

# PUBLIC OPINION REGARDING CULTURAL PROPERTY POLICY

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Nearly twenty years ago, when speaking about international trade in art, Paul Bator wrote:

It is *my impression* (emphasis added) that over the past 20 years there has been an important change in consciousness. Art importing societies such as the United States have become increasingly aware that the preservation and conservation of humanity's artistic and archaeological heritage constitutes a general human obligation. . . .<sup>1</sup>

At the time Bator was writing, there was no reliable measure of the strength of public sentiment with regard to cultural property issues. Most countries in the world, with the exception of the United States, had attempted to preserve their own cultural heritage by enacting legislation regulating the export of cultural property. In addition, the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>2</sup> had been adopted and ratified by many nations. However, in the United States, the necessary implementing legislation had not been passed. Thus, UNESCO was not an effective tool in the fight against the illicit trade of antiquities in the United States.

Today, however, the situation has changed. For the first time since cultural property issues have become a matter of widespread concern, we have an accurate gauge of public opinion on the topic. Only a few weeks ago, the Archaeological Institute of America announced the results of a quantitative study undertaken by Harris Interactive on behalf of a broad coalition of United States archaeological organizations.<sup>3</sup> In addition to the Archaeological Institute

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<sup>1</sup> Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 313 (1982), reprinted in PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 37 (The University of Chicago Press 1983).

<sup>2</sup> See Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971), available at [http://www.unesco.org/culture/laws/1970/html\\_eng/page1.htm](http://www.unesco.org/culture/laws/1970/html_eng/page1.htm) (last visited Nov. 27, 2000) [hereinafter UNESCO].

<sup>3</sup> See generally MARIA RAMOS & DAVID DUGANNE, *EXPLORING PUBLIC PERCEPTIONS AND ATTITUDES ABOUT ARCHAEOLOGY* (Harris Interactive, eds., 2000), available at <http://www.saa.org/Pubedu/nrptdraft4.pdf> (last visited Mar. 27, 2001).

of America, other organizations supported the study. These other organizations include the Society for American Archaeology, Archaeological Conservancy, Bureau of Land Management, Fish and Wildlife Service, Forest Service, National Park Service, and the Society for Historical Archaeology.

The study aimed to examine the perceptions of, knowledge of, and attitudes about archaeology among the American public. The study consisted of 1,016 telephone interviews with adults aged eighteen or older who were selected at random from the continental United States. The margin of error was plus or minus 3% at a 95% confidence level. Thus, it can be argued that the results accurately reflect the opinions of the population of the United States as a whole.

The initial questions in each interview were designed to test the public's awareness, perceptions, and knowledge of archaeology. Not surprisingly, nearly every respondent was aware in some way that archaeologists study ancient civilizations (99%) and the human past (98%). Most (82%) also knew that archaeologists work worldwide. Almost all of the respondents (99%) said that archaeological sites have educational and scientific value, and nearly as many (94%) said that archaeological objects and sites have aesthetic or artistic value. More than a third had actually visited an archaeological site and more than half learned about archaeology by watching television.

Most (96%) of the respondents agreed that there should be laws to protect historical and prehistoric archaeological sites, and nearly as many (90%) felt that there should be laws to prevent the general public from importing artifacts from a country that does not want those artifacts exported. There was strong support (69%) for laws preventing the general public from selling artifacts found on their own property, and even greater support (82%) for laws preventing the general public from selling artifacts found on someone else's property.

The respondents were asked, "What would you do if you found an object for sale that you knew was taken from an archaeological site, and you really liked the item?" Interestingly, only 18% of the respondents said that they would buy the item and keep it, while twice as many (36%) replied that they would not buy the item. In addition, 19% said they would report the seller to local law enforcement authorities; 12% said they would buy the item and donate it to a heritage institution, museum or historical society; 9% said they would report the object to the state archaeology or historical commission; and 8% indicated that they would find out if it

was legal to purchase the item. Finally, there were a number of responses such as 'tell the seller that the item is illegal,' 'buy it as a gift,' and 'do nothing,' for which very small percentages (less than 4% of the total) were recorded.

Because the question was purely open-ended, respondents sometimes gave multiple answers that fit into more than one of the categories used to analyze the data. As a result, the total percentages add up to more than 100% (in this case 120%). For example, most of those who answered that they would purchase the item qualified their response by some reference to the legality of the purchase. A sample of their verbatim responses includes:

"If it were legal to purchase, I would buy it. I would not break the law." "If the price was right and it was legal, I'd buy." "If it were for sale, I would buy it and contact the authorities to find out where it came from and if it's sold legally." "I'd buy it since they need permission to sell it." "If it were illegal, I would do nothing. If it were legal, I would buy it."

Significant in the responses to this particular question is the fact that more than three quarters of those questioned gave answers indicating that, when confronted with the purchase of an archaeological artifact, they would support the preservation of archaeological heritage even when doing so conflicted with their own desire to own such an object.

Yet, despite their stated interest in protecting archaeological sites and artifacts, only a small number of respondents knew about current laws affecting archaeology. Only 23% were aware of laws regarding the buying and selling of artifacts, while slightly more (28%) knew of laws protecting archaeological sites. Nevertheless, the general consensus of those interviewed was that archaeology is important to today's society. When asked to rate "the importance of archaeology in today's society" on a scale of 0 to 10 (where 0 means "not at all important" and 10 means "very important"), the mean score of the respondents was 7.3. Furthermore, when asked why they rated the importance of archaeology as they did, a majority (60%) said it was due to their interest in the past and the value of archaeological research and education. It is clear, therefore, that there is strong sentiment in favor of archaeological research and preservation among the general public.

It is significant that we now have a measure of the American public's attitude toward archaeology because it is widely acknowledged that public opinion can play a significant role in the formulation of government policy. Nearly twenty years ago, Benjamin Page and Robert Shapiro (of the University of Chicago and Colum-

bia University, respectively) published a study on the relationship between public opinion and government policy in the United States during the years 1935 to 1979.<sup>4</sup> After analyzing the data from a large number of national surveys, as well as measuring policy outputs over the two years preceding the initial survey and the four years following the final survey, the authors were able to demonstrate a substantial congruence between changes in opinion and policy over a fifty-year period. They determined that factors such as interest-group campaigns and elite leadership affect public policy. However, they concluded that they do so by manipulating public opinion, i.e., "policy changes only *because* opinion changes."<sup>5</sup>

A change in public opinion in and of itself, however, cannot bring about a policy change. Although we can now demonstrate that the American public values the preservation of archaeological sites and objects both here and abroad, changes in governmental policy will not necessarily result. Before such changes can happen, the issue must rise to prominence, either on the agenda of the relevant government officials or on the agenda of those who influence their agendas.<sup>6</sup> Therefore, it is important to understand how and why issues come to command the attention of those who are empowered to resolve them.<sup>7</sup>

In any public debate, the most important opposing parties are not individuals, but groups.<sup>8</sup> Groups filter out information that is detrimental to their cause. Groups also reinterpret information so as to arrive at conclusions that are vastly different from those presented by their opponents. As a result, groups often propose dissimilar and even conflicting solutions to problems while at the same time presenting their interests as "synonymous with the general interest."<sup>9</sup>

In the case of cultural property, one group—archaeologists—has consistently argued in support of restrictions on trade in illicit antiquities. This group believes that over time, such restrictions will bring about a reduction in the looting of archaeological sites and the resulting loss of scientific information which is detrimental to

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<sup>4</sup> See generally Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 *Am. Pol. Sci. Rev.* 175 (1983).

<sup>5</sup> *Id.* at 186.

<sup>6</sup> See generally John W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (Harper Collins 1995).

<sup>7</sup> See generally ROGER W. COBB & CHARLES D. ELDER, *PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING* (1983).

<sup>8</sup> See David B. Truman, *The Governmental Process: Political Interests and Public Opinion* 43 (Alfred Knopf, New York 2d ed. 1971) (1951).

<sup>9</sup> COBB & ELDER, *supra* note 7, at 31.

everyone—present and future generations alike.<sup>10</sup> In contrast, collectors and dealers have advocated a free market for antiquities. They have suggested that further restraints on the trade in antiquities will encourage illicit excavations. Specifically, they argue that restraints on the trade will effectively drive the antiquities market underground. In addition, they argue that such restraints will also deprive the public of opportunities to share in world culture.<sup>11</sup> Since the claims of the archaeologists on one hand, and the collectors and dealers on the other hand are mutually exclusive, both groups cannot be correct. However, such a result is to be expected. As Cobb and Elder have so succinctly put it, “consistency is a logical imperative, not a political one.”<sup>12</sup>

Claims for repatriation of cultural property are often based on political rather than legal arguments (as was evident in many of the arguments regarding the repatriation of the Elgin [or Parthenon] marbles). In fact, source nations have achieved repatriation of their cultural property both in the courts and through negotiated or political settlements. Some repatriation claims are supported by existing legislation, but others are not. In the case of illicitly excavated objects, for example, the difficulty of proving exact provenance is often insurmountable. Thus, legal action becomes impossible. *Greece v. Ward*<sup>13</sup> was just such a case. Here it was not legal action that brought about the return of the objects to Greece. Rather, the archaeological objects were repatriated as the result of an out-of-court settlement with a United States non-profit organization, which received them as a donation from the dealer.

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<sup>10</sup> See Ricardo J. Elia, *Looting, Collecting, and the Destruction of Archaeological Resources*, in 6:2 NONRENEWABLE RESOURCES 85-98 (Plenum Press 1997) (discussing the destruction of an artifact's original archaeological context as the most serious consequence of looting).

<sup>11</sup> See, e.g., John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1 (1998).

<sup>12</sup> COBB & ELDER, *supra* note 7, at 77.

<sup>13</sup> See Emily C. Ehl, *The Settlement of Greece v. Ward: Who Loses?*, 78 B.U. L. REV. 661 (1998) (citing Ricardo J. Elia, *Greece v. Ward: The Return of the Mycenaean Artifacts*, 4 INT'L J. CULTURAL PROP. 119, 120-22 (1995)).

On May 14, 1993, attorneys for Greece notified the Ward Gallery that the Mycenaean artifacts belonged to Greece and demanded the artifacts' return. . . . [T]he Ward Gallery failed to comply with Greece's demand. On May 25, 1993, Greece asked the U.S. District Court for the Southern District of New York for a temporary restraining order to prohibit the sale or transfer of the artifacts. At the same time, Greece sought a declaratory judgment to establish that it was the collection's lawful owner. In December 1993, seven months after Greece filed the lawsuit but still at the beginning of the pre-trial discovery process, the Ward Gallery announced that it had reached an out of court settlement with Greece. The gallery agreed to donate the collection of the Mycenaean artifacts to the Society for the Preservation of the Greek Heritage, a Washington-based nonprofit charitable organization, and Greece agreed to drop the suit.

*Id.* at 674-75.

Although pressure from members of the archaeological community familiar with the case contributed in large part to its eventual settlement, many of us remain uneasy about this particular avenue for achieving the return of illicitly excavated objects to their country of origin. Why should American taxpayers in effect indemnify art dealers and collectors by allowing tax deductions for such donations? Dealers who choose this way out of their predicament incur little or no financial risk. Only their reputations are at stake. As a result, such settlements only exacerbate rather than curtail the problem of illicit trade in stolen antiquities.<sup>14</sup>

Some museums and collectors, on the other hand, have sought to “to avoid embarrassment”<sup>15</sup> by voluntarily repatriating cultural property whose origin has been questioned. One of the best-known examples is, of course, the return of the “Lydian Hoard” to the Republic of Turkey by the Metropolitan Museum of Art.<sup>16</sup> The “East Greek Treasure,” as the museum called it “for purposes of obfuscation,”<sup>17</sup> was finally returned to Turkey in 1993, more than twenty-five years after its acquisition by the Metropolitan.

Hoving’s account of the Metropolitan Museum’s change in acquisition practices at about this time is especially instructive. Specifically, it implies that it was not just the threat of new legislation that brought about the Metropolitan’s change of heart. Rather, it seems that the threat of negative public reaction played a major role. As Hoving stated:

At the [UNESCO] conference, I was astonished to learn of the extent of the smuggling, especially from Africa, Turkey, and Italy. It was not that I suddenly got religion; it was that I recognized that with the UNESCO hearings, the age of piracy had ended. I decided to change the Metropolitan’s free-wheeling methods of collecting. Just in time.<sup>18</sup>

Today, the public is increasingly knowledgeable about cultural

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<sup>14</sup> See generally *id.*

<sup>15</sup> See Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 404 (1995) (stating that a fear of negative publicity induces art institutions to avoid lawsuits over illicit antiquities).

<sup>16</sup> See Mark Rose & Ozgen Acar, *Turkey’s War on Illicit Antiquities Trade*, *Archaeology*, Mar.-Apr. 1995, at 44, 46 (referring to 6th Century B.C. hoard of silver and gold antiquities illegally excavated and smuggled out of Turkey, which was knowingly purchased by Metropolitan Museum of Art).

<sup>17</sup> See THOMAS HOVING, *MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART* 217 (1993) (explaining how Turkish connection to the collection was disguised).

<sup>18</sup> *Id.* at 217 (reiterating the power of public opinion as a motivating force behind new institutional attitudes toward collecting artifacts).

property issues. This development may be attributed to the efforts of journalists such as Karl E. Meyer of *The Washington Post*, Nicholas Gage of *The New York Times*, Walter Robinson of *The Boston Globe*, and Mike Toner of *The Atlanta Journal-Constitution*, to name only a few. Archaeologists and an ever-growing number of museums now include discussions in their educational programs of the harm caused to the archaeological record by looting. The survey data to which I referred earlier shows that public awareness of the problem is widespread. However, as can be seen with regard to other issues, such as environmental protection, the cessation of the ivory trade, and the protection of endangered species, it may take time for cultural property issues to command enough public attention to bring about further changes in public policy.

So where does this leave us with regard to the repatriation of cultural property? By now it should be clear that I regard many repatriation debates, especially those involving antiquities that left their countries of origin long before the UNESCO convention was ratified, as belonging to the political, rather than the legal, domain. As with all political problems, various opposing groups have defined the issues in keeping with their own particular view of the facts. These groups muster their own set of facts in an attempt to sway public opinion and ultimately to bring about their desired ends. Examples of such stereotypes are Merryman's argument that "archaeologists are not helping"<sup>19</sup> and Elia's assertion that "collectors are the real looters."<sup>20</sup>

What will it take to find an acceptable solution to the "cultural property wars," as the organizers of this symposium have dubbed the problem? Perhaps we should begin by taking to heart the message that Walter Lippman gave us many years ago when he said, "public opinion is primarily a moralized and codified version of the facts. . . . The pattern of stereotypes at the center of our codes largely determines what group of facts we shall see and in what light we shall see them. . . ." <sup>21</sup> As a result, we tend to regard those who deny our own moral judgments or see a different set of facts as "perverse, alien, or dangerous."<sup>22</sup> It is only when we recognize that our opinions are partial experiences, seen through our stereotypes, that we become truly tolerant of an opponent. Without that habit,

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<sup>19</sup> See John Henry Merryman, *Commentary: Archaeologists Are Not Helping*, 55 THE ART NEWSPAPER, Jan. 1996, at 26.

<sup>20</sup> Ricardo J. Elia, *A Seductive and Troubling Work*, ARCHAEOLOGY, Jan.-Feb. 1993, at 69 reiterated by Colin Renfrew, *Collectors are the Real Looters*, ARCHAEOLOGY, May-June 1993, at 16.

<sup>21</sup> WALTER LIPPMAN, PUBLIC OPINION 126 (1922).

<sup>22</sup> *Id.*

we believe in the absolutism of our own vision, and consequently in the treacherous character of all opposition. Although we are willing to admit there are two sides to a 'question,' we do not believe that there are two sides to what we regard as 'fact.' Therefore, unless archaeologists and collectors are willing to begin an open dialogue in which each group acknowledges the validity of at least some aspects of the other side's position, we are destined to remain at a stalemate until the weight of public opinion settles the debate for us.

There is one fact, however, that I believe everyone, archaeologists and collectors alike, can accept without debate: looting of archaeological sites must be stopped. Not only does looting irrevocably destroy scientific information—information that helps us understand our past and that guides us as we prepare for the future. It also diminishes the value of artifacts derived from these sites. Thus, it is in the best interest of all of us to find ways to stop the looting of archaeological sites. By working together toward this goal, we may, in the process, find a way to end the cultural property wars that challenge us today.