently looted and illegally traded in contravention of the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) Convention of 1970 and U.S. import laws.<sup>9</sup> Researching and publishing objects of unknown history, the societies argue, increase their market value for collectors and legitimize their acquisition, thereby supporting the antiquities market, and by association, the continued plunder of archaeological sites.<sup>10</sup>

In response, collectors and the museum community argue that it is not the trade but poverty and local corruption in so-called “art-rich” or “source” nations that drive the looting of sites, and it is only because of collectors and collecting institutions that many important objects are not simply destroyed but are taken care of, properly studied, and made accessible to scholars and the public. Moreover, outlawing trade altogether would drive underground the many objects that are not looted but found by happenstance, the chestnut example being the Dead Sea Scrolls, which are said to have been discovered by chance in Qumran by Bedouin herders.<sup>11</sup>

So the debates continue over the trade in archaeological and cultural objects and what the best methods to regulate it are, if indeed it should be regulated at all. These debates are conten-

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[www.state.gov/r/pa/prs/ps/2007/88794.htm](http://www.state.gov/r/pa/prs/ps/2007/88794.htm); see also Randy Kennedy, *U.S. Weighs China's Call to Restrict Art*, INT'L HERALD TRIB., Apr. 2, 2005, at 2.

8. See BIBLICAL ARCHAEOLOGY SOC'Y, PUBLICATION OF UNPROVENANCED ACTS: STATEMENT OF CONCERN ¶ 5 (1996), available at <http://www.bib-arch.org/bswbOOunprovenancedstatement.html>.

9. See Naomi J. Norman, *Editorial Policy on the Publication of Recently Acquired Antiquities*, 109 AM. J. ARCHAEOLOGY 135, 135-36 (2005).

10. See Hugh Eakin, *Must Looted Relics Be Ignored?*, N.Y. TIMES, May 2, 2006, at E1. For the American Institute of Archaeology publications policy, see Norman, *supra* note 9, at 135-36.

11. For a statement of this position, see, for example, BIBLICAL ARCHAEOLOGY SOC'Y, *supra* note 8.

tious, emotional, and often contain not-so-subtle claims about the relative morality of its interlocutors. At one end are those who believe that everyone has a shared interest in and claim to the common heritage of humanity and that this sharing is best achieved through a vibrant and legal trade in cultural materials. On the other end are those who believe that the heritage of humanity is best secured through the recognition that cultural objects have special significance for specific groups, and thus support the efforts of such groups to regulate their trade and seek their repatriation. In the literature, these two sides have become known respectively as “cultural internationalist” and “cultural nationalist,” representing the “Two Ways of Thinking about Cultural Property” originally defined by legal scholar John Henry Merryman over two decades ago.<sup>12</sup>

Into this bipolar scheme, views of the various parties interested in cultural objects have been slotted, with varying degrees of merit, thus reinforcing the polarization of the debate. On one side, archaeologists are considered aligned with U.S. policymakers and foreign governments against the antiquities trade, and on the other, museum professionals—some of whom are archaeologists themselves—are aligned with collectors and dealers in support of it. The overall classification of the various groups into these two basic types, however, has resulted in a distillation of a complex web of both convergent and divergent interests into little more than a set of talking points and assumptions that are uncritically grouped together. As a result, arguments are repeated wholesale as sets of memes or interrelated talking points that do little to advance productive policy.<sup>13</sup> And while some may argue that the debate has not so much stagnated as been “won” by critics of the antiquities trade, we must ask whether stopping the trade actually remedies what many perceive to be the heart of the problem. As Colin Renfrew, one of the strongest voices against the trade, noted only a few years ago, the looting and destruction of archaeological sites “has increased rather

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12. See, e.g., John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986). For recent statements of the two main positions in this debate, see John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11 (2005) and Lyndel V. Profit, *The International Movement of Cultural Objects*, 12 INT'L J. CULTURAL PROP. 225 (2005).

13. See Alan Audi, *A Semiotics of Cultural Property Argument*, 14 INT'L J. CULTURAL PROP. 131, 132 (2007).

than diminished in the thirty succeeding years” since the UNESCO Convention of 1970.<sup>14</sup>

But the ongoing problem of looting in the face of increasing regulation highlights a more important point about the current discourse I wish to raise in this Essay. Namely, that the two polarized positions are often repeated without critical reflection on whether they actually serve the stated interests of their constituent groups. It is my belief that if we unpack the individual positions and arguments of the different stakeholders in the antiquities debates, we might be able to move the discussion forward from its current stalemate and develop more nuanced policies that not only may represent a pragmatic way forward, but one which might better satisfy their interests. In order to do this, it is necessary to critically examine the components of each group’s arguments—their goals, assumptions, and inconsistencies—and try, where possible, to identify what implicit concerns may be driving their current stances in the debate. To some extent, this approach builds upon the values-based model elaborated by Paul Bator a quarter century ago in his seminal essay on the international art trade.<sup>15</sup> But I plan to move beyond his effort in a critical way. That is, in the following sections, I intend to discuss what I’ll call the “Conflicting Truths,” “Contradictions and Inconsistencies,” and other “Complicating Factors” that underlie the various positions held by the debate’s dominant voices, in order to expose where possible their biases and agendas. Such an effort is necessary because of what can only be seen as a lack of good faith on all sides to honestly work towards pragmatic solutions. It is hoped that by scrutinizing the different positions, we can move toward new ways of thinking about the trade in cultural property.

## II. *CONFLICTING TRUTHS*

All sides in the debates regarding the antiquities trade and the problem of looting make certain assumptions that they regard as unquestionable truths about the trade from which they strengthen their arguments. The problem is that many of these

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14. A. Colin Renfrew, *Foreword* to *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD’S ARCHAEOLOGICAL HERITAGE* xi, xi (Neil Brodie et al. eds., 2001).

15. See Paul Bator, *An Essay on the International Trade in Art*, 34 *STANFORD L. REV.* 275, 275-76 (1982).



initial points are themselves highly dubious. In fact, it may be said, to use Merryman's phrase, that they are positions "no thinking person" would dare hold.<sup>16</sup> The problem is that archaeologists, museum professionals, collectors, auction-house directors, and policymakers, are "thinking people," and yet seem to accept points that should not go unquestioned. It is the point of this brief section to outline these different and conflicting truths upon which each side makes its case, and illustrate how they not only represent entirely opposing value schemes, but are each themselves highly debatable.

#### A. *Archaeologists and Critics of the Antiquities Trade*

A core "truth" archaeologists tend to build their arguments upon is the idea that—desirability aside—stopping the trade in antiquities is a realistic possibility. This basic premise underpins archaeologists' fight against any licit trade schemes, support for trade embargoes of all kinds, and criminal prosecutions for dealers and collectors in violation of them. The problem with this view is that objects that can move, do move, and even when the most authoritarian regimes forbid it, objects are often exchanged among people and across borders. This is especially true when the objects are prized as having special or unique qualities, such as aesthetic, prestige-oriented, or other value-added characteristics. As long as people desire such objects, they will be traded, whether licitly or illicitly. Just because archaeologists do not value objects in this way does not mean that such a different way of valuing objects will cease to exist.

Related to this last point is the broader assumption that the commodification of culture in general can be somehow resisted and even undone with sufficient effort. Such a view underlies the efforts of some archaeologists against any kind of valuation of cultural objects. This includes the suggestion that museums should not take out insurance policies on antiquities, because putting any kind of price tag on an object assumes both a "replacement value" on what is essentially an irreplaceable item, and the existence and validity of a market that sets the price of such objects. Based on the first assumption that the market may be and should be halted, the thinking goes that because there should be no market, there should be no "market value," and

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16. See Merryman, *Cultural Property Internationalism*, *supra* note 12, at 11.

taking out insurance policies undermines this position. Any actions that forestall this process—such as insurance estimates—by acknowledging that which should be eliminated, only hinder efforts to end the antiquities trade, and thus should be avoided.<sup>17</sup>

Despite how unpalatable it may be for archaeologists, however, the commodification of culture is unavoidable, particularly in a global economy driven largely by markets, competition, and distinction. Western notions of property—both “real” and “intellectual”—have established a system whereby anything can be isolated, decontextualized, packaged for consumption, marketed, and traded—in short, commodified. This has become even more prevalent in a global era where individuals are increasingly seeking to distinguish themselves from the increasingly similar crowd. Culture, perceived as a resource for supplying consumers with innovative, different, and “authentic” (and “unique”) objects and experiences, has thus become the ultimate commodity—the last resort for people to distinguish themselves in a Sombartian sense of “conspicuous consumption” through their acquisition of preciosities.<sup>18</sup> Even UNESCO has acknowledged the inevitability of cultural commodification in their latest efforts at safeguarding the so-called “intangible” heritage and cultural “diversity,” the latest convention explicitly aimed as securing market share for specific cultural products.<sup>19</sup>

As a side note, I want to distinguish “commodification” from “commercialization,” which is explicitly addressed and warned against in the Society for American Archaeology’s (“SAA”) Code of Ethics. In the SAA Code, “commercialization” is linked to the exploitation of archaeology for monetary gain, and in particular the destruction caused by illicit looting and trade in antiquities.<sup>20</sup> Speaking as an archaeologist, while we can and should act to combat the crass exploitation of archaeology and archaeological materials, which is presumably at the expense of our primary

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17. See Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 405 (1995).

18. See, e.g., ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1996). See generally THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE (Arjun Appadurai ed., 1986).

19. See generally Alexander A. Bauer, *Definitional Anxieties*, ANTHROPOLOGY NEWS, Dec. 2005, at 27.

20. See SOC'Y FOR AM. ARCHAEOLOGY, PRINCIPLES OF ARCHAEOLOGICAL ETHICS, at Principle No. 3: Commercialization (2007), available at <http://www.saa.org/about-SAA/committees/ethics/principles.html>.

interest in the preservation and integrity of the archaeological record, I do not think it is possible for us to intervene in the commodification process, particularly since the majority of what we do is fetishize the archaeological record and build our careers and our livelihood on it. In fact, UNESCO itself seems to distinguish between the two as well: while the 2001 Convention on the Protection of the Underwater Cultural Heritage expressly forbids “commercial” activities regarding that heritage, promoting the “commodification” of culture for economic development is at the heart of its 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>21</sup>

### B. *Collectors and Supporters of the Antiquities Trade*

The foundational assumption that most collectors and supporters of the antiquities trade make—and delude themselves into believing—is that the current trade in antiquities is a separate issue from looting, which everyone, including them, agrees is despicable. Rather, they usually argue, looting is driven by poverty and a problem of poor local law enforcement and corruption, and the trade has little to do with it. Moreover, the number of objects on the market looted in such a fashion is a small minority and shouldn’t taint what is in the main a morally unblemished trade.<sup>22</sup>

While from a theoretical standpoint, trade is an issue separate, and ideally separable, from looting (this will be discussed further later), the assertion that demand for antiquities has no effect on looting is ludicrous and patently false. While increased attention to a cultural product may help create a market for it, demand plays a pivotal role in driving the search for supply to satisfy it. This is particularly the case with “unique” or “precious” kinds of products, such as art or objects for which individuals will pay large sums of money.<sup>23</sup> Indeed, the cause and effect of mar-

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21. Compare Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M. 40, with Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, 45 I.L.M. 73.

22. A classic statement of this position appears in Brief for American Association of Museums (“AAM”), et al. as Amici Curiae Supporting Claimant Michael H. Steinhardt, United States v. An Antique Platter of Gold, No. 97-6319 (2d Cir. Mar. 6, 1998) [hereinafter AAM Amici Curiae Brief].

23. See Borodkin, *supra* note 17, at 407-08; see also Grant E. Strother, Stopping Traffic: Illicit Antiquities and U.S. Public Policy (2007) (unpublished A.B. Thesis, Woodrow Wilson School of Public and International Affairs, Princeton University) (on file with

ket demand on looting has been aptly demonstrated over and over, and most starkly when new discoveries or exhibits championing the importance and beauty of a heretofore under-recognized cultural tradition, such as Ban Chiang pottery from Thailand<sup>24</sup> or Apulian red-figure vases from Italy,<sup>25</sup> are soon followed by an increase in such items on the market and an increase in the looting of those items in their countries of origin. The point here is that just as the archaeologists' belief that the commodification of culture can be somehow undone deserves questioning, it is equally worth questioning collectors' belief that they do not have a hand in the process that increases the value of cultural objects and thus encourages an increase in their supply, which, when the trade is illicit, is achieved either through looting or forgery.

Now it is true that the motivations of looters are complex, and poverty does play an important role. Work on "subsistence looting" in Alaska and Mesoamerica has raised our collective awareness of these dimensions.<sup>26</sup> But what is perhaps most telling is that many collectors and defenders of the market point to these studies as support for the trade, or at least to diminish its vilification. In this light, buying antiquities is thus helping out the poor locals, otherwise unsupported by their national governments (even if the monies paid to local diggers pales in comparison to that earned by middlemen). Unnoted, however, is the apparent contradiction: if the market does not support looting, as initially contended, how can the plight of "subsistence looters" be in any way ameliorated by the activities of collectors and the market? It can't be both ways.

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author) (comparing successful policies targeting the demand-side of the illicit trade of other precious commodities such as conflict diamonds and endangered species).

24. See Froelich Rainey, *Do Archaeological Methods Promote Looting?*, 3 J. FIELD ARCHAEOLOGY 112, 112-13 (1976).

25. See Ricardo J. Elia, *Analysis of the Looting, Selling, and Collecting of Apulian Red-Figure Vases: A Quantitative Approach*, in TRADE IN ILLICIT ANTIQUITIES, *supra* note 14, at 145-53.

26. See David P. Staley, *St. Lawrence Island's Subsistence Diggers: A New Perspective on Human Effects on Archaeological Sites*, 20 J. FIELD ARCHAEOLOGY 347 (1993); see also Julie Hollowell-Zimmer, *Digging in the Dirt—Ethics and 'Low-End Looting,'* in ETHICAL ISSUES IN ARCHAEOLOGY 45-56 (Larry J. Zimmerman et al. eds., 2003). See generally David Matsuda, *The Ethics of Archaeology, Subsistence Digging, and Artifact 'Looting' in Latin America: Point, Muted Counterpoint*, 7 INT'L J. CULTURAL PROP. 87 (1998).

*C. Moral Arguments*

The claim that buying antiquities can somehow help provide a source of income to those who need it most raises one final assumption worth questioning here. Often underlying the arguments of the debating parties is an appeal to morality, with each one claiming that its position is not selfish, but rather maintained for some sort of "common good." Archaeologists say that materials should be preserved for archaeologists to excavate and study in order to generate knowledge that benefits the world. Collectors say that they rescue objects of rare beauty and cultural achievement that would otherwise be destroyed, and their collections are shared with the world through museums. Museums say they act as safe repositories for the world's most important objects, and provide access and education for all its visitors. Governments of so-called "source nations" claim that their ownership and export laws serve to protect sites from destruction and that keeping objects in their country of origin acts to preserve them in their original cultural context. The U.S. government contends that by enforcing other nations' patrimony laws, it is also acting to preserve, as well as show respect for, their cultures and monuments. That policies satisfactory to all of these various interests have not yet been developed suggests two things, which are not mutually exclusive: first, that these interests are in conflict because they rely on different and potentially incompatible "truths" about the nature of cultural heritage; second, that the motives and positions of these different groups may consist of complex and self-contradictory elements that are rarely scrutinized.

*III. CONTRADICTIONS AND INCONSISTENCIES*

Given that the arguments discussed above do not seem to be as they first appear, I will thus attempt to lay out what I believe are the primary and secondary goals of each of the interested parties, and highlight the ways in which they present contradictions or inconsistencies with their current positions. For convenience' sake, the parties I have identified here are archaeologists, museums, collectors and dealers, foreign national governments, the U.S. government, and local communities (in the so-

called “source” nations).<sup>27</sup>

Attempts to articulate values serving a universal public good, such as Merryman’s triad of regulatory imperatives—preservation, truth, and access<sup>28</sup>—are neither universal nor value-neutral, and thus their utility for evaluating the different sides of these debates may be questioned. One need consider only for a moment cases where “preservation” or “access” of an object is neither desired nor appropriate: the “war gods” figures made by the Native American Zuni are meant to disintegrate among the elements in order to maintain balance in their lives,<sup>29</sup> and access to specific and important objects or places is restricted in many cultures. So while “preservation, truth, and access” might sound agreeable, we must ask the necessary questions, “preservation” of what exactly, and to what end? “Access” for whom? And whose view of “truth?” These questions about what the values of preservation, truth, and access actually mean should be kept in mind when scrutinizing the goals of the different interest groups. It is likely that what these terms mean is highly specific to each interest group, revealing again that what we are dealing with in part is a multiplicity of value schemes inconsistent with each other.

#### A. *Archaeologists*

All archaeologists, regardless of disciplinary specialty, are first and foremost interested in the preservation of the archaeological record. Field archaeologists, and those who more clearly align themselves with the “scientific” as opposed to “humanistic” aspects of the discipline, will be more assertive about the importance of preserving and recording archaeological context—the physical space in which an artifact is discovered in relation to

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27. I have not included “the public” as an interest group, not because they are not interested or are irrelevant, but because what constitutes “the public” is open to debate. As I mentioned at the end of the previous section, all parties to the debate claim that they are acting in the interest of the “public good” in one way or another, and while these claims may not be equally persuasive, there are certainly communities beyond those immediately involved who would benefit from each side’s perspective. These communities are more accurately conceived of as “publics” rather than a single “public.” As a result, it is better to understand the various “publics” interested in this debate as aligned with one of the other parties discussed here.

28. See generally John Henry Merryman, *The Nation and the Object*, 3 INT’L J. CULTURAL PROP. 61 (1994).

29. See William L. Merrill, Edmund J. Ladd, & T.J. Ferguson, *The Return of the Ahayu:da: Lessons for Repatriation from Zuni Pueblo and the Smithsonian Institution*, 34 CURRENT ANTHROPOLOGY 523, 546 (1993).

other artifacts and features in the earth—in addition to the artifacts themselves. But all seek to preserve artifacts and the information about the past that they contain, in order to gain a full understanding of the past and safeguard those materials for future generations. This “safeguarding” mission has been codified in several archaeological ethics statements, including that of the Society for American Archaeology, whose Code lists stewardship as its first, and foundational, principle.<sup>30</sup>

Preservation of the archaeological record and the information it provides is also the rationale behind what is known in the United States as cultural resource management (“CRM”), and elsewhere as archaeological heritage management, or some variant of those terms. The aim of CRM is to mitigate the destruction of cultural resources caused by public works and other construction projects, by preserving and/or documenting the archaeological data impacted by the project as fully as possible. In the United States and many other nations, such activities are mandated by law and are carried out by archaeologists specifically trained for that purpose.<sup>31</sup>

Given the extent of archaeological efforts to combat the destruction of sites by construction projects, it should be little wonder why the illicit excavation and looting of sites is similarly fought by archaeologists. Clandestine excavations aimed at finding rare and valuable artifacts often leave sites in ruin, without the documentation and detailed excavation records that are supposed to accompany legal excavations. Contextual information about any object that is discovered is lost, and in fact intentionally undocumented to minimize evidence of illegality, and countless other materials that are not so attractive to looters looking to make a sale are destroyed in the process. Combating looting as another significant force behind the destruction of sites is thus directly related to archaeologists’ primary goal of preserving artifacts and the archaeological record.

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30. See Mark J. Lynott & Alison Wylie, *Stewardship: The Central Principle of Archaeological Ethics*, in *ETHICS IN AMERICAN ARCHAEOLOGY* 35-39 (2d ed. 2000).

31. In the United States, these laws include the National Historic Preservation Act of 1966, 16 U.S.C. § 470 (2006), the National Environmental Policy Act of 1974, 42 U.S.C. §§ 4321-4347 (2006), and the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (2006). For a classic statement on the goals and strategies of Cultural Resource Management in the United States, see generally William D. Lipe, *A Conservation Model for American Archaeology*, 39 *THE KIVA* 213 (1974).

A secondary value that many archaeologists hold is a desire to support the interests and rights of the communities in which they work. This is presumably linked in part to a general sympathy that any researcher might develop with a host community. But for many researchers acutely aware of the historical global inequalities that have allowed them the opportunity to excavate sites in other countries (how many Middle Eastern scholars, for example, direct archaeological projects in North America?), giving support for local interests, even (and sometimes, especially) when these go against Western ones, is part and parcel of a more mature, post-colonial archaeology.<sup>32</sup>

Archaeologists' support for repatriation efforts and vesting laws is thus aimed at addressing these two main concerns: first, support is offered for enforcement in order to combat looting and the illicit trade it's part of, and second, supporting the claims of other countries to their cultural property is a gesture of respect and reconciliation for the injustices of cultural appropriation perpetrated during the colonialist era.<sup>33</sup>

But what about domestic looting, such as in China? Or the rights of descendent or transnational communities who don't have a voice on either the domestic or international stage? Many countries contain minority communities whose interests are not always served by their national governments. Yet while archaeologists have grown increasingly aware and critical of politically motivated uses of the past, such as for nationalistic purposes (often at the expense of local communities or oppressed minorities), many remain largely supportive of efforts to repatriate objects in spite of these concerns.<sup>34</sup> Domestic repatriation or cultural property rights laws such as the Native American Graves Protection and Repatriation Act ("NAGPRA") in the United

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32. See, e.g., *ARCHAEOLOGISTS AND LOCAL COMMUNITIES: PARTNERS IN EXPLORING THE PAST* (Linda Derry & Maureen Molloy eds., 2003).

33. See generally Elazar Barkan, *Amending Historical Injustices: The Restitution of Cultural Property—An Overview*, in *CLAIMING THE STONES/NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY* 16-46 (Elazar Barkan & Ronald Bush eds., 2002).

34. See generally Alexander A. Bauer, Shanel Lindsay, & Stephen Urice, *When Theory, Practice and Policy Collide, or Why Do Archaeologists Support Cultural Property Claims?*, in *ARCHAEOLOGY AND CAPITALISM: FROM ETHICS TO POLITICS* 45-58 (Yannis Hamilakis & Philip Duke eds., 2007).



States<sup>35</sup> or the Protected Objects Act in New Zealand<sup>36</sup> are the exception, not the rule (and are in fact much more common in nations where settler communities pushed aside indigenous ones, such as in North America and Australia). And while UNESCO's efforts to safeguard heritage are substantial, they must necessarily operate on the level of the nation-state, and can do little to secure trans- or sub-national minority rights. The recent UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, in which global diversity is promoted through the protection of *national* cultural expressions, clearly illustrates these limitations.<sup>37</sup> Given such problems, it is clear that archaeologists' desire to respect the interests of the communities in which they work is not always satisfied (and is in fact sometimes directly contravened) by supporting national-level policies, such as vesting statutes that declare all antiquities to be state property.

Finally, as Bator discussed, the quickest way to encourage a black market and the illicit activities it engenders, such as looting and forgery—two things no archaeologist who prioritizes the preservation of information can support—is to make the entire trade illegal.<sup>38</sup> Given that, why are archaeologists adverse to the idea of a legalized trade in cultural objects? This seems even stranger considering the fact that the trade of such objects in the past has long been a prominent area of archaeological research. Many of the objects whose embargo is supported, such as the Attic Greek pottery found in cemeteries throughout central Italy, were themselves made as trade items.<sup>39</sup> So, following the logic of repatriation, why don't archaeologists champion their eventual return to Greece? Given that objects have "social lives" which continue today, why is their place at one point in history prioritized over all others?<sup>40</sup>

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35. Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 (2006).

36. See Protected Objects Act 1975, 1975 S.R. No. 41 (N.Z.).

37. See generally Bauer, *supra* note 19.

38. See Bator, *supra* note 15, at 317.

39. See Nigel Spivey, *Greek Vases in Etruria*, in *LOOKING AT GREEK VASES 131-50* (Tom Rasmussen & Nigel Spivey eds. 1991).

40. This problem is nicely illustrated by the case of the Horses of Constantine in San Marco, which were taken to Venice after the Sack of Constantinople in 1204. Though their origin is murky, they are thought to have been made in Greece and brought to Rome in antiquity, then taken to Constantinople in the early Byzantine pe-

If the trade in cultural objects can be decoupled from looting and the loss of information it represents, which I admit is a vitally important “if,” why should archaeologists be against a regulated, but legal, circulation of properly-excavated and documented materials? I suspect that much of the resistance stems from the initial assumption discussed above that the commodification of culture is bad and can be undone. If archaeologists disabuse themselves of this assumption, and recognize that the commodification of these kinds of objects began millennia ago, then perhaps we can move forward and begin to take a more realistic view of the issues.

### B. *Museums*

On their face, the mission of most museums follows closely Merryman’s triad of preservation, truth, and access. What these terms mean, however, vary depending on the particular characteristics of the institution. Museums share archaeologists’ concerns over the preservation of archaeological materials. But whereas most archaeologists place equal if not greater emphasis on the preservation of archaeological context, most museums tend to be concerned primarily with the well-being of individual objects. Certainly the information supplied by archaeological context is valuable, but the object *qua* object is equally so, and much can be learned simply from its careful study.<sup>41</sup>

While most university-based museums do not continue to collect antiquities in any significant way,<sup>42</sup> many larger indepen-

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riod. While they (or, in fact, replicas, for the sake of preservation) still stand today over the entrance to the Basilica, they were in fact taken to Paris by Napoleon in 1797, on the justification that they had been looted from Constantinople by the Venetians, and thus Venice was not their proper home. Also interesting to note is that they were taken to Rome during the First World War for safeguarding. See generally Marilyn Perry, *St. Mark’s Trophies: Legend, Superstition, and Archaeology in Renaissance Venice*, 40 *J. WARBURG & COURTAULD INSTS.* 27 (1977). While there is clearly an issue of legality here, in that the Attic pottery, for example, was sold to Etruscan buyers in antiquity, while the pots have recently been stolen from Italy, the point I am trying to make is that *moral* arguments that objects should be returned for reasons of cultural affiliation are more complex and questionable.

41. For the positions of museums and, in particular, art-history ones, see Robert Hallman, *Museums and Cultural Property: A Retreat from the Internationalist Approach*, 12 *INT’L J. CULTURAL PROP.* 201 (2005) and Nora Niedzielski-Eichner, *Art Historians and Cultural Property Internationalism*, 12 *INT’L J. CULTURAL PROP.* 183 (2005).

42. Many university museums were the first to declare moratoria on collecting unprovenanced antiquities.

dent museums still do. To these collecting institutions, “access” means both the providing of access to museum visitors and scholars, as well as the continued ability to enrich the collection through purchase, bequest, and long-term loans. That enriching the collection continues to be a primary concern is made clear by recent statements of several museums including the Met in New York, which reaffirmed and revised its mission statement in September 2000 to read:

The mission of The Metropolitan Museum of Art is to collect, preserve, study, exhibit, and stimulate appreciation for and advance knowledge of works of art that collectively represent the broadest spectrum of human achievement at the highest level of quality, all in the service of the public and in accordance with the highest professional standards.<sup>43</sup>

In this way, Merryman’s triad of values may be better understood in the museum context as preservation of the object, research and education, and acquisition. As a result, the museum community (represented by the positions of the American Association of Museums (“AAM”) and the Association of Art Museum Directors (“AAMD”)<sup>44</sup> tends to fight both increased regulation of the antiquities trade, which limits their ability to acquire important new objects, and repatriation, which in some cases may seem antithetical to their “preservation” mission.

The view of repatriation as antithetical to “preservation” may be questioned, however. Certainly many Western museums provide unparalleled facilities for the conservation and preservation of objects. But if “preservation” is understood more broadly than the object to mean the preservation of context or even the preservation of the culture that made it, then the acquisition and retention of some materials by museums undermines that goal.<sup>45</sup> Even with respect to the object itself, it is reasonable to question whether continued collecting actually secures preservation of artifacts themselves. Objects are often damaged (and others destroyed) through looting practices and the illicit trade. Mosaic panels, for example, are often cut into smaller pieces for transport (and smuggling), causing irreparable harm to the

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43. METRO. MUSEUM ART, ANNUAL REPORT FOR THE YEAR 2000-2001, at 7 (2001).

44. See AAM *Amici Curiae* Brief, *supra* note 22.

45. See Protts, *supra* note 12, at 231.

pieces (such as the case of the Kanakaria Mosaics<sup>46</sup>). And even when objects are transported legally, they may be damaged in transit. This is not to say that objects should never travel, but we must recognize that even for museums the value of preservation is subject to compromise in the face of competing interests. What this says, therefore, is that for some museums the value of preserving context is often not compelling enough.

We can similarly question collecting museums' prioritization of research and education in light of their continued support of the antiquities trade. While objects themselves can tell us some things about the culture who made them, a vast amount of valuable contextual information is lost when sites are looted—the kind of contextual information that other, non-ancient-art departments of art museums value highly—such as when and where exactly something was produced and for what purpose or market or event it was originally made.<sup>47</sup> Likewise, when the history of an object's ownership is kept obscure, there is a greater likelihood that forgeries will be passed off into the market as the real thing, which acts to compromise our understanding of the past and other objects in a collection, not to mention results in a financial loss for the institution.<sup>48</sup>

For these reasons, it seems that for museums, the acquisition of legal and well-documented materials would be far preferable to that of non-documented and potentially looted materials. This is even truer if the purchase of illegal materials increasingly opens them up to lawsuits and/or criminal prosecution. Some larger museums realize this and are attempting to revive the system of *partage*, in which a percentage of the materials uncovered in excavations co-sponsored by the museum are then offered to the museum.<sup>49</sup> This is certainly one way to continue acquiring

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46. See *Cyprus v. Goldberg*, 717 F. Supp. 1374 (S.D. Ind. 1989). The Euphronios Krater, bought by the Metropolitan Museum of Art for a reported US\$1,000,000 in 1972 and recently turned over to Italy as part of their 2006 Agreement, was also suspected of being broken on purpose for easier smuggling. See Thomas Hoving, *Super Art Gems of New York City*, ARTNET, June 29, 2001, <http://www.artnet.com/magazine/features/hoving/hoving6-29-01.asp>.

47. See SUSAN M. PEARCE, *MUSEUMS, OBJECTS, AND COLLECTIONS: A CULTURAL STUDY* 48-57 (1993).

48. See David W. Gill & Christopher Chippendale, *Material and Intellectual Consequences of Esteem for Cycladic Figurines*, 97 AM. J. ARCHAEOLOGY 601, 629 (1993). See generally OSCAR WHITE MUSCARELLA, *THE LIE BECAME GREAT: THE FORGERY OF ANCIENT NEAR EASTERN CULTURES* (2000).

49. The 2006 agreement between the Metropolitan Museum and Italy includes a

objects in a manner that is both legal and less destructive to the archaeological record. Another way to do this would be for museums to increase their cooperative arrangements with "source" nations and push for a limited, legalized trade in well-excavated and documented artifacts, and in return, to promise to acquire objects exclusively through that channel.

### C. *Collectors and Dealers*

The concerns of collectors and dealers overlap in many ways, and thus will be treated as a unit for convenience. That many dealers are also collectors and vice versa also makes their grouping appropriate, although there are some significant areas of difference which will be pointed out in the discussion.

The primary concerns of most collectors and dealers of antiquities are the authenticity and integrity of the objects, the ability to own (or pass title to) such objects, and a relatively unfettered access to objects for acquisition. For most collectors, the process of discovering and possessing the unique or prized object and the amassing of a collection is a passion, and in most cases, there is a genuine love of the objects collected and the cultures from which the objects originate,<sup>50</sup> though the willingness with which most collectors will subvert export laws of other countries because they are considered "unfair" calls that love and respect of those cultures into question.<sup>51</sup> As with museums, "preservation" is important insofar as the object itself is concerned, and many collectors feel that they are "preserving" important works that might otherwise be destroyed through neglect or conflict, if the object comes from countries beset by poverty or strife.<sup>52</sup> Dealers certainly care about the preservation and

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provision that materials discovered in excavations supported by the museum will be made available for loan to the museum.

50. See, e.g., PEARCE, *supra* note 47; Shelby White, *A Collector's Odyssey*, 7 INT'L J. CULTURAL PROP. 170 (1998).

51. One reason for this disjunction is that collectors may distinguish between the ancient culture they admire and the contemporary nation-state that may or may not be related to that ancient culture. While certainly there are different degrees of relatedness in different cases, there is still the overall point that a lack of recognition and respect for the living communities who regard themselves the heirs of that material is an unaddressed problem in these disputes. See Daniel Shapiro, *Repatriation: A Modest Proposal*, 31 N.Y.U. J. INT'L L. & POL. 95, 108 (1998).

52. For example, Martin Schøyen, who has amassed a major collection of ancient and medieval Buddhist manuscripts from Afghanistan, sees himself as rescuing these items from near certain destruction at the hands of the Taliban. See Atle Omland &

integrity of objects as well, although it is arguable that this is motivated more by money and quality control than altruism (and if the world of “dealers” includes the middlemen and others involved in bringing the materials to the market, then preservation of the object seems like a low priority indeed, since there are many documented cases of objects being broken for easy and illicit transport).<sup>53</sup> Whatever their motives, however, it seems clear that both collectors and dealers care that the objects on the market are authentic and in good condition.

Equally important to collectors and dealers is the availability of materials for purchase and ownership. To that end, both groups are clearly against increased regulation of the antiquities trade and efforts by “source” nations to retain and repatriate cultural objects. In fact, they largely feel that objects should be ownable by anyone and, as a result, regard at least the export laws of other countries to be unreasonable (and thus should not be enforced in the United States).<sup>54</sup> As for the looting of sites, it is my belief that most collectors do regard it as a bad thing and would prefer to acquire materials that have not been obtained through such means. That said, there is clearly a good deal of willful ignorance going around, as most prized objects that appear for the first time on the market are likely to have been looted.<sup>55</sup>

With the recent and growing trend of successful lawsuits and criminal proceedings against dealers and collectors, however, it is becoming an increasingly dodgy proposition to acquire objects from the market without doing one’s due diligence.<sup>56</sup> Given the stakes, I would assume that if there were a regulated but legal trade in antiquities, most collectors and dealers would prefer to obtain objects that way, particularly if the materials ac-

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Christopher Prescott, *The Schøyen Collection in Norway*, 13 *CULTURE WITHOUT CONTEXT* 8, 11 (2003).

53. See generally Hoving, *supra* note 46.

54. See generally AAM Amici Curiae Brief, *supra* note 22.

55. One remarkable example is that of the “Weary Herakles,” in which two pieces of a sculpture, one jointly owned by collector Shelby White and the Boston Museum of Fine Arts and the other in the Antalya museum were found to fit together. See A. COLIN RENFREW, *LOOT, LEGITIMACY AND OWNERSHIP* 32-35 (2000).

56. See Povoledo, *supra* note 3; see also *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003). See generally Kelly Elizabeth Yasaitis, *National Ownership Laws as Cultural Property Protection Policy: The Emerging Trend in United States v. Schultz*, 12 *INT’L J. CULTURAL PROP.* 95, 113 (2005).

quired that way were of good quality, and were accompanied by more in-depth and reliable information of the kind obtainable through archaeological excavation—after all, information can be a commodity too. Moreover, objects obtained this way would be guaranteed against forgeries (thus satisfying an important interest of collectors), would be legal and thus immune from seizure (and the collector immune from prosecution), and may even be of greater value due to the information accompanying them. Finally, a regulated, licit trade may even attract buyers whose concern over legal issues discouraged them from collecting.

#### D. *Governments of So-Called "Source" Nations*

The governments of many nations rich in archaeological resources—especially those sought by collectors and museums—seek to control those resources by preserving and retaining the cultural property that they currently possess, and pursuing the repatriation of important works from other nations. To do the former, many nations have adopted cultural patrimony laws that vest ownership of archaeological and cultural resources in the state.<sup>57</sup> To do the latter, and re-gain objects taken out of the country under questionable circumstances, is a good deal trickier, though a combination of rigorous litigation and public relations campaigns—as illustrated by Italy's recent efforts—is proving to be a potent combination.

Such efforts to control cultural materials are undertaken because of both the symbolic value and economic value these items hold for the country. The symbolic value refers to the fact that many items are a source of pride and are considered the "heritage" of the particular culture or cultures represented in that nation. Such items are a source of pride and their possession by foreign owners—often as a legacy of the colonial era—may be considered a tragedy. Because of this "symbolic violence," even acknowledging the claims of nations to these objects as valid might go a long way towards reconciliation and developing new solutions.<sup>58</sup> Viewed from a less positive perspective, nations may seek to retain objects in order to control the discourse about

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57. See generally John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477 (1988).

58. See Shapiro, *supra* note 51, at 105-07.

their cultural legacy and suppress unwanted narratives about the objects (of course, the same can be said for the motives of Western, so-called “universal” collecting institutions as well). While on one hand, it is important to challenge colonialist, Western narratives that have dominated the archaeology of many regions, it is important too that these narratives do not simply, “exchange . . . one set of limiting conditions with another.”<sup>59</sup>

Economic motives are also important factors in national efforts to preserve and retain objects and sites, as cultural property is increasingly becoming a major source of tourist revenue.<sup>60</sup> Part and parcel with this are the increased efforts at combating looting and the destruction of sites, with countries such as Egypt and Italy stepping up their efforts to crack down on local looters and smugglers, and protect sites. But is the increased exploitation of archaeological and cultural resources for economic gain being undertaken at the expense of the resources themselves? Archaeological sites are fragile and even the best behaved tourists will damage sites when visiting in overwhelming numbers. Sites such as Machu Picchu are facing significant preservation concerns due to its popularity with tourists, and more fragile sites are often forced to close to the public.<sup>61</sup>

In other cases, national governments’ attempts to use archaeological sites and monuments for attracting tourists may be at the expense of the integrity of the site and/or the well-being of the communities in which they are situated. Nations may prioritize excavating and reconstructing sites—and phases of sites—that are more attractive to tourists, even if that entails effectively destroying or building over less “marketable” phases of history or those which challenge dominant political-historical narratives.<sup>62</sup> Moreover, living communities occupying land on or near sites of importance may be forcibly relocated so that the site may be explored and developed for tourism, thus conveying to those living at the site that their well being is less important

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59. See Roderick J. McIntosh, Susan Keech McIntosh & Téréba Togola, *People Without History* (1989), reprinted in *ARCHAEOLOGICAL ETHICS* 185-197 (K.D. Vitelli ed., 1996).

60. See generally *TOURISM AND HERITAGE MANAGEMENT* (Wiendu Nuryanti ed., 1997).

61. See Lama Abraham, *Threat to Macchu Picchu: Too Many Tourists*, TIERRAMÉRICA NEWS SERV., July 5, 2005, <http://www.tierramerica.net/2005/0507/iarticulo.shtml>.

62. See Christine M. Boyer, *Cities for Sale: Merchandising History at South Street Seaport*, in *VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE* 181-204 (Michael Sorkin ed., 1992).



than that of the site.<sup>63</sup> Such prioritizing of the past over the present is not only an act of symbolic violence towards those living communities but may also serve to reinforce the idea that archaeological materials are inherently valuable, likely promoting activities such as looting that the government may be trying to avert.

Finally, aside from the ethical problems raised by some national preservation strategies, it is also not feasible to try to comprehensively protect sites in countries full of archaeological remains. Many places (and arguably all) have been described as being one large archaeological site and often do not have the resources to monitor the major sites, let alone every individual's backyard.<sup>64</sup> The fact that many sites and materials still remain undiscovered makes protection even more difficult. Given this situation, looting is easy and almost impossible to protect against.

#### *E. Local Communities*

Local communities' interests often parallel those of the nation, as for those groups too, archaeological remains can hold both symbolic and economic value. The reason I am discussing them in a separate category, however, is because while their interests in cultural property may be the same, in many cases they operate in conflict with those of their national government. Since a dominant feature of the modern nation-state is for local identities to be subordinate to national ones, this can often result in a cooption or even rejection of local interests by the nation (as discussed in the previous section). The ownership and display of the cultural history of local minorities by national, rather than regional, museums allows it to be more easily assimilated into the national narrative, which may neither reflect nor

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63. See Lynn M. Meskell, *The Practice and Politics of Archaeology in Egypt*, in *ETHICS AND ANTHROPOLOGY: FACING FUTURE ISSUES IN HUMAN BIOLOGY, GLOBALISM, AND CULTURAL PROPERTY* 146-69 (Anne-Marie Cantwell et al. eds., 2000) (discussing the Egyptian town Gurna and its ramifications on archaeological practice and ethics).

64. The United States is no exception to this, and one of the goals of cultural resource management ("CRM") in the United States and elsewhere is to prioritize the "significance" of sites in danger of destruction from development and erosion. See Lipe, *supra* note 31, at 213-45; see also Robert C. Dunnell, *The Ethics of Archaeological Significance Decisions*, in *ETHICS AND VALUES IN ARCHAEOLOGY* 62-74 (Ernestene L. Greene ed., 1984).

serve local interests.<sup>65</sup>

So while local communities may share their government's goals to protect archaeological resources and to reclaim materials through repatriation, many may feel that relocation or repatriation of the region's objects to a national repository is unsatisfactory, for it does not allow them to reap either the economic (through tourism) nor the symbolic (through proximity) benefits. For this reason, many communities would prefer to see the cultural resources located in, or taken from, their area, be used in such a way as to bring their community direct economic or social gain.

But while local communities may be among the least empowered players in the "cultural property world" currently in place,<sup>66</sup> there are still complex ways in which local dynamics play out that seem in conflict with what may be their acknowledged interests. Specifically, the lack of economic well-being in many communities that happen to be rich in archaeological resources has facilitated a permissive—and sometimes even glorifying—environment for antiquities looters. Some *tombaroli* in Italy, for example, have gained special status for the wealth they bring to the community through their digging activities.<sup>67</sup> And for some groups, looting archaeological materials is not only permitted, but seen as an important subsistence strategy to make ends meet during more economically depressed seasons, justified by a view of antiquities as being gifts planted in the ground by ancestors.<sup>68</sup>

In this way, then, we can see that even local interests are complex and sometimes result in contradictory practices. While there is often great desire for archaeological materials to reside in, or be returned to, communities for symbolic reasons, local economic needs may trump even these. So when materials do not meet economic needs by staying *in situ*, some communities will endeavor to sell them, either legally or illegally. Any successful strategy for combating looting, therefore, must take into account the economy of the regions where looting occurs and of-

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65. See Bauer, Lindsay, & Urice, *supra* note 34, at 45-58.

66. See Prott, *supra* note 12, at 228. *Contra* Merryman, *Cultural Property Internationalism*, *supra* note 12, at 11.

67. See generally Sam Migliore, *Treasure Hunting and Pillaging in Sicily: Acquiring A Deviant Identity*, 33 *ANTHROPOLOGICA* 161, 161-75 (1991).

68. See Barkan, *supra* note 33, at 16-46.

fer solutions in which the benefits of preserving materials there outweigh those of looting.

#### IV. *SATISFYING THE INTERESTS: A LEGAL, REGULATED TRADE?*

One direction worth discussing that I have raised throughout this Essay is the possibility of a licit trade in properly-excavated and state-sanctioned cultural materials. I focus on this for several reasons.

First, I believe that there will always be some sort of trade in cultural materials, and part of this trade is likely always to be illicit. The idea of stopping all illicit trade, let alone any trade at all, seems impractical and, with respect to a legal trade, undesirable. Developing ways to curb the illicit trade and thus mitigate the violation of both the archaeological record and cultural rights it causes, however, is a worthwhile goal.

Second, allowing for a controlled, licit trade may be one component of just such a policy, for a licit trade may satisfy some (though not all) demand. In addition, objects acquired legally would not open up the purchaser to possible litigation or prosecution, and might in fact offer value-added benefits such as detailed information and stories about the objects, not to mention moral satisfaction (which is itself increasingly commodified, as illustrated, for example, by the success of organic and fair trade products).

Third, a licit trade might lead to the restructuring of the economics of the antiquities trade, such as deflating prices (that had been inflated because of the risk involved in an illicit trade), which, combined with increasing enforcement, could undercut the benefits for looters, smugglers, and unscrupulous dealers. In addition, the monies from a trade regulated by source countries could support additional protection and conservation measures at archaeological sites, and employment for communities who might otherwise turn to illicit digging as a source of income.<sup>69</sup>

Fourth, developing an "open," less secretive trade in legal materials—with such objects accompanied by clear and detailed provenance records and permits—would, by contrast, highlight those objects that were more likely obtained through illicit

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69. See Borodkin, *supra* note 17, at 413-15.

means. This would have the effect of being a “sunshine” policy, forcing an end to anonymity and secretiveness in the trade since collectors would more likely choose to purchase objects that met the standards of legal antiquities.<sup>70</sup>

Fifth, one important value Bator noted would be advanced by a circulation of cultural items is the “general interest in the breakdown of parochialism.”<sup>71</sup> While this value may be equally served by the development of reciprocal exchange agreements, a controlled, licit trade in well-documented materials would also advance this goal. But I am not suggesting simply a version of the current antiquities trading system. As Prott cogently pointed out:

The one-sidedness of this [current] kind of cultural internationalism is evident—it looks far more like *cultural imperialism*, based as it seems to be on the activities of those from wealthy countries with each other and with poorer states whose cultural resources are flowing in one direction, without an equal exchange.<sup>72</sup>

In order to truly achieve the goal suggested by Bator and recently re-cast by Appiah as one of promoting “cosmopolitanism” and dialogue,<sup>73</sup> we must ensure that objects be distributed, if not evenly, then at least widely, so that art from all traditions may be available for viewing and study across the world, and not just in the museums of wealthy nations:

Sixth, the terms of any legal trade are set by the nations whose objects they are, and it is important to respect the rights of nations to determine the fate of their objects.<sup>74</sup> On one hand, this is not different than the way the current regulations operate, which are largely the result of national ownership and export laws. But respecting a nation’s rights to write the law does not

70. See Prott, *supra* note 12, at 238-40 (discussing the secretive nature of the antiquities market).

71. Bator, *supra* note 15, at 307-08.

72. Prott, *supra* note 12, at 228.

73. See generally KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006).

74. We must be mindful, of course, of the point raised earlier that national governments may not always act in the interest of minority and indigenous groups within their borders. While nations’ laws must be respected as a point of international law, and nations’ interests should be respected as a ‘post-colonial’ view, this also does not mean that archaeologists and others should not work to encourage and support sub-national groups’ assertions to control their heritage.

mean that we should not make the case for why the law might be changed. The point is that those domestic export laws should be encouraged to change, or at least, the practice of issuing export permits should be more than merely a theoretical possibility. Nations such as Japan and England have cultural property laws that prohibit the export of certain important objects, and many nations have schemes where the government has the right to buy an object from an individual to prevent its export.<sup>75</sup> In these countries, which have a rich archaeological record of their own, the problem of looting is less severe. Collectors outside Japan, for example, know not to purchase an object that is not accompanied by proper certification.<sup>76</sup>

The proposal for a limited, legal trade in cultural property is not new.<sup>77</sup> Many of the individual merits of such a plan have been raised elsewhere and at greater length. And a legal trade is certainly not the only way that objects can and should circulate. The effects of NAGPRA and the recent Met-Italy agreement illustrate how increased sharing and cooperation can help build trust and promote the circulation of cultural property in ways outside the market system.<sup>78</sup> The contribution I have attempted to make here, however, is to show how a legal trade in properly-documented materials, under the auspices of the nations whose objects they are, can in fact serve the interests of many of the groups concerned with cultural property, and at the same time aid the fight against looting and illicit trade.

## V. COMPLICATING FACTORS

If the six points enumerated above about a legal, regulated trade would in fact play out as described, would satisfy so many of the various and conflicting interests, and such a trade has

75. See Bator, *supra* note 15, at 315-16.

76. See Cultural Heritage Preservation in Asia, Cultural Property Law Session—Unedited Transcript (April 9, 2003), available at <http://www.asiasource.org/culturalheritage/culturalproperty.cfm>.

77. See generally John Henry Merryman, *A Licit International Trade in Cultural Objects*, 4 INT'L J. CULTURAL PROP. 13 (1995); Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L. J. 466 (1988); Ann Somers Cocks, *A Moment of Truth for All in the Antiquities Field*, ART NEWSPAPER, June 12, 2006, available at <http://www.theartnewspaper.com/article01.asp?id=307>.

78. See generally Robert K. Patterson, *The "Caring and Sharing" Alternative: Recent Progress in the International Law Association to Develop Draft Cultural Material Principles*, 12 INT'L J. CULTURAL PROP. 62 (2005).

been proposed before by scholars across the ideological spectrum, why is it that such proposals have met with little support generally? Are there other complicating factors at work here that might explain resistance on all sides to changing the status quo?

In the previous sections, I attempted to enumerate and examine the various assumptions, goals, and contradictions of the main participants in the antiquities trade debates. As stated at the outset, the aim was to unpack the arguments into their constituent parts in order to more clearly evaluate them and perhaps move toward some kind of accommodation among them. In this final section I want to examine why, even if the points made above might be acknowledged privately, there is great resistance to conceding them publicly and in practice.

#### *A. Archaeologists*

If indeed archaeologists' main concern is the preservation and stewardship of the archaeological record, they may not necessarily object to a legal trade in well-documented, properly excavated materials, as I suggested earlier. And if the concerns of the local and/or descendent communities are met, then most archaeologists would surely not object to museums' collecting new material under these circumstances. In fact, this is the way NAGPRA<sup>79</sup> itself works: if a site is excavated in consultation with the appropriate Native American tribe and that tribe decides to transfer materials to that (or even another) museum, then such transfers are legal.

So if a trade in properly excavated materials were approved by descendant communities, and could in fact satisfy museums' and collectors' desire to acquire new pieces, why do archaeologists stay quiet and not push for a more pragmatic antiquities trade policy? One reason might be that archaeologists fear doing anything that might anger the national governments which issue the research permits necessary to conduct fieldwork. Examples abound in which archaeologists had their privileges revoked for doing something against national wishes.<sup>80</sup> Criticizing

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79. See NAGPRA, 25 U.S.C. § 3001 (2006).

80. Famously, British archaeologist James Mellaart, who excavated the important Neolithic site of Çatalhöyük in Turkey, had his permit and even privileges to enter the country revoked after he publicized a group of artifacts that were suspected of being

national policy is thus something that most archaeologists avoid.

But what does it mean to be “nice” to the governments of host countries?<sup>81</sup> While postcolonial sensibilities do suggest deference to their wishes—after all, it is their right to control their own archaeology—archaeologists must be mindful of the possible problems of nation-centered perspectives: among those discussed earlier being nationalized narratives, disregard for local or indigenous rights, and economic exploitation at the expense of preservation (though this is not to say that only national governments commit these transgressions). Are there limits to what archaeologists should support? In the case of Egypt, whose fight against antiquities traffickers has been praised by many archaeologists, some reports suggest that Secretary General of the Supreme Council of Antiquities Zahi Hawass intends to limit or even eliminate altogether the involvement of foreign archaeologists in Egyptian archaeology, though he has said that this is not the case.<sup>82</sup> But where national interests do seem to be working against those of archaeologists, we may wonder whether scholars will simply remain quiet for fear of losing the privileges they do have.

### B. *Museums*

Recent years have brought increasing scrutiny on museums’ acquisitions policies, and some of the United States’ most important museums with antiquities have agreed to new arrangements with other States that emphasize reciprocal loans and cooperation over new purchases of materials.<sup>83</sup> While such agreements limit the avenues for continued acquisition, they may not signal the “end” of archaeological museums altogether, but rather the end of these museums as we have known them to be—products

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looted. While he was later allowed to return to the country, he was never allowed back at Çatalhöyük and the site remained unexplored from 1965 until 1993, when Ian Hodder began new excavations there. See generally MICHAEL BALTER, *THE GODDESS AND THE BULL: CATALHOYUK—AN ARCHAEOLOGICAL JOURNEY TO THE DAWN OF CIVILIZATION* (2006).

81. See K. Anne Pyburn, *Archaeology for a New Millennium: The Rules of Engagement*, in *ARCHAEOLOGISTS AND LOCAL COMMUNITIES: PARTNERS IN EXPLORING THE PAST*, *supra* note 32, at 170. Pyburn observes that “being nice” to host governments has its ethical shortcomings.

82. See Sharon Waxman, *The Show-Biz Pharaoh of Egypt’s Antiquities*, *N.Y. TIMES*, June 13, 2005.

83. See, e.g., *Met-Italy Agreement*, *supra* note 1, at 429-30.

of an Enlightenment-based and colonialism-facilitated era of acquisition. In these post-colonial times, exchanges of objects will likely still carry on, but will depend more on maintaining relationships and good will.<sup>84</sup> Fears about the “emptying of the world’s museums” are overstated and very much parallel similar fears voiced by museums of Native American history and archaeology at the time NAGPRA was passed in 1990. But almost two decades later, those fears have proven not only to have been largely unfounded, but NAGPRA itself is now widely seen as having opened up important new avenues for cooperation and sharing between museums and the communities whose objects they curate.<sup>85</sup> It is likely that the cooperative agreements born from international repatriation disputes will promote similar structures that will allow archaeology museums to operate in new and important ways.

While this may seem overly optimistic (though I don’t think it is), given this new climate, it is worth wondering why museums have not taken a stronger stance toward developing new kinds of relationships with so-called “source” countries. It is really only since *United States v. Schultz*,<sup>86</sup> where a dealer was convicted of conspiring to traffick stolen antiquities, and the recent criminal trials in Italy of Giacomo Medici, Robert Hecht, and Getty Mu-

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84. In an almost poetic way, these museums will be acting out on a global scale a form of ceremonial gift exchange not unlike the “Kula ring” studied by Bronislaw Malinowski. See BRONISLAW MALINOWSKI, *KULA: THE CIRCULATING EXCHANGE OF VALUABLES IN THE ARCHIPELAGOS OF EASTERN NEW GUINEA* (1920); see also MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* 3-11 (Ian Cunnison trans., 1967). To Mauss, the circulation of gifts binds people to each other in webs of relationships and reciprocal obligations that keep society together. See generally ANNETTE WEINER, *INALIENABLE POSSESSIONS: THE PARADOX OF KEEPING-WHILE-GIVING* (1992). Weiner raises the point that the gifts that circulate in this fashion are understood to be inalienable, or something that cannot actually be given away (in terms of having transferable title) outside of this web of reciprocity, a view of object-possession that precisely matches how many antiquities are being regarded today by their countries and cultures of origin. In this way, what we are in fact seeing is a move away from market exchange toward a system of ritualized gift exchange, a development which would have been sure to intrigue Mauss and others.

85. For an assessment of NAGPRA’s impact on one major collection of Native American materials, see Robert W. Preucel, Lucy F. Williams, Stacey O. Espenlaub & Janet Monge, *Out of Heaviness, Enlightenment*, 45 *EXPEDITION*, No. 3, 2003, at 21, 21-7. For an analysis from a more legal perspective, see James A.R. Nafziger & Rebecca J. Dobkins, *The Native American Graves Protection and Repatriation Act in Its First Decade*, 8 *INT’L J. CULTURAL PROP.* 77, 107 (1999).

86. See *United States v. Schultz*, 333 F. 3d 393 (2d Cir. 2003).



seum curator Marion True,<sup>87</sup> that major museums have been forced to think differently about their collecting practices.<sup>88</sup> The promise of new cooperation and cultural exchange offered by agreements such as the Metropolitan Museum of Art's begs the question, why didn't this happen earlier? And given what the museum gains from such an agreement, one may wonder what could have been achieved if they had acted earlier and before the most recent legal developments effectively pushed them into negotiation.

As being respected academic and "public" collecting institutions, museums were (and perhaps still are) in a unique position to push for a limited, legalized trade in cultural objects. On one hand, they have an interest in there being a legal way to acquire new objects either through sale or *partage* (which had stopped being a common practice in many countries during the last three decades), but on the other, they have something important to offer in return that might give them the ability to successfully lobby other nations for such legal options: the legitimacy they give to the market in antiquities and the debate about it. Put simply, major collecting museums could have offered to forswear collecting antiquities on the market—and even lent their support to national cultural property laws (such as those they have argued against U.S. recognition of)—in exchange for being allowed to obtain properly excavated objects through purchase or *partage* directly from national governments. Given the merits of such an approach, we should question why there seems to be no impetus within the museum community to use the obvious bargaining chip they have to push for such a compromise.

Just as archaeologists likely hesitate to do anything to annoy their host country, I suspect that the reason behind the museum position is that they fear alienating donors, many of whom are collectors themselves, and the inevitable bequests of their collections. Taking a stand against the market, even if it might open up new doors with other governments, would require turning against the interests of collectors (at least in the short term) and

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87. For an overview, see PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS* (2006).

88. An example is the new collections policy of the Getty Museum. See generally Board of Trustees, *The J. Paul Getty Museum Policy for Acquisitions*, 13 INT'L J. CULTURAL PROP. 423 (2006).

thus might drive their beneficence and collections toward other museums or outlets. Given the precipitous state of most museum funding in the United States, the effects of a philanthropists' embargo might be devastating.<sup>89</sup>

### C. Governments of So-Called "Source" Nations

As stated earlier, governments of all nations have a difficult time protecting and preserving their archaeological resources. In regions with a particularly long history of intensive human settlement with tangible artifacts and monuments, this task can be overwhelming and expensive. Italy, for example, is often cited for being undeserving of foreign enforcement of its heritage laws, since it is the World's seventh largest economy, but the United States is the World's largest national economy with a considerably less dense record of preserved, tangible archaeological remains,<sup>90</sup> and yet the U.S.'s archaeological preservation apparatus is similarly stressed, if for different reasons. For this reason, any solution to ease the overburdened system and assist local museums and managers with their obligation to preserve and manage archaeological materials should be considered seriously.

Both the management and protection of existing sites and the curation of materials already excavated takes effort, money, and infrastructure (such as guards and storage facilities). It is often noted by those who support the antiquities trade that there might be a benefit in allowing some of the excess materials in museum depots to be sold to collectors and foreign museums that would appreciate the opportunity to buy them.<sup>91</sup> While this argument is typically used to defend the purchase of objects that may have been illegally exported from their country of origin (thus conflating two different issues), the basic idea that countries should consider selling or otherwise transferring some excess materials to foreign buyers should not be controversial, and

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89. See generally DANIEL M. FOX, *ENGINES OF CULTURE: PHILANTHROPY AND ART MUSEUMS* (1995).

90. This is not to say that the archaeological record of the United States is any less rich, only that the use of perishable materials among many North American pre-Columbian societies has resulted in an archaeological record that has not withstood the elements quite so enduringly as the stone-building and pottery-making cultures of Italy.

91. The limitation of this argument is that many collectors and museums value the *unique* object, and thus the "duplicate" would not be as desirable to obtain. This is another point that usually goes unacknowledged in the debates over the antiquities trade.

in fact was included among recommendations offered by UNESCO.<sup>92</sup> Doing so would help distribute the burden of managing archaeological resources, help to satisfy the interests of collectors and collecting museums, and provide national governments with an additional source of funding for protecting the sites and material it still must maintain.

So, if by willingly selling a limited amount of excess materials, nations could really achieve all these things, then why don't they do it? Why is there a continued resistance by many nations to consider even the most minor policy of antiquities de-accession and sale? Well for one thing, there might be the very real fear that opening that door even slightly will have much larger effects, including an increase in collecting demand (since there would likely be more collectors interested in buying in a legal market) and thus market activity, and this might promote increased looting of sites. Second, a legalization of some antiquities sales might compromise nations' abilities to prosecute or sue for infringement of the law, as this might create loopholes or additional opportunities for smuggling (through the forgery of what would be more ubiquitous export permits). These are very real issues that would need to be dealt with before any such plan went ahead.

But beyond the more mundane, operational concerns, why is the sale of some material rarely considered? One reason may be that "selling the nation's patrimony" tends not to be a politically wise move. The destruction of the old Pennsylvania Railroad Station in New York City to make room for a more revenue-producing Madison Square Garden precipitated an outcry so great as to mobilize the City and Federal Government alike into adopting historic preservation laws.<sup>93</sup> And when in 2002, the Italian Government adopted a law that would allow for some

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92. See U.N. Educ., Scientific & Cultural Org. [UNESCO], *Recommendation Concerning the International Exchange of Cultural Property* (1976), available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13132&URL\\_DO=DO\\_PRINTPAGE&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13132&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html). It should be noted, however, that this Recommendation explicitly discouraged a market-based approach to the transfer of cultural property, which would inflate prices so that the distribution of materials worldwide—UNESCO's goal being to promote cross-cultural understanding and education—would be unbalanced toward wealthy countries. See Prott, *supra* note 12, at 234-35. *Contra* Merryman, *Cultural Property Internationalism*, *supra* note 12, at 22-24.

93. See Landmarks Preservation Law of 1965, ch. 8-A N.Y.C. Adm. Code, § 205-1.0; see also National Historic Preservation Act, 16 U.S.C. § 470 (2006).

privatization of its cultural resources, unrelenting criticism came from all sides.

The reaction to the Italian privatization law is particularly instructive with regard to the potential problems and complexities that any such policy would have to consider, and to the strange contradictions in the antiquities debates under discussion here. Under Italy's Financial Act 2002, initial steps were taken to permit private organizations to purchase or lease natural and cultural resources belonging to the state, such as historic monuments, buildings, beaches, and even some archaeological sites.<sup>94</sup> The idea behind the law was to transfer ownership of—and thus the financial burden of maintaining—historic properties away from the state and to private organizations willing to care for them (and presumably to develop them for private tourist potential). Not surprisingly, Italian public advocacy groups concerned with cultural preservation decried the law. But in a more intriguing twist, outcry also came in the form of a petition “against the privatization of Italian excavations, museums and monuments” signed by directors of thirty-seven of the world's major museums, including those of the British Museum, the Louvre, the Museums of Berlin, and the Metropolitan Museum, because, in their view, “Italian heritage constitutes . . . a primordial value for World Heritage and thus belongs not to individuals but to the whole world.”<sup>95</sup> The irony that directors of collecting institutions would fight Italy's plans to sell its cultural property is worth noting, but that they express their disapproval employing the very same logic they regularly use to support the continued practice of private collecting and ownership of cultural property is striking. With disapproval seemingly inevitable no matter what course is charted, it is little wonder that serious discussions over a nation's sale of its cultural property do not take place.

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94. Law 112/2002, Gaff. Uff. No. 139, June 15, 2002 (Italy). See Roland Benedikter, *Privatisation of Italian Cultural Heritage*, 10 INT'L J. HERITAGE STUDIES 369, at 378-79 (2004), for a discussion of the offer for sale of the Roman period site of Alba Fucens for a mere €40,615. Similar debates over privatization of heritage are playing out in other countries, such as Germany. See generally Cornelius Holtorf, *What Does Not Move Any Hearts—Why Should It Be Saved? The Denkmalpflegediskussion in Germany*, 14 INT'L J. CULTURAL PROP. 33 (2007).

95. See Benedikter, *supra* note 94, at 383-84.

## CONCLUSION

What can we learn from enumerating the assumptions, conflicting priorities, and inconsistencies of the parties involved in the antiquities trade debates? Is there a way to move forward beyond the entrenched and polarized ways of thinking about cultural property that have dominated the discourse for the past three decades and develop new solutions that can accommodate the interests of the different affected groups?

While the main point of this Essay is to scrutinize critically the main arguments in the debate as they are currently constituted, what I am hoping is that this may be the first step in a discussion that moves away from repeating the talking points and kitchen-sink kind of arguments made in the past decade or so.<sup>96</sup> By examining the constituent parts of each side's position in the antiquities trade debates, we are able to isolate the foundational assumptions, the internal contradictions, and the unacknowledged concerns of each party and thus more thoroughly evaluate their merits. The hope is that by identifying the points of intersection among the various parties and seeing which values are not so much in conflict but complementary, we can find agreement and therefore a positive policy direction. But until these interest groups are willing to admit their real motivations and acknowledge the assumptions and contradictions in their views, we will remain unable to move forward.

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96. See Audi, *supra* note 13, at 131-56.