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Brian A. Yapko

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COMMENTS

The Evolution Of American Attitudes And Laws Regarding Ethnic Art And Artifacts: From Cultural Imperialism To Cultural Pluralism

I. INTRODUCTION

Enlightenment within the international community regarding the irreparable waste of antiquities has increased substantially within the last seventeen years.¹ As the general public has learned, relics and art works, generally classifiable under the rubric "cultural patrimony," are in chronic peril of being plundered, defaced, and illicitly traded.² The romantic adventurism of Indiana Jones is not apposite. The reality of the plunder will more likely involve a third-world local who, hungry for a source of cash, loots the local tell³ or fails to report an urn found while performing construction work.⁴ He may mutilate an

1. 1970 was a watershed of increased public awareness regarding the pillage of artifacts. By 1970, Dr. Clemency Coggins of Harvard had published her seminal article on the subject, Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94 (1969). Additionally, 1970 was the year of ratification of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972), *reprinted in* 10 INT'L LEGAL MATERIALS 289 (1971) [hereinafter Convention on Cultural Property].

2. See generally Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982); Coggins, *supra* note 1; Coggins, *The Maya Scandal: How Thieves Strip Sites of Past Cultures*, 1 SMITHSONIAN 8 (1970) [hereinafter Coggins, *The Maya Scandal*]; *Legal Aspects of the International Traffic in Stolen Art: A Symposium*, 4 SYRACUSE J. INT'L L. & COM. 51 (1976); *Jurisdictional Issues in the International Movement of Cultural Property: A Symposium*, 10 SYRACUSE J. INT'L L. & COM. 281 (1982); S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY* (1977).

3. A "tell" may be defined as a large mound built up from the accumulated residue of consecutive inhabitants and the remains of mud-brick architecture as found in the Near East. W. RATHJE & M. SCHIFFER, *ARCHAEOLOGY* 397 (1982).

4. In most archaeologically rich countries, looting is initiated by local diggers who then sell their finds to middlemen, who in turn resell to local or foreign dealers. Some of the looting is unorganized and amateurish, and some of it is organized, professional, systematic and well-financed. Bator, *supra* note 2, at 292.

Etruscan tomb to purloin the vase inside.⁵ Or he may take a saw to a Mayan stele⁶ and hack it into fragments small enough for export.⁷ The mangled object finds its way into the hands of foreign traders, and from there into the collections of art gatherers in wealthier lands.⁸

Civilization pays an inestimable price when archaeological sites are thoughtlessly ransacked for their treasures.⁹ Certainly art and

5. *Cultural Property Treaty Legislation: Hearings on H.R. 3403 Before the Subcomm. on Trade of the House Comm. On Ways and Means, 96th Cong., 1st Sess. 79 (1979) (statement of Oscar White Muscarella) [hereinafter *Hearings on H.R. 3403*].*

6. Bator, *supra* note 2, at 278 n.4. A stele or stela (respectively pronounced stee-lee or stee-luh) is a stone slab which is "usually carved with both pictures and hieroglyphics, erected in religious ceremonial centers." *Id.*

7.

Stelae are much too heavy to remove intact from a site. They are usually found in remote jungle areas that must be reached by mule or dugout. For this reason they must be cut or broken up. The robbers, with varying degrees of skill, use power saws, crowbars, chisels, acid, or, more primitively, heat in order to crack the stone into pieces. If a stela is in good condition, the aim is to saw off the sculptured face of the stone. This common method, even at its most efficient, sacrifices the inscriptions, which are found on the sides of the stela and sometimes on the back as well. When this method does not work, a frequent occurrence, the face of the stela is left a pile of chips on the ground — with any salable bits removed.

Coggins, *Archaeology and the Art Market*, 175 *SCIENCE* 263 (1972), quoted in Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 *L. AM.* 68, 69 (1975).

8.

Since World War II there has been an enormous increase in interest among art collectors (and a corresponding increase in the value of) antiquities and all varieties of primitive and ethnographic art. This has fueled an intense world-wide search for such art; the search has in turn led to an important black market in pillaged art. . . .

A large proportion of looted material is smuggled out of the country of origin and finds its way into art-collecting countries such as the United States, Japan, Switzerland, Germany, England and France. Some of the smuggling is the work of individual "amateurs" — soldiers, diplomats, tourists. Some is carried out through well-organized and complex organizations run by local and foreign dealers. . . .

Bator, *supra* note 2, at 291-92 (citations omitted).

9. A non-exhaustive list of the values that are affected by the illicit trade and pillage of art and artifacts includes:

- (1) the preservation of archaeological evidence, particularly in an on-site context;
- (2) the association of art with its geographical-historical milieu;
- (3) the preservation of the national patrimony for reasons of awakening the national conscience, fostering community pride, socializing youth, enhancing local scholarship, and elevating national civilization;
- (4) the preservation of both individual *objets d'art* and, when significant, sets and collections of them;
- (5) the enhancement of an exporting or loaning state's foreign policy and the financial resources of its museums;
- (6) the enrichment of the importing state's civilization;
- (7) the promotion of international understanding through diffusion of art;
- (8) the respect for cultural diversity, acknowledgment of a global patrimony, and parochialism;
- (9) the widest possible visibility and accessibility of significant objects;
- (10) the protection of significant objects, under the best possible circumstances, in both the country of origin and the importing country;
- (11) the encouragement of respect for the law and the mutual development of shared controls;
- (12) the enrichment of aesthetic and intellectual interests of individual collectors, museums, and museum viewers; and
- (13) restraints on the production of forgeries.

Nafziger, *Comments on the Relevance of Law and Culture to Cultural Property Law*, 10 *SYRA-*

history-loving members of the public are deprived of objects of admiration. Science suffers as well: as the archaeologist loses not only the tangible object of study, but its provenance.¹⁰ Once divorced from its historic context, the object becomes "forever beautiful but dumb," even if it is later recovered.¹¹ This plunder is particularly egregious to those cultures of the world which regard art as the tangible manifestation of their national pride or the embodiment of their past.¹² Illicit trade in cultural patrimony threatens the very honor of such nations.¹³ To denude a culture of its patrimony may thus be far worse and far more insulting than a crime against international order. It symbolically rises to the level of a crime against history, against knowledge and against civilization itself.

What one authority has vividly described as a "hemorrhage"¹⁴ aptly characterizes the illicit flow of objects from art-rich, economi-

CUSE J. INT'L L. & COM. 323, 324 n.6 (1983) [hereinafter Nafziger, *Cultural Property Law*]; Nafziger, *An Anthro-apology for Managing the International Flow of Cultural Property*, 4 HOUS. J. INT'L L. 189, 194-95 (1982).

10. "Provenance" refers to the fact that any archaeological object in the art market: was originally part of a context; e.g. in a tomb with other objects placed there at a given time for a specific purpose, or in a city level within a mound in a certain geographical area. Offered as an individual item for sale, merely as a work of art, the orphaned object is stripped of all social, anthropological and theological value — which can never be recovered. We can not know what function or significance the object may have had within its own culture, nor whether it had a secular or religious value, not to mention under what conditions it was preserved and deposited. And because clandestine digging is never witnessed by responsible individuals, it cannot be determined whether an object manufactured in one area was actually recovered in another, thereby depriving anthropologists and historians of basic information concerning economic and cross-cultural relationships.

Hearings on H.R. 3403, supra note 5, at 78-79 (statement of Oscar White Muscarella).

11. Coggins, *The Maya Scandal, supra* note 2, at 10.

12.

[T]he art of a society is both a manifestation and a mirror of its culture, and that the existence and awareness of a common culture is intimately tied to the existence and awareness of a sense of community. The national artistic patrimony is therefore closely linked to the process of education: The study of a nation's art is part of the process through which citizens learn who they are. This is obviously true of works possessing special historical or symbolic significance — national monuments or treasures such as Notre Dame, the Lincoln Memorial, or the Crown of St. Stephen A perception of a common culture and common past is one way of learning that we are part of a community, that we belong to one another in a special way.

Bator, *supra* note 2, at 304; *see also* 16 U.S.C. § 470(b) (1982) ("[T]he spirit and direction of the Nation are founded upon and reflected in its historic heritage.").

13. In the case of the Afo-A-Kom of Cameroon even more than the honor of the culture was at stake. When the Afo-A-Kom statue was stolen from the people of Kom, whose soul it was said to embody, the effect on the culture was profound. "An integral part of their spiritual life was gone. Essentially a superstitious people, the Kom blamed any of their misfortunes on the loss of the Afo-A-Kom." L. DUBOFF, *THE DESKBOOK OF ART LAW* 71 (1977).

14. Nafziger, *supra* note 7, at 68.

cally poor third-world countries to wealthy art-imposing nations. It is thus readily predictable which nations will probably lose their antiquities and which nations will very likely gain them.¹⁵ The primary uncertainty, and thus the source of international controversy as to remedy, lies in the logistics of how the relic will find its way from host to parasite.¹⁶ A sophisticated black market for antiquities flourishes throughout the world,¹⁷ and there are no assurances that any specific sanction — economic or criminal — will ameliorate the situation.¹⁸

This Comment will discuss one system of international cooperation, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,¹⁹ in order to evaluate its present and potential role in the protection of antiquities and cultural materials, and to consider why so many of the world's largest art-importing nations have declined to join the agreement.²⁰ This Comment will focus more specifically on the United States' participation in the Convention, and on this country's own history of protecting cultural artifacts. United States history demonstrates an imperfect yet solid evolution from ethnic hegemony²¹ to cultural pluralism.²² This progressive attitude, which has emerged almost in spite of itself, ultimately favors the protection of ethnological materials, artifacts, and the cultures that have spawned them. A summary of this history may help illuminate why

15. "Any country with a rich cultural heritage or unique ethnological art is a potential target for the world's art thieves. The smuggled art almost invariably travels from underdeveloped 'art-rich' nations to economically wealthier 'art-hungry' nations, [with] the United States, Europe, and Japan being the primary markets." Comment, *Legal Restrictions on American Access to Foreign Cultural Property*, 46 *FORDHAM L. REV.* 1177, 1178-79 (1978).

16. The logistical problems include such legal ambiguities as 1) the tracing of title, 2) evidentiary problems of fact, 3) statutes of limitations, and 4) the private international law theories regarding the enforcement of another country's penal statutes. L. DUBOFF, *supra* note 13, at 79.

17. Nafziger, *Cultural Property Law*, *supra* note 9, at 323.

18. For an analysis of some of the criminal and economic alternatives, see Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 *SYRACUSE J. INT'L L. & COM.* 281 (1983); Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 *SYRACUSE J. INT'L L. & COM.* 333 (1983).

19. Convention on Cultural Property, *supra* note 1.

20. See *infra* text accompanying notes 85-94.

21. For the purposes of this Comment, "ethnic hegemony" refers to the subjugation of one ethnic group by another to the former's material disadvantage. As such, the term encompasses racism and ethnocentricity.

22. "Cultural pluralism" as used in this Comment contemplates a society in which many diverse cultures interact but do not endanger each others particular ethnic and cultural integrity or continuity.

the United States has been unique among art-importing nations in signing the Convention, while other nations have been reluctant to follow suit.²³

Further, the United States is itself a nation rich in archaeological materials. As custodians of our unique Native American Indian patrimony, the United States has a compelling interest in ensuring that its citizens are not deprived of domestic art treasures. To this end, the United States should carefully probe not only the success of the UNESCO Convention, but the efficacy of such domestic laws as the Archaeological Resources Act²⁴ and the National Historic Preservation Act.²⁵ This domestic legislation demonstrates a warm pride in our national archaeological and artistic heritage which will nevertheless require a substantially deeper commitment to regulation if we are to preserve our precious past.²⁶

II. THE UNITED NATIONS CONVENTION ON CULTURAL PROPERTY

A. Historical Background

Intimations of international cooperation to protect cultural property were heard as long ago as 1815, when much of Europe began to assess the damage caused by Napoleon's conquering rampage across the Continent and his transfer of pillaged art to Paris.²⁷ Since at least Roman times, it had always been the prerogative of the victor in war to loot art treasures from the vanquished.²⁸ In the aftermath of the

23. See *infra* text accompanying notes 225-31.

24. 16 U.S.C. §§ 470aa-470ee (1979).

25. 16 U.S.C. §§ 470-470w-5 (1970).

26. See *infra* text accompanying notes 195-225, 232-42.

27.

Napoleon systematically removed art treasures from countries occupied by France during the Napoleonic Wars. After Waterloo at the negotiations for the Convention of Paris in 1815, France attempted to include a clause allowing for the retention of confiscated property in Paris. Nevertheless, the Duke of Wellington, speaking for the Allies, stated that the systematic looting of art by a conquering army was contrary to principles of justice and to the rules of modern warfare. The Allies ordered the return of the confiscated property, and the property acquired by France through treaty, to their countries of origin.

Bassiouni, *supra* note 18, at 288 (footnotes omitted).

28.

It was the Romans — in approximately 400 B.C. — who first glorified the plunder of art. They apparently believed that collecting booty (note that property confiscated in accordance with the international rules of war is generally referred to as "booty"; other appropriations are normally called "plunder") from a vanquished nation was a legitimate by-product of war. The triumphal processions of returning generals usually included a display of the newly acquired treasures. Thus the masterpieces of

Napoleonic Wars, however, the conviction began to spread that this was an uncivilized practice. From the early nineteenth century on, various codes and regulations have been written to obviate, or at least to minimize, such custom.²⁹

Instruments purporting to regulate the illicit international transfer of cultural patrimony in times of peace have been a much more recent innovation.³⁰ Thus, when the United Nations Educational, Scientific and Cultural Organization (UNESCO) promulgated the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Convention)³¹ in 1970, it was the prototype for such a multinational agreement, and a giant step in signalling to the world that the pillage of art was an act to be universally condemned.

B. Adoption of the Convention

Adoption of the UNESCO Convention was initially urged in the early 1960's by those Latin American nations whose artifacts were being depleted by illegal trade.³² By 1969, a draft convention had been proposed and rejected. It featured an unworkably broad definition of cultural property "ranging from archaeological discoveries to property of artistic interest which is more than fifty years old, rare manuscripts, books and specimens of flora and fauna."³³ In addition, the draft imposed heavy regulatory burdens on signatory nations, and failed to provide for legitimate cultural exchange.³⁴

The final draft diluted these burdens and was adopted in 1970 by

Greece, Egypt and Asia Minor were proudly displayed in Rome as a symbol of its wartime prowess.

L. DUBOFF, *supra* note 13, at 129.

29. Among such instruments have been the Lieber Code, *see infra* notes 173-79 and accompanying text; the 1874 Conference of Brussels, *reprinted in* 1 AM. J. INT'L L. SUPP. 96 (1907); the Hague Convention of 1907, 100 B.S.P. 338, LIV L.N.T.S. 437, LXXII L.N.T.S. 458, CLX L.N.T.S. 456 (1907); the Roerich Pact, *see infra* notes 216-17 and accompanying text; and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

30. *See* Bassiouni, *supra* note 18, at 297-305.

31. Convention on Cultural Property, *supra* note 1.

32. Mexico and Peru first appealed to UNESCO to formulate a method to stop illicit trafficking in 1960. They were subsequently joined by Argentina, Brazil, Costa Rica, El Salvador, Guatemala, Guinea, India and Peru. S. WILLIAMS, *supra* note 2, at 179.

33. Preliminary Draft Convention Concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *quoted in* S. WILLIAMS, *supra* note 2, at 179.

34. S. WILLIAMS, *supra* note 2, at 179.

a vote of 77 to 1.³⁵ The Convention is based on the premise that the interchange of cultural property:

increases the knowledge of the civilization of man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations. . . .

* * * *

[I]t is essential for every state to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations. . . .

* * * *

[T]he illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of UNESCO's mission to promote. . . .³⁶

In summary, the Convention urges signatory nations to "set up within their territories . . . national services . . . for the protection of the cultural heritage."³⁷ The Convention further requires State Parties to adopt a system of certification of property,³⁸ and to require antique dealers to record the origin of each item of cultural property, the supplier, and a description of the item.³⁹

C. *Article 7 and Article 9*

Of the Convention's several provisions, the United States ultimately adopted the two most important measures, articles 7 and 9. Article 7 requires State Parties to "prohibit the import of cultural property stolen from a museum or religious or secular public monument . . . [and] to take appropriate steps to recover and return any such cultural property."⁴⁰ Article 9 allows "any State Party to this Convention whose cultural property is in jeopardy from pillage of archaeological or ethnological materials to call upon other State Parties . . . to participate in a concerted international effort to determine and carry out necessary measures."⁴¹

Article 7 addresses the fact that in the absence of a treaty, even though an art treasure may be stolen and illegally exported from a

35. Of the General Conference, there were eight abstentions. *Id.* at 194 n.159.

36. Preamble, Convention on Cultural Property, reprinted in 10 INT'L LEGAL MATERIALS 289 (1971).

37. *Id.* at art. 5.

38. *Id.* at art. 6.

39. *Id.* at art. 10.

40. *Id.* at art. 7.

41. *Id.* at art. 9.

specific nation, it does not follow that the import of the object into a foreign state is illegal.⁴² Prior to United States adoption of the Convention, for example, if an art work was stolen from a foreign museum and imported into the U.S., the import was not a *per se* illicit act.⁴³ The foreign state's only remedy was a civil suit based on conversion. This remedy was cumbersome, time-consuming, and expensive. Further, foreign states would prefer to avoid the risk of an adverse judgment, and the potential diplomatic embarrassment of suing in a foreign jurisdiction.⁴⁴ Article 7 renders the import of stolen national art treasures a criminal act, and thereby allies the law enforcement machinery of the receiving state to the victimized art-exporting state.

Article 9, with its "in jeopardy of pillage" provision, addresses an even thornier problem. One crucial attribute of property ownership is possession.⁴⁵ How then may a state which may never have been apprised of the existence of its previously undiscovered artifacts assert ownership after they have been removed? Many countries obviate this burden by enacting legislation which automatically vests title to any undiscovered antiquities in the state.⁴⁶ With at least titular own-

42. An art object which has been illegally exported from a foreign state is not barred from being lawfully imported into the United States. Illegal export does not render the import actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed solely because it was illegally exported from another country. This general rule apparently applies in all the other major art-importing nations as well, including England, France, Germany and Switzerland. Bator, *supra* note 2, at 287.

43.

The only qualification to this rule in effect in the United States [was] the 1972 statute [the Pre-Columbian Act, 19 U.S.C. §§ 2091-2095 (1976)] that Congress passed in response to the Maya crisis. This statute bars the import of illegally exported "pre-Columbian monumental or architectural sculpture or mural" . . . Such material . . . may not be imported unless accompanied by a certificate showing that its export did not violate the law of the country of origin.

Id. at 287-88.

44. Two examples of foreign states bringing suits in American jurisdictions are *Union of India v. Norton Simon Foundation*, No. 74 Civ. 5331 (S.D.N.Y. 1976) (which was eventually settled out of court), noted in Bassiouni, *supra* note 18, at 283 n.8; and *Guatemala v. Hollinshead*, No. 6771 (Superior Ct. Los Angeles, Cal., filed Dec. 29, 1971), cited in Schneider, *Plunder or Excavation? Observations and Suggestions on the Regulation of Ownership and Trade in the Evidence of Cultural Patrimony*, 9 SYRACUSE J. INT'L L. & COM. 1, 15 n.76 (1982). This case was superseded by a criminal action. See *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

45. "The chief attribute of property ownership is the exercise of rights 'to possess, use, and enjoy and dispose of a thing.' Ownership rights generally cannot be exercised with respect to undiscovered objects." In re Cohn, 16 F. Supp. 644, 646 (N.D. Tex. 1936), *aff'd*, 93 F.2d 322 (5th Cir. 1937).

46. The preeminent example is Mexico which extends national ownership of cultural pat-

ership alleged, the foreign state has standing to have its case heard.⁴⁷

Article 9 considers a difficulty which undercuts a state's statutory assertion of title: the nature of archaeological remains is that their provenance does not respect national boundaries. Many Greek artifacts rest in Turkey; Mayan relics overlap the nations of Guatemala, Mexico and Belize; Roman ruins circle the Mediterranean. Thus, even though a state may assert ownership, proving ownership is a vastly different matter. Article 9 relieves the country of origin of the burden of proving ownership. Rather, the exporting nation need only show that the object sought belongs to an "endangered species" of artifact.⁴⁸ If the "species" is indeed "in jeopardy from pillage,"⁴⁹ the object is entitled to statutory protection, ownership is presumed, and the receiving nation has an affirmative duty to assist the looted state in retrieving its property.⁵⁰

D. United States Enactment of Enabling Legislation

Prior to the United States enactment of enabling legislation, if a foreign state sought to recover an art treasure illicitly imported into the United States, its remedy was a civil suit.⁵¹ In the 1970's, however, this cause of action was supplemented by bilateral agreements with Mexico⁵² and Peru.⁵³ In addition, the Fifth Circuit's novel inter-

rimony to private collections and absolutely forbids the export of pre-Columbian items. Nafziger, *supra* note 7, at 71.

Embargo is explicitly attempted in many of the countries of the . . . "third" world and in most of the communist states, [e.g. Brazil, Bulgaria, People's Republic of China, Soviet Union, and Zaire] through legislation prohibiting the export of all protected cultural property, which in turn is defined to include all or virtually all art. . . .

Bator, *supra* note 2, at 315. *But see id.* at 350 ("A blanket legislative declaration of state ownership of all antiquities, discovered and undiscovered, without more is an abstraction — it makes little difference in the real world.").

47. "Unless there is a bona fide declaration of [state] 'ownership,' illegal export does not itself make property 'stolen' for purposes of the NSPA [National Stolen Property Act]." Bator, *supra* note 2, at 350.

48. *Hearings on H.R. 3403, supra* note 5, at 17 (statement of Bator).

49. Convention on Cultural Property, *supra* note 1, at art. 9.

50. *Id.*

51. A foreign state could bring a civil suit based on conversion; if it could prove scienter and ownership, it could also invoke the criminal sanctions of the National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (1976). For application of the Act to stolen Mexican antiquities, see *United States v. McClain*, 545 F.2d 988 (5th Cir.), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977) (per curiam).

52. Treaty of Co-Operation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and

pretation of the National Stolen Property Act⁵⁴ in *United States v. McClain*⁵⁵ allowed for the imposition of criminal sanctions on an individual who illicitly imports artifacts from a foreign nation which has statutorily provided for automatic vesting of title in the state.⁵⁶

In the 1970's, momentum clearly favored the protection of foreign cultural materials. The United States thus enthusiastically supported the UNESCO Convention, and on August 11, 1972 the Senate ratified the Convention by a vote of 79 to 0.⁵⁷ U.S. enthusiasm, however, was not unqualified. The Senate set forth a number of reservations and understandings regarding the agreement.⁵⁸ The most important understanding was that the Convention would not be self-executing but would require Congressionally approved enabling legislation.⁵⁹ This legislation, the Cultural Property Act,⁶⁰ was not enacted until ten years later.⁶¹ This legislation "experienced the worst of Washington paralysis"⁶² as Congress attempted to balance competing interests.⁶³ The legislation repeatedly died in committee.⁶⁴ Ultimately it emerged as an abridged version of the Convention.

As adopted, the Cultural Property Act rejects as overly burdensome and restrictive the UNESCO provisions for a system of export

Cultural Properties, July 17, 1970, 1 U.S.T. 494, T.I.A.S. No. 7088, *reprinted in* 9 INT'L LEGAL MATERIALS 1028 (1970).

53. Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 15, 1981, United States-Peru, — U.S.T. —, T.I.A.S. No. 10136.

54. 18 U.S.C. §§ 2314-2315 (1976).

55. *McClain*, 545 F.2d at 988.

56. *Id.* at 1001-02.

57. 118 CONG. REC. 27925 (1972).

58. SENATE COMM. ON FOREIGN RELATIONS, CONVENTION ON OWNERSHIP OF CULTURAL PROPERTY, S. EXEC. DOC. NO. 29, 92d Cong., 2d Sess. 17 (1972).

59. "The United States understands the provisions of the Convention to be neither self-executing nor retroactive." *Id.* at 9.

60. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (1983) [hereinafter Cultural Property Act].

61. The Cultural Property Act was enacted January 12, 1983 and went into effect April 12, 1983.

62. Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 4 SYRACUSE J. INT'L L. & COM. 97, 102 (1976) (statement of James Nafziger) [hereinafter Proceedings].

63. *See supra* note 9 for a discussion of some of the relevant competing interests.

64. "The enabling legislation as originally introduced was S. 2677, 93d Cong., 1st Sess. (1973). The Original Bill was then revised and reintroduced as H.R. 14171, 94th Cong., 2d Sess. (1976)". Proceedings, *supra* note 62, at 98 n.5. The next version was H.R. 3403, 96th Cong., 1st Sess. (1981) which was in turn replaced by the final draft S. 1723, 97th Cong., 1st Sess. (1981).

certification, import checks, and the regulation of antique dealers.⁶⁵ Instead, it confines itself primarily to carrying out articles 7 and 9.⁶⁶ It also adds provisions vesting decision-making authority in the President,⁶⁷ who is to act on the advice of an established Cultural Property Advisory Committee.⁶⁸

Even as abridged, however, the Cultural Property Act still adopts the most important terms of the Convention, and should therefore achieve a rudimentary protection of cultural materials. In addition, it articulates a much needed moral policy;⁶⁹ it may also ultimately emerge as a wise stratagem of international diplomacy.⁷⁰ The efficacy of the Act, however, is not beyond doubt. To date, there have been no cases either to challenge or construe its language.⁷¹ The absence of conflict suggests that application of the Act has been limited.⁷² And, because a law is only effective insofar as it is enforced, the Cultural Property Act presently appears to have no teeth.

E. Theft from the Mexican National Museum

The lack of effectiveness of the Cultural Property Act may be demonstrated by the following example. On December 24, 1985,

65. See Convention on Cultural Property, *supra* note 1, at arts. 5, 6 & 10.

66. 19 U.S.C. §§ 2603, 2607 (1986).

67. See *id.* § 2602.

68. See *id.* § 2605.

69.

[I]t lays out in clear terms for all to read that the Government and the people of this Nation will not continue to condone the destruction of the world's cultural heritage by the clandestine diggers of ancient sites; by the smugglers, who transport across international boundaries antiquities recovered by such digging or by theft; and by the "fences," or intermediate dealers in the stolen objects. This is a good bill and an important one, not because it will in itself halt the activities of the international criminals I have just referred to, but because it makes a major and honorable move in [that] direction by creating a mechanism for preventing American money from financing illegal acts.

Hearings on H.R. 3403, supra note 5, at 31 (statement of James R. Wiseman, Director, Archaeological Studies Program, Boston University, on behalf of the Association of Field Archaeology).

70. "The administration believes the United States should render such assistance on grounds of principle, good foreign relations, and concern for the preservation of the cultural heritage of mankind." *Id.* at 4 (statement of Mark B. Feldman, Deputy Legal Adviser, Dept. of State).

71. As of February 1987.

72. An alternate interpretation of this silence is that the Act is working so well that no controversy has arisen over its provisions. More likely, the scope of the Act is so narrow that no opportunity has arisen for its provisions to be invoked. This would be unfortunate since the illicit trade in art has not stopped, and yet cannot be caught in the web of the Cultural Property Act.

thieves stole 140 priceless Mayan, Aztec and other national treasures from Mexico City's National Museum of Anthropology⁷³ in what has been termed "the biggest plundering that has been done to the Mexican archaeological heritage."⁷⁴ To test the efficacy of the Cultural Property Act, let us assume that the thieves transported the stolen articles into the United States. According to the terms of section 2607 of the Act, "[n]o articles of cultural property documented as appertaining to the inventory of a museum . . . which is stolen . . . may be imported into the United States."⁷⁵ The stolen museum artifacts would be covered under this provision, and so their importation into the U.S. would be rendered illegal. Under section 2609, the art works become subject to seizure and forfeiture, in order to be "offered for return to the State Party in whose territory is situated the institution."⁷⁶

In this scenario, Mexico's patrimony would be restored with justice triumphantly served. In reality, however, numerous variables can undercut the functioning of the Act. First, we have presumed too readily that the thieves' tracks were traceable to the United States. The thieves of the Mexican antiquities disappeared with the treasures and may never be found.⁷⁷ Additionally, this is not an isolated instance:⁷⁸ the thieves who stole eight Impressionist paintings from the Marmottan Museum in Paris in November, 1985, similarly disappeared without a trace.⁷⁹ Before a state can utilize the Cultural Prop-

73. L.A. Times, Dec. 27, 1985, pt. 1, at 1, col. 2.

74. *Id.* at 14, col. 4.

75. 19 U.S.C. § 2607 (1986).

76. 19 U.S.C. § 2609 (1986).

77. A partial list of stolen art works which have never been discovered include: Rembrandt's "The Painter Jacob de Gheyn III" (\$4,680,000) stolen from Dulwich College Gallery, London, May 1983; Goya's "Portrait of Miss Maria Teresa de Apodaca de Sesma" (\$1,500,000) stolen from the Museo Minicipal Estevez, Rosario, Argentina, November 1983; Rembrandt's "Portrait of a Rabbi" (\$1,000,000) stolen from M.H. de Young Memorial Museum, San Francisco, December 1978; Pieter Brueghel's "Christ and the Woman Taken in Adultery" (\$826,000) stolen from the Courtauld Institute Galleries, London, February 1982; Rembrandt's "Landscape with Cottages" (\$800,000) one of 18 pictures taken at gunpoint from Montreal's Museum of Fine Arts, September 1972; and Caravaggio's "Nativity" (\$600,000) cut from its frame at the oratory of San Lorenzo, Palermo, Italy in October of 1969. A further listing would include works by Picasso, Matisse, Rubens and Paul Klee. Cooper & Behr, *The Marmottan Job*, NEWSWEEK, Nov. 11, 1985, at 50.

78. "The International Foundation for Art Research, a nonmonitoring agency, estimated that the sale of stolen art works is second only to the drug trade as the world's largest illegal business." *Id.*

79. The outlaws stole two paintings by Renoir, a Berthe Morisot, a Narusé and five works by Monet — including Impression-Sunrise which gave the school of impressionism its name. The loss was estimated to amount to at least \$12.5 million. *Id.*

erty Act, the art objects must surface and be traced to the victimized state. In the Mexican Museum case, it is probable that the objects will never materialize. Any purchaser must maintain a low profile and keep the treasures inconspicuous.⁸⁰ Alternatively, if the thieves are unable to sell the "hot" objects, they may destroy them to evade discovery.⁸¹ If the art works do eventually surface, they must be identified as Mexican property in order to initiate proceedings under the Cultural Property Act.⁸² However, only a select group of dealers, collectors and scholars would be qualified to make such an identification.⁸³

In short, the Act and the Convention are undermined by the fact that illicitly traded objects have a habit of disappearing.⁸⁴ Moreover, if and when they do resurface they may not be recognized and may thus remain exiled from their countries of origin. One might suspect that the Cultural Property Act works more effectively as a public relations measure designed to foster international good will, than as an actual system of regulation. If the law is to be as effective in fact as it is in spirit, at least two changes are required. First, the Cultural Property Act should develop in greater detail a system of internal regulations among traders in art and among customs officials. Second, if the Convention itself is to meet its objective of protecting cultural property, greater international cooperation and participation must be fostered.

F. Refusal of Other Art-Importers to Sign in to the Convention

What significantly undercuts the UNESCO Convention is the fact that very few of the world's major art importing countries have adopted the agreement.⁸⁵ Not surprisingly, the Convention's most en-

80. "It's like trying to fence the 'Mona Lisa,' . . . [a]ny unscrupulous collector who bought the stolen objects would have to 'hoard them,' because that's all you can do with them." L.A. Times, *supra* note 73, at 14, col. 1 (quoting Robert Childs, director of collections at the Los Angeles County Museum of Natural History).

81. *Id.*

82. 19 U.S.C. § 2610 (1986).

83. One notable fluke to this general difficulty was in the *Hollinshead* case, cited in *supra* note 44. By remarkable coincidence, archaeologist Ian Graham documented a remarkable discovery of Mayan ruins in Guatemala, which allowed him to positively identify one of the stelae which later became the res of Guatemala's civil case, and the government's criminal case, against Clive Hollinshead, a California art dealer.

Generally, however, provenances are shrouded in mystery and there is no way to establish title with the necessary precision. Bator, *supra* note 2, at 345-46.

84. See *supra* note 77.

85. Among those nations refusing to adopt the Convention are Great Britain, France,

thusiastic supporters have been countries such as Egypt, Jordan, Ecuador and Mexico, archeologically rich countries which have suffered the most from the looting of antiquities. The art-importing nations, in contrast, have considerably less incentive to adopt the Convention. They perceive some of its provisions as cumbersome.⁸⁶ Moreover, by its very nature it requires nations which import art to exercise self-denial.⁸⁷

The "cumbersome" provisions of the Convention need not preclude a state from adopting the instrument.⁸⁸ The United States, perhaps unwisely, circumvented this problem by limiting the Cultural Property Act to the scope of articles 7 and 9 of the Convention. Furthermore, the terms of the Convention are not so unpalatable as to drive all other art-importers away. Italy and Canada have entered the agreement.⁸⁹ France has flirted with the possibility of implementation for several years, but as of yet, has not become a signatory.

Member nations hoped that United States' implementation would create enough momentum to induce art-importers such as the United Kingdom, France, the Netherlands, Switzerland, West Germany and Japan to follow suit.⁹⁰ Ironically, since the United States accepted the Convention, no other major importing nation has fol-

West Germany, Denmark, the Netherlands, Switzerland, and Japan. *Hearings on H.R. 3403*, *supra* note 5, at 40 (statement of Douglas C. Ewing).

86. See, e.g., comments by the Netherlands Government:

Controls, in order to be effective, should imply factual examinations of all transports upon importation, with the purpose of checking whether they contain any goods noted on a world-base as stolen property. In fact, examining shipments on such a large scale as to allow for a deterring effect is regarded neither practically possible nor desirable, because it would considerably hamper the flow of trade.

Comments by the Netherlands Government to UNESCO, *quoted in* L. Prott & P. O'Keefe, National Legal Control of Illicit Trade in Cultural Property (study commissioned by UNESCO and submitted to a consultation of experts held at UNESCO headquarters in Paris, Mar. 1-4, 1983), *reprinted in* Prott, *supra* note 18, at 340.

87.

Of the other major art-importing countries, none has ratified the convention and none is likely to do so because they recognize that it is to the grave detriment of their own citizens and institutions. Certainly, the other major art-importing countries in Europe, the Near East and the Far East will have no incentive whatsoever to pass legislation because, as long as the United States act[s] unilaterally, there will be every benefit to them from the added flow of art from U.S. actions.

Hearings on H.R. 3403, *supra* note 5, at 40 (statement of Douglas C. Ewing).

88. See, e.g., Prott, *supra* note 18, at 338-44.

89. *Id.* at 340-41.

90.

[W]e can think of countries where this kind of conscience weighs . . . heavily in the public atmosphere - - the Netherlands, for example. You will not find a country more animated by a sense of what is fair, with their colonial past and involvement in these things. The Netherlands has not signed it; Sweden has not signed it. Or what

lowed suit.⁹¹ This leaves the United States in a vulnerable position. If Congress effectively strengthens the Cultural Property Act and restricts the illicit importation of antiquities, the only effect this may have is to divert the flow of art objects to Switzerland or Japan.⁹² The United States must, therefore, question whether or not it is worthwhile to maintain a virtually solitary effort. Although it is difficult to exercise self-denial when our allies refuse to do so, this exercise may nevertheless be worthwhile: the United States is the world's largest importer of art.⁹³ As such, its refusal to aid and abet the plunder of national treasures, even in isolation, must have some impact at the source of the trade.⁹⁴

G. Potential Implications of the Art-Importers' Refusal to Join the Convention

The refusal of other art importing nations to join the community effort may be observed at three levels. In terms of economics, the art-importers have every reason to abstain: not only is art beautiful, it is a superb investment which appreciates in value. Art also is portable

of Denmark and Norway and Great Britain? Surely the British are close to us in this.

Hearings on H.R. 3403, supra note 5, at 40 (statement of Douglas C. Ewing).

91. A list of countries in order of deposit of the instrument is as follows: Ecuador (1971), Bulgaria (1971), Nigeria (1972), Central African Republic (1972), United Republic of Cameroon (1972), Kuwait (1972), Democratic Kampuchea (1972), Yugoslavia (1972), Mexico (1972), Niger (1972), Socialist People's Libyan Arab Jamahiriya (1972), Argentina (1972), Iraq (1973), Brazil (1973), Dominican Republic (1973), Egypt (1973), Panama (1973), German Democratic Republic (1973), Poland (1974), Jordan (1974), Algeria (1974), Zaire (1974), Islamic Republic of Iran (1975), Syrian Arab Republic (1975), Tunisia (1975), Nepal (1976), Saudi Arabia (1976), Bolivia (1976), India (1977), Czechoslovakia (1977), Nicaragua (1977), Qatar (1977), Mauritania (1977), United Republic of Tanzania (1977), Uruguay (1977), El Salvador (1978), Mauritius (1978), Canada (1978), Oman (1978), Italy (1978), Hungary (1978), Guinea (1979), Honduras (1979), Cyprus (1979), Peru (1979), Cuba (1980), Sri Lanka (1981), Turkey (1981), Pakistan (1981), Greece (1981), Republic of Korea (1983), Democratic People's Republic of Korea (1983) and the United States of America (1983). U.N. Doc CL/2895, Annex II, at 28-29 (1985).

The only nations to join the agreement subsequent to the U.S. are: Senegal (1984), Guatemala (1985), Portugal (1985) and Spain (1986). *Id.* (Supp. 1987).

92. "[O]nce you take one of the big markets out of the game, you simply lower the price for the other looters. You give them an incentive to continue doing whatever they were doing and less of an incentive to come in." *Hearings on H.R. 3403, supra* note 5, at 12 (statement of Michael A. Glass).

93. H.R. REP. No. 615, 95th Cong., 1st Sess. 4 (1977).

94. The Pre-Columbian Act, 19 U.S.C. §§ 2091-2095 (1972) which implemented the U.S.-Mexico Treaty, cited in *supra* note 54, may serve as a precedent since it has had a substantial impact in preserving Mayan art, and in diminishing the destruction of stelae and other large monuments. Bator, *supra* note 2, at 334.

and easily alienable which may even provide tax benefits.⁹⁵ International trade in art is a multi-billion dollar business which, to the importing nation, may foster prestige, scholarship and tourism.⁹⁶

At the political level, the incentives to join or abstain are mixed. The abstract ideal is beyond reproach: international cooperation in the name of science and art.⁹⁷ At a lower level of abstraction, however, difficulties arise. As previously alluded to, there is the Convention itself, which many states perceive as burdensome.⁹⁸ Western nations also fear being manipulated by members of the overwhelmingly third-world agreement. UNESCO has not always placed itself above politics for the sake of culture. For example, UNESCO expelled Israel for alleged archaeological abuses which were unsubstantiated.⁹⁹ Both the United States and Great Britain have withdrawn from the organization for political reasons.¹⁰⁰ Art-importers may well see the Convention as a bargaining chip which they would rather not concede to the third-world.¹⁰¹

On the other hand, from a historical perspective, the third-world deserves recognition that it has been victimized by the importers for their artworks. The controversy between Great Britain and Greece over the infamous Elgin Marbles provides a classic case study.¹⁰² At

95. "Art . . . [has a] recently-acquired status as a big business. Auction prices in the past few years have set record values for both contemporary and ancient works of art. Along with real estate and gold, art more than ever before has come to be regarded as a hedge against inflation and a highly sought-after commodity." Palmer, *Symposium: Legal Aspects of the International Traffic in Stolen Art, Introduction*, 4 SYRACUSE J. INT'L L. & COM. 51 (1976) (introductory statement by Meredith Palmer, Arts Analyst, U.S. Information Agency).

In addition, the U.S. has traditionally encouraged the duty-free importation of art from abroad, and has offered generous federal income tax deductions of up to thirty percent of gross income at current market value for contributions of art to certain institutions. Nafziger, *supra* note 7, at 71.

For a detailed discussion of art as a form of investment, see L. DUBOFF, *supra* note 13, at 361-82.

96. See *supra* note 9; see also Bator, *supra* note 2, at 305-06.

97. See *supra* text accompanying notes 35-36.

98. See *supra* text accompanying notes 65, 86-87.

99. The charges brought against Israel involved plundering of the Jerusalem area. In a New York Times article, John P. Roche noted:

Now, if the Israelis were busily dynamiting mosques and installing a branch of Grossinger's atop Golgotha, there might be a technical basis for this complaint. But first of all, nothing of this sort has been undertaken and second, even if it had, the Arabs and their allies have clearly forfeited the right to complain.

Roche, *UNESCO vs. Israel: Playing Politics with Culture*, N.Y. Times, Dec. 29, 1974, § 2, at 1, col. 1, quoted in L. DUBOFF, *supra* note 13, at 108.

100. L.A. Times, Dec. 6, 1985, pt. 1, at 14, col. 1.

101. Proceedings, *supra* note 62, at 121 (statement of James McAlee).

102. For accounts of Lord Elgin, the Ottomans, and the famous Greek friezes, see L.

the historical-political level, the refusal of wealthy, art-importing nations to make what third-world art-exporters would interpret as a gesture of conciliation perpetuates the divisive influence of "elginism"¹⁰³ among nations.¹⁰⁴ Notwithstanding the economics and contemporary politics of the issue, the art-importers' abstention from the convention may symbolically connote that an attitude of cultural imperialism and paternalism is legitimate.¹⁰⁵ Not surprisingly, most of the prominent art-importers have indeed had active colonial pasts.¹⁰⁶

The United States cannot claim to have clean hands in this regard. Echoes of manifest destiny resound even to this day, and in much of the world the American "gringo"¹⁰⁷ is viewed as no less imperialistic than any other importing national. But at least to the extent that cultural patrimony is concerned, the United States has gone far to remove the shackles of nineteenth century cultural hegemony.¹⁰⁸ American concern for the patrimony of others may have a dark side as a simple bargaining chip to be bartered in exchange for more pragmatic concessions in areas where resentment of the United States runs deep.¹⁰⁹ Yet there is real sincerity in Americans' desire to

DUBOFF, *supra* note 13, at 65-69; S. WILLIAMS, *supra* note 2, at 9-12. Great Britain argues that had Elgin not removed the art works from Athens to London, they would have been destroyed or damaged. Greece argues that the British perspective is paternalistic and irrelevant since Greece is now capable of taking care of the art works. The controversy can be distilled down to the question of who's patrimony is it, Greece's or England's, after 180 years in the British Museum?

103. "The term 'elginism' has become synonymous with the up-rooting of ancient monuments piece by piece or in their entirety and then exporting them under a guise of legality. The transfer is effected by an official transaction with the country of origin." S. WILLIAMS, *supra* note 2, at 9.

Note the French definition of "elginism": "the acts of a vandal who ravages and destroys works of cultural value." The relative hostility of the French definition was the result of the fierce jealousy of Lord Elgin who, as British Ambassador at Constantinople, succeeded in shipping to England valuable friezes and fragments from ancient Greek monuments which the French had themselves desired for the Louvre. *Id.*

104. Bator, *supra* note 2, at 303.

105. One interpretation of abstention is the idea that certain countries have no interest in protecting their antiquities, or are incapable of doing so. But such an argument, if it "falls short of outright bigotry . . . attains the distinction of paternalistic self-interest." *Hearings on H.R. 3403*, *supra* note 5, at 32 (statement of James R. Wiseman).

106. See *infra*, notes 187-91 and accompanying text.

107. Proceedings, *supra* note 62, at 110 (statement of Andre Emmerich).

108. See *infra* notes 152, 159-63, 227 and accompanying text.

109. The traditional American attitude has been that the government should not endeavor to help other countries enforce their own laws when the activities involved would enrich our art collections without violating any of our nation's laws. Since 1970, the U.S. has recognized that such a course is not viable, presumably due to the resentment of developing countries which "feel they have been victimized by circumstances and foreign exploitation, resulting in

heal old wounds and assist in the preservation of national patrimonies.¹¹⁰ Why has the United States assumed leadership in this area, and why have others, among them some of the United States' closest allies, failed to follow? In order to better understand foreign attitudes towards international cultural rights, a historical review of American attitudes in this matter is essential.¹¹¹ It may be, for example, that the United States' unique position as a "melting pot" has permitted its attitudes to evolve with extraordinary rapidity. The United States has stripped native Africans of their tribal heritage, displaced and destroyed the cultures of Native American Indians, and converted and imperialized the Polynesian culture of the Hawaiian Islands.¹¹² In the course of little more than a century, the United States has become, partly by design, one of the champions of the struggle for the recognition and preservation of the cultural integrity and patrimony of other societies. Ironically, however, the United States still has a considerable distance to go before it can adequately preserve its own national patrimony.

III. THE HISTORICAL EVOLUTION OF AMERICAN CULTURAL ATTITUDES AND LAWS

A. *Artifacts Distinguished from Art Treasures*

Identifying when and how the preservation of cultural property first became important in the United States depends considerably on how one defines cultural property.¹¹³ It is one thing for European colonists to regard with nationalistic pride the art treasures they brought with them from England and Germany. It is something quite

the exportation of priceless, irreplaceable national treasures which have depleted forever the cultural patrimony of the future generations of those countries." Proceedings, *supra* note 62, at 112 (statement of Mark Feldman).

110. See *supra* note 69.

111.

We recognize that the effects of our regulation can be only imperfect until there is widespread support of these measures in other countries, but we feel that the United States has a responsibility to put its own house in order to the extent that the American art market is a major, if not the single most important, incentive for . . . despoliation.

Proceedings, *supra* note 62, at 115 (statement of Mark Feldman).

112. See *infra* notes 123-59 and 164-72 and accompanying text.

113. See, e.g., Convention on Cultural Property, *supra* note 1, at art. 1 which states: "[T]he term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science. . . ." The definition then goes on to delineate a host of categories ranging from "[r]are collections and specimens of fauna, flora" to rare manuscripts, and postage stamps. *Id.*

different for their descendants to honor and preserve the patrimony of non-Western cultures such as those of the Native American. Historically, the relics of non-European societies have not been accorded the same respect and protection as more conventional Western works of art, such as paintings and sculptures.¹¹⁴ The evolution from ethnocentricity and xenophobia to enlightened pluralism requires a tremendous ascent in the understanding and appreciation of other cultures. Although distinctions between art and artifact or ethnological material can be difficult to draw when discussing Grecian statuary or Byzantine vases, it is less difficult when the subject is utilitarian pottery shards or arrowheads.¹¹⁵ A distinction can be drawn between the article of anthropological as opposed to aesthetic interest. In the American experience, where cultures of disparate technological levels have clashed, the distinction is fundamental.

*B. American Archaeology: the Speculative Period*¹¹⁶

Archaeology has always existed in one form or another,¹¹⁷ but it

114. It is interesting to note that Indian crafts were prized for their utility if not for their aesthetic value, right from the start. Indian ware has been found intermingled with European and colonial pottery at archaeological sites in Virginia and New England. *See generally* Watkins, *Ceramics in the Seventeenth Century English Colonies*, in *ARTS OF THE ANGLO-AMERICAN COMMUNITY IN THE SEVENTEENTH CENTURY* 28 (1974).

115.

[T]here is a substantial overlap in the values affected by the international trade in both [conventional art and archaeological material]: Whether a Raphael should be permitted to leave Italy and a fifth century vase should be permitted to leave Greece are questions which raise many common problems

Nevertheless, the trade in archaeological materials does raise some significant independent issues. The looting of sites, with its resulting destruction of scientific and scholarly evidence, is an important problem special to archaeological materials.

Bator, *supra* note 2, at 285.

116. Willey & Sabloff divide the history of American archaeology into four periods: the Speculative Period (1492-1840), the Classifactory-Descriptive Period (1840-1914), the Classificatory-Historical Period (1914-1960) and the Explanatory Period (1960-present). G. WILLEY & J. SABLOFF, *A HISTORY OF AMERICAN ARCHAEOLOGY* 7-9 (1980). Because this Comment does not address the history of American archaeology so much as the influence scientific progress has made on our perceptions of our ethnic diversity and resulting laws, this Comment will not highlight these time classifications.

117. The earliest documented archaeologists were the last native kings of Babylon who carried out active building schemes in the ancient cities of Sumer and Akkad. Activities, however, were not strictly archaeological in that digging was not carried out as a deliberate means of finding man's earlier history. The same is true of Greece and Rome. Herodotus and other Greeks made remarkable ethnographical observations and encountered surviving prehistoric barbarians, but their practices were more strictly ethnological or anthropological than archaeological.

Archaeology as a modern science was an indirect result of the Renaissance. Scholars in

did not exist as a scientific discipline until the 1840's. Prior to 1846, the year Congress created a national institution for the promotion of science from the Smithsonian bequest of 1826,¹¹⁸ no particular national policy existed for the preservation of archaeological or ethnographic materials. Cultural property was like any other chattel, thus traditional common law property principles applied. The cultural aspect of the object accorded it no special status. Before such materials could be valued for their own sake, a certain process of education had to transpire.

Before the 1840's, archaeology and anthropology were emerging disciplines carried out by amateur societies pervaded by a natural philosophy sensibility.¹¹⁹ This has been labeled the "Speculative Period" of American archaeology¹²⁰ because investigations and conclusions were conducted by projections of fantasy and intuition rather than by scientific methodology. These projections imposed Western interpretations onto non-Western subjects, thereby strengthening an ethnocentric climate which could not support a serious legal position as to "primitive" cultural artifacts.¹²¹ As anthropology progressed,

Italy and travelers to Italy, Greece, Asia Minor and Egypt began to discover and collect classical and Near Eastern antiquities. It was particularly during the period 1750-1880, the second renaissance of Greek scholarship, that the antiquities of the classical works were discovered by French, English and German scholars. Excavations of the ruins of Pompeii began in 1709, and by the time Napoleon invaded Egypt with 167 skilled draftsmen and scientists, the scientific study of humankind's antiquities had begun its development. European studies in Egypt and Mesopotamia continued unabated and by the 1840's had established patterns of scientific methodology which could be considered hallmarks of the true modern archaeologist. G. DANIEL, *A SHORT HISTORY OF ARCHAEOLOGY* 14-25 (1983).

118. The Smithsonian was founded by the bequest of James Smithson, who had left his estate to a nephew, with the stipulation that should the nephew die without issue, the whole estate should go to the United States of America to found at Washington, under the name of the Smithsonian Institute, an establishment for the increase and diffusion of knowledge among men. The nephew died in 1835, but Congress did not accept the gift until ten years later. Opposition to acceptance of the bequest had been based on the argument that Congress had no power under the Constitution to accept such a gift.

Under the guide of its first secretary, Joseph Henry, a professor at Harvard, the Smithsonian began to collect flora and fauna, and to study the Indian tribes of the west. 20 *ENCYCLOPEDIA BRITANNICA* 839 (1960).

119. See G. WILLEY & J. SABLOFF, *supra* note 116, at 19-32.

120. See *supra* note 116.

121. Indian rights to real property had been recognized from the beginning of the Republic, but revised constantly down to the mid-nineteenth century to dispossess and relocate the Native American under color of law. J. WISE & V. DELORIA, *THE RED MAN IN THE NEW WORLD DRAMA* 228 (1971).

The pervading attitude was judicially dignified by Chief Justice Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823):

The United States, then, have unequivocally acceded to that great and broad rule by

however, protectionist laws followed, thus suggesting a causal relationship between scientific enlightenment and affirmative cultural pluralism.¹²²

1. Indians and moundbuilders

The process of education began in colonial times. Two of the most compelling anthropological mysteries of the day involved the origin of American Indians¹²³ and the origin of the mysterious earthen mounds which were scattered prodigiously throughout the old mid-west from Virginia to Iowa.¹²⁴ One school of thought believed that the Indians themselves had created these mounds. This theory, however, was dismissed by a great portion of the intellectual community.¹²⁵ Settlers in Anglo North America did not believe the Indian capable of any complex construction, notwithstanding the existence in lower latitudes of Native American remains which demonstrated very sophisticated building techniques.¹²⁶ It was not until the 1890's that

which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstance of the people would allow them to exercise.

Id. at 587.

122. See *infra* notes 159-72 and accompanying text.

123. G. WILLEY & J. SABLOFF, *supra* note 116, at 15.

124. Myth held that the multitude of mounds which were constantly being discovered in Ohio and frontier areas as the colonists pushed west could not have been built by the "savages" who then inhabited the region. Instead, they must have been constructed by a civilized race that had disappeared a long time in the past. *Id.* at 20.

125. By 1800, two basic positions had emerged regarding the origin of the mounds: either the Moundbuilders and the Indians (or their direct ancestors) were one and the same people, or the Moundbuilders, whose hypothesized origins were as varied as those first proposed for populating the New World, were an ancient race who had died off or moved away, to be later replaced by the Indians. *Id.* at 21.

126.

The Spaniards saw the wonders of Tenochtitlan, capital of the Aztecs, the public works of the Incas, or the other great achievements of the Indians of Middle and South America, and they were interested in using the Indians as labor[ers]. The English in North America, especially after the French and Indian War, saw the Indians as warlike degenerate savages who were occupying land the new settlers wanted for their own use. It was inconceivable to much of the literate public of Eastern North America that the culture of the Indians or their ancestors was civilized enough to have built the mounds.

Id. at 20.

One fascinating footnote to the debate is that Thomas Jefferson, in 1784, determined to discover what the mounds consisted of. (The answer: bones and pottery.) He undertook the excavation of a mound on his property in Virginia, which has since been recognized as "the first scientific excavation in the history of archaeology." M. WHEELER, *ARCHAEOLOGY FROM THE EARTH* 6 (1956), quoted in G. WILLEY & J. SABLOFF, *supra* note 116, at 28.

the scientific community conclusively accepted the American Indian as the descendant of the mysterious moundbuilders.¹²⁷

The origin of the Native American posed an even more compelling question for European colonists. Taught to trust the Biblical view of creation and diffusion, Christian Americans "knew" that the Indian had to be descended from Noah and his sons, because the rest of humankind had been drowned in the Flood.¹²⁸ Much intellectual exercise was spent tracing the Indian's presumed lineage from Noah. The original explorers of the Americas had theorized that a lineal descent could not be established and that the Indian therefore was not human!¹²⁹ Less drastic theories contemplated that Native Americans were descended from the Lost Ten Tribes of Israel, wayward Vikings, or refugees from Atlantis.¹³⁰

Theories similarly preposterous, and racist, circulated regarding other peoples such as the black Africans, whom colonists first began to import as slaves in 1619,¹³¹ and Hawaiians, whose existence was not even suspected until Captain Cook's discovery of the "Sandwich Islands" in 1778.¹³²

127. The Moundbuilder controversy was not decisively laid to rest until the publication of Cyrus Thomas' monumental report on the mound explorations of the Bureau of (American) Ethnology in 1894. G. WILLEY & J. SABLOFF, *supra* note 116, at 35.

128. Genesis 7:21: "And all flesh died that moved upon the earth, birds, cattle, beasts, all swarming creatures that swarm upon the earth, and every man." *Id.*

129.

The question of who the Indians were and where they came from was of great importance, because, to Europeans, who had been taught that everyone was descended from Adam and Eve and that, at the time of the universal flood, only Noah and his family survived, the inhabitants of the New World either had to be related to some descendants of Noah or else were not human. Some of the early Spanish explorers and settlers believed that the latter was the case and that the Indians were beasts. But, after several key rulings culminating in the historic Papal Bull of Pope Paul III in 1537, and through the efforts of men such as Antonio de Montesinos and Bartolomé de las Cases, it was established that the American Indians were indeed human, that they should be treated as such, and that every effort should be made to propagate the [Catholic] faith among them.

G. WILLEY & J. SABLOFF, *supra* note 116, at 15.

130. *Id.*

131. The first slave ship visited Jamestown in 1619. The Royal African Company, an English concern, was given the monopoly on the African slave trade in 1672, but before the end of the century individual traders were permitted to enter the business. They first came from London, Liverpool and Bristol, and later from New England. The trade reached its peak in 1734 when 70,000 slaves were imported into North America. One authority has estimated that 5,000,000 slaves were imported to America during the entire period of the African slave trade; however, only one tenth of these were brought to the North American continent. F. SIMKINS, *A HISTORY OF THE SOUTH* 63 (1953).

132. Captain Cook had been commissioned by the British Government to determine once and for all whether any north-west passage existed from the Atlantic to the Pacific. After

In the ethnocentric society of Colonial America, legislation protecting the tribal property of "primitive" cultures would have been incomprehensible. No such law existed in America or Europe *per se* for Western remains, let alone for non-Western relics.¹³³ Yet art in Americas colonial period was certainly valued. Despite the relative crudeness of American culture, there was an appreciation of portraiture and the crafting of silver.¹³⁴ Aesthetics, however, did not transcend cultural boundaries. Some romantics may have idealized primitive cultures.¹³⁵ But, bluntly, white Americans generally did not believe that the ethnographic materials of non-white cultures were worth preserving.¹³⁶ If the property of "savages" was to be preserved at all, it was only as curiosities and oddities.¹³⁷ Add to this bias the desire of Christians to convert non-Christians in order to "save" them,¹³⁸ and the erosion of non-Christian, non-Western cultures was ensured.

2. Westernization and conversion

The best intentions of Christian proselytizers were undercut by bigotry and greed. The zeal of missionaries acting "with crucifix in one hand and the dagger in the other"¹³⁹ had been felt in the New

discovering Hawaii, he christened the group after his patron Lord Sandwich, and there met his death in a struggle with natives in 1779. 6 *ENCYCLOPEDIA BRITANNICA* 371 (1960).

133. See *supra* notes 29-33 and accompanying text.

134. W. COOPER, *IN PRAISE OF AMERICA: AMERICAN DECORATIVE ARTS 1650-1830*, at 80 (1979).

135. "Noble Savages and people living with nature became fashionable in the eighteenth century, bursting on Western civilization with an intensity that is startling even today." B. FAGAN, *CLASH OF CULTURES* 7 (1984). The quintessential example of this is, of course, Rousseau and his *Discours sur l'Origine et le Fondement de l'Inegalite parmi les Hommes*. "His sentimentalizing about the sensibility, eroticism, and naturalness of non-Western peoples was picked up with avidity by the writers of the Romantic movement in England." *Id.* at 93; cf. Alexander Pope's Essay on Man written prior to Rousseau: "Lo! the poor Indian whose untutored mind/Sees God in clouds and hears Him in the wind." A. POPE, *AN ESSAY ON MAN*, lines 99-100 (1733).

136. See *supra* text accompanying note 121.

137. See, e.g., B. FAGAN, *supra* note 135, at 227, which discusses the Haida culture which went into the "curio and art business, selling fine carvings and model canoes along the length of the [Pacific north-west] coast. These 'curiosities' were much in demand in Eastern cities. . . ." *Id.*

138. "The belief that the heathen should be converted as a Christian duty was not limited to priests and ministers. Financial supporters of the earliest expeditions, ministers of state, and colonial officials sought genuinely to carry out what they regarded as a moral duty." W. WASHBURN, *THE INDIAN IN AMERICA* 111 (1975).

139. B. FAGAN, *supra* note 135, at 141 (quoting D. DIDEROT, *SUPPLÉMENT AU VOYAGE DE BOUGAINVILLE* (1796)).

World long before the 1840's. The process of conversion and destruction began with Columbus, continued through Cortes and the annihilation of Aztec civilization, and was taken up in Middle America by priests who destroyed priceless records of Mayan civilization.¹⁴⁰

In what is now U.S. territory, Catholic missionaries and soldiers from Spain and its successor, Mexico, continued the process.¹⁴¹ In the East, their English counterparts began to spread Protestant beliefs and claims to Native American soil in Massachusetts and Virginia.¹⁴² The process of conversion and subjugation continued well into the 1840's and beyond, not just on this continent, but across the sea as well. Although Polynesian Hawaii did not become American territory until 1898,¹⁴³ the Islands, nevertheless, underwent Americanization beginning in the 1820's as they encountered seafaring whalers and Congregational missionaries from New England.¹⁴⁴

Finally, there was the African who lived in the midst of white America.¹⁴⁵ One major justification for the "peculiar institution" of slavery was that the African "heathen" was thereby converted and saved from himself.¹⁴⁶ Because the African was literally stolen from his native land and culture, he did not have the benefit of community as a force of resistance. He had no choice but to learn English and Christianity, and to forget his ancestral birthright.¹⁴⁷

140. For an account of the consequences of the Spanish Conquest, see B. FAGAN, *supra* note 135, at chs. 3-4; see also C. CERAM, *GODS, GRAVES AND SCHOLARS* § IV (1980).

141. W. WASHBURN, *supra* note 138, at ch. 5.

142. *Id.*

143. See *infra* note 185.

144. The arrival of the first company of missionaries from New England took place on March 31, 1820. Fourteen other companies followed during the next 35 years — over 150 men and women — ministers, teachers, physicians, printers, farmers and businessmen who introduced the church, the school and the press. By 1822, the missionaries had learned the language, reduced it to writing and begun printing the first textbook. Two months later the first printed law was issued, in 1834 the first newspaper was published, and by 1832 the New Testament was published. 11 *ENCYCLOPEDIA BRITANNICA* 269 (1960).

145. See F. SIMKINS, *supra* note 131, at 121-32 (a more complete account of slave society in the ante-bellum South).

146. "The most startling contribution of the Old South to religion was the reconciliation of Christianity with slavery." F. SIMKINS, *supra* note 131, at 164. One clergyman from South Carolina argued that "[t]he right of holding slaves . . . is clearly established in the Holy Scriptures both by precept and example." It has also been viewed as an obligation to perform labor for another as determined by the providence of God. *Id.*

147.

They did not come voluntarily in groups but were individually snatched from tribal moorings and thrown into the company of strange Negroes of diverse languages and customs. With a genius for imitation, they inevitably adopted the culture of their white captors as a common basis of social intercourse. Their masters, having an

Efforts to convert the American Indians met with less success. They simply refused to assimilate and moved further and further west, thereby postponing the inevitable confrontation of cultures.¹⁴⁸ By contrast, in Hawaii the native culture maintained sovereignty; although the Islands were decimated by European diseases¹⁴⁹ and Westernized to a large extent, they retained significant cultural integrity compared to their continental counterparts.¹⁵⁰ Unthreatened by the whip or the gun, the Hawaiians were not stripped of their unique institutions and patrimony.¹⁵¹

B. Enlightenment Versus Imperialism

By the mid-1840's, two major attitudes had emerged which would eventually be recognized as incompatible: objective intellectual enlightenment and racist cultural imperialism. The former could be symbolized by the foundation of the Smithsonian Institute.¹⁵² The latter, more vociferous at the time, was embodied in the term "manifest destiny," which encouraged the territorial expansion of the United States. A doctrine of little substance, yet one which generated enormous energy, it envisioned an America of white Anglo-Saxon Protestants settling farming communities "from sea to shining sea."¹⁵³ Manifest destiny predicted great national wealth and prestige, but did not allow for the preservation of non-European based culture. As the United States spread west, the question of what to do with the "indigestible Indian" thus became a question of more and more compelling interest.¹⁵⁴

Even as the Indian question became imminent, the moral ques-

intimate interest in their Negroes, so successfully introduced them to Anglo-Saxon customs that few African traits survived.

F. SIMKINS, *supra* note 131, at 63.

148. W. WASHBURN, *supra* note 138, at 165-69.

149. E. NORDYKE, *THE PEOPLING OF HAWAII* 50-55 (1977).

150. Whether such integrity can still be recognized or has any future is uncertain. Hawaiians are now so intermixed with other races that their solidarity as an ethnic group is not highly developed. By the end of the twenty-first century, the race may have merged beyond recognition. *Id.* at 54-55. In 1975, pure-blooded Hawaiians were estimated to represent less than one percent of the people of Hawaii. *Id.* at 20.

151. The Hawaiian monarchy maintained sovereignty over the islands until 1893 when American citizens staged a revolution which overthrew Queen Liliuokalani and ultimately led to American annexation. T. BAILEY, *A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 428-34 (8th ed. 1969).

152. *See supra* note 118.

153. T. BAILEY, *supra* note 151, at 4.

154. W. WASHBURN, *supra* note 138, at ch. 8.

tion of the white maintenance of a slave economy came to a head.¹⁵⁵ Preserving the culture of the African slave was never an issue; it was far too late for that. The question now was whether it was morally permissible for one race to hold another in utter subjugation as if its members were chattels. Union victory in the American Civil War settled this question. Although Union motives in emancipating the slaves may have been to press political and military advantages, the gravamen of the action was nevertheless rooted in popular moral outrage at a perceived evil.¹⁵⁶ Evolving ethical standards permanently altered public policy in the nature of a constitutional amendment.¹⁵⁷ Certainly, the cultural integrity and patrimony of dissimilar ethnic groups cannot be respected until the culture in question is acknowledged to belong within the human community and to participate in certain inherent rights.¹⁵⁸ Until the 1860's, the concept of non-white humanity had not even been universally accepted. But now the ethnocentric elements of American public policy could begin to be weeded out so that a more nourishing fruit could grow.

1. Scientific developments

In the meantime, archaeology and anthropology had begun to develop as serious academic disciplines. By the 1840's, there were European models and standards to emulate.¹⁵⁹ Furthermore, scientific developments occurred which rendered the subject of man's past one of compelling interest. First, Charles Lyell's theory of geology¹⁶⁰ made probable the suggestion that the Earth was far, far older than

155. For an account of events and attitudes leading up to the Civil War, see F. SIMKINS, *supra* note 131, at ch. 13.

156. Abolitionist sentiments pre-date the American Revolution. For an account of the history of antislavery, see W. WIEDEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848* (1977).

157. U.S. CONST. amend. XIII, § 1.

158. See Bassiouni, *supra* note 18, at 289 (discerning the evolution of "what can now be called the inalienable right of all peoples to their natural cultural heritage").

159. G. WILLEY & J. SABLOFF, *supra* note 116, at 34.

160.

The doctrines of stratigraphic geology and uniformitarianism were well to the forefront before the publication of Charles Lyell's *The Principles of Geology*. . . . Like Darwin's *Origins of Species* — and Darwin was much influenced by Lyell's *Principles* — it was not that the ideas were new, but they were set out clearly and cogently, for all who could read, to understand. Lyell's sister-in-law, in her account of his life and work, describes him in 1894 as having a mission "to free science from Moses." This is what he did: his work sealed the case of the fluvialists against the catastrophic diluvialists. From now on, in archaeology as well as geology, Moses and the Flood were dead.

G. DANIEL, *supra* note 117, at 51.

had been suggested by literal interpretations of Genesis.¹⁶¹ Second, Charles Darwin's theory of evolution persuasively argued against the immutability of species. As Darwin later developed in *The Descent of Man*, evidence suggested that humankind's origins may have been natural rather than preternatural, and considerably more humble than was previously believed.¹⁶²

This academic thread weaving through the remainder of the nineteenth century and into the twentieth century made the study of different cultures valuable as a scientific pursuit.¹⁶³ Non-Western cultures were thus elevated while biblical doctrine was undercut; the roots of cultural pluralism were firmly planted.

Ironically, Darwin's theory of evolution was also used to justify the domination of non-Western cultures. Social Darwinism¹⁶⁴ lent scientific legitimacy to the perception that Western culture was Man's supreme achievement, and that non-European cultures were deficient or less highly evolved.¹⁶⁵

Nevertheless, the enlightened concept that "all men are created equal"¹⁶⁶ became the more pervasive ethic. But tragically, even as the Civil War was fought to test this tenet, the Indian Wars fought by the

161. In 1642, Dr. John Lightfoot of the University of Cambridge, held that "'man was created by the *Trinity* about the third hour of the day, or nine of the clocke in the morning on 23 October 4004 BC.'" *Id.* at 34 (quoting J. LIGHTFOOT, A FEW AND NEW OBSERVATIONS ON THE BOOK OF GENESIS (1642)).

162.

The Origin of Species had a profound effect on the development of archaeology. At first Darwin expressed no opinion of the effect of his theory on man's ancestry, nor did he in that book comment on the anatomical likenesses between man and the apes, except to say that the acceptance of his theory suggested that "much light will be thrown on the origin of man and his history." . . . When the dust of the battle between the evolutionists and the anti-evolutionists had settled and Darwinism was widely accepted, it was obvious that the theory of organic evolution made people more ready to accept the antiquity of man. It made the roughly chipped stone axes from the Somme and Suffolk not only credible but essential, and a belief in Neanderthal man credible and essential.

G. DANIEL, *supra* note 117, at 96.

163. G. WILLEY & J. SABLOFF, *supra* note 116, at 3-4, 76.

164. S. CLOUGH, D. BRANDENBURG, P. GAY, O. PFLANZE & S. PAYNE, A HISTORY OF THE WESTERN WORLD, 1715 TO THE PRESENT 990-92 (1964).

165. B. FAGAN, *supra* note 135.

Nineteenth-century Europeans believed, as had their predecessors, that Western civilization was the pinnacle of human achievement, a signpost of inevitable progress for the future. But their belief was now couched in far less tolerant terms. The non-Westerner became an even more inferior being, often considered as having the intelligence of a ten-year-old child. From there it was a short step to the ardently racist doctrines of late nineteenth-century imperial Europe.

Id. at 7.

166. The Declaration of Independence para. 2 (U.S. 1776).

federal government in the west against the Plains Indians¹⁶⁷ all but guaranteed their cultural destruction, if not their physical annihilation.¹⁶⁸ By the 1880's, the Native American had ceased to be a military threat,¹⁶⁹ and the master plan begun in the 1850's of establishing a system of reservations to be administered by the Department of the Interior was fulfilled.¹⁷⁰ The Indian was tragically segregated both from mainstream society and from his own tribal heritage. It is a fundamental irony of American history that during a period of reflection regarding human dignity, the American Indians, esteemed as sovereign nations in the United States Constitution,¹⁷¹ were stripped of their ancestral birthright.¹⁷²

2. The Lieber Code

Another irony of the Civil War, albeit on a more positive note, was that the United States government first made itself heard regarding the protection of cultural property. Indeed, the Lieber Code of

167. For a list of tribes and an inventory of Indian land cessions to the U.S. between 1776 and 1945, see W. WASHBURN, *supra* note 138, at 186-87.

168. *Id.* at ch. 9.

169. See J. WISE & V. DELORIA, *supra* note 121, at 290-93 who note that

Although Indian disturbances occurred in 1895 among the Bannock tribes, in 1898 among the Chippewas at Leech lake, in 1913 among the Navajo, and in 1915 among the Paiutes, the killing of Sitting Bull, and the massacres of members of his Sioux tribe at Wounded Knee in 1890 marked the end of organized Indian resistance.

170. Washburn notes that "[t]he concept of reservations for the Plains Indian tribes derives from 1849, following the creation . . . of a Department of the Interior, [into] which the Indian Office was moved." W. WASHBURN, *supra* note 138, at 190. Orlando Brown, a political friend of Zachary Taylor, was named Commissioner of Indian Affairs, and one of his "first recommendations was that clear and definite boundaries of what constituted Indian areas of residence and hunting be established and that no trespassing in these areas be allowed without the approval of the occupant tribes or the proper agents of the government." *Id.* at 191.

Through the reservation period, the U.S. government sought to convert the Indian to white economic practices and values. White farmers were hired to live among the Indians and teach former hunters how to become agriculturalists. Indians were urged to learn the crafts associated with "civilized" lives. *Id.* at 231.

171. See, e.g., U.S. CONST. art. I, § 8, cl. 3.

172. Washburn notes that

United States reservation policy failed because it sought not merely to prevent the Indian from troubling the white man by keeping him disarmed, isolated, and separate, but because it sought also to perform a grandiose social experiment whose outcome would be a red white man and a Christian heathen. It could not work, at least in so short a time and under such unfavorable conditions. The United States government was not the first or only organization to stub its toe on the hard rock of cultural resistance. Culture never has been, and is not, a force to be overcome by simple military force, congressional legislation, or educational edicts.

W. WASHBURN, *supra* note 138, at 232.

1863¹⁷³ was the first codification anywhere of the principle that "by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war."¹⁷⁴ The Lieber Code was a series of military regulations which dictated how Union troops were to conduct themselves during their conquest of the Confederacy. Executed by Lincoln's Secretary of War, the Lieber Code (the Code) was drafted by Dr. Francis Lieber, a political philosopher and international jurist.¹⁷⁵ Among other things, the Code permitted the victor to seize "all public movable property."¹⁷⁶ This right was severely limited, however, by the rule that "the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of educations, or foundations for the promotion of knowledge . . . museums of the fine arts, or of a scientific character . . . is not to be considered public property."¹⁷⁷

Because the Code specifically addressed conduct during war, it had no direct effect on the development of domestic policies on the protection of cultural property. In terms of laws protecting American patrimony, it leaves no lineal descendants. In terms of international law, however, the Lieber Code's effects were profound since it served as the basis for the Brussels Conference of 1874¹⁷⁸ and the Hague Conventions of 1899 and 1907.¹⁷⁹

C. *The Twentieth Century*

The United States government was not heard again on the subject of American patrimony until the turn of the 20th century, this

173. Instructions for the Government of Armies of the United States in the Field, General Order No. 100, Adjutant General's Office, Dept. of the Army, Apr. 24, 1863 [hereinafter Lieber Code], 2 F. LIEBER, CONTRIBUTIONS TO POLITICAL SCIENCE, INCLUDING LECTURES ON THE CONSTITUTION OF THE UNITED STATES AND OTHER WRITINGS 245 (1881); see also Bassiouni, *supra* note 18, at 289 n.28.

174. H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 395 (1846), quoted in S. WILLIAMS, *supra* note 2, at 15.

175. S. WILLIAMS, *supra* note 2, at 15-16.

176. *Id.* at 16 (quoting art. XXXI of the Lieber Code).

177. *Id.* (quoting art. XXXIV of the Lieber Code).

178. The Project of an International Declaration Concerning the Laws and Customs of War, adopted by the Conference of Brussels, Aug. 27, 1874, reprinted in 1 AM. J. INT'L L. SUPP. 96 (1907).

179. Convention Concerning the Laws and Customs of War on Land (1907), 100 B.S.P. 338, LIV L.N.T.S. 437, LXXXII L.N.T.S. 458, cited in S. WILLIAMS, *supra* note 2, at 17.

time with the American Antiquities Preservation Act.¹⁸⁰ American society had altered dramatically between the Civil War and the turn of the century. Even as Indians were removed from society, former black slaves were being integrated into it. Immigration expanded from non-Western European countries¹⁸¹ and Asia.¹⁸² More and more, the United States became a heterogenous society. The frontier disappeared and manifest destiny became a moot subject.¹⁸³

On the other hand, Americans began to focus political attention overseas. The Spanish-American War gave the United States territory in the Philippines, Guam and Puerto Rico.¹⁸⁴ Hawaii became an American territory in 1898¹⁸⁵ as did the Panama Canal Zone in 1903.¹⁸⁶ The United States thus had its own period as a colonial force analogous to the "hold-outs" against the UNESCO Convention such as Great Britain,¹⁸⁷ France,¹⁸⁸ the Netherlands,¹⁸⁹ West Germany¹⁹⁰

180. 34 Stat. 225 (1906) (codified at 16 U.S.C. § 433 (1982)).

181. The year 1882 marks a turning point in the history of immigration to America. The influx from Western and Northern Europe crested, and arrivals began to appear from Eastern and Southern Europe, particularly South Russia, Austria-Hungary and other Mediterranean countries. Among the stimuli for this "new" immigration were overcrowded conditions in Southern and Eastern Europe, anti-Semitic persecution in Russia, and unprecedented opportunities for employment in American factories and mines. A. SCHLESINGER, *POLITICAL AND SOCIAL GROWTH OF THE UNITED STATES, 1852-1933*, at 279-80 (1939).

182. Chinese had migrated from the 1850's on, primarily to the Pacific Coast. Asians encountered greater racial antagonism than did their European counterparts, and Congress even restricted Chinese immigration by a series of treaties. *Id.* at 282-83.

183. "Manifest Destiny, in the twentieth century, vanished. Not only did it die; it stayed dead through two world wars." F. MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY* 266 (1966).

184. T. BAILEY, *supra* note 151, at 468-74.

185. *Id.* The Hawaiian monarchy, which had managed to maintain sovereignty throughout the nineteenth century in the face of imperialistic interest from Great Britain and France, was toppled from within by Americans residing in Hawaii (many of whom were the progeny of the original missionaries). Interested in protecting their prosperous industry in sugar cane and their trade with the U.S. which was threatened by rival sugar growers in the U.S., these American sugar growers conspired to overthrow Queen Liliuokalani, take political control of the Islands and deliver them over to the U.S. The plan was accomplished in 1893, but Grover Cleveland, an archfoe of imperialism, refused annexation. The ad hoc government in Honolulu lobbied actively in Washington for annexation, but it was not achieved until 1898 when McKinley was in the White House and the enthusiasm of the American victory in the Spanish-American War encouraged imperialism. *Id.* at 428-35.

186. *Id.* at 493-98.

187. Listed among Great Britain's colonies have been Cape Colony in South Africa, India-Pakistan, Hong Kong, and a host of other locales adding up to "the greatest colonial empire the world ha[s] ever known." L. HOLT & A. CHILTON, *THE HISTORY OF EUROPE FROM 1862 TO 1914* (1917).

188. French possessions have included Senegal, Morocco, Algeria, and Indochina.

and Japan.¹⁹¹

During this period the United States was exposed to foreign cultures both from within and abroad. Increased cultural sophistication led to increased appreciation of dissimilar cultures and an idealization of foreign institutions. A similar process occurred abroad, where American culture became a subject of fascination. Interest was particularly piqued with the "Wild West."¹⁹² Buffalo Bill's "Wild West Exhibition" toured the United States and Europe in the 1880's and 1890's.¹⁹³ One important incident involved the export to Europe of a number of American Indian artifacts in 1891. When the export was disclosed, popular opinion decried the loss to American museums, and Americans began to contemplate how to preserve their Indian patrimony.¹⁹⁴

1. The American Antiquities Preservation Act and the Archaeological Resources Act

The American Antiquities Preservation Act (Antiquities Act)¹⁹⁵ protected antiquities of archaeological interest which were found on Federal or Indian lands.¹⁹⁶ The Antiquities Act intended to preclude the appropriation, excavation, injury, or destruction of "any historic or prehistoric ruin or monument or any object of antiquity situated on lands owned or controlled by the Government."¹⁹⁷ The penalty was \$500, 90 days imprisonment, or both.¹⁹⁸

The Antiquities Act was an excellent first step on the road to protection of the valuable and unique resource that is America's cul-

189. Dutch colonies have included Java, Sumatra, Celebes, the Molucca Islands, and portions of Borneo. *Id.* at 322.

190. Various nineteenth century German colonies expanded into German Southwest Africa. Other colonized areas were Togoland, the Cameroons, and German East Africa. In the Pacific, Germany added New Guinea, the Marshall Islands, and the Solomon Islands. *Id.* at 331-32.

191. Japan, which had only been opened to the outside world by Commodore Perry in 1853, by 1895 had acquired from China the island of Taiwan, the Pescadores Islands, and the Liaotung Peninsula in southern Manchuria. By 1910, it had acquired the southern half of Sakhalin, and Korea. *Id.* at 324-27; E. REISCHAUER, JAPAN, THE STORY OF A NATION 152-55 (3d ed. 1981).

192. J. BURKE, BUFFALO BILL, THE NOBLEST WHITESKIN chs. 9-10 (1973).

193. W. WASHBURN, *supra* note 138, at 227.

194. See Prot, *supra* note 18, at 337.

195. 16 U.S.C. § 433 (1982) (the Antiquities Act).

196. *Id.*

197. *Id.*

198. *Id.*

tural patrimony. But well-intentioned as it was, the Act suffered from a number of flaws which undercut its efficacy. Most importantly, in the Ninth Circuit case of *United States v. Diaz*¹⁹⁹ in 1974, the Act was found to be unconstitutionally vague in its definition of "archaeological resource."²⁰⁰ Superceding legislation, the Archaeological Resources Protection Act of 1979 (Resources Act),²⁰¹ eventually remedied this defect.

Another flaw was the inadequacy of the criminal penalty.²⁰² As the market for antiquities began to skyrocket after World War II, a \$500 fine no longer provided much incentive to refrain from looting.²⁰³ The Resources Act ameliorated this flaw by raising the penalty to a \$10,000 fine or one year's imprisonment or both.²⁰⁴

Other problems, however, which have not been addressed, include the fact the neither the Antiquities Act nor its successor, the Resources Act, protected cultural material discovered on private property. In nations such as Mexico,²⁰⁵ Peru,²⁰⁶ and Turkey,²⁰⁷ cultural material discovered on private land is automatically vested in the state. The United States follows the English common law in giving the property owner rights to all material on or under the land.²⁰⁸ Not even for cultural patrimony will a property-owner's rights to subsurface material be abridged.²⁰⁹

Yet another flaw is the absence of any restriction on the alienability of artifacts. The UNESCO Convention addresses illicit trade in art and artifacts.²¹⁰ The precise reason why such trade is illicit is be-

199. 449 F.2d 113 (9th Cir. 1974).

200. *Id.*

201. 16 U.S.C. §§ 470aa-470ll (1979).

202. H.R. REP. No. 311, 96th Cong., 2d Sess. 1710 (1979).

203. *Id.*

204. 16 U.S.C. § 470ee(d) (1979).

205. Ley Federal Sobre Monumentos y Zonas Arqueologicas, Artisticas e Historicas, 312 Diario Oficial [D.O.] 16 (1972).

206. Truslow, *Peru's Recovery of Cultural Patrimony*, 15 INT'L L. & POL. 839, 841 n.15 (quoting Law No. 6634 of June 13, 1929 (Peru)).

207. Antiquities Law No. 1710 of 1973 (Tur.), cited in Fishman & Metzger, *Protecting America's Cultural and Historical Patrimony*, 4 SYRACUSE J. INT'L L. & COM. 57, 62 n.18 (1976) (citing Antiquities Law No. 1710 of 1973 (Turkey)).

208. For a discussion of the efficacy of states laying claim to ownership of national antiquities, see O'Keefe, *Export and Import Controls on Movement of the Cultural Heritage: Problems at the National Level*, 10 SYRACUSE J. INT'L & COM. 352 (1983).

209. As the old maxim goes: "Cuius est solum, eius est usque ad coelum et ad infernos." "To whomever the soil belongs, he owns also to the sky and to the depths." BLACK'S LAW DICTIONARY 341 (5th ed. 1979).

210. See *supra* text accompanying note 36.

cause most nations have restricted export of their antiquities.²¹¹ Most art-rich nations have a policy proscribing or limiting the export of their national heritages. Austria permits virtually no such export at all.²¹² Great Britain allows some export, but only after the object is made available to British buyers for a reasonable price.²¹³ In contrast, the United States has no such policy to provide for the retention of the national patrimony.²¹⁴ Thus a wealth of American Indian artifacts is finding its way out of the United States and into collections in Switzerland and Japan.²¹⁵

2. Other protective legislation

After 1906, Congress did not again express concern for domestic patrimony until the Roerich Pact of 1935,²¹⁶ which was an inter-

211. There are basically two types of export restrictions: "expropriation" and "preemption" legislation. "Expropriation" means that export of the patrimony is totally prohibited. "Preemption" means that the state is given an opportunity to acquire the art work before it is exported. Among those nations with expropriation laws are Austria, France, Hungary, India, and Turkey. Examples of states with preemption laws are Italy and Great Britain. Fishman & Metzger, *supra* note 207, at 59-64.

212.

Austria prohibits the exportation and sale of objects of historical, artistic, or cultural interest unless created by living artists or by artists who have been dead for less than 20 years. The state will undertake any measure of registration or supervision to stop the export of objects of exceptional value, permitting the export of objects of art only on rare occasions. Control is not restricted to works of national interest, to objects within the control of government or in the public domain. Regulation extends to sales within the country and penalties for violations are strict.

Id. at 59-60.

213. In Great Britain, the Reviewing Committee on the Export of Works of Art of the Department of Education and Science requires the issuance of a license before an art work or antique can be exported.

The decision whether or not to refuse an export license for objects of "national importance" is based on three criteria established by the Reviewing Committee: a) whether the object is so closely connected with British history and national life that its departure would be a misfortune; b) whether it is of outstanding aesthetic importance; [and] c) whether it is of outstanding significance for the study of some particular branch of art, learning or history.

Id. at 63-64.

214. There are apparently only six or seven countries that do not regulate the export of cultural property, including the United States, Denmark, Uganda, Singapore, and Togo. Bator, *supra* note 2, at 314 n.71.

215. "The United States is indeed a lootee, not only in terms of American Indian materials that are being routinely stolen from U.S. museums but in terms of archaeological objects that are often clandestinely and improperly excavated, and then frequently sent abroad for sale in galleries in Europe." *Hearings on H.R. 3403, supra* note 5, at 66 (statement of Mary Elizabeth King).

216. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, T.S. No. 899, 167 L.N.T.S. 289. State parties were the Argentine Republic, Bolivia, Brazil, Chile, Columbia, Costa Rica, Cuba, the Dominican Re-

American Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments. The treaty provided that in times of war, belligerents must refrain from destroying buildings and monuments of artistic, scientific or historical interest.²¹⁷

In the same year, Congress enacted the Historic Sites, Buildings, and Antiquities Act (Historic Sites Act)²¹⁸ whose stated policy was "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."²¹⁹ This Act authorized, among other things, the creation of a national trust for historical sites (such as homes of former Presidents)²²⁰ and authorized procedures to be followed in the event that dam construction threatened sites of historical interest.²²¹

Congress supplemented the Historic Sites Act in 1970 with the National Historic Preservation Act.²²² This comprehensive instrument authorized, among other things, a National Register of Historic Places,²²³ monetary grants to Indian tribes and ethnic minorities for the preservation of their cultural heritages,²²⁴ and a loan program to private parties who are custodians of property included in the National Register.²²⁵

3. Implications of America's evolution

It is encouraging to note that as the United States has moved from homogeneity to pluralism, it has acquired, almost in spite of itself, a deeper sensitivity to ethnic needs. It is of equal interest that the cultural imperialism of our past has also emerged as a force for the preservation of antiquities and other cultural property. Congress' declaration that "the historical and cultural foundations of the nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people"²²⁶ suggests a course of cultural introspection and pride in the

public, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States of America, Uruguay, and Venezuela.

217. *Id.*

218. 16 U.S.C. §§ 461-469h (1985).

219. *Id.* § 461.

220. *Id.* § 467b.

221. *Id.* § 469.

222. 16 U.S.C. §§ 470-470w-6 (1985).

223. *Id.* § 470a.

224. *Id.* § 470a(d).

225. *Id.* § 470d.

226. *Id.* § 470(b)(2).

past. This patriotism need not be synonymous with cultural imperialism, but may be fulfilled by an appreciation of diversity and greater sensitivity to our pluralism. In a conceptual sense, not only have the standards of artistic and anthropological materials merged,²²⁷ but the effect of national pride and scholarly enlightenment have blended as well.

It would be an oversimplification if the story ended here, however. To begin with, American pluralism is far from perfect. Despite our progress in acknowledging and protecting the dignity of all individuals, racism and ethnocentricity persist.²²⁸ And, although it is less insidious, assimilation consistently threatens the integrity of diverse ethnic groups.²²⁹

What, if anything, can be gleaned from the American experience which can be considered *vis-à-vis* the other art-importers? Our treatment of ethnic minorities, although relatively good, does not set a model standard for the rest of the world.²³⁰ America's primary distinction appears to be that the United States has tolerated diversity imperfectly, and sometimes grudgingly, although the exposure to diverse peoples has heightened American sensitivity to different cultures. Without this exposure, American attitudes would have evolved with less ease. This does not suggest that non-heterogeneous societies are insensitive to intercultural needs. It simply suggests that such nations might need to take other roads to reach the same destination. Intercultural esteem may be developed in other ways: through trade, the media, through academic exchanges, and especially international cultural exchanges.²³¹ America's historical development neither can, nor should, be duplicated, especially since acceptance and appreciation of each group's uniqueness is what pluralism is all about. What

227. See *supra* text accompanying notes 113-15.

228. See, e.g., Sowell, *The Plight of Black Students in the United States*, in SLAVERY, COLONIALISM, AND RACISM 179 (S. Mintz ed. 1974); see also W. WASHBURN, *supra* note 138, at 272-75; B. FAGAN, *supra* note 135, at 286-89.

229. W. WASHBURN, *supra* note 138, at 250-66.

230. But see Banton, 1960: *A Turning Point in the Study of Race Relations*, in SLAVERY, COLONIALISM, AND RACISM 31 (S. Mintz ed. 1974), noting that

[D]evelopments in the United States probably have a greater demonstration effect than those in other countries. . . . If the so-called "guest workers" of the European Economic Community establish themselves and their families in European societies in the way West Indians, Indians, and Pakistanis have in Britain, they will have to be assisted . . . if these countries are not to experience disorders of a kind previously characteristic of nonindustrial multiracial societies. American experience will serve as a guide both to governments and to minority leaders.

Id. at 42.

231. Bator, *supra* note 2, at 306-10.

the United States can offer from its own experience (even though its own road has been a rocky one, and even though it is not there yet) is a course clear enough to indicate a worthwhile and humane destination.

IV. RECOMMENDATIONS

Despite the beneficence of past Congressional actions, much more still needs to be done within the United States. American cultural property and especially its irreplaceable antiquities, is far too valuable a resource to be entrusted to private hands on such a large scale.²³² If a citizen makes a discovery of exceptional anthropological interest, he should be required to notify the government of the find.²³³ Property rights to the find need not automatically vest in the government, but the government should be given the first opportunity to buy the object.²³⁴

Second, export regulations must be promulgated in order to stem the flow of American antiquities to foreign countries. They need not be draconian as we do not wish to preclude the exchange of art and artifacts completely.²³⁵ We simply need to know what is leaving this country so that if the object in question is a potential asset to the national patrimony, we can take steps to retain it.

Third, in order to avoid the possible negative consequences of restricting the export of American art,²³⁶ we should encourage even

232.

Art belongs to the nation as a whole and is not the "mere" property of the owner. If a piece of art or an historical document were so important that its loss would be a loss to the nation, then even the creator of that work of art could not permit his desires to harm the nation's cultural patrimony.

Fishman & Metzger, *supra* note 207, at 75.

233. See, e.g., *supra* note 213. The British system of licensing would be an effective means of informing the government of a find, if adopted by the U.S.

234. Fishman & Metzger posit the creation of an "Art Export Advisory Council" which would determine the value of the object to the national cultural heritage and recommend government purchase by the Smithsonian Institution accordingly. Fishman & Metzger, *supra* note 207, at 72-73.

235.

[I]t would be a disaster if all art stayed home, if one could see Mexican art only in Mexico, French art only in France. . . . Countries that allow their art to spread abroad derive both obvious and subtle advantages. Art is a good ambassador. It stimulates interest in, understanding of, and sympathy and admiration for that country. Giving foreigners a taste of a nation's art by allowing export will attract foreign scholars, students, and tourists to visit that country and study its art; this can in turn stimulate and enrich that country's intellectual life.

Bator, *supra* note 2, at 306.

236. See *id.* at 326.

farther the temporary exchange of art among nations. Exhibitions such as the highly successful art exchange between the Hermitage and Pushkin Museums in the Soviet Union and the private collection of Armand Hammer²³⁷ can reduce parochialism; at their best, such exchanges can help increase mutual understanding since "art is a good ambassador."²³⁸

Fourth, the flow of American antiquities is directed to those same art-importing nations that have refused to join in the UNESCO Convention.²³⁹ The United States has had the unique opportunity to view the issue from both sides. It is the largest art market in the world,²⁴⁰ but it is also a nation whose diverse citizenry has come from cultures that have felt the ravages of imperialism. The United States knows what it means to have its own patrimony plundered and traded.²⁴¹ It should thus be our job not just to join the art-exporters in decrying the pillage, but to educate our fellow art-importers as to the consequences of abstention from the Convention, and, if necessary, to urge them to follow suit with social and cultural sanctions.²⁴² The United States' interest in the protection of both American and international art deserves more concrete support than the mere abstract embrace of an ideological position.

237. L.A. Times, Dec. 28, 1985, pt. 2, at 1, col. 1.

238. Bator, *supra* note 2, at 306.

239. See *supra* text accompanying notes 85-94.

240. See *supra* text accompanying note 93.

241.

[T]wo examples from our own history[:] From 1933 to 1935, six collectors in Oklahoma levelled a mound 33 feet high as "as long as a football field" in Flores County, named Spiro Mound. This was one of only three known sites of an important prehistoric religious cult, and it was apparently the greatest. The contents of the mound were scattered and much was destroyed. No records were kept, no photographs made. Fifty years later, we are still trying to piece together the archaeological picture. In its way, Spiro Mound was an American King Tut's tomb. We will never know what the mound really contained. Many of the pieces found are still in private hands; some are probably in Europe.

In New Mexico, a culture called Mimbres once produced beautiful pottery with pictures of animals and people. Collectors will now pay more than a thousand dollars for a painted bowl. Consequently, local dealers and collector/dealers lease mineral rights to land containing Mimbres sites and use a backhoe to excavate the pottery. American archaeologists know almost nothing about the Mimbres culture as a result. Many Mimbres bowls are now being sold in Europe.

Hearings on H.R. 3403, supra note 5, at 67 (statement of Mary Elizabeth King).

242. Perhaps the most appropriate sanction is to cut back cultural exchanges with uncooperative states. However, unresponsive nations might retaliate by depriving Americans of the benefits of their cultural exchanges. The alternative, then, would be to offer the UNESCO hold-outs an advantage to joining UNESCO, such as *increased* cultural exchanges. Not only could such an offer result in increased participation in the Convention, it would encourage desirable cultural exchanges.

V. CONCLUSION

As has been shown, the illicit international trade of national patrimony is a problem which requires international cooperation if it is to be remedied. The UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of ownership of Cultural Property offers some relief by protecting, among other things, art objects stolen from public edifices, and archaeological artifacts which are in jeopardy of pillage.²⁴³ However, the instrument cannot be truly effective without the participation of major art-importers. The United States has implemented the Convention, but other art-importing nations have not. The United States position on the subject is the product of its own unique historical and political relations.

The United States once practiced cultural hegemony, but through a gradual process of intercultural contact, academic enlightenment and practical self-interest, it has emerged as a relatively pluralistic society which has come to better appreciate the value of the artistic and ethnographic materials of all human societies. As a society which has known subjugation by virtue of, among others, the Indian, Black and Hawaiian experiences, the United States is uniquely sensitive to both sides of the issue.

The United States is better prepared to honor the cultural patrimony both of its own diverse past, and that of other nations. In doing so, however, Congress should be prepared to take more decisive measures, such as restricting private property rights and implementing export regulations. Americans should also urge other art-importing nations to follow this example and join the UNESCO Convention, both because it is morally proper to do so, and because the United States has a personal stake in such cooperation.

As rational members of the legal community, it is easy to become so accustomed to viewing an issue in the abstract that the tangible reality of the law works to protect is forgotten. It is one thing to glibly discuss Indian pottery — or Byzantine, or Sumerian, or Japanese pottery — and to analyze it as a public resource, or a question of policy, as if the subject were fishing rights, or industrial quotas: art and artifacts are different however. They speak to the soul as well as to the mind. They deserve protection, for, as one of the sources of humankind's humanity, they are not just another by-product of civilization; they are an end of civilization in themselves, and, as Keats

243. Convention on Cultural Property, *supra* note 1.

observed, a transcendence of it.²⁴⁴

Brian A. Yapko

244.

When old age shall this generation waste,
Thou shalt remain, in midst of other woe
Than ours, a friend to man, to whom thou say'st,
Beauty is truth, truth beauty — that is all
Ye know on earth, and all ye need to know.

J. KEATS, ODE ON A GRECIAN URN lines 46-50 (1819).

