



The Distinctiveness of Property and Heritage

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This piece takes up the competing concepts of property and heritage. Recent scholarship views property as a series of connections and obligations—rather than the traditional power to control, transfer or exclude. This new view of property may be safeguarding resources for future generations, but also imposes onerous obligations based on concerns over environmental protection, the protection of cultural resources, group rights, and even rights to digital property. Yet these obligations can also be imposed on subsequent generations, and certain obligations are imposed now based on the actions of past generations.

This article examines the multigenerational aspects of property via a body of law which should be called heritage law. Heritage law now governs a wide range of activities some of which include: preventing destruction of works of art, preventing the theft of art and antiquities, preventing the illegal excavation of antiquities, preventing the mutilation and destruction of ancient structures and sites, creating a means for preserving sites and monuments, and even righting past wrongs. This piece justifies the new conceptualization in two ways. First, by showing that properly distinguishing property and heritage will allow us to better protect heritage with a richer, fuller understanding of the concept. And second, by demonstrating how current definitions lead to imprecise analysis, which may produce troubling legal conclusions.

A growing body of heritage law has extended the limitations periods for certain cultural disputes. This has shifted the calculus for the long-term control of real, movable, and even digital property. This can be acutely seen with respect to cultural repatriation claims—specifically the claims of claimants to works of art forcibly taken during World War II; or the claims by Peru to certain anthropological objects now in the possession of Yale University which were removed by Hiram Bingham in the early part of the 20th Century.

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I. INTRODUCTION

In Oxford, Alabama a conflict has emerged over what should happen to a small earthen mound likely constructed by indigenous tribes more than a thousand years ago.¹ The stones sit behind a strip mall just off the interstate, and local developers have sought permission to use the mound as fill dirt for other new commercial developments. Should local businesses be permitted to exploit this mound of earth for future development—which the city surely needs and would produce immediate economic benefits—or should the site and the knowledge it contains be preserved for future generations? This ongoing dispute draws lines between two ways of thinking about places, objects, and ideas: either as property reducible to interests, or as heritage.

This article draws out the heritage doctrines from traditional property law to examine what specific doctrines might be approached from a heritage perspective. It looks to the nature of heritage and property and erects a set of principles for distinguishing the two. Property has been the traditional means by which individuals order these interactions, yet a powerful and different idea of heritage has increasingly challenged the lofty position enjoyed by property.

New concepts of heritage offer a helpful counterpart to property. This article examines and distinguishes property and heritage. Lyndel Prott noted in 1989 that “the legal definition of the cultural heritage is one of the most difficult confronting scholars today.”² The intervening years have seen a number of attempts to further define the concept, while the idea of heritage plays an increasingly important role in areas like digital culture, environmental heritage, environmental protection, and the disposition of cultural objects.³

Heritage should be defined as the physical and intangible elements associated with a group of individuals which are created and passed from generation to generation. The idea of heritage carries an implicit series of choices whether heritage should be accepted from past generations,

1. Campbell Robertson, *When Scholarship and Tribal Heritage Face Off Against Commerce*, N.Y. TIMES, March 13, 2010, at A1, available at http://www.nytimes.com/2010/03/14/us/oxford.html?_r=1.

2. Lyndel V. Prott, *Problems of Private International Law for the Protection of the Cultural Heritage*, V RECUEIL DES COURS 224 (1989).

3. As Janet Blake notes, “[t]here exists a difficulty of interpretation of the core concepts of ‘Cultural heritage’ (or ‘cultural property’) and ‘cultural heritage of mankind’ and as yet no generally agreed definition of the content of these terms appears to exist.” Janet Blake, *On Defining the Cultural Heritage*, 49 INT’L & COMP. L.Q. 61, 62-63 (2000).

and if so whether it should be passed on to future generations.⁴ Furthermore, this definition encompasses a surprising breadth of objects and ideas.

Heritage may take many forms. There exists material heritage, intangible heritage, and natural heritage.⁵ Material heritage includes buildings,⁶ works of art,⁷ as well as antiquities and their archaeological context.⁸ Property can of course be tangible or intangible also. Yet not every intangible can be the object of property rights. Ideas such as goodwill,⁹ love songs,¹⁰ celebrity identity,¹¹ and even ideas themselves¹² are all manifestations of human expression which are not reducible to property law. For some of these objects, the idea of heritage offers a powerful instrument to order our relationships with these objects and concepts. Taken as a whole, the scholarship which examines heritage has suffered by taking a myopic view of the concept, too often focusing on indigenous groups and repatriation. These are worthy avenues of study and serious debate, yet heritage should be reconceptualized and applied to a wider series of relationships.

4. This stands as the author's definition of heritage, and though it necessarily suffers from a lack of particularity, the idea of property also shares these frailties. As Lyndel Prott and Patrick J. O'Keefe argue:

Heritage creates a perception of something handed down; something to be cared for and cherished. These cultural manifestations have come down to us from the past; they are our legacy from our ancestors. There is today a broad acceptance of a duty to pass them on to our successors, augmented by the creations of the present.

Lyndel Prott & Patrick J. O'Keefe, "Cultural Heritage" or "Cultural Property"?, 1 INT'L J. CULTURAL PROP. 307, 311 (1992).

5. A recent Westlaw search in August of 2010 for legislation using the words "cultural heritage" by the author revealed 171 Federal statutes and 899 state statutes which use the term.

6. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (in which the Supreme Court held a city's action to preserve the Grand Central Terminal was not a taking and therefore did not require just compensation under the Fifth Amendment).

7. Federal law makes it a crime to steal an object of cultural heritage from a museum, and defines an object of cultural heritage as an object that is in the custody or control of a museum and is over 100 years old and worth in excess of \$5,000, or is worth at least \$100,000. 18 U.S.C. § 668 (2010).

8. For example, the Archaeological Resources Protection Act protects material remains of human life or activities that are at least 100 years old and of archaeological interest. Archaeological Resources Protection Act of 1979. 16 U.S.C. §§ 470aa-470mm (2006).

9. *Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316-17 (9th Cir. 1989).

10. See *Quackenbush Music, Ltd. v. Wood*, 381 F. Supp. 904 (D. Tenn. 1974).

11. See *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993).

12. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) ("no author may copyright his ideas or the facts he narrates").

In fact, a similar reconceptualization of property took hold because of shifting societal conditions: “As important as legal scholarship has been in articulating a conception of property as a bundle of rights, these writings would have had little impact without the social, economic, and political forces that demanded a reconceptualization of property.”¹³ Put another way, our view of property must have a strong descriptive component, examining and anticipating the ways in which property manifests itself. In a similar way, heritage must also have a descriptive component.

Heritage and property are two fundamentally different approaches to examining and ordering human expression. They are often at odds—but not always. In many cases, objects which we would classify as heritage may be owned as property. This class of objects can be described as cultural property. Jeremy Bentham argued that property may carry certain elements of heritage and intrinsic value which if taken from us may “[rend] us to the quick.”¹⁴

Our notions of property adapt and shift. Advances in technology meant that ownership of land has changed to deny the ownership of the air space over that land. This idea—the *ad coelum* doctrine—has been eclipsed by the reality of air travel; else “every transcontinental flight would subject the operator to countless trespass suits.”¹⁵ Edmund Burke argued we must preserve our heritage, lest successive generations risk undoing the good works of their forebears.¹⁶ Burke was decrying the

13. Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 288 (2002).

14. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 115 (C.K. Ogden ed., 1931). As Bentham argued:

Every part of my property may have, in my estimation, besides its intrinsic value, a value of affection—as an inheritance from my ancestors, as the reward of my own labour, or as the future dependence of my children. Everything about it represents to my eye that part of myself which I have put into it—those cares, that industry, that economy which denied itself present pleasures to make provision for the future. Thus our property becomes a part of our being, and cannot be torn from us without rending us to the quick.

Id.

15. Vincent Chiappetta, *The (Practical) Meaning of Property*, 46 WILLAMETTE L. REV. 297, 315 (2009) (citing *United States v. Causby*, 328 U.S. 256, 261 (1946)).

16. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 53 (London, 1790). Burke stated:

But one of the first and most leading principles on which the commonwealth and the laws are consecrated, is lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not thin it amongst their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society; hazarding to leave to those who come after them a ruin, instead of a

damage and destruction committed during the French revolution. This paper takes up Burke's argument and shows how the law can better prevent society from wasting its inheritance. Conventional property frameworks cannot fully account for the interests and values necessary to adequately preserve heritage. Property and heritage interact, but the two concepts can be separated in a mutually beneficial way. Though some have argued we might be better normatively served by using a property framework,¹⁷ this paper argues the two concepts are fundamentally separable.

This article first presents an overview of recent property law theory, showing that even this venerable concept has been subjected to criticism and problems of definition. This article then compares heritage law to this property theory. The piece then concludes that property and heritage should be properly distinguished because they are two distinct bodies of law with separable goals. Properly distinguishing property and heritage allows for a richer, fuller understanding of both concepts. Current definitions of property and heritage foster imprecision and inaccurate legal conclusions.

II. OUR UNDERSTANDING OF PROPERTY

A. *The Traditional View*

To properly distinguish property from heritage, we must first revisit the core idea of property itself. Property law has traditionally been seen as the best way to protect owners.¹⁸ A traditional view of property recognizes that property protects right-holders from other individuals and groups which allows for a decentralized governing body.¹⁹ Others view property rules as a network of relationships which foster communities.²⁰ There are a number of justifications for property rights, including legal recognition of "labor, its cousin first possession, individual self-definition and autonomy, stewardship, divine right, utility, collective

habitation—and teaching these successors a little to respect their contrivances, as they had themselves respected the institutions of their forefathers.

Id.

17. See *infra* note 175 and accompanying text.

18. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

19. RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 139-42, 238 (2000).

20. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

good, need, and power.”²¹ James Madison argued property law comes from “that dominion which one man claims and exercises over the external things of the world in exclusion of every other individual.”²² Richard Pipes defines property as “the right of the owner or owners, formally acknowledged by public authority, both to exploit assets to the exclusion of everyone else and to dispose of them by sale or otherwise.”²³ The right to exclude provides a “rough but low-cost method of generating information that is easy for the rest of the world to understand.”²⁴ This definition allows a property owner to do just about whatever they wish with it.²⁵ This deeply-rooted idea of property which allows for individual use only will necessarily prevent the values of stewardship from gaining hold, and may even lead to the waste and destruction of heritage for future generations.

If we accept that certain classes of human expression should be passed on to future generations, property-centric frameworks may result in some pernicious consequences. As Sarah Harding has argued, “the concept of ownership in a single person or entity persists and pervades our understanding of the concept of property.”²⁶ Yet this traditional view carries an implicit choice and ordering of the importance of values, and property may in some cases help to further important values such as environmental protection.

Property law has often been compared to a bundle of rights. In fact, “the bundle” has dominated property theory.²⁷ The metaphor envisions property as a bundle of sticks, each one representing a right associated with property. These rights can include the right to: exclude, possess, use, manage, receive income and capital, maintain, transfer, enjoy with the absence of term; the prohibition of harmful uses; and the liability to execution.²⁸

The concept was perhaps first used in 1888, “[t]he dullest individual among the *people* knows and understands that his *property* in anything is

21. Chiappetta, *supra* note 15, at 303-04 (citations omitted).

22. J. MADISON, PROPERTY, IN THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 186 (Marvin Meyers ed., 1981).

23. RICHARD PIPES, PROPERTY AND FREEDOM, xv (2000).

24. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 971 (2004).

25. Edward J. McCaffery & Stephen Munzer, *Must We Have the Right to Waste?*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 76, 76 (2001) (criticizing the idea of a right to waste).

26. Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 759 (1997).

27. Arnold, *supra* note 13, at 284 n. 18.

28. Anthony M. Honoré, *Ownership*, in OXFORD ESSAYS ON JURISPRUDENCE 107, 113-24 (A. G. Guest ed., Clarendon Press 1961).

a bundle of rights.”²⁹ This view soon gained increasing support, as one commentator writing in 1922 noted “property has ceased to describe any *res* or object of sense at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities.”³⁰ Indeed, Benjamin Cardozo early in the 20th century argued that the concept of property must shift to accommodate new realities.³¹

Yet the prominence of the bundle metaphor has led to criticism. Some have argued that there must be some object of the rights in this bundle, and have argued property deals with legal relationships among people with respect to things.³² The connection between property rights and things has been under-examined, which has prompted some scholars to look at the rights in the bundle as a web of relationships among people with respect to valuable resources.³³ We have witnessed a shift then from Blackstone’s 18th century definition of property from “sole and despotic dominion”³⁴ to “a set of legal relations among persons.”³⁵ Put another way, property in the 19th century was shifting from “Blackstonian physicalism and absolutism to the bundle of rights.”³⁶ Changes in society and technology were shifting the way scholars viewed property. The idea that property was a tangible thing over which an owner had complete dominion was declining,³⁷ and the social dimensions of private property envisaged in Blackstone’s writings was gaining increased currency.³⁸

29. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 43 (2d ed. 1900).

30. Arthur L. Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429-31, 429 (1922).

31. BENJAMIN NATHAN CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928).

32. JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 2 (3D ED. 1989). LANCE LIEBMAN, A CONCISE RESTATEMENT OF PROPERTY I (2001).

33. NANCIE G. MARZULLA & ROGER J. MARZULLA, PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION 19 (1997).

34. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (David S. Berkowitz & Samuel E. Thorne eds., Oxford 3d ed. 1979) (1765).

35. Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: the Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 328-30 (1980); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 27-28 (1988).

36. Arnold, *supra* note 13, at 288 citing Thomas C. Grey, *The Disintegration of Property*, in PROPERTY NOMOS XXII, 69-85 (J. Roland Pennock & John W. Chapman eds., 1980); Vandavelde, *supra* note 35.

37. Vandavelde, *supra* note 35, at 333-59.

38. See FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 11, 13 (1985); Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601 (1998) (arguing Blackstone thought about limits to exclusive private control over things but also an individual’s obligations to others); Stephen R. Munzer, *Property and Social Relations*, in NEW ESSAYS IN THE LEGAL AND

This really took hold when Wesley Newcomb Hohfeld offered important contributions to the bundle of rights conception with a series of essays between 1913 and 1917.³⁹ He argued that property consists of fundamental legal relations which can be four jural opposites: (1) right-no right, (2) privilege-duty, (3) power-disability, and (4) immunity-liability.⁴⁰ Hohfeld thought of property as a cluster of attributes, which allowed for a great range of forms and functions for property ownership. He revealed the relations between rights and correlative duties. Others have taken up this idea. Felix Cohen argues that property is “relations between people” which offers “exclusions which individuals can impose or withdraw with state backing against the rest of society.”⁴¹ This “state backing” of individual right offers a Hohfeldian jural relation between exclusion and access. Charles Reich extended the definition in arguing that property should include entitlements to government benefits and services because of the fundamental values advanced by recognizing these property rights.⁴²

Yet perhaps because of the primacy of the bundle metaphor, it has met a good deal of criticism. Some argue it focuses on rights but minimizes any duties right holders may owe.⁴³ Arnold suggests the bundle “masks an essentially individualistic, commodifying, acquisitive concept of property every bit as reified and anti-social as the Blackstonian concept.”⁴⁴ Moreover it does not have any efficient boundaries, which might produce over-propertization.⁴⁵ Property has

POLITICAL THEORY OF PROPERTY, 33 (Stephen Munzer ed., 2001) (noting Blackstone recognized rights in intangibles).

39. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Fundamental Legal Conceptions*]; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

40. Hohfeld, *Fundamental Legal Conceptions*, *supra* note 39, at 30.

41. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 357-87 (1954).

42. Charles A Reich, *The New Property*, 73 YALE L.J. 733, 733 (1963).

43. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 16-18 (2000) (arguing the bundle of rights does not address obligations); JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD 16-18 (2001) (looking at what social responsibilities may accompany ownership); John E. Cribbet, *Property Lost: Property Regained*, 23 PAC. L.J. 93, 101 (1991) (“If we view property as primarily a matter of private rights and public regulation as destructive of those rights, we have forgotten the lessons of the past.”).

44. Arnold, *supra* note 13, at 290.

45. Rose, *supra* note 38 at 278-85 (using that when we think about the bundle of sticks we need to think of the whole bundle, not just the individual sticks); Tom W. Bell, *Review: The Common Law in Cyberspace*, 97 MICH. L. REV. 1746-1770, 1764-67 (1999) (warning about the over-propertization of cyberspace); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1189-91 (1999) (describing the

been stretched and extended when, for example, courts decide cases involving body parts,⁴⁶ trade secrets,⁴⁷ gene fragments,⁴⁸ certain aspects of software,⁴⁹ campaign contributions,⁵⁰ and even racial identity.⁵¹ The bundle concept does not allow us to separate property rights from other rights, thereby diminishing the concept of property and offering little real guidance when courts must define property rights.⁵² Some have gone so far as to argue the “metaphor of property as a bundle of rights is seriously misleading,”⁵³ and even “little more than a slogan.”⁵⁴ Above all, by focusing only on rights and relationships, we can ignore the characteristics of the object of the rights, or “thingness.”⁵⁵

B. *Reconceptualizing Property*

Property now does not deal just with things but with social relationships as well.⁵⁶ Arnold has argued that we should replace the metaphor of property as a bundle of rights with property as a web of interests: “a robust, comprehensive concept of private property is necessary to advance environmental values, and conversely, a decline in the importance and meaning of property hurts environmental values. . . . The appropriate environmental response to this problem is to articulate a comprehensive understanding of property emphasizing the importance of

harms which can occur if we look at the property rights in the bundle in isolation); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000) (arguing Property must “track a limited number of standard forms” in the way the civil law does under the numerus clausus principle does, which would produce a number of benefits.).

46. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 480 (Cal. 1990).

47. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984).

48. See Molly A. Holman & Stephen R. Munzer, *Intellectual property rights in genes and gene fragments: A registration solution for expressed sequence tags*, 85 IOWA L. REV. 735-1835 (2000).

49. See Richard H. Stern, *The Bundle of Rights Suited to New Technology*, 47 U. PITT. L. REV. 1229 (1985).

50. See Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1233, 1233 (2000).

51. See Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1132 (1997).

52. See JIM HARRIS, PROPERTY AND JUSTICE 119-61 (1996); WALDRON, *supra* note 35 at 29, 33, 52; Grey, *supra* note 36; Vandeveld, *supra* note 35 at 362-67.

53. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1867 (2007).

54. J. E. Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. REV. 711, 714 (1995).

55. Arnold, *supra* note 13, at 291.

56. Singer, *supra* note 43; Munzer, *supra* note 25, at 36-75; see also Cohen, *supra* note 41, at 359-65, 378-79.

human-object relationships.”⁵⁷ Arnold argues that property theorists need to “reconstitute property: to articulate a conception of property that integrates both its humanness and its thingness.”⁵⁸ In the same way, heritage can and should be defined as a competing, sometimes overlapping metaphor of a different web of interests.

In fact, property has several prominent features that reflect the “intellectual and social forces” which have helped to “reconceptualize” it.⁵⁹ If we think first about what kind of features a legal concept of heritage may have, then we can examine which features should be added or subtracted in order to make heritage distinct from property. Primarily, we might point to the notions of bestowing heritage on future generations, and receiving heritage bestowed by our forebears. Would adding these features then subvert property and make it something incompatible with the current view of property. As a result then, do we need to find a similar reconceptualization for heritage? Arnold argues the definition of property has been distorted because of attempts to account for the difficult cases on the margins.⁶⁰ We have gotten away from thinking about an “ideal” definition. This has two consequences: “(1) it confuses legal actors, scholars, and non-specialists with a greater sense of property law’s indeterminacy than may be justified by a more comprehensive analysis; and (2) it constantly recasts property doctrine and norms according to odd cases rather than according to typical cases.”⁶¹

Property can be separated in a way that heritage cannot. It is disaggregable. The different rights which come together to form the bundle of sticks⁶²—a perhaps too-common metaphor for property rights—can be separated and analyzed in isolation. There may not even be a single property rights holder but rather a number of individuals with interests and relationships to one another. Property may also be commoditized, bought, and sold.⁶³ Property has also been surprisingly adaptable. As Arnold argues, “[n]ew rights in property can be conceived. New sets of rights can be bundled. New objects of property

57. Arnold, *supra* note 13, at 281.

58. *Id.* at 284.

59. *Id.* at 289.

60. *Id.* at 295.

61. *Id.*

62. *Id.* at 289-90.

63. Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 808 (2009) (“Doctrines of alienability, however, also inject a malleability to transfers around property that is less present where categories are stable. This allows people to treat land as a commodity, but also increases the pressure to preserve status and also, of course, gives fuel for further accumulation.”).

rights can be identified. The conception of property, when defined so broadly and abstractly as a bundle of rights can change with changing social needs and values.⁶⁴ As a result of this overbreadth, we have created an imperfect definition, which has overtaken what should be heritage in some cases, thus producing some bad consequences. Though Arnold is correct in pointing out that property “functions” because it “serves social needs and values, unhindered by formalistic constraints or narrow conceptions.”⁶⁵

Yet property can also be viewed as a continuum with sole and despotic dominion resting at one end. Chiappetta argues that in this continuum, “[s]ole and despotic dominion only represents one endpoint of an extremely nuanced continuum of successively less absolute ownership possibilities eventually reaching the other terminus of ‘none.’ Adopting only the most extreme of the possible alternatives as *the* definition of property unjustifiably narrows the scope of public policy debate. It is time to stop maligning Blackstone and treat sole and despotic dominion as the straw man it is.”⁶⁶

And yet scholars have argued that property as a concept is in decline.⁶⁷ Thomas Grey examined the limits of looking at property as a bundle of rights. He pointed to a number of changes in the ways of thinking about property, changes that he argued signaled the end of property as a clear bright-line concept.⁶⁸ Without clear boundaries, property as a concept can after all shed its usefulness.⁶⁹ Property is, as Arnold argues, “a malleable, divisible, disaggregable, functional set of rights among people.”⁷⁰ Property interests can be created in intangibles, but also tangibles, and in abstract concepts, but also concrete realities. As the distinction between property rights and other kinds of rights breaks down, their categorization is a matter of convenience or public policy, and thus it offers no conceptual coherence.⁷¹ The current study of property remains positivist and pragmatic; for example the study of property law in law school mainly teaches the basics of real estate.⁷²

64. Arnold, *supra* note 13, at 289.

65. *Id.* at 290.

66. Chiappetta, *supra* note 15, at 314.

67. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 693-702 (1985); Joseph Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983).

68. Arnold, *supra* note 13, at 282.

69. Jeanne L. Schroeder, *Chix Nix Bundle-o-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 256 (1994).

70. Grey, *supra* note 36, at 82.

71. *Id.* at 70, 74-80.

72. Arnold, *supra* note 13, at 293 (citations omitted).

And so long as this is the case, the full complexity of human ideas and expression will elude sound ordering by the legal system.

In fact, property shifts to meet the form of human expression or object. No single overarching theory of property can be found, rather we should consider the “practical” function of the concept.⁷³ Property responds to different needs. As Hanoch Dagan argues, “the fee simple absolute [allocates] a rather robust bundle of entitlements to owners, thus providing the safe haven from others’ demands that is indeed a precondition for independence.”⁷⁴ Other forms of property like co-ownership or marital property may “provide diverse frameworks for various types and degrees of interdependence, mutual responsibility, and solidarity.”⁷⁵ Yet the fundamental connection property shares with the individual, and the ability of owners to manipulate their interests in property leave property unable to effectively navigate heritage resources.

John Sprankling has argued there are certain biases in property law, and has offered specific reforms. He argues that wilderness should be exempted from the doctrine of adverse possession.⁷⁶ He also argues that the good husbandry test of the doctrine of waste should be replaced by what he calls a “prudent preservation” standard for wilderness lands, a rebuttable presumption should be erected that the good faith-improver doctrine cannot apply to wilderness, and the nuisance doctrine should account for injury to nature, not just humans.⁷⁷ Thomas Jefferson argued against the overpropertization of inventions:

It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea. . . . Inventions then cannot in nature, be a subject of property.⁷⁸

Robert P. Merges has pointed out the bias in the Lockean view of property by noting that “true property rights . . . are held by individuals

73. See generally Chiappetta, *supra* note 15.

74. Hanoch Dagan, *From Independence and Interdependence to the Pluralism of Property*, in *Property, State and Community*, 22 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1602017 (last visited March 27, 2011).

75. *Id.*

76. John G. Sprankling, *Environmental Critique of Adverse Possession*, 79 *CORNELL L. REV.* 816, 864-84 (1993).

77. John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 *U. CHI. L. REV.* 519, 588-90 (1996).

78. Letter from Thomas Jefferson to Isaac McPherson (August 13, 1813), XIII in *THE WRITINGS OF THOMAS JEFFERSON* (Albert Ellery Bergh ed., 1907), available at http://memory.loc.gov/ammem/collections/jefferson_papers/mtjser1.html.

who work on things so as to justify *removal* from the primordial commons.”⁷⁹ John Locke’s view of government excludes certain groups. He noted, “[t]hus in the beginning all the World was *America*,” which assumes that when Europeans met Native Americans the indigenous peoples could not acquire rights in the land because their use of the land did not constitute “labor.”⁸⁰ Despite these shortcomings, real property enjoys rigid constitutional protections.⁸¹ Justice Scalia has argued this can be attributed to the historical expectation that real property is a unique and immovable resource.⁸² The expectations view of property promotes settled justified expectations from a utilitarian perspective. As Jeremy Bentham wrote, “Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.”⁸³ The concept uses Bentham’s utilitarianism to protect a property owner’s investment-backed expectations when a government taking arises.⁸⁴ It has been used to consider the expectation of a worker via their employment and the property of the employer, which these workers help to create and change.⁸⁵

1. Property as Independence or Interdependence

Hanoch Dagan has attempted to reveal the “core normative essence of property” by dividing recent property scholarship as conceiving property as either independent or interdependent.⁸⁶ He shows recent attempts to find property take a position either via Kant as a “castle of independence,” or an Aristotelian position that property is in fact founded on interdependence.⁸⁷ He concludes that it is this “multiplicity of property institutions is the key to property’s normative promise.

79. Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1185 (2008) (emphasis added).

80. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 301 (Peter Laslett ed., 3d ed. 1988).

81. The Fifth Amendment prevents the government taking of private property without just compensation. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

82. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992).

83. JEREMY BENTHAM, THE THEORY OF LEGISLATION 111-13 (C.K. Ogden ed., 1931) (1802).

84. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1258, 1211-12, 1229-34 (1967).

85. See, e.g., Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

86. Dagan, *supra* note 74, at 1.

87. *Id.*

Property can be the home of both independence and interdependence (and can serve the other property values as well), and thus provides people with valuable options of human flourishing.⁸⁸ We can extend Dagan's view to easily encompass ideas of heritage as well. By extending the Aristotelian end of the spectrum to encompass the interdependence not just of individuals but of *generations* of individuals, the law can better value our collective and individual heritage. Dagan himself argues that property law and theory are not "doomed to a fundamental contradiction between two poles."⁸⁹ We should take "the heterogeneity" of property theory seriously and we can understand property by examining the "umbrella of property institutions."⁹⁰ What emerges are two theories which purport to advance different ends of the property-doctrine spectrum but which are in fact strikingly similar: "Neo-Kantians present a monistic account, purporting to transcend a profound conceptual tension. Similarly, the neo-Aristotelian theory offers an understanding of property that purports to govern the entire terrain of property law."⁹¹

First, let's find the sources of the independence property scholarship. Dagan distills two recent neo-Kantian accounts of property, one by Arthur Ripstein,⁹² and the other by Ernest Weinrib.⁹³ Dagan argues that "Kant's conception of the right to personal independence, which differs from other, more robust conceptions of autonomy, understood as the ability to be the author of one's life, choosing among worthwhile life plans, and being able to pursue one's choices."⁹⁴ This also finds support in the traditional view of property—that property is what lawyers call the rights that individuals have with respect to objects and ideas. Yet there are a number of these property rights, and they are connected. The Aristotelian interdependence view can be traced to recent attempts to create a relational theory of property using Aristotle. Highlighting recent work by Gregory Alexander and Eduardo M. Peñalver, Dagan states that this new account "highlights the crucial role of property in fostering virtuous human interdependence."⁹⁵ We are left

88. *Id.*

89. *Id.* at 2.

90. *Id.* at 3.

91. *Id.* at 6.

92. ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009).

93. Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795 (2002).

94. Dagan, *supra* note 74, at 4.

95. Dagan, *supra* note 74, at 6-9 (citing GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*

then with competing ideas of property which are counterproductive. Neither of these doctrines can or should explain the entire property landscape. Similar arguments and dualistic fallacies have emerged with respect to cultural property.⁹⁶ One of the emerging trends in property law has been to trace these connections and to show how property rights can be traced to component actors in a community. One of the most powerful ideas has been to see the personhood in property.

2. Personhood and Property

The personhood theory of property looks at how objects are important to human identity and freedoms.⁹⁷ Margaret Radin has examined this concept of property in a series of important books and articles.⁹⁸ She argues some kinds of property deserve greater legal protection because they express individual personhood and should be nonfungible.⁹⁹ The features of individual objects are not as important as

(1999); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2008); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127 (2009)).

96. 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, 693-94 (2008). As Bauer argues:

[T]he debates continue over the trade in archaeological and cultural objects and what the best methods to regulate it are, if indeed it should be regulated at all. These debates are contentious, emotional, and often contain not-so-subtle claims about the relative morality of its interlocutors. At one end are those who believe that everyone has a shared interest in and claim to the common heritage of humanity. . . . 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.

Id.

97. MARGARET JANE RADIN, REINTERPRETING PROPERTY 35-71 (1993) [hereinafter RADIN, REINTERPRETING PROPERTY].

98. RADIN, REINTERPRETING PROPERTY, *supra* note 97; MARGARET JANE RADIN, CONTESTED COMMODITIES (1996) [hereinafter RADIN, CONTESTED COMMODITIES]; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) [hereinafter Radin, *Property and Personhood*]; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*]; Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) [hereinafter Radin, *The Liberal Conception of Property*]; Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1995) [hereinafter Radin, *Property Evolving in Cyberspace*].

99. Radin, *Property and Personhood*, *supra* note 98, at 959.

the relationship and meaning these objects create with their “holders”.¹⁰⁰ Radin divides property objects as either fungible or constitutive.¹⁰¹

Fungible objects do not have any role in creating personhood because a fungible object is “perfectly replaceable with other goods of equal market value.”¹⁰² Constitutive property though is property which carries special meaning for the holder such that “its loss causes pain that cannot be relieved by the object’s replacement.”¹⁰³ Examples of fungible property might be a sum of currency; while one’s wedding ring may be constitutive.¹⁰⁴ Yet these relationships are subjective, depending on the person. Even money may be constitutive as it can protect us from the unknown, offer validation for one’s choices, and can carry meaning for more than just commodity.¹⁰⁵ Radin argues that personal property “should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people,” while fungible property rights “should yield to some extent in the face of conflicting fungible property claims of other people . . . [and] recognized personhood interests.”¹⁰⁶ Legal rules should not only allow for the creation of wealth but also to promote human flourishing.¹⁰⁷ Property law can promote this human flourishing by “enabling individuals to live lives worthy of human dignity.”¹⁰⁸

Carpenter et al. have argued this personhood model allows indigenous concepts about property to enter into “legal discourse,” which would allow their understanding of land and resources to “make exceptions to the prevailing ‘universal commodification’ standard for property that is nonfungible, incommensurable, and inalienable, as some indigenous cultural property surely are.”¹⁰⁹ They offer this view because historically there has been limited judicial recognition of heritage.¹¹⁰ Sarah Harding has used Radin’s model of property and personhood to

100. RADIN, REINTERPRETING PROPERTY, *supra* note 97, at 57-59.

101. *Id.* at 2 (using the term “personal property” to connote property constitutive of the person, though she admits possible confusion because the term “personal property” has long been used to contrast “real property”).

102. *Id.* at 37.

103. *Id.*

104. *Id.* at 57-58.

105. See KENNETH O. DOYLE, THE SOCIAL MEANINGS OF MONEY AND PROPERTY (1999).

106. Radin, *Property and Personhood*, *supra* note 98, at 1014-15.

107. Radin, *Market-Inalienability*, *supra* note 98, at 1851.

108. Alexander, *supra* note 95, at 745.

109. Carpenter, Katyal & Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1048 (2009).

110. See *Onondaga Nation v. Thacher*, 189 U.S. 306, 309-11 (1903) (holding that federal courts do not have the jurisdiction to hear the appeal of a state court holding which prevented the tribe from recovering four wampum belts.).

show how claims for the repatriation of objects may become increasingly viable.¹¹¹ Yet this view of property over heritage can be criticized. The personhood view of property can be extended multi-generationally via heritage law. Though we might find some important advances for indigenous and other cultural resources in a personhood theory of property, we would still be denying what actually happens. Property has shifted as changes have taken place to society generally.¹¹² There is no better example of this than the changes which have been created in the law to account for claims to works of art and heritage which span generations.

C. *Limitation Periods and Multigenerational Legal Actions*

Works of art and objects of cultural significance inspire emotion. When disputes involving these objects arise, they have increasingly involved wrongdoing which has occurred further and further in the past. Because these objects are extremely valuable and portable, the tremendous value associated with cultural property encourages thieves or the dishonest to hide works for long periods of time. These disputes require courts to divine the intentions and actions of past generations, while also anticipating and evaluating the merits of potential future generations to a claim. Heritage law has emerged as the loose collection of doctrines and policies which guide courts and lawmakers in these disputes.

These heritage laws weigh the facts regarding an earlier theft or misappropriation which often may have only recently come to light.¹¹³ As a result, limitations rules will be particularly relevant.¹¹⁴ The relevant limitations rules in the United States are implemented at the state level, which produces some very different approaches.¹¹⁵ The main approaches

111. Harding, *supra* note 26, at 725-27.

112. See *supra* notes 62-78 and accompanying text.

113. See *DeWeerth v. Baldinger*, 836 F.2d 103 (2nd Cir. 1987). In *DeWeerth*, a claimant brought suit to recover a work of art stolen during World War II. The court noted that the claimants' inaction to consult the proper Catalogue Raisonné or conduct any search whatsoever indicated a lack of diligence. *Id.* at 111-12.

114. Every state has comprehensive legislation establishing limitations periods of most actions arising under statutory or common law. Federal actions also have statutes of limitations. For a general discussion of limitation periods as they pertain to art and antiquity disputes, see 77 AM. JUR. PROOF OF FACTS 3D, Proof of a Claim Involving Stolen Art or Antiquities §§ 29-33 (2010).

115. For an interesting and thorough examination of the possible impact these state laws may have on the rules of limitation if adopted in the U.K., see David Carey Miller, David W. Meyers & Anne L. Cowe, *Restitution of Art and Cultural Objects: A Reassessment of the Role of Limitation*, 6 ART, ANTIQUITY, & L. 1, 17 (2001). The conflict of laws which emerge when limitations periods conflict has created a great deal

are the demand and refusal rule and the discovery rule. The demand and refusal rule does not start the limitations period until a dispossessed claimant demands the objects at issue.¹¹⁶ The discovery rule takes a similar kind of approach, but begins the limitations period when a claimant discovers, or reasonably should have discovered, she had a claim to an object at issue.¹¹⁷ These rules, though grounded in property, take on a heritage component, as courts are asked to weight the actions of the present claimants against historical events.

In some cases other equitable doctrines can temper the operation of these limitation-extending rules. A defendant may use the doctrine of laches to defend against an action for the return of a work of art when there is prejudice.¹¹⁸ One such case involved a 19th-century painting by Franz Xaver Winterhalter titled *Girl from the Sabine Mountains*. The current possessor based her defense on laches, arguing that it wouldn't be fair to allow the claimant to regain title to the work.¹¹⁹ Senior Circuit Judge Bruce M. Selya admonished the appellant: "Proving prejudice requires more than the frenzied brandishing of a cardboard sword; it requires at least a hint of what witnesses or evidence a timeous investigation might have yielded."¹²⁰

The operation of these statutes of limitation are a potentially invaluable tool for buyers or sellers of disputed cultural objects.¹²¹ They have had the practical effect of opening up long-past disputes and wrongdoing to courts of law. They are an expanding area of the law in which heritage claims have begun to erode the lofty position enjoyed by property law. For example, an on-going dispute between Peru and Yale University presents a difficult question for a court,¹²² requiring the law to mete out justice with respect to a series of agreements reached with the Republic of Peru in the years immediately following World War I.¹²³

of uncertainty in the art market Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111, 124-27 (2008).

116. See Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 318 (N.Y. 1991).

117. See O'Keeffe v. Snyder, 416 A.2d 862, 869 (N.J. 1980).

118. Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008).

119. *Id.* at 56.

120. *Id.* at 58.

121. For a discussion of the importance of limitations periods to cultural heritage disputes see Derek Fincham, *Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, 37 SYRACUSE J. INT'L. L. & COM. 145, 189-201 (2010).

122. John Christoffersen, *Senator Christopher Dodd Says Artifacts Held by Yale Belong to Peru*, AP, June 15, 2010, http://www.ardaily.org/index.asp?int_sec=2&int_new=38572 (last visited Sept. 4, 2010).

123. David Glenn, *Peru v. Yale: A Battle Rages Over Machu Picchu*, THE CHRON. OF HIGHER EDUCATION, April 3, 2009, available at <http://chronicle.com/article/Peru-v-Yale-A-Battle-Rages/13277>.

Also, scholars are increasingly looking at the viability of reparation actions for former slaves.¹²⁴ These actions present new ways of thinking about the law, and whatever we might think of the merits or demerits of these actions, by thinking about heritage law as a multigenerational mechanism, we can make better informed judgments and predictions about the direction this body of law may be taking. The origins for much of this body of law stem from works of art, antiquities, and a body of law dealing with what has been called cultural property.

C. *Cultural Property*

A number of definitions exist to describe cultural property. Cultural property has been referred to as the “fourth estate” of property, along with real property, intellectual property, and personal property.¹²⁵ The flagship international convention defines cultural property as “specifically designated by each State as being of importance for archeology, prehistory, history, literature, art or science and which belongs to” a number of listed categories.¹²⁶

Cultural property encompasses a number of different ideas and shifting concepts and has suffered from insufficient definitions. At least part of the difficulty in choosing a coherent definition stems from the tension between two distinct concepts, “property” and “culture.” Patty Gerstenblith defines cultural property as “two potentially conflicting elements,” which are “culture” and “property.”¹²⁷ The former is comprised of values derived from a group of people,¹²⁸ while the latter carries with it the conflicting and value laden attachment society and legal thinkers attach to an individual rights-based legal principle.¹²⁹ In contrast, John Merryman has defined cultural property as “objects that embody the culture.”¹³⁰

124. See Helen Bishop Jenkins, *DNA and the Slave-Descendant Nexus: A Theoretical Challenge to Traditional Notions of Heirship Jurisprudence*, 16 HARV. BLACKLETTER L. J. 211 (2000).

125. Steven Wilf, *What Is Property's Fourth Estate? Cultural Property and the Fiduciary Ideal*, 16 CONN. J. INT'L L. 177 (2000).

126. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property art. 1, 96 Stat. at 2351, 823 U.N.T.S. at 234, 236. See also Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (codified at 19 U.S.C. §§ 2601-2613) (implementing the UNESCO Convention in the United States).

127. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 567 (1995).

128. *Id.* at 561-62, 566.

129. *Id.* at 567.

130. John Henry Merryman, “Protection” of the Cultural “Heritage”?, 38 AM. J. COMP. L., (Supplement) 513, 529 (1990).

Cultural property law and theory are increasingly used as a way for groups to seek property law protections for their cultural heritage. Native American groups have used trademark rights in tribal symbols.¹³¹ Mardi Gras Indians—the African American groups which have taken their culture from Native American groups near New Orleans—have begun using copyright law to receive compensation from the stunning photos taken when the Mardi Gras Indians parade.¹³² Property principles have allowed for the return of Native American objects from certain American museums,¹³³ the protection of sacred sites with easements,¹³⁴ and have used these laws to seek compensation for the taking of their lands, resources, and traditional knowledge.¹³⁵ Tatiana Flessas has described the expansion of the concept of cultural property to encompass fauna, flora, minerals, historical objects, or objects which invoke important national memories, paleontological goods, and items of interest to anthropologists and other specialized researchers.¹³⁶

There exist three main justifications for property ownership.¹³⁷ The first is a libertarian justification that individuals acquire rights in property because of the labor they use to fashion the property.¹³⁸ The second, a utilitarian theory, argues society as a whole benefits from private—not public—rights in some forms of property.¹³⁹ Finally there is the personality theory, which argues that one can produce rights in an object by imposing one's will upon it.¹⁴⁰ Use of the term “property” to describe art and antiquities may be criticized on one level as it may presuppose a market for the objects or the necessity of a market. In an influential call

131. See Phil Patton, *DESIGN NOTEBOOK: Trademark Battle Over Pueblo Sign*, N.Y. TIMES, January 13, 2000, at F1, available at http://www.nytimes.com/2000/01/13/garden/design-notebook-trademark-battle-over-pueblo-sign.html?sec=&spon=&page_wanted=all (recounting how the Zia pueblo has used trademark law to protect a sun symbol the tribe has been using since 1200).

132. See Campbell Robertson, *Want to Use My Suit? Then Throw Me Something*, N.Y. TIMES, March 23, 2010, at A13, available at <http://www.nytimes.com/2010/03/24/us/24orleans.html>.

133. See KATHLEEN S. FINE-DARE, *GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 91-97* (2002).

134. See *United States v. Platt*, 730 F. Supp 318, 323 (D. Ariz. 1990) (granting the Zuni Pueblo a “prescriptive easement” to lands owned by a private rancher which allowed the completion of a sacred Zuni pilgrimage).

135. See Carpenter, Katyal, & Riley, *supra* note 109, at 1025.

136. Tatiana Flessas, *Cultural Property Defined, and Redefined as Nietzschean Aphorism*, 24 CARDOZO L. REV. 1067, 1072-73 (2003).

137. Gerstenblith, *supra* note 127, at 568.

138. LOCKE, *supra* note 80, at Book II, ch. V, §§ 26-27.

139. Radin, *Property and Personhood*, *supra* note 98, at 958.

140. See William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1335-68 (1990).

for a reform of cultural discourse, Lyndel Prott and Patrick O'Keefe argued for a shift from talking about cultural property to discussing cultural heritage.¹⁴¹ As Margaret Jane Radin argues, it may be necessary to develop a scheme of partial or complete commodification of some objects of property and services so as to maximize personal liberty and contextuality.¹⁴²

A number of scholars have argued for strong property rights in cultural objects. John Henry Merryman may be the most notable, arguing that cultural property includes a "limited range of objects that are distinguishable from the ordinary run of artifacts by their special cultural significance and/or rarity," and it "centrally includes the sorts of things that dealers deal in, collectors collect, and museums acquire and display: principally works of art, antiquities, and ethnographic objects."¹⁴³ The 1954 Hague convention describes cultural property by noting "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."¹⁴⁴ An important voice in the archaeology community, Clemency Coggins, has said cultural property "will continue to be a useful term as long as anyone can own parts of the cultural heritage."¹⁴⁵

Yet cultural property has been criticized as well. A rich body of scholarship has examined and even criticized the idea of cultural property.¹⁴⁶ As Edward Rothstein argues, cultural property "illuminates neither the particular culture involved nor its relationship to a current political entity. It may be useful as a metaphor, but it has been more

141. Prott and O'Keefe, *supra* note 4.

142. Radin, *Market-Inalienability*, *supra* note 98, at 1903.

143. John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11, 11-12 (2005).

144. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215. The phrase first appears in the Preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

145. Clemency C. Coggins, *United States Cultural Property Legislation: Observation of a Combatant*, 7 INT'L J. CULTURAL PROP. 52, n. 19 (1998).

146. See, e.g., SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (2005); KATE FITZ GIBBON, WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW (2005); 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 (2008); Sarah Harding, *Defining Traditional Knowledge—Lessons from Cultural Property*, 11 CARDOZO J. INT'L & COMP. L. 511 (2003); Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property Are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597 (2007); Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982).

commonly used to consolidate cultural bureaucracies and state control.¹⁴⁷

Cultural property has difficulty fitting within existing property law and theory. Eric Posner has argued that cultural property is theoretically indistinguishable from other forms of property and we should allow a market-based free exchange in these objects.¹⁴⁸ Posner attributes the protection and repatriation of cultural property to “moral error”:

A starting point is that cultural property, like any form of property, is valuable to the extent that people care about it and are willing to pay or consume or enjoy it. If cultural property is ‘normal’ property, then there is no reason to regulate it, or to treat it as different from other forms of property. In an unregulated market, the people who value it most will buy it.¹⁴⁹

Yet Posner makes a fatal error in assuming the cultural property market is in fact regulated in a meaningful way. The current trade in art and antiquities suffers from tremendous under-regulation because buyers and sellers are not required to transmit important title information when objects are bought and sold.¹⁵⁰ Posner makes another mistake in assuming the most highly valued works of art can be found in museums.¹⁵¹ He fails to appreciate the role museums and cultural shapers play in creating the value of an artwork. A work of art will invariably increase in value when it is on display in New York. Jackson Pollock’s *Mural* was donated to the University of Iowa, but its value and importance may be much higher if the work were to be sold and displayed in New York and elsewhere.¹⁵² His criticism undervalues culture generally. Rosemary Coombe notes that this type of criticism stems from “the origins of the concept in forms of colonial governance, acknowledging its complicity with orientalism, and showing how many, if not most, constructions of tradition and cultural identity were

147. Edward Rothstein, *Antiquities, the World Is Your Homeland*, N.Y. TIMES, May 27, 2008, at E1, available at http://www.nytimes.com/2008/05/27/arts/design/27conn.html?_r=1&pagewanted=all.

148. Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213, 222 (2007).

149. *Id.* at 222.

150. See Derek Fincham, *Fraud on Our Heritage: Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, 37 SYRACUSE J. INT’L L. AND COM. 145, 153-54 (2010).

151. Posner, *supra* note 148, at 225.

152. Rumors Denied of a Pollock Sale in Iowa, ARTINFO, Feb. 6, 2009, <http://www.artinfo.com/news/story/30315/rumors-denied-of-a-pollock-sale-in-iowa/> (last visited May 22, 2010).

reifications that served and continue to serve the interests of settler and colonial elites.”¹⁵³

Instead, we should focus on the cultural aspects of cultural property. Anthropologist Michael F. Brown has called for an increased emphasis on culture in two ways.¹⁵⁴ First, he criticizes the use of law to govern many cultural disputes which “forces the elusive qualities of entire civilizations—everything from attitudes and bodily postures to agricultural techniques—into ready-made legal categories.”¹⁵⁵ Second, he argues legal “rights” are too rigid and limit the network of cultural interests that are shared and transmitted.¹⁵⁶ Brown argues that the “cultural and intellectual commons are at risk, not the cultural expression of indigenous peoples.”¹⁵⁷ Brown takes up the arguments of Lawrence Lessig to show that culture and intellectual property are best seen as forms of creation which are enriched by others, and a collaborative sharing of these ideas leads to better more fruitful expressions and works generally.¹⁵⁸

Over-propertyization may in fact produce disastrous consequences. Brown notes “the difficulty—the near-impossibility . . . of recapturing information that has entered the public domain.”¹⁵⁹ He offers pointed criticism of indigenous peoples’ attempts to control the portrayal of their cultural expression within a property-based framework. For example, he quotes a member of the Klamath Tribe in Oregon: “All this information gets shared, gets into people’s private lives. It’s upsetting that the songs of my relatives can be on the Internet. These spiritual songs live in my heart and shouldn’t be available to just anyone. It disturbs me very much.”¹⁶⁰ Yet these harms are worth the open access and cross-pollination that technology and attention allow. More diverse cultural expressions with a tremendous increase in the number and range of influences create a richer palette for culture-makers to draw on.

153. Rosemary J. Coombe, *Anthropology’s Old Vice or International Law’s New Virtue*, 93 AM. SOC’Y INT’L L. PROC. 261, 265 (1999).

154. MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2004).

155. *Id.* at 217.

156. See Michael F. Brown, *Culture, Property, and Peoplehood: A Comment on Carpenter, Katyal, and Riley’s “In Defense of Property,”* 17 INT’L J. CULTURAL PROP. 569, 573-75 (2010).

157. BROWN, *supra* note 154, at 212-13.

158. See *id.* at 5; see generally LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Vintage Books 2002) (2001).

159. BROWN, *supra* note 154, at xi.

160. *Id.* at 6.

Others have criticized the use of property law to exclude and restrict via ownership and entitlements.¹⁶¹ Naomi Mezey argues that “[t]he problem with using ideas of cultural property to resolve cultural disputes is that cultural property uses and encourages an anemic theory of culture so that it can make sense as a form of property.”¹⁶² She argues “[p]roperty is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things . . . cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable.”¹⁶³ By linking indigenous rights in a property framework, she fears unwanted restrictions in cultural expression: “It is the circulation of cultural products and practices that keeps them meaningful and allows them to acquire new meaning, even when that circulation is the result of chance and inequality.”¹⁶⁴ If we only think in terms of cultural property then we risk suppressing culture: “As groups become strategically and emotionally committed to their ‘cultural identities,’ cultural property tends to increase intragroup conformity and intergroup intransigence in the face of cultural conflict.”¹⁶⁵ By only concerning itself with preservation, cultural property risks minimizing the idea of culture itself:

[T]he 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.¹⁶⁶

Any vibrant set of principles for the governing of objects of culture must account for the vibrancy of culture. And one fatal flaw of using a property framework for too much culture will “tend to sanitize culture, which if it is anything is human and messy, and therefore as ugly as it is beautiful, as destructive as it is creative, as offensive as it is inspiring.”¹⁶⁷ Take Italy for example. Any visitor to Rome is bombarded with crumbling remnants of past empires. Columns, arches, carvings, pieces of important market centers are the rubble foundation for modern Rome. Might Italians be sacrificing progress or development by holding too tightly to some of these remnants? Can there be real tangible benefits

161. See Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004 (2007).

162. *Id.* at 2005.

163. *Id.*

164. *Id.* at 2007.

165. *Id.*

166. *Id.* at 2005.

167. *Id.*

from allowing other cultures and nations to appreciate and even take away some of these pieces of Roman heritage?

This problem of the magnificent but oppressive past forms the basis for cosmopolitan criticisms of cultural property. Kwame Anthony Appiah balances concern for what he calls cultural patrimony with a desire to preserve cultural objects for everyone:

When Nigerians claim a Nok sculpture as part of their patrimony, they are claiming for a nation whose boundaries are less than a century old, the works of a civilization [formed] more than two millennia ago, created by a people that no longer exists, and whose descendants we know nothing about. We don't know whether Nok sculptures were commissioned by kings or commoners; we don't know whether the people who made them and the people who paid for them thought of them as belonging to the kingdom, to a man, to a lineage, to the gods. One thing we know for sure, however, is that they didn't make them for Nigeria.¹⁶⁸

Appiah argues that states act as "trustees for humanity" because these "Nok sculptures belong in the deepest sense to all of us."¹⁶⁹ Cultural property issues are not reserved for individual states or peoples but instead are "an issue for *all* mankind."¹⁷⁰ Appiah shares the criticisms of Brown and Mezey when he argues: "We find ourselves obliged, in theory, to repatriate ideas and experiences."¹⁷¹ One unfortunate example of this might be the attempts by Egypt to copyright its antiquities, in which Egypt would attempt to require royalties whenever certain depictions of monuments were made for commercial purposes.¹⁷² Thinking of aspects of culture as part of a national patrimony might lead to a "hyper-stringent doctrine of property rights" which would harm the interests of "audiences, readers, viewers, and listeners."¹⁷³ His solution is to "fully respond to 'our' art [is] only if we move beyond thinking of it as ours and start to respond to it as art."¹⁷⁴

168. KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 119 (Henry Louis Gates, Jr. ed., W.W. Norton & Company 2006).

169. *Id.* at 120.

170. *Id.* at 121.

171. *Id.* at 129.

172. See Egypt 'to Copyright Antiquities,' BBC, Dec. 25, 2007, <http://news.bbc.co.uk/2/hi/7160057.stm>. (last visited May 24, 2010).

173. APPIAH, *supra* note 168, at 130.

174. *Id.* at 135.

D. *Cultural Property and Stewardship*

In an ambitious recent piece, three authors—Kristen Carpenter, Sonia Katyal and Angela Riley—attempt to show that “indigenous cultural property transcends the classic legal concepts of markets, title, and alienability.”¹⁷⁵ They re-conceive indigenous cultural property claims as a claim involving “peoples” and argue that stewardship should be used to “explain and justify” indigenous property claims involving non-owners.¹⁷⁶ The authors argue that “because cultural property is partially intended to repair the ruptures associated with a history of colonization and capture, it also raises questions about the utility and appropriateness of property law as a remedy for harms suffered by indigenous peoples.”¹⁷⁷ They point to “revolutionary changes” in cultural property which has elevated the “salience of indigenous peoples’ claims” while also inviting criticism.¹⁷⁸ The first shift expanded the definition outward from “cultural property” to “cultural heritage.”¹⁷⁹ The authors contend that cultural property has expanded from the tangible into the intangible.¹⁸⁰ They also point to “the increased visibility of indigenous peoples generally.”¹⁸¹

Carpenter et al. explore the different cultural property protections have been erected in the United States via property law. This includes what they term “American cultural property”¹⁸² and “Indian cultural property.”¹⁸³ Yet they do not offer any real discussion of why they have chosen to label these laws and the objects and practices they protect as “property” rather than heritage. Their efforts, if successful, will likely lead to a more practical short-term appreciation of indigenous claims, while sacrificing clarity for the competing concepts of heritage and property. The authors note that “[c]ultural property’s uncertain place in the property literature flows partly from the inadequacy of traditional property theory to embrace the unique vision it offers.”¹⁸⁴ Cultural

175. Carpenter, Katyal & Riley, *supra* note 109, at 1027.

176. *Id.* at 1022.

177. *Id.* at 1033.

178. *Id.*

179. *Id.* at 1033-34; *see also* Manlio Frigo, *Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?*, 86 INT’L REV. RED CROSS 367, 369 (2004).

180. Carpenter, Katyal & Riley, *supra* note 109, at 1034.

181. *Id.* at 1034-35; Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1131-38 (2005).

182. Carpenter, Katyal, and Riley, *supra* note 109, at 1036.

183. *Id.* at 1036 (*citing* Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (2006)).

184. *Id.* at 1038.

property is “at heart, a form of property, but that the existing theoretical framework for cultural property is insufficient to capture its normative and doctrinal possibilities.”¹⁸⁵ The authors reason that “cultural property protection reflects, in part, the now pervasive view that property is a bundle of relative, rather than absolute, entitlements, including limited rights to use, alienate, and exclude.”¹⁸⁶ They put forward an idea of cultural stewardship as a model. This “trusteeship in cultural property is often overlooked [. . .] because it indirectly suggests that while a tribe may act as a fiduciary on behalf of its own tribal members, a much wider framework of beneficiaries stand to benefit from the protection of the tribe’s cultural property.”¹⁸⁷

All of these criticisms given by Posner, Brown, Mezey, and Appiah view property the same way, according to Carpenter et al., because “they all converge on a similar underlying view of property itself as fundamentally defined by ownership—with its rights of alienability and exclusion and its norms of commodification and commensurability.”¹⁸⁸ Thus, there emerges a tension between property law “which focuses on the utility of markets, exclusion, and commodities, and cultural property, which necessarily includes interests that are sometimes inexplicable in market terms.”¹⁸⁹ The bonds that groups create with objects can be very powerful. Collectively, peoples’ connections to an object or monument creates group rights which regulate that connection. As John Moustakas argues:

The absence of works representing an “irreplaceable cultural heritage” is psychologically intolerable. Just as the destruction of the Statue of Liberty would diminish the bond between immigrants who shared the same first glimpse of the United States, or the toppling of Jerusalem’s Wailing Wall would wound the spirit of world Jewry, Lord Elgin’s removal of the Parthenon Marbles injures Greek groupness by having emasculated the greatest of all Greek art—the Parthenon. By destroying the Greeks’ mana, the embodiment of their highest humanistic hopes and a measure of their existence, Lord Elgin harmed the Greek grouphood by irreparably diminishing an integral part of the celebration of “being Greek.”¹⁹⁰

185. *Id.* at 1046.

186. *Id.* at 1066.

187. *Id.* at 1074.

188. *Id.* at 1046.

189. *Id.*

190. John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1195-96 (1989).

The better concept to describe this relationship is heritage, not property. Kathryn Last has argued that cultural property” is a restrictive concept” and we should focus instead on “cultural heritage.”¹⁹¹

III. HERITAGE: THE LAWS GOVERNING MULTIGENERATIONAL DISPUTES

Heritage is the physical and intangible elements associated with a group of individuals which are created and passed from generation to generation. Tension between different conceptions of heritage and its disposition often leads to heated and contentious arguments.¹⁹² Lyndel Prott notes that the “legal definition of the cultural heritage is one of the most difficult confronting scholars today.”¹⁹³ But this problem, one in fact shared by the concept of property as well, must not prevent us from looking at the concept and using it to craft solutions to disputes involving group rights or generation-spanning controversies. Cultural heritage carries “contrasting values to different groups in our contemporary society: cultural and heritage values, social and family rights and prerogatives, scholarly and educational values, even monetary and economic values.”¹⁹⁴ When the identity of a people becomes linked to an object, that group can acquire ownership rights in the object, which may even make it inalienable, particularly when we consider future generations who might depend on a connection with the object to construct their own identity.¹⁹⁵ As such, there exists a substantial amount of subjectivity in weighing whether any set of elements should be preserved and bestowed on future generations. Some scholars have criticized the concept—John Henry Merryman has criticized the term “heritage” because he takes it to imply a right of repatriation, which may not be justified by law or policy.¹⁹⁶ Yet we must be careful to craft law and policy which reflects the actual structure of the law.

Janet Blake notes that cultural heritage “has itself been imported from other academic disciplines such as anthropology and archaeology without incorporating the theoretical background which led to its

191. Kathryn Last, *The Resolution of Cultural Property Disputes: Some Issues of Definition*, in 7 THE PERMANENT COURT OF ARBITRATION/PEACE PALACE PAPERS: RESOLUTION OF CULTURAL PROPERTY DISPUTES 53, 53 (Kluwer Law Int’l 2004).

192. Michael Kimmelman, *When Ancient Artifacts Become Political Pawns*, THE NEW YORK TIMES, Oct. 23, 2009, <http://www.nytimes.com/2009/10/24/arts/design/24abroad.html> (last visited Jan. 16, 2010).

193. PROT, *supra* note 2, at 224.

194. Barbara J. Winter, *New Futures for the Past: Cooperation between First Nations and Museums in Canada*, 1995 U. BRI. COLUM. L. R. 29, 35 (1995).

195. Gerstenblith, *supra* note 127, at 570.

196. Merryman, *supra* note 130, at 522.

development.”¹⁹⁷ In fact, much of cultural heritage involves a choice—one which must be ratified by successive generations—about which elements to cherish and maintain and which to let lapse.¹⁹⁸ Blake rightly points out that we have seen a sharp increase in what has been described as cultural heritage. The concept originally included only works of art and “high culture,” but has expanded to include cultural objects, intangible creations, and even scientific knowledge.¹⁹⁹ The work of UNESCO on expressions of traditional culture and folklore have expanded the definition of what we consider cultural heritage such that physical connections are not the only salient aspect any longer.²⁰⁰ Heritage theory also offers a way to think about our natural environment. There is also a connection between cultural heritage and natural resources, “[t]hat the natural heritage is global is now beyond dispute. Fresh water and fossil fuels, rain forests and gene pools are legacies common to us all and need all care. Cultural resources likewise form part of the universal heritage.”²⁰¹ Much connects cultural heritage with biological diversity; both resources are nonrenewable and important to the cultural flourishing of many societies.²⁰²

Blake unpacks the elements of cultural heritage as reflected in international law. She finds the common elements are first, a “form of inheritance to be kept in safekeeping and handed down to future generations,” and second, a “linkage with group identity.”²⁰³ This notion of inheritance and bestowing offer a rich theory with a great deal of merit. Blake notes that “traditionally, ‘cultural property’ has generally been the term of art employed in international law to denote the subject of protection.”²⁰⁴ And yet the use of the term property “carries with it a range of ideological baggage which is difficult to shed when using the term in relation to the cultural heritage.”²⁰⁵

Heritage is a web of interconnected subjective interests. It is the manifestation of culture, a reminder of past cultures, and a tool by which

197. Blake, *supra* note 3, at 63-64.

198. *Id.* at 68.

199. *Id.* at 72.

200. *Id.* at 72-73.

201. DAVID LOWENTHAL, *THE HERITAGE CRUSADE AND THE SPOILS OF HISTORY* 228 (Cambridge University Press 1998).

202. Janet Blake, *On Defining the Cultural Heritage*, 49 INT’L & COMP. L.Q.61, 71 n. 44 (2000)

203. Blake, *supra* note 3, at 83-84.

204. *Id.* at 65.

205. *Id.*

cultures ebb and flow and change over time.²⁰⁶ Heritage produces different characteristics and relationships between other objects and groups of people than property does. By examining these different relationships we can see that heritage can be separated from property. In so doing we are left with a richer understanding of property itself, but also a framework for the preservation and judicial recognition of heritage. By exposing the obvious and subtle differences between heritage and property we can expose the gaps and shortcomings in the discourse of the law but also expose lacunae where the current law does not touch heritage. Heritage matters because of its connections made with the present; “heritage is sanctioned not by proof of origins but by present exploits . . . gauged not by critical tests but by current potency.”²⁰⁷ As Derek Gilman points out, “Heritage means different things to different people, even within the same culture. Whether led by temperament or agenda, some incline towards myth while others focus on the historically reliable. Heritage is not an objective fact about the world but a social construction.”²⁰⁸

A. *The Core Concept of Heritage*

To solve the difficult problems of subjectivity and definition embedded within the subjective concept of heritage, we must first focus on the core concept of cultural heritage.²⁰⁹ Aldo Leopold laid the foundation for the modern environmental movement by sketching out the essential principles of environmentalism: first, the interconnectedness of people and their physical environment, and second, the importance of the unique characteristics of each object.²¹⁰ This article defines heritage in a similar way, first by examining the connection between people and physical and intangible elements, and second the passing of these elements and connections from generation to generation.

This bestowing of ideas and objects creates a different kind of value which property law is badly equipped to order. As Christopher Byrne argues, “there is a fundamental difference between goods that are

206. As Derek Gillman points out, “we are what we are, because we were what we were.” DEREK GILLMAN, *THE IDEA OF CULTURAL HERITAGE* 52 (2d. ed., Cambridge University Press 2010) (2006).

207. Lowenthal, *supra* note 201, at 127.

208. Gillman, *supra* note 206, at 44.

209. Last, *supra* note 191, at 59.

210. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1986). Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature’s Boundaries*, 73 S. CAL. L. REV. 927, 943-52, 981-86 (1990); Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299, 301, 309, 350 (1995).

standardized and easily replaced, and those that are vested with emotional, spiritual, or cultural qualities”; heritage ideas and objects “retain unique and transcendent cultural significance which imparts inherent value to them.”²¹¹ This value must be tied to “human experience,” because as Sarah Harding argues, “[t]he suggestion that a . . . [Leonardo da Vinci] manuscript has value independent of human valuing or human experience is incoherent; cultural heritage is valuable precisely because it is an expression or an intimate part of human experience.”²¹² Much like “an art theorist would probably not attempt to define ‘art’ solely in terms of a physical objects hypothesis. . . . The same can be said of ‘cultural heritage.’”²¹³ It is this connection to the human experience which must be the core around which heritage can be meaningfully defined.²¹⁴ We must look beyond the physical description of objects to their connection with people.²¹⁵ In some cultures, certain objects lose their value without these associations; “the sacredness of the ritual is violated if the objects are misused.”²¹⁶

Gael Graham has noted that international law in recent decades has focused on the idea of regulating “a common cultural heritage.”²¹⁷ Harding proposes that cultural heritage is “anything that is of some cultural importance.”²¹⁸ Lyndel Prott has argued that heritage “implies something cherished which is to be handed on to succeeding generations.”²¹⁹ As a consequence, the use of the term “cultural property” has been criticized. Property “has acquired a wide range of emotive and value-laden nuances.”²²⁰ Karen Warren has argued that “[b]y conceiving the dispute over cultural heritage issues as a dispute over properties, and by focusing the debate over cultural properties on the question of rights and rules governing ownership . . . the dominant perspective keeps in place a value-hierarchical, dualistic, rights/rules

211. Christopher S. Byrne, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects*, 8 J. ENVTL. L. & LITIG. 109, 118 (1993).

212. Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 317 (1999).

213. Gregory Tolhurst, *A Comment on the Return of Indigenous Artefacts*, 3 J. ART, ANTIQUITY & L. 15, 23 (1998).

214. Flessas, *supra* note 136, at 1070-71.

215. Blake, *supra* note 3, at 84.

216. Harding, *supra* note 212, at 312; Moustakas, *supra* note 190, at 1195 (“What some groups see as a cultural artifact, other groups see as a living thing which enables them to achieve confidence in themselves and, thus, able to imagine their future.”).

217. Gael M. Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 INT’L LAW. 755, 755-56 (1987).

218. Harding, *supra* note 212, at 297.

219. Prott, *supra* note 2, at 226.

220. Prott and O’Keefe, *supra* note 4, at 309.

ethical framework for identifying what counts as a worthwhile value or claim, for assessing competing claims, and for resolving the conflicts among competing claims.”²²¹ That nicely highlights the fatal flaws of property with respect to certain claims. Disputes involving cultural objects bring to bear “cross-cultural claims that cannot be addressed solely by reference to values that have traditionally been embedded within the legal commentaries on property.”²²² Cultural property connotes control in the form of property rights. Yet “this way of delineating an individual or group’s relationship to a thing may be quite alien in other societies.”²²³ This has led some to argue that cultural objects which carry deep connections with a community should be inalienable.²²⁴ Joseph Sax has argued “the fate of some objects is momentous for the community at large.”²²⁵ In addition, some cultures value different kinds of connections between people and objects. For example, the English Court of Appeal has held that an Indian temple idol can be accorded legal personality in Indian law to enable the temple to seek its return.²²⁶

This connection to a culture forms an important core concept in defining the concept of heritage. Use of the term “culture” has been criticized as well. There exists a disconnect between the way legal systems envision property and culture. In some cases, the idea of property can dominate culture. Roger Mastalir argues “[c]ultural property stripped of cultural significance would be merely property, more or less beautiful or rare and more or less valuable on the basis of that beauty or rarity only.”²²⁷ Patty Gerstenblith has argued that “‘culture describes the relationship between a group and the objects it holds important. The concept of ‘property’ in its traditional sense of focusing on legal rights of individuals to possession of objects is foreign to this notion.”²²⁸ For example, we can think about how individual

221. KAREN WARREN, REINVENTING THE MUSEUM: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON THE PARADIGM SHIFT 303, 315 (Gail Anderson ed., 2004).

222. Flessas, *supra* note 136, at 1068 n.3.

223. Prott and O’Keefe, *supra* note 4, at 310.

224. Moustakas, *supra* note 190, at 1184 (arguing “[t]he nexus between a cultural object and a group is the essential measurement for determining whether group rights in cultural property will be effectuated to the fullest extent possible—by holding such objects strictly inalienable from the group”).

225. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 4 (2001).

226. *Bumper Dev. Corp. v. Comm’r of Police of the Metropolis*, [1991] 1 WLR 1362.

227. Roger W Mastalir, *Proposal for Protecting the Cultural and Property Aspects of Cultural Property under International Law*, 16 FORDHAM INT’L L.J. 1033, 1039 (1992).

228. Gerstenblith, *supra* note 127, at 567.

empowerment allows for heritage preservation.²²⁹ Local knowledge and appreciation is integral to this process. Local knowledge and participation can be an important aspect of the zoning process, yet the law often ignores this knowledge.²³⁰ Scholars have long argued that individual residents need to pay attention to the planning decisions of their own cities and to think about what makes a city successful.²³¹ Heritage rights and objects suffer from insufficient judicial recognition, prompting some commentators to argue for an expansion of property to encompass some of the characteristics of property.²³² But this expansion only serves to dilute and make incomprehensible the ideas of heritage and property, which at their core are competing concepts.²³³ Heritage rights and restrictions are recognized in some cases. Owners of property that might be subject to protection and restriction to preserve historic character may be expected to anticipate these restrictions.²³⁴ Conservation land trusts have been used to fill the gaps in environmental law.²³⁵

B. *Levels of Heritage*

We can look at cultural heritage on a number of levels. There are instances where objects and classes of objects can be tethered to an individual, to communities, or even to smaller groups which transcend modern borders. Take for instance the national recognition of Native American heritage.

Traditionally, the federal government has failed to protect Native American lands.²³⁶ In *United States v. Sioux Nation of Indians* the

229. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992) (arguing that grass-roots efforts to promote environmental justice are more likely to produce results than a legal-scientific approach).

230. Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 *IOWA L. REV.* 1057 (1990).

231. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1965).

232. Arnold, *supra* note 13, at 307 (arguing that, historically, judicial recognition of land has allowed an owner of real property to receive just compensation when government regulation prohibits economic use, but not when the regulation permitted economic use).

233. Carpenter, Katyal & Riley, *supra* note 109, at 1025.

234. See *Dist. Intown Props. Ltd. P'ship v. Dist. of Columbia*, 23 F. Supp. 2d 30, 38 (D.D.C. 1998), *aff'd*, 198 F.3d 874 (D.C. Cir. 1999).

235. Mary Christina Wood & Matthew O'Brien, *Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement*, 27 *STAN. ENVTL. L.J.* 477, 536-38 (2008).

236. Carol M. Rose, *Possession as the Origin of Property*, 52 *U. CHI. L. REV.* 73, 85-86 (1985).

Supreme Court awarded \$17.1 million plus interest—for a total of \$122.5 million—for the wrongful taking of the Black Hills.²³⁷ The Lakota people rejected the ruling, and the money currently sits in an interest-bearing account. Instead, they want the return of the Black Hills itself.²³⁸ Alexandra New Holy has argued that:

[t]he strength of the Lakota in defining themselves as Lakota in relationship to a lived physical, social, and spiritual relationship with Paha Sapa [the Lakota name for the Black Hills], as defined by treaties, can be demonstrated by their refusal to accept monetary compensation without a return of Black Hills lands. In order to know who they are, they must remember and uphold their spiritual covenant with Paha Sapa.²³⁹

This lack of recognition for Native American heritage continues in other forms. Nell Jessup Newton has argued that “the fifth amendment takings clause affords less protection for Indian land than for other land.”²⁴⁰

Yet the federal government, applying a heritage framework, has begun to correct its relationship with Native American Groups. The Native American Graves Protection and Repatriation Act (NAGPRA)²⁴¹ stands as a model heritage law framework which has allowed cooperation and dialogue between Native Americans and the federal government. It addresses the theft and destruction of Native American cultural objects and remains by fostering relationships between the federal government, museums, archaeologists, and Native Americans.²⁴² It vests control of Native American human remains and objects from federal or tribal lands with the tribes. It requires federally funded institutions to inventory Native American human remains and other objects and allows for repatriation of objects.²⁴³

Carpenter et al. point out that property law allowed for the return of Inuit remains which had been mounted and displayed at the American

237. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980).

238. John P. La Velle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40, 42 (2001).

239. Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317, 352 (1998).

240. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 255 (1984).

241. 25 U.S.C. § 3005(a) (2000).

242. 136 Cong. Rec. S17174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

243. NAGPRA does have limits, including little “complete control over cultural symbols” for example. Brown, *supra* note 156, at 587.

Museum of Natural History.²⁴⁴ Yet they offer no justification for classifying NAGPRA as a property-based remedy. In fact, NAGPRA should properly be considered “heritage law,” because it respects and accommodates the web of interests engendered by a piece of material heritage. After all, NAGPRA has not been challenged by Takings Clause claims because museums could never have acquired good title to human remains or grave objects. These objects are inalienable pieces of indigenous heritage. Section 3001(13) of NAGPRA states the Act does not violate the Takings Clause because museums will not have given up lawfully held property. Patty Gerstenblith has noted that “human remains and funerary objects are not subject to private ownership . . . provisions dealing with unassociated burial objects, sacred objects and objects of cultural patrimony are also carefully drafted so that they apply only to objects that were owned communally by a Native American tribe or Native Hawaiian organization.”²⁴⁵ Similar provisions can be found elsewhere in the law,

In the United States, the heir or next of kin has traditionally not had a property right in the dead body but rather a right in the nature of a custodian to hold and protect the body until burial, to determine its disposition, to select the place and manner of burial and, in the case of expressed wishes stated in a will, the executor has the duty of complying with the deceased’s wishes pertaining to manner of disposition of remains.²⁴⁶

The drafters of NAGPRA were careful to use some property terms, but also carefully avoided them in other circumstances. For example, in the case of the excavation of remains or cultural objects found on tribal or federal lands, those objects are regulated via either “ownership or control.”²⁴⁷ Also, federal agencies or museums with “possession or control” over Native American objects must compile an inventory.²⁴⁸ Yet, the repatriation provisions for human remains avoid use of

244. Carpenter, Katyal, & Riley, *supra* note 109, at 1030-31 (citing KENN HARPER, GIVE ME MY FATHER’S BODY: THE LIFE OF MINIK, THE NEW YORK ESKIMO 24-25 (2001)).

245. Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 435 (2003).

246. Cohan, John Alan, *An Examination of Archeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)*, 27 ENVIRONS ENVTL L. & POL’Y J. 349, 402-03 (2003).

247. 25 U.S.C. § 3002(a) (2006).

248. *Id.* § 3003(a).

“ownership or title.”²⁴⁹ American law treats these remains as heritage—they cannot be owned.²⁵⁰

NAGPRA has criminal prohibitions, and defendants have attempted to challenge convictions under NAGPRA based on a traditional property-based constitutional principles. Yet courts have recognized that NAGPRA protects objects of Native American *heritage*, not property. For example, in *United States v. Corrow*, the defendant challenged his indictment for selling Navajo ceremonial masks, a prohibited act under NAGPRA.²⁵¹ During the federal district court trial, Corrow claimed the statute was unconstitutionally vague, because the terms “cultural items” and “cultural patrimony” were not sufficient to provide him fair notice that he was violating its provisions.²⁵² The Federal district court disagreed. The void for vagueness analysis looks at the defendant’s particular conduct, and Corrow had knowledge of Navajo culture and traditions.²⁵³ He knew that the buying and selling of bird feathers was probably illegal.²⁵⁴ The defendant also argued the criminal provision would lead to arbitrary and discriminatory enforcement, because law enforcement officers would be unable to determine which objects might fit under the statutory definitions.²⁵⁵ The court dismissed this argument, as testimony of a United States Department of the National Park Service employee stated that law enforcement personnel frequently consult with tribes to determine if an object may be contested.²⁵⁶ Corrow raised the same issue on appeal.²⁵⁷ He relied on conflicting Navajo testimony regarding the importance of the ceremonial masks at issue.²⁵⁸ However, the Tenth Circuit Court of Appeals rejected his argument. He had “fair notice” that the masks “could not be bought and sold absent criminal consequences.”²⁵⁹ Once again, the court analyzed the specific conduct of the defendant. The void for vagueness analysis requires that a statute “convey to those individuals within its purview what it purports to prohibit and how it will punish an infraction.”²⁶⁰ Here, the defendant had frequently bought and sold Native American objects, and was on notice

249. *Id.* § 3005(a)(1).

250. *See* 43 C.F.R. § 10.10 (2005).

251. *United States v. Corrow*, 941 F. Supp. 1553, 1564-67 (D. N. Mex. 1996).

252. *Id.* at 1559.

253. *Id.* at 1561-62.

254. *Id.* at 1565.

255. *Id.* at 1559.

256. *Id.* at 1564-67.

257. *United States v. Corrow*, 119 F.3d 796, 799 (10th Cir. 1997).

258. *Id.* at 801.

259. *Id.* at 804.

260. *Id.* at 802.

that his behaviour was criminal, even if he was not aware of the specific provision under NAGPRA which may have been applicable.²⁶¹ And though he did not make this argument in his appeal, the defendant had a very different conception of how these objects and practices should be used. The law precludes the commodification of ceremonial masks, and as a result his conviction was upheld.

Likewise, in *United States v. Tidwell*, the defendant appealed his conviction for trafficking in objects in violation of NAGPRA.²⁶² Tidwell argued that the vagueness of the cultural patrimony definition rendered the statute unconstitutionally vague.²⁶³ As the terms used by NAGPRA were established by oral history, “it was impossible for him to have fair notice of his wrongful conduct.”²⁶⁴ The court did not look with favour on Tidwell’s argument. His background knowledge as a dealer in Native American Art put him on notice of NAGPRA’s prohibitions.²⁶⁵

NAGPRA presents some complicated dilemmas. When members of a Hopi tribe announced they would use repatriated religious objects in daily ceremonies, it produced “a disheartening prospect for curators who dedicate their working lives to such objects’ conservation.”²⁶⁶ Steven Vincent summarizes the major critique of NAGPRA, “[i]t is the affirmation of group—or tribal—rights over the imperatives of science and the free transmission of knowledge that outrages so many critics of NAGPRA.”²⁶⁷ Also, Naomi Mezey argues that repatriated objects will prevent further creativity by limiting the “authentic” ways one may express her identity.²⁶⁸ Cultural property laws will also render “cultural stuff off limits to outsiders” and will mean that “Indian stuff belongs to Indians.”²⁶⁹ She argues NAGPRA is a “radical” law which “obscures cultural movement, hybridity, fusion, and the potential for competing claims to cultural objects . . . [and] also dissuades imitation, discussion, and critique between groups by making a group’s cultural stuff off limits to outsiders.”²⁷⁰ These are hard questions, and there will be winners and losers when important cultural values conflict. Yet NAGPRA offers a model of how the law can value and respect heritage, which may mean

261. *Id.* at 804.

262. *United States v. Tidwell*, 191 F.3d 976, 978-79 (10th Cir. 1999).

263. *Id.* at 979.

264. *Id.* at 980.

265. *Id.*

266. Brown, *supra* note 154, at 17.

267. Steven Vincent, *Indian Givers*, in *WHO OWNS THE PAST* 33, 39 (Kate Fitz Gibbon ed., 2005).

268. Mezey, *supra* note 161, at 2017.

269. *Id.* at 2018.

270. *Id.*

sacrificing property principles in some cases. There are other examples of changes which have been dictated by the inability of property law to accommodate heritage.

The Watts Towers in Los Angeles are a series of towers and structures. Simon Rodia was an Italian immigrant and construction worker who had moved to Watts in 1921; he built the towers around his home for the next 34 years using found objects.²⁷¹ His raw materials were objects such as shells, tiles, bottles, pipes, bits of plates and just about anything else which struck his eye.²⁷² The towers may be “one of the most powerful works of 20th-century American art, yet because of their location and their humble creator they “have been in a perpetual state of crisis for more than half a century.”²⁷³ A reporter visiting the towers in 1965 described them:

[a] scalloped wall that is completely covered with mosaic runs along the street, and from outside it half a dozen spires are visible. Inside it, on the triangular piece of ground that was formerly Rodia’s yard, a visitor can see three large towers, four smaller towers, two or three fountains, some bird-baths and decorated pathways, a model of a ship, and an openwork gazebo.²⁷⁴

These towers, created by one untrained laborer with a vision have taken on new meaning, and have helped to build community and challenge common perceptions of the Watts area of Los Angeles.²⁷⁵ Attempts to tear down the structure provided the spark which led California to enact its own moral rights rules.²⁷⁶ This moral rights framework for artists views works of art not as mere goods, but values the intent of the artist which can follow the work after an artist has sold or created their work. It recognizes the heritage embedded in certain classes of art, and fosters protection and the bestowing of that work on future generations.

Yet heritage may be called upon in other circumstances as well. On December 19, 2007, Alex Salmond, Scotland’s First Minister, stated “I find it utterly unacceptable that the Lewis Chessmen are scattered around. . . . And you can be assured that I will continue campaigning for

271. Hector Tobar, Watts Towers—World’s Treasure, L.A.’s Secret, L.A. TIMES, May 28, 2010, at A2, available at <http://www.latimes.com/news/local/la-me-tobar-20100528,0,4696688,full.column>.

272. LEON WHITESON, THE WATTS TOWERS 23 (Mosaic Press 1990) (1989).

273. Christopher Knight, *The Watts Towers’ Perpetual State of Crisis*, May 28, 2010, L.A. TIMES CULTURE MONSTER (2010), <http://latimesblogs.latimes.com/culturemonster/2010/05/the-watts-towers-perpetual-state-of-crisis.html> (last visited June 16, 2010).

274. Calvin Trillin, *I Know I Want to Do Something*, NEW YORKER, May 29, 1965, at 72.

275. Whiteson, *supra* note 272, at 30-31, 40.

276. Sax, *supra* note 225, at 23-24.

a united set of Lewis Chessmen in an independent Scotland.”²⁷⁷ This statement is sure to gain support among those Scots who feel England has been harassing and plundering Scotland for centuries. The claim for the removal of all the chessmen to Scotland was surely intended to strengthen the notion of an independent and historically separate Scotland. Yet it stands as a good example of the kind of irresponsible and base nationalistic claim that does a disservice to legitimate repatriation claims. The Lewis chessmen are a medieval collection of 93 pieces forming four or five complete sets.²⁷⁸ They were most likely carved in Norway in the 12th century, and then were likely taken by a merchant on their way to nobles in Ireland.²⁷⁹ Salmond’s policy has some troubling consequences for Scotland’s museums. Its collections are packed with objects taken home by Scots during the colonial era, and many of these objects were hardly taken in a properly bargained for exchange. These institutions would surely have to quickly dispose of much of their collection. In fact, the chessmen were legally acquired, and there is absolutely nothing to suggest they were wrongfully acquired. If we were to return these objects to their homeland where they were created, they would not return to the Outer Hebrides, but rather to Norway. This conflict and discussion of cultural property often manifests itself in the choice of terminology. The idea of property has a long history, with a great deal of important legal and philosophical underpinnings. Heritage has not been accorded the same rich history, however. Yet applying the legal concepts of property causes difficulties when applied to cultural heritage when rules guiding the protection of current possessors, the concept of “ownership,” and the dangers of over-propertization and commoditization.²⁸⁰

277. Ian Jack, *Our Chessmen Were Taken, but Scotland Is Heaving with Stolen Art*, THE GUARDIAN, Jan. 12, 2008, at 36, available at <http://www.guardian.co.uk/comment/isfree/2008/jan/12/britishidentity.uk>. Jack argues:

It would be easy to accuse Salmond of nothing more than opportunism, adding to his reputation for that streak. In fact, he has been sporadically campaigning for the return of the Lewis Chessmen for 10 years. My explanation is that his demand comes out of a previous era of nationalism that was quite blind to Scotland’s history as England’s imperial partner—needed to be blind to it, because in terms of wealth it was Scotland’s golden age and inconvenient to anti-English grievance. I had thought that the grievance mode was passing. But not yet, not yet.

Id.

278. Neil Stratford, *THE LEWIS CHESSMEN AND THE ENIGMA OF THE HOARD*, (British Museum Press) (1997).

279. *Id.*

280. Prott and O’Keefe, *supra* note 4, at 309-12.

Choosing to apply either a heritage or property framework may betray certain normative preferences.

C. *Cultural Property v. Cultural Heritage*

A number of writers have examined the differences between ideas of “cultural property” and “cultural heritage.”²⁸¹ There has been little consensus for the precise boundaries of both concepts.²⁸² Authors will often use the terms property and heritage interchangeably.²⁸³ Cultural heritage connotes an idea of permanence. As Janet Blake notes, it is a “form of inheritance to be kept in safekeeping and handed down to future generations.”²⁸⁴ Cultural property has a limited scope as it can prove “inadequate and inappropriate for the range of matters covered by the concept of the cultural heritage.”²⁸⁵ Cultural property has been described as a “sub-set,”²⁸⁶ a larger collection of cultural heritage which is “capable of encompassing this [within its] much broader range of possible elements, including the intangibles.”²⁸⁷ Language can also present a difficult problem, “Rather than a mere shortcoming arising from different language versions conveying the same concept, this becomes a more substantive matter . . . cultural property is commonly translated into terms such as ‘biens culturels,’ ‘beni culturali,’ ‘bienes culturales,’ ‘Kulturgut,’ and ‘bens culturels.’” These terms have “significantly different legal meaning in the relevant domestic legal systems.”²⁸⁸ Lowenthal argues that cultural heritage law suffers because it is stretched too thin: “Too much is asked of heritage. In the same breath we commend national patrimony, regional and ethnic legacies, and a global heritage shared and sheltered in common. We forget that these aims are usually incompatible.”²⁸⁹ Gregory Tolhurst argues that cultural properties are physical objects, and cultural heritage are the intangible expressions of culture.²⁹⁰

281. See Prott and O’Keefe, *supra* note 4; Roger O’Keefe, *The Meaning of ‘Cultural Property’ Under the 1954 Hague Convention*, 46 NETHERLANDS INT’L L. REV. 26 (1999); Blake *supra* note 3; Flessas, *supra* note 136; Frigo, *supra* note 179.

282. Blake, *supra* note 3, at 66.

283. Etienne Clement, *Some Recent Practical Experience in the Implementation of the 1954 Hague Convention*, 3 INT’L J. CULTURAL PROP. 11 (2007).

284. Blake, *supra* note 3, at 83.

285. Prott and O’Keefe, *supra* note 4, at 319.

286. Frigo, *supra* note 179, at 369.

287. Blake, *supra* note 3, at 67.

288. Frigo, *supra* note 179, at 370.

289. Lowenthal, *supra* note 201, at 227.

290. Tolhurst, *supra* note 213, at 24. He argues:

Cultural heritage arguably concerns itself with those attributes of culture that are intangible, such as certain ideas, practices or behaviour. These are the

To allay this tension, we can examine the concepts of cultural heritage and cultural property in international instruments. The first use of the term “cultural property” came in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.²⁹¹ This was followed in 1970 by the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.²⁹² Similar language is also found in the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, of 26 March 1999.²⁹³ Also using the term is the European Convention on Offences Relating to Cultural Property.²⁹⁴ However, there are other international conventions which apply other terms. The Unidroit Convention on Stolen or Illegally Exported Cultural Objects replaces “property” with “objects.”²⁹⁵ Many commentators, however, were still using term “cultural property” when referencing it.²⁹⁶

Yet other instruments refer to heritage. The 1992 European Convention on the Protection of the Archaeological Heritage, which replaced a 1969 version with the same name,²⁹⁷ and the 1985 Convention

things that are of real benefit to the human race and which help advance the human race. Moreover it is these matters that the human race generally can claim an interest in. Not everyone would define ‘cultural heritage’ in that way, many definitions would include not only the intangible but also the tangible.

Id.

291. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter the Hague Convention].

292. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 [hereinafter UNESCO Convention].

293. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Hague Cultural Property Protocol II].

294. European Convention on Offences Relating to Cultural Property, June 23, 1985, 25 I.L.M. 44.

295. UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

296. Frigo, *supra* note 179, at 368 (citations omitted).

297. European Convention on the Protection of the Archaeological Heritage (Revised), Jan. 16, 1992, 1966 U.N.T.S. 305. Article 1 defines “archaeological heritage:”

The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study.

To this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs:

the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;

for the Protection of the Architectural Heritage of Europe,²⁹⁸ are two examples. UNESCO also supported the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage soon after the earlier 1970 instrument.²⁹⁹ And more recently, the 2001 UNESCO Convention for the Protection of Underwater Cultural Heritage,³⁰⁰ the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage,³⁰¹ and the 2003 UNESCO Declaration Concerning the

for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and

which are located in any area within the jurisdiction of the Parties.

The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water.

Id.

298. Convention for the Protection of the Architectural Heritage of Europe, Oct. 3, 1985, 1496 U.N.T.S. 147, 25 I.L.M. 380. Article 1 of the Convention defines “architectural heritage:”

1. Monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings;

2. Groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units;

3. Sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest.

Id. at 381.

299. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37. Article 1 defines “cultural heritage:”

Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

Sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Id.

300. Convention on the Protection of Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40.

301. Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> [hereinafter Intangible Convention].

Intentional Destruction of Cultural Heritage³⁰² all focus on heritage. These international instruments all combine to “[reflect] both the growing concern in environmentalist issues in its integration of the cultural with the natural heritage as well as the concept of a ‘common heritage of mankind’ which had been developing at this time in relation to seabed mineral resources.”³⁰³

Many have strongly criticized the efforts of indigenous groups to assert property rights over their traditional cultural resources, arguing that culture should be free from restrictions, and should be seen as a commons. Naomi Mezey argues that “the idea of property has so colonized the idea of culture that there is not much culture left in cultural property.”³⁰⁴ If indigenous peoples and culture-creators everywhere resort to over-propertization, then we risk the exclusion of future generations of culture-creators who rely on what has come before to promote the free flow of cultural expression and foster creativity. Rosemary Coombe has argued indigenous traditional knowledge must be protected because “most of the worlds’ poorest people depend upon their traditional environmental, agricultural, and medicinal knowledge for their continuing survival, given their marginalization from market economies and the inability of markets to meet their basic needs of social reproduction.”³⁰⁵

The Indian Arts and Crafts Act (IACA)³⁰⁶ attempts to protect authentic Native American products. The legislative history highlights the magnitude of the problem as “counterfeit Indian products were responsible for an annual loss ranging from forty to eighty million dollars per year from the Indian arts and crafts industry in the United States.”³⁰⁷ The IACA does not treat the objects themselves as heritage, but rather respects and promotes traditional arts and crafts, allowing this process to be treated as heritage so that present and future generations

302. UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Oct. 17, 2003, *available at* http://portal.unesco.org/en/ev.phpURL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html.

303. Blake, *supra* note 3, at 62.

304. Mezey, *supra* note 161, at 2005.

305. Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development*, 17 FLA. J. INT’L L. 115, 115 (2005).

306. Indian Arts and Crafts Act of 1935, ch. 748, 49 Stat. 891 (current version at 25 U.S.C. §§ 305, 305a, 305b, 305c, 305d and 18 U.S.C. § 1159 (2010)); Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (codified as amended at 25 U.S.C. §§ 305, 305d, 305e (2010)).

307. Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 339 (2002).

can continue to market and sell these objects. Some have argued that it hampers Native American identity by restricting too many objects.³⁰⁸

There are a number of ways in which heritage can be created. There are a number of reasons for the creation and the cultivation of heritage. Groups may wish to foster a sense of pride in the community or nation, or there may be a desire to attract tourists and travelers, or simply to add prestige. In some cases nations may seek all of these. In Mongolia, the Genco Tour Bureau has spent seven million dollars to create the Chinggis Khaan Statue Complex to honor the famous Mongol Genghis Khan.³⁰⁹ Heritage can be destroyed and erased as well in order to remove the material culture of a group. The world witnessed again the destructive force of iconoclasm in 2001 when the Taliban destroyed the Bamiyan Buddhas and removing pre-Islamic culture from all over Afghanistan.³¹⁰

IV. CONCLUSIONS

This piece has offered a definition of heritage as the physical and intangible elements associated with a group of individuals which are created and passed from generation to generation. This definition allows us to distinguish heritage from other traditional notions of property. The two concepts of heritage and property should be properly distinguished in legal discourse. Heritage law now governs a wide range of activities, some of which include preventing destruction of works of art, preventing the theft of art and antiquities, preventing the illegal excavation of antiquities, preventing the mutilation and destruction of ancient structures and sites, creating a means for preserving sites and monuments, and even righting past wrongs. This piece will hopefully encourage other scholars to engage in an ongoing dialogue about heritage and its preservation. Competing notions of heritage and property may prevent resolutions to some disputes, and cause the conflation of the ideas of property and heritage. Yet a richer understanding of heritage will allow us to properly weigh the interests of future generations and evaluate the obligations imposed on us by our forebears.

308. William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009 (2001).

309. Bill Donahue, *Flogging Genghis Khan*, THE ATLANTIC, Sept. 2010, <http://www.theatlantic.com/magazine/archive/2010/09/flogging-genghis-khan/8182> (last visited Aug 23, 2010).

310. Gillman, *supra* note 206, at 9-12.