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The legal dimensions of Cultural Property ownership: taking away the right to destroy

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Le necessità del patrimonio culturale

The legal dimension of Cultural Property ownership: taking away the right to destroy

by [Yoav Meer](#) [1]

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Thus far, academic attention to cultural property has been confined to the question of ownership... most commonly, the discussion revolves around who is the *lawful* or the *desirable* owner. However, legal scholarship has failed to interrogate other interesting aspects of cultural property, including the different rules that should apply to such ownership... under most legal regimes, the owner of an artifact enjoys the independence to destroy that object... the greatest artifacts of humankind can be privately owned, thus allowing their owners to treat the object however they choose... based on cultural property's unique character as a rare, scarce, non-renewable, and non-substitutable resource, as well as on the values it encompasses and promotes and the effect its destruction may have on third parties... cultural property deserves a higher level of protection... when one is the owner of a cultural property artifact, she should not be allowed to destroy that object.

1. Introduction

Thus far, academic attention to cultural property has been confined to the question of ownership. Who owns the Elgin Marbles? Should Yale University return pieces of the Machu Picchu to Peru? In situations of national patrimony, are government always the rightful owners or should indigenous peoples be part of the property dispute? Recent scholarship has discussed those issues in depth. Most commonly, the discussion revolves around who is the *lawful* or the *desirable* owner. However, legal scholarship has failed to interrogate other interesting aspects of cultural property, including the different rules that should apply to such ownership. By limiting the discussion in such a way, scholarship has not addressed Jeremy Waldron's suspicion (with respect to private property) "that talk of 'a right to property' means something different in each case: it is not just a different theory or a different justification, but a different conception of what it is that has to be justified" [2]. The identification of the owner of an object may, at best, serve as shorthand for identifying the holder of a "bundle of rights" [3]. Not all owners will have the same bundles of rights: "talk about '*the*' property owner invites the fallacy of misplaced concreteness, of reification" [4].

Remarkably, under most legal regimes, the owner of an artifact of inestimable cultural value enjoys the independence to exploit, conceal, or destroy that object [5]. Imagine for example a renowned Rembrandt painting, owned by an eccentric billionaire. She may choose to hide it in her basement, destroy it entirely, tear it apart, or display it in her living room [6]. The greatest artifacts of humankind can be privately owned, thus allowing their owners to treat the object however they choose [7]. In 1912, after the decline of the Qing Dynasty, JP Morgan negotiated to buy the entire Chinese Imperial collection. He died in 1913, without having completed the transaction [8]. It is astonishing to imagine a nation's entire cultural history being at the mercy of a single individual. Unlike ordinary property, the destruction of such property represents a loss to more than just the owner. Because it is non-renewable and non-substitutable, the destruction of a major art work often means the loss of ideas, knowledge, culture, and history. It prevents future generations and artists from viewing the work, learning from it, and being inspired by it. Arguably, the fate of Leonardo da Vinci's notes, purchased in 1994 by Bill Gates, is of concern to the global community [9]. Cultural property - even if privately owned - may embody interests and values that are important to a larger community. The notion that the general public holds a stake in certain objects has worked its way into our consciousness. Therefore, distinctive limitations should follow cultural property ownership, to the benefit of the public.

In this paper, I will examine cultural property ownership from a private law perspective. I will identify its unique

character and discuss the different legal rules that should apply to it and the justifications for such treatment. Essentially, I argue that cultural property deserves a higher level of protection and that the owner of such property should not be allowed to destroy or dispose of it. Many aspects of cultural property are currently "undertheorized" [10] and "unattended" [11]. This gap in research concerning the special characteristics which might attach to cultural property is intriguing, considering that in intellectual property arguments regarding the public domain and the public good are often voiced. For example, a copyright protection is time-limited and subject to the "fair use" exception. In cultural property, however, "where one is simply the proprietor of an artifact that embodies data or ideas... no notion of public realm exists" [12]. The ownership of tangible objects is treated as private and unqualified [13]. Similarly, while scholars have explored the unique property rights of indigenous peoples, both tangible and intangible, no parallel discussion has emerged with respect to other types of cultural property.

Importantly, this paper does not address the transferability of cultural property or the initial allocation of such resources. Many countries regulate the import and export of such items. They enact laws to control the international movement of cultural property [14]. Some countries also regulate the initial allocation of such resources. Items of archeological significance may be considered public property and even art may get special protection [15]. Other objects of public value - be it scientific, historical, architectural, or other - may be subject to varying legal norms [16]. In the United States, however, very little of this applies [17]. My paper does not discuss these issues. It focuses only on the actual ownership and the legal rules that should attach to it. More specifically, I examine the owner's right to destroy an object of cultural significance. The question I ask is simple and straightforward: Where one is the owner of a cultural property object, should she be allowed to destroy that object? For reasons provided below, I answer in the negative.

2. Cultural Property

(a) What is Cultural Property and why is it Different from Other Objects of Ownership?

(i) Definition and Significance

By 'cultural property' I refer to objects that embody culture, including archaeological, ethnographical and historical objects, as well as works of art and architecture [18]. Such objects differ from 'ordinary' property based on their rarity, their unique cultural or historical significance, and their non-renewability and non-substitutability [19]. I should note that my paper does not attempt to identify what is 'cultural property' or challenge existing definitions. Rather, it is sufficient to assume that such objects exist and that their unique character entails the application of different legal rules to them.

Let us go back to the examples I mentioned in Part I. As I explain there, the destruction of a Rembrandt painting represents a loss to more than just the owner. It is non-renewable and non-substitutable and its destruction may imply the loss of ideas, knowledge, culture, and history. Also, future generations and artists will be prevented from viewing the work, enjoying it, learning from it, and being inspired by it. The damage I describe caused by the object's destruction is premised on the idea of cultural property as having an expressive value. Cultural property communicates personal or communal experiences. It enlightens us and educates us about ancient civilizations and times in history that would have been forgotten otherwise. The meaning of these items of cultural property derives from what people see in them and the values that attach to them. Items of artistic value may make us laugh or cry; they may remind us of people or events and inspire us; they may make us question the meaning of life; they may bring hope or remove every bit of it [20]. Preservation allows valuable insights into the development of humankind and it uncovers hidden elements of historical knowledge [21]. It does not only ensure society's continuing employment with cultural property, but also the enjoyment of future generations. What the artifact communicates is entangled with the creator's time, society, culture, and history, as well as those of the consumers [22].

Furthermore, cultural property encompasses additional values. Certain items may reflect, facilitate, or contribute to knowledge, play, aesthetic experience (beauty and harmony), sociability, religion, and other non-religious spiritual values [23]. The Bamiyan Buddhas, for instance, reflected life, knowledge, aesthetic experience, and religion [24]. Picasso's *Guernica* reflects life, knowledge, and aesthetic experience [25]. Cultural property may also introduce some broader social values, including connections among members of a group and providing a sense of personal or group identity. Lastly, it has a historical and symbolic value: It connects the present and the future with the past and it may be the conveyor of various meanings through symbolic expressions. Merryman adds to this list truth and certainty, morality, memory, survival, identity, community, and pathos [26]. The most compelling justifications Merryman presents for the unique nature of cultural property are truth and authenticity, which he associates with accuracy and validity. An authentic object is accurate and historically valid. It is also truthful and honest. The value of truth and authenticity is demonstrated through modern practice: Thousands of museums, libraries, and archives exist worldwide, partially in order to deliver the 'real' object [27]. The artifacts are preserved, studied, authenticated, and interpreted in those institutions. Universities and academics spend much of their time and money pursuing those endeavors and contribution to the quest for cultural truth [28].

The assumption that property loss can always be remedied by money is inaccurate in the case of cultural property. Radin's work articulates that property is not always "commensurable," "commodifiable," or "alienable" [29]. As some property is constitutive of personhood, it should be treated differently from a legal perspective. Some objects of property may require specialized consideration. Offering unique protection to property would advance the concept of

"human flourishing," which Radin mentions [30]. In light of Radin's property-and-personhood analysis, I propose that cultural property is to groups what private property is for individuals. Some objects of cultural property are so significant in the creation of group identities and exercise and existence of peoplehood that they demand greater protection than what the ordinary market through its transaction can offer [31].

(ii) Identity, Peoplehood, and Grouphood

The term people pertains to a collective of individuals that their association is based on political affiliation, religion, culture, language, race, ethnicity, or history [32]. This notion reflects a common understanding that groups have a shared origin (geographically or genealogically), as well as contemporary commonalities, such as language, religion, or culture [33]. In this essay, I refer to peoplehood as the status of being a people or belonging to a people (these terms may be used interchangeably in this essay with grouphood and group) [34]. Conversely, although recognizing the existence of groups in modern society, other scholars argue that "modern peoplehood creates a fiction of homogeneity, of holistic essences" [35]. Moreover, traditional definitions of identity and groups may come short in a world in which one may be simultaneously American, Christian, and German speaking. Conventional categories of language, religion, and nationality break down in a globalized world.

This section is premised on the notion that groups have an inalienable right to exist and that their identity and survival are closely related to cultural property in general, and more specifically, to its preservation. If we honestly believe that groups have the right not to merely exist, but also to exercise their culture and traditions, to flourish, and perpetuate their customs, then these rights are closely-related to historical objects, archeological artifacts, and ancient sites. This connection, I believe, justifies the different treatment of cultural property, as such that promotes grouphood by providing stronger protections for cultural property [36].

In order for a group to be able to exercise a full cultural life and establish a secure group identity, cultural property is mandatory. Individuals must be exposed to their history, much of which is represented, illustrated, and depicted by objects, in order to find their place and role in the greater scheme of things [37]. Through cultural property, individuals may connect with each other and amplify the sense of community and membership in a group [38]. Typically, groups are united and defined by a shared history, culture, or religion. Often, objects of cultural property - to the extent that they reflect deeper understandings about history and society - are the creators or facilitators of group identities. They represent, illustrate, or depict history. Cultural property tells groups who they are, and where, how, and when did they come from. The preservation of cultural property allows societies all that [39]. Ultimately, cultural property preservation also contributes to cultural diversity. The more cultures that survive, the more diverse our communities will be [40].

By contrast, the destruction of cultural property leaves the people without a sense of identity and without any uniting forces. Without items of cultural property, groups would find it hard to exist [41]. It will become harder to tell the stories that connect these individuals with each other and make them a people [42]. Every culture, society, or group, are based - to varying extents - on objects that tell a story or depict or illustrate a historical, cultural, or religious communality, thus providing a sense of grouphood. Without such objects, it would be much harder to develop group identities in any sustainable way. Another way to describe the importance of cultural preservation is by explaining it through the collective right to self-determination. The association that cultural property provides with the past and the implications of that connection, in turn, provides groups with better opportunities to define themselves and see themselves as group. Denying them from history or from such opportunities would go against the right to self-determination [43]. Take the Western Wall for instance. Its meaning to modern Judaism is enormous. It connects modern Judaism with biblical Judaism and associates Jews all over the world with each other. If the Wall were to be destroyed, it would also mean the destruction of a major part of Jewish identity, history, and culture.

(b) Globalization and the International Perspective

Traditionally, cultural heritage has been conceived as containing objects of art, archeological sites, monuments, and so on. The meaning of these objects is affected by the value people attach to them. Such values, until recently, were described as nationalistic or communal. At present, however, these objects and places are receiving growing appreciation by a much wider spectrum of global citizenry [44]. Perceptions of cultural heritage are ever-changing. Nowadays, they must be associated with the emerging concept of global cultural commons [45]. Certain items are of such enormous cultural value that all people hold a stake in them, either as a group or as individuals [46]. The new global-cultural commons is multicultural and supranational. It is affected to a large extent by mass media and global communications that are accessible to most people in the world. Hollywood blockbusters become successful all over the world. Sports stars like Leo Messi or Lebron James are recognized anywhere. There is an ongoing process of homogenization of culture and the creation of a global culture. It is facilitated by a rapid flow of information and the easy access to it.

Seen as a core ingredient of our cultural and social life, art has always played a main role. It is inherently associated to personal, group, and national identities. In *The Rise of the Network Society*, Manuel Castells explains that "in a world of global flows of wealth, power, and images, the search for identity... becomes the fundamental source of social meaning" [47]. This search for identity - either individual or group - is never independent from external forces. It is influenced by globalization and technological advancement. As the world becomes smaller, our search for identity is influenced more and more by factors from other places [48]. If art is indeed becoming global, then the Rembrandt

painting I mentioned earlier should not be seen as Dutch only. Through the processes described in this section, it has made its way into our hearts and minds. If we examine who holds a stake in that painting, that is, who will suffer some sort of damage if the painting is lost or destroyed and who cares about its condition, I believe it is not only the Dutch people. Similarly, the Mona Lisa, once considered a monumental piece of European art, has now become the most famous painting in the world. It has affected cultural trends globally. Moreover, some archeological sites, once considered of solely national significance are now cared for by the global community. Many people, most of them non-Egyptians, look at the Pyramids and see their common historical origin. International organizations, sponsored by many states, invest money and effort in the preservation of the Pyramids for the benefit of the global public.

Some UNESCO documents express a globalistic view of cultural property. On this view, the preservation of cultural property is "of great importance for all peoples of the world" [49] and it therefore follows that "damage to cultural property... means damage to the cultural heritage of all mankind" [50]. Implicitly, these documents assume a concern - on the owner's part - for the preservation of cultural property, as a form of collective good. Conceivably, these obligations are based on a "global perception of the objective intrinsic value of cultural heritage, which transcends any kind of 'private' owner" [51]. Such a relationship may be based on notions of globally shared responsibilities, care for present and future generations, and so on. The overall philosophical justification for a globalistic approach is based on the notion that everyone has an interest in the preservation and enjoyment of cultural property, wherever it may be, as part of the cultural heritage of humankind [52].

Supporters of the globalistic approach argue for greater international intervention for the protection of world heritage. This trend, of the growing recognition in the importance of the cultural heritage of all mankind may be associated with other notions I discuss in this section. Although it is beyond the scope of this paper, I would like to mention that many international law scholars have been arguing for greater intervention by the international community in cases of the destruction of cultural treasures [53]. Although there is no *per se* norm against the destruction of cultural property during peacetime, international law recognizes cultural property as having a distinct and greater importance [54]. Thus, it expects host states to protect their cultural resources in most circumstances [55]. Arguably, the erosion of sovereignty principles in the last decades has contributed to the development of such views [56]. There is some evidence that may suggest that a customary international law regarding the protection of world cultural heritage is emerging, especially in times of violent conflict. The idea of increased rights of intervention or states' duties to protect cultural heritage are both consistent with the underlying principle that cultural property is unique and should be preserved for the benefit of all peoples of the world [57].

By contrast, the nationalistic perspective, which is the focus of most legal literature, seems to recognize states as the rulers of the "sole and despotic dominion," [58] without questioning the nature of that entitlement. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ('UNESCO 1970') [59] addresses "illicit import, export and transfer of ownership" [60]. Therefore, the Convention assumes ownership in the traditional sense and creates limitations on the illegal or illicit transfer of it. Under the national approach, emphasis is given to "*national* culture" [61] and cultural heritage is seen as independent to each state [62]. Accordingly, states are empowered as the ultimate controllers of items of cultural property, and "the attribution of national character to objects" [63] is implied. By adopting a state-centric outlook, this approach rejects the notion of "the cultural heritage of all mankind" [64].

Responding to nationalistic claims, Appiah argues that globalization and the passage of time since the creation of most cultural objects had made it increasingly difficult to plausibly claim that an object 'belongs' to a specific people [65]. To demonstrate the validity of his claim, Appiah refers the reader to the case of the Nok sculptures, which are claimed by Nigerians to be part of their national patrimony. According to Appiah, the Nigerian nation is less than a century old, whereas the Nok sculptures are more than 2,000 years old. Therefore, the sculptures were created by peoples that no longer exist as a group and their descendants know nothing about. It is unknown whether the sculptures were commissioned by kings or created by a common man. Nor do we know if they had any religious meaning or were done in exchange to other commodities. The only thing we know for sure, says Appiah, is that they did not come from Nigeria [66]. In the deepest sense, articulates Appiah, the Nok artwork belongs to all of us [67]. Accordingly, cultural property in general should not be seen as a national issue. Rather, it is "an issue for *all* mankind" [68].

Existing literature has not fully considered the global approach and the national approach has not been seriously challenged or scrutinized. While cultural property is often conceived as part of "the cultural heritage of *all* mankind," international law has historically granted states a monopoly over how and when to invoke cultural property rights [69]. Although many may conceive cultural property as belonging to all humankind, mainstream positivistic international law supports the nationalistic approach. Most writers have emphasized the importance of cultural preservation in the context of nation-states or indigenous groups and have not addressed its global significance. Indeed, "outside the realm of indigenous groups' rights, the intranational dimension of cultural property law remains unfortunately undertheorized by academics and overlooked by practitioners" [70].

3. A Property Law Perspective

(a) *The Shortcomings of the Blackstonian Approach*

In the Anglo-American legal tradition, we tend to associate property with exclusivity, that is, the ability to exclude others from the object. William Blackstone described property as the "sole and despotic dominion which one man

claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" [71]. This notion, of the absolute rights of an owner to do whatever she wishes with her possessions has been influential in our jurisprudence for a long time [72]. Conventional perception of property law suggests that the owner enjoys an enormous degree of autonomy over the objects of ownership, in a way which enables her to exploit or even destroy the artifact [73].

When we imagine 'absolute' ownership, it is not always clear what it means. Indeed, "absolute is perhaps the most ambiguous word met in discussions of ownership" [74]. It may be used to deny the temporary character of an interest or to deny its defeasible character. Alternatively, absolute may be read as emphasizing that the ownership is beyond social control [75]. But, in many ways, ownership has never been truly absolute. It has always had a broader social aspect [76]. The significance of the social aspect of private ownership has varied, however, from age to age and from society to society. For instance, what is described as "sacred and inviolable" in the Declaration of the Rights of Man, has become in French law open to expropriation on grounds of public utility and subject to a general framework disallowing abuse [77].

The traditional view of the right to property is intimately linked to the paradigm of liberal individualism. An owner holds the right to exercise her property right however she wishes. It is part of her personal autonomy, identity, and ability to express herself. Since Demsetz [78], the majority of legal scholarship on property rights has concentrated on property as the right to exclude others from the object of ownership [79]. Under this property-as-exclusion approach, the owner may make all decisions regarding the resource, including entry, usage, destruction, and so on. But Demsetz also advances a more comprehensive conception of property. He argues that a proper interpretation of private ownership must take account of community preferences [80]. Some communities may have stricter rules governing private ownerships and societal preferences may change according to technology, volatility of related costs, opening of new markets, and so on [81].

Students of the economic analysis of the law, their views informed primarily by the work of Calabresi & Melamed, are generally sympathetic to the exclusionary framework [82]. They see the exclusionary framework, under which a monopoly of power over a certain object is granted to an owner, as extremely potent in the protection of ownership rights. The owner is firstly seen as a gatekeeper: She can protect her property interests from a "wide and indefinite class of uses" [83]. The right to exclude, presumably, signals others that the property is 'off limits' and helps the owner protect her private possessions. The right to exclude others from your property is a "rough but low-cost method of generating information that is easy for the rest of the world to understand" [84]. Calabresi & Melamed argued that the exclusivity model is mostly suitable when large transaction costs may incur. For instance, when there is a potentially large crowd of stakeholders or interested parties. Unlike other approaches, exclusivity is not ambiguous. It provides for a well-defined set of rules which ultimately leads to a reduction in transaction costs. Furthermore, the concentration of all property rights on the owner will make the owner internalize their costs and would result in economically-efficient usage of the resource, thereby promoting the general social welfare [85].

These archaic views of property fail to take into consideration social, historical, and cultural values. Let us examine the term cultural property itself. It is an oxymoron: Culture is a concept that pertains to group-oriented notions of value, preservation, heritage, and identity. Property, on the other hand, is a concept mostly premised on individualism and the exclusion of others [86]. Furthermore, culture is a dynamic, ever-changing concept. Cultural trends fluctuate; they are both influential and influenced simultaneously. Ownership, by contrast, is a fixed concept. It implies control, alienation, and "sole and despotic dominion" [87].

Under most legal regimes, the owner of an object of inestimable cultural value enjoys the independence to exploit, conceal, or destroy that object [88]. The greatest treasures of humankind may be privately owned, allowing their owners to treat the object however they choose [89]. It has been proposed that cultural property is "for most legal purposes, like other property" [90]. However, many objects that we classify as cultural property, while subjected to ordinary notions of ownership are important to our common agenda [91]. Works of art, objects of great scientific value, and documents of historical or literary interest, all offer the same impediments. Traditional views of private property cannot adequately accommodate public interests such as preservation, access, and authenticity [92]. At its core, the Blackstonian approach makes it hard to reconcile that private goods may serve a public need and that the public may hold a substantial interest in privately-owned objects. It is much easier to imagine property ownership as a dichotomy: An object is either privately or publicly owned. A shirt or a watch are both owned by the person who wears them. Some objects, like the beach, or the king's crown are likely to be publicly owned [93]. The law also recognizes objects that may not be owned or traded, such as human beings or body organs [94]. But cultural property does not necessarily fit into any of these categories. It is a different, most problematic, class of objects of property. As a result of the unique nature of cultural property on the one hand, and the outmoded conception of private property on the other, legal scholarship has failed to prevent the "imminent collision between theory and practice" and to reconcile these tensions [95].

In the world of William Blackstone, if the Louvre Museum in Paris were to sell the Mona Lisa, undoubtedly an object of great cultural value, the new owner would then be allowed to do as she wishes with it. The Blackstonian approach falls short because it does not prevent the destruction of such objects. The destruction of the painting, an entirely permissible activity under the traditional approach, represents the loss of ideas, knowledge, culture, and history. It is a tragic loss. One author suggests that a painting being destroyed is "in its way, as the biography of a person who ends up murdered" [96]. Equally, the owner may hide it in her basement as long as she fancies, thus denying the general public from enjoying the painting and being inspired by it. Imagine now that instead of an object of fine art,

she purchases the remains of a species of dinosaurs, discovered recently under somebody's property. Normally, the market would regulate itself and the owner would be incentivized to sell the bones to a museum or a research institution. But, what if she sells it to an eccentric billionaire who chooses to exhibit the remains in his guestroom? What if there are severe information gaps that prevent the creation of an efficient market? Or perhaps, she is economically irrational? Consider the next real life example: In 1990, Maurice Williams of South Dakota found the remains of a *Tyrannosaurus rex* at his ranch [97]. He sold the remains to a private body for USD 5,000. Later in time, a claim was brought regarding the validity of the contract. Among other things, the Court held that the dinosaur (now known as "Sue") was indeed part of Williams' land and is to be considered his property [98]. As such, Williams may destroy it, sell it, or deny access to it to scientists or members of the general public wishing to observe it. Potentially, this could have resulted in a great scientific loss. Luckily, in 1995, Williams sold Sue to Sotheby's, who offered it for auction. With the help of several corporations (including Walt Disney and McDonald's) and the California State University system, the Field Museum in Chicago was able to purchase the remains. Another possible example is the unpublished manuscript of Albert Einstein, in which he elaborates on his Special Theory of Relativity, accompanied by his handwritten notes. Although it was the basis for Einstein's General Theory of Relativity, the manuscript has never been made available to the public [99]. It was discovered in 1987 and subsequently sold to an anonymous buyer at an auction [100]. The new owner then kept it out of the public reach until 1996 when it was put up for sale again [101]. Perhaps the most infamous occurrence is the one involving Eugene Dubois and his discovery in 1892 of the first fossil remains of the *Homo Erectus* [102]. Dubois' findings, despite being highly controversial at the time, are now acknowledged as highly significant to scientific research. Reacting to scholarly criticism of his work, Dubois locked the remains away in a vault of nearly a quarter of a century [103]. It was only in the 1920s, after enormous public pressure and following the involvement of the Dutch Parliament, when he allowed others to view and analyze the fossils [104]. In addition, the private ownership of cultural property may be used for individual forms of censorship. By destroying an object or hiding it, the owner may express its discontent with it. Such actions may affect collective memories, shape the national narrative, and so on. Excluding the artifact from the public eye may lead to its exclusion (and the exclusion of what it stands for) from history and society [105]. Many great objects of enormous public value have been hidden away for decades [106]. Indeed, in some cases inaccessibility may be a more acute problem than destruction as it is more widespread.

Furthermore, unlike ordinary property, cultural property is non-renewable and non-substitutable. If Mark Zuckerberg, founder of Facebook, were to shutdown the website, his action would impose negative externalities on all Facebook members. However, another entrepreneur may launch a similar social network that would offer the same services and serve the same purposes and the same clientele. Similarly, a shirt that is destroyed can be substituted by another shirt. The enjoyment from one shirt is presumed to be comparable to the enjoyment from another shirt. The destruction of the shirt by its owner is not likely to create any negative externalities. It is only the owner that would suffer from its loss. Rembrandt's painting, on the other hand, cannot be substituted or renewed. It is unique. No one can recreate the painting. Reproductions may exist, although in my view, they are not a proper substitute. There is something dishonest about reproductions, in a way that makes them lose their cultural meaning. It is almost as if we are being told a lie and are expected to believe it even though we know it is a lie. A more extreme example than Rembrandt's painting are archeological sites. If destroyed, the Great Wall in China (just like many other archeological or historical sites) cannot be restructured, reproduced, or substituted.

Additionally, the Blackstonian approach does not adequately take into account the interests of third parties and past and future generations. The notion that the general public holds a stake in certain objects has worked its way into our consciousness. Cultural property items are a critical ingredient in the construction of group identities. They are often associated with notions of grouphood and peoplehood. Recognizing that peoples have intrinsic rights to exist, develop, engage in a cross-generational dialogue, and create, these rights are often connected to the preservation of their cultural heritage and their ability to enjoy it [107]. The Blackstonian approach is not supportive of these trends. For a full and fulfilling community life, people need to be exposed to their history, traditions, customs, and culture [108]. This can only be achieved through the preservation of cultural property objects and through allowing access. If the Egyptian government were to destroy the Pyramids, we would all cry for that loss. Global citizens would all feel like a part of their collective culture, the cultural heritage of humankind, is now lost forever. That feeling, presumably amplified, would be shared by other individuals, members of the relevant cultural group (or groups). Our ancestors are also stakeholders in this dispute. Rembrandt created his paintings to be enjoyed by the public. Over time, they have become classics. When the Romans built the Coliseum they hoped it would last for many years, not to be taken down by a real-estate entrepreneur. The destruction of any of those monuments would harm past generations and would terminate our ongoing conversation with them. Future generations are also potentially harmed by the destruction. Their ability to enjoy the object, experience it the same way we did and to be influenced and inspired by it is lost. The destruction of an item of cultural value carries enormous negative externalities.

Thus far in this Section, I demonstrated how cultural property challenges many of the assumptions made regarding private property and goes beyond traditional legal concepts of market, entitlement, ownership and alienability. My main point was that in the cultural property case, the Blackstonian approach is insufficient, inadequate, and goes against desirable social goals. Eric Posner argues the opposite. By and large, he suggests that that *more* property is required in order to promote cultural preservation [109]. For Posner, property rights are required in order to protect individual rights and safeguard valuable resources from depletion [110]. Cultural property, he contends, is just another form of property, thus not entitled to unique legal treatment [111]. In his view, the free-market based exchange of goods should not be influenced by cultural consideration. It is the market, not the law, that should attach any additional values to objects of cultural significance. Moreover, providing a cultural property status to objects is a difficult task for the law. The market, on the other hand, would regulate itself. Objects of great cultural

value are likely to be of according monetary value. By allowing the market to regulate itself, the law would not need to make decisions that may seem arbitrary on the one hand, or entirely subjective on the other. At the most fundamental level, cultural property is only valuable to society to the extent that people care about it and are willing to pay in order to enjoy, consume, or preserve it [112]. Therefore, cultural property is no different to other forms of valuable resources. Posner concludes by suggesting that since cultural property is no different to other forms of property (and it is doubted that the category even exists), then there is no reason that the law should offer special legal protections to it [113]. In support of such claims, law and economics scholars typically point to the art market. It is true, they say, that some works of art end up in private hands. But the most valuable ones end up in museums or collections that are open to the public. If the market functions efficiently with respect to highly valuable art, it seems logical that it would operate similarly with respect to cultural property [114]. The main critique on these views is that a purely market-based approach fails to take into account social and public values, as well as the possibility of market failures [115]. Moreover, Posner's perspective is premised on the rationality and knowledge of owners. While one may assume that owners of objects of great value would treat them appropriately, it is unfortunately not always the case [116]. History of humankind is full of incidents of irrational or mistaken actions taken by owners of artifacts of great significance.

(b) Property as a Social Institution

By contrast to the Blackstonian approach, there exists a stream in legal thinking that sees property as a social institution: Property law is described as a balancing of different interests, involving "a complex bundle of relations" [117] between owners, objects of ownership, and third parties [118]. This approach implies a progressive conception of property, one that incorporates owners' obligations with notions of social responsibility and equality [119]. More than a mere bundle of rights, property law is presumed to create implied covenants of responsibility and commitment among owners and others who live, work, or study with the owner, or can potentially be somehow affected by her exercise of property rights [120]. Accordingly, designing a property regime is a choice which every society makes for itself and may vary between societies. Different rules may apply to different objects of ownership, depending on their characteristics, social importance, scarcity, renewability, and substitutability. The exclusionary rule is seen as only *one* aspect of *one* familiar property scheme [121]. A rule suggesting that the owner must not use his property in a way that affects the wellbeing of his peers (e.g., nuisance) or the rule that he must allow access to others if his property is adjacent to where a public good is situated (e.g., if your land is adjacent to a public beach) are *other* aspects of property law [122]. A property regime allocates resources and determines their usage by designing rules that best manifest societal values. Privileging certain interests (e.g., preservation) over others (e.g., personal autonomy or individualism) is an inevitable part of a property regime, and I propose that a cultural property regime should adopt cultural preservation (*i.e.*, the non-destruction of certain items) as its governing principle. Once such framework principles are agreed, they will influence the design of the property regime in terms of restrictions on ownership as well as the legal duties and obligations which should attach to items of cultural property.

Under the social institution approach, property law is described as "a set of institutions, each of which is constituted by a particular configuration of rights" [123]. The composition of rights and duties that constitute each of these legal institutions is determined (or at least should be determined) by the institution's individual character and its normative commitments [124]. In both law and life, various property institutions exist. Let us examine cultural property as a possible property institution, while remembering Demsetz's claim that one of the primary functions of property law is to create incentives to achieve a greater internalization of externalities [125]. Given the unique nature of cultural property, every action committed by an owner of such object would have potentially enormous externalities because of its social interdependencies. Cultural property, I propose, is another set of property-based relationships that should be constructed differently. The unique nature of the objects, as well as its convoluted web of stakeholders' relationships, dictate a dissimilar legal treatment. This is not to say that the idea of private property should be categorically rejected in the context of cultural property. Rather, I suggest that different legal rules should govern this ownership. Mainly, the right to destroy should be disassociated from the bundle of rights. It would be a mistake to think that a desirable cultural property regime does not recognize private ownership; it just assumes a different kind of private ownership, one which entails special legal rules. This suggestion is not out of the question, considering that "existing property institutions are constantly evolving, and new institutions are added (while others are dropped)" [126].

Theories of property that do not consider notions of social responsibility and social welfare are seen by many as unjust. Market failures, as well as the physical or other characteristics of some objects, may require curtailing an owner's property right so that the ownership can properly serve the public interest [127]. Moreover, even the most individualistic justifications for private property - individual liberty and personhood - typically associated with private ownership and control over resources imply some social considerations [128]. From a moral point of view, neither of these values (liberty and personhood) can justify an exclusionary framework, as long as the law does not guarantee the availability of "necessary - as well as constitutive - resources" to non-owners [129]. The social institution approach is also consistent with the most appealing conceptions of membership and citizenship [130]. An absolutistic conception of property reinforces a society of alienated individuals, in a culture that "underplays the significance of belonging to a community, [and] perceives our membership therein in purely instrumental terms" [131]. Therefore, a "responsible conception of property" should appreciate the virtue of market norms and free market transactions, but should not allow such norms to override other societal aspects [132]. Accordingly, property relationships should be seen as a series cooperative human interactions rather than a set of exclusionary individualistic regimes. Not acknowledging the social aspects of private ownership would "undermine both the freedom-enhancing pluralism and

the individually-enhancing multiplicity that is crucial to the liberal idea of justice" [133].

As I state earlier in this paper, there is often a misconception regarding the absoluteness of private ownership. Historically, private ownership has never been fully (or truly) unlimited and unqualified. Incidents in which prohibitions or limitations were imposed on ownership include harmful uses (such as nuisance in torts), while uses that were beneficial to society as a whole were allowed despite possible property breaches (e.g., the fair use doctrine in intellectual property or the expropriation of property by public authorities) [134]. Although social aspects of ownership have always been there, emphasis given to them has varied from time to time and between different societies. In Rome, temples were often found on private lands. The landowners in those cases bore a duty of care and were committed to the preservation and protection of those buildings [135]. In the Middle Ages, owners of houses built against city walls carried a duty to make sure their houses are maintained and taken care of, as they supported the walls. The duty was framed as an obligation owed by the property owner to the public [136]. In Colonial America, legislation sometimes demanded a publicly-beneficial use of the property from the owner [137]. Later, in the 19th century, property rights in some forms of businesses were restricted based on the affect of those businesses on the public interest [138]. In French law, property may be expropriated based on public utility. It may also be subject to the general doctrine prohibiting abuse of ownership [139]. German Basic Law (*Grundgesetz*), Article 14(2) provides that "property entails obligations. Its use shall serve the public good" [140]. Dagan explains that the German understanding of property is derived from a German conception of human dignity as the most fundamental principle in the German Constitution [141]. As opposed to the Anglo-American property-as-exclusion approach, the German Constitution wishes "not to create a zone of security" but "to make it possible for individuals to realize their own human potential" [142]. This reading of private property allows German law to reconcile ideas of individual liberty on the one hand and social welfare on the other, while promoting the idea of social responsibility [143]. The German Constitutional Court has adopted a purposive and contextual approach to the protection of property rights [144]. It recognized that property law has multiple purposes, and that those different purposes ultimately serve different private or communal interests [145]. Accordingly, the level of constitutional protection provided to an owner's rights depends on the nature of the object and its function, as well as the property interests that are at stake. A purely economical interest, for instance, will receive a weak protection, while interests that are related to the owner's dignity, his ability to self-govern the object, and self-realization will receive stronger protections [146]. The "sliding scale approach" [147] which is used to assess "the social obligation and the social function of property" [148] is seen by Dagan as socially desirable. Instead of a unified, obsolete, and possibly misleading conceptualism, the German Court employs a "realistic methodology of contextual normative analysis," which also takes account of the heterogeneity of types of property [149]. Finally, Socialism once offered a revised view of the relations between society, the State, and private ownership. The owner's rights over the object and her powers to exercise those rights were curtailed to varying degrees in favor of the social interest. The law stipulated that for the productive use of property and in the interest of health, comfort, and the general public good, many uses are disallowed and some objects may never be privately-owned [150]. In some cases, not only that the owner was prohibited from using his property in negative ways, he was obligated to use it efficiently and positively [151].

(c) Property, Community, and Grouphood

As I explain in Part II(a)(ii), Cultural property is often associated with groups' rights to self-determination and their existence, cultural flourishing, and perpetuation. Viewing cultural property as pertaining to grouphood may redefine our understating of the private ownership of cultural property artifacts. A new, alternative model of private property is thus required in order to deal with such claims. Varying societal goals such may be obtained through the preservation of certain objects. A property regime that sets cultural preservation as an underlying principle promotes these goals and the overall values they underscore. In order to support notions of grouphood or peoplehood, a cultural property legal regime must be seen as a unique legal institution. Not only because of the objects in question, but also because it may support, create, or destroy groups and communities. If we acknowledge that cultural property may bring special meaning to the constitution of grouphood, then special protections or restrictions should apply [152]. A restraint on the ability to destroy, which I discuss later in this paper, may be one such restriction. I wish to stress, however, that the grouphood/peoplehood argument is only one possible justification for the different legal treatment of cultural property. In other places in this paper, I argue that cultural property has additional values, independent to any group association. Further, cultural preservation is important even for objects that do not belong to any specific group, but carry a global significance. Alternatively, objects may assume such meaning with time.

In her most famous paper, Margaret Jane Radin links private property and personhood [153]. Radin argues that because some property expresses individual personhood, it is non-fungible and therefore, deserves a higher level of protection [154]. Radin rejected the idea that all property may be assessed in monetary terms, and that the destruction of an object may always be remedied with money. Further, Radin challenged the prevailing conceptions of private property as undisputedly "commensurable," "commodifiable," and "alienable" [155]. Ultimately, she puts forward the claim that since some objects of property are conducive to personhood, they require special consideration and should receive special protection by the law.

Taking Radin's work one step further, I wish to suggest an analogy. If we accept Radin's analysis of private property as constituting and critical to personhood, then an analogous claim can be made with respect to cultural property. Cultural property is for groups what chattel - under Radin's conception - is for individuals. It constitutes group identities and is critical for their existence, in a way similar to the relationship between private property and individual identities [156]. Private property assists personhood in the sense that it promotes self-development. With

respect to some objects of ownership, it can be said that without them, the owner would be a different person or would not be able to express himself in the same way. A good example may be a wedding ring. For a married person, the ring is more than just its weight in silver. It represents a bond with his or her spouse. It is a reminder of the covenant between them, entered to on their wedding day. Even an identical ring would not be able to replace the emotional value and the memories attached to the original ring. Also, the ring communicates to the world their marital status, which they consider part of their identity - part of who they are. Similarly, I believe cultural property assists groups in building, forming, expressing, and presenting group identities. Once an item is considered as having great cultural value, it may automatically assume a role in linking group identities or creating them. It may also shape or reflect such identities. The identity of peoples may be inextricably connected to an object [157]. Take the Coliseum in Rome, for instance. It is important for the people of Italy in forming their cultural, historical, and national group identity. It serves as a constant connection between modern Italy and its historical ancestor - the great Roman Empire. For Italians, the Coliseum not only provides a connection with past generations, it is also a reminder of their prominent legacy. Worldwide, it is considered an iconic image of the Roman empire, as well as present day Rome and Italy. For Roman-Catholics, the site carries an additional meaning: Every year on Good Friday, the Pope begins a procession in a site adjacent to the Coliseum. Clearly, if the site were destroyed, the loss to the world - and not only Italy - would be great. In the sense of grouphood though, the Italians, or the Roman-Catholics, might suffer more, as it is a more integral part of their group identity. In a similar vein, the Dead Sea Scrolls embody a deep grouphood meaning for many Jews worldwide. Often described as one of the greatest archeological discoveries of the 20th century, the Scrolls are perhaps the most reliable evidence of life, culture, and society in ancient times in the territory that is today Israel. The Scrolls are dated between 3rd century BCE and 1st century CE, and they contain parts of the Jewish Bible, including additional parts that were omitted from it. They provide valuable insights to life in those times, the destruction of the Holy Temple, and the inception of Christianity. Decades ago, the Scrolls were extremely significant in the creation of a sense of common history and group identity for the people of Israel and contributed to the creation of an early-days Israeli nationalistic narrative. The Western Wall in Jerusalem is another good example. For Jews all over the world, the Wall serves as a common grounds, a connector between Jewish communities all over the world, their history, and their origin. Further, as the Wall is the only remaining piece of the Holy Temple, it continues to serve a religious purpose and provides a context to Judaism and Judaic worship even today. In 1967, after the occupation of East Jerusalem from Jordan, the Wall received a contemporary-nationalistic meaning, which for many is now the prevailing view. Whatever the significance of the Wall may be (national, religious, historical, or cultural), it is seen by both Israelis and non-Israelis as an extremely important landmark, linked to both Israeli and Jewish definitions of grouphood. Imagine now that the Scrolls and the Wall were both destroyed. The possible implications are beyond conception. How would history, or modern Israel, Judaism, and Jewry look without these objects?

(d) Alternative Approaches

(i) Stewardship

If we consider the exclusionary approach as the most absolute form of ownership, then with respect to cultural property, the other side of the private ownership spectrum may be to suggest that a stewardship relationship exists between the holder of cultural property and humankind. Accordingly, every decision she makes should be done to the benefit of the group. A stewardship model of cultural property would view the holder, as well as all interested parties (members of the relevant group or groups) as equal parts stakeholders in the collective enterprise. The control of the object is thus seen as pluralistic rather than individualistic. This pluralism of interest and right holders is strongly connected to the notions of grouphood and group identities: Each member of the relevant group (or groups) has a share, or an interest, in the object [158]. By contrast to the exclusionary approach, which emphasizes ownership, title, and control, the stewardship approach focuses on "custody" and "trusteeship" [159]. This unusual structure of ownership and control has been described as "multiple levels of interactivity" which may include "overlapping and sometimes opposing obligations, rights, and duties regarding fiduciaries and beneficiaries at different points along the cultural property spectrum" [160].

Notions of stewardship are especially prominent in the environmental sphere, where they are considered as part of the foundational ethos of the environmental movement [161]. In that context, stewardship is associated with conservation and sustainability. It requires individuals to use natural resources in such a way that would protect the environment from degradation and would maintain the quality of those resources [162]. The underlying social goals are concern for future generations, as well as all fellow inhabitants of the earth. Similar arguments can be made with respect to cultural property. Just like most natural resources, it is non-renewable and non-substitutable. One might even argue that the Great Barrier Reef or the Egyptian Pyramids are global commons in the same sense as the air or the high seas are. We all hold a stake in their preservation and we would all suffer from their destruction. It makes sense then to employ the same theoretical and analytical frameworks that we use in environmental law to cultural property law. In cases like cultural property, of multiple stakeholders and a big number of potential users and beneficiaries, it may be easy to imagine it as a "web of interests," rather than the traditional bundle of rights [163]. In the cultural property case, it is easy to see how this web is immensely thick and complex: There are many interconnections between persons, peoples, and objects. Interest groups may include owners of cultural property, artists, past and future generations, states, global civil society, the art market, and finally the artwork (or other items of cultural significance) itself. To seriously consider the stewardship/ web approaches, we would need to analyze each cultural object's nature, its characteristics, whose interests are at stake and which interest, and the nature of the non-owners' relationship to the object [164]. The stewardship approach to cultural property would likely

prove to be costly, inefficient, and inapplicable. Additionally, I believe it goes against fundamental values of our legal system, typically associated with liberal notions of property, in an excessive way.

(ii) Property as Governance/ Management

In this section I discuss the property-as-governance approach, which lies in the middle between the Blackstonian approach and the stewardship approach. For me, it is an adequate and proper compromise between competing interests and rights. Under traditional views, the right to manage, that is "the right to decide how and by whom the thing owned shall be used" [165], is typically considered as the most important aspect of private ownership. It is seen by many as the core and essence of property rights. Management includes powers of licensing acts which would otherwise be unlawful and the power of contracting with respect to the object of ownership. As such, a 'manager' may permit others to use his object, enter his land, define the limits of such permission, and enter contracts in regard to the exploitation of the object of ownership [166]. Honoré demonstrates the right to manage through a deck chair. An owner may do more than just sit on his chair. He may "validly license others to sit in it, lend it, impose conditions on the borrower, direct how it is to be painted or cleaned, contract for it to be mended in a particular way" [167]. Denying the Blackstonian conception of property, Smith suggests another approach which he calls governance [168]. Rules of governance isolate certain activities and allow or prohibit them [169]. They define proper and improper uses based on the identity of the object or the owner, social desirability of the activities, public policy considerations, individual rights, and so on [170]. Because such an approach imposes higher transactional and informational costs, it might be more suitable for small groups, specific activities, or only certain classes of objects [171]. Precision can be obtained by "focusing on proxies that measure ever smaller classes of uses, but at greater cost." [172].

Considering that property is at the end of the day a social institution, and given the unique nature of cultural property, I believe that the governance approach is most suitable for cultural property. It seems to me that such an approach would be a fair compromise between liberal ideas, such as personal autonomy and individualism, and notions of social responsibility, stewardship, and community and grouphood [173]. Analyzed through the classic exclusionary framework of owners' rights, this suggestion may understandably seem intimidating. On one end of the spectrum, scholars who view culture as a collaborative work would be appalled by this. The mere idea of private ownership of cultural property is horrific to them. How can you allow a single individual to own, like JP Morgan once aspired to, an entire nation's patrimony? My response to that is twofold. First, under current law, that is already permissible. My suggestion is not revolutionary in that sense. If any, it *takes away* from an owner's rights of ownership and does not add to them. My suggestion serves to limit the owner's bundle of rights rather than to enhance it. Therefore, advocates of this collaborative-communal approach should see it as a step in the right direction. Second, in the cultural property discourse, it is widely acknowledged that the most important concern is preservation. Accordingly, it is preservation that I intend to reckon with in this paper. In my view, the governance approach, complemented by the designation of destruction as an improper use, is the most appropriate way to regulate such activity. Conceivably, communal ownership may be more appropriate for other purposes. But these are other questions that I do not attempt to deal with here. If the question is narrowed to destruction only, then it is easier to see the merits of the governance approach. On the other end of the spectrum, students of the economic analysis of the law may argue that we should let the market regulate itself. After all, there is a reason that these artifacts are sold for high prices and usually end up in museums, universities, or collections. To them, that demonstrates the ability of the market to regulate itself efficiently. I have tried to deal with some of those arguments in section III(a) above. But there is one more thing I wish to say. There is something troubling - from a philosophical perspective - about this method of analysis. To me, it reduces the conversation and avoids dealing with the more profound and fundamental questions regarding cultural property. Another line of argumentation can be from the liberal-individualistic camp. Restrictions on the right of property are often suspect of going against our most fundamental legal-social institutions. The claim is that they infringe on individual autonomy, free speech, and so on. My response is once again twofold. First, it happens all the time. When you drive a car, your ability to exercise your property right is limited. You may not go above a certain speed or go against the traffic. These limitations are justified because they are meant to protect the public, establish public order, and ensure the public's health and safety. Other instances in which the right to property is limited based on public policy considerations include many zoning and planning regulations, the common law tort of nuisance, and the fair use exception in intellectual property. Second, examined independently, such restrictions are justified compromise in the case of cultural property. It is a proper balance between liberal notions of private ownership on the one hand, and the public interest and the greater social good on the other. Further, the suggested cultural property regime encompasses a very narrow group of objects and would not have general applicability. Only a small number of objects and owners would be affected. Juxtapose this with the potential contribution to the general welfare. The answer seems obvious: Where only a small number of right-holders would be hurt and to a very small extent, while the public good would increase immensely, the sliding scale should tip toward the public, rather than the individual.

All in, I believe that applying the governance approach to cultural property strikes the right balance between the different values and interests. Jeremy Waldron identifies several possible normative frameworks for the creation of a regulatory regime [174]. Generally, we should consider all interests, or at least all interests that may conceivably be affected by the regime. But as Waldron rightly points out, often certain interests are favored over others. Building on Waldron's analysis, I believe that the governance approach is the most suitable for cultural property. Its application to cultural property will be consistent with at least two of Waldron's justifications (first and third) [175]. The governance approach takes into consideration multiple classes of stakeholders and balances competing rights. To

begin with, the approach will serve to increase the public good. For reasons already mentioned, cultural property's existence is extremely beneficial, as well as critical, to all people of the world. It serves many public purposes and promotes worthy social values. Second, it sets preservation as its main *telos* and focuses on its promotion. Other (secondary) *telos*'s, that are beyond the scope of this paper, may be contextualization, authenticity, and access. If preservation is indeed the main *telos*, then the right to destroy - antonymous to preservation - must be designated as an improper use of the object.

4. Taking Away the Right to Destroy

Destruction, according to one definition "occurs when an owner's acts or omissions eliminate the value of all otherwise valuable future interest in a durable thing" [176]. Unlike the transfer of ownership, destruction prevents everyone from ever using the object in a valuable or meaningful way. The right to destroy - sometimes referred to as the right to waste - was developed under an absolute conception of private property [177]. In an agrarian community, the right was perceived as both necessary and non-problematic [178]. By disposing of your old crops you made room for new ones. Destroying an old house made room for the construction of a new one.

The right to destroy (*jus abutendi*) is part of the property-as-exclusion framework. When the idea of private property first emerged giving the owner full control over the object, including the *jus abutendi*, was seen as an essential part of that structure. Early on in Western political thinking, Aristotle recognized that private property was needed in order to ensure that property would be cared for or at the very least not wasted or destroyed. Likewise, in Rome, the owner's ability to destroy his property was considered an important part of ownership [179]. The Romans described property rights as *jus utendi fuendi abutendi*: The rights to use the object and all income generated by it or to completely consume and destroy it [180]. Moreover, the Roman approach included the *jus utendi et abutendi*, that is the right to use or misuse the property without any interference [181]. In England, William Blackstone understood the English common law of property as enabling the owner to burn his house, so long as the fire does not threaten other people's property [182]. In his writing, Blackstone quite clearly iterated that the law of property has shifted from diverse and time-limited interests in the Middle Ages to absolutistic notions of ownership [183]. In a similar manner, early American courts adopted the idea of *jus abutendi* and incorporated it into their property law jurisprudence. The courts viewed the right to destroy as the most extreme form of property rights imaginable. They assumed that an owner has the right to destroy, and as such, she will surely have the right to dispose of her property in less dramatic manners [184].

Allowing owners to destroy their property may promote important social values, such as personal autonomy, expressive interests, and creativity. Destruction may be at times part of the owner's autonomy and her way to express herself. On the other hand, destruction can also be free speech suppression if the intention is to deny or prevent the communicating of a political message. Burning a monument because you disagree with what it stands for is one such instance. Lastly, destruction could be related to the right to privacy, when it comes to the destruction of letters, personal journals, or other documents and objects that are seen as personal, private, or confidential. In addition, the right to destroy may in some cases be economically efficient [185]. It seems plausible to assume that the owner is normally in the best position to determine how to handle her subject of ownership. If the costs of preserving and maintaining an object are great and it has no contribution to social welfare, then disposing of it would be a logical, rational thing to do. More importantly, if the owner believes that such preservation and maintenance are of no benefit to her, destroying the object would once again seem like the logical, rational thing to do. Also, destruction may be done for the purpose of making room for newer, better, more beneficial objects. Clearly, we can imagine some cases in which destruction should not only be permitted, it should be seen as a socially desirable activity. Disallowing destruction in such instances would impose significant costs on owners each time they wish to dispose of the object of ownership [186]. Instead of disposing of it, they would have to worry about its preservation or possibly seek alternative solutions. Moreover, monitoring and prevention costs (to enforce the non-destruction rule) may be quite significant. If we accept the assumption that allowing destruction, by and large, often makes sense from an economic point of view, then the flip side of that would be to say that disallowing it would entail such liabilities and duties on owners that no one would want to own property or that alternatively, the general welfare would diminish.

Accordingly, it may be argued that if we apply the rule of non-destruction to cultural property, not only that cultural preservation will not be promoted, it would actually be jeopardized. But this analysis does not consider the unusual negative externalities of cultural property destruction. If we accept that cultural property is different (for reasons mentioned earlier), then its destruction will pose significant negative externalities on third parties (present, past, and future). Furthermore, in an efficient market, the price of the cultural object is likely to reflect those limitations. An informed buyer would pay the worth of the painting while knowing that she will never be allowed to destroy it. The painting's price would be diminished based on that, to the extent that the non-destruction may be a potential liability. It would reflect the owner's relatively qualified ownership. Also, if one were to knowingly and voluntarily enter a contract, then arguably, limitations on property that were known at the time of the purchase will not be seen as countering personal autonomy. For example, many people buy cars, knowing they will not be able to make certain modifications to them or drive beyond the allowed speed limit. Others may purchase buildings-for-preservation knowing they will not be able under zoning and planning regulations to make changes to the physical appearance of the building.

Despite the predominant absolute conception of property ownership, nearly all societies and legal systems recognize some groups of objects which will be subject to different standards [187]. Such limitations may include the

prohibition on selling, leaving by will, endurance beyond the lifetime of the creator or the original owner, or forbidden uses (some or all uses) [188]. In those situations in which the law curtails the owner's right to destroy her property, waste avoidance has been the primary justification for doing so [189]. The argument is typically made that general welfare is decreased when valuable resources are eradicated [190]. Concerns about wasting valuable resources or the inefficient usage of them is by far the most popular justification in favor of restricting the owner's ability to destroy her property [191]. Alternatively, the argument is presented as trying to minimize negative externalities that are often a possible implication of the destruction of property [192]. Interestingly, John Locke, a champion of private property by himself, is often cited as an oppositionist to the absolute right to destroy. That is Locke's 'spoilage' proviso [193]. Locke's *Second Treatise of Government* is sometimes read as challenging the existence of the right to destroy. Locke wrote:

"As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy" [194].

Locke emphasized that any use of personal property should be made to the advantage of life. The acquisition of property is only desirable as long as others are not harmed by it. Also, the last sentence in the Proviso clearly states that Locke viewed the destruction of some property as an impermissible activity. Furthermore, under another Lockean proviso, it can be said that private ownership of some objects of cultural property should be disallowed entirely, or at least limited. Locke suggested that private ownership would sustain if, and only, "there was still enough and as good left" [195]. The majority of Locke's interpreters agree that the enough and as good clause is meant to be a restriction on acquisition [196]. In the cultural property context, a plausible argument could be made that consistent with the Lockean framework, the right to destroy, or perhaps the idea of absolute ownership entirely, is unfitting. For a Rembrandt painting, once owned by an individual, does not leave "enough and as good" for others. Each object of cultural property is unique and invaluable and its appropriation from society by an individual owner harms all others.

When you purchase a new car, you do it knowing you will be able to dispose of it in the future. Otherwise, no one would ever buy new cars or their value would be reduced. Cultural property is different. When you purchase a Rembrandt, you do so with the intention of keeping it or selling it. Rational people do not generally buy high art intending to one day dispose of it. Also, when you dispose of an old car, its parts may be used in other ways. Other car owners may benefit from it. Further, it vacates the physical space that may now be used by another car. The purchase of a new car is generally seen as beneficial to society. Not only that it is economically desirable, the new car would probably be safer, energy-efficient, and would impose a lesser risk on third parties. The same cannot be said for cultural property. Its destruction does not make room for new cultural property and it cannot be dismantled and reused in other creations. When Ford manufactures a car, it manufactures many cars that are 100% identical to each other. If one of them is destroyed in an accident, the owner may purchase a new one, completely identical (to the extent that she did not develop any emotional connections to the vehicle). Even if Ford has stopped manufacturing that model, the old owner may purchase another car that would basically serve the same purposes and answer the same needs. However, cultural property is unique. It is a non-renewable and non-substitutable resource.

Moreover, the right to destroy can be examined from the creator's perspective (and not only that of the owner). Disallowing authors to destroy their work may have a chilling effect on authorship. A legal regime that requires the preservation of all written work, for instance, may have less works created than one that requires preservation for a limited time only (e.g., the life of the author) [197]. Protecting authors' rights to destroy would presumably incentivize creation: Authors would not be worried about the possible implications of their work if it is unsuccessful in their view for any reason [198]. An artist unhappy with his work or worried about the reputational or other damages it may cause him will be able to destroy it. In the past, many artists have destroyed their works because they were unhappy with the outcome or worried about their reputation. From the artist's perspective, this serves an economic interest: A bad work may harm his reputation, thus decreasing the value of all other work. A legal regime that allows creators to destroy their work during their lifetime or order that destruction in their will is also consistent with notions of personal autonomy and freedom of expression. It is the artist's individual autonomy and his desire to express himself that drive him toward destruction. Through the destruction of his work, the artist may be communicating a message to the public regarding the nature or the quality of his work, or perhaps about himself as an artist.

From an economic point of view, it is generally assumed that an artist is the best judge of his work and is in the best position to determine which of his works should be removed from his repertoire [199]. The artist in this case, being fully informed, is trying to maintain the value of his other works by destroying one that he views as being of inferior quality [200]. This set of assumptions may be true for the general case, but particular cases in history tell us differently. Many artists only received fame after their death (Van Gogh is one example). Furthermore, some of the finest works in existence today were intended to be destroyed by their creators and were saved at the last minute, sometimes against the author's wishes. Here, a telling example would be Franz Kafka's work and Max Brod's refusal to destroy them. Famous author Franz Kafka died in 1924. In his will, he appointed Max Brod as administrator of his estate, which included many unpublished letters and manuscripts. Despite Kafka's wishes, Brod did not incinerate the writings. In coming years, Brod promoted the publications of Kafka's work, including Kafka's most celebrated pieces: *The Trial*, *The Castle*, and *Amerika*. In this paragraph I have provided possible reasons both for allowing and prohibiting artists from destroying their work. But this does not have to be a binary choice. A possible middle ground could be to allow the destruction of objects by their creators when that property has not been published, publicized,

displayed at a public space, or gained public appreciation [201]. Admittedly, even under this compromise-approach, the works of Kafka, and others, would not have been saved.

Greatness may sometimes only be measured by its long-term impact. Many artists, authors, and also scientists only received recognition after their death. Henry David Thoreau, Emily Dickinson, and Galileo Galilei are a few noteworthy examples. Because history and future generations are often the best judges of the quality of an artwork or the cultural significance of an artifact, preservation is of critical importance. 500 years after Shakespeare's death, his plays are still read by millions every year. People throughout the world adore Michelangelo's work, even though the artist himself died in 1564. The Egyptian Pharaohs ordered the construction of the Pyramids thousands of years ago. That is exactly their secret: The lasting impact of the Pharaohs and that time in history can be measured now, from the distance of the years, by listening to the historical story told to us through the Pyramids and their contents. This story is being told not only in Egypt, but also in museums in New York, London, Cairo, and Tokyo [202].

The physical preservation of cultural property is important for our understanding of the object and our appreciation of it. Without it, all the values inherent to cultural property and embodied in such objects would be negated. Further, physical preservation is perhaps the only thing that can guarantee or facilitate the existence of all other values that cultural property represents. Concededly, preservation is a necessary, albeit not independently sufficient, condition. Other conditions, like access, contextualization and authenticity, are also necessary in order to promote values and interests linked with cultural property. Nonetheless, I maintain that physical preservation is more consequential because it is only the physical integrity of the object that would allow other values and interests. Without it, all is lost. If the object were destroyed, it would have no context. Possibly, other objects would lose context as well: Some artifacts are meant to be appreciated as a group, part of a collection, or as they are adjacent to other objects of cultural value. Sometimes objects make sense only when viewed next to each other or in reference to another object with similar characteristics, from a similar era or created by the same artist. Additionally, authenticity can in most cases only be established if the object is fully preserved and in good from.

5. Conclusion

This paper discusses the legal dimensions of cultural property ownership. In particular, it addresses the right to destroy, viewed as part of an owner's bundle of rights. The main argument I try to put forward is that when one is the owner of a cultural property artifact, she should not be allowed to destroy that object. This view is based on cultural property's unique character as a rare, scarce, non-renewable, and non-substitutable resource, as well as on the values it encompasses and promotes. Cultural property connects past, present, and future generations by communicating knowledge, ideas, culture, and history. It also contributes to the development of group identities, and correspondingly, its preservation is critical to notions of grouphood and peoplehood.

As part of the discussion, I entertained several theoretical views of private property, in an attempt to find the one most consistent with the ideas expressed in the previous paragraph. I began by outlining the traditional Anglo-American exclusionary conception of property and its shortcomings insofar as cultural property. After realizing that property-as-exclusion (the Blackstonian approach) is an inadequate regime for the regulation of cultural property ownership, I presented a more progressive view of property law, one which considers property as a social institution that involves multiple stakeholders, and advocated for the development of a new cultural property regime. At that point, I presented the stewardship approach, sometimes mentioned in the cultural property context. However, my analysis shows that it goes too far: Fundamental notions of liberalism cannot be reconciled with such an extreme approach. With that in mind, I decided to choose the middle grounds between the exclusionary and stewardship approaches. The governance approach is a worthy and desirable socio-legal compromise. Through the property-as-governance optic, I chose to designate destruction as an improper use of cultural property, one that would be impermissible under the new suggested regime.

Note

[1] I would like to thank Katrina Wyman for her supervision, and Eyal Benvenisti and Hanoch Dagan for their comments. Special thanks goes to Sally Johnston for first inspiring me with the idea for this paper.

[2] J. Waldron, *The right to private property*, 15 (1988).

[3] B.A. Ackerman, *Private Property and the Constitution* (1977).

[4] *Id.*

[5] J.L. Sax, *Playing Darts with a Rembrandt*, 1 (1999).

[6] Considering that Rembrandt died in 1669, neither he nor his estate may exercise moral rights over the painting.

[7] See *Playing Darts with a Rembrandt*, *supra* note 5.

[8] *Id.*

[9] *Id.*, at 5.

[10] Kristin A. Carpenter & et al., *In Defense of Property*, 118 *Yale L.J.* 1022, 1080 (2008).

- [11] See *Playing Darts with a Rembrandt*, *supra* note 4, at 197.
- [12] *Id.*, at 3.
- [13] *Id.*
- [14] Art *Law cases and Materials* 592 (Duboff et al eds., 2010).
- [15] *Id.*
- [16] *Id.*
- [17] *Id.*
- [18] John Henry Merryman, *The Public Interest in Cultural Property*, 77 *Cal. L. Rev.* 339, 341 (1989).
- [19] John Henry Merryman, *Cultural Property Internationalism*, 12 *Int'l. J. Cultural. Prop.* 11 (2005).
- [20] *Id.*
- [21] See *Art Law*, *supra* note 13, at 585.
- [22] *Id.*, at xxii.
- [23] J. Finnis, *Natural Law and Natural Rights*, 86-8 (1980).
- [24] D. Gillman, *The idea of Cultural heritage*, 13-4 (2006).
- [25] *Id.*
- [26] J.H. Merryman, *Thinking about the Elgin Marbles: Critical Essay on Cultural property, Art and Law*, 149-153 (2nd ed. 2009).
- [27] *Id.*, at 163-4.
- [28] *Id.*
- [29] M.J. Radin, *Contested Commodities*, 8-15 (1996).
- [30] M. Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982); *In Defense of Property*, *supra* note 9, at 1047.
- [31] *Id.*, at 1048, 1053.
- [32] *Id.*, at 1053.
- [33] *Id.*, at 1054.
- [34] *Id.*, at 1053.
- [35] *Id.*, and citations there.
- [36] See e.g., John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 *Cornell. L. Rev.* 1179, 1185 (1988).
- [37] See Merryman, *Thinking about the Elgin marbles*, *supra* note 25, at 53, 153.
- [38] *Id.*
- [39] See *Art Law*, *supra* note 13, at 585.
- [40] *Id.*
- [41] *Id.*
- [42] *Id.*
- [43] See Gillman, *supra* note 23, at 13-4, 19.
- [44] Lourdes Arizpe, *Cultural Heritage and Globalization*, in *Values and Heritage Conservation* 32 (2000), http://www.getty.edu/conservation/publications/pdf_publications/valuesrpt.pdf (last visited May 26, 2011).
- [45] *Id.*
- [46] *Id.*
- [47] M. Castellas, *The Rise of the Network Society*, 3 (2nd ed., 2010).
- [48] Steve Cisler, *Arts, Crafts, and Globalization*, <http://switch.sjsu.edu/web/v5n3/A-1.html> (last visited Apr. 14, 2011).
- [49] The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May. 14, 1954, *available at* <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf> (last visited Jan. 7, 2011).
- [50] *Id.*
- [51] F. Lenzerini, *The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and*

Two Steps Back, 13 *Italian Y.B. Int'l L.* 131, 134 (2003).

[52] See Merryman, *Cultural Property Internationalism*, *supra* note 18, at 18; Erik Jayme, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 *Vand. J. Transnat'l L.* 928, 929 (2005); L. Casini, "Italian Hours": *The Globalization of Cultural Property Law*, 9 *J. of Int'l Const. L.* (2011).

[53] 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Oct. 17, 2003, *available at* http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Jan. 4, 2011). Note that the Declaration followed the destruction of the Bamiyan Buddhas by the Taliban.

[54] K. Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 *Yale J. Int'l L.* 183, 264 (2003).

[55] *Id.*

[56] *Id.*

[57] M.A. Fe Candelaria, *The Angkor Sites of Cambodia: The Conflicting Values of Sustainable Tourism and State Sovereignty*, 31 *Brook. J. Int'l L.* 253, 269, 272 (2005).

[58] W. Blackstone, 2 Commentaries *1.

[59] 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, *available at* <http://unesdoc.unesco.org/images/0011/001140/114046e.pdf#page=130> (last visited May 26, 2011).

[60] *Id.*, at Article 2.

[61] *Id.*

[62] *Id.*, at Article 4 ("property which belongs to the following categories forms part of the cultural heritage of each state").

[63] See Merryman, *Thinking about the Elgin marbles*, *supra* note 25, at 83.

[64] See e.g., Hague Convention 1954, *supra* note 48, at the Preamble; UNESCO Constitution, Nov. 16, 1945, *available at* http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Oct. 21, 2011); Similar views were expressed more recently in the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, *supra* note 52. For a broader perspective, see e.g., Articles 22 and 27(1) to The Universal Declaration on Human Rights, Dec. 10 1948, *available at* http://www.un.org/events/humanrights/2007/hrphotos/declaration%20_eng.pdf (last visited Jan. 8, 2011); Preamble, Article 1, and Article 27 to the International Covenant on Civil and Political Rights, Dec. 16, 1966, *available at* <http://www2.ohchr.org/english/law/ccpr.htm> (last visited Jan. 9, 2011); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, *available at* <http://www2.ohchr.org/english/law/cescr.htm> (last visited Jan. 9, 2011); See also Joseph P. Fishman, *Locating the International Interest in Intranational Cultural Property Disputes*, 35 *Yale J. Int'l L.* 347, 365, 368 (2010).

[65] *In Defense of Property*, *supra* note 9, at 1044; K.A. Appiah, *Cosmopolitanism: Ethics in a World of strangers*, 115-35 (2006).

[66] *Id.*, at 119.

[67] *Id.*, at 120.

[68] *Id.*, at 121.

[69] See Fishman, *supra* note 63, at 358-9.

[70] *Id.*, at 350.

[71] See Blackstone, *supra* note 57.

[72] *In Defense of Property*, *supra* note 9, at 1065-6.

[73] *Id.*

[74] A. M. Honoré, *Ownership*, in *Oxford Essays in Jurisprudence* 107, 144 (A.G. Guest ed., 1961).

[75] *Id.*

[76] *Id.*, at 144-5.

[77] *Id.*

[78] Harold Demsetz, *Toward a Theory of Property Right*, 57 *Am. Econ. Rev.* 347 (1967).

[79] Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 *J. Legal Stud.* S453, S454-5 (2002).

[80] *Id.*

[81] *Id.*

[82] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, *Harv.*

L. Rev. 1089 (1972).

[83] Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Va. L. Rev. 965, 973 (2004).

[84] *Id.*, at 971.

[85] See Demsetz, *supra* note 77, at 350.

[86] *In Defense of Property*, *supra* note 9, at 1033.

[87] See Blackstone, *supra* note 57.

[88] *Playing darts with a Rembrandt*, *supra* note 4, at 1.

[89] *Id.*

[90] See Merryman, *Thinking about the Elgin marbles*, *supra* note 25, at 29.

[91] *Playing darts with a Rembrandt*, *supra* note 4, at 197.

[92] *Id.*

[93] *Id.*, at 6.

[94] *Id.*

[95] See Moustakas, *supra* note 35, at 1184.

[96] Igor Kopytoff, *The Cultural Biography of Things*, in *The Social Life of Things: Commodities in Cultural Perspective* 64, 67 (Arjun Appadurai ed., 1986).

[97] *Playing darts with a Rembrandt*, *supra* note 4, at 181.

[98] *Id.*

[99] *Id.*, at 65.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*, at 17.

[106] *Id.*, at 8.

[107] See Moustakas, *supra* note 35, at 1184-5.

[108] See Merryman, *Thinking about the Elgin marbles*, *supra* note 25, at 53.

[109] See e.g., Eric Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 Chi. J. Int'l L. 213, 222-4 (2007); *In Defense of Property*, *supra* note 9, at 1039.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*, at 1039-40.

[115] *Id.*, at 1076.

[116] *Playing darts with a Rembrandt*, *supra* note 4, at 7.

[117] Waldron, *supra* note 1, at 18.

[118] H. Dagan, *Property at a Crossroad*, (2005) [*in Hebrew*].

[119] See e.g., Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 Yale L.J. 549 (2000); H. Dagan, *The Distributive Foundation of Corrective Justice*, 98 Mich. L. Rev. 138, 149 (1999).

[120] *Id.*

[121] J. Waldron, *Community and Property. For These Who Have Neither*, 10 T.I.L. 161, 162 (2009).

[122] *Id.*

- [123] H. Dagan, *Property and the Public Domain*, 18 *Yale J.L&Human.* 84, 86 (2006).
- [124] *Id.*; A. Lehavi describes property law as constituting "the formal regime which sets out the ways in which society allocates, governs, and protects entitlements and obligations in resources and human relationships around them. A political institution, property law is at its basis the result of conscious decisions by the state's authorized entities to designate resources as subjects of property and to create a certain set of entitlements and obligations accruing to them". See Amnon Lehari, *How Property Can Create, Maintain, or Destroy Community*, 10 *T.I.L* 43, 65 (2009).
- [125] See Demsetz, *supra* note 77, at 348.
- [126] *Id.*, at 87.
- [127] H. Dagan, *The Social Responsibility of Ownership*, 92 *Cornell L. Rev.* 1255, 1259 (2007).
- [128] *Id.*, at 1259-60.
- [129] *Id.*, at 1260.
- [130] *Id.*
- [131] *Id.*; H. Dagan, *Takings and Distributive Justice*, *Va. L. Rev.* 741, 771 (1999).
- [132] See *The Social Responsibility of Ownership*, *supra* note 126, at 1260.
- [133] *Id.*, at 1261.
- [134] See *Ownership*, *supra* note 73, at 144-5.
- [135] *Playing darts with a Rembrandt*, *supra* note 4, at 6.
- [136] *Id.*
- [137] *Id.*
- [138] *Id.*
- [139] See *Ownership*, *supra* note 73, at 145.
- [140] <http://www.iuscomp.org/gla/statutes/GG.htm#14> (last visited Apr. 19, 2011); Dagan uses a slightly different translation: "ownership entails obligations. Its use should also serve the public interest". See *The Social Responsibility of Ownership*, *supra* note 126, at 1257.
- [141] *Id.*
- [142] *Id.*; G. Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*, 113 (2006).
- [143] *Id.*, at 146; See *The Social Responsibility of Ownership*, *supra* note 126, at 1257.
- [144] *Id.*, at 1264.
- [145] *Id.*
- [146] *Id.*
- [147] See Alexander, *supra* note 141, at 138.
- [148] *Id.*
- [149] *The Social Responsibility of Ownership*, *supra* note 126, at 1264.
- [150] See *Ownership*, *supra* note 73, at 145-7.
- [151] *Id.*, at 146.
- [152] See Moustakas, *supra* note 35, at 1185.
- [153] Radin, *Property and Personhood*, *supra* note 29, at 957.
- [154] *Id.*, at 957, 959-61, 986-88; *In Defense of Property*, *supra* note 9, at 1046-7.
- [155] *Id.*, at 1047; Radin, *Contested Commodities*, *supra* note 28, at 8-15.
- [156] *In Defense of Property*, *supra* note 9, at 1048.
- [157] *Id.*, at 1060.
- [158] See e.g., *In Defense of Property*, *supra* note 9, at 1069-74.
- [159] *Id.*, at 1074.
- [160] *Id.*, at 1073.

[161] *Id.*, at 1075-6.

[162] *Id.*

[163] *Id.*, at 1080; See also Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 *Harv. Env't'l. L. Rev.* 281 (2002).

[164] *Id.*, *In Defense of Property*, *supra* note 9, at 1081.

[165] See *Ownership*, *supra* note 73, at 116.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] Smith points out that "if we focus on governance rules as those that pick out more specific activities for measurement, then a wide range of rules, from contractual provisions, to norms of proper use, to nuisance law and public environmental regulation can be seen as reflecting the governance strategy; compared to basic trespass and property law, all these governance rules require the specification of proper activities". See *Id.*

[172] *Id.*, at S467.

[173] At least one other author has suggested that since the Blackstonian approach falls short with respect to cultural property, Smith's governance regime should be considered. Note however, that Carpenter & et al conclude that part of their paper by stating that "the relevance of the governance approach to cultural property notions is undertheorized". See *In Defense of Property*, *supra* note 9, at 1080.

[174] See Waldron, *Community and Property*, *supra* note 120, at 162-4.

[175] The first justification is that focusing on a certain interest or a class of interests will ultimately contribute to the general good. The third justification is that we see the property regime as aimed toward the promotion of a specific interest.

[176] L.J. Strahilevitz, *The Right to Destroy*, 114 *Yale L.J.* 781, 793 (2005).

[177] The conception of 'waste' is derived of ordinary language and refers to a non-urgent expenditure of scarce resources (*e.g.*, "a waste of time" or "a waste of money").

[178] E.J. McCaffery, *Must We Have the Right to Waste?*, in *New Essays in the Legal and Political Theory of Property* 76, 77 (Stephen R. Munzer ed., 2001).

[179] *The Right to Destroy*, *supra* note 175, at 787.

[180] *Id.*

[181] *Id.*

[182] *Id.*, at 788-9.

[183] See McCaffery, *supra* note 177, at 77-8.

[184] *Id.*, at 788.

[185] *The Right to Destroy*, *supra* note 175, at 785.

[186] *Id.*, at 785.

[187] See *Ownership*, *supra* note 73, at 109-110.

[188] *Id.*

[189] *The Right to Destroy*, *supra* note 175, at 821.

[190] *Id.*

[191] *Id.*, at 796.

[192] *Id.*

[193] J. Waldron, *Enough and as Good Left for Others*, 29 *The Philosophical Quarterly* 319 (1979).

[194] J. Locke, *Second Treatise of Government*, in *Two Treatises of Government* 285, 308 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690).

[195] *Id.*

[196] In *Enough and as Good Left for Others*, *supra* note 192, Waldron argues that this mainstream reading of Locke is incorrect and internally inconsistent.

[[197](#)] *The Right to Destroy*, *supra* note 175, at 832.

[[198](#)] *Id.*

[[199](#)] *Id.*, at 833.

[[200](#)] *Id.*

[[201](#)] *Id.*, at 835.

[[202](#)] *See Art Law*, *supra* note 13, at xxi.

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