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# Opinion

## Legal Issues in the Trade of Antiquities

Daniel Shapiro\*

### 1 Introduction

The text that follows is an edited transcript of a Forum presented by the Committee on Art Law of the Association of the Bar of the City of New York on May 15, 1991. Almost nothing of substance has changed in the interim. The participants reflect widely divergent interests and views. The issues raised and points presented remain at the core of the debate on regulating trade in antiquities. The Forum was organized and introduced by New York attorney Daniel Shapiro. It was intended to be and still is a good introduction to the major issues and perspectives. We hope that the discussion is sufficiently provocative to encourage our readers to continue the debate, whether in these pages or elsewhere.

### 2 The discussion

*Daniel Shapiro:* This forum arises from our interest in and concern for the cultural past and its objects. Archaeologists, museums, dealers, governments, collectors, scholars and the educated public all care about and make claim to the past and its tangible relics. These interests are often tangled and conflicting. The issues are complex and offer no simple solution. The volume of claims and lawsuits involving the trade in antiquities has risen dramatically in recent years. These disputes are recorded in newspapers and magazines, often as front page and lead articles.

Far from clarifying the issues, the rapidly-developing law and literature in this field is often one-sided. Interested parties may well emerge from a study of this literature uncertain as to how best to pursue their interests, and suspecting that their concerns are being ignored.

This evening we have the extraordinary good fortune to have some of the most knowledgeable participants involved with these matters. Listing their expertise and accomplishments would occupy the better part of the evening and my introduction to them must be very brief:

\* Attorney, New York.

ARTHUR DANTO, art critic of *The Nation*, is one of the foremost philosophers in America. He has written widely on art, history and cultural property.

CLEMENCY COGGINS has a joint appointment in Archaeology and Art History at Boston University. She is an active archaeologist who has called attention to the plight of the Mayan Stelae and is a member of the Cultural Property Advisory Committee which is involved in implementing the UNESCO Convention.

LAWRENCE KAYE is counsel to the Republic of Turkey. He is at the forefront of Turkey's claims to cultural property and has instituted lawsuits against (inter alia) the Metropolitan Museum of Art. He is also involved in the claim for restitution of a classical statue in San Antonio.

WELD HENSHAW is counsel to the Museum of Fine Arts in Boston. The Museum has world famous collections in Egyptian, Pre-Columbian and Greco/Roman Art. He is currently engaged in litigation over the Egyptian Pectoral claimed by Lafayette College. He too is involved in resolving a dispute with Turkey.

MARION TRUE is the Curator of Antiquities at the J. Paul Getty Museum which, as you know, is at the forefront of many issues involving cultural property.

ELY MAURER is the Assistant Legal Advisor at the State Department specifically concerned with cultural property issues.

CONSTANCE LOWENTHAL is an art historian and Executive Director of the International Foundation of Art Research (IFAR), a not-for-profit organization constituting the first and largest registry of stolen property. She writes for the *Wall Street Journal*.

LAWRENCE FLEISCHMAN is the chairman of the Kennedy Galleries in New York which specializes in 18th and 19th Century American Art. He participates in this discussion, however, as a lifelong collector of antiquities.

GEORGE ORTIZ is a well known collector of antiquities, residing in Switzerland. We are exceptionally fortunate that he has graciously agreed to visit New York to participate in the panel.

MARJORIE STONE is general counsel, vice president and a director of Sotheby's. She is regularly involved in issues concerning the trade in cultural property.

TORKOM DEMIRJIAN is President of the Ariadne Galleries in New York and specializes in antiquities. He participates as a representative of antiquities dealers at large.

JAMES FITZPATRICK is counsel to the American Association of Dealers in Antiquities, Oriental and Primitive Art. He was involved in negotiating the implementation of the UNESCO Convention and, most recently, in the Ben Johnson case which is currently on appeal.

STUART SEIDEL is the official of the US Customs Service best qualified to speak about the Service's approach to the importation of cultural property.

PROFESSOR JOHN MERRYMAN is almost single-handedly responsible for the developing specialism of Art Law. He is without question the most esteemed international authority on Cultural Property issues. Among other things, he is President and Founder of the International Cultural Property Society and Chairman of the Editorial Board of the International Journal of Cultural Property. He is a frequent contributor to the literature on this subject and has represented the United States at UNIDROIT, meeting with representatives from other countries to evolve solutions to issues that are the subject of our debate.

I turn over this evening's forum to Professor Merryman.

*Prof. John Henry Merryman:* Someone has said that antiquities have been around a long time. Although not a terribly profound statement, it is an easy way to start. The appeal of antiquities is complex and multifarious, but at the bottom line lies our fascination with the human past. Antiquities tell us who we are and where we come from. They echo John Steinbeck's line from the *Grapes of Wrath*: "How will we know it's us without our past?" The study of objects is a study of humanity.

Antiquities are a special class within the larger group of cultural objects which also includes works of art, ethnographic objects, manuscripts, old books, coins, perfume bottles, vintage automobiles, fruit box labels, anything that people collect or that museums acquire and display. But at the core of all of these lie antiquities.

Cultural objects began to receive specific legal attention relatively late. Leaving aside the Pope's prohibition against the export of antiquities from the Papal lands in the 16th Century, the first real legal attention to cultural objects began only a little over a hundred years ago, with efforts to develop rules of war that would protect cultural objects from destruction. Those efforts, which continue today, culminated in the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. There is a wonderful line in the Preamble to the Convention which says the Convention is about protecting and preserving "the cultural heritage of all mankind."

Beginning earlier in this century, national governments began to legislate with respect to cultural property, and national systems of cultural property retention and management developed. These national systems fall into roughly four categories. At one end is the kind of legislation one encounters in a number of Latin American nations in which the basic position is: Everything belongs to the state and nothing can leave. Period, end of discussion. In another group, of which France is a good example, cultural objects are subject to control if there is any intention or expectation of exporting them, but they are divided into two categories. One category of ob-

jects may not be exported, period. They are considered so important, of such value to the nation, or to the people of the nation, that they should not be permitted to leave. In the second category are objects which, under certain circumstances, can be exported. With respect to systems of this kind, the trick is to get the appropriate authorities to act on an application, given their tendency to err on the side of the angels, i. e. to deny permission to export. The result is bureaucratic confrontation and delay. People who wish to export things from Italy, which has a system roughly equivalent to the French, can recite horror stories about the difficulty of getting works out of the country, even though the legislation appears to contemplate that substantial categories of cultural objects can leave.

The third kind of system exists in Great Britain and Canada. This system also divides objects into roughly two categories. One category routinely receives permission for export without difficulty. The other category consists of objects of particular importance. As to these, the British and Canadian solution is to suspend granting the export license for a period of time, normally three to six months, to give the national and local government, local institutions and (in England) perhaps even private individuals an opportunity to acquire the object at the full price.

This system is thought to be the most civilized because it does not deny the opportunity of export. It gives British institutions an opportunity to buy the object at a fair price. Only if it is not bought will an export permit be granted. This of course, happens only to few particularly important objects.

The fourth category is illustrated by the United States and Switzerland. Here there are no restrictions on the export of cultural objects: if you want to export something, export it. In the United States, there is a slight qualification as to objects stolen from Federal Government or Indian lands, but otherwise there is no problem. So if you want to export a Jackson Pollock masterpiece or an American Indian object or a Northwest Indian object, you can do it.

That is roughly the landscape of national control systems. Until the era following World War II, the international traffic in cultural objects was largely controlled by the enforcement activities of the source nations. That is, objects did or did not get out of France according to the extent to which France was able to enforce its export scheme. After World War II, there was a concerted international effort, conducted largely through UNESCO, to get other nations to enforce the export controls imposed by source nations. For example, the United States was asked to enforce Mexico's export controls, or Peru's export controls, or Greece's export controls. That effort has produced a substantial number of discrete consequences in United States law. These consequences are not always well coordinated with each other. Some of the resulting dissonance between, for example, the provisions of the Cultural Property Implementation Act on the one hand, and the practice of the U.S. Customs as a result of its

internal directives on the other hand; may become clear in the discussion that follows.

We have in effect a young body of law, much of it developed after World War II. It is still being worked out, still being adjusted, still trying to achieve mutually acceptable accommodations among diverse interests. Our panel is a microcosm of these diverse interests, and the discussion to follow is one event in a fitful, uneven and controversial process which seeks to achieve an accommodation: an accommodation, I would add, that we should all recognize as comprising diverse but legitimate interests. No one on the panel represents an illegitimate interest. What we are talking about is different points of view that have legitimate bases.

To begin to clarify those interests, I will pose a hypothetical case.

Suppose I have a fine, large Greek pot, elegantly painted by Euphroneus, and I decide to sell it. Will you buy it, Dr. True?

*Dr. True:* If I could.

*Prof. Merryman:* No questions asked?

*Dr. True:* No, I'd ask a lot of questions, and my institution would demand that I ask certain questions. The most important questions would be inquiries to the governments of countries that were the possible sources of the piece. If I received no information that led me to believe it had been illegally removed, and if the piece was available at an affordable price, I would certainly try to buy it.

*Prof. Merryman:* Why would you ask those questions of those governments?

*Dr. True:* Because my museum has a well established policy. It will not buy something if to do so is contrary to the legitimate interests of an art rich nation. At the same time, however, the museum's mandate is to build a collection of antiquities for the West Coast of the United States.

*Prof. Merryman:* In the case of a Euphroneus vase, whom would you contact?

*Dr. True:* Specifically, we would write to the Culture Ministries of Greece, Italy and Turkey: the countries where it is most likely to have been found. If I had information that led me to believe there might be another source, I would also write to Cyprus or to North Africa. I would give these nations time to respond. My museum has done this before with every proposed acquisition since 1988.

*Prof. Merryman:* Including the Aphrodite?<sup>1</sup>

*Dr. True:* Including the Aphrodite. One reason we felt we could pursue the acquisition of the Aphrodite was that we had a letter from the Italian government which expressed absolutely no interest in or knowledge of the piece.

*Mr. Henshaw:* The Museum of Fine Arts, Boston, has a checklist for such situations. This includes writing to IFAR; which keeps as complete a dossier as possible on lost, stolen or missing works. We seek

legal advice from counsel in the country of presumed origin; there might be more than one such country. We also contact Infosearch, which does checks in relation to the Uniform Commercial Code, to make sure that there is no encumbrance on the property; something people rarely do. A UCC financing statement is like a house mortgage which is recorded in the registry of deeds. If you want to perfect your security interest in the Aphrodite, or want to see whether someone else has a security interest, you file a UCC financing statement and record it, and have one of the companies that conduct UCC searches check to see whether others have filed a statement. Of course, miscellaneous additional questions arise in individual cases.

*Prof. Merryman:* This sounds like a lot of trouble. As a buyer, I'm going to have to wait for you to write letters. There will perhaps be all sorts of additional questions. Maybe, I'll talk to Mr. Ortiz. George, would you buy my pot?

*Mr. Ortiz:* I'm not a pot collector, but I think I would if I could afford it.

*Prof. Merryman:* What kind of questions would you ask?

*Mr. Ortiz:* I would obviously ask whether it is stolen. But a person is not going to say it is. The real issue is: what is a stolen object? To me a stolen object is an object that comes from a museum, a museum depot, a museum reserve, or from a known and excavated archaeological site whose perimeter is well delimited and marked, or from a private owner, whether a collector or not. It is not every object under the ground, unknown and unfound in a given country, that is claimed to be the property of that country, and therefore stolen and illicit when traded. I do not accept such a position because I find it amoral, immoral and not conducive to making one world, one understanding, one people. I will read something that I once said:

“Now what are we talking about here? We are talking about art. Art is far more than just commerce. Art is the material manifestation of man's noblest expression. It is an idealism made into matter, it is a message. It is a message of communication. We are trying to make one world where ideas circulate, and the expression of ideas as manifested through art, should also circulate.”

*Prof. Merryman:* Mr. Fleischman, would you be interested in this pot?

*Mr. Fleischman:* Certainly if I could afford it, but let me state something. The approach to the problem of antiquities is often negative. I think that if people could get together and devise a more positive approach many solutions are possible. I'd want to know who is offering me the pot. When you ask me whether I would buy it from you, I would reply: Who are you?

*Prof. Merryman:* I'm a collector.

*Mr. Fleischman:* Are you an established collector that I know or are you just coming out of the closet?

*Prof. Merryman:* I bought this from a collector in Zurich.

*Mr. Fleischman:* I think very highly of dealers, though I deal only with a handful of them. Antiquities dealers have been attacked in ways I consider disgraceful. They are legitimate people operating legitimate galleries. They have places of business. They love their merchandise and their business, making things available to the public and to museums for their preservation. Governments know and visit them. Their own government audits them. They pay taxes. They are doing nothing illegal. No dealer from whom I have ever bought would decline to state on the bill of sale that he had the legal right to sell the object and that it was legally exported and imported. It is an old maxim that one should know with whom one is doing business. If, on the other hand, someone comes out of the closet or with an object under his coat I would not buy it.

*Prof. Merryman:* Before we all get out our handkerchiefs for the dealers.

*Mr. Fleischman:* Pocketbooks, not handkerchiefs.

*Prof. Merryman:* How can you and George Ortiz morally justify acquiring these things that almost certainly have been illegally removed in violation of the laws of the country of origin?

*Mr. Fleischman:* I am not certain they have been illegally removed. The Romans removed things when they occupied territories, so did the Turks and the Greeks. It is not easy to know where an object came from; it could have been removed 2,000 years ago. In a sense, I feel that I am preserving objects by collecting them. The National Geographic Magazine has several times remarked how many Etruscan things are being destroyed on farms. For example, if a contractor in Italy finds an antiquity, because there is no system for protecting it, and because the legal mechanisms can be very complex, he may just destroy it. It is lost forever.

*Prof. Merryman:* So your answer to the question is what?

*Mr. Fleischman:* My answer to the question is that I believe in these objects being shown and being preserved and that these objects belong to the world. Antiquities are extremely important to understand cultures.

*Prof. Merryman:* Mr. Ortiz, what is your answer to that question? How can you square your activity, as an active collector over a large number of years, with the moral problem that many of these things will have been removed from their country of origin contrary to the laws of those nations?

*Mr. Ortiz:* It doesn't create a moral problem for me because I think that the way UNESCO is going about solving the difficulty and the approach of the source nations is political, ideological, utopic, often uninformed, exaggerated, and if I may say often in bad faith. For

example, the remark in a journal of field archeology in 1991 that: “the plundered art trade is multi-billion dollar, only behind drug smuggling and perhaps weapon trading” is ridiculously misinformed and exaggerated. Now it is conventional for excavated antiquities to be regarded as plundered and for anyone who deals in them to be stigmatised as a crook. Such critics forget (or fail to mention) that 85% of those archaeological objects which have come on the market since World War II are chance, accidental finds. Is it illicit to find something accidentally when plowing your field? Is it illicit to find something when digging a highway? Is it illicit to find something when building a house? Is it illicit to chance upon something? Were it not for the art market, the thing would be smashed or ploughed into the ground, or concrete would be poured on top of it. Why? Because otherwise work would be stopped.

Imagine that a contractor has to finish a ten-mile section of highway. If he does, he gets a Christmas bonus for his workers. The government says he must build the highway; but if he chances on archaeological remains, everything must stop. Again, imagine that a farmer chances on something in his field. He sells it because that way the market saves it; otherwise, he destroys it. If he admits to the police that he has it he gets beaten up.

Until a few years ago Greek and Roman coin hoards, which (like all treasures) are always accidental finds and never found in official digs, would be taken by a dealer to the British Museum Coin Department, who would be allowed to record it, following which the coins would be sold individually or in groups. Nowadays, coin hoards are not taken to the British Museum, because people are terrified, and in consequence the sources of things are hidden. Information and context are lost. It's wrong.

*Prof. Merryman:* Would anybody care to respond to what Mr. Ortiz and Mr. Fleischman have been telling us about the nobility of collecting?

*Lawrence Kaye:* It is a hard act to follow, but yes. It is illicit if the laws of the country say that it's illicit. Mr. Ortiz would reject the laws of a particular country. That's fine to say, but it is contrary to the rule of law. As eminent an authority as Professor Merryman has written that countries which have national property statutes are empowered to enact them. Once enacted other countries should respect those laws.

I think the issue is probably wrongly stated. It's not who owns the past, but perhaps who respects the past. There is no question who owns the objects of antiquity. If a properly-drafted foreign property statute vests ownership in the state, the state has ownership. The state can own antiquities that are in and on the ground. If statute so provides, someone who finds such objects must surrender them to the state.

There is a reason for that. One unfortunate thing about the four types of statutes Professor Merryman outlined is that all of them



(except for the first) seem to prevail in art importing countries, not in art rich countries.

If you look at the art rich countries you see the need for the laws. It is based on history. The only way for art rich countries to trace their history, when they do not have the written history of some industrialized countries, is through archaeology, from generation to generation, using their antiquities. That is what these statutes are all about. Once you disregard that, once you say "I don't really care where it came from, I'm buying it and I don't honor the laws of those countries", you are destroying the ability of those countries to define their whole history.

Access and preservation can wait. When a collection of antiquities is looted, it is important to understand who is doing the looting. The peasants do the looting. They do not protect unexcavated sites. They send their discoveries to a middle-man (who probably gets the money). He in turn sends it to a dealer who brings in other dealers. Maybe the object ends up in a gallery or museum in an art importing country.

*Prof. Merryman:* Mr. Demirjian, you are a dealer. Is that the way it works?

*Mr. Demirjian:* No, it is not. I have several very good examples. I live in the United States, and I live in a real world. I know the difference between what is real and what is ideal. My responsibility is to conform with United States law, not the laws of some other countries which may not be very valid in this country.

A long time ago it would not be unusual to be arrested if one possessed a pack of Marlboro. So what should we do in this country? Arrest somebody because they smoke Marlboros?

A long time ago, in countries like Turkey, coins were, as George Ortiz said, being melted down because there was no efficient mechanism to realize value. They were being lost forever. Whose cultural patrimony is being protected when that happens? How should I, as a dealer in this country, behave if I am absolutely convinced that the country claiming this cultural patrimony does not respect another country's cultural patrimony? What happens in an Arabic country, for example, if Jewish related materials are found: are they treated with the same kind of respect? In Turkey, for example, which claims extensive concern for the cultural environment, medieval Armenian churches are being destroyed. How is a country which claims so much interest in cultural preservation, and which demands from me a complete change in lifestyle and view of law and ethics, entitled to respect when it has sheep grazing within its medieval churches?

*Prof. Merryman:* Ms. Stone?

*Ms. Stone:* I disagree with some of what was said before. Our courts do not normally enforce the domestic laws of most countries. I do not understand why we opt in this single instance to enforce particular overseas internal laws, viz. patrimony laws. We do not enforce overseas criminal or general civil laws, whereas we apparently be-

lieve that we should enforce patrimony laws. I do not agree with that at all.

I also think that patrimony laws can be highly inconsistent within a country. There is a distinction, not previously made in this debate, between heritage and other cultural property.

Some countries which advance claims under their patrimony statutes make claims to (and forbid the export of) property that has nothing to do with their history or their culture. Even so, some contend that we should honor that claim simply because they have enacted a law.

I also have a big question about whether the United States, which has always believed in individual property ownership, should selectively enforce the laws of those countries which do not believe in individual property ownership in one selective field, viz. art. Such countries allow you to own your house and your car, but deny your ownership of a sculpture which could have been passed down in your family for four generations. I absolutely cannot concur with what has been previously said.

*Dr. Lowenthal:* In our archive of stolen art, we can list and catalogue only those things that are previously known. Whatever you may mean by “stolen”, and I hear different definitions today, we need information by which an object can be identified without its being confused with anything else.

*Prof. Merryman:* So if the object is from an illicit clandestine dig it would not qualify for your list?

*Dr. Lowenthal:* We need a photograph and we need measurements. Most things found under the ground other than by archeologists do not have these. Our lists are therefore limited by the kind of information we need. I think *Turkey v The Metropolitan Museum of Art*<sup>2</sup> is really one of the first claims for the repatriation of something that was previously unrecorded, unphotographed etc. That should be very very interesting. I know everyone here is watching carefully.

*Prof. Merryman:* The same thing is true of *Peru v Johnson*,<sup>3</sup> I believe.

*Dr. Lowenthal:* Yes, that’s right. There is also a case on the West Coast.

*Prof. Merryman:* Jim Fitzpatrick?

*Mr. Fitzpatrick:* Let me make two comments on this question of patrimony laws. First, I think Larry Kaye is enthusiastic on foreign patrimony laws, but I think he is dead wrong in terms of the impact of foreign patrimony laws in the United States. There have only been a couple of occasions when a foreign law has served as the basis of an enforceable right in the United States. That was in the context of the criminal prosecution, in one circuit, in the *McClain*<sup>4</sup> case that many of you know about.

Broadly, I do not believe that foreign patrimony laws have served as a major basis for the repatriation of goods. In this country, we

have a cultural property law that tried to sort out the very questions that many of us are talking about here, balancing the tensions among foreign countries and dealers, and museums, and collectors, and archaeologists, and anthropologists. We've spent ten years passing a law that attempted to establish a process to define what goods are properly excluded from our country. That legislative history made it absolutely clear that a foreign government's claim of ownership is not the operative fact. Rather, a government must under our statute meet very clearly defined standards. Specific works that were in danger of pillage were to be excluded from this country after an expert finding by the cultural property board, and the officials of the government, and when the United States government was acting as part of a multinational response to that issue of jeopardy, pillage, in a foreign country. We sorted through, John, I believe, many of these issues in terms of the reconciliation of the various interests that are here. We have a process in place...

*Prof. Merryman:* Well, it's an interesting process, but it doesn't work. No other major art importing country is a party to the UNESCO Convention so the concerted action provision never applies.

*Mr. Fitzpatrick:* Then we ought to go back to Congress, and the archaeologists and the foreign countries ought to go back, and propose a different law. That law was Congress's reconciliation of what our national policy is going to be.

*Prof. Merryman:* Mr. Maurer, how can you continue to work for an agency that is engaged in such irresponsible activity?

*Mr. Maurer:* I would like to go back and comment on some of the things already said. First, I have difficulty with this notion that if a peasant living in a country whose laws grant the State ownership of unexcavated antiquities finds an antiquity, finders keepers, or something like that. I find that rather like the notion that a lost wallet belongs to the finder. You know that the law does not sanction that.

*Prof. Merryman:* Well, we know that unlike the wallet owner, the nation didn't lose that stuff that the farmer found in the field.

*Mr. Maurer:* It was not lost, but evidently it was picked up by peasants when it belonged, by the law of the particular country, to that country. Now, getting to that point, I would like to take issue with some of the statements that have been made.

We have recognized that the USSR is entitled to ownership of the oil under its soil, even though it may not allow private ownership; so I don't think that we can be discriminating, if a country in its own wisdom decides to become the owner of antiquities under its soil.

*Prof. Merryman:* In the interest of expedition, Mr. Maurer would you agree that saying that a country may own the resources under its soil, so far as its internal law is concerned, is a separate question from whether another country will enforce that?

*Mr. Maurer:* Yes, I can see a difference there, but basically one of the things that we do uphold is to protecting or trying to restore to a country or an individual whatever is stolen. I make a distinction between that case and the case where we are enforcing merely the export control laws of another country.

In the case of stolen property it is one of the tenets of our law that, if the stolen property comes to the United States, the bona fide purchaser does not get title. We have procedures for seeking to recover such property. Now, I make a distinction between that and the enforcement of the export control laws of countries. With respect to the latter, the UNESCO Convention took a very limited view of what we would enforce. Its view was that, in the case of illegally exported archaeological and ethnological objects, we would have a special procedure; first, a request by a country which was then approved by the committee on cultural property of the USA, and secondly import controls. If that material came in, it could be seized and returned. Now that is a very limited remedy and...

*Prof. Merryman:* Even more limited in view of the fact that the concerted action provision is a dead letter?

*Mr. Maurer:* The concerted action provision still remains to be applied after the emergency control legislation on ...the emergency controls that we have are exhausted, and at that time we may in fact...

*Prof. Merryman:* What other art importing nation besides the United States and Canada is a party to UNESCO?

*Mr. Maurer:* Only ourselves and Canada, but I think since we are the main...

*Prof. Merryman:* France is not a signatory?

*Mr. Maurer:* No, France is not.

*Prof. Merryman:* Germany?

*Mr. Maurer:* Neither Germany nor Switzerland.

*Prof. Merryman:* England?

*Mr. Maurer:* England and Japan are not.

*Prof. Merryman:* Are Scandinavian countries?

*Mr. Maurer:* No. It is maybe to our credit that we, as the major art importing country, are party to UNESCO and have been helpful to the endeavours of those countries to recover their property.

*Prof. Merryman:* I think Mr. Seidel would like to come to your support.

*Mr. Seidel, USCS:* As a representative of a law enforcement agency, my perspective differs slightly from that of the other speakers so far.

My agency looks first to the manner in which the item came to be in the United States. That is our first concern, because if someone breaks a U.S. law when importing that item, foreign law is immater-

ial. Most of the items that have been the subject of litigation have (as Mr. Fitzpatrick pointed out) involved discussion, not as to the content and effect of foreign law, but as to the content and effect of U.S. law at the time of import.

Once that law is broken at the time of importation, the item can be seized and forfeited under US law. There is a policy in the United States that, following such forfeiture, we shall try to return the object to the country whence it was unlawfully taken if that country wants it back.

*Prof. Merryman:* How about the Poussin “Holy Family on the Steps”? You didn’t return that.

*Mr. Seidel, USCS:* No, but you have to understand that we’re enforcing US law. If something is seized and forfeited for a violation of US law, the United States Government owns it. If the United States Government owns it, it can dispose of it in any way it pleases.

*Prof. Merryman:* But wasn’t the Poussin improperly declared on entry?

*Mr. Seidel, USCS:* That’s what I’m saying. If the U.S. law is broken, if the object is smuggled, unlawfully declared, or otherwise imported in violation...

*Prof. Merryman:* And, Poussin’s “Holy Family on the Steps” was improperly declared.

*Mr. Seidel, USCS:* Unfortunately, it was undervalued. The undervaluation law doesn’t provide for absolute forfeiture, and that is one of the problems. There is a bona fide purchaser defense for one type of violation but not for a different type. But I do not think we can delve into the details of the law. My point is that our first concern is for US law. If US law is not violated, we examine how far a particular foreign law might apply to US law. For example,...

*Prof. Merryman:* Is your internal Customs Directive US law?

*Mr. Seidel, USCS:* It summarizes U.S. law but includes policy.

*Prof. Merryman:* Has that document been tested in any judicial proceeding?

*Mr. Seidel, USCS:* We have commenced actions involving interpleader to test it. In each case the importer withdrew from the litigation before final judgment.

*Prof. Merryman:* It is a very effective device, is it not?

*Mr. Seidel, USCS:* Yes, it has had some success.

*Prof. Merryman:* Definitely. Mr. Danto, I think you indicated interest in this question?

*Mr. Danto:* I want to say something about the controversy between the collectors, who have rather high-flown views about the universality of art and how it belongs to all mankind, and these dreadful patrimonial laws that get in the way of acquisition of vases and beautiful objects for all mankind.

I think that if your aim is preservation, those laws are probably really benign. Without them, there would be very few obstacles to the destruction of those kinds of objects. Let us say that the history of art is the history of destruction of art. It is the history of iconoclasm; of burning stone for lime; of melting down statues for arms. It's all those kinds of things, and it's only because you now have a national reason to preserve these things for your past that you are in a certain sense contributing to what the collectors declare their aims are, namely to preserve these things. So, if you are considering principle, it seems to me they are really more allies than antagonists.

*Prof. Merryman:* Dr. Coggins?

*Dr. Coggins:* I would like to change the basis for this discussion if possible. All our discussion has been in terms of law and property. Many archaeologists are not even interested in this question of property or in what belongs to whom. The point is the archaeological and historical record, the preservation of information, the concept of cultural heritage rather than cultural property. Cultural heritage is a multidimensional concept, which comprises more than objects. It could include ritual or action of various kinds, such as dance. It is a fabric, and it is this fabric of society which is destroyed in the process of bringing archaeological things out of a country and into a market. Once this fabric is torn, archaeologists no longer have anything to work with. There is no longer any question of heritage. These things become merely property.

One can, I believe, think of these as environmental and conservation problems. Certain heritages are a kind of an endangered species. It is, perhaps, in the emerging discipline of environmental law that we might find an effective medium for dealing with these problems, rather than by incessantly harping on who owns what – an unfortunate way of viewing the problem. I have no answers but I would like to change the route of the debate.

*Prof. Merryman:* So we can be absolutely clear about this, Dr. Coggins, would it be accurate to paraphrase a part of your meaning as follows: That if an object has been properly and professionally excavated, and documented so that the informational value has been acquired from it, you are not then terribly interested in whether it is exported from the country of origin or not.

*Dr. Coggins:* This is a different question, a different level of question. It becomes then a matter of nationalism and of property, no longer one of pure heritage. That is why I made the distinction I did at the point I did.

*Prof. Merryman:* Do we all see that distinction? Very good. Dr. True?

*Dr. True:* I want to speak to something Larry Kaye said. It also has to do with something Arthur Danto said.

Mr. Kaye suggested that a country's interest in the export of antiquities has nothing to do with economics. I think absolutely the reverse is true, that it has a lot to do with economics.

In a former presentation on cultural property, Ariel Kozloff discussed the export of a very important skeleton to Cleveland. No one in Africa made any fuss about the skeleton's remaining in Cleveland for study, because it had no economic value.

I think the market in antiquities does, in fact, have great value. The objects themselves have a value, which motivates much of the law affecting them. I also believe, with Professor Danto, that that value has been instrumental in the preservation of objects. Once people saw there was a value in a statue, they no longer put it in a lime kiln. It owes its preservation to its value. Similarly, terra-cotta vases that were once broken because no one had any interest in them (they were looking for gold and silver) are now valued, studied and preserved.

I would also like to speak to what Clemency Coggins said about excavations. I have spent the last two weeks in Greece looking at the results of archaeological excavations. I wish to ask whether, if excavators feel it is so necessary to dig sites to find information, they might make some provision for the maintenance of those sites. Sites are deteriorating at a unbelievable rate. The foundations of buildings are disintegrating. I think it is often better to allow no excavation unless some duty of preservation is imposed.

*Dr. Coggins:* I certainly agree with that, and I think it would be a lot better if there were a lot less excavation.

An attitude shared by many art and antiquities dealers is that a site should be harvested and brought to the market and realized for whatever it is worth. In fact, it is an excellent idea that we should be banking sites: that is, leaving them alone; preserving and documenting them much better than we do. I agree with Marion True: fewer, rather than more, excavations.

*Prof. Merryman:* We have ventured into new territory. We are beginning to consider the treatment objects receive if they remain in, or are returned to, the source nation. May we continue to talk about that? What do we know about that, for example, Mr. Ortiz?

*Mr. Ortiz:* Dr. Coggins has a very valid point when she talks about archaeology in Central America. I refer here to the devastation of Mayan Stelae. The way in which these are hacked to pieces in the forests, just to sell the figures or the heads, is real destruction. Similarly with the inscriptions on the sides and on the back. These things draw their importance from their situation in a given place in the country. Their obliteration or removal is destruction.

But to compare the farmer who fortuitously finds an antiquity with a person who picks up another's wallet in the street – a wallet which, though lost, still belongs to somebody – is to raise quite different issues. Is it correct to classify these works of art found in the ground as *res nullius*: the property of nobody? Or are they *res communis*: the property of the people at large? If they are *res communis*, the retentionist argument becomes self-contradictory, because the object belongs to everyone.

All I am saying is that we inhabit a world which is trying increasingly to be moral. The U.S. intervention in the Gulf is an example of that. We are trying to be more ethical. Whether we succeed is another problem.

Within that context, the laws which certain countries are enacting on the retention of patrimony, far from saving antiquities and preserving them for mankind (note, for mankind and not just for themselves), far from giving them to knowledge, scholarship and study, are leading and will continue to lead to their destruction on a massive scale.

The authorities in such countries should first start to educate within their own country and to look after their own things. I'll give you two examples.

Sir John Boardman, Lincoln Professor of Classical Archaeology and Art of Oxford, a great scholar and not a museum man, who was not seeking to defend museums or purchasers, writes in his book, *The Greek Overseas*, 1980, chapter 1:

“The Nature of The Evidence: More loss of scholarly information is suffered through excavation in the cause of scholarship than through tomb robbing for collectors and museums; yet the non-publishing excavators continue to enjoy credit for their discoveries.”

Dr. Koe of Yale University, former chairman of the Department of Anthropology, says:

“Archaeologists are among the worst offenders since as many as half of all the excavated sites are never published.”

Think about that for a minute. Boxes are forgotten, lying in basements. The person who dug them up is long gone. His notes are scattered and the labels have vanished. The sites might just as well have been destroyed. Every Department of Archaeology, and every museum, is familiar with this problem.

Chance finds that are illicitly exported are at least saved for posterity. They are lent, they are given to museums, they are entered in exhibitions, they are studied by scholars. Maybe it is unethical for the farmer to keep them and sell them, but at least they are then saved.

*Prof. Merryman:* Is that fair to archaeologists, Dr. True?

*Dr. True:* In many ways I am afraid I think it is true. I believe that one of the sad aspects of the rift between archaeologists and collectors and collecting institutions is that it has only made matters worse in this respect.

In many cases excavators (in pursuit of their own interests) continue to dig sites unnecessarily. I am sorry Baldassare Conticello [Superintendent of archaeology, Pompeii] cannot be here because I



feel Pompeii is one such example. The excavators continue to dig, and to uncover more buildings, when the wall paintings on those already excavated have so deteriorated that one can barely see them. Many of the buildings are no longer open; recent earthquakes have created tremendous damage.

In addition to digging without preserving, excavators are not publishing. I just have had long discussions in Greece with colleagues about the famous Merenda Kouros and the Phrasikleia, and the Kore that was found with it. Mastrokostas has still not done the publication and has no intention of doing it. This story is repeated again and again.

There was a time when museums participated in excavations at the invitation of governments. Finds were shared and systematically published. In my opinion, that was a very constructive way to go about excavating. I am very sorry that the laws of most art-rich nations now work against that.

*Prof. Merryman:* Dr. Coggins?

*Dr. Coggins:* Comparing non-publishing scholars (of whom there are many) with looters of sites is unfair. There is no legitimate comparison.

*Prof. Merryman:* To whom is it unfair?

*Dr. Coggins:* To archaeologists. I do not think it is accurate. Nor do I accept that 85% of antiquities are discovered by chance. The poor peasant who suddenly finds a mass of extraordinary coins and golden crowns and so forth in his field scarcely exists anymore in the world.

One serious cause of destruction is ordinary construction work. Public works are an important cause of site-destruction in a variety of countries. Statistically, the innocent peasant represents a very, very insignificant source of antiquities. There are serious people out there, deliberately seeking antiquities and finding them in most cases.

*Prof. Merryman:* I would ask the panel a question. Could we agree that the preservation of information is an objective that we all care about, we all approve of, we think is important? Is it not high on our list of values?

*From Panel:* Yes.

*Prof. Merryman:* And the preservation of the objects themselves? Do we also care about that?

*A Voice:* The highest.

*Prof. Merryman:* No problem on that. So what is the problem? Mr. Fleischman?

*Mr. Fleischman:* The problem is this. Who ripped the marble off the great buildings of Rome? The local people. Who destroyed it and had the kilns going? The local people. How do you know about

Greek art, Roman art, Renaissance art? Because collectors cared about the objects that represent them. Works of art were created to be looked at, to be believed in, and to be inspired by.

Who is helping with the floods in Venice? American collectors. Who contributes every time there is a cause to support in every European country? Again, American collectors.

Countries which want the help of market nations in protecting their patrimony must understand that this is not possible if people do not understand the art in question. What is all this rubbish about saving heritage? Heritage has been saved for hundreds of years by people who cared enough to see that important objects end up in the Vatican museum, the British museum and elsewhere. Do you think we would have the Elgin marbles today if they were not preserved in the British Museum?

*Prof. Merryman:* Yes, we probably would have them. They would probably be in the Louvre.

*Mr. Fleischman:* I want to say one other thing about patrimony. It really boils down to dollars and tourists. Not to any desire to spread knowledge.

Consider this episode, which occurred at the British Museum. It is a famous story and a true one. A very important Minister of Culture stood before a monument in a classical department of the British Museum and shed tears. The monument came from her country and its exile was so sad. A Curator tapped on her shoulder and whispered in her ear that it did not come from her country, it came from such and such country. She dried her tears and said "Oh" and went on to the next thing.

Much of the campaign for restitution stems from nationalism. Its proponents have no interest in seeing that heritage objects are part of the spirit of mankind. Countries like ours are trying to help art-rich nations, by preserving classical objects. There is not a single collector who does not believe in preservation and help.

*Mr. Kaye:* But supporters of your view speak of preservation as capable of occurring only if there is access in a Western Museum. To them, there has to be preservation in the West. I am reluctant to say it, but many detect an element of racism in this attitude. There is also a certain arrogance in Western Museums, and a certain failure to recognise what is happening in the world now.

*Mr. Fleischman:* In Greece you will see things in storage that are unavailable to scholars or the public. In the great Museum of Naples there are unused objects in storage, disintegrating in their cases. These museums are not poor, and there is very little in the American museums to compare with what they have.

*Mr. Kaye:* And there is nothing in the basements of the Metropolitan either, I understand. The fact is, that when people talk about preservation they talk about access.

A lot of people have misunderstood me tonight. Marion True said that I do not appreciate the importance of economics. But economics are the whole problem. Were it not for the fact that collectors promote organised attempts to remove artifacts from their countries of origin, giving incentives to peasants (who actually get very little from the trade) and encouraging looting, we could reach sites in time and excavate them properly. A site looted is a site destroyed. The local searchers not only destroy objects but prevent archaeologists from putting them in a proper historical context. Take for example the reconstruction made possible by the discovery of the Mayan tomb, as reported today. The premature and unscientific removal of a single object from the site may prevent archaeologists and historians from identifying its origin, why it came from there, what it was doing there, and from generally rebuilding the history of the situation. If all such tombs had been looted, Mayan civilisation would not have had the major impact on history which it has had.

If the people who buy illicit art are isolated, the effect will eventually percolate through. Looting will cease and public access will be extended. You will have access in wonderful museums in countries like Turkey that set the objects in their historical context. The world will have access because countries like Turkey are engaging in sharing and exhibitions. For example, there is a wonderful Hittite exhibition, which has visited Japan, Europe and the United States twice from Turkey.

Why do people place such emphasis on the necessity for museums to *own* all this wonderful patrimony of mankind? They do not have to. The countries of origin can own it, and they can share it by exhibition in their own wonderful museums and by joint exhibitions around the world. I think that is how we are going to preserve the cultural property of mankind.

*Prof. Merryman:* We should give the two museums a chance to respond. Dr. True, Mr. Henshaw.

*Dr. True:* You paint a wonderful, idealistic picture of Turkey. I excavated there and I do not believe it for a minute. I have been to the museums. One cannot get into the basement or photograph the objects. It is the same in every art-rich country. I wish it were not so. None of us condones looting or wants to encourage it. But in fact it is the laws in Turkey that encourage it.

If, as you so passionately maintain, the question should not be one of ownership, why are art-rich countries unwilling for indigenous objects to be placed in institutions around the world, once they have been studied? Such objects would be the very best ambassadors. If we could have one beautiful Hittite object in our museum in Los Angeles, far more people would probably see it than in a provincial Turkish museum. And if it has been properly documented, what argument is there against the prospect of its being exported? The idea that all such objects must remain in their country of origin

conflicts with the idea that they have historical importance for the world. It is a position with which I do not agree.

When Mr Kaye was speaking before, he expressed the view that access and preservation could wait. If the idea is that art-rich nations should simply amass, simply accumulate and retain everything found in their territory without any obligation to preserve, grant access or publish, the result is a great sacrifice of information and scholarship. I do not approve of that at all.

*Mr. Henshaw:* There will always be tension between cultural anthropologists and archaeologists on the one hand, and collectors and museums on the other. This is unavoidable. I do not think it can be cured and I agree with much of what Professor Coggins has said. The point at which matters become very difficult (and at which I had a controversy with Professor Coggins) arises when we have to decide the fate of something excavated years and years ago. The object enters the U.S., is acquired by a collector and exhibited at (say) eight museums. Throughout this time there is neither a peep nor a squawk from any potential country of origin. Years later, when the collector is getting old and considering estate planning, a museum acquires his collection. Are archaeologists then to complain, when the object has been here for twenty years and exhibited in eight museums? The situation becomes totally unrealistic. These objects are now safe in the Museum of Fine Arts where they will be seen by countless generations of people from all over the world.

*Prof. Danto:* I find it charming to think that the *Barbarini Popes* would be referred to as the locals. The idea that works of art are objects to be preserved is of relatively recent origin. The laws under debate are very, very recent laws.

One dislikes the idea of nationalism, but in principle a Turkish object means something very different to the Turks when in Turkey from what it means when it sits as a mute ambassador from Turkey in an unvisited glass case at the Metropolitan Museum. When young people visit and see it, they say, "That is us? That's the best we are capable of? That defines our culture?" I think the notion of culture itself is such an evolving concept that we are talking in the middle of something that is shifting every moment.

*Mr. Fitzpatrick:* Let me make this suggestion. It is clear that passions are high and that the degree of conviction on each side is clear and convincing. The passion and the conflict are going to continue. To me, that makes it all the more important that everyone involved should have a set of rules under which to operate. We spent ten years trying to establish a cultural property law which set out such rules. John Merryman says that is a failure because other nations did not comply with the standards established by Congress. If so, let us devise a different set of rules. We have the Customs authorities now basically disregarding all the standards that were established in the cultural property law concerning particularized items subject to loot-

ing (a multi-national response evolved with expert guidance as to what should be kept out of this country) and applying instead an across-the-board standard, whereby anything pre-Columbian is now embargoed from the U.S.

The question is, "Who owns the past?" The way things are going, the answer will be: "Europe and Japan." We in the U.S. shall neither own the past nor have access to it, because other art importing countries will simply reject any kind of self-denying ordinance.

But when rules become necessary, the problem arises of keeping the bureaucrats under control. In the 1970s, we recognised other countries' cultural property problems in order to achieve certain State Department policy goals. We exchanged a restriction on the importation of stelae for an agreement by Mexico not to allow the import of any more stolen cars. The process of evolving a cultural property import law was in large part an attempt to bring experts into the process of determining when is it legitimate to recognize the cultural patrimony of another country. The only sensible way to proceed is to formulate common rules which bring in the appropriate expertise and try to bring some certainty to national policy. We did it once. If that endeavour was misguided, we should try again. What we should not do is simply abdicate the debate (and the necessary guidance) to passion.

*Dr. Coggins:* Mr. Fitzpatrick (who represents the American Society of Dealers in Ancient, Oriental, and Primitive Art) spoke of the ten years it took to get the cultural property statute through Congress. He suggested that if it did not work very well (which it does not seem to do) we might fix it. I wonder whether he is going to help in that exercise. It was largely through his representation that we took ten years to get the legislation passed in the first place.

*Mr. Seidel, USCS:* I generally agree with Mr. Fitzpatrick. My one reservation concerns his interpretation as to the rules we apply.

The pre-Columbian statute he mentioned was adopted by Congress in the 1970s to assist Central and South American countries in enforcing their own export laws on pre-Columbian monumental art. It is contrary to U.S. law to bring such objects into the U.S., if they have been exported from one of the South or Central American countries in violation of the local law.

In general, the U.S. does not enforce foreign export laws. In the absence of a statute, we do not enforce foreign laws governing exports. But as I observed, we do enforce U.S. law. If, during the enforcement of that U.S. law, we learn that a foreign country claims title (which it may be able to establish) we try to recognise that claim.

So, for example, if a foreign country claims ownership of certain items which have been smuggled into the U.S. or otherwise illegally introduced into it, we will co-operate with the foreign country, once the objects are seized and forfeited under U.S. law. This is no differ-

ent from stolen automobiles. If you steal a car from a Mexican in Mexico, and bring it to the U.S., we will assist the Mexicans in recovering that car.

*Prof. Merryman:* I think that is an adequate defence. Thank you very much.

*Prof. Merryman:* Mr. Maurer, I do not know whether you qualify as a bureaucrat, but you are certainly entitled to defend yourself.

*Mr. Maurer:* I am a bureaucrat. I represent the State Department, and we have been involved in these things with Mr. Fitzpatrick and Mr. Seidel for a long time.

I regret I must take issue with some points made by Mr. Fitzpatrick. He somehow believes that, in the evolution of the Cultural Property Implementation Act, principles emerged which are now being violated by the U.S. Customs, with the support of the State Department.

In our view, the remedies which existed before the 1970 convention was implemented were never meant to be impaired. In so far as the U.S. Customs had reason by its statute to seize property that had been improperly declared, we thought it proper to continue that power. We do not accept that this continuation in some way violated the spirit or the wording of what was agreed on implementation of the 1970 convention.

I am distressed to learn that there are so many things in the basements of foreign museums which are not displayed and which have been allowed to deteriorate. I would, however, echo what Mr. Kaye has said: that this fault may be shared by American museums.

Ours is a government acting within the best of its ability according to its resources. I am not sure that we should second guess it. I confess to being concerned when I hear speakers using the argument that they are preserving the heritage of mankind to justify acquiring property that may be stolen or illicit in origin. I think there is a lack of morality in that. It is not for individuals to take the position that they are justified in acquiring illegally-obtained or illegally-removed objects, on the ground that such acquisition enables the heritage to be preserved for the world to enjoy. People who maintain that position are second guessing the Turkish Government and other governments concerned. It is not for us to do that.

*Prof. Merryman:* Dr. Lowenthal.

*Dr. Lowenthal:* Estimates differ as to the proportion of illegally-obtained antiquities on the market. Some sources say that 90% are freshly plundered; others, that 85% are chance finds. I am unaware of any research to verify these estimates on either side. Certainly, most old things have no provenance that can be documented. In its place, there is normally a story which one believes, or takes with a grain of salt, or throws out the window, according to taste. In short, one does not know where the object came from.

You might be concerned about the looting of an archaeological site, or about whether a chance finder has been fairly compensated. Whatever the depth of these concerns, your essential concern will be something else. You will be concerned to establish (given the obsession of collectors and the selectivity of private collectors and museums over the past century or more) whether the artifact offered to you is stolen. By this, I mean stolen in the sense that you would understand if an object were taken from your house.

So, whether it is 85% or 90% that comes to the market with this cloud of uncertainty, there is another small percentage that you must and can check to see that it was not stolen from some individual or institution like yourself.

*Prof. Merryman:* Is the panel generally in favour (subject to expiry of the relevant limitation period) of returning to the owner works that have truly been stolen from him/her?

That being so, I would like to focus on a slightly different topic, already raised by Mr. Kaye. Is it realistic to argue for an attempt to abolish the market in antiquities? Is it realistic to suppose that a scheme of legislation could be developed and enforced in the U.S. that would stop antiquities from coming into the U.S.? Or are we really talking about distinguishing again between an open market and a black market?

*Mr. Demirjian:* Antiquities have been collected for longer, perhaps, than anything else. The collectors were often deeply interested in them for their own sake; they loved them and cherished them. If there is no mechanism for a free market, and a clandestine market develops in its place, the latter will gradually deter honorable collectors and attract people whose interest in cultural objects stems more from monetary incentives than from any sense of historical and artistic value.

The collectors in this room have, perhaps, contributed more to the enrichment of world culture and heritage than any black market mechanism could do. This country operates on a capitalist free market system, which I am proud to represent.

*Prof. Merryman:* It works very conveniently for a dealer, does it not?

*Mr. Demirjian:* Most certainly. It's certainly very convenient. But there are millions of other things I could do at which I could be just as successful. I am very proud of myself and all my colleagues. We display the utmost care and devotion in our conduct and often sacrifice our personal interests in trying to do what is best for the preservation of antiquities.

*Prof. Merryman:* Can I ask our other speakers whether it is possible to have no market at all, or whether the real issue is simply what kind of a market? Mr. Ortiz.

*Mr. Ortiz:* I think the latter is precisely the issue. But I would first like to say in honour of the citizens of your great country, that,

without collectors in the U.S., there would be no Metropolitan Museum of Art and no National Gallery of Art. That is something to be considered.

Those of us who are acting in good faith are trying to preserve antiquity for study, for scholarship, for enjoyment, for the benefit of mankind, for our own benefit, for the benefit of the countries whence it comes. They cannot look after their stuff. I don't think we should be that self-critical of ourselves and our civilization.

I offer just one example of what our tradition stands for. When Napoleon invaded Egypt around 1800, there were 17 European grammars of Arabic languages and 10 dictionaries; 10 and 4 for Persia, 15 and 7 for Turkey, with original contributions to the cultures of those countries and their languages. There was not one dictionary or one grammar in any of those countries, not even in manuscript form, of any European language. So, we have a background of tradition. Our possession of antiquities has occurred not simply because we have the money to acquire them, but because we also have a tradition of culture, of scholarship, of competence, that enables us to appreciate and study them. There's nothing wrong with the countries that have them in their ground, but they have a long way to go before they can look after what they have. They cannot yet look after what is already in their museums or what they find.

This being so, the laws which art trading nations enact and enforce must be constructive, moral and ethical laws. They must operate for the preservation of cultural objects.

*Prof. Merryman:* Mr. Fleischman, can you address the question on the market?

*Mr. Fleischman:* Any attempt to abolish the market would be disastrous. I recognize that numerous national treasures should remain in the countries where they are currently situated. But that is not incompatible with the notion of a legal trade, regulated and negotiated through ambassadors, with those countries which we recognize. Do away with the latter and you are heading for disaster.

*Dr. True:* After the UNESCO Convention and the implementation legislation, people became wary. We saw an upsurge in the number of forged documents. The market will never be stopped. What happens if you ask for documents is that you get them; they are simply manufactured for you. That makes the situation even more disturbing, because it means there are several levels of deceit through which one must travel before one gets genuine information.

If we can find a better way of working with the art rich countries, if they are willing to modify their approach to collecting so that a more open, compromise situation can be reached, everyone would benefit. Trying to cut off the market will just not work.

*Dr. Lowenthal:* I have heard information confirming Dr True on the matter of provenance documents. Forgery occurs not only at the very highest level. A collector told me that he was offered something for \$90,000, or \$120,000 with provenance. While we are always happy



to emphasize the need for provenance, we have no intention of creating a new product. Everyone now has to be an expert, not only in selecting antiquities, but in choosing the documents that supposedly constitute their provenance.

Can we stop the market in things looted from archaeological sites? It seems to me that the kind of international cooperation would be something like the ban on elephant ivory. In my opinion, long before there is a ban on the art trade, there will be a ban on exotic woods from the rain forests.

*Mr. Ortiz:* Mrs. Lowenthal says that, while objects come with stories, one does not know whether they are true. I have been collecting for forty-two years and my passion is finding out such stories. I want to publish my collection accurately, and I have been able to find where the objects came from, more or less. It has taken me years but I have found out. Now, what do I do, when I want to exhibit part of my collection and am writing the catalogue? If I give the provenance, the object may be claimed. Should I remain silent or enter into detail and risk restitution claims? The types of laws we are discussing can lead to the destruction of information.

*Prof. Merryman:* I think we agree that the present situation is not ideal. I think the panel as a group, with the exception perhaps of those whose governmental position requires them not to say so, would concede that the present system is not working well. So we are thrown back on Mr. Fitzpatrick's suggestion that we see whether we can devise a better system. Of what would such a system consist?

*Mr. Fitzpatrick:* A better system can exist only if there is a community of concern with art-importing nations. Destroying the U.S. market will not destroy the international market. If the market is a cause of looting, the elimination of looting requires elimination of the international market. We have not yet found a way of achieving that.

The only way that one can make progress is to use the economic and political power of the U.S. to persuade other countries to adopt the same kind of self-denying ordinance as we were asked to adopt in the cultural property law. Admittedly, that will be very difficult. But I cannot believe that a viable solution is likely to evolve from our enforcing foreign patrimony laws which foreign governments themselves do not enforce. Most foreign patrimony laws simply come into play when something is illegally exported, and are the functional equivalent of export control laws.

The burden of establishing a better, different legislative model lies essentially with the archaeologists. Those of us who were concerned with the present legislation worked very hard to find a community of interest. I am not sure the current law is working as well as it might, but I do not think the onus rests on us to initiate a better system.

*Prof. Merryman:* Do you have some ideas for a better system, Ms. Stone?

*Ms. Stone:* I do not think every collecting country will ever agree on a single system. If individual treaties can be struck, that is wonderful, but the Swiss Government (like many other governments) will never agree to ban imports of antiquities. So I do not think a UNESCO-type cultural property convention is viable in the practical world. Unfortunately, I live in that world at Sotheby's.

Our discussion has hitherto presumed that all antiquities currently being traded have been looted, that everything being bought and sold is a recent find taken from a contemporary site. I can testify from my practical commercial experience that many objects which attract claims come from individuals who have had them in their families (and can document their ownership) over many years. The background is not always one of pillage and looting and denuding a country of its heritage. The patrimony claim from the overseas Government may arise simply because the vendor (wishing to sell his/her own property) has illegally exported it.

*Prof. Merryman:* But we are certainly talking about illegally exported objects.

*Ms. Stone:* Illegally exported objects is a subject that has not only to do with antiquities. It touches every area.

*Prof. Merryman:* But in the antiquities business, a substantial portion of the objects traded are illegally exported.

*Ms. Stone:* I agree with that. They are illegally exported, but that does not make it illegal to sell them in this country.

*Prof. Merryman:* No. That's right.

*Mr. Seidel, USCS:* I agree with Mr. Fitzpatrick that just having legislation on the U.S. side is not enough. The Pre-Columbian Monumental Statute enacted in 1970 did, in effect, dry up the trade in that type of art coming into the United States, but several years later, it started reappearing in Europe and Japan. That is not to say we should not have enacted the legislation or enforced the law. Things would have been far worse, I think, had we not done so. You have to start someplace. I think that if the U.S. sets the tone, and passes a realistic law which is merely prospective and does not threaten old collections that have existed for hundreds of years, other countries may very well sign on. Then, eventually, the trade may dry up.

I suggest that more use be made of an arrangement I have seen between foreign countries and museums, whereby a work acquired by a U.S. museum in the United States but claimed by a foreign country is restored here then legally transferred to the foreign country, but subject to arrangements for its display around the world for a certain period, so that others benefit from access to it.

U.S. law allows that under the Florence Convention. The famous Egyptian museum's collection that was passed around the U.S., and the Chinese museums and the Dresden collection, were all brought into the United States under that Convention. It is a very successful

way of encouraging foreign countries, not only to preserve their own patrimony, but to allow others in the world to see it. I think we need more of that. But we have to work together, and it has to start someplace.

*Prof. Merryman:* Thank you. This is probably a good point at which to consider questions from the audience. We'll start with Dr. Vermuele. The question is: Does not ancient art, from the Iron Age through the Byzantine Asia Minor, also belong to the roughly 3 million Greeks and Armenians driven abroad in the generation from Abdul Hammid to Atatürk? This is directed at Turkey, obviously.

*Mr. Kaye:* I think the focus has to be on the current national property laws. These laws do not go back forever. Turkey's legislation is among the oldest; many statutes are more recent. An ownership claim must fit within the rubric of the national property law. The object must have been illegally excavated and taken out of the country in violation of the existing law. There is no great Pandora's box, threatening to affect all the antiquities in every museum in the world. So the answer to Dr Vermuele is, probably not.

We can think not in terms of our enforcing these patrimonial laws but in terms of our honouring them. That is what the U.S. does: it honors the laws of other countries. It gives them deference, and that is all it will be asked to give to foreign property laws.

This being so, I do not think the issue is really a legal one. Rather it is, as Ely Maurer said, a moral one. The solution we seek is not the abolition of the market but the existence of a principled market. In my judgment, our museums must lead the way toward that.

*Prof. Merryman:* Speaking of principles, one principle is that of a free market. Would you accept that principle?

*Mr. Kaye:* I accept, as a general proposition, a free market.

*Prof. Merryman:* Would you accept the principle of a free market in antiquities? For example, in Turkish antiquities?

*Mr. Kaye:* In Turkish antiquities that are not owned by the state under its laws?

*Prof. Merryman:* You are reintroducing what many would regard as a quibble about ownership. Suppose that these articles do not meet the definition of ownership by the State in article 7(b) of the Cultural Property Implementation Act. Would you approve a free market in those antiquities?

*Mr. Kaye:* I do not agree with that. Is there an article 7 of UNESCO? I do not think that that definition of ownership should apply. One of the problems with UNESCO and our cultural property legislation is that, while the principle and the approach of the U.S. are correct, they do not go nearly far enough. That is why the legislation specifically states that the pre-existing common law remedies continue to exist. I do not think the one has anything to do with the other. One needs the cultural patrimony or the cultural ownership laws to be

working in conjunction with international agreements like UNESCO.

*Prof. Merryman:* So what appeared to be an agreement turned out not to be?

*Mr. Kaye:* On that point, yes.

*Prof. Merryman:* Here is a question from Ann Sullivan. What is a good way to determine whether protective export laws actually encourage black market trade or suppress it? Should studies be performed? Can they be performed? Who should perform such studies: sociologists, Government agencies?

They desperately need to be performed. There is an extraordinary lack of any kind of statistical knowledge on these questions. As a consequence it is almost impossible to take any kind of action. Frequently there are law students interested in pursuing this. If anyone knows anyone who has any knowledge, or any basis for putting together statistics, on any aspect of this problem, it is desperately needed.

*Ms. Stone:* I strongly doubt whether it is practical to expect a collector who has something in his/her collection against which a potential claim can be made to voluntarily become part of a study. Most people are not going to discuss objects that they own or believe they own if they think a claim may result from their disclosure.

*Prof. Merryman:* We have another question for Mr. Kaye. How do you explain the state of the museums in Turkey? Do they really respect their antiquities?

*Mr. Kaye:* Everyone is telling stories tonight, so I shall quickly tell one too. I think it speaks to the contextual arguments that have been advanced.

I visited the museum in Ismar, Ephesus. A curator there showed me a beautiful vase. He told me that when he was a little boy living nearby, he actually found that vase in an area near his home. Complying with Turkish law, he brought it to the appropriate authorities. It was restored and put in the museum, only to be stolen from it later. The boy went on to become an archaeologist and a curator. Happily, the vase was discovered in an American museum and (as is becoming commoner nowadays) was returned voluntarily to Turkey. Now it was sitting there and he could study it.

This shows the feelings of the Turkish people towards the objects that are their history. I do not think countries like the U.S. can appreciate these feelings. Whoever says that countries like Turkey are not preserving or caring for their antiquities is speaking from ignorance and has not visited Turkey recently. One goes from one museum to the other. At the Anatolian civilization museum, in room after room, through civilisation after civilisation, one sees the archaeological history of Turkey, with everything displayed in its proper context.

*Mr. Demirjian:* I was born in Turkey. I am Armenian and I grew up there until the age of 18. You are describing a country that I do not know. Yours is a very naive view, which does not reflect what really happens in Turkey. It is just your view of what you think Turks feel for these things.

*Mr. Kaye:* I disagree but I am not going to debate the point with you. Some collectors tonight have come close to saying that if you see in a neighbour's house a vase in which you have (and I quote) "a deep love and great interest", but which you do not think is properly displayed on the mantel and which you think you can display better in your own house, you should be entitled to take it there.

*Dr. True:* I want to say something about context. Why is there no context for a Turkish object in a city which has many Turkish immigrants? We have a Cypriot object in our museum. We have a very large Cypriot population in Los Angeles. The same is true of Greek objects, and of all the antiquities we possess. America is made up of people from other places. Why should their art not be represented?

*Prof. Merryman:* I have another question. Why should the country of origin not simply buy or offer to pay for antiquities as a way of keeping them? That way, if someone discovers in his/her field something which he/she would, under present conditions, be tempted to sell it to a middleman for clandestine export, he/she would be able to sell it to a government agency for a reasonable fee, or (even better) leave it where it is, inform the government agency and be rewarded for having brought this to its attention, in a way that is realistic given international market conditions for that kind of antiquity. Mr. Ortiz?

*Mr. Ortiz:* Thank you. That's exactly what should be done, to enable the Turkish government, for instance, to pay 5% or 10% of the international price to the farmer. Then, if its a little village, the local school teacher gets a little drink in the schoolhouse, and the local politician comes along and taps the farmer on the back and gives him a medal, and the stuff can stay in the country. But they don't have any of that. They would beat up the farmer, if anything, and say: "You have handed that over; what else have you hidden?" So the farmer either destroys the object or sells it.

*Prof. Merryman:* Other responses to that question?

*Ms. Stone:* There are patrimony laws which offer rewards: the laws of Great Britain, Canada and to an extent France. The patrimony statutes of many other countries also allow for fair market value to be paid for an item, and the item can be lawfully exported from some, or a right of first refusal is given to the government. These might be fair methods of addressing the situation. But the majority of countries have no such provision.

I raised this question with a Government official of a South American nation. I said: "Under your law everything in the country be-

longs to the country and there is no individual ownership of objects. What if a person wants to sell something that has been in his/her family for years? For example, they may need the money because someone is sick. Can that person approach the government and try to sell it to the government?" He said, "No, if they try to sell it to the government, it will be seized." That encourages a black market; that person is going to illegally export the object. By our standards, the person owns it.

*Mr. Seidel, USCS:* When art has been displayed and there is a market, values can be established. Under a reward system, there is a practical problem as to who sets the value of a recently-excavated object which has never been on the market before. Moreover, what happens if the value is set high and the country of origin cannot afford to pay?

I have no problem with the British, French or Canadian method where an object has been displayed, cataloged, and sold many times within the country. But we are not talking about that. We are talking about archaeological items that appear for the first time. How do you set a value there? If you allow it to be set by the market place it will be jacked up, because the market knows it will always be bought by the claimant country.

*Mr. Fitzpatrick:* That is not the way English law works. The English system is very specific. It does offer rewards for newly-found archaeological items. The art market will not simply jack up prices, because it could be stuck with them. Under the English system, if the British Museum considers an outside bid fair, and it wants the item, it will match the bid. If it thinks the bid is too high, it lets it pass. In other words, they do not just buy automatically in England. And they do deal with newly excavated things.

*Prof. Merryman:* Torkom Demirjian, last comment before summing up.

*Mr. Demirjian:* We are underestimating the strength as well as the power of markets. Markets have a capacity for determining values, but only when they are free. Only a global free market will work. Antiquities have a worldwide appeal because they are part of our universal heritage. Everything we do must be based on realistic view of the world, not an idealistic view. It must take into consideration human nature; not only here, but in Turkey, Greece, Italy, Siberia. When free markets have been subjected to influence by certain idealistic systems they have collapsed. People are people; they have their own aspirations. They have their own interest of educating their children, feeding their family. They are not going to abide by arbitrarily-made laws that go against human nature.

If we deny recognition to this, we do not help the protection of heritage. Unrealistic controls eventually cause a loss of information. The market becomes disorderly and ceases to work. This happens to be a capitalist view.

*Prof. Merryman:* Unless some member of the panel insists, we will treat that as the last panel intervention. I will now spend a few moments trying to bring this debate to a close.

First, I want to thank the members of the panel very much for their wonderful cooperation.

Second, I would like to enumerate a few things I think we accomplished this evening.

1. We had, I think, universal agreement on the panel that it is very important to preserve cultural objects, and that whatever scheme is established should have as one of its primary values preserving the objects themselves.

2. Believe we have substantial agreement on the panel that it is also terribly important to preserve information: both the kind of information that can be acquired directly from the objects, and the kind of information that can be acquired from their context. We agree that any sort of scheme we come up with should be one that, to the best of our ability, preserves information as well as the objects themselves.

3. Further, I think we have substantial agreement on the panel that the existing system, which is more or less adequately described in documents you received and by what was said by the panelists, does not satisfy anyone. At least, it does not satisfy anyone in action. Perhaps in design it might. But it is clear that in action it satisfies no-one. We have a system which, so far as it works, does not work well. It does not achieve the kinds of objectives that we have agreed we want to achieve.

4. Finally, and as an obvious inference from that, we have recognition that we need some better system for dealing with the problem, because it is a genuine problem: a problem of (somehow or other) accommodating the legitimate interests of museums, and collectors, and dealers, and auction houses, and archaeologists, and ethnographers, and cultural historians, and all the rest.

We need some such scheme. The only remaining minor question is: how do we achieve such a better system? Maybe, at the next panel, we will be able to come up with that answer.

Thank you all for coming.

## Notes

1 The Aprodite referred to is a much-discussed larger than life-size marble sculpture recently acquired by the Getty Museum.

2 This case was subsequently settled before trial.

3 *Government of Peru v Johnson*, 720 F Supp 810 (CD Cal 1989). Peru lost. See Merryman, "Limits on State Recovery of Stolen Artifacts: Peru v Johnson" (1992) 1 IJCP 169.

4 *US v McClain*, 593 F 2d 658 (5th Cir 1979).

