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FEATURE ARTICLE

A Semiotics of Cultural Property Argument

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Abstract: This article applies the tools of legal semiotics to examine the terms, modalities, and conventions of legal argument in the cultural property context. In a first instance, the author re-enacts Duncan Kennedy's study of recurrent patterns within legal argument to illustrate the highly structured nature of most cultural property argument. This mapping exercise shows how legal concepts draw their meaning in part from their place within a broader linguistic system, and as a result cannot by themselves form an adequate basis for ethical positions. Following this, the pervasive Elgin Marbles controversy is shown to resemble a myth (in Roland Barthes's sense of the term) behind which a series of value judgments and support systems are embedded into cultural property argument. The conclusion presents a number of observations sketching a framework centered on restitution as a starting point for resolution of cultural property disputes.

Readers of this journal are undoubtedly familiar with many of the well-worn terms of what could loosely be called cultural property argument. Cultural property scholars are often quick to emphasize the nonlegal considerations underlying cultural property positions, yet their contributions are often couched in, or ornamented with, legal arguments. Decades of legal scholarship, cases, and debates carried out in the press seem to have weighed heavily on scholarly analysis, creating a substantial inventory of readymade arguments supporting just about any position in a cultural property dispute. As a result discussion surrounding the protection or restitution of cultural property has come to rely on a dizzying self-referential and

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self-justifying series of legal theories and counter-theories deploying and combining any number of arguments stemming from property law, contract law, history, international law, choice of law principles, the imperatives of disinterested scientific inquiry, anticolonialism, neoimperialism, the inalienable rights of social groups and nations, and so on.[1] Viewed as a whole, the legal arguments predictably have tended to cancel each other out, muddying the field enough to entrench a status quo in which restitution is studied, analyzed, and bitterly debated, while Western museums are rarely, if ever, compelled to question their vast holdings or contemplate their return.

The purpose of this article is to examine the terms, modalities, and conventions of legal argument in the cultural property context[2] to illustrate its highly structured nature. I hope that the reader—and especially the reader with no formal legal training—comes away either troubled or comforted: the former if he held stock in or used legal propositions such as "innocent buyers of stolen cultural property should not be held liable" or "a source nation's export control laws should be applied in the courts of market nations"; the latter if, like many nonlawyers, he suspected all along that formulaic legal reasoning is in fact highly problematic and that there may be more than a little bad faith behind lawyers and judges who claim to be doing nothing more than "applying the law." The theoretical apparatus deployed in this article best describes legal reasoning as it relates to gaps, ambiguities, or conflicts in laws, but it is considerably less insightful as a description of argument in areas of settled law.[3] For that reason, it is particularly well suited for application to cultural property argument, which I would characterize as an open discourse with very little settled law or final authority to speak of.

Part I is a re-enactment of Duncan Kennedy's study of recurrent patterns within legal argument,[4] through the mapping of the basic elements of legal arguments used in the cultural property context. Continuing with this empirical investigation, Part II considers the pervasive influence of the Elgin Marbles narrative over cultural property argument in light of Roland Barthes's concept of the myth.[5] In Part III I conclude by tentatively putting forward some thoughts on a restitutionary framework for approaching cultural property disputes.

PART I. *A SEMIOTICS OF LEGAL ARGUMENT* FOR CULTURAL PROPERTY

Duncan Kennedy's groundbreaking work defining the terms of what is now known as legal semiotics has given rise to a substantial literature.[6] His emphasis on recurrent patterns within legal argument in American legal discourse is a powerful tool for exposing the mechanical and ultimately reductive quality of legal argument generally. Yet as in other contexts, his profound insights exposing the highly stylized and imperfect nature of legal reasoning have had little to no effect outside

of legal academia. It is still common to hear social scientists who are otherwise well versed in various strands of critical theory claim to apply legal reasoning without problem. This is particularly true of debates over cultural property, where anthropologists, archeologists, government officials, museum curators, and collectors participate in what they would readily qualify as a quintessentially legal argument over ownership.

In this section, I re-enact Kennedy's semiotics of legal argument and apply it to the cultural property context to illustrate some of the inherent flaws in any argument that claims to rely on legal reasoning. Following Kennedy's lead, I consider argument-bites, which by definition present themselves in opposed pairs as a basic unit and starting point for analysis. With this empirical starting point, I undertake a "second-order mapping task of identifying the major clusters." In other words, I group argument-bites into clusters within which an arguer may permissibly level shift, or answer an argument-bite with another from a different pairing from within the same cluster. This task illustrates how, as another scholar of legal semiotics has succinctly put it, "legal concepts draw meaning from their place within a broader legal argument, just as semioticians have stressed the ways in which words take meaning from their place within a larger linguistic system."[7] I hope the reader comes away agreeing that many, if not most, of the arguments deployed in these debates depend on others for their meaning and, by their nature, limit the field of acceptable discussion; ultimately, they restrict the universe of potential solutions to cultural property disputes.

Before proceeding, a few words anticipating an oft-formulated critique to the following analysis. The fact that one can formulate legal arguments for any position leads neither to nihilism nor moral retreat.[8] On the contrary, as J.M. Balkin has put it, the fact that one can "argue for anything" is "the very reason why every human being, and especially every lawyer, bears a heavy responsibility for the ways in which she employs moral argument"[9]; hence Part III of this article, where I sketch the foundations of a framework for restitution of artifacts by Western museums.

Typology of Argument-Bites in Pairs

I begin by putting forward an initial catalog of argument-bites in pairs as they often appear in court cases and law review articles. As Kennedy notes, "A competent legal arguer can, in many (most? all?) cases, generate for a given argument-bite at least one counter argument-bite that has an equal status as a valid utterance within the discourse."[10] This does not necessarily imply that the counter argument-bite is as persuasive as the original argument-bite, but it does suggest that such an opposition is always possible.[11]

Kennedy's original analysis stresses that his analysis is most appropriate in cases when "the legal issue is one that permits a reference to policies or purposes or underlying objectives of the legal order, rather than a legal issue that can be sat-

isfactorily resolved through deductive rule application or by reference to binding precedent."[12] In other words, stereotyped argument-bites are deployed in the absence of settled law to resolve gaps, ambiguities, and conflicts; the insights of legal semiotics are at their most powerful in cases where there is no existing authority from which a result can be deduced. As I discuss in more detail later, one might advance that the legal culture of cultural property is defined by certain traits that make it particularly well-suited for this sort of analysis.

The following inventory should provide an empirical starting point for understanding cultural property. I have not engaged in the exercise of tracing the following individual argument-bites back to specific sources, in part because I think readers will easily connect them to cultural property sources they have read, but also because it is their very recurrence in a variety of different sources and contexts that makes them intelligible as legal arguments. I echo Kennedy's exhortation to "please resist the impulse to assess the strength of these arguments as they appear in this context."[13]

Competence Arguments

Source nation patrimony laws should not be enforced in domestic (market country) courts because they are against public policy.

versus

Source nation patrimony laws establish ownership and we must honor ownership as defined by the state in question out of deference, comity, or public policy.

Export control laws by their nature and intent create property rights.

versus

Export control laws, like customs regulations, do not necessarily create property rights.

Domestic courts of law are the proper avenue for resolving cultural property disputes.

versus

International disputes over cultural property should be resolved through nonjudicial (diplomatic/executive) avenues (what U.S. courts refer to as the political question doctrine).

Moral Arguments

Cultural property should be considered the inalienable (nontransferable) property of states.

versus

Cultural property is property like any other (freely transferable).

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The state owes a duty to citizens to keep and protect its cultural property.

versus

The state has the sovereign right to dispose of cultural property whichever way it chooses.

Buyers should not have to check the provenance of objects.

versus

Buyers should be obligated to exercise due diligence to check provenance of objects.

Cultural property should be kept by those who have a rightful claim to it.

versus

Property claims may be superseded in cases where a rightful owner does not have the resources or is otherwise unable to preserve the object.

Rights Arguments

States (or social groups) have the right to own their cultural property before other claimants.

versus

Other entities (museums, collectors, etc.) have the right to own cultural property if they wish.

States have the right to limit export of or trade in cultural property.

versus

People have the right to dispose of cultural property however they wish.

Administrability Arguments

Forcing buyers to verify the provenance of cultural property is unduly burdensome.

versus

We do not want to give buyers an incentive to turn a blind eye to wrongdoing.

This regulation is so restrictive that it encourages the black market.[14]

versus

It is a state's duty to protect its own cultural property through restrictive regulations.

A buyer's duty to request documentation supporting seller's warranties[15] encourages good bookkeeping.

versus

Such a duty is unduly burdensome, inhibits trade, and/or incites forgery because such documentation often does not exist.

If we allow for restitution in this case, we open the floodgates to the emptying of our museums.

versus

We may limit this result to the facts of this case.

Historical Arguments

Property rights stemming from colonization or domination are historically tainted and should not be honored.

versus

These rights should be treated in the same manner as any other property rights.

The state or group claiming the title to this cultural property in fact has no historical claim to the property because so much time has elapsed.

versus

The state or group claiming the title has a historical claim for a fact-specific reason.

There is no continuity between the group claiming the object and the creator of the work.

versus

What matters is not historical continuity but self-identification.

The state or group with a valid claim to this object is unidentifiable because the object was moved long distances during its life.

versus

The state or group that currently controls the site where the object was found has a valid claim to the object.

It is useful here to recall Kennedy's general observations on the nature of argument-bites:

- They are argument-bites solely because they are used over and over again with a sense by the arguer that they are making a move or placing a counter in the game of argument.
- Each argument-bite is associated with a variety of counter-bites, which are accessible through any number of oppositional moves called operations.
- Every legal argument within a legal culture is by definition relatively structured.[16]

This final point is the most important for these purposes. Within a particular legal culture—a concept I discuss in more detail below—arguments are mechan-

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ically applied, paired, and opposed to one another in a highly structured environment.

Kennedy goes on to identify the mechanisms through which argument-bites are countered or denied, which he calls operations.[17] For present purposes, I only recall these operations and let the reader perform the relatively straightforward task of rearranging the previously listed argument-bites into different pairings: denial of factual or normative premise, symmetrical opposition, counter-theory, mediation, refocusing on opponent's conduct (proposing an exception), flipping, and level shifting. The last operation, level shifting, is particularly interesting: In short, level shifting allows an argument-bite in a legal argument to be answered with an argument-bite from another pair, as long as they are associated with the same legal issue at hand—the same cluster.[18] Identifying arguments where level shifting is possible allows the identification of clusters, or sets of arguments that are customarily invoked together.[19]

Clustering

Argument-bites acquire meaning through their oppositional relationship to bites generated through operations. Taking a step back, argument-bites that are customarily invoked together can be grouped into clusters. Several clusters may be identified in the cultural property context:

Applicability of Source Nation Laws in Market Nation Courts
States' Duties and Responsibilities/Delimitation of Communities' Protected Interests
Buyers' Duties and Responsibilities
Sellers' Duties and Responsibilities
Standing to Invoke Property Rights in Cultural Property

Thus, if A says to B, "This buyer should have a duty to request documentation supporting the seller's warranties," both A and B have in mind all the other arguments in the Buyers' Duties and Responsibilities cluster: "Such a duty would be burdensome"; "In most cases such documentation would not be available"; "This would encourage the development of a black market"; "Innocent buyers should not be punished"; "We don't want to encourage turning a blind eye to shady transactions"; and so forth. In short, the cluster itself is essential to evaluating how a bite is understood. In Kennedy's words, "We listen to the bite, when an opponent deploys it in a particular doctrinal context, with the other members of the cluster already in mind. What we hear depends on those unspoken cluster bites, just as it depends on each bite's support system and countermaxims."[20] Argumentative back-and-forth in a legal context deceptively appears as a movement toward a solution or synthesis, but in fact it may be just a random (re)arrangement of preexisting building blocks.

Clusters are inherently dynamic in nature. Broad intellectual shifts can cause new argument-bites to appear within the discourse, thereby increasing or decreasing the value of preexisting argument-bites. For example, a new argument has appeared in tort cases in U.S. courts over the last few decades, "X should be liable because he is the least cost avoider." As Kennedy notes, the "least cost avoider" argument has changed the meaning of, and lessened the value of, "no liability without fault."[21] Similarly, one might illustrate the dynamic nature of cultural property clusters with relatively new arguments that have arisen since decolonization in the 1950s and 1960s and the rise of postcolonial studies (e.g., "objects obtained during periods of domination over another country are tainted" has lessened the effect of "property rights are absolute"). Needless to say, when a new argument does make its way into the legal discourse, it is only a matter of time before the system simply finds a new point of equilibrium.

Nesting

The final step in Kennedy's reasoning that I would like to re-enact here is nesting, which is Kennedy's name for the reproduction, within a doctrinal solution to a problem, of the policy conflict the solution was supposed to settle. This phenomenon is one reason that prompted a scholar to refer to the "crystalline structure" of legal thought and legal argument.[22]

In the cultural property context, nesting can be illustrated with the paradigmatic cultural property question of whether a defendant may raise an innocent buyer defense in a claim for forfeiture of a looted artifact. A judge deciding the question must first decide whether or not to allow an innocent owner defense. In making the decision, the judge considers arguments on both sides. On one hand, not allowing the defense (i) creates an easily administrable rule, (ii) deters carelessness, and (iii) ensures that between two innocents, the one causing the harm will be the one to pay. On the other hand, allowing the defense (i) ensures fairness in all circumstances and (ii) ensures that no one is made liable without fault. If the judge chooses to allow the innocent owner defense (in effect accepting one set of arguments and rejecting the other), the plaintiff may respond by saying, "Fine, even if you allow the innocent owner defense, my client wins because an innocent owner has to act in good faith, and the defendant didn't act in good faith." Once again, the judge considers arguments on both sides in deciding whether to restrict the innocent owner defense to good faith. What is interesting here is that the judge considers the same inventory of arguments when deciding whether to allow the innocent owner defense. If the judge decides that good faith of the defendant is not a factor—in other words, that only objective reasonableness matters—then the judge in fact deploys and accepts the arguments previously rejected. The following diagram[23] is a recreation of a diagram in Kennedy's article that he uses to illustrate nesting in the tort defense of mistaken self-defense:

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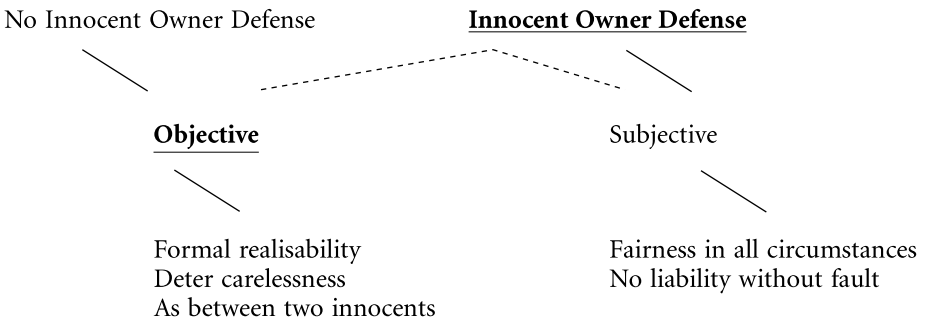

The deceptively simple model described here is unsettling. Kennedy notes that a judge "can, without violating any norm of legal argument" make the first policy choice seem inevitable and necessary, only to turn around and say precisely the same thing for the opposite policy choice when he defines the contours of the first policy choice.[24]

Remarks on the Legal Culture of Cultural Property

This preliminary, admittedly incomplete, catalog of arguments-bites and operations should illustrate the conclusions first formulated by Kennedy in the context of American law generally: "The power of structuralist methodology is that it shows that what at first appears to be an infinitely various, essentially contextual mass of utterances (parole) is in fact less internally various and less contextual" than it appears. "It does this by 'reducing' many of the particular elements of the discourse to the status of operational derivatives of other elements."[25] Hence Kennedy's conclusion: "It is hard to imagine the argument so firmly channeled into bites could reflect the full complexity either of the fact situation or the decision-maker's ethical stance toward it."[26]

I would like to pause here to set forth a few remarks about what one might call the legal culture of cultural property. The mapping I have undertaken thus far as an empirical inquiry cannot on its own tell the reader much about why legal argument takes the form that it does. Understanding why certain argument-bites or operations carry more weight within a certain discourse than others, and why certain argument-clusters are the preferred ground for certain arguments, requires understanding the highly contextual and historically contingent legal culture in question.[27] Kennedy's insights apply to American legal discourse, which is characterized by, among other things, a class of practitioners who share many of the biases, techniques, and understandings of a first-year law school curriculum. In the cultural property realm, the legal culture in question has certain particularities that set it apart from other discourses. The following observations are of a necessarily tentative nature, but I think that by tracing the contours of the legal culture of cultural property, I can at least add some color to the previous discussion.

First, legal argument in the cultural property context generally has a transnational character. Disputes often focus on the application of competing laws from different jurisdictions or the application by one jurisdiction of another jurisdiction's ownership/export control law. Although it may be possible to predict the inventory of arguments and counterarguments preferred by, say, American judges adjudicating claims for restitution brought by Egyptian authorities, the same predictions rarely hold true for Egyptian judges adjudicating the same claims. Furthermore, U.S. and Egyptian judges are (self-consciously or not) competing within a discourse where theirs is not always the final word (unlike in other areas of the law). Neither can afford to "sound" provincial, and the need to come across as "objective" may compel them to value certain arguments-bites or operations (e.g., emphasizing deference or applying foreign law) that they would otherwise have dismissed out of hand.

Second, although in most areas of the law, argument is shaped, expanded, and fenced in by lawyers and judges whose professional discourse by its nature excludes nonlawyers, cultural property argument seems to stand apart in that there are categories of nonlawyers who are granted "permission to argue" and deploy the legal argument-bites set forth earlier.[28] Four categories of factors come to mind: first, museums house many of the objects in dispute and are active participants in the international art trade.[29] Second, private collectors drive the machinery of both licit and illicit trade in cultural property while giving voice to proponents of so-called *art for art's sake*.[30] Third, archaeologists and anthropologists play a role in legal argument both directly and indirectly to the extent that their interests and concerns are alluded to as a justification for many of the policy choices made by arguers.[31] As one archeologist put it, "On a very basic level, all archeologists have a vested interest in the law because of our critical need to protect and conserve the archeological record."[32] Fourth, national governments as such have a strong interest in legal debates over cultural property.[33] This is especially true to the extent that nations can be divided into source and market nations,[34] each with its own concerns, and to the extent that every nation has its own cultural property; indeed, in many ways, every nation *needs* its own cultural property to be a nation.[35] As a result of the interplay of interests of these four groups, the legal culture of cultural property can be framed; each of the four has an inventory of arguments it is more likely to deploy, and others it is likely to dismiss, all drawn from the same inventory. On a more speculative note, I suggest that although nonlawyers borrow freely from the legal repertoire of terms and operations that defines legal argument (especially concepts of property), their "permission to argue" diminishes the value of certain counterintuitive legal concepts that would otherwise be given more weight among lawyers (e.g., statute of limitations or the bad faith innocent buyer defense from the aforementioned nesting example).

Third, the other important step for the purposes of defining the legal culture of cultural property consists in identifying the accepted grounds where these debates take place. Just as knowing that legal arguments generally unfold in American

courtrooms—with their particular procedural rules—is essential to understanding the American legal culture, understanding where the legal debates occur is also important to identify the legal culture of cultural property. By and large, I would suggest that cultural property disputes are rarely acted out in courtrooms—although there are some notable exceptions[36]—but rather they are mediated through other avenues. For example, the dispute over the Elgin Marbles essentially takes place at the inter-State level between the United Kingdom and Greece. In disputes between the Metropolitan Museum, the Louvre, or the British Museum on one hand and the governments of source nations on the other, legal argument is deployed in press interventions, law review articles, archeology and anthropology journals, and private negotiations (including through diplomatic avenues). Perhaps this lends to cultural property argument a looser, more fluid character than other forms of argument where the highly stylized and repetitive nature of the adjudicatory process favors certain operations and turns over others. Nonetheless, in these cultural property debating grounds, no matter what outcome the parties decide on, the result can be (and is) cloaked in legal argument, which is deemed to have persuasive value in and of itself. One might surmise that the negotiated and often nonpublic character of the resolution of cultural property disputes may affect the emphasis put on certain argument-bites over others, reducing the weight of deterrence- or precedent-based arguments that would carry more persuasive weight in a courtroom.

As a side note, one might pause here to point out that the characteristics I have set forth thus far—the absence of final authority and settled law, the wide range of permitted arguers, and the lack of a set procedural apparatus—together leave a very wide space open for the kind of improvisational arrangements of argument-bites that have characterized so much cultural property argument.

Finally, I do not think it would be an exaggeration to say that the Elgin Marbles narrative casts a dominant, stifling shadow over cultural property argument in a way that is unique to this area of legal discourse. The purpose of the next section is to explore some of the ways the Elgin Marbles dispute affects cultural property legal argument as I have discussed it thus far.

PART II. MYTH, MARBLES, AND THE INTELLIGIBILITY OF CULTURAL PROPERTY ARGUMENTS

It is extraordinary to note how often an author writing about cultural property mentions the Elgin Marbles (or, as defenders of restitution refer to them, the Parthenon Marbles). I can think of no other area of the law that is so deeply dependent on one paradigmatic (and, remarkably, still active) dispute. A published bibliography of cultural property sources has devoted no less than three full pages of sources arguing one side or the other of the Elgin Marbles dispute.[37] Significantly, the most widely cited legal scholar of cultural property, John Henry

Merryman, first established himself as a cultural property authority with an article arguing against restitution of the Elgin Marbles more than 20 years ago; he subsequently edited an anthology of cultural property-related essays entitled, appropriately enough, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*.[38] Authors of cultural property–related law review articles allude to the Elgin Marbles as though it needs no introduction, simply mentioning "Elgin" or "Parthenon" with the understanding that the reader will make the necessary associations.[39] The terms of the dispute are so well-known and understood that even when the dispute is not evoked, the reader of a cultural property article already brings to the table an understanding of the Elgin Marbles story and a series of prejudices and presuppositions concerning cultural property that I would argue directly results from an individual understanding of the Elgin Marbles myth.

The Elgin Marbles as Myth

First, an explanation on my use of the term myth to describe the Elgin Marbles story. I understand myth in the sense it was used by Roland Barthes in *Mythologies* to describe second-order cultural meanings.[40] Just like Barthes's Citroën, striptease, plastic, and *Guide Bleu* tourism guide, the Elgin Marbles is a sign composed of a signified and a signifier, that signifier being itself a sign composed of a signifier and a signified. Schematically:

$$\text{signified} + \text{signifier} = \text{sign} = \text{SIGNIFIER}$$

$$\text{SIGNIFIER} + \text{SIGNIFIED} = \text{SIGN} = \text{MYTH}[41]$$

As an example, Barthes describes a *Paris-Match* cover where a young black soldier in French uniform gives the military salute while staring at the flag. To Barthes, the clear signification is "that France is a great empire, that all her sons, without any color discrimination, serve faithfully under her flag, and that there is no better answer to the detractors of an alleged colonialism than the zeal this young black shows in serving his so-called oppressors."[42] The myth buries the young man's story and replaces it with a narrative that serves an impoverishing function that makes the historically contingent seem natural and inevitable. The second-order meaning is protected by the first-order meaning; thus, the myth can fight back with the alibi that this is, in fact, a young black man serving faithfully under the flag—defenders of the photograph "could claim that it is simply a picture of a black soldier and nothing more."[43]

Similarly, simply saying "Elgin Marbles" sets into motion a process for the reader or listener. The Elgin Marbles are, on a first level, marble sculptures located in the British Museum in London; but on a second level, they have another richer meaning that encompasses a narrative:

> The Parthenon is a building of unique architectural complexity and artistic distinction. Lord Elgin took advantage of his position as Ambas-

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> sador in Athens to obtain a firman from the Ottoman authorities, which somewhat ambiguously[44] gave him authority to take down metopes, friezes, and pediment sculptures from the Parthenon. He brought them back to England and sold them to the British Museum. They have been kept by the British for two centuries and might have been damaged had they been left on the Parthenon. The Greeks have a romantically[45] attractive claim to restitution.

The elements of a template for cultural property disputes are all there: finder/seller (the Ottomans), intermediary/seller (Lord Elgin), nation (the Greeks), and third party buyer (the British Museum). Notice that everyone would agree on this narrative, and even the most pro-British Museum polemicist would recognize the Greek's abstract rightfulness (What gentleman hasn't read Byron?). More importantly for the purposes of understanding the myth of the Elgin Marbles, just as Barthes's young black man in uniform serving under the flag connotes a host of value judgments, there is a whole series of underlying value judgments behind the Elgin Marbles. Following Barthes's lead, much can be said about what the Elgin Marbles signify. A suggested list: the glorification of Greek civilization and thus the greatness (read: superiority) of Western civilization as understood as a direct descendant of Greek civilization[46]; the moral depravity of Ottomans (read: Turks (read: Muslims))—who else but a savage could have signed the firman?; the rise and fall of the British Empire; the British Museum as a great (above the political fray) public institution for the good of humanity; the pollution (dirtiness) of the Third World as including Greece (atmospheric pollution in Athens somehow always comes up); whiteness as proxy for cleanliness and authenticity[47]; the gentleman; the lost paradise or a libidinal desire for a return to the womb[48]; democracy and liberalism[49]; art for art's sake, etc.

Looking to cultural property argument, it should become clear how the omnipresence of the Elgin Marbles in the cultural property sphere is less than innocuous. The long shadows of the British Museum (clean) and Athens (smog) may help explain why, in an argument for restitution, it is assumed that the defendant-museum is capable of taking good care of the object, and that the plaintiff-nation must overcome a presumption that the object will be damaged or deteriorate if it is returned. An informed reader reading a statement on the rights of nations to dispose of their own property will likely understand the argument in light of Greece's claims to the Elgin Marbles, as well as the British response. It is not that the argument would not be understood without the Elgin Marbles in the background, but rather that the Elgin Marbles myth is a permanent presence within the debate living in every cluster. The Elgin Marbles are more than just a backdrop to the scholarly debates over whether states have inalienable rights over their own cultural property or whether there is such a thing as a patrimony of humanity; they are *active participants* in these debates.

The Elgin Myth and Cultural Property Argument

Finally, a note on how the Elgin Marbles relate to the argument clusters cataloged earlier in this article. In Kennedy's terms each argument-bite has behind it a support system or justification, which is essential to understanding the argument-bite in context. "Our ability to understand and assess the value of an argumentative sequence is heavily dependent on our imaginative ability to place each bite in its implicit support system, and understand the response to the bite as also a response to that system."[50] Thus, the Elgin Marbles in all their forms constitute a support system on which legal arguments in cultural property rests. They occupy an important section of the legal culture's collective imaginary. Some of the forms the myth may take in supporting an argument-bite include the following:

The Elgin Marbles as National Treasure: emphasizing one nation's claim to cultural property. Interestingly, even this track is not dispositive in the Elgin Marbles case; although it may easily be argued that they are a treasure for Greece, some in Britain argue that they have become such an integral part of the British Museum, the most British of British institutions, that they now too have an equal stake in them.

The Elgin Marbles as Private Property: emphasizing the ownership and valid transfer of property questions. Debates over transfer rights evoke and call up the debate over the validity and scope of the Ottoman firman.

The Elgin Marbles and the Innocent Owner: emphasizing the British Museum as innocent owner, because after all it was Elgin as private party acting outside his official capacity who tore down the sculptures.

The Elgin Marbles and National Continuity: Debates over whether today's Greeks are actually related to those who built the Parthenon[51] are at the center the Elgin Marbles claim but also at the center of most, if not all, restitution claims to nations. One might recall Benedict Anderson's thorough critique of such "continuous" constructs, what he calls "the objective modernity of nations to the historian's eye versus their subjective antiquity in the eyes of nationalists."[52]

The Elgin Marbles as Archaeological Treasure: No one disputes that archaeological value of the Parthenon and its sculptures, nor of many other similarly situated object of undisputed archaeological value. This track emphasizes the need to put the "object's interests first" and prevent looting[53] and is often intertwined with calls for the return to the original context, or at least to the originating country.

The Elgin Marbles as Aesthetic Treasure: emphasizing the importance of exhibition and having a duty to exhibit works.[54] Arguments that the British Museum has allowed the sculptures to be seen by many more people than would have in Athens may be deployed in other contexts where major Western museums expose the art to large numbers of tourists. The same goes for argu-

ments that source nations like Turkey, Egypt, and Greece have more objects than they could ever expose.

The Elgin Marbles as Humanity's Patrimony: Thoroughly mixed in with the view of major museums like the British Museum, the Louvre, and the Metropolitan in New York as guardians of humanity against fickle politicians and crazed third world leaders, this track shares much with the aesthetic and archaeological tracks by portraying itself as an apolitical, or depoliticizing, force.[55] Needless to say, depoliticizing a status quo characterized by rampant inequalities insulates present injustices from critique.

There are, of course, many possible interpretations of the Elgin myth. Indeed, one could look to the facts of the case and come up with a host of different legal principles going in any number of different tracks. (Incidentally, each of these tracks could be made to correspond roughly to a cluster of legal arguments.) When a reader with a basic familiarity of cultural property issues finds a mention or implicit evocation of the Elgin Marbles, it opens up the possibility of any of these different argument-bite clusters. The context surrounding this evocation is what directs the reader to one track over another. Thus, the Elgin Marbles narrative can act as the starting point for almost any different cultural property line of argument. One could even go so far as to suggest that these arguments are made intelligible in large part, but not completely, through the Elgin Marbles myth.[56] Not unlike the structure described in the first part of this article, the Elgin Marbles define the acceptable bounds of cultural property debate while increasing or decreasing the relative persuasiveness of cultural property argument-bites.

A final thought on Elgin: More than anything the Elgin Marbles contribute to the status quo in favor of continuing ownership of looted art by Western museums in that *they're still in London*. The fact that they will remain in the hands of the British Museum for the foreseeable future in and of itself suggests a kind of idle or recreational character to cultural property argument that will be difficult to transcend.

PART III. CULTURAL PROPERTY: A TENTATIVE FRAMEWORK

The tools of semiotics applied to cultural property argument (both in its classic argument-bite/operation form and in its application to the paradigmatic Elgin Marbles), illustrate how legal reasoning, in this context as in others, ultimately restrains the bounds of acceptable discourse and limits the universe of potential solutions to cultural property disputes—or at least muddies the water enough to prevent clear-cut solutions from emerging.[57] Yet as one legal scholar put it,

> Criticism is initially reactive and destructive, rather than constructive. But our mistaken belief that our current ways of doing things are somehow natural or necessary hinders us from envisioning radical alternatives to what exists.... By systematically and constantly criticizing the

> rationalizations of traditional legal reasoning, we can demonstrate, again and again, that a wider range of alternatives is available to us.[58]

The remainder of this article sets forth some general thoughts on a "wider range" of alternative approaches to restitution that might escape self-reference or undue reliance on formalistic legal tools. Many of my observations apply only to the specific subset of cultural property disputes that take the form of arguments over restitution by Western museums to source countries; there is much more to cultural property than that, but I leave discussion of other themes, and especially the private art trade, for another day. My purpose is not to set forth a systematic approach to cultural property, but rather to lay down some general principles that I think can serve as useful markers for tracing a way forward. I am aware that many of the points that follow are not immune to the kind of critique I have been engaging in thus far; I can only hope that by having cleared up at least some of the layers of legal smokescreen, the principles that follow will be judged and critiqued on moral, ethical, or political grounds without reference to law or legalism.

Before beginning my sketch of a framework, I would like to set forth why I believe that appeals to "universalism," "internationalism," or "common humanity" cannot possibly address what is really at stake in cultural property dispute. Whenever I read a scholar deny restitutionary claims by a (usually wealthy) owner of looted cultural property to a (usually much less wealthy) aggrieved claimant by arguing that the objects in question are the common patrimony of all humanity (and are therefore best kept at the Met or the British Museum), I am reminded of Barthes's unforgiving sketch of the myth of *The Family of Man*,[59] a museum exhibit where the images and discourse "aim[ed] to eliminate the weight of History" by lauding the commonalities of man around the world while at the same time ignoring inequalities and injustices (i.e., politics and history).[60] I tend to think that anyone who knows the history of exploitative policies and imperial structures by virtue of which the objects in question ended up where they are (in a Western museum) cannot in complete good faith argue against their return based on "common humanity." There are no Native American artifacts in Egyptian museums. The deliberate obfuscation of history can never provide a satisfactory avenue for resolving cultural property disputes.

I begin, then, with some thoughts on the modalities of the relationship between anthropologists and the colonized, which are compelling topics in and of themselves and have been treated in detail elsewhere.[61] Anthropology as a discipline has been grappling with "a genuine malaise about the sociopolitical status of anthropology as a whole,"[62] and although I do not intend nor am I qualified to add to this literature here, I do think that this malaise should be kept in mind in debates over restitution of cultural property.[63] In short, I would just note that it is deeply problematic to ask of the beneficiaries of restitution that they ape Western exhibitionist practices as a condition of restitution, especially when the discipline of anthropology has so often been perceived as a proxy (or representative) for outside (imperial) power to be resisted. However the terms of cultural property

debate are defined, they must exhibit at least an awareness of the uneasy relationship between potential claimants (the colonized) and museums by recognizing that something lies behind curatorial "detachment" and "science." Curatorial and scholarly practices are neither natural nor universal,[64] and with apologies to "orthodox" archeologists and anthropologists, I do not consider it defensible—at least not as a general rule—to condition the return of cultural property on granting continuing unconditional access to Western researchers.

On a related note, the museum in its dominant Western form illustrates the underlying question of narrative. Edward Said identified the issue as the "problematic of the observer," asking of anthropology "Who speaks? For what and to whom?"[65] The dominant curator/anthropologist as narrator paradigm underlies the morally untenable continued ownership of major artifacts by Western museums acquired during times of (or by virtue of) colonization or imperial domination. Narrative, of course, plays a key role in "structuring, assimilating, or excluding one or another version of history."[66] Can permission to narrate, to borrow Said's phrase,[67] ever really be granted in cases where the artifacts are held, exposed, and mediated by the Western museum (with all the institutional and ideological baggage that implies)? No one would claim that all ethnographic or archeological exhibits should self-consciously address all these issues. But is the other extreme—which not only denies the postexcavation life of the object,[68] but also the claims of the native/colonized to the object—any better?

The denial of the colonized/native's claims to artifacts is revealingly illustrated by Western exhibitionist practices. Recalling the "projective grandeur" of the Egypt described in Napoleon's *Description de l'Egypte*, Said notes, "I say 'projective' because as you leaf through the *Description* you know that what you are looking at are drawings, diagrams, paintings of dusty, decrepit, and neglected pharaonic sites looking ideal and splendid as if there were no modern Egyptians but only European spectators."[69] Just as the temples and palaces are reproduced in the *Description* "in an orientation and perspective that staged the actuality of ancient Egypt as reflected through the imperial eye," the Egyptian, Assyrian, Greek, or Phoenician objects in Western museums are also reflections and projections of an original reality repackaged for Western eyes. They become the props within the museum-going spectacle, an interactive experience for the Western viewer to comfortably learn about the past without the inconvenience of the native to spoil the view.[70] As Said observes, "The Greek classics served the Italian, French, and English humanists without the troublesome imposition of actual Greeks."[71] This tendency to divorce culture from its people was memorably described by Benedict Anderson in his description of the paintings commissioned by Indonesia's Ministry of Education in the 1950s, which were placed in classrooms everywhere as visual representations of the country's past. "The well-regarded artist imagines the [Borobur] in its ninth century A.D. heyday with instructive perversity . . . [s]urrounded by well-trimmed lawns and tidy tree-lined avenues, *not a single human being is in sight*."[72]

My notes on museums and museology set forth earlier likely belie my own feelings on cultural property disputes. From an anti-imperial perspective, I believe that the starting point must be restitution. Simply put, a wrongfully taken object should be returned, including objects taken by virtue of an imperial, exploitative apparatus that is widely abhorred today . The details and the response to the inevitable (and silly) "you'll empty the Louvre" warning can be discussed and agreed on by reasonable parties, but I believe the starting point must be a recognition of past wrongs and present aspirations of victims of past (and often continuing) injustice.

There are two forms of critique of restitution that I would like to address. I call them forms because they underlie many of the superficial arguments against restitution. By addressing each critique in turn, I believe that I respond by extension to many arguments that implicitly take these forms of critique.

The first critique turns on arguing that the colonized/native could not properly care for the objects if they were returned. This Elgin Marbles–inspired theme[73] is deeply pernicious, especially in light of past colonial practice. Does it not directly parallel Fanon's description of the efforts made by colonial powers at "cultural estrangement," where "the effect consciously sought by colonialism was to drive into the natives' heads the idea that if the settlers were to leave, they would at once fall back into barbarism, degradation, and bestiality"[74]? Nonetheless, one might ask how developing countries could be asked to put forward the sums it would require to create and maintain the facilities that might house and protect these valuable objects.[75] One option might be to require the beneficiary of the object's value (such as the Louvre or the Metropolitan Museum, or, by extension, the municipalities of Paris or New York), which has profited from millions of dollars of revenues stemming from the objects, to pay for the necessary facilities to house the objects. A slightly less fanciful option would be to tack on a loan, the repayment of which might be tied to future, long-term revenues stemming from additional tourism revenue.

The second critique is much more potent, and it underlies many (if not most) arguments resisting restitution. Even when those who resist restitution accept the moral wrongs and injustices that caused the artifacts to end up in Western museums, they often argue that because culture and nation are created, imagined, or otherwise constructed, there is effectively no one to whom to return the objects. There are at least two responses. The first flows from the realization that the link between living cultural traditions and the past is semiotic. As the anthropologist Richard Handler recently put it,

> There is no sense in making a distinction between "genuine" and "spurious," or "authentic" and "inauthentic" cultures and traditions, because all culture exists in the present, and must be enacted and re-enacted or interpreted and re-interpreted in the present by human beings who are all in one way or another "real" or "authentic."[76]

Nations or social groups create their own culture, and in the process they may choose to include in it objects housed in Western museums that they perceive to have been wrongfully removed because of past injustices. Arguing that their per-

ceived link to the object is "inauthentic" is beside the point.[77] The second, related response is political, and I think Frantz Fanon expresses it with characteristic conviction:

> I am ready to concede that on the plane of factual being the past existence of an Aztec civilization does not change anything very much in the diet of the Mexican peasant today. I admit that all the proofs of a wonderful Songhai civilization will not change the fact that today the Songhais are underfed and illiterate, thrown between sky and water with empty heads and empty eyes.[78]

Yet he goes on to note,

> But it has been remarked several times that this passionate search for a national culture which existed before the colonial era finds its legitimate reason in the anxiety shared by native intellectuals to shrink away from that Western culture in which they all risk being swamped.[79]

The meaning of the elements of a national culture as well as its objects may have been defined in large part by the museumizing West, but that ought not preclude the elaboration of a new meaning or a different intelligibility as an alternative expression of shared values and, perhaps, resistance.

Finally, regardless of the value or subsequent treatment of the objects, the very act of returning cultural property is in and of itself an act of resistance to continuing forms of injustice.[80] Restitution, especially if coupled with some form of compensation, is a powerful symbolic act that acknowledges past injustices and simultaneously discredits attempts at reviving such injustices, which may arise in other modified forms later. Why not go further? Would it be too fanciful to suggest, as did a law school professor of mine,[81] that the United Kingdom offer up Stonehenge to India or Uganda for the next 100 years? From the moment one accepts that it is not because of a particular organic link between the native and the object that restitution is desirable, such solutions become intellectually feasible.

All too often, rearranged and rehashed argument-bites pass for substantive analysis. Along with the Elgin Marbles myth and its alibis, the misleading veneer and authority of legal propositions have come to permit authors to dispense with the underlying issues at stake by adopting heavily value-laden positions that appear innocent or objective. I know of a few mainstream cultural property scholars who have attempted to take a step back from the highly predictable and unsatisfying cultural property legal back and forth and distill the underlying questions; Paul Bator[82] and Daniel Shapiro[83] come to mind, but there are surely many others. And although I disagree with some of their conclusions (and they would probably disagree with mine), I think they propose the most fruitful approach to cultural property questions. Daniel Shapiro insightfully notes that the "problem with the legal approach is that it usually leaves a residue of discontent, with at least one of the parties feeling that the important questions were not asked or not fully answered."[84] In a sense, all I have done here is try to flesh out the structure under-

lying legal argument that may help explain the "discontent" that Shapiro correctly identifies. Perhaps identifying the source of the discontent is the first step in combating it. Although it can sometimes feel as though too much has already been written about cultural property, once the legal arguments are stripped away, the field suddenly looks rather barren. There is still much work to be done.

ENDNOTES

1. For a very good introductory bibliography, see Fiedler and Turner, *Bibliography*. For a representative collection of essays and contributions, see Hoffman, *Art and Cultural Heritage*; Brodie, *Trade in Illicit Antiquities*; Merryman, *Imperialism, Art and Restitution*; Messenger, *The Ethics of Collecting*; Fitz Gibbon, *Who Owns the Past?*; International Bureau of the Permanent Court of Arbitration, *Peace Palace Papers*; and Richman and Forsyth, *Legal Perspectives*. Twenty-five years after its first publication, Paul Bator's essay, "An Essay on the International Trade in Art," remains the best short introduction.

2. I use the term legal argument in the sense used by Duncan Kennedy as "argument in favor of or against a particular resolution of a gap, conflict, or ambiguity in the system of legal rules." Kennedy, "A Semiotics of Legal Argument," 75.

3. Kennedy, "European Introduction," 317.

4. Kennedy, "A Semiotics of Legal Argument," 75. Kennedy traces his analysis back to Saussure and Lévi-Strauss, especially *The Savage Mind*. See Kennedy, "A Semiotics of Legal Argument," 105–07. A version of the article was republished along with a response to critiques from European scholars. See Kennedy, "European Introduction."

5. See Barthes, *Mythologies*.

6. See Kennedy, "Form and Substance"; Kennedy, "The Structure of Blackstone's Commentaries"; and Kennedy, "A Semiotics of Legal Argument." Some representative examples include Paul, "A Bedtime Story"; Schlag, "Cannibal Moves"; Balkin, "The Crystalline Structure"; Balkin, "The Hohfeldian Approach"; Balkin, "The Promise of Legal Semiotics"; Paul, "The Politics of Legal Semiotics."

7. Paul, "The Politics of Legal Semiotics," 1782.

8. For a good response to the "nihilism" critique, see generally Singer, "The Player and the Cards."

9. Balkin, "The Crystalline Structure."

10. Kennedy, "A Semiotics of Legal Argument," 77.

11. Kennedy, "A Semiotics of Legal Argument," 77.

12. See Kennedy, "European Introduction," 317.

13. Kennedy, "A Semiotics of Legal Argument," 98.

14. For the formulation of such an argument in the context of Mexico, see DuBoff and King, *Art Law*, 14.

15. See, for example, *United States v. An Original Manuscript Dated November 19, 1778 Bearing the Signature of Junipero Serra Located at Sotheby's*, 1999 U.S. Dist. LEXIS 1859, 20–21 (1999) (finding that defendant's "lack of documentation of the history of the Manuscript and his failure to inquire into the provenance of the Manuscript is highly suspicious and Toft cannot claim to be an innocent owner under such circumstances").

16. Kennedy, "A Semiotics of Legal Argument," 80.

17. Kennedy, "A Semiotics of Legal Argument," 81.

18. Kennedy, "A Semiotics of Legal Argument," 88.

19. Kennedy, "A Semiotics of Legal Argument," 92.

20. Kennedy, "A Semiotics of Legal Argument," 95.

21. See generally Kennedy, "A Semiotics of Legal Argument," 95–97.

22. Balkin, "The Crystalline Structure."

23. Kennedy, "A Semiotics of Legal Argument," 100.

24. Kennedy, "A Semiotics of Legal Argument," 101.

25. Kennedy, "A Semiotics of Legal Argument," 81.

26. Kennedy, "A Semiotics of Legal Argument," 104.

27. Kennedy, "A Semiotics of Legal Argument," 80. In other words, "every legal argument within a legal culture is by definition relatively structured." Kennedy, "A Semiotics of Legal Argument," 80.

28. Besides legal professionals, most of the collections cited in note 1 include essays and other contributions from archeologists, anthropologists, museum professionals, government officials, collectors, and others.

29. See, for example, *Brief of Amici Curiae of American Association of Museums et al. in support of claimant Michael H. Steinhardt, United States v. Steinhardt*, 184 F.3d 131 (2nd Cir. 1999); American Association of Museum Directors, *Report of the AAMD*; Bhlen, "Major Museums Affirm Right."

30. See Marks, "The Ethics of Art Dealing," 7. See also Fitzpatrick, "Steal UNIDROIT," 47, an article by long-time counsel to the National Association of Dealers in Ancient, Oriental and Primitive Art.

31. For a particularly thoughtful contribution by an archeologist, see Renfrew, *Loot, Legitimacy*.

32. Sebastian, "Archeology and the Law," 3.

33. For an interesting instance of U.S. senators debating cultural property issues as they relate to American interests, see Hearing Before the Subcommittee on Criminal Law of the Committee on the Judiciary, U.S. Senate, Ninety-Ninth Congress, First Session, on S.605, *A Bill to Amend Sections 2314 and 2315*.

34. See, for example, Merryman, "Two Ways of Thinking."

35. For a discussion of the role played by museums in a people's collective imaginary, see Anderson, *Imagined Communities*, 178–84.

36. See, for example, *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *United States v. Steinhardt*, 184 F.3d 131 (2nd Cir. 1999); *United States v. Schultz*, 333 F.3d 393 (2nd Cir. 2003), *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278 (7th Cir. 1990); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *United States v. One Lucite Ball Containing Lunar Material (One Moon Rock) and One Ten Inch By Fourteen Inch Wooden Plaque*, 252 F. Supp. 2d 1367 (2003).

37. Fiedler and Turner, *Bibliography*, 26–28.

38. Merryman, ed., *Thinking About the Elgin Marbles*. A seminar on cultural property law offered at Georgetown University Law Center over the last few years was called, unsurprisingly, "Art and Cultural Property Law: Indiana Jones and the Elgin Marbles."

39. There is no sense in listing the cultural property articles that allude to the Elgin Marbles; I'm tempted to add that it would be more interesting to draw an inventory of cultural property pieces that do *not* mention the Elgin Marbles, but it is likely that those articles appear mostly in journals like this one that may assume that readers have a general familiarity with the controversy. Nonetheless, for readers looking for a very small cross-section of articles mentioning the Elgin Marbles from the last year or so (lest they think that the myth isn't alive and well), see, for example, Knox, "They've Lost Their Marbles"; Chang, "Stealing Beauty"; Goldberg, "Reaffirming McClain"; Stroh, "Preserving Fine Art"; George, "Using Customary International Law"; Warring, "Underground Debates"; Salem, "Finders Keepers?"; Wiersma, "Indigenous Lands"; and Candelaria, "The Angkor Sites."

40. See Barthes, *Mythologies*.

41. Barthes, *Mythologies*, 200.

42. Barthes, *Mythologies*, 201.

43. "The bad faith of this persistent alibi is one of the things Barthes finds most objectionable in myth." Culler, *Barthes*, 28.

44. That won't matter, in the end, even though many of the arguments have in fact centered on the validity of the firman.

45. Merryman expeditiously dismisses their claim as "Byronism." See Merryman, *Thinking About the Elgin Marbles*, 22. For an amusing instance of a judge quoting directly from Byron's "Siege of Corinth," see *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278, 279 (7th Cir. 1990).

46. "Greeks always require barbarians." Said, *Culture and Imperialism*, 52.

47. Quoting from Martin Bernal's *Black Athena*, Edward Said notes how "whereas Greek civilization was known originally to have roots in Egyptian, Semitic, and various other southern and

eastern cultures, it was redesigned as 'Aryan' during the course of the nineteenth century, its Semitic and African roots either actively purged or hidden from view." Said, *Culture and Imperialism*, 15–16 and 110. For an interesting look at how "whiteness" plays into the restoration of art, see Scigliano, "Inglorious Restorations."

48. Recall Salvador Dalí's memorable account of his "intra-uterine" recollections in his autobiography and his description of birth as the source of the shared human myth of the lost paradise. Dalí, *The Secret Life*, 26–27.

49. In a discussion of the Elgin Marbles, one author duly notes, "Athens was the first society which sought to solve the great problems of reconciling power with justice, social cohesion with individual freedom, and the pursuit of excellence with equality of opportunity." He adds for good measure, "Politics and democracy are Greek words too." Browning, "The Parthenon in History," 2.

50. Kennedy, "A Semiotics of Legal Argument," 92.

51. See, for example, Hitchens, *The Elgin Marbles*, 88–90.

52. Anderson, *Imagined Communities*, 5.

53. For a representative example, see Atwood, *Stealing History*.

54. The argument has been taken to amusing extremes. See Sax, *Playing Darts*.

55. For a representative example, see British Museum, *Declaration on the Importance and Value of Universal Museums* ("Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation."). The declaration is not signed by a single museum located outside of Europe and the United States.

56. As Barthes wrote, "The critic is not responsible for reconstructing the work's message but only its system, just as the linguist is not responsible for deciphering the sentence's meaning but for establishing the formal structure that permits this meaning to be transmitted." Barthes, *Essais Critiques* (quoted in Culler, *Barthes*, 66.)

57. For an exploration of alternative approaches to cultural property, see Carman, *Against Cultural Property*.

58. Singer, "The Player and the Cards," 58–59.

59. Barthes, *Mythologies*, 173.

60. Edward Said insightfully noted in the celebration of "difference" and "otherness" an "ominous trend." He wrote that it "suggests not only what Jonathan Friedman has called the 'spectacularization of anthropology' whereby the 'textualization' and 'culturization' of societies occur regardless of politics and history, but also the heedless appropriation and translation of the world by a process that for all its protestations of relativism, its displays of epistemological care and technical expertise, cannot easily be distinguished from the process of empire." Said, "Representing the Colonized," 213–14.

61. Said, "Representing the Colonized," 219–20.

62. Said, "Representing the Colonized," 208.

63. Michel Leiris compared his ethnological trip across Africa to performing in a traveling circus with performers (including himself) putting on the same show at each stop along the way. Leiris, *L'Afrique fantôme*, 56 ("La vie que nous menons ici est au fond très monotone, comparable en cela à celle des gens de cirque qui se déplacent tout le temps mais pour donner toujours le même spectacle"). The metaphor (and its implicit reversal) is brutally penetrating.

64. For an application of semiotic theory to museums and the production of meaning, see Bauer, "Is What You See All You Get?" See also Durrans, "The Future of Ethnographic Exhibitions," 125–39, on the interpretive role of ethnographic museums.

65. Said, "Representing the Colonized," 212.

66. Said, "Representing the Colonized," 221.

67. Said, "Representing the Colonized," 222.

68. See Bauer, Linsay, and Urice, "When Theory, Practice and Policy Collide," 53–54.

69. Said, *Culture and Imperialism*, 118.

70. The French Egyptologist Auguste Mariette "excavated with complete abandon" during the nineteenth century, to the point that "as the European museums (especially the Louvre) grew in Egyptian treasure, Mariette rather cynically displayed the actual tombs in Egypt empty, keeping a bland composure in his explanations to 'disappointed Egyptian officials.'" Said, *Culture and Imperialism*, 120.

71. Said, *Culture and Imperialism*, 195.

72. Anderson, *Imagined Communities*, 183–84 (emphasis in original).

73. This critique holds such a powerful sway that Greece was compelled to build a Parthenon museum to house the Elgin Marbles as a way to boost its argument. Incidentally, recent commentators have shown that in the case of the Elgin Marbles, there is strong evidence that the British Museum severely damaged the sculptures in the 1930s through faulty conservation techniques and that the sculptures may have been better off staying in Athens. See Hitchens, *The Elgin Marbles*, 75–79.

74. Fanon, *The Wretched of the Earth*, 210–11.

75. Alas, pecuniary value is inescapable. Incidentally, I have never understood those who deny objects' pecuniary value on the grounds that this commodifies them and thus encourages a market, an argument-bite deployed by opponents of the art trade. Every object, licit or illicit, has pecuniary value; I would think that there is at least some reason to believe that banning the art trade would only increase objects' value. As a sidenote, it would be a fascinating undertaking for someone to map the characteristics and combinations which make some objects worth more money than others on the art market.

76. Handler, "Cultural Property," 355.

77. Daniel Shapiro argues along similar lines suggesting that the Elgin Marbles be returned to Greece. He writes, "that the Elgin Marbles displayed in the British Museum are acknowledged as Greek is not what is at issue. What is wanted is that the marbles be recognized as integral to *present* Greek identity." Shapiro, "Repatriation," 106 (emphasis in original).

78. Fanon, *The Wretched of the Earth*, 209.

79. Fanon, *The Wretched of the Earth*, 209.

80. Those who deny the value and potential *symbolic* power of cultural artifacts ought to contemplate the nonexhaustive list of objects plundered from Palestinian lands and now in Israel in the appendix to a study by Joanna Oyediran. See, Oyediran, *Plunder*. The problem with Oyediran's enterprise—which goes through the Hague Convention and Regulations of 1907, the Fourth Geneva Convention of 1949, and the Hague Convention and Protocol of 1954 to show why Israel's actions violate international law—is that a reader comes away thinking that Israel's duties to the Palestinians arise solely out of such international law violations, and not necessarily out of the moral imperatives stemming from the political (colonial) reality on the ground. That said, Oyediran's work is crucial in several ways, not least of which is the stunning inventory drawn in the appendix of artifacts found in the West Bank and the Gaza Strip since 1967 and transferred to Israeli institutions, or removed from the Palestine Archeological Museum. Such a list speaks louder than any legal argument ever could.

81. Lama Abu Odeh.

82. Bator, "An Essay on the International Trade in Art," especially Part II.

83. Shapiro, "Repatriation."

84. Shapiro, "Repatriation," 95.

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RESPONSES

Barton Beebe*

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My hope is that Alan Audi's important and necessary intervention represents a turning point in "cultural property argument." In Parts I and II of his critique, Audi expertly uses the tools of "legal semiotics" to do exactly what those tools were designed to do: demystify the language game of legal argument to reveal the "irreducibly antinomal"[1] and dialectical nature of its maxims and countermaxims. Audi quite persuasively sets forth a disturbing vision of a discourse that functions by its nature not so much to generate meaning and normative force as to suppress them, all so that the status quo remains undisturbed. Just as the fact that the English are unlikely to give up the Elgin Marbles anytime soon "suggests a kind of idle or recreational character to cultural property argument," so too Audi's critique. Indeed, stripped of its legal features, the field of cultural property argument does look "rather barren."

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My concern, of course, is with where Audi is leading us. What other "field" of argument will serve our ends better? Among the standard criticisms of the legal semiotic approach are first, that it generates cynicism or even "nihilism" (whatever that is); second, that it fails to recognize the degree to which the grammars of legal and political argument are the same; and third, and closely related to the second, that it fails to recognize the degree to which every language game, every system of meaning production, is hopelessly antinomal and dialectical in nature. The criticism is that for all of its efforts to lead us to an authentic discourse, the legal semiotic approach merely removes us to "moral, ethical, or political grounds," to borrow Audi's phrase from Part III of his article, even more mystifying—and quieting—in their structuralism than the legal field we left.[2] The criticism has force, and some may read Part III of Audi's article, registered in a completely different key from the article's previous parts, as good evidence in support of it. There is not space here to develop Balkin's "postmodern" and, to my mind, persuasive response.[3] Nor is it necessary to do so. We are of course always situated in one discourse or another, but let us at least accept Audi's basic—and actually quite modest—claim that in the specific context of cultural property argument, legal rhetoric works by its nature to obscure what is truly at stake and should carry no special authority. Pragmatically speaking (to adopt a different lawyerly mode of address), we should do the best we can with the tools available to us. As I take it, Audi's point is simply that we can do better with tools other than legal argument. Trial by combat meted out justice in the early days of cultural property; and no one doubts that trial by legal argument, however flawed in its stylized thrust and parry, is preferable. But more preferable still is a field of discourse receptive to unstylized, "uncooked" claims from morality, ethics, and emotion, the kinds of claims that Audi develops in Part III.

Even so, if we are to fall back to a field of "moral, ethical, and political" argument, we should fully expect to confront there the same structural problems that legal semiotics identified in legal argument. Our challenge is to develop modes of analysis that allow us to work through these problems. Legal semiotics have so far failed to do so. As with most modes of critique that analogize their methods to Saussurean sign semiotics, the primary failing of legal semiotics is that it offers no account of change, of *genealogy*. In an effort to master synchrony, it defers diachrony; more generally, it defers *narrative*. Quite frustratingly, legal semiotics typically speaks of new arguments and counterarguments as simply emerging—out of what material conditions and why is rarely explained. But as Audi rightly notes, our task now is to induce new arguments and counterarguments—new "values," in an ethical and Saussurean sense—out of the material conditions in which we find ourselves, conditions primarily of postcolonialism and perhaps of North Atlantic imperial decline more generally. This may be why Part III of Audi's article, the peculiar supplement to his "legal semiotic" project, has nothing to do with legal semiotics and everything to do, one hopes, with the future of cultural property argument.

ENDNOTES

1. Balkin, "Promise of Legal Semiotics," 1837.
2. Paul, "Politics of Legal Semiotics."
3. Balkin, "Promise of Legal Semiotics."

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Patty Gerstenblith*

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The author sets out an assumption—that the law in the area of cultural heritage is unsettled. He uses this faulty assumption as a basis for criticizing the use of and reference to legal rules within the cultural heritage field. In his introduction Audi states that he will apply a "theoretical apparatus" derived from "legal reasoning as it relates to gaps, ambiguities, or conflicts in laws" but admits that this methodology is less appropriate for settled areas of the law. At this point he unwittingly undermines the premise of his article. He goes even further in attributing "more than a little bad faith behind lawyers and judges" who claim to be applying the law. He seems to confuse policy arguments, where admittedly commentators can offer conflicting views that seem to carry equal validity, with legal arguments. He also believes that the legal arguments cancel each other out as if a decision from a court or a statute that congress passes is on a par with arguments offered by those who favor or disapprove of the result.

How the author can make these assertions is a mystery; but I note that he cites without discussing the major cases in the field, and he cites none of the U.S. statutes, statutes of other countries, or international conventions that now form the basis of a well-settled law in the field of cultural heritage. He ignores the significance of the decisions in both the *Schultz* and the *Antique Platter* cases.[1] He also ignores the growing number of agreements that the United States has with other countries under the Convention on Cultural Property Implementation Act and the growing body of law based on forfeitures of antiquities that are stolen property or whose import violates U.S. law. It is unfortunate that Audi uses such a faulty premise, because if he had presented a more accurate view of the law, some

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of the points he makes later in the article might hold validity and insight for the cultural heritage field.

One example of the author's strange detachment from legal reality is his discussion of the question of whether the possessor who must relinquish an antiquity is entitled to an innocent owner defense. The author reenacts the argument as if there were no binding U.S. Supreme Court precedent on the question of how to determine whether an innocent owner defense is available. He caricatures the process by which a judge would apply the settled legal rule and the analysis used in distinguishing between questions of law (whether a defense is available) and questions of fact (whether the defendant qualifies as an innocent owner). In the former analysis, the judge looks to *U.S. v. Bennis* and the language of the applicable statute; in the latter analysis, the judge looks to factual issues of the defendant's conduct.

It is precisely this misguided notion—that cultural heritage law is unsettled and, therefore, both unknowable and an inaccurate guide by which to conform one's conduct—that has encouraged those involved in the international trade in antiquities to continue to violate the law. But one wonders, at what point does an assertion that the law is unsettled morph into an excuse for criminal conduct or, even worse, the setting up of a potential defense based on lack of knowledge or intent to violate the law? These factors are at play in the prosecution and conviction of the well-known art dealer, Frederick Schultz, for conspiring to handle antiquities stolen from Egypt.

Until his indictment in the summer of 2001, Schultz was the president of the National Association of Dealers in Ancient, Oriental and Primitive Art (NADAOPA).[2] This association was involved in the contentious development of U.S. law regarding the international trade in antiquities since at least the 1970s—disapproving of the nascent 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and its implementation by the United States. Leaders of NADAOPA, including Schultz himself, appeared before the Cultural Property Advisory Committee to oppose the requests of other nations for agreements with the United States to restrict the import of undocumented archaeological and ethnological materials. NADAOPA also submitted amicus curiae briefs in several major international cultural property cases that came before U.S. courts. In the 25 years from the *McClain* decision to Schultz's conviction, NADAOPA, its attorneys, and others involved in the international antiquities market attempted to create an aura that the law was unsettled, unknown, and unknowable. This may not only have contributed to Schultz's violation of the law but became part of his attempted defense, albeit an argument rejected by the courts.[3] Audi seems to have bought into this fiction of unsettled law. He may thereby contribute to misunderstandings on the part of others engaged in the international market, and he undermines other points in the article that could make a contribution to the development of this field of law.

The final segment of the paper raises some interesting questions—why should the perennial disputes over historical claims to restitution (symbolized by the Elgin

or Parthenon Marbles in the British Museum) form the conscious or subconscious backdrop for the resolution of contemporary claims and the problem of ongoing looting of archaeological sites? Audi seems to posit that these historical claims are what give rise to the ignored issues of restitutionary justice. This theme is one well worth exploring; but why was it necessary to try to delegitimize the law in this field to consider the role that these historical claims, rightly or wrongly, continue to play?

ENDNOTES

1. Audi mentions these cases and a few others in an endnote, while writing the bulk of his article as if these cases have no significance for his underlying premise concerning the state of the law.
2. Meier and Gottlieb, "Illicit Journey."
3. U.S. v. Schultz.

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U.S. v. Schultz, 333 F.3d 393, 410–414 (2d Cir. 2003).

Yannis Hamilakis*

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I am in full agreement with Alan Audi's basic premise, so forcefully made in this article, that the legalistic discourse and the associated "argument-bites," as he calls them, are an inadequate and highly problematic lens through which to explore the issues of restitution of what we call "cultural *property*," another, equally problematic term.[1] I would equally concur that any discussion on the subject that ignores the colonial past (and I would add, the neocolonial present), and the power inequities associated with it, is not only hypocritical but it also conceals an undeclared interest, effectively taking sides in the ongoing cultural and overtly political global battlegrounds. The issue of the Elgin or Parthenon Marbles is correctly identified by the author as the omnipresent shadow in all debates of restitution, the shadow that haunts museum professionals and politicians alike. It is this shadow that led the current director of the British Museum to start the initiative on the "Universal Museum," an initiative that falls apart only by looking at the list of signatories: 18 major museums, all located in Europe and North America.[2] In his article in the *Guardian* in defence of this thesis (that museums such as the British

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Museum or the New York's Metropolitan, tell a universal story, hence their need to retain objects from all over the world), he even invoked Edward Said; but the title of this article gave the game away: "The Whole World in our Hands."[3] Who has the right to represent the universal? Why is it that the exhibition of the global story of humanity, even if such an exercise were possible in supposedly neutral and depoliticized terms, must be staged in London, New York, or Paris, and not in Cairo, Sao Paolo, or Delhi? As Homi Bhabha reminded us,[4] the desire to "grasp the whole," to represent and stage the universal, has always been at the core of the colonial imagination; we need only think of the nineteenth-century Grand Fairs and Universal Expositions, and the role of antiquities in them.

I argued in 1999[5] that examining the Elgin Marbles story through a cultural biography approach can prove much more interesting than a narrow legalistic perspective on restitution, and it can perhaps indirectly point to the pitfalls of the whole restitution discourse. Taking further this angle in a broader study on antiquity and national imagination in Greece,[6] I put forward a series of suggestions. First, the specific materiality of these artifacts and their sensory and sensuous appreciation by humans are central in understanding their immense power. Second, in Greek national imagination since the nineteenth century, "the marbles" are often personified, acquire the properties of human beings, and express feelings and emotions. Interestingly, this discourse is reflected in both the current official rhetoric, which claim that it is the marbles themselves that demand their restitution, or rather their return to the homeland, as well as in the unofficial, popular discourses, found in newspapers articles, children's stories, and poetry, which talk of the sorrow and the sadness of the imprisoned marbles. Finally, based on the analysis of the aforementioned, I claim that much like the *Taonga* Maori objects,[7] these artifacts are not simply important feats of the ancestors that need to be brought back; they are rather the ancestors themselves; they are the living and breathing entities, the members of the national body that long for their reunification with the broader national family; a family that includes the living people as well as and the animate, anthropomorphic, or anthropomorphized antiquities. I call this world view, the *nostalgia for the whole* or the *desire for completeness*, which I identify as being at the center of national imagination.

There is no space here to elaborate on this argument, nor to present the supporting evidence; yet, this alternative world view, the view that sees these artifacts as subjects rather than objects, as animate entities who need to be engaged with as with fellow humans, throws the legal and mechanistic narratives on restitution into disarray. It forces confrontation of the reality that the terms of our intellectual engagement come from a specific, historically and politically situated discourse within a dominant version of western modernity; their claims to universality, therefore, are hollow and shaky. In other words it brings the debates on restitution of artifacts even within Europe much closer to the debates on reburial, repatriation, and cultural restitution in former colonial contexts such as the Americas, Australia, and Africa. The colonial and neocolonial gaze, the staging of an

assumed neutral universal material history in the metropolis, and the associated power dynamics must be confronted as much in the crypto-colonies in Europe,[8] as in the former colonies and neocolonies beyond it.

ENDNOTES

1. Compare Carman, *Against Cultural Property*.
2. Compare Curtis, "'A Continuous Process of Reinterpretation.'"
3. MacGregor, "The Whole World in Our Hands."
4. Bhabha, "Double Visions."
5. Hamilakis, "Stories From Exile."
6. Hamilakis, *The Nation and Its Ruins*.
7. Compare Tapsell, "The Flight of Pareraututu."
8. Compare Herzfeld, "The Absent Presence."

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Audi confronts what troubles many: the repetitive, stagnant nature of cultural property debates. Restitution certainly falls into this mold. So do other topics. He is

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also right that the debate is barely legal, carried on more in the press and media than in the courts. He is equally insightful that the Elgin Marbles play an inordinate role in these debates, and often set the framework for discussion even when not directly noted. What is unclear is whether calling attention to the debate as counter-balanced argument-bites will get beyond the constraints of past thinking and formulaic argument.

To begin, I do not believe that restitution or even the debate over the Elgin Marbles is quite as repetitive and stagnant as Audi would have it. There has been movement since John Merryman wrote his seminal article. The argument has moved from legal to moral and is now, for want of a better description, *contextual*. Each side argues that the marbles are better understood either in the context of the British Museum, among the remains of other cultures and times, or in a new museum in Athens, among other remains from the Parthenon and Acropolis. This contextual argument is a subset in the debate whether cultural property is best viewed as the heritage of humankind or as Greece's patrimony, universal or national, cosmopolitan or communitarian.

Audi conceives cultural property debates as the repetitive use of argument-bites. He is concerned to deal with the larger issues and his focus on argument-bites is intended to clear the field for more meaningful debate, in particular the debate over restitution that is affected by the vestiges of imperialism. Cutting through the stagnant, muddying debates of argument-bites, Audi forcefully states:

> Simply put, a wrongfully taken object should be returned, including objects taken by virtue of an imperial, exploitative apparatus that is widely abhorred today. . . . The starting point must be a recognition of past wrongs and present aspirations of the victims of past (and often continuing) injustice. . . . Viewed as a whole, the legal arguments predictably tended to cancel each other out, muddying the field enough to entrench a status quo in which . . . Western museums are rarely, if ever, compelled to questioned their vast holdings. . . . [T]he Elgin Marbles contribute to the status quo in favor of continuing ownership of looted art in Western museums in that *they're still in London*. (italics in original)

Audi is right: We must think outside the box of argument-bites, the bad arguments they represent (return would not be to the originating culture and objects would not be properly cared for if returned); avoid the preemptory rejection of restitution; and deal with individual claims. But saying that wrongfully taken objects should be returned and that colonial exploitation is wrong is not creating a new argument or framework but bald assertion. The situation is complex, of course, and a forceful statement may seem what is needed to break the log jam; but it is doubtful that clearing the muddying waters of argument-bites followed by such assertion will do the trick. It seems we are back to, if not argument-bites, choosing sides, which, as in discussions of religion and politics, will likely lead nowhere. More is needed than a focus on unhelpful arguments and a stultifying structure, a plea for openness, and then reassertion of one of the underlying positions.

The problem is that the discussion is fixed in the context of old dichotomies. It tends to remain limited to matters of ownership, which only one side can win. What is needed is discourse that encompasses nationalism and internationalism, a present-day cultural identity and a colonial past, where neither side believes it has trump. After all, isn't nationalism part of humankind's heritage and likely to last, and won't the local remain however cosmopolitan we get? The challenge is to create a context where these perennial differences can be discussed and mediated.

Perhaps it is unfair to ask those who did not create and deplore the current state of affairs to find a way to advance beyond them. What is needed is not to take sides, to neither accept the boundaries of current ownership nor to expect new moral insight into where cultural property should be. It is to be open to the possibility that what is in London might better be in Athens, or the reverse, or someplace else instead. The point is that there is no final place for culture property. Like culture itself, it is the constant rethinking and reevaluation that is important for which there is no one time solution. It is the process that counts.

Unfortunately, this is little more than preaching. There is much real work to be done. Large issues and differences need to be worked out. Hopefully Audi's article and, most importantly, those to follow will begin this process.

REJOINDER

Alan Audi

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I am grateful for the responses to the piece. With admirable concision, Professor Beebe has summarized the promise and perils of legal semiotics and the challenges ahead. He is right to note that any "moral, ethical, and political" argument can be broken down with the same tools used to break down legal argument; but one might be tempted to add that having done away with law's aura of authority and diminished the persuasive force of legal arguments may be reward enough for now, at least in the realm of cultural property argument.

Professor Beebe reminds us of the limits of legal semiotics, and in doing so serves as a fitting introduction to Professor Hamilakis's fascinating suggestions, which do indeed throw "the legal and mechanistic narratives on restitution into disarray." In many ways, his "alternate world view" refines and moves beyond my thinking as I sketched it in Part III. In seeking to confront "the colonial and neocolonial gaze" and "the associated power dynamics," Professor Hamilakis puts

forward a sophisticated framework that has the rare merit of opening new paths for analysis. My bias in favor of restitution was and is rooted in history, and Professor Hamilakis does well to bring us back to the present by reminding us of the materiality of all artifacts: "living, breathing entities." His general framework only affirms the need to eschew legal arguments and enrich the discourse through complimentary, and hopefully contradictory, contributions to the cultural heritage literature. Professor Hamilakis's approach deserves expounding and developing in more detail, and I hope it spawns much further discussion, interdisciplinary exchange, and cross-pollination.

Indeed, what is most encouraging is that both Professors Beebe and Hamilakis agree on the need to move beyond the language of legal argument. The same cannot be said for Professor Gerstenblith, whose response serves as a very useful dialectical tool to illustrate the persistence of certain standard theoretical responses to legal semiotics, and allows me to come full circle in my re-enactment of legal semiotics by briefly putting forward legal semiotics' response to the orthodox critique. Professor Gerstenblith's heart is in the right place, but in her rush to speak out in favor of the preservation of cultural property, she appropriates the litigator's technique of portraying the law as clearly and inarguably dictating the outcome she desires. In so doing, she opens the door for her opponents to use the very same litigator's tactics, setting the stage for the predictable and dispiriting legal back and forth my article attempts to leave behind.

The law of cultural property is settled, she insists. One might be tempted to respond by asking her why the Greeks and the British haven't just sat down, "applied the law" and gone on with their lives. How would an African minister of culture or Italian archaeologist react to Professor Gerstenblith stating that the U.S. Supreme Court has spoken, that statutes and treaties have been enacted by the United States, and that one only need go out and apply them? There are many people in the world who do not believe that U.S. legislative and judicial instances are the last word, people who live in other countries with their own laws and courts, and who may find her argument that law is "settled" just another example of provincialism masquerading as universality. Reasonable people argue about the law of cultural property all the time. I emphasize this point throughout article but especially in the long discussion on the legal culture of cultural property. I note that the absence of final authority and settled law because of the transnational character of most disputes; the wide range of permitted arguers (archaeologists, anthropologists, curators, and diplomats, not just men and women admitted to a U.S. state bar); and the lack of an established procedural apparatus, taken together leave a wide open space for improvisational arrangements of argument-bites. In many ways, cultural property is a prototypical example of a conflict- and gap-filled area of the law.

The examples of settled law cited by Professor Gerstenblith are cases and statutes governing stolen cultural property. Indeed, the law tells us that a vase stolen from the Baghdad museum in 2003 that turns up in the hands of a Swiss dealer

should be returned. Frankly, this is neither interesting nor helpful. Of course there are examples of easily applicable laws within the cultural property umbrella; but the real underlying issue—what to do with the thousands of antiquities in Western museums that were taken over the centuries and that formerly or still-colonized or subjugated groups are claiming—has no clear answer in the law, nor could it (for the reasons set forth in the article).

When lawyers practice, they seek to obtain a desired outcome by playing by the rules of the game. It is our task as scholars to question the assumptions and processes underlying the game. I am fully aware that day-to-day legal practice overwhelmingly occurs under fixed laws with easily determinable outcomes; but even in a world where cultural property law were as settled as Professor Gerstenblith claims (whatever that would look like), nothing would preclude the kind of critique deployed in my article. First, as a general matter, there is no such thing as a completely settled area of law, because any litigators worth their salt can find gaps and ambiguities within the law on which to built arguments. Second, legal semiotics make no claims as to the predictability of judicial outcomes: judges consistently acting in bad faith can lead to a kind of settled law, but that certainly shouldn't preclude critique. Third, 30 years of critical legal studies have thoroughly debunked the notion that judges just *apply the law*; I can do no more in this limited space than refer the reader to the canonical critical theory contributions for a full explanation why and how judges apply their policy preferences (although, as I noted, many nonlawyers suspected that all along). I would add that Professor Beebe's response succinctly summarizes the problem that Professor Gerstenblith ignores: The "dialectical nature of maxims and countermaxims" illustrates "a disturbing vision of a discourse that functions by its nature not so much to generate meaning and normative force as to suppress them, all so that the status quo remains undisturbed." Finally, in her bizarre attempt to equate belief in unsettled law with apology for the law's transgressors (convicted antiquities dealers, no less), Professor Gerstenblith unwittingly stumbles on the interesting question (with which legal semiotics has been grappling): whether legal semiotics leads to cynicism or nihilism, a rather "standard criticism" that Professor Beebe thoughtfully evokes in his response and I address at the beginning of Part III of my piece.

As a side note, Professor Gerstenblith has misread my discussion on nesting. Whether an innocent owner defense exists and whether to permit a good faith exception to the defense are both questions of law, not fact.

Finally, in Professor Shapiro's comment, he argues that "argument has moved from legal to moral and is now, for want of a better description, *contextual*." That is certainly an accurate description of the general trend, although I would point to Professor Gerstenblith's response to illustrate that the legal has a way of persisting despite efforts to transcend it. Moreover, I am not sure that the debate over context is not just another set of policy arguments to be co-opted and internalized by the legal discourse. Absorption into law is not necessarily a bad thing, of course, so long as the arguments are judged for themselves. The danger, and the reason to

be vigilant, arises when arguments become force of law, taking on the additional (and unwarranted) persuasiveness and authority that come with being *the law*. There is nothing wrong with law so long as it is recognized for what it is.

This brings me to Professor Shapiro's thoughtful critique of Part III of the article. He writes that "saying that wrongfully taken objects should be returned is . . . bald assertion" and that "choosing sides . . . as in discussions of religion and politics, will likely lead nowhere." I partly share his skepticism, which is why I wholeheartedly support the efforts of those who seek new paradigms to build on (e.g., Professor Hamilakis's materiality of artifacts). But I also believe that, once we strip legal arguments of their inherent persuasive value and move beyond the game of lawyers endlessly parroting each other's argument-bites, we can set the stage for productive exchanges—including exchanges of "bald assertions"—that lead to acceptable solutions beyond the "old dichotomies." Professor Shapiro is right that "it is the process that counts," and as Professors Beebe, Hamilakis, and Shapiro show, the process ahead is promising indeed.

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