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Value, Obligation and Cultural Heritage

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VALUE, OBLIGATION AND CULTURAL HERITAGE

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I. INTRODUCTION

In the Fall of 1994, Bill Gates purchased a 300 page manuscript, handwritten and illustrated by Leonardo da Vinci. The manuscript consists of loose sheets on which da Vinci wrote about astronomy, geology and meteorology. The cost of the manuscript: $30.8 million. The other bidder for the manuscript was an Italian foundation backed by an Italian bank that desired to see the manuscript returned to Italy.¹ The manuscript was added to Gates’ impressive and ever growing art collection.²

Let us suppose that Gates marries modern technology with one of the greatest scientists and artists of the sixteenth century by scanning the manuscript and placing it on the Internet,³ a modern invention that is no

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1. See John J. Goldman & Suzane Munch, Leonardo Work Fetches Record $30.8 Million, L.A. TIMES, Nov. 12, 1994, at A1. Members of the Italian Cariplo Foundation, expressed their disappointment in a press conference: “We thought . . . that the Leonardo da Vinci belongs to our cultural heritage and obviously we wanted to bring it back really badly . . . . It will remain outside Italy and we are very disappointed.” Id.


3. This is not far from the truth. Gates’ company Corbis Corp. has just produced the manuscript in CD format. The manuscript is referred to as the Codex Leicester, after the Earl of

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doubt foretold somewhere in da Vinci's manuscript. Like everything else on the Internet, any individual with reasonable search skills could locate the manuscript, read it, and marvel at its backward handwriting and precise drawings. It would of course even be possible to print out your own copy of the manuscript. Then, Gates throws a big party in his new mansion and in fine robber baron style has all his guests puff away on cigarettes rolled with pages from da Vinci's manuscript.

Most people, including the Italian foundation that was outbid by Gates, would be shocked at the destruction of the manuscript. But why would we find the destruction so appalling? After all, Gates has vastly improved accessibility to the content of the documents, da Vinci is not around to raise a "moral right" related claim, and there is no one with any legitimate property interest sufficient to interfere with Gates' property rights. Gates certainly paid enough money for the manuscript, should he not have the right to do what he wants with it even if this means burning it? What is it about the destruction of the manuscript that we find so shocking? Why would we consider Gates' behavior not just senseless but reprehensible and immoral? The answer lies in Gates' failure to comply with a fundamental duty to refrain from damaging the manuscript. This article is about the nature of that duty and its relevance to legal rules governing the management of cultural heritage.

Outside of war time, and the destruction that often occurs during the looting of archaeological and architectural sites,\(^5\) most objects of cultural

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\(^{4}\) It is not clear whether the "moral rights" doctrine even covers outright destruction of a creator's work. See Roberta Rosenthal Kwall, Copyright and the Moral Right: Is an American Marriage Possible?, 38 VAND. L. REV. 1, 9 (1985). It should also be noted that some countries, most prominently France, view a creator's moral right as perpetual. In such situations, the next of kin, a spouse or an official public organization is entrusted with the protection of the work in question. See id. at 15-16.


\(^{5}\) See PAUL M. BATOR, THE INTERNATIONAL TRADE IN ART 1-4 (1981) (describing the work of Clemency Coggins that so dramatically revealed the extensive damage inflicted on important cultural, architectural and historical sites from looters looking for objects to sell in the international art market); Judith Miller & Stephen Kinzer, Massive Plundering of Early Christian Art Exposed, N.Y. TIMES (Online), Apr. 1, 1998 (discussing the looting and consequent destruction of churches in Cyprus).
heritage do not meet the imagined fate of the da Vinci manuscript. The monetary value of cultural heritage encourages preservation rather than destruction. But despite the physical survival of cultural heritage, we frequently destroy much of its intrinsic value by reconstituting it in radically limited and instrumental terms. We tend to focus on its scientific, educational, political, and market value, to the exclusion of its more fundamental value. The problem lies not in the existence of these instrumental forms of value but in their domination over other forms of value. This domination manifests itself in a number of different ways. First, we ignore or at least resist the potential connection between the placement of cultural heritage and its value. In our obsession with the instrumental value of cultural heritage, we fail to see the value that is often lost through displacement. Although displacement is being remedied by increasingly rigorous movement and repatriation laws, it continues to be a problem. Furthermore, to the extent that there is a trend toward repatriation, we need to understand why this is a good thing and when it is appropriate. The work that has been done on understanding and justifying repatriation, while addressing the important connection between community and culture, tends to focus on the rights of cultural groups or the political value of cultural heritage. The advocates of this approach argue that the disposition of cultural heritage is an issue for culturally affiliated groups without interference from others. Those who argue against repatriation and


7. See, e.g., Mary Curtius, Indian Remains Are Bones of Contention at Berkeley, L.A. TIMES, Apr. 27, 1998, at A1 (describing how a Berkeley anthropologist has refused to give up a collection of 9,000 skeletons, many of them Native American); Susan Diesenhouse, Arts in America; Looted or Legal? Objects Scrutinized at Boston Museum, N.Y. TIMES, July 30, 1998, at E2 (describing how the Museum of Fine Arts in Boston refuses to return 138 artifacts apparently stolen from Mayan graves and illegally exported); Margaret Loke, Aleut Sacred Objects to Be Auctioned at Sotheby's Despite Protests by the Tribe, N.Y. TIMES, Nov. 30, 1998, at E5 (describing Sotheby's refusal to withdraw Aleut sacred objects from auction); Museum Rejects Guatemala Request, N.Y. TIMES (Online), July 9, 1998 (describing how Boston's Museum of Fine Arts refuses to return 32 artifacts apparently stolen from Mayan graves and exported).

restrictive laws stress its educational and scientific value or other benefits derived from having open access to a wealth of objects and customs. This article attempts to steer away from these approaches and to focus more precisely on the potential intrinsic value of cultural heritage.

Second, even when displacement is not an issue, we occasionally treat cultural heritage inappropriately and disrespectfully. For example, a few years ago, the Peabody Museum discovered that it had in its possession several drawings of Navajo dry paintings or “earth images.” Earth images are traditionally destroyed at the end of Navajo healing rituals and the ceremony itself is only open to immediate participants: the singer, assistants, sponsor, family and patient. The drawings were sketched by an anthropologist, A. M. Tozzer, who was invited to witness a healing ritual. The Museum was concerned that possession of the sketches was both a form of disrespect and an invasion of privacy and consequently sought the advice

>The Intellectual Property of Indigenous Peoples U.N. Doc. E/CN.4/Sub.2/1993/28 (The report was commissioned by the United Nations sub-commission on Prevention of Discrimination and Protection of Minorities and argues for greater rights of control over cultural heritage by indigenous peoples as a matter of human rights and self-determination); Gregory M. Mose, The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking A Rights-Based Approach to the Protection of Religious Cultural Property, 3 Buff. J. Int'l L. 180 (1996) (arguing that the protection of religious cultural property should be done through the recognition of the right of religious freedom); Amanda Pask, Cultural Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture, 8 Intell. Prop. J. 57, 61 (1993) (“The issue is the right of Native peoples to determine the appropriateness of the use being made of their cultures . . . .”); Theresa Simpson, Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand, 18 Hastings Int'l & Comp. L. Rev. 195, 220 (1994). While recognizing that the value of cultural property is more cultural than political she goes on to state that an ability to safeguard one's own cultural heritage is an important aspect of the rights of indigenous peoples to participate and be recognized in the international realm. See id. For a discussion of various justifications for repatriation, including some group or cultural rights-based justifications, see Sarah Harding, Justifying the Repatriation of Native American Cultural Property, 72 Ind. L.J. 723, 739-73 (1997).


10. See, e.g., Charles Storch, At Peace With the Past: Museums Create a Flurry of Mixed Emotions as They Race to Divulge Native American Artifacts, Chi. Trib., Nov. 15, 1993, at Tempo 1 (reporting that, in accordance with the instruction of Hopi elders, the Hopi kachinas in the Field Museum’s possession were taken out of their plastic bags, “fed sacred cornmeal” and turned to face West). The New Age appropriation and other, in some cases intentional, mistreatment of Native American spiritual rituals is discussed in Brown, supra note 9, at 201. For example, Brown discusses the “Smoki” Snake Dance, “a parody of Hopi ritual conducted by wealthy Anglos in Prescott, Arizona.” Id.
of the Navajos to determine whether they should be restored as planned or allowed to deteriorate.\textsuperscript{11} Resolving this and other similar issues, such as the proper positioning of a Hopi kachina,\textsuperscript{12} or the stewardship and accessibility of the Dead Sea Scrolls,\textsuperscript{13} requires a deeper understanding of the value of cultural heritage.

Finally, there are instances of physical destruction that, although not frequent, are disturbing.\textsuperscript{14} Setting aside looting, the destruction of cultural heritage occurs most frequently in armed conflicts and ironically it is precisely because of the unique and significant value of cultural heritage that its destruction is both intentional and demoralizing.\textsuperscript{15} With respect to all of these problems, we seem to lack a clear, consistent, respectful, and non-relativistic way to think about cultural heritage. What I propose in this article is a way to think about cultural heritage that focuses on its intrinsic value.

I begin by looking at how we define cultural heritage and how this process of definition has led us to think of cultural heritage in predominantly competing instrumental terms. Furthermore, the various political and instrumental ends for which we use cultural heritage and the contrast between the instrumental goals of collecting and source nations has encouraged us to believe that our fundamental attitudes are equally divided. There are undoubtedly differences in attitudes toward cultural heritage across cultures but my position is that these differences are not as significant as is often presumed. The cross-cultural similarity lies in the deeper meaning we attribute to cultural heritage and the sense of obligation that marks our relationship with it.

Part III is devoted to the development of an ethic of cultural heritage. It begins with a close analysis of the concept of intrinsic value and argues for a more expansive definition that recognizes that certain things have significance beyond their instrumental value and yet cannot be classified as

\begin{itemize}
  \item \textsuperscript{11} See Brown, supra note 9, at 193 (citing Elizabeth Sandager, Ethical Implications of the Documentary Record, 21 NEW ENG. ARCHIVISTS NEWSL. 4, 5).
  \item \textsuperscript{12} See Storch, supra note 10, at Tempo 1.
  \item \textsuperscript{14} The Bosnian War provided numerous highly visible examples of the destruction of cultural heritage. See Karen J. Detling, Eternal Science: The Destruction of Cultural Property in Yugoslavia, 17 MD. J. INT'L L. & TRADE 1, 66-69 (1993); Mose, supra note 8, at 191-99.
  \item \textsuperscript{15} See Detling, supra note 14, at 43, 68-69; Gael M. Graham, Protection and Reversion of Cultural Property: Issues of Definition and Justification, 21 INT'L LAW. 755, 756 (1987).
\end{itemize}
ends-in-themselves. Such things are intrinsically valuable because they are constituents of other things that are ends-in-themselves. The purpose of this analysis is to construct a basis for considering things in the non-human world as appropriate objects of moral concern. My analysis in this section is highly dependent on similar work that has been done in the area of environmental ethics. Following this, I briefly look at the connection between intrinsic value and obligation. I conclude that the connection is created not by the mere weight of intrinsically valuable goods but rather by the importance to our individual well-being of respecting such goods.

The final section of part III looks specifically at the value of cultural heritage and places it within the category of intrinsically valuable goods discussed at the outset. I identify two basic experiences associated with cultural heritage, aesthetic experience and cultural experience, and argue that they are intrinsically valuable as ends-in-themselves. Cultural heritage in some form or another is an essential part of both of these experiences. In short, cultural heritage is intrinsically valuable because it is a constituent of both aesthetic and cultural experiences. Although aesthetic experience and cultural experience are independent aspects of cultural heritage, I focus on cultural experience, highlighting both anthropological and philosophical perspectives, as this is the more encompassing of the two experiences.

Part IV addresses what this means for the regulation of cultural heritage. The purpose of part IV is not to devise an exhaustive system of regulation and management but rather to draw some practical and general conclusions from the theory presented.

There are an increasing number of examples of cooperation between museums and claimants[16] and between collecting and source nations[17]. This

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17. The United States has taken action under Article 9 of the UNESCO Cultural Property Convention to restrict the import of artifacts from certain regions in central America, at the request of the specific Central American governments. See, e.g., Ann Guthrie Hingston, U.S. Implementation of the UNESCO Cultural Property Convention, in ETHICS, supra note 16, at 129, 134-45 (discussing U.S. import restrictions on artifacts from the Cara Sucia region in El Salvador). The U.S. has also entered into bilateral treaties imposing some import restrictions and providing a system for repatriation with Mexico, Peru, Guatemala and Ecuador. See Leo J. Harris, From the Collector’s Perspective: The Legality of Importing Pre-Columbian Art and Artifacts, in ETHICS, supra note 16, at 55, 165-66.
cooperation is founded at least partially on a mutual understanding of the significance of certain objects and a sense of obligation to the integrity of the objects themselves.\textsuperscript{18} This paper is about that shared understanding and the universal element in our various attitudes toward cultural heritage. By emphasizing our shared attitudes, I hope to provide a way to both explain and critique, in essence to reason through, our attempts to regulate the movement and treatment of cultural heritage.

II. CULTURAL HERITAGE: DEFINITION AND PRACTICE

This part first will address the changing definition of cultural heritage and the significance of how we define it. Cultural heritage is broadly interpreted as anything that is of some cultural importance, whether it be art, literature, music, archaeological sites, sacred artifacts, historical artifacts, natural formations, or ancient remedies. Although some contemporary commentators limit cultural heritage to things that are truly connected to a specific culture, both in origin and purpose, this article will adhere to a broader definition of cultural heritage. Following the discussion on the definition of cultural heritage, I will explore some of the commonly perceived differences between Western and non-Western attitudes to cultural heritage. The purpose of this discussion is to identify where the real differences lie and to determine whether these differences are significant enough to prevent agreement on the normative relevance of cultural heritage.

A. Defining Cultural Heritage

There is no dearth of definitions of cultural heritage, at least if we consider cultural heritage and cultural property as essentially the same thing. Most official documents and commentators utilize and define the term "cultural property"\textsuperscript{19} rather than "cultural heritage." Following the lead of

\textsuperscript{18} The success of the Zuni in repatriating their sacred objects has been at least partially attributed to their ongoing attempts to educate museums on the significance, purpose and meaning of the objects in question. See William L. Merrill & Richard E. Ahlborn, Zuni Archangels and Ahayuda: A Sculpted Chronicle of Power and Identity, in EXHIBITING DILEMMAS: ISSUES OF REPRESENTATION AT THE SMITHSONIAN 176, 195 (Amy Henderson & Adrienne Kaeppler eds., 1997).

two prominent international writers in this field, I have settled on the term "heritage" to escape the legal and philosophical baggage associated with "property." Cultural heritage made its first official appearance in international documents in the latter half of the nineteenth century. The Declaration of the Brussels Conference of 1874 and the Hague Conventions of 1899 and 1907 focused on the confiscation and destruction of cultural heritage during times of war. Using the U.S. Lieber Code of 1863 as a model, these documents attempted to limit foreign access to cultural heritage by converting it into private property. The Brussels Declaration and the 1899 Hague Convention state that cultural heritage, "although belonging to the State, shall be treated as private property." The types of property that fell within the stated private property protections were described in primarily functional terms—property "devoted to religion, charity, education, arts and sciences." Needless to say, these early documents focused on heritage considered important by Western standards.

The Hague Convention of 1954 also dealt with the protection and disposition of cultural property during time of war, but viewed it as the "cultural heritage of all mankind" and established a system for the universal protection of cultural property rather than leaving it to the law of

20. See Prott & O'Keefe, supra note 19; see also Daes, supra note 8, ¶ 21-23.
21. Initially, I was going to focus on refuting the applicability of a property rights framework for dealing with cultural heritage despite the fact recent scholarship has extended and applied a property rights analysis in increasingly inventive ways. See, e.g., Katharine Baker, Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection, 59 OHIO ST. L.J. (forthcoming 1998) (proposing the use of a property rights paradigm in custody battles). A property rights approach conjures up a specific type of relationship, the paradigm of which is inappropriate in the cultural heritage context. In the end, I opted to focus on creating a means for understanding and critiquing how we deal with cultural heritage whatever box we put it in, rather than focusing on the construction of legal categories. For commentaries addressing the inappropriateness of the Western notion of property rights and ownership when dealing with questions of repatriation and control of cultural heritage, see Daes, supra, note 8, at ¶ 26-27; Coombe, Postcolonial Struggle, supra note 8, at 283-85; and Pask, supra note 8, at 80-84.
23. See id. at 17 n.94 (citing Convention Concerning the Laws and Customs of War on Land (1907), 100 B.S.P. 338, LIV L.N.T.S. 437, LXXII L.N.T.S. 458, CLX L.N.T.S. 456).
24. Id. at 17 (citing the Brussels Declaration).
25. Id. (emphasis added).
26. Supra note 19.
private property. The definition of cultural property contained in the Hague Convention of 1954 is much more elaborate and focuses on the fundamental value rather than the functional purposes of cultural property, referring to it as “property of great importance to the cultural heritage of every people.” But similar to the earlier Hague Convention, the definition of cultural property reads like a list of Western-appreciated antiquities. Only with the passage of the UNESCO Convention was there some recognition of the national character and definition of cultural property. Article 1 of the UNESCO Convention defines cultural property as that which is “specifically designated by each State as being of importance” and then sets out a non-exhaustive list of the types of things that might be considered cultural property. The UNIDROIT Convention, which is intended as a replacement for the “spectacularly unsuccessful” UNESCO Convention,

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28. The earlier Hague Convention failed miserably to protect cultural heritage during the two World Wars. Although some of the cultural heritage atrocities committed by the Nazis were dealt with in the Nuremberg trials, the sentiment following WWII was that there needed to be more elaborate forms of protection for cultural property during times of conflict. See Williams, supra note 22, at 23-28; M. Catherine Vernon, Common Cultural Property: The Search for Rights of Protective Intervention, 26 CASE W. RES. J. INT'L. L. 435, 457-59 (1994).


30. See id. The Article 1 definition of cultural property states:

For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership;

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments or architecture, art or history, whether religious or secular; archeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.

Id.

31. UNESCO Convention, supra note 6.

32. Although the list is not meant to be exhaustive, it covers such a range of objects that, at least within the sphere of manmade and natural objects, it seems comprehensive. In fact one of the weaknesses of the UNESCO Convention has been its imprecision, leading to national declarations that anything older than 100 years is automatically cultural property. See Jennifer N. Lehman, The Continued Struggle with Stolen Cultural Property: The Hague Convention, The UNESCO Convention and the UNIDROIT Draft Convention, ARIZ. INT'L. & COMP. L. 527, 542-43 (1997); see also Alan Shestack, The Museum and Cultural Property: The Transformation of Institutional Ethics, in ETHICS, supra note 16, at 93, 99 (commenting on the “excessively general” nature of the UNESCO Convention).


34. Lehman, supra note 32, at 543.
does not change this aspect of the definition although it does use the phrase “cultural objects” rather than “cultural property.”

Other recent documents discussing the protection of cultural heritage have moved even closer to viewing it as primarily national or culture-specific rather than international in character. Two things provide evidence of this shift. First, the definition of cultural heritage has broadened to include intangibles such as folklore and sacred rituals, cultural heritage more frequently associated with developing nations and indigenous peoples.

Second, recent documents encourage the exclusive ownership and possession of cultural property by source nations. For example, a United Nations Report on the protection of cultural and intellectual property states that “each indigenous community must retain permanent control over all elements of its own heritage.” Heritage is defined as all things that are the “creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks.”

The debate between the “cultural internationalists”—those who believe cultural heritage is the property of all human kind—and the “cultural nationalists”—those who believe that it is first and foremost the property of source nations—has been well-documented in the ever-growing mound of literature on the disposition of cultural heritage.

35. See UNIDROIT Convention, supra note 33, art. 2 & Annex.

36. Throughout this paper, I use the term “indigenous people” more frequently than other terms such as “source nations” or “developing nations,” to indicate the cultural groups originally associated with a significant portion of controversial cultural heritage. I have opted to use this term because disputes occur both between and within nations.

37. Daes, supra note 8, ¶ 30; see also Bellagio Declaration, reprinted in JAMES BOYLE, SHAMANS, SOFTWARE, AND SPIELENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 192, 194 app. B (explicitly calling for new “rights regimes” to protect the intellectual property of indigenous peoples).

38. Daes, supra note 8, ¶ 24.

39. The “cultural internationalist” approach is best illustrated in the Hague Convention and the work of John Henry Merryman. See Merryman, Public Interest, supra note 9; Merryman, Two Ways of Thinking, supra note 9.


41. See, e.g., Coombe, Native Claims, supra note 8, at 260-65; Detling, supra note 14, at 49-52; Stephanie O. Forbes, Securing the Future of Our Past: Current Efforts to Protect Cultural Property, 9 TRANSNAT'L LAW. 235, 240-43 (1996); Roger W. Mastalir, A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law, 16 FORDHAM INT'L L.J. 1033, 1058-67 (1992); Mose, supra note 8, at 188-91; Simpson, supra note 8, at 198.

Michael Brown, in discussing the debate over intangibles, refers to the two groups as “cosmopolitan scholars” and “indigenous activists.” See Brown, supra note 9, at 197. Karen Warren refers to the debate as one between utilitarian and deontological considerations. See Karen
how this has played out in international documents primarily because it has led us to a certain way of thinking about cultural heritage that is at a minimum constraining. The scholarly debate about the disposition of cultural heritage has led us to think that its value and treatment must be viewed through one of these two positions. The nationalists maintain that cultural heritage is exclusively the property of source nations, that source nations should have the power to deal with it in accordance with their own rules and customs, and that the value of cultural heritage is poorly understood outside of its culturally affiliated group. On the flip-side, the internationalists maintain that cultural heritage is the property of all humanity, its educational, scientific and aesthetic qualities are its most valuable assets, and its proper place is in Western museums where it can be viewed by a wider audience and its preservation is guaranteed.

If there is a current winner in this debate, at least in print if not in practice, it appears to be the nationalists. An increasing number of scholars and official documents, both international and domestic, take the view that the disposition of cultural heritage should be determined exclusively by source nations or culturally-affiliated groups. As a consequence, we increasingly view cultural heritage as an issue of cultural, ethnic, or in some cases minority rights, and as one of the keys to cultural preservation and self-determination. The deepening division between these two groups has also contributed to the conceptual separation of Western cultural heritage, largely represented by everything we classify as “art,” from non-Western forms of cultural heritage, traditionally thought of as “artifacts” but increasingly associated with intangibles.


42. *See*, e.g., Daes, supra note 8.

43. *See*, e.g., Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, 25 U.S.C. §§ 3001-3013 (1994). Under NAGPRA, museums determine the cultural affiliation of Native American cultural objects, but the culturally affiliated tribe decides whether the object in question is “cultural patrimony” and whether it should be repatriated. *See id.* § 3004 (addressing the summary of sacred objects and cultural patrimony); *id.* § 3001(3)(D) (defining cultural patrimony as that which is determined by the cultural affiliated tribe as having “ongoing historical, traditional, or cultural importance central to the Native American group or culture itself”); *id.* § 3005(a) (upon the request of the culturally affiliated tribe, the item in question must be repatriated).

44. *But see* Brown, supra note 9.

45. *See*, e.g., Daes, supra note 8.

46. *See* Coombe, *Native Claims*, supra note 8, at 255-58 (discussing the distinction crafted in the museum world between “art” and “artifact”).

47. *See* Cathryn A. Berryman, *Toward a More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. 293, 310-12 (1994) (emphasizing the importance of folklore and the failure of the present legal regimes to protect it); Daes, *supra* note 8, ¶ 21-24 (emphasizing the
This article advocates that there are fundamental similarities in how we think about cultural heritage across cultural and national boundaries and consequently relies on a very broad, undivided definition of cultural heritage. This approach should not be confused with the cultural internationalist's position that cultural heritage is the common heritage of mankind. This article does not argue that objects of cultural heritage belong to all of us as a form of rightful inheritance. Nor does this article argue that cultures or nations are identical or even largely similar in their treatment of cultural heritage. Rather, the aim here is to highlight the normative similarities in our attitudes toward cultural heritage and to search for a common, non-rights, and non-instrumental based understanding of its significance. There is some commonality in our perceptions of the value of cultural heritage that is often overlooked because of our focus on differences in recognition, selection, and treatment. The debate between the internationalists and nationalists, between art-rich nations and source nations, has focused our attention on these differences and the role of cultural and private property rights. This debate has obfuscated the deep connections and shared attitudes that exist in our relationship with cultural heritage. By turning questions relating to the disposition of cultural heritage into basic questions of cultural and property rights we have undermined the prospect of meaningful discussion about the nature of cultural heritage and cultural practices.

This is not to say that the cultural rights perspective is somehow incorrect. One of the most important issues with respect to cultural heritage is the historical denial of indigenous peoples' right to determine the fate of their own cultural heritage and to protect it from violation and theft. This is very much central to any discussion about the disposition of cultural heritage. But in the absence of a clear understanding of the meaning and significance of cultural heritage, present claims for repatriation and protection are poorly understood and frequently denied. Thus, we need a stronger theory of the significance of cultural heritage which both explains our actions and provides some guidance for resolving future disputes. In essence, we need to think of cultural heritage outside of the rights/ownership conceptual framework that has dominated and divided our thinking on cultural heritage. 

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profound significance of intangibles such as a song to indigenous people and the unity of tangible and intangible forms of cultural heritage).

48. See Warren, supra note 41, at 12-18 (arguing that at the very least we need to supplement the rights/ownership framework with other models which emphasize compromise, consensus and stewardship); B.G. Karlsson, Comments, 39 CURRENT ANTHROPOLOGY 210, 210-11 (1998) (also emphasizing the need to step outside of the rights/ownership paradigm).
In keeping with my desire to consider a broad cross-cultural notion of cultural heritage, cultural heritage is defined as an individual or group creation of either a tangible or intangible\textsuperscript{49} good which, by virtue of the creation process, customary use, historical event, or simply geographic proximity, becomes an important expression of human or cultural life. It is a mishmash of things, including songs,\textsuperscript{50} dances,\textsuperscript{51} stories,\textsuperscript{52} remedies,\textsuperscript{53} textile designs,\textsuperscript{54} sacred objects,\textsuperscript{55} drawings,\textsuperscript{56} works of art,\textsuperscript{57} sculpture and architectural structures.\textsuperscript{58} We tend to sort and classify these things in separate property categories—intellectual property, personal property, real property, and more recently cultural property—and yet normatively these

\textsuperscript{49} Part of the reason for choosing the phrase cultural heritage is to create a category that can more easily accommodate intangibles. See Prout & O'Keefe, supra note 19.

\textsuperscript{50} See Anthony Seeger, Ethnomusicology and Music Law, in BORROWED POWER, supra note 8, at 52, 54-56 (discussing the cultural significance of the songs of the Suyá Indians of Brazil); Wayne Suttles, Streams of Property, Armor of Wealth: The Traditional Kwakiutl Potlatch, in CHIEFLY FEASTS: THE ENDURING KWAKIUTL POTLATCH 71, 110 (Aldona Jonaitis ed., 1991) [hereinafter CHIEFLY FEASTS] (discussing the significance of songs in the potlatch ritual).

\textsuperscript{51} See Aldona Jonaitis, Preface to CHIEFLY FEASTS, supra note 50, at 11, (describing dances in the Kwakiutl potlatch as “inherited privileges”).

\textsuperscript{52} See Lenore Keeshig-Tobias, Stop Stealing Native Stories, in BORROWED POWER, supra note 8, at 71, 73 (“So potent are stories that, in native culture, one storyteller cannot tell another’s story without permission.”); Pask, supra note 8, at 59-60 (highlighting the controversy over the appropriation of Native stories).


\textsuperscript{54} See Bruce Ziff & Pratima V. Rao, Introduction to Cultural Appropriation: A Framework for Analysis, in BORROWED POWER, supra note 8, at 1, 15-16 (discussing an Australian law suit over the use of traditional Aboriginal patterns depicting “the dreaming” in carpets); Joane Cardinal-Shubert, In the Red: Money, Appropriation and Native Imagery, Fuse Mag., Fall 1989, at 13, 20 (discussing the appropriation of a “traditional design used in hand-knitted Kwakwutl sweaters”).


\textsuperscript{56} See Brown, supra note 9, at 193 (discussing the significance of Navajo “dry paintings” or “earth images” drawn during Navajo healing rituals); Goldman & Muchnic, supra note 1 (discussing the significance of the da Vinci manuscript and quoting the disappointed Italian group that was unable to purchase it for Italy).

\textsuperscript{57} See Anne Swardson, Move to Put Picasso’s ‘Guernica’ Closer to Home Draws Flak in Spain, WASH. POST, Apr. 28, 1997, at A15 (reporting on the dispute in Spain over attempts to move the highly symbolic Picasso painting, depicting the Nazi bombing of Guernica during the Spanish Civil War, closer to the town of Guernica).

\textsuperscript{58} See John Moustakas, Note, Group Rights in Cultural Property: Justifying Strict Inalienability, 74 CORNELL L. REV. 1179, 1186 (1989) (focusing on the significance of the Parthenon Marbles to the Greeks and arguing for their return under the notion of “property for grouphood”).
things are similar in that they contribute at a fundamental level to individual well-being, and they provide the ties that help bind communities.

In short, cultural heritage is a very large category of tangibles and intangibles including things that seem to have no intrinsic beauty but serve a valuable cultural purpose and things that are stunningly beautiful but have very little cultural connection. This definition of cultural heritage is broader than most, not in the type of things it covers but in the fact that it includes things that have no immediate or strong connection to a particular group.\textsuperscript{59} It is difficult and not wholly useful to separate group objects from privately held objects, cultural things from pure art. All art has some connection to culture and culture frequently expresses itself in artistic form. Furthermore, although distinct values or experiences are associated with cultural and art objects, most cultural heritage evokes a combination of these values.

To make the argument that there are some shared values with respect to cultural heritage that transcend national and cultural boundaries, it is important to examine our varied practices and determine whether they necessarily prohibit cross-cultural understanding of the significance of cultural heritage. Needless to say, our practices are divergent and one should not attempt to fully reconcile them. But there does exist a deep commonality in our attitudes that needs to be drawn out. This commonality is evident in our dependency on cultural heritage and our corresponding sense of duty and responsibility to protect it.

B. Cultural Heritage: Practices and Beliefs

How important is it to individuals and cultural groups to protect their cultural heritage and what do they consider to be cultural heritage? In an attempt to find some framework for discussing our practices, this section will look at a number of issues that are often used to highlight the differences between source nations and collecting nations. The first issue that tends to divide our perception of our practices is the form of ownership or possession. There is a presumption that Western nations prefer private ownership and source nations or indigenous peoples prefer group or common ownership. The second issue is the nature of cultural heritage. Indigenous peoples increasingly emphasize the need to develop protections for their

\textsuperscript{59} Some of the more compelling discussions of cultural heritage explicitly restrict their discussion to things created by and for a specific cultural group. See \textit{id.} at 1184 (proposing a theory for the return of cultural property which is bound up with "group identity"); Patty Gerstenblith, \textit{Identity and Cultural Property: The Protection of Cultural Property in the United States}, 75 B.U. L. REV. 559, 569-70 (1995) (defining "cultural property" as "those objects that are the product of a particular group or community and embody some expression of that group's identity").
intangible cultural heritage, whereas collecting nations seem more concerned about protecting tangibles. Finally, collecting nations and indigenous peoples tend to be divided over the question of access to cultural heritage. Indigenous peoples stress the importance of keeping certain objects and customs secret, whereas freedom of information is a dominant principle in the Western world. This section argues that these issues or fault lines create false dichotomies. With respect to the first issue, the form of ownership, there is little basis in practice for the supposed distinction and the distinction itself is based on limited and perhaps inappropriate Western legal categories. A close look at the two remaining issues, the nature of cultural heritage and access to it, also reveals less divergence in practice than initially presumed and deep similarities in our desire to protect and preserve cultural heritage.

1. Form of Ownership: Individual v. Group Possession

Much of the literature concerning the disposition of cultural heritage commonly assumed that indigenous peoples and source nations tend to view most of their important cultural objects or ideas as group owned,60 whereas a good deal of Western cultural heritage is individually or privately owned. In fact, group ownership is often a requirement for legitimate repatriation claims. For example, NAGPRA provides for the return of cultural patrimony defined as an object whose importance is “central to the Native American group or culture itself, rather than property owned by an individual Native American.”61 Group ownership as a requirement for repatriation, in fact, may encourage many groups to claim their cultural heritage is group owned in the absence of any strong proof that this is the case.62 This claim, in turn, has influenced how we measure and evaluate the claims of others.63 As such, I am not sure we can say with any certainty that

60. See Brown, supra note 9, at 194.
62. For example, it is not clear whether something such as a “sacred bundle” is group property. A calico wrapped sacred bundle reputed to have belonged to Plains Cree Chief Big Bear, which found its way to the American Museum of Natural History, was claimed by both descendants of Big Bear and various Cree communities. See Rebecca Clements, Misconceptions of Culture: Native Peoples and Cultural Property Under Canadian Law, 49 U. TORONTO FAC. L. REV. 1, 8 (1991).

In order to protect their cultural heritage, some nations have passed laws that turn all exported cultural property into public property, thus forcing exporters to seek government approval for legal export. See Ellen Herscher, International Control Efforts: Are There Any Good Solutions?, in ETHICS, supra note 16, at 117, 118 (discussing three forms of export restrictions, including the approach used by Mexico whereby all exports are considered public property).

63. Cf. Seligman, supra note 16, at 79-80 (citing section 10 of the 1979 UNESCO commissioned study completed by the International Council of Museums entitled, Study on the
the cultural heritage of source nations is commonly group owned, or at least more so than in Western nations. When group ownership is a feature of repatriation and protective laws, not only does this become a significant measure of the importance of cultural heritage, but other normative elements of evaluation are most likely ignored.

Setting aside the difficult task of determining whether indigenous peoples actually favor communal property over private property, and the difficulty of even applying these concepts in non-Western contexts, there is evidence that much of what is important in indigenous societies and source nations depends on exclusivity, not just with respect to the world outside of their cultural and territorial boundaries, but within those boundaries too. For example, many of the songs and dances associated with the potlatch of the Northwest Kwakiutl, an elaborate gift-giving ritual through which individuals seek validation of their status among their own people and other tribes,\textsuperscript{64} are under the exclusive possession and control of particular individuals.\textsuperscript{65} The same can be said of some of the songs of the Suyá,\textsuperscript{66} or the sacred objects of the Australian Aboriginal people.\textsuperscript{67} So exclusivity, a traditional hallmark of private ownership and possession, is very much present in indigenous practices.

Conversely, Western nations pour vast amounts of public money into the ownership and maintenance of cultural heritage. Although private markets are replete with cultural heritage, so are public forums funded by public contribution. One need only take a stroll along the Mall in Washington D.C., past the National Gallery and the Smithsonian, to see first hand the amount of cultural heritage owned by the American public. A visit to the National Archives and a quick glance at the formative documents of the United States, the Declaration of Independence and the Constitution, provide obvious examples of the enormity of public funds that are allocated to the protection and preservation of America's publicly held cultural heritage. The documents live in a bronze and marble "shrine."\textsuperscript{68} The "shrine" is

\textsuperscript{64} See Sutlles, supra note 50, at 104-05.
\textsuperscript{65} See id. at 100 (discussing acquisition of privileges to certain dances); see also id. at 90 (describing the song-makers who composed songs for chiefs).
\textsuperscript{66} See Seeger, supra note 50, at 55.
\textsuperscript{67} See Kolig, supra note 55, at 29, 34 (discussing how sacred objects are exchanged and sold to the initiated).
watched by an armed guard and the documents are protected by “ballistically
tested glass and plastic laminate.” When night falls, the documents
descend to their temporary resting-place in a massive hermetically sealed
vault. NASA’s Jet Propulsion Laboratory has even constructed an elaborate
$3,000,000 camera and computer system to vigilantly monitor the
documents’ condition.

So there are many examples of something akin to private ownership or
exclusive possession of cultural heritage in indigenous societies and public or
group ownership in Western societies. As a result, there are two things we
should keep in mind when considering the relevance of the form of
ownership. First, public or group ownership may very well be an indication
of cultural significance, but it cannot be our only measure. It is certainly not
the only measure in Western cultures, but neither should it be in Western
estimates of the significance of heritage to non-Western cultures. Second,
given that our practices may not significantly diverge with respect to forms
of ownership and possession, we should look beyond these practices and
focus on our attitudes about treatment and association. Whether something is
privately possessed, such as a potlatch song, or group or publicly owned,
such as the Declaration of Independence, ownership tells us very little about
the significance of the thing. But with respect to all things we tend to
classify as cultural heritage, there is evidence of a pervasive and controlling
sense of obligation and duty among those with some connection to and
knowledge of the heritage in question. For example, the Kwakiutl preserved
the potlatch ritual despite a nearly seventy-year ban on its performance and
the draining of many of the potlatch’s material wonders. Not only did the

69. Id. at 16-17.
70. See id. The transfer of the Declaration from the Library of Congress to the National
Archives in December of 1952 also is quite remarkable. It involved more security than any living
person, including the President, would ever warrant. See Milton O. Gustafson, The Empty Shrine:
The Transfer of the Declaration of Independence and the Constitution to the National Archives, 39
AM. ARCHIVIST 271, 271 (1976) (describing security that included “[t]welve members of the Armed
Forces Special Police” and “[a] color guard, ceremonial troops, the Army Band, the Air Force
Drum and Bugle Corps, two light tanks, four servicemen carrying submachine guns, and a
motorcycle escort.”).
71. See Gloria Cranmer Webster, The Contemporary Potlatch, in CHIEFLY FEASTS, supra
note 50, at 227, 227. The potlatch was outlawed in Canada in 1884 predominantly because it was
viewed as a form of ritualistic deacquisition—a foreign and perverse idea to Western cultures. See
Douglas Cole, The History of the Kwakiutl Potlatch, in CHIEFLY FEASTS, supra note 50, at 135,
140. The legislation banning the potlatch was deleted in 1952. See Webster, supra.
72. Many of the potlatch objects, the most significant being the elaborate masks, were
acquired by the renowned anthropologist Franz Boas for the American Museum of Natural History.
See Ira Jacknis, George Hunt, Collector of Indian Specimens, in CHIEFLY FEASTS, supra note 50, at
177, 183-88. Other significant potlatch ceremonial objects were forfeited by the Kwakiutl in
potlatch survive, it continued to flourish; dedication to its artistry and
tradition never waned, and the potlatch is today as lavish and impressive as
ever.  

There are many more examples of noteworthy efforts to protect cultural
heritage, both publicly and privately held. Lynn Nicholas details the
phenomenal efforts to protect both public and private art collections during
World War II in her book *The Rape of Europa.*  

The Onondaga Nation spent seventy years trying to secure the return of a Wampum belt.  

And recently, four Australian Aboriginal painters won a court battle over the
appropriation of certain traditional patterns “depicting creation and dreaming
stories.”  

The patterns are the exclusive possession of specific individuals
who have the right to authorize their reproduction: “[i]naccuracy, or error in
the faithful reproduction of an artwork can cause deep offence to those
familiar with the dreaming.”  

In short, the differences between collecting and source nations or between
Westerners and indigenous peoples with respect to patterns of possession are
probably not as great as is often assumed and the differences that do exist
should not obscure the deep similarities in our attitudes. Disparities in

exchange for commuting the jail sentences of those charged with violating the anti-potlatch laws.  


73.  

74.  

LYNN NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE
THIRD REICH AND THE SECOND WORLD WAR* (1994). The collection of the Hermitage in
Leningrad inspired some extraordinary efforts worth mentioning. A significant portion of the
collection held by the Hermitage in Leningrad was transported to safer destinations in far off
Siberia. Once all the rail lines leaving Leningrad had been cut, the rest of the collection had to be
stored in the “vast cellars of the complex of palaces.”  

In. at 195. With no heat or electricity and at
times living on “jellied soup made of carpenter’s glue,” a few thousand artistic and literary souls
lived in the basement alongside their valuable charges.  

Id. at 196. Exhibitions and poetry readings
were held. Groups were organized to board-up bomb holes and remove snow and glass from the
galleries above: “In the first three months of 1943 alone . . . the staff would remove, by hand,
eighty tons of mixed glass, ice, and snow, much of which had to be chipped off the mosaics and
parquet floor with crowbars.”  

Id. In this way, the guardians of the Hermitage lived and worked
until the liberation of Leningrad in the winter of 1944.  

See id. at 195-196. Another example is the
story of Miss Rose Valland of the Louvre. She risked her life by secretly keeping track of where
everything in the Louvre went under German occupation.  

See id. at 126-27, 134-36. The
information was indispensable in locating the whereabouts of Louvre holdings after the war. She
was subsequently awarded the Legion of Honor and the Medal of the Resistance.  

See id. at 440.

75.  

At the turn of the century, the Onondaga lost a court battle over the return of a wampum
belt.  

See Onondaga Nation v. Thacher, 189 U.S. 306 (1903). It took the Six Nations Confederacy
another 75 years to negotiate the return of the wampum.  

See Jack F. Trope & Walter R. Echo-
Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative
History, 24 ARIZ. ST. L.J. 35, 43 (1992).*  

76.  

F.L.R. 240).

77.  

Id.
resources and education may lead to different practices, but the desire to preserve some aspect of the sacred and the beautiful does not appear to be an exclusive trait of collecting nations. In the remaining two parts, I will look at other assumptions about differences in practices and again attempt to break down the differences to search for commonality in our attitudes.


Another issue that is increasingly a focal point for comparison is the form of cultural heritage or the relative importance of tangibles and intangibles. From the early wonder cabinets of the Renaissance to our modern museums, Western cultures have placed enormous significance on collecting, possessing, and displaying things, either for the mere sake of collecting and its evidence of domination and wealth, or for the intrinsic and instrumental value of the goods themselves. The conclusion often drawn from this obsession with collecting is that Western societies prize material possessions over process.

Indigenous peoples, on the other hand, tend to place greater emphasis on intangibles and process. A wonderful example of this emphasis can be found in the practices of the Igbo of Nigeria. The Igbo intentionally destroy or neglect their artfully created structures to ensure the vitality of the urge to recreate:

The purposeful neglect of the painstakingly and devoutly accomplished mbari houses with all their art objects in them as soon as the primary mandate of their creation has been served,

78. But see Gillett G. Griffin, Collecting Pre-Columbian Art, in ETHICS, supra note 16, at 103, 108-14 (detailing the lack of regard for cultural heritage in Third World museums and governments).


The stockpiling of goods in museums leaves us wondering whether this is still one of the motivating factors behind the museum culture. Alan Shestack, while director of the Boston Museum of Fine Arts, commented, “Museum professionals are acquirers; we are inherently greedy collectors. Most of us go into the profession because the desire to accumulate and bring together objects of quality is in our blood.” Alan Shestack, The Museum and Cultural Property: The Transformation of Institutional Ethics, in ETHICS, supra note 16, at 93, 97.

80. See Greenblatt, supra note 79, at 51-52 (describing the modern approach to collecting and displaying which centers around the “uniqueness, authenticity, and visual power of the masterpiece”).

81. See Handler, supra note 40, at 64-65 (“In modern culture an individual is defined by the property he or she possesses.”).
provides a significant insight into the Igbo aesthetic value as process rather than product. Process is motion while product is rest. When the product is preserved or venerated, the impulse to repeat the process is compromised.82

The potlatch ritual, as previously discussed, also provides evidence of this difference. The individual at the center of a potlatch celebration distributed copious amounts of gifts in exchange for recognition of a specific claim or status that carried with it the right to perform various songs and dances.83 Concern about the protection of indigenous rituals and customs has led to an increasingly vocal call for some form of intellectual property protection for these cultural elements. The claim is that something akin to copyright and patent protection84 would help prevent the appropriation of folklore, rituals, remedies, designs, and stories that have become popular in certain industries such as music85 and textiles,86 and among those searching for a new spiritual life.87

It is difficult to know what to make of this difference. On the one hand, the emphasis on process and ritual in some indigenous cultures is not dramatically different from most Western religions. The intellectual and physical aspects of a culture or religion are so closely tied that it is difficult to truly separate them,88 but if forced to choose, I suspect most Western religions and cultures ultimately would choose ritual and spirituality over the preservation of relics. The material difference may be one of circumstance and power—indigenous people are neither clamoring to adapt or re invent Western religious traditions, nor did they, until recently, have appropriate methods in place to prevent the misappropriation of their own rituals.89 It

83. See Sutlles, supra note 50, at 104-05.
84. See, e.g., Daes, supra note 8, ¶ 168; Berryman, supra note 47, at 324-32.
86. See Daes, supra note 8, ¶¶ 68-80 (discussing numerous examples of the appropriation of traditional designs for usage in the design of currency, museum displays and clothing); Ziff & Rao, supra note 54, at 16 (discussing a case concerning the appropriation of an Aboriginal design in the production of carpets).
87. See Brown, supra note 9, at 201 (characterizing appropriators as “Indian wannabes”).
88. See Darrell Addison Posey, Comments, 39 CURRENT ANTHROPOLOGY 211, 211 (1998) (discussing Brown, supra note 9) (commenting on how “indigenous peoples have been explicit in showing that ‘intellectual’ aspects of culture cannot be separated from ‘physical,’ ‘natural,’ or ‘spiritual’ elements”).
89. See Elizabeth Brandt, On Secrecy and the Control of Knowledge: Taos Pueblo, in SECRECY: A CROSS-CULTURAL PERSPECTIVE 123 (Stanton Teft ed., 1980) (noting that the Hopi have even instituted policies to prevent outsiders from observing and learning about cultural
may also be the case that in the absence of wealth and power, whether intentional or circumstantial, people naturally gravitate toward putting greater emphasis on knowledge, process, and ritual regardless of their cultural background. So the fishermen of Newfoundland, mostly of Irish and English descent, placed tremendous significance on storytelling and songs. There is little doubt that this significance is at least partly attributable to their poverty which left them with little else to revere—in addition to the obvious value of songs and stories when sitting in a boat from dawn to dusk. But these differences do not stress anything fundamentally different in how we value cultural heritage as much as they point to dramatic differences in circumstances.

On the other hand, it is hard to dispute that Westerners have an almost perverse fascination with material possessions. And there is little doubt that the Western obsession with materiality creates conflict and disjunction between source nations and major collecting nations. Quite simply, Western nations horde objects from all corners of the globe and indigenous populations do not. There are two things that should be noted about this difference in practice. First, although the sheer volume of objects collected and displayed in Western museums leads to many problems, not the least of which is that it encourages rampant theft and destruction of archaeological and architectural sites, fundamental differences in attitude arise only in those situations where the maintenance and display of the object in question

practices in order to prevent the uninitiated or unauthorized, including Hopis, from obtaining sacred information).

90. See J.A. Barnes, Comments, 39 CURRENT ANTHROPOLOGY 206, 206 (1998) (discussing Brown, supra, note 9) ("But irrespective of cultural emphases indigenous peoples everywhere are typically materially poor and politically powerless. Possessing meagre resources, they tend not surprisingly to view their knowledge as private property, and it is understandable that their ethnographers should be sympathetic to their attempts to empower themselves.").

91. Storytelling, songs and general merriment are central to two Newfoundland customs of the early 19th to the mid-20th century, mummering and scoffing. See GERALD M. SIDER, CULTURE AND CLASS IN ANTHROPOLOGY AND HISTORY 75-79 (1986). In mummering, a mummer disguises himself with an often frightful mask and another’s clothing and then makes his way through the community, pounding on doors and seeking admittance. Once invited in, the mummer tells stories and sings songs, all the while drinking heartily, until the host guesses the identity of the mummer. The best mummers are those that know the most songs. See id. at 76-77. Scoffing is a more complex tradition which involves "bucking" (stealing) "a lot of food" from a neighbor, never from a stranger or someone in anyway outside the community. Id. at 78. The bucker then throws a party, which like mummering involves much storytelling, singing and merriment, and the culmination of the party is a feast on the bucked food. In the days following the scoff, there are often stories and ballads composed about the culprits. See id. at 78-79.

92. See BATOR, supra note 5, at 2-4 (describing the work of Clemency Coggins, which so dramatically revealed the extensive damage inflicted on important cultural, architectural and historical sites from looters looking for objects to sell in the international art market).
is contrary to indigenous practices or the object has an ongoing living context. Collecting nations choose to reify the objects themselves, placing them in hermetically sealed display cases, whereas in many instances, source nations and indigenous peoples desire to preserve the spirit of the object over the object itself. Often the destruction, neglect, or seclusion of the object is, in fact, central to the preservation of the spirit, as is the case with the mbari house of the Igbo and the Zuni War Gods.  

Again, the intellectual and material aspects of these cultural practices are nearly impossible to separate and an attempt to do so threatens or undermines the practices themselves. The objects are essential but will not continue to be created and infused with meaning without the underlying ritual; the sacredness of the ritual is violated if the objects are misused. Without the preservation of the entire practice, the objects fail to take on significance and they become mere curiosities.

But such differences in attitude are rare when considered in the context of the vastness of Western collections. Aside from these differences, there are disputes over stolen and illegally exported objects. Examples of such disputes are legion, but they have little to do with differences in attitude relating to the objects themselves. The vast number of objects acquired and stockpiled in Western collections no doubt highlights the problem of theft and disputes over specific objects, but it does not appear to be the problem itself.

Second, although this difference in attitude is significant, equally significant is the deep consistency evident in our approaches. Neither an emphasis on materiality nor a focus on process and spirituality entails disregarding or neglecting cultural heritage. A desire to preserve and protect

93. See Deborah L. Nichols et al., Ancestral Sites, Shrines, and Graves: Native American Perspectives on the Ethics of Collecting Cultural Properties, in ETHICS, supra note 16, at 27, 31-33; Merenstein, supra note 55, at 590 ("The Zunis believe decomposition of the Gods replenishes the earth with their powers.").

94. Although in the past curiosity has been enough to sustain the urge to collect and display, museums and collectors increasingly desire a richer context for the objects they possess. In most modern museum displays, there is an attempt to fabricate a living context or to at least provide information in written form which helps explain the purpose and significance of an object. See Greenblatt, supra note 79, at 44, 53-54 (discussing the transformation of museums into "temples of resonance" in which the context of display takes on as much significance as the art or objects on display).

95. See, e.g., Loke, supra note 7; Lehman, supra note 32, at 527-29.

96. With respect to those things that have some ongoing significance, the numbers do give a sense of urgency to claims for repatriation. The best example of this is the number of Native American skeletal remains sitting in the storerooms of numerous American museums. See Margaret B. Bowman, The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict, 13 HARV. ENVTL. L. REV. 147, 149 (1989) (estimating that there are over 300,000 Native American skeletal remains in federal institutions, constituting approximately 99% of all skeletal remains in such institutions); Curtius, supra note 7, at A1.
the sacred and beautiful exists in both traditions. The difference lies in identifying which element of a tradition is more essential and the connection between the various elements. If we focus on the entirety of a custom or ritual and the integration of its various parts, some of this difference is eradicated. In situations where conflict has arisen, the sharing of knowledge regarding an entire tradition has often created a climate of cooperation and understanding.97 There are many examples of failed negotiations, but in such situations, it is my belief that failure stems not from a difference in stressing the tangible over the intangible but rather from a debate between what I will later identify as the intrinsic and instrumental value of cultural heritage.98 What is important to recognize here is not the difference in approach that I have just highlighted, but rather the deep and unfailing commitment to the preservation of some aspect of cultural heritage that appears to be present in all cultures.


The final difference between source nations and collection nations that is often a sticking point in determining the disposition of cultural heritage is the issue of secrecy. The exploration of this issue overlaps with the previous discussion in that the preservation of intangible heritage, or protecting the authenticity of such intangibles, often requires secrecy.99 But secrecy is not an issue with respect to intangibles alone. Many indigenous peoples consider certain objects, as well as certain knowledge, limited goods that cannot be shared and disseminated without a corresponding loss in power, significance, and meaning.100 Thus, certain objects and information must remain concealed from the uninitiated either within or outside the cultural group. In

97. See, e.g., Merenstein, supra note 55, at 591-92 (documenting the success of the Zuni in repatriating their War Gods).
98. The most obvious recent example of such a debate is the dispute over the disposition of the Kennewick Man. See infra Part IV.C.
99. See Brown, supra note 9, at 197 ("[I]t is fair to say that many [native peoples] see [sacred knowledge] as a limited good that cannot properly exist in several places at once. Religious knowledge that resides in inappropriate places may find its power diminished or dangerously distorted . . . ."); Seeger, supra note 50, at 55-57 (In describing his attempt to record the songs of the Suyá, Seeger states: "One song, whose performance was so powerful that it could bring down an enemy attack, was interrupted and left incomplete because they realized I would certainly play it sometime, and the location for playback had no effect on the power of the songs. They were always dangerous.").
100. See Kolig, supra note 55, at 35-36 (detailing the importance of secrecy to the power of the object in question as a form of social control in traditional Australian Aboriginal communities); Nichols et al., supra note 93, at 33; Merenstein, supra note 55, at 590 (discussing how imperative it is to keep Zuni War Gods hidden in their shrines on Zuni lands).
this sense, secrecy is an integral part of the sacredness of certain objects, stories, songs or rituals, and as such, instrumental in maintaining a certain social structure within the cultural group. Additionally, secrecy helps protect rituals and customs from destructive external forces. It is a defensive tactic aimed at preventing such things as the “Smoki snake dance,” a New Age parody of a Hopi ritual.

Whatever the reasons for it, secrecy runs counter to the emphasis on freedom of information in liberal democratic societies. Although secrecy plays a more prominent role in our individual and collective lives than we often choose to acknowledge, Western societies tend to treat secrecy as illicit or subversive—contrary to the norm. It is important in Western democracies to not be “seen to limit information.” But there are other principles that are equally important in a liberal democracy, not the least of which are religious tolerance and the “reduction of inequalities.” These principles tend to dictate a different outcome when applied to the issue of secrecy in the context of different cultural and religious practices. They encourage the recognition and tolerance of different cultural practices, even when such practices involve some secrecy. So although it would appear that our attitudes differ on the issue of access, the underlying reason for the difference ultimately fails to support the supposed divergence in practices and attitudes. Liberal democratic societies should be able in good conscience to acknowledge the appropriateness of secrecy in certain limited contexts without undermining their basic governing principles.

Furthermore, to the extent that secrecy is also essential in maintaining a certain structure within indigenous societies, and thus some semblance of continuity and stability in the evolution of an indigenous culture, we can

101. See Christopher Anderson, Politics of the Secret, in POLITICS OF THE SECRET 1, 12 (Christopher Anderson ed., 1995). Some Aboriginal collections in Australian museums, although open to the public, are, under the instructions of specific Aboriginal communities, not to be viewed or cared for by Aboriginal people from other communities. See id. See also SIDER, supra note 91, at 7 (depicting a “mummer” and explaining in accompanying caption that the “mummer” keeps verses of certain songs to himself to maintain a position of prestige as well as a personal claim over the song); Brown, supra note 9, at 198 (“Although it is commonly believed that Pueblo secrecy is a defensive tactic reflecting centuries of external interference in the free exercise of religion, it also plays a key role in maintaining the Pueblos’ own political system.”).

102. See Brown, supra note 9, at 197-98, 201.

103. See SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 8 (1982) (commenting that negative views of secrecy are more common than favorable views and quoting Woodrow Wilson’s comment “secrecy means impropriety” in WOODROW WILSON, THE NEW FREEDOM 114 (1913)); Brown, supra note 9, at 198 (“In the United States, secrecy has long been regarded as inherently inimical to democratic process and personal freedom.”).

104. Pask, supra note 8, at 85.

105. See Barnes, supra note 90, at 206 (“[R]eduction of inequalities in the distribution of power is just as essential for maintaining liberal democracy as is a free flow of information.”).
view it as a security measure.\textsuperscript{106} Secrecy, even within liberal democratic societies with freedom of information laws, is unchallenged and far reaching when it comes to questions of national and public security.\textsuperscript{107} So, without even getting into the appropriateness of imposing liberal democratic principles on traditional and indigenous societies, it is difficult to find a fundamental difference in attitude. Not only can we find support for some secrecy within liberal democratic principles, but within Western societies, supposedly governed by these very same principles, secrecy is permitted for reasons not unlike those claimed by indigenous peoples.

\textit{C. Conclusion}

The debate between the nationalist and the internationalist and its implicit attribution of different values and attitudes to different cultures can be misleading. Although differences exist in our practices, and these differences may reflect fundamental normative distinctions, there is also an important area of common ground. Both Western nations and indigenous peoples recognize the significance of cultural heritage and universally strive to protect what is respectively considered its most important elements. Issues such as group ownership, the relative importance of intangibles and the role of secrecy point to some differences in approach, but they also mask the deeper consistencies. Conflicts and problems arise not because we have dramatically different approaches to cultural heritage, but rather, because collecting nations often ignore what they understand to be the fundamental value of cultural heritage within their own cultures when dealing with foreign cultural objects and customs. They choose, not surprisingly, to focus on the instrumental value of the heritage in question rather than its inherent fundamental and intrinsic value.

In the following part, I will look more closely at the intrinsic value of cultural heritage and ultimately argue that some cultural and aesthetic experience, and thus some cultural heritage, is essential to the well-being of both individuals and communities. By providing an experience of wonder, cultural heritage allows us to transcend our present circumstances and imagine or connect with other individuals, communities and cultures. It also reinforces cultural identity, thus serving as a vital link within and between


\textsuperscript{107} See Brown, \textit{supra} note 9, at 198 (criticizing secrecy, although accepting that it is warranted "in matters of national security, in deliberations on sensitive administrative or legislative matters, in certain kinds of law-enforcement activities, and so forth").
communities. Perhaps another way to convey the significance of cultural heritage is to focus on its creation. Cultural heritage is a creation of individual genius and ingenuity, while at the same time, it is an expression of a cultural community. Our experiences of cultural heritage tend to reflect this dual nature; cultural heritage encourages us to simultaneously transcend the self and anchor the self within communities.\textsuperscript{108}

III. VALUE, OBLIGATION, AND CULTURAL HERITAGE

The temptation here is to jump right into a discussion of the value of cultural heritage in the hope of convincing my readers from the outset of the worth of my position. But analytically, it is important to begin with the concepts that I am employing and then to determine whether cultural heritage properly fits within these concepts.

A. Intrinsic Value\textsuperscript{109}

What does it mean for something to have intrinsic value?\textsuperscript{110} Conceptually, what is a necessary feature of intrinsic value? The primary and most common meaning attributed to this phrase is non-instrumental value.\textsuperscript{111} According to this understanding, something has intrinsic value if it is an end in itself; if it is something that we can say is a good for which something else exists. Other meanings of “intrinsic value” attempt to refine

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\textsuperscript{108} Greenblatt captures this dual nature of cultural heritage in his discussion of museum exhibits. He states that cultural heritage, or more specifically museum objects, have the power to either arouse wonder or to resonate in the viewer, depending on both the nature of the object and its display. See Greenblatt, supra note 79, at 42 (setting out the ideas of “resonance” and “wonder”), 45 (discussing the experience of resonance), 50-52 (discussing the experience of wonder). Ivan Karp also states that museum displays are designed to either enshrine the object (wonder) or are used as “a space for telling a story” (resonance). Ivan Karp, \textit{Culture and Representation}, in \textit{EXHIBITING CULTURES: THE POETICS AND POLITICS OF MUSEUM DISPLAY} 11, 12-13 (Ivan Karp & Steven D. Lavine eds., 1991).

\textsuperscript{109} For this section and section B on obligations, many of the sources that are cited deal with environmental ethics. In the latter half of this century, the field of environmental ethics has challenged us to examine the value of the non-human world and our potential obligations to the environment. Environmental ethics is important to this project for two reasons. First, the material focusing on environmental ethics has stretched our understanding of value in a way that is useful for thinking about cultural heritage. Second, for many cultural groups, the environment is an essential component of their cultural heritage.

\textsuperscript{110} I take “intrinsic value” to be synonymous with “inherent value” or “inherent worth,” although others have argued that these phrases are quite different. See, e.g., \textsc{Paul W. Taylor}, \textit{Respect for Nature: A Theory of Environmental Ethics} 72-77 (1986).

this notion of an end. G.E. Moore, for example, has argued that something has intrinsic value if its value “depends solely on the intrinsic nature of the thing in question.”112 The “intrinsic nature” or “intrinsic properties” can be further defined as non-relational properties: properties that can be defined independent of their connection to other principles, people or things. Another approach proposes that a thing is intrinsically valuable if it has “objective value,” or value which is independent of the valuation of a valuer—a meta-ethical rather than a normative or ethical view of intrinsic value.113 If either of these refinements exhaust the category of intrinsic value then there is clearly no room in this concept for cultural heritage. The suggestion that a potlatch dance or the 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. But it is not clear that intrinsic value is restricted to these ideas. In the following sections, I will explore these definitions to determine whether they reflect the totality of our shared understanding of intrinsic value and then move on to an alternative understanding of intrinsic value.

Before proceeding to a discussion of intrinsic value, however, I should point out that it is possible to argue that the relevant question is not what has intrinsic value but rather what sorts of things have morally relevant value. R.M. Hare, a prominent twentieth century philosopher, has argued that only those things capable of valuing and capable of having interests can have morally relevant value.114 Other things might have value according to Hare but not in a morally relevant sense; there are no moral reasons when dealing with non-sentient things to treat such things one way or another because they in fact have no interests in themselves. But this is an excessively anthropocentric view of value in which morality exists only with respect to things that have interests and are thus capable of generating rights.115 Under

112. Id. at 120 (quoting G.E. Moore, The Conception of Intrinsic Value, in PHILOSOPHICAL STUDIES 260 (1922)).

113. There are approaches or ways to discuss intrinsic value other than the three I have chosen to highlight. See, e.g., Tom Regan, Does Environmental Ethics Rest on a Mistake? 75 MONIST 161, 164-79 (1992). Regan’s “ontology” of intrinsic value breaks-down into “mental-state theories,” “states of affairs theories,” “end-in-itself theories,” and “hierarchical ends-in-themselves theories.” Id.

114. In his classification of entities with value, Hare refers to those things that can themselves value as alpha. See R.M. Hare, Moral Reasoning About the Environment, 4 J. APPLIED PHIL. 3, 5 (1987). Entities which are not capable of valuing but are “valuable in themselves” fall into beta, and entities which are only ever instrumentally valuable are gamma. Id. at 5-6. He rejects the idea that something can have value without anyone valuing it. See id.

115. See id. at 8.
such an approach, duties exist only through an application of the "Golden Rule" or as correlativels, directly or indirectly, of rights.\footnote{116} Thus Hare's approach is to start with the question of interests and rights and then to move from there to duties and the question of intrinsic value. I want to begin with the question of value, or what are aspects of a good and flourishing life independent of rights and interests, and then determine how duty fits in.

1. Objective and Non-relational Value

The objective value theory holds that something has intrinsic value only if it can be said to have value independent of our personal or collective value assessments.\footnote{117} Under such an approach, intrinsic value is completely divorced from our inclinations to appreciate something. The test for such an approach is often framed by the following question: would $x$ continue to have value even after the disappearance of humans (and any other valuing agents)?\footnote{118} Setting aside the difficulty of even imagining the existence of value or inherent worth in the absence of all humans, Vermeer's *The Girl with a Pearl Earring*, the Parthenon Marbles or a Suyá song are clearly not valuable in such a situation. Thus, under the objective value theory, cultural heritage cannot be intrinsically valuable. If we cannot come up with a broader approach to intrinsic value, my inquiry has come to an abrupt end.

What happens if we take the opposite approach, that only those things that are valuable because we think them so are capable of being intrinsically

\footnote{116} {See id. at 8-9.}

\footnote{117} {See O'Neill, supra note 111, at 120.}

\footnote{118} {See id. I presume some animals have the capacity to appreciate or value other things, but for the sake of ease in language, I will simply use the term "humans" when discussing entities capable of valuing.}
valuable. In other words, intrinsic value is comprised of only those things that are the subject of human assessment, a subjectivist approach. Hare would argue that if we reject the objectivist argument and take a subjectivist approach, we are forced back into his position—that only humans have intrinsic or, in Hare’s language, morally relevant value.119 In other words, if there is no such thing as intrinsic value in the absence of humans, then we must accept the conclusion that only humans or those beings that can value have intrinsic value and all others things are merely instrumentally valuable.120 Intrinsic value for the subjectivist is thus associated with the sources of value and “the only sources of value are the evaluative attitudes of humans.”121 Needless to say, such a theory also makes it impossible to view cultural heritage as intrinsically valuable.

But if we take a subjectivist approach as originally stated, that human assessments are the only sources of value, are we committed to Hare’s position? That is, even if humans are the only sources of value, are we then tied to the conclusion that only humans or human states are intrinsically valuable? There is, as far as I can tell, no necessary connection between these two statements. The first is really a question of meta-ethics, whereas the second is a question of normative ethics. There is no reason why a subjectivist meta-ethic should logically preclude us from making a non-subjectivist or non-anthropocentric argument about what sorts of things have intrinsic value. So, even if we accept that humans are the only source of value, we do not have to commit ourselves to a thoroughly anthropocentric view of intrinsic value—that only humans have intrinsic value. Our position on normative ethics need not be contingent on our views about meta-ethics, and to make such a connection would simply confuse “claims about the source of values with claims about their object.”122 Thus, the subjective value approach does not preclude us from constructing an ethic in which things in the non-human world have intrinsic value.

119. Hare explicitly rejects the objective value theory approach. See Hare, supra note 114, at 6 (arguing that it is incoherent to say that “something has value although nobody . . . values it”). It is possible, however, to recast his position as a refinement of the objective value theory. We could explain his theory as follows: only those things that are valuable independent of our personal and collective value-assessments have morally relevant value (the objective value theory), but the only things that can possibly fit this description are the sources of value itself—humans or other valuing-agents.

120. See id. at 5-7. Hare considers the possibility of a class of entities “which have value . . . though they do not have value to anything.” Id. at 6. He concludes that this is incoherent, but this does not mean non-valuing things cannot have intrinsic value. In such a case, intrinsic value would be morally irrelevant. See id. at 6-7; see also W.D. Ross, THE RIGHT AND THE GOOD 140 (1930) (arguing that only human states have intrinsic value).

121. O’Neill, supra note 111, at 121.

122. Id.
The non-relational definition of intrinsic value is very much like the objective value theory, although with a slightly different focus. The non-relational approach focuses less on the question of the valuing agent and more on the properties of the thing being valued. It stipulates that intrinsic value is restricted to intrinsic properties. This appears to be the approach taken by G.E. Moore in his foundational work on the question of what is “good.” Moore stated, “In order to arrive at a correct decision on . . . this question, it is necessary to consider what things are such that, if they existed by themselves, in absolute isolation, we should yet judge their existence to be good . . . .” Although this sounds very much like the objective approach, let me stress again that the emphasis is on the properties of the thing being valued, not how or by whom it is being valued. Thus, an object cannot have intrinsic value if such a determination requires reference to something other than the properties of the object itself: intrinsic values must be valuable “quite apart from everything else.” Accordingly, if the value we attribute to something is in relational terms, then that value is necessarily instrumental. This presumes all extrinsic or relational properties are instrumental properties, but this presents a very limited understanding of relational properties: intrinsic value need not be exclusive of extrinsic or relational properties.

Let me give an example that brings my argument closer to my present purpose. A Zuni War God has relational value in that its positive value to the Zuni only exists in its being left alone by humans. Its value is contingent on its situation with respect to the Zuni and other humans. If a War God is removed from its hiding spot, it ceases to exercise its positive Godly functions. But given the God-like status granted to these fetishes, the Zuni believe their value extends beyond their usefulness or ability to satisfy human desires. So the value of the War Gods is dependent on their situation with respect to humans, but it is non-instrumental in that it goes beyond mere

123. It is also possible to read Moore as providing a variant of the objective value approach. See Robert Elliot, *Intrinsic Value, Environmental Obligation and Naturalness*, 75 MONIST 138, 138 (1992).
125. *Id.* at 187.
126. See O’Neill, supra note 111, at 123-25.
127. See GERALD F. GAUS, *VALUE AND JUSTIFICATION: THE FOUNDATIONS OF LIBERAL THEORY* 126-30 (1990); Elliot, supra note 123, at 139 (arguing that a thing has intrinsic value if it has value-adding properties and these need not be intrinsic properties).
128. See Merenstein, supra note 55, at 590.
usefulness or utility to human endeavors. In short, it seems plausible to suggest that some things have both relational and non-instrumental value.  

Aside from their individual shortcomings, the most significant problem with both the non-relational and the objective value theories is that they view intrinsic value as abstract and disconnected. Under either of these approaches, intrinsic value is reserved for a very limited set of ideas. In the following section, I will explore the possibility of isolating a category of intrinsic value that is embedded in, rather than distanced from, human experience, without being limited to human experiences.

2. Non-Instrumental Value

Another way to frame the issue of intrinsic value is to examine the means-end dichotomy. We tend to think that something must be either an end or a means; that these two categories exhaust all possible categories of value. In such a scheme, only those goods thought to be ends have intrinsic value. But our experience with cultural heritage suggests that perhaps there is a category of value in between means and ends in which something is neither an end-in-itself nor a means. The idea of an “end” invokes abstraction and conclusion, not unlike the definitions of intrinsic value discussed above, and yet the value of cultural heritage, not unlike the value of the environment, exists in its embeddedness in our lives. What we need is a theory of value that recognizes the importance of things that may not have self-justifying value but nonetheless resist being reduced to mere means.

The notion of instrumental value entails valuing something for its contribution to the existence of another non-instrumental good. If we value something merely for the consequences it produces then we can safely say that such a thing has instrumental value. Accordingly, if instrumental value is dependent on consequences, intrinsic value is independent of

129. See O'Neill, supra note 111, at 125. O’Neill provides an example from the environment which formed the basis of my Zuni War God example. O’Neill suggests that wilderness might have value only as wilderness—that is, as untouched by humans—so that its value is in relation to humans but still arguably non-instrumental. See id.

130. Over the course of a number of years, Moore chipped away at the concept of intrinsic value until he came to believe that only two or three things, pleasure, friendship, and perhaps beauty, could qualify as having such foundational importance. See Anthony Weston, Between Means and Ends, 75 Monist 236, 242 (1992).

131. See id. at 236-37.

132. Weston refers to this as “deeply interdependent.” Id. at 237.

133. See Elliot, supra note 123, at 139 (using the phrase “contributing to the production of some other thing which has intrinsic value”).
consequences. Joseph Raz stated that a good is intrinsically valuable if “it is valuable independently of the value of its actual or probable consequences, and not on account of any consequences it can be used to produce or to the production of which it can contribute causally.” 134 This being the case, it is possible for something to be intrinsically valuable even if it is not an end in itself, or valuable “irrespective of what else exists” as long as its value is not solely “on account of any consequences it can be used to produce.” 135 This does not preclude an argument that some goods are valuable as ends-in-themselves and in fact the two previous definitions of intrinsic value may help us identify what those things might be. But it does broaden the concept to include an entirely different category of goods.

The question remains, what sorts of goods fall into this category of things not quite ends and not valued solely for their effects? Raz has suggested that goods that are “elements of what is good in itself” are intrinsically valuable. 136 It is important to recognize that the relationship between an “element” or a “constituent” and “an end-in-itself” is not causal or consequential, but rather fundamental and essential. 137 The value of goods that are deeply and fundamentally embedded in other intrinsically valuable goods goes well beyond any consequences they might produce and thus they can be considered intrinsically valuable. So, anything which is an element of something which is intrinsically valuable in the first few senses—objectively or non-relationally or as an “end”—is itself intrinsically valuable albeit relational and contingent.

If we then presume that the least controversial of intrinsic goods is a flourishing human life and that this is a good “irrespective of what else exists,” then those things that are constituents of this flourishing life are also intrinsically valuable. Let us look at the example of art as presented by Raz. If we accept that experiencing art is a valuable life enriching activity or that “life with art” is intrinsically valuable, then art itself, a necessary element of a life with art, would be intrinsically valuable. 138 It is important to recognize that under this explanation art, very broadly defined, does not simply contribute or cause the desired effect of an enriched life, it is an important element of such a life. If we consider art to be something that simply makes a life better, just as winning a lottery arguably makes a life better, then it

135. Id.
136. Id.
137. Of course, this does not preclude valuing such constituent goods for their consequences, but it recognizes that such goods play more than a consequential role in their contribution to other intrinsically valuable goods.
138. RAZ, supra note 134, at 200-01.
clearly does not have intrinsic value. If, on the other hand, the existence of art does not simply make a life better but is in fact part of at least one definition of what it means to have a good life, then it is an element of, or it is a constituent of, a flourishing life. Under this definition, art is not an end in itself, but is intimately and necessarily connected to another intrinsically valuable good, a flourishing life.

This theory implies a certain hierarchy of intrinsic value. Under Raz's theory, there are those things which are valuable-in-themselves and at a lower order are those things that are constituents of goods valuable-in-themselves. The notion that intrinsic value might not be monolithic may seem troubling but we can find support for such thinking as far back as Aristotle. Aristotle believed some goods to be externally connected to the making of a good or happy life and others "as relating to soul or to body; we call those that relate to soul most properly and truly goods." Although Aristotle did not refer to external goods as intrinsically valuable or constitutive, he did consider them to be essential to life with happiness, despite the fact they are clearly lower in order than those goods considered "properly and truly goods."

Thus, intrinsic value may include objective and non-relational value but is not limited to these forms of value. Constituent goods, those that are constituents of other goods recognized as intrinsically valuable, also are intrinsically valuable. Their value exists in that they are a part of another good, not simply in that they bring about positive consequences. Given that cultural heritage cannot be an end-in-itself, the task is to determine whether

139. Regan also pondered a hierarchical theory of intrinsic value, ultimately rejecting it as nonsensical or at the very least not parsimonious, but his theory is based on placing ends-in-themselves in some sort of hierarchical order, whereas the above theory focuses on the relationship between ends-in-themselves and another category in between such ends and means. See Regan, supra note 113, at 177-78. Paul Taylor also entertained the notion of a hierarchy of intrinsic value through his various definitions of "intrinsic value," "inherent value," and "inherent worth." See Taylor, supra note 110, at 72-74. Using Taylor's approach, those things that are intrinsically valuable as constituents of other things that are valuable as ends-in-themselves seem to have "inherent value." See id.

140. Raz suggests a third category of intrinsic value, ultimate value, which is not relevant for my present purposes. Goods have ultimate value if they "explain and justify the judgment that [something] is good in itself, and which are such that their own value need not be explained or be justified by reference to . . . other values." Raz, supra note 134, at 200. So there are goods which are good-in-themselves, other goods which are constituents of such goods, and finally goods which explain or justify the value of such goods. All these types of goods are intrinsically valuable in that their value is non-instrumental under Raz's theory.


142. Id. at 17 ("Yet evidently, as we said, [happiness] needs the external goods as well; for it is impossible, or not easy, to do noble acts without the proper equipment.").
it is constituent of another intrinsically valuable good. I have outlined in my brief discussion of art how such an argument might be constructed, but it is important to identify more precisely the value of cultural heritage before this argument can be made.

B. Obligation

Before I embark on what would appear to be the next logical step, discussing the value of cultural heritage and fitting it in with what I have said about intrinsic value, I want to deal with the issue of obligation.\(^{143}\) It should be apparent by now that this article is building towards an argument that we have a duty to cultural heritage because it is intrinsically valuable. However, it is not clear that we have a duty to something simply because it might have intrinsic value.\(^{144}\) A moment of wonder, such as witnessing birth, might in fact be intrinsically valuable but there is nothing in this realization that grounds respect or duty. We must come up with some way to connect obligation and value. We could do this by simply reducing claims about intrinsic value to obligation: if something is intrinsically valuable then by definition we should prefer it to other non-intrinsically valuable things. Although this is a plausible argument, it is hardly satisfying. It seems that we need more to justify having an obligation to something that is intrinsically good.

The usual suspect for grounding a duty is a right, the operative assumption being that only rights can be foundational. If this is in fact true, I would have to argue that public or future generations have at least a non-discrete right that would provide the moral foundation for our shared duty. There may very well be public and future generation rights in cultural heritage that provide adequate support for protective measures, but such rights do not fully explain the ubiquitous sense of duty, respect and obligation towards cultural heritage. If we are protecting cultural heritage for future generations, essentially we are making a statement not just about

\(^{143}\) At this point, I am not interested in the specifics of such a duty but rather whether any duties are required in association with intrinsically valuable goods.

\(^{144}\) See O'Neill, supra note 111, at 131.

It is standard at this juncture of the argument to assume that possession of goods entails moral considerability: "moral standing or considerability belongs to whatever has a good of its own." This is mistaken. It is possible to talk in an objective sense of what constitutes the goods of entities, without making any claims that these ought to be realised. . . . One can recognise that something has its own goods, and quite consistently be morally indifferent to these goods or believe one has a moral duty to inhibit their development.

*Id.* (quoting R. Atfield, A THEORY OF VALUE AND OBLIGATION 21 (1987)).
for whom we are acting, but additionally about the appropriate normative attitude with respect to cultural heritage. We would be mortified if the next generation failed to respect those things we have strived so hard to protect, just as we are when our own generation disregards this obligation. We do not protect cultural heritage to give future generations the option of neglect and mistreatment, we protect it because we think it should, to the extent possible, be around for all generations. So although it is not incorrect to argue that our duty with respect to cultural heritage is to preserve it for future generations, this does not fully explain our belief that future generations should do likewise. If cultural heritage is so valuable that we think it should be preserved for all peoples at any point in time then, in essence, we have declared it to be a constant and primary source of obligation for which the establishment of a right would serve a merely fictional role. That being the case, is it coherent to think of duties as foundational? We need look no further than our individual selves to contemplate this.

We commonly recognize that there are certain things that are good for us, that we should do regardless of whether we really desire to do them. This reflects a certain sense of obligation to or respect for the self. It may be true that we do such undesirable things for our overall well-being, but must this be translated into rights? Is our well-being limited to our "desires and preferences?" The fact that we do things out of self-respect or to improve ourselves, even if they run contrary to personal preferences and desires, indicates that well-being is a much richer concept than mere preferences.\(^{145}\) This being the case, we can imagine situations where we do have obligations to ourselves in the absence of a right. Furthermore, as Raz has pointed out, "rights entail conflict," or a claim on another, and to imagine a conflict in or a claim to oneself is nonsense.\(^{146}\) A duty, on the other hand, does not imply conflict or demand and thus can clearly exist in the absence of a right.

Thus, it is plausible to consider duties as foundational, as not contingent on a pre-existing right. But we still do not have an answer to what might justify the creation of such a duty. Intrinsically valuable goods seem

\(^{145}\) This is also captured in Kant’s expression of the “Supreme” good:
The supreme created good is the most perfect world, that is, a world in which all rational beings are happy and are worthy of happiness. Man can hope to be happy only in so far as he makes himself worthy of being happy, for this is the condition of happiness which reason itself proposes.

important enough to justify the existence of a duty; intrinsically valuable goods, such as a flourishing life, are as foundational as personal preferences and interests expressed through rights. But rights naturally correspond or give rise to duties whereas we still do not know how to connect duty and intrinsic value. So the question remains, how do we go about connecting duty and intrinsic value in the absence of the clear analytic framework created by a rights analysis?

If the mere fact that a good is intrinsically valuable is not enough to provide the justification for a duty, we must look at other reasons for promoting intrinsically valuable goods. One set of answers looks at utilitarian justifications: we have an obligation to maximize goods that are intrinsically valuable.147 If art is intrinsically valuable as a constituent of a flourishing life, then under a utilitarian approach we have an obligation to maximize the existence of art. As with most maximizing theories, this runs into a problem when we consider other intrinsically valuable goods.148 How do we compare or make choices between intrinsically valuable goods? Is the despoliation or mere neglect of art acceptable if done in the name of maximizing another intrinsically valuable good? This problem is typically exacerbated by the incommensurability of intrinsically valuable goods.149

An alternative approach considers obligation as independent from the goods in question. Under such an approach, obligation and respect are required as an independent feature of our well-being; respect for intrinsically valuable things is itself part of a good and flourishing life.150 It is essential to our humanity that we treat such goods as valuable objects irrespective of our personal or collective desires. Under this approach, the obligation in question is justified by certain properties of that obligation, not just the end of the obligation. Accordingly, our attitude with respect to intrinsically valuable goods is as important as the goods themselves. The justifying good, the intrinsic value of cultural heritage, provides a normative basis for the duty: we respect cultural heritage because it is a good thing to do so. But our obligation to respect is ultimately justified by the importance of

147. See Elliot, supra note 123, at 148-49 (discussing maximizing consequentialist theories); O’Neill, supra note 111, at 132. Moore appears to depend on a species of maximizing theories: “It is, in fact, obvious that in order to decide correctly at what state of things we ought to aim, we must not only consider what results it is possible for us to obtain, but also which, among equally possible results, will have the greatest value.” MOORE, supra note 124, at 186-87.

148. It should be evident at this point that I subscribe to a pluralistic theory of intrinsic value, that is a theory which presumes the existence of more than one intrinsically valuable good. See Regan, supra note 113, at 163 (discussing pluralistic and monistic theories of intrinsic value).

149. See Elliot, supra note 123, at 149; O’Neill, supra note 111, at 131.

150. See O’Neill, supra note 111, at 132-33.
respecting intrinsically valuable goods, not by the goods themselves. Respect for intrinsically valuable goods is itself constitutive of human flourishing. In our failure to respect intrinsically valuable goods as such or by our use of them as mere ends to our personal goals and desires, we evidence not only an inability to grasp the value of the good itself but equally what it means to have a good and flourishing life.

Although this is a stronger link to obligation than the previous maximizing theory, it does not necessarily escape all of the problems presented by that approach. If respect for intrinsically valuable goods is required as being constitutive of our well-being, what are we to do when respect for one good conflicts with respect for another? Tom Regan, a philosopher and environmental ethicist, stated the problem as follows. If “all intrinsically valuable entities are equal in intrinsic value” then we have no means to choose between them or to reflect existing differences in our attitudes. If, on the other hand, intrinsically valuable entities are not all equal and “some hierarchy of intrinsic values is preferred, then there is simply no parsimonious reason for supposing that ‘lower’ members of the hierarchy have ‘some’ intrinsic value in the first place.”

If this is true, we would indeed be left wondering whether the recognition of intrinsic value gets us anywhere when attempting to justify or explain obligation. However, I think Regan’s last statement is untrue. It is possible to think of intrinsic value as having a certain order as long as one sees it as an order created by the properties of the goods themselves rather than by their respective value to us or, as Regan stated, a “preferred”

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151. Cf. id. (discussing the approach in the context of an obligation to the environment).
152. Perhaps the best example of this form of analysis can be found in Aristotle’s discussion of friendship. Aristotle states that a failure to treat friends as ends-in-themselves is a reflection of one’s inability to live up to the requirements of a good life. See ARISTOTLE, supra note 141, at Bk. VIII, 3–6.

Perfect friendship is the friendship of men who are good, and alike in virtue; for these wish well alike to each other qua good, and they are good in themselves. Now those who wish well to their friends for their sake are most truly friends; for they do this by reason of their own nature and not incidentally; therefore their friendship lasts as long as they are good—and goodness is an enduring thing.

Id. at 196. “For all friendship is for the sake of good or of pleasure . . . and to a friendship of good men all the qualities we have named belong in virtue of the nature of the friends themselves . . . .”
Id. at 197. “And in loving a friend men love what is good for themselves; for the good man in becoming a friend becomes a good to his friend.” Id. at 200.

154. Id.

155. Regan’s overall thesis is that environmental ethics have made a mistake in focusing on the question of the intrinsic value of the environment—that the notion of intrinsic value cannot meet the demands of respect and obligation placed on it by environmental ethics. See id. at 180-81.
hierarchy. Thus, goods which are constituents of other intrinsically valuable goods are necessarily lower in order than goods which are intrinsically valuable as ends-in-themselves. This order is not arrived at by assessing the respective value of goods in relation to our preferences and choices, but rather through an analysis of intrinsic goods as a self-contained and ordered system. Regan suggests that we construct “secondary principles” in order to work through conflicting duties.\footnote{156} I see at least one such secondary principle emerging naturally through the structure of intrinsic goods themselves. It may be the case that, as James Nickel implies, we need more secondary principles to help distinguish different intrinsically valuable goods. Nickel argues that the notion of intrinsic value I have used here could apply to many, many things, thus making it less likely it really warrants a duty to respect, let alone any other duties.\footnote{157} Although I think the material that follows dealing with cultural and aesthetic experience might provide the foundation for such a secondary principle,\footnote{158} I have not argued it as such. I have used this material to argue why it is that cultural heritage is intrinsically valuable but I have not taken the further step of arguing why this might make cultural heritage more important than other intrinsically valuable goods. In the paragraph that follows, I dispense with the question of preferences or priorities between intrinsically valuable goods by stating that the duty to respect only requires that we not subject intrinsically valuable goods to our personal preferences and desires—nothing more. But I agree with Nickel that I need a slightly more robust argument to support some of the arguments made in the last section regarding the treatment of cultural heritage.

Furthermore, the basis for obligation as previously discussed is flexible enough to deal with conflict. It is possible to maintain respect and a sense of obligation for specific intrinsically valuable goods, while preferring others, so long as such preference reflects a rational, not exclusively preference-based ordering as discussed above. While the notion of maximizing requires comparison and measurements between intrinsically valuable goods, this is not so for the idea of respecting intrinsically valuable goods as constituents of, for example, a flourishing life. Such a theory requires that we continue...
to respect such intrinsically valuable goods, but respect does not necessarily require that we prefer them over other intrinsically valuable goods. It only requires that we give proper weight to such goods, which necessarily means not leaving their fate to be determined by personal desires and preferences alone.

Thus far, I have presented a theory of intrinsic value that recognizes a second-order of intrinsically valuable goods, namely those goods that are constituents of other intrinsically valuable goods, and I have provided a workable justification for treating such goods with a sense of obligation and respect. The last and perhaps long-awaited move is to explain how cultural heritage fits into this analysis.

Before moving to the final section, I wish to point out that although I have argued in this section for a duty to respect intrinsically valuable goods that is independent of rights, such an obligation, at least in the context of cultural heritage, is not divorced from human experience. The duty to respect may be separate from human desires, preferences, and rights, but this should not be mistaken for an attempt to completely separate such obligation from human experience. In the following section, I discuss the value of cultural heritage as it relates to two fundamental human experiences. These experiences are ultimately what give cultural heritage its intrinsically valuable status, and thus it could be argued that the duty to respect is ultimately, albeit indirectly, tied to the preservation of these human experiences.

C. The Value of Cultural Heritage

Finally, we come to the question of the value of cultural heritage and how this ties into my analysis of intrinsic value and duty. Cultural heritage embodies a complex combination of values. Some objects of cultural heritage undoubtedly have significant investment value and it is no surprise

159. Given that much of my analysis on intrinsic value is taken from the work of environmental ethicists, it is worth noting that the approach laid out in this article is different from one strain of environmental ethics that was quite prominent in legal discussions in the early 1970s. This approach argued for an environmental or ecological ethics that is not human-dependent. See Christopher Stone, Should Trees Have Standing: Towards Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450 (1972). I believe my approach falls under what McCloskey has described as, “a new normative ethic by way of modifying and correcting traditional ethical theories so as to acknowledge new, specifically ecological values and duties.” H.J. MCCLOSKEY, ECOLOGICAL ETHICS AND POLITICS 30 (1983). Of course, my approach replaces the notion of ecological duties with cultural heritage duties.

160. Recall that Gates purchased the da Vinci manuscript for $30.8 million. See Goldman & Muchnic, supra note 1. Objects that are more strictly cultural can also have significant value.
that cultural heritage has great potential as both propaganda and as "a hedge against ideological totalism."\textsuperscript{161} The increasing monetary, social and educational value of cultural heritage has also resulted in its use as a powerful expression of and means for obtaining sovereignty.\textsuperscript{162} All these uses of cultural heritage emphasize its instrumental and auxiliary value. This type of value is clear and uncontroversial. But is it possible to argue that cultural heritage, something as simple as a song, a document or a work of art, also has intrinsic value?

In this section I will discuss two experiences that I argue are ends-in-themselves and which require the existence of cultural heritage: aesthetic experience and cultural experience.\textsuperscript{163} Cultural heritage is, in varying degrees, intimately connected to both aesthetic experience and cultural experience. By utilizing a broad definition of cultural heritage, such a category necessarily will include some things that seem to be more closely associated with cultural experience and others with aesthetic experience.\textsuperscript{164} However, it is important to recognize that aesthetic experiences are ultimately shaped by the cultures in which we live and thrive; cultural experience and aesthetic experience are intimately connected. Although it is possible for some cultural objects to have no aesthetic value, all artistic objects have some cultural value. We might in fact say that the aesthetic is a personal experience of the cultural. Because aesthetic experience is very much culturally determined, I will spend most of the following section discussing cultural experience and its relation to cultural heritage. I do, however, think it is important to address aesthetic experience separately as it draws attention to the personal side or "wonder" element of cultural heritage. There is something unique about aesthetic experience even if it is ultimately a product of our cultural association.

It is worth pointing out that this argument does not entail the existence of any specific objects of cultural heritage, but rather the assurance that there


\textsuperscript{162} \textit{See Daes, supra note 8, ¶ 4} (connecting cultural property with territorial sovereignty and self-determination).

\textsuperscript{163} I leave open for the moment the question of what it means for cultural heritage to exist. With some forms of cultural heritage, particularly (but not exclusively) intangible forms, this might entail concealment. It might also be the case that existence actually entails destruction if the ongoing significance of the object in question hinges on such an occurrence. In short, existence is a complex issue and for the moment it is enough to point out that it should not be taken as synonymous with preservation.

\textsuperscript{164} Although I think it is possible for some cultural objects to have no aesthetic value, all artistic objects have some cultural value.
will in fact be some cultural heritage. If, however, we agree that some cultural heritage is constitutive of a flourishing life, and if we agree on a definition of cultural heritage, it would make sense to ensure the existence of the best forms of cultural heritage.

1. Aesthetic Experience

The nature of aesthetic value or experience is a complicated question, but it is possible to identify a few consistent themes. Without any pretense of exhaustiveness, aesthetic theories appear to be classified as follows: theories that view art or the aesthetic experience as essentially related to emotion; theories that connect it with the imagination; and, finally, theories that view it as an experience unto itself or the consummate human experience. I am going to focus briefly on just one, but all of these theories view aesthetic experience as potentially autonomous and certainly foundational. The only reason I have chosen to even look at one approach is to provide those unfamiliar with aesthetic theory with a sense of how aesthetic experience is foundational. To this end I have chosen to focus on an emotion-based perspective.

Clive Bell is perhaps one of the most well-known supporters of an emotion-based understanding of aesthetic experience. Bell argued that all works of art provoke a certain emotion that he classifies as "aesthetic emotion." This emotion, which he argued is peculiar to art, is of the

165. See Clive Bell, Art 6 (1958) ("The starting-point for all systems of aesthetics must be the personal experience of a peculiar emotion. The objects that provoke this emotion we call works of art."); Jon Elster, Fullness and Parsimony: Notes on Creativity in the Arts, in EXPLANATION AND VALUE IN THE ARTS 146, 150 (Salim Kemal & Ivan Gaskell eds., 1993) ("Ultimately, I believe, the main value of all art is emotional."). See also Jeffrey Dean, Clive Bell and G.E. Moore: The Good of Art, 36 British J. AESTHETICS 135, 136-37 (1996) (explaining Bell’s theory that art provokes a certain kind of emotion).

166. See R.G. Collingwood, The Principles of Art 306 (1938). Collingwood rejects the "thingliness" of art, claiming it exists entirely in the imagination: "Now the aesthetic experience is an imaginative experience. It is wholly and entirely imaginative; it contains no elements that are not imaginative, and the only power which can generate it is the power of the experient's consciousness." Id.; see also Hamilton, supra note 161, at 87-88 ("The aesthetic experience does not occur at the level of the semantic but rather the imaginary . . . . [Art] creates the condition for imaginatively living through a different world altogether.").

167. See John Dewey, Art as Experience 274 (1934). Dewey believes the best life is aesthetic in its very nature: "[A]ll the elements of our being that are displayed in special emphases and partial realizations in other experiences are merged in esthetic experience. And they are so completely merged in the immediate wholeness of the experience that each is submerged . . . ." Id.

168. See Bell, supra note 165, at 17.
highest moral significance; it is the greatest good. This rather extravagant conclusion was captured in the following assessment of the "good" of art:

It is the philosopher's privilege to call upon the artist to show what he is about is either good in itself or a means to a good. It is the artist's duty to reply: "Art is good because it exalts to a state of ecstasy better far than anything a benumbed moralist can even guess at; so shut up."¹⁶⁹

More recently, Jon Elster, in a discussion of creativity, also concluded that "the main value of all art is emotional."¹⁷⁰ He went on to state,

On the one hand, works of art can sharpen and condense emotions that we experience outside the work, in the world—love, grief, envy and the like. On the other hand, they provide autonomous sources of specifically aesthetic pleasures—created by echoes, symmetries, contrasts, surprises, the resolution of tension and similar devices.¹⁷¹

Bell and Elster, along with others who believe the value of art exists in its connection to emotion,¹⁷² recognized the autonomy of an emotional aesthetic experience. In the notion that art provides an autonomous and fundamental emotional experience resides the belief that it is intrinsically valuable.

Aesthetic experience in this sense¹⁷³ is not unlike what Stephen Greenblatt has described as the experience of wonder: "the power of the displayed object to stop the viewer in his or her tracks, to convey an arresting sense of

¹⁶⁹. Id. at 79.
¹⁷⁰. Elster, supra note 165, at 150.
¹⁷¹. Id.
¹⁷². Susanne Langer's influential theory of art and music also can be seen as primarily emotion-based in that it connects forms of art with particular forms of feeling. See SUSANNE K. LANGER, FEELING AND FORM 125-26 (1953).

A succession of emotions that have no reference to each other do not constitute an "emotional life," any more than a discontinuous and independent functioning of organs collected under one skin would be a "physical life." The great office of music is to organize our conception of feeling into more than an occasional awareness of emotional storm, i.e. to give us an insight into what may truly be called the "life of feeling," or subjective unity of experience . . . .

¹⁷³. The imagination-based explanations of the nature of aesthetic experience also resonate with Greenblatt's notion of wonder.
uniqueness, to evoke an exalted attention." Greenblatt went on to describe how the experience of wonder transforms the object so that it "seems not to be a possession but rather to be itself the possessor of what is most valuable and enduring." "Wonder," in Greenblatt's analysis, is contrasted with the notion of resonance. An exhibit designed to encourage resonance "pulls the viewer away from the celebration of isolated objects and toward a series of implied, only half-visible relationships and questions . . . ." Thus we might associate resonance with cultural experience, whereas wonder seems closely tied to aesthetic experience, an intensely personal experience.

As previously mentioned, it is unnecessary for me to choose between the various aesthetic theories or to take a critical stance with respect to one or more of them as all of them view aesthetic experience as foundational. Whether the experience is thought of as predominantly emotional, cognitive, or imaginative, it is recognized as an essential aspect of human experience. The real controversy in aesthetic theory appears to focus on whether aesthetic experience is the ultimate experience not whether it is an intrinsically valuable experience. In either case, it is intrinsically valuable and art or artistic objects are a constituent of this experience. As a constitutive component, art is itself intrinsically valuable. Thus, that part of cultural heritage that can be called art and that evokes wonder, is thus intrinsically valuable; it is "the possessor of what is most valuable and enduring."

2. Cultural Experience

Cultural experience is no less valuable. If aesthetic experience is arguably an experience of the human spirit in isolation, cultural experience stresses our interdependence both across time and space. Although the idea

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174. Greenblatt, supra note 79, at 42.
175. Id. at 52.
176. Id. at 45.
177. I would be remiss if I did not mention Plato who, of course, did not think very highly of aesthetic experience. Plato believed that art and poetry are merely imitative forms, unreliable in their depiction of virtue and thus potentially destructive to the polis. See PLATO, THE REPUBLIC 595b—607a (G.M.A. Grube trans., 1992). This then is what I wanted to get agreement about when I said that painting and imitation as a whole produce work that is far from the truth, namely, that imitation really consorts with part of us that is far from reason, and the result of their being friends and companions is neither sound nor true.
178. Greenblatt, supra note 79, at 52.
of culture is "notoriously elusive,"\textsuperscript{179} it is often defined as a "whole way of life: material, intellectual, and spiritual, of a given people."\textsuperscript{180} But this is a very limited notion of culture that fails to grasp its fluid and inventive qualities. It is not just an integration of essential aspects of our being, nor is it simply the lens through which we interpret and give meaning to our experiences. At a more foundational level, culture is our collective being. It is not simply "backward-looking 'traditionalism,'"\textsuperscript{181} it is a form of "collective intentionality."\textsuperscript{181} As a forward-looking, non-static phenomenon it must always remain in some sense elusive and yet utterly indispensable: "Without a culture we would not be human, but stunted, crippled organisms if indeed we were, by some fluke, to survive at all."\textsuperscript{182} The things we identify with culture, objects, customs, rituals, and folklore provide a context in which to coordinate and coadjust a multiplicity of emotions and interests; and especially, as the loci for intentional, forward-looking actions, they may keep the need for collective action, collective adjustment of interests, and collective expression of feelings and emotions within the terrain and the domain of the coparticipants in a custom, serving as a boundary to exclude outsiders.\textsuperscript{183}

The notion of culture or cultural things as a "context" also appeared in some recent philosophical discussions of the significance of culture. Will Kymlicka has been at the forefront of a movement within liberal moral philosophy that attempts to convey the impossibility of personal autonomy in the absence of some recognition of cultural context.\textsuperscript{184} Kymlicka dealt with this connection directly, arguing that one's cultural context is essential to the development and pursuit of one's conception of the good life, and thus liberal political and moral theory must come to terms with some form of cultural rights. This then sounds very much like a straightforward cultural

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\item \textsuperscript{179} Frances Berenson, \textit{Inter-Cultural Understanding and Art, in PHILOSOPHY AND CULTURE II 248}, 248 (Venant Cauchy ed., 1988).
\item \textsuperscript{180} \textit{Id.} at 248.
\item \textsuperscript{181} \textit{SIDER, supra} note 91, at 94.
\item \textsuperscript{182} Peter Miller, \textit{Western Traditions, Nature's Values, and Environmental Ethics, in PHILOSOPHY AND CULTURE II, supra} note 179, at 74.
\item \textsuperscript{183} \textit{SIDER, supra} note 91, at 94. Sider is writing in the context of Newfoundland fishing communities. These fishing communities, consisting of mostly Scottish and Irish descendants, invented a number of customs, such as "scoffing," "mummering," and "cuffing," that were designed to test, replay, and in many ways, reinvent their experiences within close-knit, impoverished communities highly dependent on an unpredictable industry. \textit{See Id.}
\item \textsuperscript{184} \textit{See WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989) [hereinafter KYMLICKA, LIBERALISM].}
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rights argument from which I am attempting to distance myself for the purposes of this paper. But we can separate Kymlicka's moral and political arguments and for the moment focus on his claims about the significance of culture.

Kymlicka argued that all human choices are made within a cultural context; cultural structure is recognized as a "context of choice." This context naturally provides us with sets of alternative life plans as well as the framework for assessing the legitimacy and value of those plans. As such, cultural context, including language, customs, and cultural heritage, provides us with the means for the establishment and expression of our individual autonomy; "[c]ultural membership affects our very sense of personal identity and capacity." Kymlicka commented specifically on the significance of cultural heritage, adding that it is a source of "emotional security and personal strength." Why else, Kymlicka went on to note, is the destruction and degradation of cultural heritage so central to oppressive regimes around the world? It is precisely because of the deep connection between "one’s sense of personal agency" and "one’s cultural heritage" that the destruction of cultural heritage is such an effective tool of domination.

It is important to note that although Kymlicka argued from within a liberal framework, stressing the value of cultural experience to individual well-being, cultural experience is not purely instrumental in value. Cultural experience in Kymlicka’s analysis appears to be intrinsically valuable in precisely the same way previously discussed: it is a constituent of something that is foundational, individual well-being. Kymlicka stated:

Liberals should be concerned with the fate of cultural structure, not because they have some moral status of their own, but because it’s only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value.

So although cultural experience has no independent moral status, it is, according to Kymlicka, profoundly significant to our sense of worth.

185. Kymlicka, Liberalism, supra note 184, at 166.
186. Id. at 175.
187. Id.
188. Id. at 175-76.
189. Avishai Margalit and Joseph Raz put forth a similar argument for the significance of culture. See Avishai Margalit & Joseph Raz, National Self-Determination, in Joseph Raz, Ethics in the Public Domain 125, 133-35 (1994). They maintain that membership in a "pervasive culture" is essential to individual well-being because it provides people with "meaningful choices" and an "anchor for their self-identification and the safety of effortless, secure belonging." Id.
190. Kymlicka, Liberalism, supra note 184, at 165 (emphasis added).
But there is a shortcoming in Kymlicka’s concept of culture and cultural heritage. Kymlicka presumed a certain authenticity of cultural practices and sees individuals responding and growing within an authentic cultural experience without recognizing the dialogic relationship between individuals and culture—and at another level interculturally. Kymlicka hinted at the open and pluralistic nature of culture¹⁹¹ but this aspect is not prominent in his discussion; Kymlicka’s cultural context appears almost static, deriving strength from its stability rather than its flexibility.

Charles Taylor took Kymlicka’s arguments a few steps further.¹⁹² Taylor, arguing from within a communitarian framework, emphasized the dialogic nature of the relationship between individuals and culture. This not only has the effect of more closely tying human development to community and culture, but it simultaneously captures the fluid, responsive nature of culture. So just as individuals flourish and develop within cultures, so cultures evolve in reaction to human changes and circumstances. Taylor did, however, see the preservation of certain elements of culture as a legitimate and appropriate public goal. Culture is an expression of the good life, at least the common aspects of a good life¹⁹³ and, as such, individuals are entitled to preserve certain essential elements of their culture in an attempt to provide continuity into the future.¹⁹⁴

Others who emphasize the fluidity of culture are more skeptical about any attempts to preserve particular customs and cultural peculiarities. Jeremy Waldron has argued for what he calls a “cosmopolitan alternative,” eschewing any notion of there being distinct cultures. He stated: “from a cosmopolitan point of view, immersion in the traditions of a particular community in the modern world is like living in Disneyland and thinking that one’s surroundings epitomize what it is for culture really to exist.”¹⁹⁵

¹⁹¹. See id. at 168 (arguing that we must be on our guard against particular visions of the character of a cultural community).

¹⁹². As a communitarian, Taylor’s approach is significantly different from Kymlicka’s. In fact, Kymlicka devotes a chapter in his book to Taylor’s work and ultimately distances himself from the communitarian framework. See Kymlicka, Liberalism, supra note 184, at 74-99. In a more recent volume on multiculturalism, Taylor appears to take a less decidedly communitarian stance, but his recognition of the dialogic nature of human life certainly involves a stronger and deeper bond between community, culture and the individual than is captured in Kymlicka’s notion of culture as a “context of choice.” Charles Taylor, The Politics of Recognition, in Multiculturalism 25, 34 (Amy Gutmann ed., 1994).


¹⁹⁴. Taylor uses this argument to support collective cultural goals such as those pursued in Quebec. He states “[i]t is axiomatic for Quebec governments that the survival and flourishing of French culture in Quebec is a good.” Id. at 58.

Waldron did not completely reject the value of culture as set forth by liberals such as Kymlicka, but he certainly disagreed with the notion that we are somehow attached to specific cultures or need the security of a single, stable, cultural context. For Waldron, modern life involves a "kaleidoscope of cultures," each culture borrowing and mixing with others so that the only true culture left is cosmopolitan in nature. Preserving the elements of any particular culture would thus be backwards and damaging to the reality of modern life. In short, our connections are not with specific cultures and communities but rather to the world community with its many interdependencies.

Waldron's emphasis on the evolving and interdependent nature of cultures has strong support among some anthropologists and ethnographers. James Clifford, in his fascinating collection of essays, *The Predicament of Culture*, commented on the blurring and shifting of cultural boundaries: "Difference is encountered in the adjoining neighborhood, the familiar turns up at the ends of the earth . . . . A whole structure of expectation about authenticity in culture and in art is thrown in doubt." But unlike Waldron, Clifford did not question the existence and ongoing significance of cultural differences. "Organic culture" may be disappearing, but Clifford argued that it is being replaced with an "inventive process"; "The roots of tradition are cut and retied, collective symbols appropriated from external influences." If we follow Clifford's analysis, the increasing interconnectedness of cultures and the world economy is not leading to simply one large mongrel breed of culture, but alternatively spawning a new form of creative cultural process dependent on increasingly open channels of exchange. Clifford quoted Ulf Hannerz, a researcher on world cultures, who states that "[m]y sense is that the world system, rather than creating massive cultural homogeneity on a global scale, is replacing one diversity with another; and the new diversity is based relatively more on interrelations and less on autonomy."

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196. *See also* James W. Nickel, *The Value of Cultural Belonging: Expanding Kymlicka's Theory*, 33 *Dialogue* 635, 635-36 (1994) (arguing that Kymlicka's "options for choice argument" does not support his subsequent argument for secure cultural belonging). However, Nickel goes on to argue that there are a multiplicity of other persuasive arguments in support of secure cultural belonging. *See id.*


198. *See id.* at 110-12.


200. *Id.* at 14. Nothing captures the essence of this process better than the picture on the cover of Clifford's collection. The picture is of a performer at Igbo masquerades in Nigeria, the performer is dressed as a "White Man," *Onyeocha*, who has taken the familiar form of a field worker complete with notebook and pencil. A description of the picture is on the book's back cover. *See id.* at 207.

201. *Id.* at 17 (quoting Ulf Hannerz).
There are a few things that we can conclude from this discussion of the role and nature of cultural experience. First, culture, whether as a context or as a dialogic counterpart, is of fundamental significance to our identities and individual well-being. It is through culture that we find expression and give meaning to our lives. Second, despite the growing connectedness and interdependence of cultures or the dialogic relationship between cultures, specific cultures continue to assert, albeit in relational, inventive forms, unique existences. Thus, not only is culture, broadly-speaking, essential to our well-being, specific cultures continue to play a central role in our lives. The question which remains is how should cultural heritage fit into this analysis?

Clearly cultural heritage, as Kymlicka recognized, is the essence of cultural experience and thus is both as crucial to our well-being and as valuable as cultural experience or culture broadly defined. And yet if we adhere to the notion of culture as a fluid, non-static phenomenon, objects and customs seem ultimately dispensable—mere incidents of cultural evolution. If culture is a process, then should we not consider its products mere secondary elements or by-products of that process? If we attempt to venerate cultural heritage, are we risking the assertion of authenticities which "would be at best artificial aesthetic purifications?"202 Furthermore, in the process of veneration are we simply "reinscribing the authority of our own cultural categories?"203

Similar to the disparaging usage of cultural symbols,204 the reification of certain cultural objects and traditions unquestionably generates a fixed, definite and generally outdated image of a specific culture.205 The imposition of Western categories of meaning imposes a foreign and in some circumstances perverse system of value on the traditions and objects of other

202. Id. at 4.
203. Coombe, Postcolonial Struggle, supra note 8, at 74, 80.
204. See Nell Jessup Newton, Memory and Misrepresentation: Representing Crazy Horse in Tribal Court, in BORROWED POWER, supra note 8, at 195, 195-96 (discussing the appropriation of Native American names and images in popular culture and marketing, and in particular, the dispute over "The Original Crazy Horse Malt Liquor").
205. See Joane Cardinal-Schubert, In the Red, in BORROWED POWER, supra note 8, at 122, 124-26; Newton, supra note 204, at 197-98.
A restrictive "art-culture system" has come to control the authenticity, value, and circulation of artifacts and data. Analyzing this system, I propose that any collection implies a temporal vision generating rarity and worth, a metahistory. This history defines which groups or things will be redeemed from a disintegrating human past and which will be defined as the dynamic, or tragic, agents of a common destiny.
CLIFFORD, supra note 199, at 12-13, 230-36.
cultures.\textsuperscript{206} Within Western nations flourishes a system of value that "finds intrinsic interest and beauty in objects from a past time . . . . Temporality is reified and salvaged as origin, beauty and knowledge."\textsuperscript{207} The distinction of not more than a century ago between artifact and art has eroded and what was once considered "grotesque" is now an "aesthetic masterpiece."\textsuperscript{208} The appropriation, (re)invention and reification of cultural heritage have effects that reverberate well beyond the boundaries of Western culture. Just as our own assumptions cement certain images in our minds and impose a pre-ordained set of values, so these images and values affect the cultures which form the subject of our fascination.\textsuperscript{209}

But the protection of cultural heritage need not lead to the essentialization of culture. Like Taylor, and perhaps in a more attenuated way like Clifford, I believe cultural heritage plays an indispensable role in the existence and evolution of distinct cultures. Intention and inspiration do not exist in isolation. The rich context provided by cultural heritage is essential to a continuous and meaningful cultural experience. Furthermore, many communities view cultural heritage as a link between the physical and metaphysical worlds and as such it provides an ongoing means of communication and direction within cultures.\textsuperscript{210} This communicative function of cultural heritage stresses not just its present relevance but more importantly its truly dynamic nature in certain contexts.

We must resist the Western urge to view objects and traditions as metonyms for particular cultures, but we must also resist the opposite tendency, again a Western approach, to marginalize the unique connection between specific cultures and their heritage. Cultural heritage is not the

\textsuperscript{206} See Coombe, \textit{Native Claims}, \textit{supra} note 8, at 255-58 (discussing the distinction between "art" and "artifact," terms used in Western museums to categorize, divide, and define Western and non-Western museum objects).

\textsuperscript{207} CLIFFORD, \textit{supra} note 199, at 222.

\textsuperscript{208} \textit{Id.} at 228. In a previous chapter Clifford discussed the growing "aesthetic anthropological debate" in museum displays and the extent to which "science can be aestheticized, art made anthropological." \textit{Id.} at 202-04.

\textsuperscript{209} In a discussion of the transformation of "marginal peoples" when they enter an "historical or ethnographic space that has been defined by Western imagination," Clifford stated:

\begin{quote}
Entering the modern world, their distinct histories quickly vanish. Swept up in a destiny dominated by the capitalist West and by various technologically advanced socialisms, these suddenly "backward" peoples no longer invent local futures. What is different about them remains tied to traditional pasts, inherited structures that either resist or yield to the new but cannot produce it.
\end{quote}

\textit{Id.} at 5; see also Newton, \textit{supra} note 204, at 197-99 (discussing the degradation and demoralization that results from the use of Native American names and images as marketing tools).

\textsuperscript{210} See Robin A. Morris, \textit{Legal and Ethical Issues in the Trade in Cultural Property}, 1990 NEW ZEALAND L.J. 40, 40 (stating that cultural artifacts can link the physical and metaphysical world and communicate symbolically and as visual aids to the spoken word).
totality of culture but it is a constituent in that, in the right hands, it provides
the seeds and tools for growth and invention. The desire of culturally
affiliated groups to control and in some cases preserve their cultural heritage
is not a reflection of a tendency toward cultural essentialism as much as it is
an attempt by specific cultures to preserve "a particular historical trajectory
of their own." 211

Thus cultural heritage is not a mere incident of culture; it is an
indispensable aspect of cultural experience and the evolution of cultures.
Given that cultural experience or a stable cultural context is intrinsically
valuable, cultural heritage as a constituent of that experience is also
intrinsically valuable.

D. Conclusion

The satisfaction of human interests and desires is the one incontrovertible
good in modern philosophy but surely there must be a richer notion of the
good or a richer set of goods in the world. At the very least there must be
things that are part of a flourishing life that form the basis for our judgments
about others and ourselves and that are not reducible to individual
preferences. I have suggested that cultural and aesthetic experience are
goods in themselves in that they are aspects of a flourishing life. Although
aesthetic experience is determined by culture, it is an intensely personal
experience, one infused with wonder, whereas cultural experience is social,
reflecting our need for shared experiences and values. Cultural heritage
comprises the overlapping domains of art and culture and as such involves
aesthetic and cultural experience. It is in its many forms essential to these
experiences and is thus intrinsically valuable.

Two things must be clarified before moving on to the last part of this
article. First, as I stated previously, this analysis is not meant to refute the
instrumental value of cultural heritage, roughly speaking, its political,
economic and educational value. My goal has simply been to stress its
essential, irreducible value that rests in its embodiment of aesthetic and
cultural experiences. Second, this analysis provides little to no guidance on
what we do with specific items of cultural heritage and in particular what
happens when cultural and aesthetic values clash. The argument above has
provided a justification for the existence of art and culture, but not for the
existence or special treatment of specific items. In the following and final

211. Arif Dirlik, The Past as Legacy and Project: Postcolonial Criticism in the Perspective of
part, I address this issue and the related question of how we regulate and determine the appropriate treatment of cultural heritage.

IV. THE REGULATION OF CULTURAL HERITAGE

This part does not propose an entire regulatory scheme. Others have already crafted elaborate legal solutions to the problems associated with cultural heritage. The main purpose of this article has been to provide a way to both explain and critique, in essence to reason through, our attempts to regulate cultural heritage. But there are some general guidelines and practical conclusions that can be drawn from the approach discussed.

At this juncture, there is one objection that is likely looming large in the minds of many readers and thus should be addressed before moving on. The previous part laid out an ethic of cultural heritage, one that focuses on the intrinsic value of cultural heritage and the consequent duty element in our relationship with it. Even if we assume this approach has some merit to it, this does not justify the formal regulation of human behavior with respect to cultural heritage. In short, establishing the existence of a moral duty in no way requires or presupposes the existence of a formal or legal duty. To make this move without providing a further justification for the existence of a legal duty reveals a fundamental failure to understand the nature of legal duties as well as moral duties.

Hohfeld’s influential article about legal relations said very little about the nature of legal duties. This was not an oversight but rather reflected the limited role for duties in Hohfeld’s analysis. Hohfeld’s systematic discussion of legal relations reduced legal duties to mere correlatives of legal claim rights. Under this analysis, the leap from a moral to a legal duty requires, at the very least, proof of a corresponding legal right. And yet the previous part of this article attempted to distance itself from the notion that the duty to cultural heritage corresponds to any rights. Hohfeld’s analysis did not,

212. See, e.g., Gerstenblith, supra note 59, at 673-88.
213. See Richard Stith, Generosity: A Duty Without a Right, 25 J. VALUE INQUIRY 203, 212-13 (1991) (discussing the “logical irrelevance of enforcement mechanisms” to what he refers to as “mutual duties”—duties that exist without correlative rights). Carl Wellman recognizes the existence of absolute duties, in contrast to relative duties, even in the law but these duties are absolute precisely because they are unenforceable—“there is no one with the legal power to enforce them through the courts.” Carl Wellman, Relative Duties in the Law, 18 PHIL. TOPICS 183, 200 (1990).
214. See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions As Applied in Judicial Reasoning, 23 YALE L.J. 16 (1913). Hohfeld’s typology of legal relations isolates four basic entitlements—rights, privileges, powers and immunities—and identifies both “correlatives” and “opposites” for each of these entitlements. See id.
however, appear to preclude the creation of a claim right if necessary to enforce a duty. In other words, legal claim rights do not necessarily exist prior to the recognition of a duty and it appears possible to simply construct a claim right to act as an artificial correlative of a pre-existing duty. Thus, a legal claim right need not be anything more than the power to enforce the duty in question, the power to "carry forward judicial proceedings to enforce some duty-imposing law."  

Of course, simply because it is possible to create a legal claim right to correlate to a previously non-correlative duty under Hohfeld’s typology does not mean it is a good thing to do so. There may be other reasons why it is important to leave such duties to the realm of informal sanctions and reject the artificial construction of a legally enforceable claim right. There are at least two types of reasons for rejecting enforceability. The first category of reasons concerns the potential difficulty of enforcing such a duty. Enforcement mechanisms for duties that can be classified as at least partially positive rather than solely negative may end up being too costly, too invasive of other rights, or simply too difficult to define in a way which maximizes their effectiveness. These objections are certainly worthy of consideration, but, as enforcement concerns, they are secondary to the main purpose of this article and thus will not be addressed here.

The second category of reasons concerns the nature of a non-correlative duty. Is there something about the nature of non-correlative duties that mandates non-enforceability? Do we risk destroying the mutuality of shared duties if they become enforceable? If, as seems plausible, the shared nature of such duties is connected to our voluntary assumption of their demands, then their mutuality may very well be at risk if enforcement mechanisms are employed. But, this is a legitimate concern only so long as the mutuality exists and remains strong. If there are other societal forces or conflicts that threaten to erode the duty in question, it may be necessary to shore up that duty to respect with some more formal enforcement mechanisms, even at the risk of undermining the voluntary nature and thus mutuality of such duties. I began this article by suggesting that the instrumental values associated with cultural heritage threaten to erode its fundamental, intrinsic value as well as our shared duty to preserve that value. The ever-increasing demand for cultural objects in the international art market threatens to dramatically alter the significance of such objects and their underlying contexts. For this reason, it makes sense at least to entertain more extensive guidelines for the disposition of cultural heritage and the possible creation of a legal right to enforce such guidelines.

215. Wellman, supra note 213, at 199.
Having said this, the following analysis is not restricted to the creation of legal regulations. It may be the case, as has been argued by at least one commentator,216 that cultural heritage can be most effectively regulated through less formal non-governmental guidelines and professional rules of conduct rather than formal legal regulations. The advantages of self-regulation are obvious. The sanctions, whether taking the form of formal censure or informal pressure, are likely to be vastly more effective than the mere threat of fines or other typical legal sanctions. Furthermore, professional organizations, such as the Archaeology Institute of America, have the requisite knowledge to create effective regulations or guidelines. What follows is simply a framework for creating such guidelines or possibly more formal legal regulations based on the previously discussed ethic of cultural heritage.

A. Sorting Out the Intrinsic Values

First, how do we get from recognizing the intrinsic value of art and culture to recognizing the value of specific instances of cultural heritage? It goes without saying that the cultural heritage ethic laid out above does not provide a justification for the protection of all objects of cultural heritage. But it does provide an argument for the existence of a range of good cultural heritage.217 A robust aesthetic or cultural experience necessarily will entail a collection of worthy examples of art and culture, just as any good life entails some wealth of opportunity. This reflects our present practices in that we focus on protecting only relatively important cultural heritage, rather than everything that might fall under this category. As is apparent, I am in full agreement with Nickel's criticism that not all cultural heritage can or should be part of an obligation to respect. Here, I argue quite plainly that my approach is restricted to only important cultural heritage, heritage that we could classify as nearly indispensable. It should also be pointed out in response to Nickel that even when there are what appears to be numerous examples of a particular type of cultural heritage, for example Zuni War Gods, each might in fact be singularly important because each has separate and specific spiritual value.

217. What constitutes a “good” example of cultural heritage is of course a complicated issue that will necessarily entail both universal and local criteria. Most of the recent attempts at regulating cultural heritage recognize that cultural groups will play an important role in assessing the value of their own heritage. See, e.g., Native American Graves Protection and Repatriation Act (NAGPRA) of 1994, 25 U.S.C. § 3001(3)(D) (1994) (defining “cultural patrimony” as that which is considered to be of profound importance and inalienable by the tribe).
If the intrinsic value of cultural heritage is intimately connected to the value of cultural experience and the value of cultural experience exists in something like its dialogic relationship to the individuals who comprise the culture, then this tells us something about the appropriate treatment of cultural heritage. If an object, custom, story or ritual has a living context it should remain in or be returned to that context if we are to accord it the respect which it is due. Heritage that exists outside of its culture, isolated and de-contextualized, may not be appreciated for its intrinsic value. But, just as it is removed from one cultural experience, can we not argue that it becomes entrenched in another? In other words, is a “living context” restricted to an original context? Is de-contextualization simply re-contextualization? Although it is possible to make this argument,\(^{218}\) in most cases this is a weak ex post facto justification. The weakness of this argument is evident in the practices of Western museums and collectors in that they recognize original contexts are more important than displaced contexts. For this very reason they go out of their way to understand, describe and, in some cases, replicate original contexts through the use of music, lighting, props and descriptive labels. What is most prominent in the Parthenon Marble display at the British Museum is not the role of the British in salvaging and preserving artifacts but rather the role of the Parthenon in Ancient Greek culture.\(^{219}\)

But we must be cautious about making sweeping statements with respect to the placement of cultural heritage. Although many forms of cultural heritage should remain in close proximity to their culturally affiliated groups, we should avoid the notion of permanent cultural ownership. The solution to the appropriate treatment of cultural heritage is not an entrenched cultural ownership/rights position\(^{220}\) that fails to create any real standards with respect to the objects themselves. As previously discussed, an ownership/rights approach fails fully to reflect the nature of our relationship

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\(^{218}\) The British have consistently claimed that the Parthenon marbles are as much a part of their culture as they are a part of Greek culture. See Merryman, *Elgin Marbles*, supra note 9, at 1915-16.

\(^{219}\) This is not to say I think the Parthenon Marbles should be returned, at least under the notion of existing within a “living context.” The only “living context” that arguably exists for the Marbles is the structural remains on the acropolis and for this reason perhaps they should be returned, but I do not think the present day Greeks can present a cogent case for their culture being a “living context.” See *Moustakas*, supra note 58, at 1196-202 (arguing that the Marbles are intimately connected to Greek identity).

\(^{220}\) See Karlsson, supra note 48, at 210. Karlsson agreed with Brown’s rejection of entrenching rights of ownership in cultural groups, but in doing so he also appears to reject Brown’s characterization of the indigenous people’s rights approach as a “polemical romanticism.” Karlsson argued that Brown “too easily reduces the indigenous stance to one of cultural ‘essentialism.’” *Id.* at 211.
with cultural heritage. Furthermore, to grant claims for cultural heritage based on an assertion of cultural rights without any further analysis of the worth of the claim is, as Taylor stated, "an act of breathtaking condescension."\textsuperscript{221} Taylor argued that the validity of any cultural claim, and I include in this claims for cultural heritage, must be demonstrated concretely and to do so requires something in addition to a robust notion of cultural rights and equal respect for other cultures. We need a "fusion of horizons"\textsuperscript{222} and a "new vocabular[y] of comparison."\textsuperscript{223} In short, we need a set of standards that captures the significance of cultural objects and fosters discussion between cultures, not a series of rights based arguments that polarize interested parties and potentially curtail discussion, cooperation and a "fusion of horizons." Recognizing the intrinsic value of cultural heritage and its profound connection to cultural experience is a step toward creating a set of either formal or informal standards. It is the foundation upon which such standards should be created.

Part of this process is recognizing the value of other connections, particularly those associated with aesthetic experiences. Objects and customs can become intrinsically valuable in foreign contexts. The Parthenon Marbles, potlatch masks, and Teotihuacán Murals are recognized and appreciated as aesthetically significant works of art outside of their affiliated cultures even if their cultural connection is weak. The same can be said of recorded Suyá songs or the Hopi Snake Dance. Aesthetic experience may not trump cultural experience but it is important to recognize the value of such experience. At the very least, recognition of this value provides us with guidance on the treatment of objects and customs that do not have an enduring, significant cultural connection. For example, the Cycladic figures at the J. Paul Getty Museum are aesthetic marvels with very little cultural connection to the present inhabitants of the Cyclades.\textsuperscript{224} In such a situation, what I have identified as a cultural experience associated with the figures is lacking. I suspect the Cycladic figures no more resonate for the inhabitants

\textsuperscript{221} Taylor, supra note 192, at 70.
\textsuperscript{222} Id. at 67 (quoting HANS-GEORG GADAMER, WAHRHEIT UND METHODE 289-90 (1975)).
\textsuperscript{223} Id.
\textsuperscript{224} This ignores the issue of the integrity of a specific site, one of the stronger arguments for the return of the Parthenon Marbles, which is simply beyond the scope of my paper. See Evangelos Venizelos, The Marbles Are an Inseparable Part of the Parthenon (last modified Nov. 3, 1998) <http://rethymno.forthnet.gr/marbles/greece.htm> (statement of the Greek Minister of Culture emphasizing the integrity of the Parthenon as a structure rather than the connection of the marbles to Greek culture). "The Parthenon Marbles are not free-standing sculptures. They are intrinsic, indivisible elements of the Temple of the Parthenon . . . . Certain of these elements are essential not only for the aesthetic appearance, but for the static stability of the building . . . ." Id.
of the Cyclades than they do for visitors to the Getty Museum—and yet they potentially inspire wonder in all observers. 225

The same analysis applies to great works of art and even such things as the da Vinci manuscript. The significance of such works lies in their aesthetic or other non-culture specific value. With respect to the da Vinci manuscript, it is possible to argue that it resonates for the inventors and artists of the world as much as it resonates for the Italians. Certainly many works of art have great cultural significance: for example the works of the Dutch Masters have special significance to the Dutch. But cultural significance in such circumstances is a product of, or dependent on, artistic significance; cultural significance is secondary to the aesthetic qualities of the work of art.

Thus, aesthetic value may be dominant in circumstances where there is a weak cultural claim or where the cultural connection is secondary in nature. But more importantly, recognizing the value of aesthetic as well as cultural experience helps us understand the increasing significance of international and domestic laws protecting cultural heritage. Furthermore, recognizing the foundational nature of these experiences provides a basis for preventing the fictional Gates folly with which I began this article and any other acts the purpose of which is to destroy the value of cultural heritage. The intrinsic value of cultural heritage, whether aesthetic or cultural, does not on its own require public ownership. 226 Nor does it require individuals to give up all property rights 227 or remove cultural heritage from the market. 228 But this theory does suggest the benefits of some public control to ensure the survival of aesthetically significant works not subject to other cultural constraints. In particular, we could extend existing laws to prohibit the intentional destruction or abuse of significant cultural heritage regardless of its age, provenance, or ownership. Again, this would be subject to legitimate cultural constraints imposed by culturally connected groups. Existing domestic laws already provide limited protections for cultural heritage—

225. There is no clear understanding of the purposes of the Cycladic sculptures, but given that most were found in graves, it is believed that they had some religious function connected with the afterlife. See J.P. Getty Museum (last modified Nov. 4, 1998) <http://www.getty.edu/museum/main/Antique.htm>.

226. Public ownership might in fact interfere with the value of cultural heritage in some instances, because it destroys the connection between individual and cultural life. See Weston, supra note 130, at 240 (making this argument in the context of the environment).

227. I agree with Nickel's comment that property rights are particularly appropriate when dealing with cultural heritage that is not indispensable to a culture. See Nickel, supra note 157, at 360-61.

228. The market may, in fact, play some role in determining which items of cultural heritage are important.
remains or tangible cultural heritage found on Indian or other public land is
protected under both the Archaeological Resources Protection Act\(^{229}\) and
NAGPRA,\(^{230}\) as is the integrity of works of art covered under the Visual
Artists Rights Act.\(^{231}\) But an array of protections covering all significant
cultural heritage for an indefinite period of time\(^{232}\) would be a step toward
recognizing the true value of cultural heritage and its significance in our
lives. The parameters and details of such legislation would admittedly not be
easy to craft,\(^{233}\) but if there is any truth to the idea that cultural heritage has
intrinsic value, then we do have a strong foundation for a more
encompassing anti-abuse law.\(^{234}\)

**B. Conflicting Intrinsic Values**

The above situations are admittedly the easy ones, either because they
rarely happen, as is the case with the personal destruction of privately owned
cultural heritage, or because the cultural value is weak enough that there are
rarely cultural disputes over the placement and disposition of the heritage in
question. But what should we do when there is a serious conflict between
aesthetic and cultural qualities or between conflicting cultural traditions;
when the contested object or custom has more than one living context? It is
worth noting that most disputes over cultural heritage do not present such
conflicts. Take, for example, the potlatch masks of the Kwakiutl. The
cultural value of the masks is realized when the masks are placed in close
proximity to the Kwakiutl but the aesthetic value of the masks is also
respected. In such a situation, appreciating one value does not exclude an
appreciation of the other. The Kwakiutl appreciate both the cultural and
aesthetic value of the masks. Viewed from the perspective of the intrinsic
value of the potlatch masks, there is no conflict between the two values we
have isolated; respecting the cultural value of the masks does not entail
negating their aesthetic value. If, however, the masks continue to be
separated from the tribe, sitting in a museum in New York or Ottawa,

\(^{229}\) Archaeological Resources Protection Act of 1979, 16 U.S.C.A. §§ 470aa-mm (West 1996


\(^{232}\) Protections for works of art covered under the Visual Artists Rights Act expire upon the
death of the artist. See id. § 106A(d)(1).

\(^{233}\) One problem would be deciding how to define or determine significant cultural heritage,
an issue which is partially addressed in the definition of "work[s] of visual art" found in the

\(^{234}\) Precedent for such an anti-abuse law might be found in the Endangered Species Act, 16
visitors to the museum may very well appreciate the masks as artistic wonders but their cultural value is diminished.

There are, however, real conflicts. For example, the Igbo, as previously discussed, purposefully neglect and destroy their artistic accomplishments, and many songs and dances must remain the exclusive domain of a few individuals or a specific cultural group in order for them to retain their cultural value. In such cases, respect for the cultural experience associated with the object or custom requires destruction, natural deterioration, concealment, or exclusivity, thus making it impossible for all but a few to appreciate the object or custom aesthetically and then for only a short period of time. But these objects are created predominantly for their cultural value; their aesthetic value, although intentional, is usually secondary. We could say that but for the survival of the cultural tradition, which for a culture such as the Igbo requires the deterioration of their mbare houses, there would be no aesthetically significant heritage associated with the tradition. In such a case when there is strong evidence that the dominant value of cultural heritage is its cultural value then this should take precedence over its aesthetic value.

What happens when there are conflicting cultural traditions associated with cultural heritage? For example, many important religious sites in Jerusalem, such as the Dome of the Rock, are essential to more than one religious and cultural tradition. Although it has been my thesis that recognizing the intrinsic value of cultural heritage sheds light on how we should resolve conflicts, it does not put us closer to a resolution when dealing with competing cultural traditions. There is some comfort in the knowledge that conflicts over cultural heritage between two legitimate living contexts are rare. Most conflicts fall into the categories previously discussed, involving either a dispute between the cultural and instrumental or aesthetic value of the heritage in question. This, however, leads us into one

235. See Clifford, supra note 82, at 241 (citing CHINUA ACHEBE, IGBO ARTS: COMMUNITY AND COSMOS ix (1984)).

236. For example, the privilege of performing certain potlatch songs and dances is granted to a select few. See Sutts, supra note 50, at 95-97; see also Seeger, supra note 50, at 56-57.

237. The Dome of the Rock, site of the Al Aqsa mosque and the rock from which Prophet Muhammad made his journey into the heavens (Qur'an 17:1), is Islam's third holiest site. It also sits atop the Temple Mount, the site of the ancient Jewish Temples. It was recently revealed that the Israeli army's chief rabbi urged the destruction of the mosque during the six-day war in 1967. See David Sharrock, Israeli Army's Chief Rabbi 'Urged Razing of Temple Mount Mosque', GUARDIAN (London), Jan. 1, 1998, Foreign Page, at 9.

238. There may be plenty of trumped up cultural claims, such as the British cultural claim to the Parthenon Marbles, but as previously mentioned, most of them are quite transparent. See supra notes 218-17 and accompanying text.
last problem, what should we do when the heritage in question is intrinsically valuable in one of the senses discussed but it also has enormous instrumental value which if realized will at least partially destroy the intrinsic value? The most recent case of such a problem is the Kennewick Man.

C. Conflicting Intrinsic and Instrumental Values: The Kennewick Man

In the summer of 1996, two men came across the remains of a human skeleton lying in the Columbia River. After a brief investigation, a group of anthropologists made two tentative findings. First, the skeletal remains were that of a Caucasian and could not be assigned to any Native American tribe living in the area. Second, the skeletal remains were approximately 9000 years old. The age and location of the remains led the Army Corps of Engineers to assume they were associated with local Native American tribes and to send out a notice of intent to repatriate the remains in accordance with NAGPRA.239 Numerous tribes in the area subsequently laid claim to the remains, now known as the Kennewick Man, named after the town near where he was discovered. At least two of the tribes claiming the remains, the Umatilla and the Nez Perce, announced that they would not permit scientific research on the remains prior to reburial.240 Shortly after the publication of the notice of intent and before actual repatriation, a group of scientists filed suit in federal district court claiming, among other things, the right to perform tests on the remains to determine whether the skeleton is Native American within the meaning of NAGPRA.241 The scientists were subsequently joined in their lawsuit by the Asatru Folk Assembly, a pre-Christian, European religion, which sought custody of the remains on the basis of the alleged European descent of the remains for the purpose of scientific study and reburial in accordance with their religious beliefs.242

In a series of rulings, the Army Corps of Engineers was told to reconsider a number of issues, including whether the remains are even subject to NAGPRA,243 and further whether scientific studies are necessary to reach a conclusion on this question.244 Almost two years have passed

242. See id.
243. See id. at 628, 644-45, 651.
244. See id. at 652-53.
since that ruling and scientific research has just begun on the Kennewick Man to determine whether it is subject to NAGPRA.\textsuperscript{245}

How should we deal with the Kennewick man? The positions of the scientists and the local tribes seem irreconcilable. Although I have no easy solution to this increasingly intractable situation, a full realization of the intrinsic value of the remains as a form of cultural heritage\textsuperscript{246} does help focus the debate and would likely encourage cooperation. It helps us understand the significance of the claim made by the Umatillas who want the bones reburied. According to their cultural traditions and oral history, the remains are from one of their ancestors and must be reburied. Until that time, the spirit of the Kennewick Man is in a state of unrest.\textsuperscript{247} It is also important to recognize that the age of the remains does not factor into an assessment of their religious or cultural significance as might be the case with Western religions. The Umatilla believe that 9000 year-old remains should be treated with the same concern and respect as ten year-old remains.\textsuperscript{248} Although some suspect the Umatilla arguments are disingenuous, driven by political rather than cultural or religious concerns,\textsuperscript{249} this argument can go both ways. The Umatilla would certainly be equally if not more justified in assuming the scientists involved have ulterior motives, given that scientists have been collecting, hoarding, and studying Indian remains since Indians first clashed with European settlers. In short, although the religious, spiritual and cultural value of the remains might seem trivial to a non-Native American when

\textsuperscript{245} See Testing Begins on Kennewick Man, N.Y. TIMES (Online) (visited Feb. 26, 1999) \textless http://www.times.com \textgreater. Other concerns and issues associated with the Kennewick Man have kept him in the public spotlight in the two-year interim. In March of 1998, there was a debate over what to do with the site where the remains were discovered. See Site of Kennewick Man Find Covered, SEATTLE POST-INTELLIGENCER, Apr. 14, 1998, at B2. In April, the controversy over the racial categorization of the Kennewick Man was heightened when James Chatters, the anthropologist who originally studied the remains, constructed a face for the Kennewick Man that resembled Patrick Stewart, a British actor. See Timothy Egan, Old Skull Gets White Looks, Stirring Dispute, N.Y. TIMES, Apr. 2, 1998, at A12. There also has been an ongoing dispute about the disappearance of a few bone fragments. See id. Finally, there has been some concern about the storage conditions of the remains. See Diedra Henderson, Corps Accused of Mishandling Kennewick Man, SEATTLE TIMES, May 28, 1998, at B1; Richard L. Hill, Kennewick Man Bones Listed, Set in Protective Packaging, PORTLAND OREGONIAN, Nov. 12, 1997, at E15.

\textsuperscript{246} Human remains are somewhat different from other forms of cultural heritage. Their value clearly goes beyond what I have identified as cultural experience, but they nonetheless raise similar issues.

\textsuperscript{247} See Ackerman, supra note 240, at 375-77.

\textsuperscript{248} See id. at 374-75.

\textsuperscript{249} See Gwynne Dyer, Kennewick Man and the New World Blitzkrieg, CHI. TRIB., Apr. 22, 1998, at A23 ("Native Americans have always emphasized that they were there first, since guilt is their main lever over a more powerful non-native society.").
compared to their claimed scientific value, the scientific value no doubt seems trivial to the Umatilla and the other tribes claiming the remains. A greater understanding of the intrinsic value of the Kennewick Man to the local Native American tribes is not going to convince the scientific community to simply give up its legal claim, but it might open up the possibility of a cooperative solution.

I have classified the scientific, educational, economic and political values of cultural heritage as instrumental because such values are secondary in nature. The scientific value of the Kennewick Man might reveal something about who we are and the ancient history of our continent but its cultural value is a part of the lives of the Umatilla. The customs associated with the burial of the remains are part of their belief system and as such they are integral to their present day lives and actions. Whereas the instrumental value of cultural heritage tells us something about who we are or assists us in achieving various personal or collective goals, the intrinsic value is part of who we are, the “we” in the case of the Kennewick Man being the local tribes. Cultural experience and thus cultural heritage, as I have argued, are a fundamental aspect of our existence deserving our profound respect. Accordingly, in most situations where there is a conflict between what I have called instrumental and intrinsic values, the intrinsic value of the heritage in question should take priority.

Thus, in the absence of any cooperative resolution to the disposition of the Kennewick Man, he should be repatriated to the local Native American tribes. I am not confident that intrinsic value absolutely outweighs instrumental value in every possible situation. No doubt there are situations where the scientific value of cultural heritage is greater than its cultural or aesthetic value, although I can cite no concrete instances where I think this is true. As a general rule, the intrinsic value of cultural heritage is more

250. Supposedly, the remains are significant not only because they may provide unique insight into the history of human beings in North America, but also because the study of such remains may help us understand certain diseases as well as societal problems, such as battered child syndrome. See Congress Eyes Kennewick Man Study, N.Y. TIMES (Online) (visited June 15, 1998) <http://www.times.com>.

251. The following hypothetical poses such a situation. Suppose a South American tribe, living in the Rain Forests, considers a particular variety of tree sacred and accordingly believes it should never be harmed or harvested. Scientists discover that the sap of this tree can be used as a cure for cancer. This presents a troubling situation in which I think most people would favor tapping the tree despite its sacred status. The intriguing question is whether such scientific value changes from being instrumental to something greater if it is intimately associated with the existence of human life, or whether it remains instrumentally significant but is so essential that it outweighs other intrinsically valuable goods. Thankfully, I am unaware of a situation which poses such a problem and so I will retreat to my perhaps now all too familiar mantra: my approach is not intended as a formula for resolving all cultural heritage conflicts, but rather is a way to help us
important than its instrumental value. Although this ordering of values has been one of the primary reasons for focusing on the intrinsic value of cultural heritage, my aim is not to suggest the imposition of this ordering as an absolute means for resolving disputes. My hope is that a greater understanding of the intrinsic value of cultural heritage and its connection to cultural and aesthetic experience will foster more cooperation with respect to controversial cultural objects and customs. Nickel's strongest objection appears to be this priority of intrinsic over instrumental value in the context of cultural heritage or in any context for that matter. I do think that at least in the context of cultural heritage, intrinsic value should weigh in very heavily precisely because the foremost purpose of cultural heritage is its role in cultural and aesthetic experience and it is these experiences that are associated with its intrinsic value. The scientific and educational value of cultural heritage is necessarily secondary because it is dependent on its primary cultural value. I do recognize that where the scientific value is independent of the cultural value, arguably although not completely convincingly as may be the case in dealing with the Kennewick Man, and where it is of profound significance, such instrumental value might indeed trump the intrinsic value of cultural heritage.  

As is apparent in this discussion and the previous discussion of competing cultural claims, not all problems in the area of cultural heritage are resolvable under this approach. There are also other practical limitations on what we can do with respect to regulating cultural heritage. For example although the dissemination and in some cases misuse of the intangible cultural heritage of indigenous peoples is a serious problem, there is little that can be done about knowledge, songs, rituals, and stories that have already been appropriated and are now part of the public domain. Much can and is being done to prevent the appropriation of intangibles in the future, but while physical objects can be returned, the return of non-physical cultural heritage remains a difficult if not impossible task. What I have attempted to do in this paper is arrive at an understanding of the richer value of cultural heritage and set out the priority of intrinsic over instrumental value. This alone provides some guidance in moving through the increasingly difficult terrain of cultural heritage disputes. In the end, any regulations or guidelines that are adopted should encourage and enforce the

understand our sense of obligation and the interests at stake. I am thankful to Stephen Siegel for suggesting this challenging hypothetical.

252. See the rain forest hypothetical, supra note 251.

253. See Barnes, supra note 90, at 206-07; Brown, supra note 9, at 202 ("Those who dream that knowledge can be 'repatriated' through copyright laws—vain attempts to slow the metastatic self-replication of information in the Age of the Simulacrum—are destined to be disappointed.").
respect that is due to cultural heritage but they should do so parsimoniously. The rigidity and finality of overly zealous legal protections are not well-suited to a good whose value is intimately connected with something as fluid as culture. Culture is not a fixed, corporeal thing and so both our designation of things considered cultural heritage and the association of such things with specific cultures should not be forever fixed. Although I have tried to explain and justify our great respect for cultural heritage by elevating it to the level of intrinsic value, it would be a mistake to consider the content of the category immutable.

V. CONCLUSION

This article attempts to cut a path through two prevailing alternatives—that cultural heritage is the common heritage of all human kind, or that it is the exclusive possession and domain of a particular group, definable and understood by only that group. It leans toward the latter, nationalist perspective in that it argued cultural heritage may at times have a specific locus but it also stresses the universal in an attempt to help us understand this connection. Thus, this paper recognizes both the universal and the particular elements in our relationship with cultural heritage. The universal element in cultural heritage is in the intrinsic value of cultural and aesthetic experiences and the connection of cultural heritage to those experiences. I have not searched for a universal element in the form of cultural heritage, nor have I argued for a universal element in terms of our connections to specific objects. The particular is in the variety of experiences connected with certain objects, the universal is in the significance of those experiences; the particular is in the form, and the universal is in the embeddedness of that form in cultural and aesthetic experience.

The nearly universal sense of duty to respect some form of cultural heritage stems from the embeddedness of cultural heritage in cultural and aesthetic experiences, what this paper identifies as the intrinsic value of cultural heritage. There may be other moral explanations for our attitude toward cultural heritage, including duties to future generations and duties to others. Although these duties frequently appear as justifications for protecting cultural heritage, ultimately they are inexplicable without reference to a theory outlining the present significance of cultural heritage.

254. Forms may in fact repeat themselves across cultures but this does not guarantee they are appreciated in similar ways. See CLIFFORD, supra note 199, at 189-93 (discussing an exhibition held at the Museum of Modern Art entitled "Primitivism in 20th Century Art: Affinity of the Tribal and Modern" and problematizing the notion of "affinities").
What I hope the foregoing analysis has provided is a clear sense of the irreducible value of cultural heritage and thus some framework for thinking about what to do with it. If we continue to focus on the instrumental value of cultural heritage, we risk making wrong decisions as well as undermining the value of something at the very heart of human experience.