

COMMENTS ON THE RELEVANCE OF LAW AND CULTURE TO CULTURAL PROPERTY LAW

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I. INTRODUCTION

Consider the following sequence of comments concerning the theft of Caravaggio's *Nativity* from a church in Palermo, Italy:

St. Lawrence Oratory . . . On the altar is a Nativity by Caravaggio. The carved wood supports, inlaid with mother of pearl, of the marble benches lining the oratory, are remarkable (1969 Michelin Guide).¹

[T]wo lists of 'most wanted' art circulated by . . . Interpol comprise two dozen works that would form the nucleus of a first-rate small museum, as these examples suggest . . . Caravaggio, Nativity, stolen in 1969 from a church in Palermo (1973).²

To this day [Caravaggio's Nativity] has not surfaced (1983).³

St. Lawrence Oratory . . . On the altar is a Nativity by Caravaggio. The carved wood supports, inlaid with mother of pearl, of the marble benches lining the oratory, are remarkable (1974 Michelin Guide).⁴

[T]he Oratory of the Company of San Lorenzo has a precious Caravaggio (1980 Rand McNally Guide).⁵

Michelin, Rand McNally, and cultural property law have at least one thing in common: They are only guides. They provide no assurance of reality. While Michelin and Rand McNally offer guidance to local culture, cultural property law offers guidance to

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1. PALERMO, MICHELIN (GREEN) GUIDE TO ITALY 262 (7th ed. 1969).

2. K. MEYER, THE PLUNDERED PAST 6 (1973).

3. Salinger, *Alias A. John Blake: The Underworld of the Art World*, 118 ABC CLOSEUP 1, 6 (July 16, 1983) [hereinafter *Alias*].

4. PALERMO, MICHELIN (GREEN) GUIDE TO ITALY 262 (English ed. 1974).

5. D. DALY, ITALY, A RAND McNALLY POCKET GUIDE 121 (1980).

its preservation and to the regulation of its removal. Guidebooks and legal provisions alike rely on human beings for their implementation; thus, the political and legal culture may have a profound effect on the efficacy of laws. The human element is especially significant in the effective exercise of criminal jurisdiction over persons suspected of having violated cultural property law. Progress can be as tortuous in interpreting and enforcing the law as in finding one's way through the labyrinthine old streets of Palermo.

There is need for more work on issues concerning the successful internalization of cultural property law. When is it, when is it not, and why not? When are laws more significant than other social constraints, and when are they not? A more precise understanding of the efficiency and effectiveness of law in protecting cultural property will greatly assist efforts to protect the global cultural heritage. So far, there has been very little inquiry into the efficacy of protective laws. Much of the scholarship on the legal protection of cultural property has been episodic and anecdotal. The result is primarily country-by-country or topic-by-topic inventories and descriptions of laws, prosecutions for art thefts, customs regulations, other law enforcement mechanisms, and museum acquisition policies. Although these inventories and descriptions are very useful, there is a critical lack of empirical analysis of efforts to implement the multiple values associated with the international movement of cultural property.⁶

6. Pertinent values include:

(1) the preservation of archaeological evidence, particularly in an on-site context; (2) the association of art with its geographical-historical milieu; (3) the preservation of the national patrimony for reasons of awakening the national conscience, fostering community pride, socializing youth, enhancing local scholarship, and elevating national civilization; (4) the preservation of both individual *objets d'art* and, when significant, sets and collections of them; (5) the enhancement of an exporting or loaning state's foreign policy and the financial resources of its museums; (6) the enrichment of the importing state's civilization; (7) the promotion of international understanding through diffusion of art; (8) the respect for cultural diversity, acknowledgement of a global patrimony, and a shared heritage of significant art, as well as the elimination of parochialism; (9) the widest possible visibility and accessibility of significant objects; (10) the protection of significant objects, under the best possible circumstances, in both the country of origin and the importing country; (11) the encouragement of respect for the law and the mutual development of shared controls; (12) the enrichment of aesthetic and intellectual interests of individual collectors, museums, and museum viewers; and (13) restraints on the production of forgeries.

Nafziger, *An Anthro-Apology for Managing the International Flow of Cultural Property* 4 Hous. J. INT'L L. 189, 194-95 (1982) (citation omitted).

One might argue that any law is better than no law, or at least no worse. Such a conclusion would be irresponsible. Many laws are simply ineffective, either for lack of careful draftsmanship, or due to limitations on the competence, capacity, or will to enforce the laws. Worse, if national legislation is too restrictive, it may encourage a black market.⁷ Art dealers argue that:

The more steps that are taken to prevent it, the more valuable the objects become. It's a very, very tricky problem. I can understand the concern of the governments involved, but the minute you say it's illegal to bring things out of Egypt, the market for Egyptian antiquities rises.⁸

Another problem is that choice-of-law rules such as *lex rei sitae* may encourage laundering of stolen art through jurisdictions with very generous protection of bona fide purchasers.⁹

7. *United States v. McClain*, 545 F.2d 988, 1000, n.26 (5th Cir. 1977) *reh'g denied* 551 F.2d 52 (1977). In reviewing the "second round of convictions [of McClain, Bradshaw, Simpson and Simpson] for having received, concealed and/or stolen goods in interstate or foreign commerce," the Fifth Circuit held that the National Stolen Property Act, 18 U.S.C. § 2314 (1976), is violated when objects are imported into the United States which are worth \$5,000 or more and which have been knowingly removed from a country that statutorily declares ownership and prohibits exportation of the claimed object. *United States v. McClain*, 593 F.2d 658, 663 (5th Cir. 1979).

8. *Alias*, *supra* note 3, at 10.

9. *See, e.g.*, *Winkworth v. Christie Manson & Woods Ltd.*, [1980] 1 Ch 496 (1979). In *Winkworth*, the plaintiff, domiciled in the United Kingdom, was the original owner of Japanese art objects which had been stolen from him and transported to Italy, where they were resold and returned to the United Kingdom. He brought the action against the defendant, a major London auction house, requesting the return of the art, which was then in the defendant's possession. The defendant argued that Italian law ought to govern under the rule of *lex situs* because Italy was the site of the critical sale of the arts. Defendant further argued that Italian law protected it as the bona fide purchaser. Under British law, which the plaintiff argued should govern the dispute, he would have had superior title. In a highly legalistic opinion, the court applied the rule of the situs in favor of the defendant.

In *Attorney General of New Zealand v. Ortiz*, [1982] 3 W.L.R. 570, the plaintiff government sought a court injunction restraining the sale of a series of wooden door panels carved by Maori craftsmen and an order effecting a forfeiture to the plaintiff of the panels. The government claimed that the panels had been removed from New Zealand in violation of its antiquities and customs laws. The two principal issues concerned whether, under New Zealand law, the Crown had become the owner of the carving and was entitled to possession, and whether certain New Zealand law could be enforced by an English court. The Court answered both questions negatively. It first rejected the plaintiff's claims of forfeiture, holding that the government of New Zealand had not seized the property before it left the country, and that New Zealand and English law both required actual seizure in order to effect its forfeiture. Thus, the court concluded that "forfeiture" could not be automatic or implied, nor could it be effected extraterritorially. The court also concluded that it would not enforce the New Zealand forfeiture provisions regardless of whether they were labeled "penal" or "public." For a more detailed discussion of *Ortiz*, see Nafziger, *The New International*

Although one can exaggerate the deficiencies of cultural property law, it is clear that we know very little about the relative efficacy of alternative legal prescriptions and even less about the relationship between cultural property law and the political-social environment. Fortunately, there is a growing perception of this gap in knowledge. In 1983, the United Nations Educational, Scientific and Cultural Organization (UNESCO) issued a report by distinguished experts that called for an assessment of the effect of legal rules in preventing or encouraging illicit traffic and in the recovery of illicitly traded items.¹⁰

This essay seeks to stimulate further research and analysis of the legal culture of cultural property law. Two main points—the importance of marshalling public opinion and of evaluating the relative significance of law—will be developed in the context of two locations, Palermo and Venice, at opposite ends of the same art-rich country.

II. ALIAS A. JOHN BLAKE: THE UNDERWORLD OF THE ART WORLD

Caravaggio's Nativity (The Adoration with Saint Francis and Saint Lorenzo) was a featured topic in the ABC News Closeup, *Alias A. John Blake*.¹¹ Written and narrated by Pierre Salinger, the one-hour documentary reenacted a journalist's carefully planned descent into the underworld of art.¹² "Blake" discovered that the art world is

Legal Framework for the Return, Restitution of Forfeiture of Cultural Property, 15 N.Y.U.J. INT'L L. & POL. 789, 795-99 (1983).

10. L.V. Prott & P.J. O'Keefe, National Legal Control of Illicit Traffic in Cultural Property, UNESCO Doc. CLT-83/WS/16 (1983).

11. *Alias*, *supra* note 3 and accompanying text. For an expanded version, see P. WATSON, *THE CARAVAGGIO CONSPIRACY* (1984).

[W]atson recounts the daring and elaborate plot with which he infiltrated the international underworld of stolen and smuggled art. In the guise of "A. John Blake," a new but apparently very well connected art dealer, Watson initially targeted for recovery a stolen Caravaggio masterpiece. The plot involved his faked bidding on paintings at the venerable auction houses of Christie's and Sotherby's, meeting with underworld figures in Naples where he survived the great 1980 Italian earthquake, and clandestine dealings with U.S. Customs. While he failed to recover the Caravaggio, he did recover two other paintings and aided U.S. Customs in apprehending a smuggling ring, one member of which was a priest. Watson's account of his daring caper furnishes readers with inside details of art dealers' methods and auction protocol.

Stuttaford, Book Review 224 PUBL. WEEKLY, Dec. 2, 1983, at 76.

12. For an interesting account of the Italian art underworld, see Rostron, *Smuggled!*, SAT. REV., Mar. 31, 1979, at 25.

. . . [b]ig business, with few rules or regulations. Perhaps a billion dollars a year changes hands for paintings and artifacts that are stolen, or smuggled across national borders. For four years, Peter Watson moved through this world as A. John Blake. Tonight we'll relive some of his experiences in the realm of gangsters, thieves and con men who live off the stolen works of some of the world's greatest artists.¹³

In this cops-and-robbers atmosphere, "Blake" infiltrated the art market in an effort to locate Caravaggio's huge (seven by eight foot) painting. For 359 years, the *Nativity* had hung in its frame behind an altar of the Oratorio of St. Lorenzo in Palermo until its theft in 1969. The theft was another *lupara bianca*.¹⁴ Although Blake apparently came close to finding the painting, its location remains a mystery to this day. Ironically, one critic has observed that the subject of the canvas seems to "appeal for help," perhaps reflecting Caravaggio's difficult circumstances when he painted it, and anticipating its later plight in the custody of thieves.¹⁵

The television program indicted the art industry for its "vested interest in keeping everything as vague as possible. They don't want to probe too much, because this is the way that a lot of dealers actually make a lot of money, this is the way they make a coup by taking quietly a painting that is stolen."¹⁶ Somewhat melodramatically, the narrator expressed the "most generally accepted view"¹⁷ that smuggled art is second in total value only to narcotics.

It may run as high as a billion dollars a year. No one really knows, and few people seem to care. Law enforcement agencies are ill-equipped to deal with it, and there are few rules and regulations to police the art market. Even the most reputable get caught in the web.¹⁸

The most insightful observation of *Alias A. John Blake* pertained to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.¹⁹ The principal purpose of that agreement,

13. *Alias*, *supra* note 3, at 1.

14. According to the *mafiusi* vernacular, the literal interpretation is "white murder," usually relating to the disappearance of a human being.

15. C. KINNIMONTH, *SICILY: TRAVELLERS' GUIDE* 158 (3d ed. 1981).

16. *Alias*, *supra* note 3, at 9.

17. *Id.*

18. *Id.*

19. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Oct. 12-Nov. 14, 1970, 823

according to the television exposé, is to marshal world public opinion. That purpose does seem to be even more important today than providing the legal teeth to curtail illegal trafficking in cultural property. Art theft, currently very much in style, is characterized by an active and efficient intelligence network in the underworld counteracted by the unusual difficulty of marketing the particular merchandise (stolen art).²⁰ "Only with heightened consciousness can this underground attack on national heritages be stopped. Otherwise the grave robbers will finish their pillage of the art treasures of Italy and South America, and there will be more empty frames like that in Palermo, Sicily, where the famed Caravaggio once hung."²¹

Alias A. John Blake came to a cogent conclusion: cultural property law currently operates best as an educational technique to encourage public opinion to respond to a serious international problem. Law provides public guidance, and international law provides a stimulus for the enactment of effective municipal legislation. Enforcement of cultural property law and cooperation among states is important over time, but at least in the short run, the UNESCO Convention seems to perform best as a preliminary technique of influencing public opinion.

III. COMPREHENSIVE RESEARCH ON PROBLEMS OF CULTURAL PROPERTY: THE CASE OF VENICE

Aside from the lesson *Alias A. John Blake* teaches about the educational purpose of cultural property law, we need to know more

U.N.T.S. 231 (1972), reprinted in 10 I.L.M. 289 (1971). See also *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYR. J. INT'L L. & COM. 97 (1976).

20. Burnham, *Culture Vultures*, SAT. REV., Sept. 1, 1979, at 36. On the one hand, "[i]ntelligence on stolen art seems to move actively through the underground, jeopardizing the security of cultural treasures whose importance comes in a random way, to the attention of the criminal milieu." *Id.* at 37. On the other hand, "[t]he one fact art owners can capitalize on in their efforts to protect their collections is that art is too readily identifiable, too valuable, and too difficult to conceal ever to become a staple currency of the underworld." *Id.* That is,

A stolen Picasso is first a Picasso, a stolen Remington is a Remington: a unique object, highly prized by lovers of art, readily recognized as cherished common property by law-enforcement officers. If this fact seems to increase the vulnerability of art to future attacks by thieves and vandals, it also constitutes its strongest defense.

Id.

21. *Alias*, *supra* note 3, at 10-11.

about its internalization. Comprehensive case studies of legal implementation would be useful. Perhaps the best example is to be found at the opposite end of Italy from Palermo, namely in Venice, the living treasure.

A. BACKGROUND

Venice's geography presents an unusually troublesome mosaic of cultural fragility, hostile natural environment, and threatening industrial port facilities. There is probably no better crucible regarding the significance of cultural property law. The magnificent art treasures of Venice, unlike those of a single archaeological site, or of an art museum in a modern American city, are both movable and immovable. The resulting regime of protection must necessarily be more complex. Venice has had to confront, and has to some extent surmounted, an unusual congruence of threats to its cultural property. Several years ago, UNESCO estimated that Venice contained some 10,000 masterpieces of art and architecture.²² Nevertheless, almost all at once, Venice was beginning to "lose six percent of its marble works, five percent of its frescoes, three percent of its canvas paintings, and two percent of its wood paintings."²³ The juridical and administrative problem has been to articulate and implement a regime that would immediately foreclose further damage to a diverse heritage from a welter of sources. These threats include: art snatchers, tombaroli,²⁴ and other thieves;²⁵ floods and other instances of rising waters; subsiding buildings; and air pollution.²⁶ Even tourist traffic can take its toll. It is hard to imagine another location so beset by so many major threats to an important cultural heritage. Venice also suffers, despite best efforts, from a dearth of funding to protect its heritage, as well as from a complex administrative system that at times may handicap those efforts.

B. RESPONSES

The problems of protecting the Venetian heritage are well known. So are the various responses: alarms for churches and other

22. K. MEYER, *supra* note 2, at 208 (1973).

23. *Id.*

24. Translated "grave robbers." 1 Dictionary of the Italian & English Languages 1367 (V. Macchi ed. 1979).

25. See Luna, *The Protection of the Cultural Heritage: An Italian Perspective*, reprinted in United Nations Social Defense Research Institute, *The Protection of the Artistic and Archaeological Heritage* 164-90 (1976).

26. For a good summary of the environmental threats to Venice, see United Nations Educational Scientific and Cultural Organization, *Protection of Mankind's Cultural Heritage: Sites and Monuments* 56-59 (1970).

monuments; stricter customs supervision; Italian participation in international law enforcement networks; implementation of Italy's unusually protective antiquities laws; capping or drastically restricting the use of artesian wells to arrest the problem of the city's gradual sinking; UNESCO rescue offers; the development of new water supplies for the industrial suburbs and restrictions on industrial development there; reconstruction of the antiquated Murazzi system of dikes around the city, improved engineering to maintain the strength of the seawalls, efforts to combat the shockwaves generated by motorboats and the corrosive effects of salt, refuse and fuel oil; and new controls to regulate pollution of the air and thus mitigate the damage to architecture that is caused by the discharge of sulfates and other emissions.

C. UNCERTAINTY ABOUT THE ROLE OF LAW

These responses to the multiple threats to the Venetian cultural heritage have taken several general forms. For example, financial and technical assistance has helped meet the threats of ground subsidence and high waters. Such measures have formally operated within a juridical framework of domestic legislation and regulations, together with international agreements and recommendations. Nevertheless, a curious feature of reports on the conservation of Venice is the uncertainty about the precise relevance of law. Despite repeated references to pertinent laws, both national and international, there has been little, if any, commentary on their efficacy. We simply do not have a comprehensive knowledge of what happens once the protective laws are enforced, nor do we know how well they operate alongside other controls, ranging from individual moral-religious scruples to ad hoc political-administrative decisions.

Although we can rely on the effectiveness of Italian legislation to enable the use of specific funds, we cannot reliably answer many pertinent questions. Have laws facilitated or handicapped the resolution of political and bureaucratic conflicts that have delayed effective responses? Have legal controls contributed to an image of stability as a premise for fund raising? Do the UNESCO agreements and recommendations have any substantial effect? Have criminal penalties deterred thefts, intentional despoliation, and corrupt practices in applying funds? Answers to these questions are important if, as many would agree, most of the conservation work in Venice and other endangered monuments remains to be done.

D. RESEARCH SCHEME

A scheme of research on the role of law in the crucible of Venice might focus on three elements: restoration efforts, bureaucratic effects, and law enforcement efforts.

1. *Restoration Efforts*

Research might begin by interviewing Venetians who have been involved in such restoration projects as the Tintoretto's in the Scuola Grande di San Rocco, the Scuola dei Carmini, the Scuola Canton and Scuola Levantina Synagogues, the frescoes in the Church of San Moise, and the loggetta adjoining the Campanile of St. Mark. What has been the experience of these persons in working within a legal framework? Did it help? Did it hurt?

2. *Bureaucratic Effects*

It would be instructive to examine local archives and conduct interviews to determine the role of law in ameliorating bureaucratic and political constraints on protecting the Venetian cultural heritage. According to Sir Ashley Clarke, former British ambassador to Italy and a member of the "Venice in Peril" restoration committee, "[t]o get even simple things done can take ages."²⁷ The political context in and around Venice seems to breed political jockeying and rivalry, administrative infighting, erosion of funds, and delay. All plans must be cleared first by local authority and then by UNESCO in Paris. This can be a complex undertaking. "Bills from one part of Venice and money from another wend their way through a labyrinth of offices until eventually they meet in Paris before slowly filtering back to the city again."²⁸

Before any major project can be started, even if the money has been allocated, many different signatures are needed, including those of several cabinet ministers, top bureaucrats of the treasury, the state comptroller's office, the public works department, and other government agencies on the national, regional, provincial and municipal levels. For example, several years ago Georgione's *Madonna Enthroned* was stolen from the nearby Cathedral of Castel-franco Veneto.²⁹ Despite earlier efforts by the regional superintendent of fine arts to have an alarm system installed, nothing was done even after a break-in. Subsequently, the painting was stolen. After its recovery, prosecution of suspects was apparently hampered by bureaucratic difficulties despite the authority of Italian criminal law. Even when the police are around, a ritual game is played (in the metaphor of one observer), for the hunters and the hunted both know that there is only a small fine for being caught.

27. *Christian Sci. Monitor*, Dec. 8, 1983, at 18, col. 1.

28. *Id.* at col. 3.

29. K. Meyer, *supra* note 2, at 83.

There is clearly some truth to the observation that "Venice is still sinking. But now it is the weight of bureaucracy that threatens to submerge international attempts to save the island city."³⁰

3. *Law Enforcement Efforts*

A comprehensive study of legal implementation should involve interviews with local experts and officials about their experiences in the enforcement of antiquities laws. Basically, the Italian scheme involves intensive state participation in the protection, preservation and alienation of all public and private cultural property. For example, exportation of important objects is prohibited when such export could constitute an injury to the Venetian patrimony. Cultural property cannot be subject to demolition, removal or modification without special permission. Collections of objects which are classified as a whole unit cannot be split up without permission. The state can specify protectionary measures for cultural property and may assume the role of guardian of endangered objects. Ecclesiastical objects in the possession of the church are under the official protection of the state. Discovered objects are the property of the state and discovery is to be reported immediately. The state maintains the right of pre-emption over such objects. It may appropriate any classified cultural property for public use or for the purpose of carrying out archaeological excavations or investigations. The critical question that remains is how, in practice, do these controls work?

IV. CONCLUSION

This essay has focused on the relevance of law and culture to cultural property law. Although these comments have only scratched the surface, they reveal lines of productive empirical research. The first step may be to remove jurisprudential blinders. At least in the United States, the Holmesian legal tradition posits a rather narrow view of law: for every right, there must be a remedy; law is a prediction of judicial outcome; and so on. Instead, the establishment of an effective regime of cultural property law, particularly as it involves criminal jurisdiction, requires more attention to the role of law in mobilizing public opinion and, more fundamentally, to the relative significance of law as an instrument of social policy.

30. *Supra* note 27, at col. 1.