

ETHICAL ISSUES IN CULTURAL PROPERTY LAW PERTAINING TO INDIGENOUS PEOPLES

KIMBERLY L. ALDERMAN*

TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. WHY DEFINE THE ETHICAL ISSUES?.....	3
A. The 5Ps Framework for Ethical Decision-Making Starts with Identifying the Ethical Problem	3
B. What Are the Surrounding Facts?	5
1. The Crises in the Cultural Property Trade Persist.....	5
2. The Cultural Property Debates are Divisive and Stagnant.....	6
3. The Cultural Property Debates Lack Clarity Regarding Ethical Concerns	8
4. Indigenous Peoples Have an Ethical Stake in Cultural Property.....	9
5. The Passage of the U.N. Declaration on the Rights of Indigenous Peoples	10
III. DEFINING THE ETHICAL ISSUES PERTAINING TO INDIGENOUS PEOPLES.....	12
A. Indigenous Descendants of Creator Cultures Are Underrepresented in the Cultural Property Debates.....	12
1. Of the Cultural Property Stakeholders, Indigenous Peoples Benefit Least From the Commodification of Culture.....	12
2. There is an Inherent Conflict Between the Interests of Indigenous Peoples and the Interests of Source Nations, Archaeologists, Museums, and Dealers and Collectors	14
B. In Cultural Property Law Control/Possession and Beneficial Interest Are Inextricably Linked and Indigenous Peoples Are Not Given Adequate Beneficial Interest in Their Artifacts Due to Arguments Against Their Getting Control	17
C. Unsolicited Representation of Indigenous Peoples Constitutes a Reinforcement of the Idea that They Are in Need of Custodial Care, Inherently Undermining Arguments that They Are Competent to Control Cultural Property.....	19

* Solo Practitioner, admitted in the U.S. Virgin Islands; J.D., *cum laude*, 2006, Howard University School of Law; B.A. (Art History & Archaeology), *Departmental Honors, Citation in Archaeology*, 2002, University of Maryland at College Park. I would like to thank Professor Reginald Robinson of Howard Law for continuing to encourage my academic pursuits and Jeremy Simkins for his unfaltering support as I balance the demands of solo practice and scholarship.

IV. CONCLUSION AND RECOMMENDATIONS	20
--	----

I. INTRODUCTION

The purpose of this paper is to identify ethical challenges in cultural property law pertaining to indigenous peoples. Doing so is a necessary step in promoting a meaningful discourse¹ over key crises in the cultural property trade. By addressing ethical concerns in a discrete manner, we can cut through rhetoric, facilitate communication, and propose solutions that more precisely target harms born of the illicit trade in cultural property and repatriation disputes. I focus on indigenous peoples because they have an ethical stake in cultural property disposition, and they are the least represented in the international cultural property debates.

The road map is as follows. In Part II, I provide the background and context within which this discussion arises, answering the question, “Why define the ethical issues?” I describe a model of ethical decision-making originally developed for use in business, called the 5Ps Method. I explain that we are starting at the base of the 5Ps pyramid with “Problem,” which requires identifying the ethical problem. In surveying the surrounding facts, I describe the ongoing crisis in the cultural property trade, including divisiveness in scholarly debates and lack of clarity as to legal versus ethical concerns. I also note the recent passage of the U.N. Declaration of the Rights of Indigenous Peoples, which functions as an excellent backdrop to highlight indigenous concerns as independent from those of other stakeholders, including source nations.

In Part III, I parse several ethical concerns pertaining to indigenous peoples that emerge from the cultural property debates:

1. Indigenous descendants of creator cultures are underrepresented in the cultural property debates;
2. In cultural property law, control/possession and beneficial interest are inextricably linked, and indigenous peoples are not given adequate beneficial interest in their artifacts due to arguments against their getting control; and
3. Unsolicited representation of indigenous peoples constitutes a reinforcement of the idea that they are in need of custodial care, inherently undermining arguments that they are competent to control cultural property.

In Part IV, I conclude with several recommendations. First, I suggest a more pragmatic approach to cultural property disputes, urging stakeholders to more clearly distinguish between legal considerations and ethical ones. Second, I

1. See Derek Fincham, *A Coordinated Legal and Policy Approach to Undiscovered Antiquities: Adapting the Cultural Heritage Policy of England and Wales to Other Nations of Origin*, 15 INT’L J. OF CULTURAL PROP. 347, 366 (2008) (employing the first known use of the term “meaningful discourse” in the cultural property context).

urge indigenous peoples to assert themselves on the international cultural property front, independently from source nations, because ethical debates so often focus on the interests of indigenous groups. Recognizing this is not always possible, I encourage source nations to better involve indigenous peoples in repatriation initiatives. Finally, I suggest that all stakeholders participate in pragmatic, meaningful discourse as to how these ethical issues might be creatively and categorically addressed.

II. WHY DEFINE THE ETHICAL ISSUES?

A. The 5Ps Framework for Ethical Decision-Making Starts with Identifying the Ethical Problem

The subject of “ethics is distinguished by the *questions* it pursues . . . about how we ought or ought not to treat each other.”² A major challenge in cultural property law has been the lack of a structure to guide ethical discussions that quickly become divisive or even hostile. In the context of cultural property protection, it is not surprising that some cultural property scholars feel we might as well abandon ethical discussions altogether in the interest of productivity.³

Dana Radcliffe, Ethics Coordinator at the Johnson School at Cornell University, developed a framework to guide ethical decision-making in the business context called the 5Ps Framework for Ethical Decision-Making.⁴ I believe that this method provides a structure that can enhance the productivity of ethical discussions in cultural property law.

The 5Ps Framework consists of a series of questions that encourage users to “identify their obligations to the sundry stakeholders and seek a defensible balance among them when they conflict.”⁵

2. Dana Radcliffe, *Achieving Ethical Clarity Through Dialogue*, CORNELL ENTER., Fall 2006, <http://www.johnson.cornell.edu/alumni/enterprise/fall2006/vantagepoint.html>.

3. See Wayne Sayles, *Ethics, Law and Globalization*, COINLINK COIN COLLECTING NEWS, Nov. 28, 2009, <http://www.coinlink.com/News/ancients/ethics-law-and-globalization>.

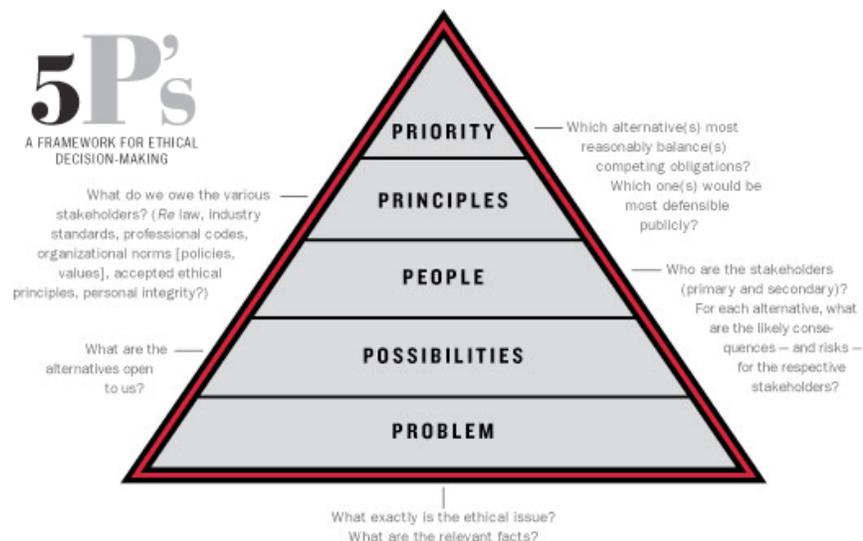
Fortunately, ethics (being purely subjective) have nothing to do with the situation. Law and international agreements guide the actions of states and individuals. . . . Since the prospect of reaching any global consensus on cultural property law is remote, we all are bound by the jurisdictional codes of the place that we happen to be.

Trying to shift the debate over cultural property control from a legal to an ethical framework is pointless.

Id.

4. See Radcliffe, *supra* note 2.

5. *Id.*



The 5Ps framework is well illustrated in the graphic above, the text of which is as follows:

Step 1: **PROBLEM**: What exactly is the ethical issue? What are the relevant facts?

Step 2: **POSSIBILITIES**: What are the alternatives open to us?

Step 3: **PEOPLE**: Who are the stakeholders (primary and secondary)? For each alternative, what are the likely consequences—and risks—for the respective stakeholders?

Step 4: **PRINCIPLES**: What do we owe the various stakeholders? (Re law, industry standards, professional codes, organizational norms [policies, values], accepted ethical principles, personal integrity?)

Step 5: **PRIORITY**: Which alternative(s) most reasonably balance(s) competing obligations? Which one(s) would be the most defensible publicly?⁶

If ethical discussions in cultural property law follow this structure, their propensity to deviate into unfocused, emotional arguments will be minimized. Further, by recognizing and better understanding ethical issues, we can shape domestic legislation and international agreements to reflect the changing ethical perspectives of local and international communities.

For the purposes of this paper, I start with Step 1 by identifying the problems, specifically those pertaining to indigenous descendants of creator cultures. Of the various stakeholders in the cultural property debates, indigenous peoples

6. *Id.*

are the least politically powerful, the least represented, and the centerpiece of many ethical concerns.

B. What Are the Surrounding Facts?

According to the 5Ps Framework, the first major question to ask in identifying the problem is, “What are the surrounding facts?”⁷

1. The Crises in the Cultural Property Trade Persist

Three decades’ worth of efforts to stem the illicit trade in cultural property have proven largely ineffective. Looting is rampant, particularly in war-torn, impoverished countries. In Iraq, for example, there is ongoing and devastating looting of archaeological sites.⁸ The looting is sometimes done “with the blessing of the village elders.”⁹ But the enormous revenues that are ultimately generated in the galleries or on the auction blocks do not filter back to the indigenous descendants of creator cultures. An ancient cylinder seal that fetches \$100 in a Baghdad souk may later sell for five figures in a New York gallery.¹⁰ Iraq is just one example, as the looting of archaeological sites is a global problem.¹¹

Smuggling also continues, enabling the trade in looted materials. Unscrupulous dealers funnel illegally exported archaeological materials through intermediary countries, such as Switzerland,¹² to then legally import them into market nations such as the United States. Bilateral agreements prevent the import of named classes of material, but it is often difficult to ascertain the country of origin.¹³ Under the regime established by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of

7. *Id.*

8. See Tom Hundley, *Loot! Chicago at Center of Battle Between Archeologists, Collectors*, CHI. TRIB., Nov. 9, 2008, <http://archives.chicagotribune.com/2008/nov/09/magazine/chimxa1109magazineplunderpg10nov09> (“[T]he ransacking of Iraq’s archeological heritage has proceeded at a breathtaking pace.”). In response, the Oriental Institute Museum of the University of Chicago ran an exhibition from April to December 2008 entitled, “*Catastrophe! The Looting and Destruction of Iraq’s Past.*” See The Oriental Institute of the University of Chicago, *Oriental Institute of the University of Chicago to Examine the Looting of the Iraq National Museum and Mesopotamian Archeological Sites*, <http://oi.uchicago.edu/museum/special/catastrophe/> (last visited Apr. 7, 2009).

9. Hundley, *supra* note 8.

10. *Id.*

11. See Jobers Bersales, *Past Forward, Heritage Tragedies*, CEBU DAILY NEWS, Jan. 8, 2009, <http://globalnation.inquirer.net/cebudailynews/opinion/view/20090108-182133/Heritage-tragedies> (looting in the Philippines); Josh Verges, *Feds Focus on Artifact Trade*, ARGUSLEADER.COM, Dec. 28, 2008, <http://www.argusleader.com/article/20081228/NEWS/812280303> (looting in South Dakota); Karen Lange, *The Stolen Past*, NAT’L GEOGRAPHIC, Dec. 2008, at 60, available at <http://ngm.nationalgeographic.com/2008/12/palestine-antiquities/lange-text/1> (looting in the West Bank).

12. Until recently, Switzerland had no federal law regulating the cultural property trade. See Marc Weber, *New Swiss Law on Cultural Property*, 13 INT’L J. CULTURAL PROP. 99, 99 (2006).

13. Consider, for instance, Roman artifacts, which may have originated in one of several countries. See Thomas Hoving, *Getting it Right at the Getty*, L.A. TIMES, Sept. 27, 2005, at B13 (“Fact is, unless an ancient Greek or Roman artifact can be proved to have been bought by Lord So-and-So on his grand tour in the mid-18th century and shipped to London, it has to have been excavated illegally and smuggled out of Italy (or Turkey or Croatia).”).

Ownership of Cultural Property, the burden is on the source nation to establish evidence of origin.¹⁴

Additionally, the repatriation debate is getting progressively more inflamed. Greece has successfully procured the return of various artifacts acquired under colonial rule and is mounting its repatriation armies to do political battle with the British Museum over the Elgin Marbles.¹⁵ Italy and Egypt have similarly persisted in their repatriation requests, and some African nations have been mounting similar campaigns.¹⁶

Peru, for instance, has entered the litigation over the shipwreck code-named the “Black Swan,” and the U.S. District Court of the Middle District of Florida is faced with the issue of whether a former colonial power or the colonized indigenous peoples should receive the benefit of underwater cultural heritage derived from the previously colonized nation.¹⁷

Every day that looting continues, context is lost. For all the smuggling, objects disappear. In the post-colonial repatriation debates, political tensions mount.

2. The Cultural Property Debates are Divisive and Stagnant

The scholarly debate in cultural property law, particularly in the area of post-colonial repatriation, is dominated by divisiveness. Virulent rhetoric is the norm rather than the exception. The debate has risen to the same level as abor-

14. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 6, Nov. 14, 1970, 823 U.N.T.S. 240; *see also* Posting of Derek Fincham to Illicit Cultural Property: A Weblog About Art, Antiquities and The Law, <http://illicit-cultural-property.blogspot.com/2008/05/can-west-do-more-to-protect-iraqi.html> (May 1, 2008, 02:39).

15. *Italy Has Returned to Greece the ‘Palermo Fragment,’* XPATATHENS.COM, Sept. 24, 2008, <http://www.xpatathens.com/news/18806>.

‘Greece aspires to bring back the Parthenon Marbles, so you can understand the contribution and importance of such a gesture,’ Greek President Karolos Papoulias told reporters after meeting with Napolitano.

The British Museum has long refused to repatriate the friezes but the Greeks have lately had more success in securing claims from other museums and collections, including the J Paul Getty Museum in Los Angeles and the Shelby White collection in New York.

Id; *see also* Posting of Kimberly Alderman to The Cultural Property and Archaeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/09/25/italy-returns-missing-foot-to-greece> (Sept. 25, 2008)(posting on the return of the Palermo fragment).

16. *See* Dr. Kwame Opoku, *More Demands for the Restitution of Stolen Benin Artefacts*, LIGALI, Oct. 13, 2008, <http://www.ligali.org/article.php?id=1897> (“Hardly a day passes by without some call for the return of the stolen cultural objects of Benin.”); *see also*, Posting of Ibrahim Namunaba to [AFRICOM-L] ICOM – Nigeria Calls for Repatriation of Cultural Properties, <http://list.africom.museum/pipermail/africom-l/2007-June/000629.html> (Jun. 11, 2007, 13:30 EAT) (“It looks like there is a strong wave of demand for the return of cultural artefacts blowing across Africa and no African country will be spared.”); Posting of Derek Fincham to Illicit Cultural Property: A Weblog About Art, Antiquities and the Law, <http://illicit-cultural-property.blogspot.com/2006/11/more-on-italys-aggressive-repatriation.html> (Nov. 29, 2006, 02:59); Posting of Derek Fincham to Illicit Cultural Property: A Weblog About Art, Antiquities and the Law <http://illicit-cultural-property.blogspot.com/2008/04/africa-repatriation-and-universal.html> (April 21, 2008, 11:33); Sarah Gauch, *In Hot Pursuit of Egypt’s Lost Mummies*, THE CHRISTIAN SCIENCE MONITOR, Jan. 04, 2007, at 7, available at <http://www.csmonitor.com/2007/0104/p07s01-alar.html>.

17. *Odyssey Marine Exploration Welcomes Peru’s Filing in “Black Swan” Case*, REUTERS, Aug. 20, 2008, <http://www.reuters.com/article/pressRelease/idUS135410+20-Aug-2008+BW20080820>.

tion and guns. Extremists abound, and the rare attempt to find middle ground is sometimes met with attacks from both sides. To compromise is considered a violation of the morals upon which many have built their philosophical worldview as it pertains to cultural property. Scholars take the offensive and the defensive, often focusing on the aspect of polarization more than cultural property itself. Continuing to adhere to stated positions has become more important than finding a solution. The debate is lively, but stagnant in the respect that little progress is made.

The recent publication of *Who Owns Antiquity?*, by Museum Director James Cuno,¹⁸ struck a nerve as some believed Cuno was implicitly arguing that cultural nationalism on the part of source nations was a stone's throw from fascism.¹⁹ Cultural nationalists rejoined with cries of imperialism.²⁰

Archaeologist Alexander Bauer has described cultural property debates as "contentious, emotional, and often contain[ing] not-so-subtle claims about the relative morality of its interlocutors."²¹ In one recent exchange online, a collector likened archaeologists to "brown shirts," referencing Nazis.²² Some archaeologists are no better, equating collectors with elephant poachers or worse.²³

18. See JAMES CUNO, *WHO OWNS ANTIQUITY?: MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE* (2008).

19. See Posting of Kimberly Alderman to The Cultural Property and Archaeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/08/14/facism-or-imperialism-its-a-two-party-system-for-archaeologists/> (Aug. 14, 2008); Alan Behr, *A Humanist Plea for Free-Ranging Antiquities*, CULTUREKIOSQUE, Aug. 14, 2008, http://www.culturekiosque.com/art/books/antiquities_james_cuno222.html.

20. See Dr. Kwame-Opoku, *A Plea for Fair and Equal Treatment: Comments on an Article by Alan Behr Entitled "A Humanist Plea for Free-Ranging Antiquities,"* MODERNGHANA.COM, Aug. 23, 2008, <http://www.modernghana.com/news/180008/1/a-plea-for-fair-and-equal-treatment-comments-on-an.html>; Roger Bland, *What's Yours is Mine*, LONDON REV. OF BOOKS, Nov. 6, 2008, available at http://www.lrb.co.uk/v30/n21/blan01_.html.

Who Owns Antiquity? is an example of U.S. cultural imperialism at its worst. Cuno's assertion that people's desire to "present their cultural heritage in their own territory" reflects "self-interest on the part of 'source' nations and those who support their claims" is breathtakingly arrogant in the light of the tremendous damage done in so many countries from Cambodia to Peru by a traffic in antiquities aimed at satisfying the demands of collectors and museums in the West.

Id.

21. See Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 *FORDHAM INT'L L. J.* 690, 690 (2008) (describing cultural property debates).

At one end are those who believe that everyone has a shared interest in and claim to the common heritage of humanity and that this sharing is best achieved through a vibrant and legal trade in cultural materials. On the other end are those who believe that the heritage of humanity is best secured through the recognition that cultural objects have special significance for specific groups, and thus support the efforts of such groups to regulate their trade and seek their repatriation.

Id. at 694.

22. See Posting of Nathan Elkins to Numismatics and Archaeology, <http://coinarchaeology.blogspot.com/2008/11/archaeological-brown-shirts.html> (Nov. 1, 2008, 02:30); Posting of Wayne Sayles to Ancient Coin Collecting, <http://ancientcoincollecting.blogspot.com/2008/10/goose-stepping.html> (Oct. 31, 2008, 09:35).

23. See Posting of Ben Macintyre to Looting Matters, <http://lootingmatters.blogspot.com/2007/09/saving-antiquities-elephant-ivory-model.html> (Sept. 22, 2007, 11:46) ("If we accept the 'elephant ivory' model, would the other side be considered 'poachers?"); Posting of Kimberly Alderman to The Cultural Property and Archaeology Law Blog,

3. The Cultural Property Debates Lack Clarity Regarding Ethical Concerns

There is an inherent tension between law and ethics in arguments advocating heightened regulation of the cultural property trade as a way to stem the illicit trade in cultural property. This tension is borne of the persistent failure of legal solutions to adequately address the ethical problems of the illicit trade.²⁴ Culturally insensitive patrimony laws conflict with the ethical goals of indigenous descendants of creator cultures. Domestically, the prevailing property model has proven itself inadequate to protect the interests of those creator cultures that lack a legally cognizable property interest.²⁵

The archaeological establishment's exuberance over context has led some to assert that every action that results in any lost context is an unethical one.²⁶ The Portable Antiquities Scheme,²⁷ for instance, has met with some hostile resistance on this basis.²⁸ The mere attempt to balance the interests involved (loss of some context versus retrieval of many objects and community involvement)²⁹

<http://culturalpropertylaw.wordpress.com/2008/12/04/regulating-disclosure-of-private-v-public-museums/#comments> (Dec. 4, 2008).

24. See, e.g., Kimberly L. Alderman, *The Ethical Trade in Cultural Property: Ethics and the Law in the Antiquity Auction Industry*, 14 ILSA J. INT'L & COMP. 549 (2008).

25. Consider for instance, the limitations of NAGPRA. While burial objects and remains are protected when found on federal land, federal law does not protect them if found on private land. State law remains and, in some instances, proves inadequate. See Posting of Kimberly Alderman to The Cultural Property and Archaeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/09/07/ola-na-iwi-naue-burials-lawsuit-highlights-systemic-problems-at-the-state-historic-preservation-division/> (Sept. 7, 2008); Posting of Kimberly Alderman to The Cultural Property and Archaeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/09/27/nagpra-in-hawaii/> (Sept. 27, 2008).

26. Compare Posting of Kimberly Alderman to The Cultural Property and Archaeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/11/12/cultural-sensitivity-for-all-seal-fur-for-none/#comments> (Nov. 12, 2008).

One reader comments:

A number of archaeologists have told me point blank that they are afraid to express their own more moderate views because they will be blackballed by their colleagues that express an anti-collecting bias like that found on the SAFE blog. This is unfortunate because it leaves the impression that all members of the archaeological community believe that repressive measures against collectors (in source and market countries) should be the centerpiece of any "cultural heritage management."

Posting of PK Tompa to The Cultural Property and Archaeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/11/12/cultural-sensitivity-for-all-seal-fur-for-none/#comments> (Nov. 13, 2008, 07:53).

Another reader responds: "There is no monolithic position, though it is fair to say that many archaeologists would be happy if buying and selling of all antiquities were made illegal, so that the only exchanges that occurred were museum-to-museum loans (and perhaps also partage of finds)." Posting of Larry Rothfield to The Cultural Property and Archaeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/11/12/cultural-sensitivity-for-all-seal-fur-for-none/#comments> (Nov. 14, 2008, 11:39).

27. For an excellent, scholarly article on the Portable Antiquities Scheme, see Fincham, *supra* note 1. For a digestible summary, see Posting of Alun Salt to Archaeoastronomy, <http://archaeoastronomy.wordpress.com/2008/11/20/should-we-pass-on-the-pas/> (Nov. 20, 2008).

28. See Posting of Paul Barford to Portable Antiquity Collecting and Heritage Issues, <http://paul-barford.blogspot.com/2009/01/pas-launders-stolen-coin.html> (Jan. 23, 2009, 09:21).

29. *Id.*

The PAS is very fond of publishing impressive numbers showing how their "partnership" with artefact hunters is growing. This is represented by the pro-collecting lobby as an expression of the degree of "responsibility" in the milieu—the Malmesbury Church Looter reminds us that these bald figures hide a multiplicity of individual motives for contacting the PAS, not all of them connected with "responsible" artefact hunting or collecting.

Id.

is seen as a violation of the ethical framework which prioritizes context. The arguments of archaeologists as to the ethical tragedy of lost context fall on the deaf ears of those who value historical information as a commodity, not something that is “good” under a universal value system.³⁰

Museums face criticism over their current and former acquisition practices.³¹ Lawful refusals on the part of museums or collectors to return archaeological materials upon demand by source nations are condemned. Some cultural property enthusiasts do not distinguish between artifacts illegally excavated or exported in the present day and those taken lawfully under colonial rule in past centuries.³²

The illicit trade in cultural property and the unethical trade of the same are two distinct but partially overlapping categories. If a national government appropriates cultural property by way of a broad patrimony law, and the creator culture is not compensated for the taking, then the action is both legal and unethical. Consider the Holocaust, where the Nazis expropriated cultural property from Jewish nationals in what were, according to the reigning regime, legal actions.³³

The cultural property crisis is as much ethical as it is legal and political. To that end, it is necessary to achieve clarity by identifying precise ethical problems, many of which pertain specifically to the indigenous descendants of creator cultures. Without this clarity, no progress can be made.

4. Indigenous Peoples Have an Ethical Stake in Cultural Property

Indigenous descendants of creator cultures have a stake in the disposition of cultural property. The impact that cultural loss has on individuals and communities creates an ethical stake even when a legal one does not exist.

To many, discovery of cultural artifacts is not just about knowledge and objects, but also about a reassurance of roots. In countries where people are commonly of mixed ethnographic ancestry, archaeology creates a common na-

The great attraction of the PAS from my point of view is the outreach aspect. All sorts of little bits of information are being gathered by amateurs and rather than being centrally hoarded they're being made available to anyone with an internet connection. It's not that there's been a lack of will in any of the museum services I've seen when it comes to public engagement, but there hasn't really been the institutional framework to help it happen. The PAS is built around engaging with the public and it's in the bones of the system.

Salt, *supra* note 27.

30. Cf. Posting of Peter Tompa to Cultural Property Observer, <http://culturalpropertyobserver.blogspot.com/2008/10/context-lost-so-what.html> (Oct. 31, 2008, 10:24).

31. See Museum Acquisitions Under Fire, <http://www.savingantiquities.org/f-culher-museums.php> (last visited March 29, 2009) (considering the ever-increasing amount of criticism museums face from preservationists); Robert Bagley and Patty Gerstenblith, *Museums Taxed by New Allegations*, ARCHAEOLOGY, Jan. 31, 2008, <http://www.archaeology.org/online/features/camuseums/>; Jane Waldbaum, *Archaeologists Call for Responsible Museum Acquisitions Policies*, ARCHAEOLOGY INST. OF AMERICA, Feb. 28, 2006, <http://www.archaeological.org/webinfo.php?page=10344>.

32. See Dr. Kwame-Opoku, *Can We Condemn Contemporary Looting of Artefacts Without Condemning Colonial Looting? Comments on Lord Renfrew's Statements on Looted Artefacts*, MODERNGHANA.COM, Dec. 2, 2008, <http://www.modernghana.com/news/193144/1/can-we-condemn-contemporary-looting-of-artefacts-w.html>.

33. See, e.g., Nancy H. Yeide, *The Plunder of Art as a War Crime: The Art Looting Investigation Unit Reports and the Hermann Goering Art Collection*, 8 RUTGERS J. L. & RELIG. 13 (2007).

tional pride.³⁴ The past gives people “confidence and a sense of special virtue.”³⁵ Further, cultural objects are tangible, easily accessible reminders of accomplishments.³⁶ For every artifact indigenous people lose to smuggling or theft, those people are denied the pride, virtue, and confidence that would have resulted from caring for it. Taking away archaeological remains damages the collective psyche of a creator culture, and steals a part of their identity.³⁷

In some cultures, removal of venerated objects from their traditional setting is an act of desecration (for example, when temples are defaced to remove carvings or when tombs are torn apart by looters searching for treasure). Historically, oppressive dominant cultures have destroyed the cultural relics of minority cultures to disempower them. One example is the 2001 destruction of the Bamiyan Buddha figures by puritanical Muslims in Afghanistan.³⁸ When sacred objects are taken away by exportation or deliberate destruction, in varying degrees, the right of a people to their cultural heritage is denied. These realities create the ethical stake that indigenous peoples have in their heritage, even when they do not have a legal interest.

Removal of archaeological remains from a creator culture robs its members of their right to cultural heritage. The Stockholm Declaration, published by the International Council of Monuments and Sites (ICOMOS), recognizes the right to cultural heritage as a fundamental human right.³⁹ The Council of Europe Framework Convention on the Value of Cultural Heritage for Society similarly recognizes the right of people to their cultural heritage.⁴⁰ The U.N. Declaration further delineates numerous specific rights indigenous peoples have in regard to cultural heritage generally and cultural property specifically.⁴¹

5. The Passage of the U.N. Declaration on the Rights of Indigenous Peoples

The United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples on September 13, 2007.⁴² While the Declaration is not legally binding, it does “represent the dynamic development of international legal norms and reflect the commitment of [U.N. member] states to move in

34. See KARL E. MEYER, *THE PLUNDERED PAST* 180–83 (Atheneum 1973).

35. See *id.* at 185 (quoting British historian J.H. Plumb).

36. See NEIL BRODIE, JENNY DOOLE & PETER WATSON, *THE McDONALD INST. FOR ARCHAEOLOGICAL RESEARCH, STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 11–12 (2000), available at https://www.mcdonald.com.ac.uk/projects/iarc/research/illlicit_trade.pdf.

37. *Id.* at 12.

38. See Kwame Anthony Appiah, *Whose Culture Is It?*, *THE N.Y. REV. OF BOOKS*, Feb. 9, 2006, at 38, 40.

39. Declaration of ICOMOS Marking the 50th Anniversary of the Universal Declaration of Human Rights, Sep. 11, 1998, http://www.international.icomos.org/e_stocdec.htm (recognizing the “right of everyone to partake freely in the cultural life of the community”).

40. Council of Europe Framework Convention on the Value of Cultural Heritage for Society arts. 1, 4, Oct. 27, 2005, C.E.T.S. 199 [hereinafter Framework Convention].

41. Declaration of ICOMOS, *supra* note 39.

42. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

certain directions, abiding by certain principles.”⁴³ The U.N. describes the Declaration as “establish[ing] an important standard for the treatment of indigenous peoples and will undoubtedly be a significant tool towards eliminating human rights violations against the over 370 million indigenous people worldwide and assist them in combating discrimination and marginalization.”⁴⁴

The U.N. Declaration describes what rights indigenous peoples have in relation to specific categories of cultural property.⁴⁵ This is significant because earlier agreements spoke only to cultural heritage generally.⁴⁶ Article 12 of the Declaration provides, “[i]ndigenous peoples have the right to . . . maintain, protect, and have access in privacy to their religious and *cultural sites*; the right to the use and control of their *ceremonial objects*; and the right to the repatriation of their *human remains*.”⁴⁷

A good portion of cultural property falls outside of these delineated categories, but the Declaration represents the international trend toward recognizing the right of indigenous peoples to culture.⁴⁸

By recognizing indigenous peoples’ right to culture,⁴⁹ we must recognize that when national interests obviate that right, an ethical quandary emerges. Acknowledging this issue, Article 12 of the Declaration goes on to provide, “[s]tates shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.”⁵⁰

National patrimony laws are often presumed to represent the interests of indigenous descendants of creator cultures. To many, this makes cultural nationalism an ethically worthy position. Nations control and are the entities that do business, even under the U.N. scheme. However, nations sometimes use the interests of indigenous cultures as political tools without necessarily giving back to the indigenous cultures once their initiatives have succeeded, even though that success was, in part, due to an indigenous heritage and cultural reconnection platform. Recovery of a cultural artifact, only to house it in a national museum

43. See Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples, <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf> (last visited March 29, 2009).

44. *Id.*

45. See United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 42.

46. See, e.g., International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, *available at* <http://www1.umn.edu/humanrts/instree/b2esc.htm>.

47. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 42, at art. 12, para. 1. (emphasis added).

48. See *id.* at art. 5.

49. *Id.* at art. 12, para. 1 (“Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies”); see also *id.* at art. 15, para. 1 (“Indigenous peoples have the right to the dignity and diversity of their cultures”); *id.* at art. 5 (“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”); *id.* at art. 8, para. 1 (“Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”); *id.* at art. 31, para. 1 (“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage”).

50. *Id.* at art. 12, para. 2.

many miles away from the local community that feels most connected to it, may not foster a feeling that the artifact has “come home.”⁵¹

Only by critically evaluating the interests of indigenous creator cultures, as distinct from those of nations and all other cultural property stakeholders, can we begin to unravel the ethical issues created by the trade of cultural property. The passing of the U.N. Declaration, which was in development for over twenty years,⁵² is timely, coinciding with a renewed societal interest in ethical behavior as distinct from legal compliance.

III. DEFINING THE ETHICAL ISSUES PERTAINING TO INDIGENOUS PEOPLES

A. Indigenous Descendants of Creator Cultures Are Underrepresented in the Cultural Property Debates

1. Of the Cultural Property Stakeholders, Indigenous Peoples Benefit Least From the Commodification of Culture

In *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, archaeologist Alexander Bauer defines the special interest groups in cultural property disputes as “archaeologists, museums, collectors and dealers, the U.S. Government, and local communities (so-called ‘source’ nations).”⁵³ The first four of these five groups have interests based in the property aspect of cultural property.

Indigenous descendants of creator cultures, on the other hand, have an interest based in the cultural aspect of cultural property.⁵⁴ The commodification of culture generates money and the power to influence legislation, international agreements, and the disposition of artifacts.⁵⁵ What many indigenous peoples want to do with the artifacts that their ancestors created does not earn them money to hire lawyers or mount campaigns. The primary benefits that having access to cultural artifacts gives indigenous peoples—a sense of belonging, a sense of pride or virtue, helping them define their group identity—even if ethically compelling, do not generate income or power. Three of the four other stakeholders, however, are economically dependent on cultural artifacts for their very existence.

Archaeologists are in the business of studying artifacts and their context. Access to those artifacts is necessary to complete research. Retaining possession

51. See Bauer, *supra* note 21, at 712–13 (“The ownership and display of the cultural history of local minorities by national, rather than regional, museums allows it to be more easily assimilated into the national narrative, which may neither reflect nor serve local interests.”).

52. Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf (last visited March 29, 2009).

53. Bauer, *supra* note 21, at 700–01.

54. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2005 (2007) (“[C]ultural property is contradictory in the very pairing of its core concepts. Property is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things.”).

55. See CUNO, *supra* note 18, at 15 (“Possession is power, and notions of property include notions of control.”).

of those artifacts ensures “proper” preservation and the possibility of further research in the future. Artifacts also represent clout for universities.

Museums require possession of artifacts in order to have material to display. That material ultimately draws paying visitors and publicity. Many museums receive state or federal funding. Other sources of income include deaccessioning material and private donations by wealthy patrons.

Dealers and collectors make a profit by trading in cultural artifacts. Some dealers import items that lack proper provenance and finagle them onto the open market by way of auction houses or private trades. Every time an object changes hands more money is generated, but none of it makes its way back to the indigenous descendants of the creator culture.

Nations use archaeological artifacts as a means to assert political power by demonstrating their ability to demand a return and to boost the economy. The economy that benefits most from the repatriation of cultural objects is that of the city where the National museum is located and of the government itself. James Cuno has suggested a more sinister motive: “[Antiquities] give modern nations a claim on an ancient past and legitimize politically dominant cultures as national cultures.”⁵⁶

In sum, archaeologists, museums, dealers, and collectors exist because of the artifacts in which they deal. If those artifacts were to disappear, then so would their business enterprises and academic scholarship. Nations also commodify cultural artifacts by way of political posturing and retention policies, which increase the perceived and real value of the cultural property traded inside and outside their borders.

The money that other cultural property interest groups generate by way of the trade earns them political influence over the text of the laws, how those laws are implemented, and the content of extra-legal mutual repatriation agreements. The economic interest that indigenous peoples have in archaeological artifacts is often secondary to “bringing home” items of cultural significance.

In addition to being at an economic or political disadvantage, indigenous peoples may not know how to “work the system” of which they may not feel a part. This creates a perfect storm for underrepresentation. The indigenous peoples who are most connected to their cultural heritage, and would have the strongest connection to ancient artifacts and their special meanings, are arguably those that are the least a part of the mainstream, dominant culture. Therefore, the propensity of an indigenous group to find an object to be of special cultural significance may be inversely proportional to their ability to successfully lobby to acquire it.

Underrepresentation perpetuates itself. Without a constant push to enforce the legal rights granted to indigenous peoples, those rights will erode. In this way, when indigenous peoples believe they do not have enforceable rights to cultural property, it becomes a self-fulfilling prophecy because whatever rights they do have wither and die without vigilant protection.

56. *Id.* at 9.

2. There is an Inherent Conflict Between the Interests of Indigenous Peoples and the Interests of Source Nations, Archaeologists, Museums, and Dealers and Collectors

There is sometimes a metaphorical empty chair at the meeting of the stakeholders in cultural property where someone representing the indigenous descendants of creator cultures should sit. Each interest group takes turns posturing as being the one that is truly sympathetic to indigenous interests. The representative of each of the other groups acts as if *they* are the ones that are really fighting for these “poor, absent, desperate people.”

Archaeologists feel sympathetic to indigenous peoples because they become intimately familiar with them through their work on-site at excavations and by studying them to develop an accurate picture of the evolution of cultural history. In *New Ways of Thinking*, Bauer states that this sympathy “is part and parcel of a more mature, post-colonial archaeology.”⁵⁷

The purpose of archaeology is to decipher the past by way of information derived from cultural objects and the context in which they are found. Preserving artifacts and the archaeological record are the priority, regardless of the wishes of indigenous descendants of creator cultures.

The archaeological community, in large part, supports repatriation efforts and patrimony laws in source nations. It is believed that nationalistic initiatives stem the trade of looted objects, ultimately resulting in a preservation of context. The support is intended to, at least in part, demonstrate sympathy and a desire to provide restitution for colonial-era cultural appropriation.⁵⁸

In cases where indigenous interests are prioritized over national ones, such as in the Native American Graves Repatriation Act (NAGRA), support from the archaeological community sometimes wanes. Some archaeologists, for instance, resent NAGRA because burial objects are returned to the Native American tribe without condition. To the rancor of archaeologists, sometimes the objects are then sold on the open market or even reburied in the ground.⁵⁹

Hawaiian Natives believe burial sites are sacred, and meant to remain not only undisturbed, but also unknown. This belief is premised upon the idea that the spirit is contained in the bones, and keeping the bones of ones’ ancestors secret is necessary to keep enemies away from them. This has created considerable tension between the Natives that want to keep burial remains and objects secret and unearthed and archaeologists who wish to study them.⁶⁰

57. Bauer, *supra* note 21, at 703.

58. *Id.*

59. See *Bonnichsen v. United States*, 367 F.3d 864, 880 (9th Cir. 2004) (denying Native Americans return of the Kennewick Man so his remains could be buried and destroyed); see also Posting of Kimberly Alderman to The Cultural Property and Archaeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/12/04/regulating-disclosure-of-private-v-public-museums/> (Dec. 6, 2008, 12:18) (Peter K. Tompa comments, “With some exceptions (like most human remains), I am not sure we are better off for [NAGPRA] what with artifacts being returned to tribes for reburial (and disintegration) or even resale.”).

60. See HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII* 134 (University of Hawaii Press 1999).

Generally, the relationship between activist Hawaiians and archaeologists is filled with conflict and distrust The controversy over the huge cemetery at Honokahua on Maui

The archaeological establishment's dedication to the preservation of context above all else has also manifested in opposition to the Portable Antiquities Scheme (PAS) of England and Wales.⁶¹ Under PAS, members of the public are compensated for finding archaeological material, thus encouraging them to turn it over to the government.⁶² Some archaeologists oppose PAS because they believe context is unnecessarily destroyed when metal detectorists pull up archaeological material.⁶³ They believe that this loss of context is not justified by the objects being turned over to the State or by the increase in community awareness and involvement in archaeological initiatives.⁶⁴

Meanwhile, source nations often act as if there is no distinction between the nation and the indigenous peoples who live or used to live within the nation's current borders. Those wishing to repatriate and retain cultural property in the nation of origin often argue that this is the only way for the cultures that created the artifacts to receive the benefit of the artifacts.⁶⁵

In *The Ethical Trade of Cultural Property: Ethics and the Law in the Antiquity Auction Industry*, I argued, in part, that compliance with foreign patrimony laws sometimes works against protecting indigenous descendants of creator cultures.⁶⁶ The crux of this argument is that, in countries where indigenous peoples are not in political power, they do not receive the benefit of government-appropriated cultural property.⁶⁷

This idea is explored in Alexander Bauer's *New Ways of Thinking*, wherein he explains:

[W]hile local communities may share their government's goals to protect archaeological resources and to reclaim materials through repatriation, many may feel that relocation or repatriation of the region's objects to a national repository is unsatisfactory, for it does not allow them to reap either the economic (through tourism) nor the symbolic (through proximity) benefits. For this reason, many communities would prefer to

(which involved the potential removal of nearly 2,000 ancient Native skeletons for the building of a Japanese-financed hotel on missionary-owned land) revealed what many archaeologists actually think about Hawaiians Moreover, this controversy spilled into the Honolulu dailies, which repeated charges that Hawaiians who resisted the unearthing were emotional as opposed to the archaeologists who were merely doing their job. To my knowledge, not a single archaeologist sided with the resistance effort Thus, no matter how serious our resistance, archaeologists continue to believe and assert that "science" should determine the fate of Native remains.

Id.

61. See Fincham, *supra* note 1, at 363–65.

62. *Id.* at 364.

63. See Salt, *supra* note 27.

64. *Id.*

65. See Stacey Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 276 (2007) ("By repatriating cultural patrimony, source nations whose people or ancestors created the objects receive this benefit . . ."). The author explains that returning the artifact is one of the reasons that the cultural nationalism is correctly supported by moral grounds. *Id.* at 281–82.

66. Alderman, *supra* note 23, at 564.

67. See also CUNO, *supra* note 18, at 14 ("Antiquities are cultural property, and cultural property is defined and controlled by the state for the benefit of the state.")

see the cultural resources located in, or taken from, their area, be used in such a way as to bring their community direct economic or social gain.⁶⁸

Cultural nationalism absolutely depends upon the perceived association of the nation with the indigenous descendants of creator cultures that live within current national borders. Without that association, arguments in favor of repatriation and retention fail. Cultural nationalism “appeals to sympathies and emotions rather than logic.”⁶⁹ People feel sympathy for other people, not for governments.

Some dealers and collectors claim they help indigenous peoples because when they buy cultural artifacts at least some of the money trickles back to the creator culture. Under this reasoning, purchasing looted artifacts more effectively funnels money to the descendants of creator cultures because the looter was likely a member of that group.⁷⁰ Some dealers and collectors experience genuine sympathy and appreciation for descendants of the creator culture of objects in their possession and believe they are expressing this appreciation by stewardship of valuable items.

Museums also assume the role of stewards of cultural property. Encyclopedic museums, in particular, are tasked with protecting the shared ancient heritage of the world and providing public access to this common heritage. “Museums own antiquities . . . only insofar as they hold them in trust for the public they serve.”⁷¹

Accordingly, when indigenous peoples are represented by competing cultural property stakeholders, those representatives do not speak for indigenous interests as indigenous people perceive them. When a competing stakeholder claims solidarity with indigenous peoples, this obscures the reality of indigenous interests and fosters the idea that the people are adequately represented even if they are not.

This creates an ethical dilemma. Do we proceed with cultural property debates despite a proverbial empty chair? Do we allow competing stakeholders to speculate and argue over what best benefits the indigenous descendants of creator cultures? Do we make the harsh accusation that those stakeholders are only feigning sympathy to advance their own causes? The ethical tension created

68. See Bauer, *supra* note 21, at 713.

69. Madeline Chimento, *Lost Artifacts of the Incas: Cultural Property and the Repatriation Movement*, 54 LOY. L. REV. 209, 217 (2008).

70. But see NEIL BRODIE, JENNY DOOLE & PETER WATSON, THE McDONALD INST. FOR ARCHAEOLOGICAL RESEARCH, STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL (2000), available at http://www.mcdonald.cam.ac.uk/projects/iarc/research/illicit_trade.pdf.

A fossil turtle bought from its finder in Brazil for \$10 fetched \$16,000 when sold in Europe

. . . Once commodified on the western market, objects continue to circulate, for years, even centuries perhaps, and to generate money in transaction after transaction. None of this money goes to the original finders or owners, or their descendants [I]f culture . . . is regarded as an economic resource then selling it abroad is a poor strategy of exploitation. Cultural heritage is, after all, a non-renewable resource.

Id. at 13–14.

71. See CUNO, *supra* note 18, at 13.

when competing stakeholders propose to advance indigenous concerns in cultural property disputes should not be overlooked.

B. In Cultural Property Law Control/Possession and Beneficial Interest Are Inextricably Linked and Indigenous Peoples Are Not Given Adequate Beneficial Interest in Their Artifacts Due to Arguments Against Their Getting Control

Property ownership has long been analogized to a bundle of sticks.⁷² Each stick represents an individual right associated with ownership, such as the right to possession, the right to income derived from possession, the right of entry, the right to dispose of, and others.⁷³ In real property law there is free trade of these rights, which are independent from one another. A home mortgage, the lease of a car, the purchase of stocks, and the creation of a trust all represent two parties agreeing to share the bundle of rights pertaining to that property. In each of these examples, it is possible to separate control/possession and beneficial interest in the property.

There is no mechanism in cultural property law to separate the right to benefit from an object from the right to possess the object. Every competing interest group recognizes *some* right of indigenous peoples to their cultural property, whether by way of ethical or legal considerations. However, there is no mechanism to give indigenous peoples beneficial interest in property they do not legally own. Either the object is handed over, or it is not. “Owning” an object, however, implicates the entire bundle of property rights,⁷⁴ and failure to distinguish between the various rights, most notably those of benefit and control/possession, does a disservice to indigenous descendants of creator cultures.⁷⁵

There has at least been some conceptual separation of ownership rights.⁷⁶ This separation has not extended into common practice or law. There has been a persistent lack of imagination on the part of cultural property owners. Parceling property rights is not a widely considered alternative to full ownership. It is true that “[c]lassic ownership theory tends to overlook the possibility of nonowners exercising custodial duties over tangible and intangible goods in the absence of title or possession.”⁷⁷ Stakeholders most often argue about who “deserves” to own cultural objects along with the entire bundle of rights associated with that ownership.

72. See, e.g., GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 2 (4th ed. 1964).

73. See *id.*

74. *Id.*

75. See Mezey, *supra* note 54, at 2017.

76. The disconnect between the right to benefit from and the right to possess cultural property creates a conceptual separation in the concept of ownership rights. See *id.* at 2005 (“Within cultural property discourse, the idea of property has so colonized the idea of culture that there is not much culture left in cultural property. What is left are collective property claims on the basis of something we continue to call culture, but which looks increasingly like a collection of things that we identify superficially with a group of people.”).

77. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. (forthcoming 2009).

It is rarely argued that indigenous descendants of creator cultures do not deserve to *benefit* from the cultural artifacts crafted by their ancestors. Instead, most arguments challenge their getting *possession* of those artifacts. In some areas, there are still lingering ideas of indigenous peoples as backward, intellectually and technologically inferior. It is often stated that indigenous peoples do not have the technological capacity or resources to “adequately” preserve objects. Stacey Falkoff explained that “some [commentators] focus on the need to protect cultural property, and specifically, on the wealth of resources that museums in market nations have at their disposal to ensure the preservation of artifacts, contrasted with the lack thereof possessed by many source nations.”⁷⁸

Archaeologists, collectors, dealers, and museums all have an interest in preserving the idea that indigenous peoples are not capable of caring for, preserving, and adequately studying their cultures’ artifacts. I believe an undercurrent idea remains that that indigenous peoples do not “know” well enough how to appreciate and protect their cultural objects. This is reflected by the bias of archaeologists who disagree with repatriating objects to Native American tribes if they are going to simply put the artifacts back in the ground.⁷⁹ The Kennewick Man case in particular highlighted the idea that it is science *versus* the tribal customs, and that the interests of the two are mutually exclusive.⁸⁰

Regardless of their technological capacities, indigenous peoples are not often politically powerful enough to secure repatriation of their culture’s archaeological artifacts on an international level. Therefore, repatriation is left in their nation’s charge; but repatriated items are in the nation’s control for the nation’s benefit.

An argument against giving indigenous descendants of creator cultures the right to beneficial interest in artifacts as distinct from possession is that there is no legal mechanism in place to do so. The choices appear to be either to give the indigenous peoples full ownership of the artifact (thus, possession *and* beneficial interest), or to refuse. At this point, arguments against indigenous peoples getting possession may arise. Some indigenous peoples do not have the resources to care for cultural objects in a way that more politically powerful cultural enthusiasts would approve of. This disparity perpetuates itself.⁸¹

For as long as this reality persists and those who trade in cultural property (privately or publicly) fail to take a more fluid⁸² approach to cultural property ownership, the arguments against indigenous peoples getting possession of artifacts will impede the possibility of their receiving beneficial interest in those artifacts.

78. Falkoff, *supra* note 65, at 278.

79. See Tamara Bray, *Repatriation: A Clash of World Views*, ARTIC STUDIES CENTER, <http://www.mnh.si.edu/arctic/html/repattb.html> (last visited Apr. 7, 2009).

80. See Posting of Timothy Sandefur to Panda’s Thumb, <http://pandasthumb.org/archives/2004/10/troublesome-nag.html> (Oct. 4, 2004, 17:09).

81. Absent major economic shift, private entities in market nations, and even the capital cities of source nations, will always have better technological and material resources available to them than do indigenous peoples.

82. The word “dynamic” may also be appropriate. See Mezey, *supra* note 54, at 2006 (“To think of culture more dynamically requires asking about the power, appropriation, and negotiation between groups. It moves away from fixing and preserving cultures and peoples and toward an interesting set of questions that flow from cultural change and contact.”).

In sum, in cultural property law, possession and benefit are thus far inextricably linked.⁸³ This causes an ethical dilemma because indigenous peoples are denied beneficial interest in the artifacts created by their ancestors on the basis of arguments against their having possession of them.

C. Unsolicited Representation of Indigenous Peoples Constitutes a Reinforcement of the Idea that They Are in Need of Custodial Care, Inherently Undermining Arguments that They Are Competent to Control Cultural Property⁸⁴

The reasons for indigenous peoples failing to assert their interest in cultural artifacts on an international level are varied. It does not necessarily mean that they, as a group or as individuals, have no interest in cultural objects that have migrated far from their origin. The bulk of the political power that indigenous peoples have is on the national level. Similarly, until the U.N. Declaration, there were only a few internationally recognized rights to cultural heritage, much less a recognized right to cultural property.⁸⁵ Any rights indigenous peoples had to cultural objects would have come from the national government.⁸⁶ Despite the U.N. Declaration, some indigenous peoples may feel that they have no rights, or are powerless to exercise their rights, on an international level.

When non-indigenous people or groups make an unsolicited attempt to represent the absent stakeholder by speaking for indigenous interests, they take a custodial position over the people. This reinforces the idea that indigenous peoples are in need of custodial care and not capable of representing themselves.

This is problematic because if indigenous peoples are portrayed as victims, then their general level of competency is inherently called into question. Further, their perceived interest in cultural property is diluted. The mere necessity of custodial care undermines the idea that indigenous peoples are competent to care for cultural artifacts and intensely interested in doing so. Further, the non-member custodian assumes the task of determining the true nature of indigenous interests.

Accordingly, unsolicited representation of indigenous interests reinforces old, damaging ideas that put indigenous peoples on a lower level than other nationals. It portrays them as incapable of speaking for themselves in cultural property discussions, or even of determining their own interests. It further perpetuates a disempowering cycle of victimhood that is overwhelmingly harmful.⁸⁷

83. Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley are currently working on *In Defense of Property*, slated to appear in the Yale Law Journal this year. See Carpenter, Katyal and Riley, *supra* note 77. The working paper reveals a creative, progressive proposal to rethink how we treat cultural property using group interests ("peoplehood") rather than individual interests ("personhood"). *Id.* A parallel can be drawn between their emphasis on "stewardship" and the "beneficial interest" discussed in this article. *Id.*

84. I recognize this ethical dilemma may be illustrated by way of this article.

85. See Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 147-51 (1991).

86. *Id.*

87. See generally Reginald Leamon Robinson, *The Word and the Problem of Human Unconsciousness: An Analysis of Charles R. Lawrence's Meditation on Racism, Oppression, and*

For as long as indigenous peoples are portrayed as less competent or politically mute, the notion that they cannot adequately appreciate, study, or care for cultural property will persist. In this way, unsolicited representation does not necessarily work toward remedying the problem that some indigenous peoples may feel that they are without rights or are otherwise powerless to exercise their rights. This creates an ethical dilemma, where sympathizers must choose between leaving indigenous people un- or under-represented, and representing them at the potential cost of further disempowerment.

IV. CONCLUSION AND RECOMMENDATIONS

This article is by no means an exhaustive discussion of the ethical problems in cultural property law pertaining to indigenous peoples. It is instead meant as a starting point for discussions on how we might have productive, meaningful discourse on these ethical issues and others. According to the 5Ps Framework for Ethical Decision-Making, the next step is to identify what potential solutions are available.⁸⁸ I suggest cultural property stakeholders take a pragmatic, open-minded approach to these ethical evaluations. By emphasizing meaningful discourse in place of hostility,⁸⁹ we can better explore alternatives that will address these ethical dilemmas and others.

An indigenous perspective is a crucial component of these discussions. Therefore, I urge indigenous peoples to assert themselves not just on the national, but also on the international level. When this is not possible, I urge source nations to better involve the indigenous descendants of creator cultures in cultural heritage initiatives such that the repatriation movement benefits the people on whose behalf such requests are made.

Finally, I urge all stakeholders to more carefully consider to what end they make their arguments—legal or ethical.

Empowerment, 40 CONN. L. REV. 1 (2008) (giving an intense, head-spinning explanation of how sympathizing with silenced, innocent victims denies minorities the opportunity to co-create their realities and adds conscious power to racism).

88. See Radcliffe, *supra* note 2, at para. 3-4.

89. See, e.g., Posting of Kimberly Alderman to The Cultural Property and Archaeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/11/04/cuno-waxman-appiah-shapiro-and-god-coming-november-19th-to-an-nyu-near-you/> (Nov. 4, 2008).

One reader comments:

I am disappointed that people continue to use the term “antiquities wars”. [sic] We are not involved in any war but in a dispute about heritage and ownership rights in an area where most of us agree that there has to be cooperation and understanding if we are to find acceptable solutions.

....

... Inverted commas do not help much in this usage which seems to be calculated to get us used to the idea that differences in beliefs and opinions are necessarily declarations of war. We can make a contribution to a culture of peace if we do not imitate military terminology.

Posting of Dr. Kwame Opoku to The Cultural Property and Archeology Law Blog, <http://culturalpropertylaw.wordpress.com/2008/11/04/cuno-waxman-appiahshapiro-and-god-coming-november-19th-to-an-nyu-near-you/> (Nov. 19, 2008, 07:47).