Cultural Property Ethics

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After briefly discussing ethics in general, stating the public interest in cultural property, and positing that collecting and dealing in cultural objects are not inherently unethical activities, the writer contrasts ethical attitudes toward legal controls over the international movement of people and of cultural objects. He then discusses the ethical bases of cultural property export controls and ethical questions raised by dealing in and collecting cultural objects, and identifies particular applications of export controls that are ethically unproblematic or ethically clouded. He discusses the difficult area of antiquities and questions whether anyone involved in it — from source nations, archaeologists, and ethnographers to museums, collectors, and the art trade — has clean hands. Finally, he states a hypothetical case of invited theft and asks readers to decide what the ethical response would be.

1 INTRODUCTION

FIRST, A FEW WORDS ABOUT ethics *qua* ethics, a topic on which it is difficult to say only a few words; there are libraries full of works on ethics by ancient sages, learned medieval doctors, and clever modern (and postmodern) thinkers but little consensus on the interesting problems they dispute. In this article I take ethics to mean action according to moral principles; thus ethics = principles of right conduct.

There is an interesting symbiosis between ethics and law. Many legal provisions prescribe right conduct or provide sanctions to punish improper conduct or require compensation to people injured by improper conduct. Apart from law, however, societies also have a variety of other guides to right conduct, ranging from religious injunctions to trade practices to rules of etiquette, that provide the bases of an ethical consensus. In societies with open, socially responsive legal systems, as most Western legal systems are, such ethical concerns may eventually be "legalized." The evolution from identification of a social concern to articulation of a responsive ethical principle to legislative or judicial conversion of the principle into law is sufficiently familiar to permit us to think of ethical principles as often, though not always, a kind of nascent law. Until legalization, however, ethics are contrasted with law. Thus an action may be described as legal but unethical or, less frequently, ethical but illegal. In either case, the law is presumed to be in the wrong. Ethics has a higher moral status than law.

Where does one find ethics? Until they precipitate into some more substantial form, ethical ideas exist in the air we breathe. They are at large in soci-

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ety and, even though not clearly articulated, direct and condition much social behavior. In the United States, there is a recent tendency toward clear articulation: "codes" of ethics with cultural property provisions proliferate, produced by associations of appraisers, archaeologists, auction houses, art historians, dealers, museums, museum directors, museum stores, conservators/restorers, and probably others. It should not surprise us that such codes tend to be consistent with the interests and to advance the programs of the associations or institutions that produce and purport to be governed by them. Indeed, for an association or institution to adopt ethical principles that appear to be genuinely contrary to its interests would arouse our curiosity. One good rule of thumb: a proposed ethical principle is more persuasive if its application actually disadvantages the proponent. In particular, we are right to examine carefully and skeptically a nation's or organization's or person's claim that its self-interest expresses an ethical principle that should bind others.

Here are two relatively uncontroversial propositions to help guide discussion of cultural property ethics:

1. There is an internationally shared public interest in cultural artifacts and the information and enjoyment that they can provide. This interest is served by preservation, study, publication, and exhibition of objects and contexts. The destruction, damaging, falsification, or suppression of cultural objects, contexts, and information about them are presumptively unethical.
2. People enjoy possessing works of art, manuscripts, antiquities, and other forms of cultural property. In market economies, the demand for cultural objects is served by the market, which is made and maintained by collectors, museums, dealers, and auction houses. None of these activities is inherently unethical.

I will assume that readers generally agree with these two propositions. Those who want more background before deciding whether or not they do agree might profitably read "A Licit International Trade in Cultural Objects" in volume four of this journal.[1] I now turn to some more interesting and controversial questions of cultural property ethics.

2 EXTRATERRITORIAL ENFORCEMENT OF NATIONAL LAWS

Until the fall of the Soviet Empire, people in the USSR and satellite nations were legally prohibited from leaving the national territory without governmental permission. Despite the existence of such laws, many tried to escape. The governmental authorities were very serious about enforcing these laws. Some who attempted to escape were caught and punished, while others were shot and killed in the attempt. Still, thousands successfully escaped to, among other refuges, Austria, which, supported by world opinion, declined to seize and return the refugees. There was a strong consensus outside the Soviet Empire that what Austria did was right. Indeed, most readers would probably have

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condemned Austria if it had returned these people to the nations from which they fled.

Recall, however, that, in fleeing, the refugees violated the laws of the duly recognized nations from which they fled. Are we to conclude that a nation has no ethical obligation to enforce, or to assist in the enforcement of, another nation's laws? What of the Austrians who helped East Germans and Czechs escape and supported them in their unwillingness to return? Were their actions in conspiring to violate duly enacted GDR and Czech laws ethical? May we generalize that the citizens of one nation have no ethical obligation to respect the laws of another?

As many readers know, the applicable *legal* rule, based on the principles of independence and equality of states in international law, is that a state has no obligation to enforce another state's laws. Nor does it have a legal obligation to require individuals subject to its jurisdiction to respect the laws of other states. Does this show that there is a congruence of a legal rule and an ethical principle that the laws of one nation are not entitled to foreign enforcement and that there is little, if any, area of ethical doubt? Not exactly.

3 FREE MOVEMENT OF GOODS AND PEOPLE

In many parts of the world, national laws provide that owners of works of art and other cultural objects may not remove them from national territory without governmental permission. Such laws are frequently violated, and the legal rule set out above applies: in the absence of a treaty, the foreign state has no obligation under international law to seize and return the illegally exported work. Codes of ethics and much world opinion, however, call for the return of illegally exported works. Although some law follows this growing sentiment, notably the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, the stated rule is still the residual legal position. Thus the legal rule and the applicable ethical principle, which agree when applied to people, appear to conflict when applied to works of art.

Why this difference? Can we deduce from this example that the nation-art relationship is ethically stronger than the nation-people relationship, so that people should be free to leave the national territory but art should not? Why? Is it because of a belief that people are plentiful and replaceable while great works of art are unique and irreplaceable? How can such a proposition be squared with the often-expressed ethical principle that human life is precious and each person is unique?

Or does this example merely illustrate a political fact, that there is strong support for the free movement of humans and less support for the free movement of art? Such a "right of free movement" (of people) has been included in a number of post–World War II constitutions and in various human rights conventions, while those instruments state no corresponding right of free movement of works of art or other cultural objects. There is, however, a form of the free movement principle in the Treaty of Rome and the General Agree-

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ment on Tariffs and Trade (GATT), which seek to promote free movement of goods by eliminating trade barriers, including export controls. Both treaties expressly permit member states to limit the export of "national cultural treasures," a term that still awaits judicial definition. The implication is that export controls over the common run of works of art and other cultural objects—those that do not rise to the dignity of "national treasures"—are impermissible.

A German scholar, Professor Eric Jayme, has argued that the freedom of movement (of people) necessarily implies the freedom of movement of works of art, because people who are penalized if they move are not free to move. The wealthy person who is not allowed to take her wealth with her is less free to leave the national territory, as is the French art collector who is not permitted to take his collection abroad and the Italian art dealer who must leave her inventory in Rome when participating in the art fairs at Basel or Maastricht. Is Professor Jayme right?

Still, as we have seen, strong public sentiment and significant international legislation support the enforcement abroad of national laws prohibiting the export of works of art and other cultural objects, and accordingly we should try to understand why. We also want to understand why the law and ethics generally agree to a right of free movement of people but often disagree on whether there is a right of free movement of works of art and other cultural property.

4 ILLEGAL EXPORT

Before we briefly examine some plausible bases for arguing that nations should enforce each others' cultural property export controls, here are two further general considerations. First, it is clear that the source nation is entirely free under international law to decide that, for any reason, it will restrict the export of cultural objects, but is it also free of ethical restraints on the quality and extent of such restrictions? Even though it has no legal obligation to do so, ought a foreign state enforce all source nation export controls, or some of them, or is it ethically free to ignore them? Second, at law, theft is distinguished from illegal export. The law will help the foreign owner recover a stolen work of art, but it will not help the foreign nation recover the illegally exported work. It is clear that theft of anything, including cultural objects, is illegal and, in most (but perhaps not, I shall suggest below, all) cases, unethical. Does the distinction between theft and illegal export have ethical utility?

4.1 CULTURAL NATIONALISM

Now we examine reasons why nations may impose restrictions on the movement of cultural objects. We can begin with the previously mentioned concept of national cultural treasures. The cultural property literature also speaks of nations' *cultural patrimony* and *cultural heritage*. Such terms imply that there is a

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significant relationship between nations and cultural objects—hence the term *cultural nationalism*—and that the relationship would be impaired by export. Supposing that such a relationship does exist, does it argue for enforcement of export controls by foreign states? What is there in the relation between a nation and a cultural object that would call for foreign recognition and enforcement?

That question is complicated by the probability that different categories of cultural objects will suggest different answers. Consider, as examples of one kind, an important Poussin painting that the French owner wishes to sell to an American museum, or an outstanding Mark Rothko painting that its American owner wishes to sell to an Australian collector. Suppose the paintings are permitted to leave their nations of origin. Is the Poussin any less a work by a great French artist when it hangs in the American museum? Is the Rothko any less an American painting when it moves from a private collection in the United States to a private collection in Australia? Has the relationship between the source nation and the object been impaired in some significant way? It is true that these works are no longer physically present in the territories of the nations in which they were created, but is that a matter of ethical concern? Ought these paintings to remain in France and the United States? Was it wrong for the French authorities to allow the Poussin to go abroad? Should the United States restrict export of great works of art? Why?

Suppose instead that the French government refused permission to export the Poussin and the owner sold it, in France, to a British dealer, who took it to London in violation of the applicable French law. From the point of view of cultural nationalism, has anything changed? The Poussin is as much the work of a great French artist in this case as it was when the French permitted its export. It is true that in this case French law has been violated, and both the owner, if the owner connived with the dealer, and the dealer may be prosecuted by the French authorities for their violation of French law. It is certainly arguable that, in choosing to violate French law, they have also offended an ethical obligation to obey the law. However, the relation between the nation and the cultural object appears to remain the same. Ought objects like the Poussin and Rothko, which can be moved without loss of identity or significance, be thought of as culturally movable? Is it accurate to refer to laws prohibiting their export as naked or bare cultural nationalism? Or should such terms be reserved for the more extreme case of refusal to permit export of works whose only connection with the nation is that they happen to be physically present in the national territory, as was the case when Italy refused permission for an Italian collector to export a group of watercolors by Adolf Hitler, and France refused to allow the owner of a collection of Italian drawings to take them abroad?

Still on the subject of cultural nationalism, are there some kinds of cultural objects that should be considered culturally immovable because of their

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national role or significance? Suppose that, instead of works like the Poussin and Rothko paintings, the objects in question were national icons, objects so closely associated with national identity that their absence from the national territory truly impaired the object-nation relationship: perhaps the Aztec Calendar Stone for Mexicans or the Liberty Bell for Americans or the Crown of St. Stephen for Hungarians. Is this a reasonable approach to defining cultural treasures under the Treaty of Rome and GATT? Compare the category of what might be called ritual objects. Can the physical presence of some objects be so central to the belief systems, ceremonies and/or rituals of living cultures—American Indian nations, Canadian first nations, African tribes—that their absence is intolerable? Finally, consider the importance of representative collections. Can a nation be so denuded of important categories of cultural objects that its peoples are deprived of access to an appropriate range of artifacts that represent their past? Should the cultural treasures concept be expanded to include ritual objects of living cultures and objects needed for representative collections?

4.2 OBJECT-CENTERED CONCERNS

Aside from cultural nationalism, which focuses on the relation between the nation (or the living culture within the nation) and the object and might be called *nation-centered*, are there other concerns that might bear on the ethical mobility of cultural property? Consider three plausible objects of concern: fragility, integrity, and information. Are some objects so delicate that movement exposes them to an unacceptable risk of damage or destruction? Should the source nation have an ethical obligation to restrict the movement of such objects? What of the obverse situation: suppose that the source nation is unable or unwilling to preserve vulnerable objects that would, if taken abroad, receive proper care; would it be ethical for the source nation to prevent removal of such objects to safety? How about export controls that protect integrity by prohibiting export of a part of a complex object—a panel from a triptych or a head separated from a full-figure sculpture? Or, suppose that the parts were separated in the past and are now located in two or more nations. Is there an ethical obligation to act to reintegrate them? Finally, it is clear that undocumented removal of the object from its context—by, for example, *tombaroli*, who document neither objects nor contexts—entails the loss of significant information. Can we think of the fragility, integrity, and information concerns as object-centered bases for ethical obligations toward cultural property?

5 ETHICAL ARGUMENTS REGARDING EXPORT CONTROLS

Although the nation-centered and object-centered concerns may help explain why source nations might decide to limit the export of cultural objects, they do not directly address the central question about whether other nations ought to enforce such export controls and whether foreign individuals ought to respect them. We now turn to those questions.

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We have previously posited an international public interest in the preservation and integrity of cultural objects and contexts and in the information derivable from them. Where export threatens impairment of an object-centered concern—fragility, integrity, or information—it also threatens this international public interest. Enforcement of a nation's export controls in such cases would appear to advance the interests of all people, not merely those in the source nation, supplying a reason why other nations and foreign individuals should feel ethically obliged to help in their enforcement. On the other hand, where retention of vulnerable cultural objects threatens impairment of object-related concerns, does not the same reasoning suggest that retention is unethical? What of return? When return of an illegally exported object would threaten object-related concerns, as presently appears to be the case in Afghanistan, would return be ethical? What is the proper foreign attitude to a source nation's covetous neglect or destructive retention of cultural objects?

Does bare cultural nationalism serve any international interest? The Poussin and Rothko paintings discussed above, for example, can be exported without apparent harm to any internationally shared concern. Indeed, another kind of international interest—in the international distribution of cultural property—may actually favor export of such works. That interest is expressed in the preamble of the 1970 UNESCO Convention:

> [T]he interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples, and insures mutual respect and appreciation among nations.

Similarly, the 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property includes the following language:

> [T]he circulation of cultural property . . . is a powerful means of promoting mutual understanding and appreciation among nations. . . . [A] systematic policy of exchanges . . . would not only be enriching to all parties but would also lead to a better use of the international community's cultural heritage which is the sum of all the national heritages.

By what reasoning should export controls that impede such objectives as increasing "the knowledge of the civilization of Man" or enrichment of "the cultural life of all peoples" or the insuring of "mutual respect and appreciation among nations" command ethical support, in the absence of some substantial offsetting concern? Does bare cultural nationalism—the kind expressed in laws that prohibit export of culturally movable objects like easel paintings, manuscripts, coins, and many other objects that can be moved abroad without damage or loss of integrity or information—not only fail to

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provide a basis for international support, but arguably offend a significant international interest? On the other hand, does the international distribution interest expressed in the two UNESCO documents quoted above not call for international support of efforts to retain representative collections within source nations?

Questions about the national icon and ritual object interests remain. Is the national icon concern more theoretical than real? Are not most works that would qualify as true national icons already held by public institutions in the source nations? If not, should one wonder how it is that an object of iconic importance is left in private hands, since governments have the power of eminent domain and the power to tax? If national icons are almost never available for export, how frequently can the question of foreign enforcement of export restrictions arise as to them? But suppose such an object of iconic importance—perhaps a pre-Inca object of a size and importance comparable to the Aztec Calendar Stone—were excavated by *huaqueros* in Peru, smuggled out of the country and offered for sale by an antiquities dealer in Geneva. If the Peruvian government asked the Swiss authorities to intervene, would they be ethically obliged to do so?

Compare objects of central importance to the belief systems of living cultures. When the Afo-A-Kom, an effigy important to the Kom people in Cameroon, appeared for sale in a New York gallery, the First Secretary of the Cameroon embassy in Washington was quoted as saying: "It is beyond money, beyond value. It is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together." That moving statement helped arouse sentiment within the African art community that led to eventual return of the Afo-A-Kom to the Kom. Similar concerns are less dramatically stated in the provisions of the U.S. Native American Graves Protection and Repatriation Act (NAGPRA) requiring the return of sacred objects, defined as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."

At this point in the discussion we may sketch the elements of an ethical decision structure more or less as follows:

1. We have identified three major interests at play: cultural nationalism, the object-centered international interest, and the distributional international interest. Are there others?
2. Cultural nationalism appears to support the ethical claim for return of illegally exported cultural objects that are:
    a. National icons (an unlikely case) or
    b. Necessary to representative collections or
    c. Essential to the rituals/belief systems of living cultures.
3. Concern for objects and contexts supports the ethical claim for return

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of illegally exported cultural objects whose removal causes or seriously threatens:

a. Damage to the object or
b. Significant loss of information about the human past or
c. Separation of the parts of a complex object.

The same concern for objects and contexts, however, would appear to argue against retention by the source nation, and hence against return to it, when that would endanger object-centered concerns.

4. The basis of an ethical claim for return of other illegally exported cultural objects is unclear, particularly in view of the countervailing general interest in the international distribution of cultural objects.

6 THE ANTIQUITIES PROBLEM

We now turn to the unauthorized, clandestine, undocumented removal and export of archaeological objects. There would appear to be little ethical ambiguity here. Unlike the deliberate, site-sensitive, fully documented, conservative methods of the archaeological profession, "bootleg archaeology" or "pot-hunting" or "grave-robbing" are often hasty and destructive and, even if carefully done, undocumented, leading to irretrievable loss of information about the human past and the proliferation of orphaned cultural objects. This is contrary to the international public interest, as well as to national antiquities laws. Those who violate sites and the dealers, collectors, and museums in the source nation and abroad who support the black market for antiquities are engaged in unethical behavior. Foreign nations should help enforce source nation antiquities legislation.

Thus it might appear that the situation is ethically unclouded and there is little to discuss. In fact, the antiquities situation is ethically complex and troubled. Since there are good reasons to preserve archaeological sites and objects *in situ* until they can be properly investigated by professional archaeologists, one would expect source nation laws and policies to support the preservation objective and discourage unauthorized excavations and removals and the black market in antiquities. In a sense they do: by their terms such laws prohibit and punish such activities. However, in practice laws of this kind have long proved to be impossible to enforce because they conspire with facts to discourage compliance. Consider three scenarios.

Suppose a farmer finds a potentially valuable object in his field. Aware that the law requires finds to be reported and the object relinquished, he also knows that reporting the find might invite unwelcome attention from public authorities and possible disruption of farming activity. He also knows that any compensation to which the law may entitle a finder, if it is eventually determined and paid by the responsible governmental agency, will not approach the object's value (in Italy, for example, the farmer would ultimately be entitled to up to half of the object's governmentally determined value). Accordingly, he may prefer to sell the object quietly, for instant cash, to the local black market dealer.

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Consider the contractor who is building a highway or excavating to lay the foundation for a new building and comes upon antiquities. She and her crew know they are legally required to suspend operations at the site and inform the archaeological authorities. While the public authorities take the time to visit the site and submit a report on it to the appropriate official in the capitol and a decision is made about whether the site is so important that it must be preserved and the building project accordingly revised, work on the road or building will be suspended for weeks or months. During that time, interest continues to accrue on the contractor's loan, and the workers must be paid or laid off. The contractor knows that adequate compensation for this loss is unlikely. Accordingly, she may prefer to persuade or bribe the workers to keep quiet, sell off any valuable objects to the black market, and quickly cover over the site.

Consider professional tombaroli and huaqueros. They know that what they do is illegal, but it is their *mestiere*, one that may have been in the family for generations and, within the local culture, is considered honorable. They take pride in their knowledge and skill and comfort themselves with the rationalization that they are mining their own cultural patrimony. If they had access to legal employment that used their expertise and paid them a reasonable wage, as experiments in Italy and elsewhere have demonstrated, they might gladly accept it. Instead, in the absence of an attractive alternative, they continue the criminal activity to which their circumstances and traditions commit them. To stop doing so would require them to give up status, income, and self-respect.

Such scenarios illustrate the futility of antiquities laws that inadequately compensate those who comply. It is cheap and easy to add a few words to the statute book, making unauthorized excavations and removals illegal, but it is difficult and expensive to provide the conditions that will induce compliance. Many source nations follow the cheap and easy course and thus insure the destruction of sites and the health of the black market in antiquities. Is such source nation conduct ethical?

Hoarding is another concern, particularly in nations whose legislation nationalizes antiquities, making them property of the nation or the people. Even in nations that permit private ownership, blanket export prohibitions and bureaucratic realities encourage over-retention of antiquities (if the applicable legislation includes an export permit procedure, granting a permit is more hazardous to the responsible bureaucrat's career than denying it, and in some source nations the prospect of actually receiving export permission, even for objects of trivial historical or scientific value, is small). As a result, some source nations have accumulated substantial stocks of redundant cultural objects that are merely warehoused, perhaps deteriorating without adequate care, possibly not even inventoried, with no prospect that they will ever be studied, published, or displayed. Hoarding of this kind damages objects and destroys

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information. It also further restricts the supply of antiquities to the legitimate market, thus inflating prices and strengthening the black market. Is such hoarding ethical? The situation in many source nations is further complicated by the tendency of such antiquities laws to encourage official corruption. The antiquities trade is criminalized, and the profits flow into the hands of people who do not pay taxes.

This possibly overdrawn, but basically accurate, picture shows how antiquities laws can nourish the practices they are supposed to prevent. Of course not all national antiquities schemes are that bad (the British and Canadian schemes, for example, are much better), but many are that bad or worse. It has been said that if one set out to design a system that would least protect the world's cultural heritage, while providing maximum support to the black market in antiquities, it might be difficult to improve on the present one. Others have observed that the principal opponents of liberalization of antiquities legislation in some source nations are those who deal in the black market. Is it inappropriate to raise ethical questions about those who adopt and resist changing such schemes?

Why does such an apparently self-defeating system persist? Do those responsible for cultural property policy and legislation in source nations not understand how their export controls actually work? When, in UNESCO, source nations and professional organizations advocate the adoption of international measures that build on and replicate their failed national controls, are they being disingenuous? What of the archaeologists who uncritically support source nation policies? Are they social innocents who do not understand that unworkable laws incur significant social costs? What is the ethical quality of their position?

Is it inaccurate and unfair to describe the antiquities situation as an ethical swamp? Does anyone involved in it have clean hands?

7 A HYPOTHETICAL

I close with the promised example of a case in which even theft of a cultural object might be ethically ambiguous. You are in a small town in Italy and visit a church where you see a powerful and historically significant painting rotting because the roof leaks and the local priest has no money to repair it. Both Church law and Italian law forbid the work's removal. The priest pleads with you, "Per piacere, signore, rubatelo!" "Please," he says, "steal it!" If you are conscientiously guided by cultural property ethics, what do you do?

NOTE

1. John Henry Merryman, A Licit International Trade in Cultural Objects, 4 *International Journal of Cultural Property* 13 (1995).

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