

500 YEARS AFTER COLUMBUS: PROMOTING AND PROTECTING MULTICULTURALISM IN THE ARTS

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The 1992 Art Law Fieldtrip to the San Antonio Museum of Art on January 4, 1992 was a splendid success, according to many of the participants. With the year 1992 featuring numerous events in the United States and abroad recalling, discussing, celebrating, and even denigrating the quincentennial anniversary of Columbus's first voyage to the two continents that would be later named North and South America,¹ a panel discussion entitled *500 Years After Columbus: Promoting and Protecting Multiculturalism in the Arts* seemed timely and appropriate. Our distinguished panel addressed a number of issues, including: what arts institutions can do to better represent the cultures of the communities they serve;² what the United States is doing to protect Native American art and culture; what the international community is doing to address the flow of art and cultural objects across national boundaries; and what should be the plan to protect and to promote multiculturalism in the arts for the next 500 years.

The discussion featured three presenters and two commentators. First, Eduardo Diaz, Director of the San Antonio Department of Arts and Cultural Affairs, who manages San Antonio's investment in the arts, described the efforts of his office to promote and protect multiculturalism in the arts of San Antonio. Mr. Diaz characterized art as "a part of culture, culture being all

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¹ See James N. Baker, *Quincentennial Fever*, NEWSWEEK Columbus Special Issue, Fall/Winter 1991, at 79-80 (listing events celebrating the quincentennial of Columbus' arrival in America). See also William H. MacLeish, *1492 America: The Land Columbus Never Saw*, SMITHSONIAN, Nov. 1991, at 34 (discussing the lifestyles of the two million people who inhabited the American continent when Columbus arrived).

² One possibility is to develop multicultural boards who will bring their varied experiences to the arts institutions. See AMERICAN COUNCIL FOR THE ARTS, DEVELOPING MULTICULTURAL BOARDS: EXPERIENCES AND OPPORTUNITIES (1990) (on file with the *Carozo Arts & Entertainment Law Journal*).

of those resources—physical, material[,] human—that shape a community and make it unique.”³ Diaz termed the debate which is central to arts funding as one between cultural democracy and democracy of culture. Quoting Gerald D. Yoshitomi, Executive Director of the Japanese American Cultural and Community Center in Los Angeles, California, Diaz stated that “[c]ultural democracy requires each of us to try to understand each other’s system of cultural support”;⁴ whereas, “[t]he democratization of culture requires only that we each understand the common support system.”⁵ Thus, as democracy requires each individual to have a discrete voice, cultural democracy requires the recognition of the integrity of each culture.

“Since the days of Columbus,” Diaz asserted, “we have been living with the imposition of Eurocentric cultural standards and bureaucratic operandi that have institutionalized multiculturalism in unnatural ways.”⁶ One such example, with which Diaz might agree, was the federal government’s attempt to integrate Native Americans into Western culture through the imposition of Western notions of land ownership, and the various cultural implications that flow from land tenure.⁷ “The challenge for the next 500 years,” Diaz concluded, “will be for all of us to permit the voices of culturally diverse communities to ring clear, unimpeded by these standards and operandi.”⁸ In the end, “cultural democracy can bring us together as a society in a way that is much more successful than other integration strategies.”⁹

Next, Professor Leonard DuBoff provided a historical analysis of the United States’ efforts to protect Native American cultural property. He began his appraisal with the Antiquities Act of 1906,¹⁰ which was enacted in response to the raiding of burial sites by treasure hunters and amateur archaeologists who were damaging these historical sites and removing important artifacts. He concluded by examining the most recently passed statutes:

³ Eduardo Diaz, Remarks at the Association of American Law Schools Art Law Section Fieldtrip to the San Antonio Museum of Art 5 (Jan. 4, 1992) (transcript on file with the *Cardozo Arts & Entertainment Law Journal*).

⁴ *Id.* at 11 (quoting Gerald D. Yoshitomi, *Cultural Democracy*, in PUBLIC MONEY AND THE MUSE: ESSAYS ON GOVERNMENT FUNDING FOR THE ARTS 213 (Stephen Benedict ed., 1991) [hereinafter Yoshitomi]).

⁵ *Id.* at 10 (quoting Yoshitomi, *supra* note 4, at 213).

⁶ *Id.* at 15.

⁷ See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 152-80 (1982) (discussing federal government’s efforts to assimilate Native Americans into mainstream American culture).

⁸ Diaz, *supra* note 3, at 15.

⁹ *Id.* (quoting Yoshitomi, *supra* note 4, at 213).

¹⁰ 16 U.S.C. §§ 431-433 (1988).

The Native American Graves Protection and Repatriation Act¹¹ and The Indian Arts and Crafts Act of 1990.¹² Professor DuBoff assessed these statutes as reflecting a new sensitivity to the concerns of Native Americans.¹³

Finally, Teresa McGuire, author of *African Antiquities Removed During Colonialism: Restoring a Stolen Cultural Legacy*,¹⁴ provided an international perspective on the movement of art across national boundaries. She postulated that the "illicit movement and trade [in art] is the number one threat to the cultural heritage of all countries."¹⁵ Ms. McGuire spoke of the similar circumstances under which the colonized native peoples of Africa, Asia, North America, and South America "were deprived of vast amounts of their cultural property, [which are] now reposed under foreign stewardship."¹⁶ The political liberation of these peoples, according to McGuire, heightened their cultural awareness and led many of them to enact nationalistic export controls to stem the northerly flow of their cultural property.¹⁷ These national export laws were the precursors to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention"),¹⁸ which was the first major instrument to mandate active, continuous interstate cooperation to protect cultural property.

Following the three presentations, the two commentators were Mrs. Aaronetta Pierce and Professor Douglas Donoho. Mrs. Pierce,¹⁹ a major force in the artistic community of San Antonio, advocated that museums and other art institutions must become responsible for promoting and protecting the arts of the culturally diverse among their constituencies. She expressed concern that thousands of young people feel disconnected from the richness of their own cultural heritage because the products of their culture are either "tokenized" or fail to appear in classrooms, textbooks, museums, symphony concerts, and performing arts

¹¹ 25 U.S.C. §§ 3001-3013 (Supp. II 1991).

¹² 25 U.S.C. §§ 305a, 305d-305e, 18 U.S.C. §§ 1158-1159 (Supp. II 1991).

¹³ Leonard D. DuBoff, *500 Years After Columbus: Protecting Native American Culture*, 11 CARDOZO ARTS & ENT. L.J. 43, 44.

¹⁴ 1990 DET. C.L. REV. 31.

¹⁵ Teresa McGuire, *International Dimensions*, 11 CARDOZO ARTS & ENT. L.J. 59, 60.

¹⁶ *Id.* at 59.

¹⁷ *Id.* at 61.

¹⁸ Nov. 14, 1970, 823 U.N.T.S. 231.

¹⁹ Mrs. Pierce serves on the board of the San Antonio Museum Association. In 1989, she chaired the Blue Ribbon Committee on the Arts that recommended the establishment of the Department of Arts and Cultural Affairs. She was also a panel member for the National Endowment for the Arts and a member of the Texas Commission on the Arts to which she was appointed by Governor Mark White.

events.²⁰ Ultimately, according to Mrs. Pierce, the United States needs to promote cultural inclusiveness because, as she quoted former National Endowment for the Arts Chairman John Frohnmayer, "the arts can be a healing and transforming element in our society."²¹

Next, Douglas Donoho, Assistant Professor of Law at Nova University's Shepard Broad Law School and author of the recently published article *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*,²² commented on the irony between Teresa McGuire's statements and those of the other panelists. Professor Donoho noted the tension between promoting the common heritage of humankind, which Ms. McGuire analyzed, and the demands of certain cultures and societies to preserve and possess cultural artifacts which identify them as a group or as a nation, as discussed by Professor DuBoff, Mr. Diaz, and Mrs. Pierce.²³ Professor Donoho distinguished the stress that inheres from trying to enrich the culture of some groups through sharing artifacts from that which derives from attempts to maintain the integrity of other groups when they deem certain items as being connected to their identity. According to Professor Donoho, this debate is ultimately one "over values and priorities."²⁴

The two articles that follow this introduction capture and expand upon the essence of the Association of American Law Schools Art Law Fieldtrip to the San Antonio Museum of Art. In *500 Years After Columbus: Protecting Native American Culture*,²⁵ Leonard DuBoff analyzes the effects of two recently passed statutes aimed at protecting Native American culture: the Native American Graves Protection and Repatriation Act²⁶ and the Indian Arts and Crafts Act of 1990.²⁷ Professor DuBoff writes that:

[t]he history of the legislative treatment of Native American artifacts and remains has been marked by two distinct and opposite approaches. Rather than recognizing Native American

²⁰ Aaronetta Pierce, Remarks at the Association of American Law Schools Art Law Fieldtrip in San Antonio, Texas 36 (Jan. 4, 1992) (quoting John Frohnmayer) (transcript on file with the *Cardozo Arts and Entertainment Law Journal*).

²¹ *Id.* at 39.

²² 27 STAN. J. INT'L L. 345 (1991).

²³ Douglas Donoho, Remarks at the Association of American Law Schools Art Law Fieldtrip in San Antonio, Texas 41 (Jan. 4, 1992) (transcript on file with the *Cardozo Arts and Entertainment Law Journal*).

²⁴ *Id.*

²⁵ DuBoff, *supra* note 13, at 49-58.

²⁶ 25 U.S.C. §§ 3001-3013 (Supp. II 1991).

²⁷ 25 U.S.C. §§ 305a, 305d-305e (Supp. II 1991).

culture and values by protecting Native American burial sites, early legislation permitted responsible excavation for the purpose of placing remains and antiquities in institutions for display and scientific study because Congress pursued a policy that favored institutionalization of remains and artifacts. In contrast, recent legislation . . . [has] increasingly limit[ed] access to historical sites and [has] limit[ed] the alienability of artifacts already on the antiquities market.²⁸

Despite the deficiencies of these Acts, Professor DuBoff views them as an improvement over previous approaches to dealing with the cultural concerns of Native Americans.

Professor DuBoff takes a historical approach, beginning his analysis with the Antiquities Act of 1906,²⁹ which, as noted earlier, was enacted as a response to the raiding of burial sites by treasure hunters and amateur archeologists. One illustration of the utter disregard that treasure hunters and amateur archeologists had toward historical sites is the case of *Charrier v. Bell*.³⁰ Charrier, a self-described "amateur archeologist," excavated 150 burial sites containing between two and two and one-half tons of artifacts on the Trudeau Plantation, which was the possible site of an ancient village of the Tunica Indians.³¹ When his attempts to sell the artifacts failed because he could not prove ownership, Charrier brought a declaratory judgment action seeking confirmation that he was the owner of the artifacts.³² While the Louisiana court rejected his arguments based on Louisiana civil law, this case is representative of both the lengths to which treasure seekers will go and their lack of concern for the cultural heritage of Native Americans.

Professor DuBoff continues his historical review with the 1935 Historic Sites Act,³³ the 1949 National Trust for Historic Preservation Act,³⁴ and the 1966 National Historic Preservation Act.³⁵ While the goal of these acts was the preservation of U.S. culture, only the 1966 Act called for preservation in cooperation with Indian tribes.³⁶

During the 1970s and 1980s, Native Americans demanded

²⁸ DuBoff, *supra* note 13, at 44 (footnote omitted).

²⁹ 16 U.S.C. §§ 431-433 (1988).

³⁰ 496 So. 2d 601 (La. Ct. App. 1986).

³¹ *Id.* at 602-03.

³² *Id.* at 603.

³³ 16 U.S.C. §§ 461-467 (1988).

³⁴ *Id.* § 468.

³⁵ *Id.* §§ 470 to 470w-6.

³⁶ DuBoff, *supra* note 13, at 46-47.

repatriation of their ancestral remains, associated burial goods, sacred objects, and other cultural objects for tribal disposition.³⁷ Professor DuBoff illustrates this period with examples of the Zuni's demand for repatriation of their War Gods and of the Ohlone Indians' demand for the return of their ancestors' remains. Congress's response, as Professor DuBoff analyzes, was the passage of the 1989 National Museum of the American Indian Act³⁸ and the 1990 Native American Graves Protection and Repatriation Act.³⁹ Professor DuBoff contends that the former Act is ambiguous, particularly its references to the term "human remains" and its division of "cultural items" into the two categories of "human remains" and "cultural patrimony." In his judgment, the Act fails miserably by not restricting the hunting of artifacts on private land or the transfer of artifacts found on private lands. Furthermore, it does not affect artifacts found prior to the effective date of the Act.⁴⁰ Thus, the Act will leave an enormous amount of Native American cultural resources where they are, in non-Native American environments.

Professor DuBoff concludes with a discussion of the Indian Arts and Crafts Act,⁴¹ which was intended to promote the development of Indian arts and crafts. The Board created by the Act has been empowered to act as protector of Indian artists by certifying authenticity and by guarding against misrepresentation. Despite the Board's expanded duties, Professor DuBoff views the Act as a paper tiger because it fails to provide defrauded purchasers with remedies. Collectively, however, Professor DuBoff views these acts as providing a new approach to protecting Native American art and cultural heritage.

Next, in her article, *International Dimensions*,⁴² Teresa McGuire links, in a provocative manner, the international struggle over cultural property with the domestic debates over multiculturalism. She writes that "if the next 500 years are to be mean-

³⁷ In June of 1989, Stanford University reached an agreement to "return the skeletal remains of about 550 Ohlone Indians to their descendants in Northern California for reburial." Jane Gross, *Stanford Agrees to Return Ancient Bones to Indians*, N.Y. TIMES, June 24, 1989, at A1. In August of 1989, the Smithsonian Institution reached a tentative agreement with Native American leaders to return remains and accompanying burial goods for reburial. Felicity Barringer, *Major Accord is Likely on Indian Remains*, N.Y. TIMES, Aug. 20, 1989, at A1. Ultimately, the Smithsonian signed a final agreement with Native American leaders in September of 1989. Irvin Molotsky, *Smithsonian to Give Up Indian Remains*, N.Y. TIMES, Sept. 13, 1989, at A14.

³⁸ 20 U.S.C. §§ 80q to 80q-15 (Supp. II 1991).

³⁹ 25 U.S.C. §§ 3001-3013 (Supp. II 1991).

⁴⁰ DuBoff, *supra* note 13, at 53.

⁴¹ 25 U.S.C. §§ 305-305e (1988 & Supp. II 1991).

⁴² McGuire, *supra* note 15.

ingful, and different from the past, the international arts community, both legally and cooperatively, must play a role in helping to restore patrimony and cultural sensibilities torn from the memories of subjugated peoples."⁴³ Multiculturalism, she believes, must "not become a new euphemism for old notions of ethnic hierarchy, but rather a more accurate reflection of the unique cultural contributions that all people have made to what truly is, or must become, the common heritage of mankind."⁴⁴

In their eloquent speeches and passionate writings, the group that assembled to discuss *500 Years After Columbus: Promoting and Protecting Multiculturalism in the Arts* urges the creation and application of a novel calculus for assessing and appreciating the cultural heritage of others. A central assumption in support of the new calculus is that when cultures have maintained their integrity, they have the most to share with others. Through this sharing, U.S. society and the international community as a whole can benefit from multiculturalism through increased respect and understanding.

⁴³ *Id.* at 70.

⁴⁴ *Id.*

