NOTES

USING CUSTOMARY INTERNATIONAL LAW TO IDENTIFY "FETISHISTIC" CLAIMS TO CULTURAL PROPERTY

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Margaret Jane Radin's personality theory of ownership posits that property that is bound up with the identity of its holder deserves the highest level of protection, so long as there is an objective moral consensus that the holder's attachment to the property is healthy. *In recent years scholars have relied on Radin's theory to claim that objects like the Parthenon Marbles are so tied to the identity of a particular cultural community that group ownership of them is justified. Furthermore, they argue that the group whose identity is bound up with an object has a stronger claim to it than a rival with no such connection or a rival whose connection has been deemed unhealthy by an objective moral consensus. Yet neither Radin nor scholars extending her theory to the cultural property context have explained how to determine when such an objective moral consensus exists. This Note argues that* jus cogens *norms of customary international law should be considered a source of "objective moral consensus" for the purpose of distinguishing healthy from unhealthy group property claims under Radin's theory.* Jus cogens *norms are valued by so many people across different cultures that there is an objective moral consensus—or the closest thing to it—that violating them is wrong. If an object is bound up with the identity of a cultural group in a way that violates one of these norms, promotes practices that violate one of these norms, or purposefully expresses adherence to contrary beliefs, then that claim to the property is unhealthy and should not be protected against the healthy claims of other groups.*

INTRODUCTION

Amid herds of spectator buses decorated in bright logos of Olympic Games sponsors, a few carry just six words on a sepia background: "The Parthenon Marbles Belong to Athens."[1]

One of the top stories of the 2004 Summer Olympics had nothing to do with athletic achievement. Instead, newspapers around the globe reported on the renewed Greek effort to retrieve a number of

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[1] Patrick O'Driscoll, *Ancient Art at Center of Dispute*, USA TODAY, Aug. 26, 2004, at 4D.

ancient marble sculptures that have been housed in the British Museum for nearly two hundred years.[2] To accompany the homecoming of the Olympic Games to their birthplace in Athens, Greece hoped to open the New Acropolis Museum. Its *pièce de résistance*: an upper gallery made of glass to display the reunited "Parthenon Marbles,"[3] the priceless friezes and sculptures that graced the Parthenon for over two thousand years before being removed by the British Lord Elgin in 1801.[4]

Yet not even Olympic goodwill could settle the stand-off between Greece and Great Britain. When the Olympic Games began last summer, the New Acropolis Museum—"so perfect it would inevitably bring an end to the art world's most enduring controversy by impelling Britain once and for all to give back the marble sculptures"[5]—was still a gaping construction hole at the foot of the Acropolis. While Greek officials are still hoping to secure the carvings' return before the rescheduled debut of the panoramic gallery in 2006, the British Museum insists that it is a better caretaker of the Marbles than the Greeks are, and that the Marbles are accessible to a greater number of people in Britain, where they are on free display to five million visitors annually.[6]

The Greeks, on the other hand, claim that the Marbles, which make up roughly half of the Parthenon's surviving carvings,[7] were taken by Lord Elgin illegally while Greece was occupied by the Turks and that they should be returned because they are Greek and represent the "essence of Greekness."[8] This most recent Greek appeal is as direct and emotional as the plea made two decades ago by then-Greek Minister of Culture, Melina Mercouri, who said of the Marbles: "This is our history, this is our soul."[9] Those words have

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[2] *See, e.g.*, Kenneth Baker, *Parthenon Marbles Deserve Repatriation*, S.F. CHRON., Aug. 20, 2004, at E1; Mitch Potter, *Going for All the Marbles*, TORONTO STAR, Aug. 15, 2004, at D01; Charles M. Sennott & Sarah Liebowitz, *They've Lost Their Marbles, and They Want the World to Know*, BOSTON GLOBE, July 12, 2004, at B5.

[3] These carvings are also known as the "Elgin Marbles." *See* John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1186 n.24 (1989) (explaining that many sources still refer to Parthenon Marbles as "Elgin Marbles," suggesting British ownership).

[4] Baker, *supra* note 2.

[5] Potter, *supra* note 2.

[6] Sandro Contenta, *New Strategy to "Reunite" Elgin Marbles*, TORONTO STAR, May 23, 2004, at F03.

[7] The British Museum possesses "56 of the 97 surviving slabs of the Parthenon frieze, 15 of the 64 metopes, and 19 of the 28 remaining figures of the pediment." *Id.*

[8] *Id.*

[9] John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1881, 1883 (1985) (quoting Melina Mercouri at press conference, as reported in *Mercouri Pleads, Return Our Marbles*, S.F. CHRON., May 26, 1983, at 26).

resonated with people around the world, and the Greek cause has garnered increasing international support.[10]

The Greek people express a passion for the Parthenon Marbles that is emblematic of the close connection felt by many towards items of archaeological, ethnographic, or historical significance—a category of objects known as "cultural property."[11] Given that people experience such strong emotional attachments to cultural property, it is not surprising that some scholars have applied Margaret Jane Radin's personality theory of ownership to the repatriation debate.[12] Radin argues that property that is bound up with the identity of its holder is particularly important to the owner's self-development and fulfillment, and is therefore deserving of the highest level of protection.[13] Property that falls into this "personal" category, such as an heirloom, home, or wedding ring, is important "precisely because its holder could not be the particular person she is without it."[14] "Fungible" property, by contrast, does not deserve this special protection.[15]

While under this theory an individual's subjective attachment to an object determines the strength of her entitlement to it, Radin does not envision personal property as a boundless category; there is an objective limit to it. She tells us that no matter how strong the relationship between object and holder, property should be considered personal property only if we[16] have deemed it, through an "objective

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[10] *See* Fran Kelly, *The World Today Archive—Greece Wants Elgin Marbles Returned in Time for Olympics*, ABC ONLINE, Jan. 20, 2004, http://www.abc.net.au/worldtoday/content/2004/s1028581.htm.

[11] Generally, cultural property refers to "objects that embody the culture—principally archaeological, ethnographical and historical objects, works of art, and architecture." John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 341 (1989).

[12] *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982) (describing relationship between property and individual's sense of self). For discussions of how Radin's theory may apply to deciding ownership of cultural property, see Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 570, 647 (1995) (recognizing personality theory as conceptual basis for using public trust doctrine to restore control over cultural property to group that produced it); Pamela Bruzzese, Note, *Distributing the Past: Jewish Cultural Property in Lithuania*, 31 N.Y.U. J. INT'L L. & POL. 145, 155–56 (1998) (arguing that grouphood theory, Moustakas's extrapolation of Radin's personality theory, supports Lithuania's return of rare Hebrew and Yiddish books to local Jewish community); Moustakas, *supra* note 3, at 1190–93, 1196–1201 (extending Radin's theory to support group rights in cultural property and argue that Parthenon Marbles be returned to Greece).

[13] Radin, *supra* note 12, at 959–60.

[14] *Id.* at 959–60, 972.

[15] *Id.* at 959–60.

[16] Radin uses the term "we" because the word connotes consensus. She does not qualify it, nor does she elaborate on who specifically is included in this category. She states merely that she employs "we" because her theory relies on consensus, as opposed to, for

moral consensus," to be bound up with an individual's personhood in a *healthy* way.[17] When an emotional attachment to property hampers the development of an individual's healthy identity, Radin terms this attachment "fetishistic," or, alternatively, she describes the attachment as constituting "bad object relations." Although Radin does not elaborate much on the definition of fetishism, she asserts that such fetishistic claims should be treated as claims to fungible property.[18]

Some scholars use the personality theory to claim that there are objects like the Parthenon Marbles so tied to the identity of a particular cultural community that group ownership of them is justified.[19] For instance, Patty Gerstenblith argues for group rights in cultural property by reasoning that cultural property is "that specific form of property that enhances identity, understanding, and appreciation for the culture that produced [it]."[20] Thus, cultural property "epitomizes Radin's definition of personal property, but as applied to a group, rather than to an individual."[21]

The grouphood theory, similar to its personhood predecessor, is designed to help decide property disputes between competing claimants:[22] A group whose identity is bound up with an object has a stronger claim to that object than a rival with no such connection. Many discussions of repatriation have relied on the grouphood theory to bolster arguments that cultural property should not be removed from the group that produced it or, alternatively, should be returned if already held by others.[23] Such analyses, however, generally assume

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example, "natural law or simple moral realism," as the source of objective moral judgments about personal property. *Id.* at 969.

[17] "A 'thing' that someone claims to be bound up with nevertheless should not be treated as personal vis-à-vis other people's claimed rights and interests when there is an objective moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy self-constitution." *Id.*

[18] *Id.* at 970.

> To refuse on moral grounds to call fetishist property personal is not to refuse to call it property at all. The immediate consequence of denying personal status to something is merely to treat that thing as fungible property, and hence to deny only those claims that might rely on a preferred status of personal property.

Id.

[19] *See supra* note 12.

[20] Gerstenblith, *supra* note 12, at 569.

[21] *Id.* at 570.

[22] "A personhood perspective of property 'can help decide specific disputes between rival claimants.' Similarly, a grouphood perspective of property will ultimately do the same among rival group claimants." Moustakas, *supra* note 3, at 1187 n.26 (quoting Radin, *supra* note 12, at 958).

[23] *See, e.g.*, Bruzzese, *supra* note 12, at 147 (arguing that rare Jewish books held by state of Lithuania are "property for grouphood" and should be returned to local Jewish community); Jessica R. Herrera, Note, *Not Even His Name: Is the Denigration of Crazy Horse*

that only the cultural group that produced the property has an intimate relationship with it.[24] The approach has not yet been applied to a situation in which a cultural group other than the producing group is considered to have a Radinesque claim.[25]

If the Radinesque claims of both sides are considered, it is difficult to see how applying the personality theory resolves a conflict like the Parthenon Marbles dispute. Now that the Marbles have resided in the British Museum for nearly two hundred years, both Greek and British cultures have arguably equal claims to the Marbles—the Marbles may be just as bound up with the cultural identity of the Britons as they are with the cultural identity of the Greeks. The Parthenon Marbles (as well as other works in the British Museum) "have entered British culture, . . . inspire British arts, give Britons identity and community, civilize and enrich British life, and stimulate British scholarship."[26]

Although one may argue that under the property-for-grouphood analysis the Greek claim is stronger than the British claim, it is certainly possible to interpret the two claims as more or less commensurate, so that neither group has a clearly superior entitlement.[27] Thus, the grouphood theory "fails to make the case for the return of the Marbles" because "it is a two-edged argument that is equally available to the British."[28] The view that two groups could have Radinesque claims to the same object is supported by international agreements that "allow for multiple claims to cultural property as part of different states' cultural heritage."[29]

Custer's Final Revenge?, 24 HARV. C.R.-C.L. L. REV. 175, 191–93 (1994) (arguing that Lakota tribe should have control over use of name "Crazy Horse" because Crazy Horse and legacy of Crazy Horse are part of Lakota cultural identity); Moustakas, *supra* note 3, at 1186, 1196–1202 (maintaining that, under grouphood theory, Parthenon Marbles belong to Greeks because they are closely tied to Greek cultural identity and should never have been removed from Greece).

[24] *See, e.g.*, Moustakas, *supra* note 3, at 1186 (maintaining that Parthenon Marbles belong to Greece because of their "intrinsic link to Greek grouphood" without analyzing whether Great Britain also has Radinesque claim); *cf.* Jonathan Drimmer, *Hate Property: A Substantive Limitation for America's Cultural Property Laws*, 65 TENN. L. REV. 691, 748 (1998) (arguing that claims for repatriation of "Nazi art" fail because relationship with genocidal culture is fetishistic).

[25] By "Radinesque claim," I mean any claimed right to cultural property premised on the object's strong connection to a group's cultural identity.

[26] Merryman, *supra* note 9, at 1915.

[27] *See id.* at 1915–16.

[28] *See id.* at 1916.

[29] Daniel Shapiro, *Repatriation: A Modest Proposal*, 31 N.Y.U. J. INT'L L. & POL. 95, 102 (1998) (referring to United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 236 [hereinafter UNESCO 1970]).

When property is bound up with the identities of multiple claimants, Radin suggests the following approach: If there is an objective moral consensus that one of the claimants has a fetishistic attachment to the object, then that claim fails.[30] Yet neither Radin nor scholars extending her theory to the cultural property context have provided an analytical framework for determining when a fetishistic relationship exists. Instead, they have left "objective moral consensus" and "bad object relations" as nebulous, largely intuitive concepts, which are difficult to apply to real world property disputes.[31] A concrete way of identifying the existence of an objective moral consensus is necessary to make a legitimate determination of what constitutes bad object relations.

While a true consensus may not exist in the real world, there are certain moral principles that are so widely held that they can be used by grouphood theorists to resolve cultural property disputes. Under the doctrine of customary international law there exists a body of norms that almost all nations are bound to uphold, even in the absence of an explicit promise to do so.[32] In particular, any norm that is so widely accepted by the international community that it is considered *jus cogens*[33] can serve as a substantive limit on the category of "property for grouphood." Under this approach, if a value that violates a *jus cogens* norm is central to a group's attachment to a piece of

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30 Radin, *supra* note 12, at 969.

31 They have, however, provided us with *examples* of bad object relations. John Moustakas maintains that "hoarding" of cultural property is fetishistic. *See infra* notes 90–93 and accompanying text. Jonathan Drimmer argues that claims for the repatriation of Nazi property seized by the United States after World War II should fail because Nazi property promotes an unhealthy (genocidal) cultural identity. *See infra* notes 140–43 and accompanying text.

32 International law has two sources: (1) agreements among nations, and (2) customary international law. Normally the requirements of an international agreement govern only those states that are parties to it; however, the body of norms that make up customary international law are so widely adhered to that states must uphold them, whether or not they contracted to do so. *See infra* notes 123–129 and accompanying text.

33 Also known as peremptory norms, *jus cogens* norms are principles of international law that are so fundamental that no state may ignore them or contract out of them through treaty or other agreement. Article 53 of the Vienna Convention on the Law of Treaties contains the following provision entitled "Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens)":

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modifiedonly by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344.

cultural property, the relationship is fetishistic and should not be protected vis-à-vis other groups' Radinesque claims.[34]

While it is certainly true that a norm can rise to the status of customary international law without first achieving universal acceptance, and that the content of customary international law is not settled, *jus cogens* norms come closest to an objective moral consensus in the international arena. By drawing on them, it is possible to establish an analytical framework for applying the personality theory to cultural property disputes.

This Note argues that scholars applying Radin's theory to cultural property debates should look to the *jus cogens* norms of customary international law as indicators of "objective moral consensus." Part I defines cultural property and introduces the repatriation debate, focusing on the competing ideologies supporting cultural property claims. Part II explores Radin's personality theory in more depth and describes how it has been used to support group rights in cultural property. Part III points out several problems with this application. In particular, this Part argues that, in order for the personality theory to help decide among competing claimants, it must indicate how to find an objective moral consensus that spans cultural differences. It reasons that *jus cogens* norms of customary international law denote loci of consensus, providing a means of distinguishing healthy from fetishistic claims.

Finally, Part IV explains the *jus cogens* doctrine and analyzes the Greek and British claims to the Parthenon Marbles against the *jus cogens* principle of self-determination. The exploration of this example demonstrates both the utility and limits of a *jus cogens*-based approach.

I
REPATRIATION OF CULTURAL PROPERTY

A. Definition of Cultural Property

The term "cultural property" was first used in international law in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention).[35] Included in the Hague Convention's definition of cultural property are movable and

[34] For instance, the fact that the prohibition against genocide is recognized as a *jus cogens* norm indicates a nearly universal belief that genocide is wrong. Accordingly, a group's claim to cultural property used to promote genocide, such as Nazi memorabilia, is fetishistic and does not deserve "grouphood" protection. *See infra* Part IV.B.

[35] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention].

immovable property "of great importance to the cultural heritage of every people";[36] buildings and monuments that house cultural property, such as museums;[37] and "centers containing a large amount of cultural property," such as cities or sections of cities.[38]

A second definition is provided in the United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (UNESCO 1970).[39] UNESCO 1970 defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science."[40] Its cultural property categories are some of the most oft-used:

> (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history . . . to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations . . . ; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest . . . ; (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . . ; (i) postage, revenue, and similar stamps . . . ; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.[41]

While the Hague Convention defines cultural property as property "of great importance to the cultural heritage of every people,"[42] UNESCO 1970 (as well as other more recent international agreements)[43] emphasizes the importance of cultural property to *national*

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[36] *Id.* at 242.

[37] *Id.*

[38] *Id.*

[39] UNESCO 1970, *supra* note 29, at 234.

[40] *Id.* at 234, 236.

[41] *Id.*

[42] Hague Convention, *supra* note 35, at 242.

[43] *See, e.g.*, International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330 [hereinafter UNIDROIT Convention].

"cultural heritage."[44] The ideological divide underlying these two approaches is explored below.

B. Repatriation Debate

In the international discussion about the preservation and possession of cultural property, the hot topic is repatriation. The Parthenon Marbles dispute illustrates that the discussion of repatriation focuses not only on property taken out of its native country during times of armed conflict, but also on property that has been stolen, illegally exported, or collected by the rulers of colonial territories.[45] In the latter situation, the great tension lies between "source" nations and "market" nations.[46] Source nations are those that are rich in objects of cultural significance, such as Mexico, Guatemala, Greece, and India. In market nations, such as the United States, France, Great Britain, and Japan, the demand for cultural property is greater than the supply.[47]

John Henry Merryman views the positions of source and market nations, as well as the web of international agreements regulating the care and transfer of cultural property, as reflecting two ideologies: "cultural nationalism" and "cultural internationalism."[48] Many scholars have followed his approach and frame discussions about cultural property in terms of these often competing modes of thought.[49] Merryman describes the position of most source nations—such as

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[44] *See* UNESCO 1970, *supra* note 29, at 232. Based in Rome, UNIDROIT is a consortium of fifty nations chartered with the goal of consolidating the private civil laws of separate nations into unified international codes.

[45] For a discussion of property taken during armed conflict, see, for example, Drimmer, *supra* note 24; Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict—Is It Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49 (1999). For a discussion of property which has been stolen, illegally exported, or collected by rulers of colonies, see, for example, Andrea Cunning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT'L L. 449 (2004); Dalia N. Osman, Note, *Occupiers' Title to Cultural Property: Nineteenth-Century Removal of Egyptian Artifacts*, 37 COLUM. J. TRANSNAT'L L. 969 (1999).

[46] John H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986).

[47] *Id.*

[48] *Id.* at 833–45.

[49] *See, e.g., id.*; Ana Sljivic, *Why Do You Think It's Yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism*, 31 GEO. WASH. J. INT'L L. & ECON. 393, 393 (1998) ("The perennial argument over whether Britain should return the Elgin Marbles to Greece is illustrative of the larger debate between 'cultural nationalism' and 'cultural internationalism.'"). Further,

> [a]lthough [Merryman's] categories [of cultural nationalism and cultural internationalism] have usually been applied to disputes between nations, the concepts can also be applied to a disagreement . . . where one ethnic group is

Greece—as exemplifying cultural nationalism: a belief that cultural property is part of a nation's cultural heritage and should remain within its borders or be repatriated if already out of the country.[50] On the other hand, market nations such as Great Britain most often espouse cultural internationalism. This theory stresses that cultural property belongs to all humankind, deserves international protection, and should be kept by the people most able to care for it and most likely to appreciate it, even if that means removing it from its country of origin.[51]

While both cultural nationalists and internationalists seem to share the same ultimate goal—the preservation of cultural property—they define "preservation" differently. Cultural nationalists focus on retention of property by the group that produced it, while cultural internationalists focus on safeguarding the physical integrity of the object.[52] Thus, "[t]o the cultural nationalist, the destruction of national cultural property through inadequate care is regrettable, but might be preferable to its 'loss' through export. To a cultural internationalist, the export of some threatened artifacts . . . to some safer environment would be clearly preferable to their destruction through neglect if retained."[53]

The first modern effort to protect cultural property was the Hague Convention, which Merryman interprets as "a charter for cultural internationalism."[54] The Preamble to the Convention states its rationale:

> Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;
>
> Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.[55]

This belief that cultural property is "the cultural heritage of mankind" is echoed in the British Museum's contention that the Par-

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divided between those who live in the place where cultural property originated, and those who live abroad but still feel a connection to the objects. Bruzzese, *supra* note 12, at 162.

50 *See* Merryman, *supra* note 11, at 361 ("The Grundnorm [of cultural nationalism] is that objects forming part of the cultural heritage should remain in or be returned to the national territory.").

51 Merryman, *supra* note 46, at 836–37.

52 Merryman, *supra* note 11, at 361–63.

53 Merryman, *supra* note 46, at 846.

54 *Id.* at 837.

55 Hague Convention, *supra* note 35, at 240.

thenon Marbles are, "like all great works of art, the patrimony of all humanity."[56] While the position contains some idealistic appeal, many are skeptical of it because it serves so well the interests of the museums and collectors in market nations who espouse it. "[T]he stark reality is that these so-called custodians for 'mankind's heritage,' translate unilaterally into 'the wealthy nations and their citizenry.'"[57]

In response to the heavy export of cultural property to market nations, source nations around the world are attempting to protect their cultural property by restricting its legal trade. For example, national laws vest ownership of cultural property in the national government and limit or prohibit export,[58] and national art registries make it more difficult for art thieves to sell stolen items.[59] Many international agreements support these efforts at retention.[60] Exemplifying the increasing support for the cultural nationalist position are two relatively recent international agreements that regulate the import and export of cultural property: UNESCO 1970 and the 1995 International Institute for the Unification of Private Law Convention of Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention).[61]

Both agreements contain language emphasizing the interests of states in their "national cultural heritage."[62] For instance, UNESCO 1970 prohibits trade in cultural objects exported contrary to the law of the nation of origin.[63] Parties agree to oppose the "impoverishment of the cultural heritage" of a nation through "illicit import, export and

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[56] O'Driscoll, *supra* note 1.

[57] Claudia Caruthers, Comment, *International Cultural Property: Another Tragedy of the Commons*, 7 PAC. RIM L. & POL'Y J. 143, 155 (1998) (quoting Walter Tonetto, *Pilfered Gifts from Asia*, DAILY YOMIURI, Jan. 19, 1997, at 1).

[58] Merryman, *supra* note 46, at 832.

[59] *Id.*

[60] *Id.*

> [Of course,] a nation can be both a source of and a market for cultural property. For example, there is a strong market abroad for works of North American Indian cultures, even though Canada and the United States are thought of primarily as market nations. Conversely, there are wealthy collectors of foreign as well as national cultural objects in most source nations.

Id. at n.4.

[61] UNESCO 1970, *supra* note 29, at 231; UNIDROIT Convention, *supra* note 43, at 1330.

[62] UNESCO 1970, *supra* note 29, at 234; UNIDROIT Convention, *supra* note 43, at 1330. However, so that negotiations leading to the UNDROIT Convention could avoid the hotly debated issue of "the balance between protection of national cultural heritage and the international dissemination of culture," Harold S. Burman, *Introductory Note, in* UNIDROIT Convention, *supra* note 43, at 1322, the Preamble to the UNIDROIT Convention emphasizes the importance of both cultural heritage and cultural exchange. *Id.* at 1330.

[63] UNESCO 1970, *supra* note 29, at 236.

transfer of ownership of cultural property,"[64] and to prevent the importation of such objects and facilitate their return to source nations.[65] The UNIDROIT Convention expresses similar concerns, demanding repatriation;[66] however, while UNESCO 1970 focuses exclusively on the bond between a nation-state and its cultural property, the UNIDROIT Convention allows for claims by non-state entities, such as indigenous groups and private individuals.[67] Underlying both efforts to protect cultural property is what grouphood theorists see as the essence of the cultural nationalist claim—a belief that access to cultural property is closely related to the development and preservation of cultural identity.[68]

II
How the Personality Theory Has Been Applied to Cultural Property

According to the personality theory of property ownership, the degree to which property ownership should be protected depends on the strength of the relationship between the holder and the object, not on a person's ability to pay for or exploit a resource.[69] A person's entitlement to property that is essential to that person's self-development should be well-protected, even made inalienable.[70] Because the basic premise of cultural nationalism and of the personality theory align, scholars frequently use the theory to support repatriation claims in academic discourse.

A. Personality Theory of Property Ownership

Radin argues that an individual needs some control over external resources, in the form of property rights, for proper self-development.[71] She maintains that an individual "cannot be fully a person without a sense of continuity of self over time," and that an ongoing

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[64] *Id.* at 236.

[65] *Id.* at 240, 242, 244.

[66] UNIDROIT Convention, *supra* note 43, at 1330 ("DETERMINED to contribute effectively to the fight against illicit trade in cultural objects by . . . establishing . . . rules for the restitution and return of cultural objects . . . .").

[67] *Id.* at 1332.

[68] "For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. . . . [Cultural property] tell[s] people who they are and where they come from. . . . A people deprived of its artifacts is culturally impoverished." Merryman, *supra* note 9, at 1912–13.

[69] *See* Radin, *supra* note 12, at 959.

[70] *See id.* at 1014–15.

[71] *Id.* at 957. Radin is following in the footsteps of Hegel here. *See generally* G.W.F. Hegel, Elements of the Philosophy of Right, 73–114 (Allen W. Wood, ed., H.B. Nisbet trans., 1991).

relationship between oneself and things, and between oneself and other people, maintains that sense of continuity.[72] The property most worthy of protection is personal property, which is "a thing indispensable to someone's being."[73] Unlike personal property, fungible property is "wholly interchangeable with money"—property held solely for its economic value.[74]

Radin counsels that the significance of a person's relationship with an object may be gauged by "the kind of pain that would be occasioned by its loss."[75] Thus, in most instances an object such as a family heirloom or a home is "personal" because its loss is likely to cause pain that "cannot be relieved by the object's replacement."[76] On the other hand, the quintessential "fungible" property is money: "[T]he opposite of holding an object that has become a part of oneself is holding an object that is perfectly replaceable with other goods of equal market value."[77]

An object that creates what Radin calls "bad object relations" or "fetishism" should not receive the same protections as personal property, regardless of whether the object is bound up with personhood.[78] For Radin, a person's relationship with a particular piece of property becomes fetishistic when the attachment is so strong (or unhealthy) that it hampers her ability to develop a healthy identity.[79] She writes:

> We can tell the difference between personal property and fetishism the same way we can tell the difference between a healthy person and a sick person, or between a sane person and an insane person. In fact, the concepts of sanity and personhood are intertwined: At some point we question whether the insane person is a person at all.[80]

Radin is not referring here to the methodical means by which a doctor might decide what ails a person, but rather to the "minimum

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72 Radin, *supra* note 12, at 1004.

73 *Id.* at 987, 1004.

74 *Id.* at 987.

75 *Id.* at 959.

76 *Id.*

77 *Id.* at 959–60.

78 *Id.* at 968–69.

79 *Id.* at 970.

80 *Id.* at 969 (citations omitted). Not only is Radin's analogy so vague as to be exceptionally unhelpful to scholars attempting to apply her theory, but, according to Jonathan Drimmer, it may also be "inapposite. As scholars assert, the decision on whether an individual is physically 'sick' or 'healthy' often is not objective, but 'the product of an artificial labeling process' inextricably tied to stigma and subjective values." Drimmer, *supra* note 24, at 752 n.408 (quoting Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1355–59 (1993)).

indicia" of insanity or sickness that a lay person relies on to make a quick judgment about another's health.[81] Radin intends to leave fetishism as a largely intuitive concept. In effect, she tells us simply that we'll know fetishism when we see it.

B. Extending the Personality Theory to Group Rights in Cultural Property

Some legal theorists reason that cultural groups have a strong entitlement to property that promotes "grouphood" in the same way that individuals have a right to property that is essential to personhood.[82] In the Note that first extended the personality theory to the question of group rights in cultural property, John Moustakas argues that some objects, such as those that serve as historical records or strong cultural symbols, are substantially bound up with group identity.[83]

Moustakas offers the Parthenon Marbles as a "property for grouphood" example and argues for the return of the Marbles to Greece.[84] Furthermore, he contends that, "[b]ecause of their intrinsic link to Greek grouphood," the Marbles are strictly inalienable and thus could not have been legitimately transferred.[85] Going further than Radin, this approach urges the strict inalienability of cultural property because its removal constitutes a threat to group cultural identity.[86]

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81 Radin, *supra* note 12, at 969.

82 *See, e.g.*, Drimmer, *supra* note 24, at 752 ("Radin's theory, applied on a society-wide level, suggests that items important to a 'healthy' group identity should receive the unique legal protections afforded cultural properties."); Gerstenblith, *supra* note 12, at 570 ("Group ownership premised on the personality theory is derived from the fact that the essence of cultural property lies in its identification with the particular cultural group that produced it."); Moustakas, *supra* note 3, at 1226 ("[W]hen property is bound up with the holder's identity, and its retention does not represent bad object relations, it qualifies as property for grouphood.").

83 Moustakas, *supra* note 3, at 1192–93, 1196–1201.

84 *Id.* at 1202–09.

85 *Id.* at 1186.

86 *Id.* at 1186 ("Protecting those essential rights embodied in property for grouphood . . . requires a regime of strict inalienability. . . ."); *see* Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 750 (1997) (summarizing Moustakas's theory as concluding that "to interfere with group control of [cultural property] undermines the group's existence and well-being").

Another justification for inalienability is that a cultural group's intergenerational nature creates the potential for market failure. At the time of transfer, the present generation will not fully appreciate the cost of the object's loss to future generations. The loss is smaller than that felt by future generations because the present generation has had the opportunity to enjoy some of the benefits derived from possessing the object. Furthermore, whereas the loss will be permanent and thus affect future generations, all the financial gain from the object's sale is likely to be realized immediately. Rosemary J. Coombe,

Moustakas's theory of property for grouphood follows Radin's theory closely: "An object qualifies as property for grouphood when (1) it is substantially 'bound up' with group identity; and (2) its retention does not constitute 'bad object relations.'"[87] Moustakas recognizes that Radin distinguishes between good and bad object relations with so little analysis that the distinction amounts to no more than an instinctive delineation;[88] however, he declines to develop the idea further. Instead, he writes simply, "Here Radin leaves us with the largely intuitive definition that good object relations are those that are healthy."[89]

Although Moustakas does not elaborate on Radin's notion of "bad object relations," he does provide two examples of this concept from the debate surrounding repatriation claims. "Most would agree," he argues, that a "source nation's retention of works already adequately restrained and protected from alienation constitutes hoarding" and that hoarding is fetishistic.[90] Thus, when a source nation seeks to retain possession of cultural property "fully replicated in its own collections," it may be guilty of bad object relations and "an inalienability rule should no longer apply."[91] As a second example, Moustakas suggests that "when objects are used to promote cultural intolerance or unbridled ethnocentricity, or have that effect, their retention is likely to be fetishistic."[92] As for the Parthenon Marbles, Moustakas sees the Greek claim as a healthy one and explicitly states that the claim is not fetishistic.[93]

The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy, 6 CANADIAN J.L. & JURISPRUDENCE 249, 263 (1993).

87 Moustakas, *supra* note 3, at 1184.

88 *Id.* at 1189.

89 *Id.*

90 *Id.* at 1223.

91 *Id.* Moustakas argues that cultural property in the property for grouphood category should be strictly inalienable, even if the group itself decides that it is no longer of value. *Id.* at 1205–06. Moustakas names three justifications for this absolute restraint on alienation:

> First, all the factors supporting [the importance of cultural property to a community] depend upon actual possession of the very thing itself. . . . Second, . . . [cultural property items] are nonreplenishable resources. . . . Third, intergenerational justice demands the prohibition on any transfers. . . . [A] transfer of grouphood property by currently ascertained members necessarily alienates the unascertained members from their own identity.

Id. at 1207–09.

92 *Id.* at 1189 n.41.

93 *Id.* at 1223 ("As the Marbles are an unreplicated, unique example of the apex of classical sculpture and stonework, strict inalienability of the Marbles does not constitute bad object relations.").

III
PROBLEMS WITH USING RADIN'S THEORY TO JUSTIFY GROUP RIGHTS IN CULTURAL PROPERTY

The distress felt by Greek Minister Mercouri and others over the British Museum's continued possession of the Parthenon Marbles seems to substantiate Moustakas's theory that "[t]he absence of works representing 'irreplaceable cultural heritage' is psychologically intolerable."[94] The question is whether and to what extent a respect for emotional attachment to cultural property can help us decide among competing claimants. Extending the personality theory to group rights in cultural property is intuitively appealing: The group whose cultural identity is bound up with an object should own it. Yet if more than one cultural group claims that its cultural identity is tied to an object, the grouphood theory does not provide a concrete way to break the tie.

The personality theory—as Radin developed it—is an individual theory of private ownership. However, in the cultural property context, individuals are rarely private owners of the items that are bound up with their group identity. Yet even in this situation, Radin counsels us to not to underestimate the strength of such ties. For, whether or not an object legally belongs to a group, group members may care very deeply about it. At a minimum, her analysis provides much needed recognition of the strong emotions at the heart of repatriation claims. Determining any further usefulness of her theory beyond such recognition requires examining three difficulties in its application: (1) ascertaining the scope of the relevant group claimant, (2) exploring why actual possession of the object is essential to the preservation of group identity, and (3) determining how to identify when there is an objective moral consensus that a claim is fetishistic and can thus be dismissed.

A. Group Scope

One difficulty with applying Radin's theory to cultural groups rather than individuals is that one must address the scope of the group to determine whether the property is constitutive of group identity. This issue is most problematic when one of the groups asserting a claim for the object is a subset of the competitor group. For instance, in the fight over control of ancient burial sites between Native American tribes and scientists working for the United States government, the larger group, the "nation state," may claim the same cul-

[94] *Id.* at 1196 (quoting Robert Browning, *The Case for the Return of the Parthenon Marbles*, 36 MUSEUM 38 (1984) (quoting Director-General of UNESCO)).

tural identification with the property as the smaller group, the "tribal nation."[95]

The debate between proponents of cultural internationalism and cultural nationalism illustrates the difficulty of defining group scope with regards to cultural property. Cultural internationalists espousing the belief that cultural property is "the heritage of all mankind"[96] view the relevant claimant group as the entire human population. They argue that the interests of everyone are served by keeping the property in a location where its physical integrity is best preserved, where it can be studied, and where many people from around the world can have access to it, and that these interests should trump national or tribal interest in retention.[97] On the other hand, cultural nationalists view cultural property as "national cultural heritage"[98] and believe that the cultural identity and heritage of the nation that produced the property, rather than mankind's common heritage, is most worthy of protection.[99]

Moustakas admits that "group scope eludes definition, even in a specific case."[100] However he argues that the unavoidable flexibility of group boundaries should not dissuade discussion of grouphood. He rightly reasons that there are still a number of cases, including the dispute over the Parthenon Marbles, in which group scope is sufficiently defined that uncertainty at the margin will not be fatal to a group rights analysis. He states:

> [W]hile Greeks clearly comprise a society themselves, no doubt composed of smaller groups, they are still very much a group in the world society. Because the restitution, disposition, and distribution of cultural property is an issue of international scope, the contours of the group right merit choosing the world society as the relevant universe from which to extrapolate Greek groupness. Greeks, then,

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95 For discussions of the ownership of Native American artifacts and human remains, see generally Gerstenblith, *supra* note 12, 622–41; Harding, *supra* note 86; Stephanie O. Forbes, Note, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L LAW. 235 (1996).

96 *See supra* Part I.B.

97 Merryman, *supra* note 11, at 355–64 (arguing that cultural internationalist goals of "preservation, truth, and access" are often undermined by cultural nationalist efforts at retention).

98 *See supra* Part I.B.

99 Merryman, *supra* note 9, at 1913.

100 Moustakas, *supra* note 3, at 1194 ("Groupness is relative because it depends upon comparison to the entity of which it is a subset."). Nonetheless, Moustakas relies on the following definition of groupness: "Members of the group identify themselves—explain who they are—by reference to their membership in the group; and their well-being or status is in part determined by the well-being or status of the group." *Id.* at 1193–94 (quoting Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148 (1976)).

> merely comprise one group in a world society of rival claimants seeking to enforce, or at least discuss, rights and aims related to cultural property.[101]

Thus, in the case of the Parthenon Marbles, he argues that Greek cultural identity is the groupness that matters.[102]

However, Moustakas fails to scrutinize the status of the opposing British claim because it is irrelevant to his analysis. His approach is backward-looking: If the Greeks' claim to the Marbles is and was always healthy, then the Marbles are property for Greek grouphood, strictly inalienable, and never could have been transferred legitimately to Britain.[103] While this analysis avoids the problem of competing claimants, a theory that privileges the emotional connection between a group and an object should at least acknowledge the possibility that *both* claimants have such an attachment. The legitimacy of the initial transfer may factor into determining whether the acquirer's current claim is fetishistic, but it should not alone deny the existence of the claim altogether.

The British Museum defends its claim to the Parthenon Marbles with both cultural nationalist and cultural internationalist arguments. The cultural nationalist argument is that the Marbles promote British cultural identity. For instance, Dr. Stephen Lloyd, senior curator at the Scottish National Portrait Gallery, insists that the Marbles have been so influential to British culture and architecture that, without them, "historic Edinburgh beauty spots such as The Mound and Calton Hill would not exist."[104]

By contrast, the cultural internationalist theory posits that physically preserving the Marbles, along with enabling a large number of

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[101] *Id.* at 1194.

[102] "In our case, it is difficult to argue that today's Greeks are not sufficiently related to the Greeks of classical antiquity to possess rights to any cultural property in which the ancients had claim." *Id.* at 1194–95 & n.62 (citing "linguistic continuity" and "historic continuity" as indicators of group continuity); *see* Michael Dummett, *The Ethics of Cultural Property*, ATHENA, Oct. 1986, at 319 ("Greek culture has naturally undergone much transformation in the course of its long history, and many influences have borne upon it: but it has been a continuous process, in which the Greek people has retained its identity, unlike many ancient peoples which have long vanished.").

[103] Moustakas, *supra* note 3, at 1186 & n.24. This backward-looking approach evokes Robert Nozick's historical concept of justice. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149–231 (1974) (discussing his own and others' views of distributional justice). Although Moustakas does not refer to Nozick in his Note, his claim seems to be premised on a first-in-time principle similar to Nozick's: If the first group to acquire an object is still a group, then it is entitled to the object. Echoing both Nozick and Radin, Moustakas suggests that there can be no legitimate transfer because "group" property is inalienable. *See* Radin, *supra* note 12, at 1014–15.

[104] *See* Martin Williams, *Greeks Offer to Go Halves on Elgin Marbles*, HERALD (Glasgow), Apr. 15, 2003, at 13.

people to access them, is most important.[105] Although the British Museum's claim presents a "scope of the group" issue, Moustakas's argument that "the relevant universe is the whole world from which to extrapolate Greek groupness"[106] applies here and supports settling on British culture as the relevant group identity. For the purposes of testing Radin's theory, I focus on the claim that the Marbles have become a part of *British* identity, such that the Greeks' rival claimant is the British.

B. Actual Possession and the Preservation of Group Identity

Application of Radin's theory to groups presents a second difficulty in that it does not explain how actual possession is essential to the preservation of group identity.[107] As Merryman reasons, "[i]t is not clear that enjoyment of *cultural* value . . . requires possession of the Marbles. . . . There must be some cultural magic inherent in the authentic object, and not in an accurate reproduction, that speaks only to Greeks, or the argument fails."[108]

On the individual level, a possession requirement makes sense: The identity of an individual is likely bound up with an object through its use.[109] Cultural property, however, is rarely something that can be used and is often something that most members of a group cannot or do not access regularly, regardless of whether it is located in the country of origin. For instance, given that the British have not hidden the origin of the Marbles and that they welcome Greeks and others into the British Museum to view them, it can be argued that the Marbles can just as easily enhance Greek identity in the British Museum as in the New Acropolis Museum in Athens.[110] The argument for

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[105] While in the past the principles of preservation and access may have counseled for keeping the Marbles in the British Museum, today it is very likely that the Marbles would be as well maintained and accessible in the New Acropolis Museum in Athens. *See* Sennott & Liebowitz, *supra* note 2 ("The plans for the New Acropolis Museum counter the British Museum's longstanding critique of how Greece has cared for its Parthenon marbles."). For a discussion of the principles underlying the public interest in cultural property, see generally Merryman, *supra* note 11, at 1881–83.

[106] *See supra* note 101 and accompanying text.

[107] Harding, *supra* note 86, at 751.

[108] Merryman, *supra* note 9, at 1913.

[109] Harding, *supra* note 86, at 751.

[110] Merryman, *supra* note 9, at 1913.

> The difficulty comes in relating the notion of cultural deprivation to the physical location of the Marbles. If the British had attempted to appropriate the identity of the Marbles, disguising or misrepresenting their origin, then the Greeks, and all the rest of us, would rightly object to such falsification of the culture. . . . [However] [p]resented as they are, spectacularly mounted in their own fine rooms in one of the world's greatest museums, the Marbles honor Greece and Greeks. . . . In the most important sense the Greek cultural heri-

repatriation seems to imply either that "the Greeks are somehow less Greek"[111] without the Marbles or that "[i]f the Greeks are as Greek as they have ever been . . . [then] either the Parthenon Marbles are not part of their identity in any real sense of that word or possession of the Marbles is not necessary for them to continue to be strong cultural symbols."[112]

However, there may be something akin to "cultural magic inherent in the authentic object"[113] that makes its possession essential to flourishing group identity—validation. Daniel Shapiro argues that behind every repatriation claim is the need to have one's "beliefs, customs, and practices" recognized and respected.[114] He further claims:

> That the [Parthenon] . . . Marbles displayed in the British Museum are acknowledged as Greek is not what is at issue. What is wanted is that the Marbles be recognized as integral to *present* Greek identity. . . . What seems to be at stake is the need to be seen as a people for whom the Marbles are a part, to participate in their history, to presently be part of the glory that was Greece, which possession of the Marbles makes most clear.[115]

Shapiro's analysis attempts to make sense of the seeming paradox underlying every Radinesque repatriation claim:

> [W]hat is at stake is what a tribe, community or people believes defines their place in the world and gives them an identity; yet, it is something that at the same time they do not have. At the heart of repatriation claims is something self-defining yet missing. . . the need for recognition and respect from others.[116]

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tage has been preserved, arguably enhanced, by the British acquisition and display of the Marbles.

Id.

111 Harding, *supra* note 86, at 752.

112 *Id.* Harding expresses concern that the possession requirement has dangerous implications for our understanding of culture.

> [T]he notion that identity, whether individual or group, must forever remain attached to a particular object is unsettling. An immutable, intrinsic connection between identity and property may unduly limit, at least in theory, an ongoing process of cultural redefinition. . . . Hegel . . . would most certainly object to Moustakas's inalienability requirement. Hegel's notion of "embodiment" hinges on an act of free will. . . . Only through assertive, positive force of the will does an object become part of one's personality. The imposition of an inalienability requirement which ignores the will of a community desiring to rid itself of a certain object runs contrary to the initial premise of the theory connecting identity and property.

Id.

113 *See supra* note 108 and accompanying text.

114 Shapiro, *supra* note 29, at 105.

115 *Id.* at 106.

116 *Id.*

This approach stresses that it is the ability to achieve (re)possession that makes possession essential. Only through garnering widespread support for their repatriation claim—convincing the international community that the Marbles are important to present Greek cultural identity—will the Greeks' claim prevail. A successful claim is proof of a valid claim.[117] It is as if to say, yes, the glorious Marbles are in fact the "essence of Greekness."

Conversely, the perpetual lack of the Marbles seems to convey the message that the Greek connection is so attenuated that the Greeks do not deserve to repossess the Marbles. The Marbles' continued absence signifies disregard for the link between Greek cultural heritage and current Greek cultural identity. Even though the British Museum glorifies ancient Greekness through its display of the Marbles, the fact that the Marbles are theirs to display denigrates present Greekness.

C. Objective Moral Consensus

The most troublesome aspect of applying Radin's theory to the repatriation debate is that, while both Radin and Moustakas rely on objective moral consensus to resolve property disputes, neither of them provides an analytic framework for discerning when an objective moral consensus exists. Radin describes the process of arriving at an objective moral consensus by example only: We know whether something constitutes bad object relations in the same intuitive way we know whether someone is healthy or sick.[118] Moustakas imports this test into his discussion of group rights in its original amorphous form. He asserts only that hoarding and promoting hatred of other cultures may constitute fetishism.[119]

This lack of direction makes the personality theory almost impossible to apply, especially in the international arena. Even accepting that there are some deep values held across cultures, there are very few property claims that will be deemed fetishistic in every culture, or even the vast majority of cultures. Identifying a belief as universal within one cultural context becomes more difficult when attempted across cultural contexts.

Stephen J. Schnably argues that Radin's reliance on an objective moral consensus makes her theory incomplete and inadequate.[120] He

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117 Shapiro equates it to "having one's religious beliefs acknowledged and being identified by others with certain critical, validating manifestations." *Id.*

118 *See supra* notes 87–92 and accompanying text.

119 Moustakas, *supra* note 3, at 1223–24.

120 Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 357 (1993).

contends that Radin does not provide a comprehensive theory of personhood because she cannot: "[B]ecause she bases her ideal of human flourishing on what she perceives to be society's deepest consensual values, the ideal extends only so far as there is any such consensus."[121] Moreover, Schnably notes that even a seemingly uncontroversial attachment—a person's attachment to her home—is uncontroversial only when viewed with generality. Probing any deeper, the attachment is problematized: It is a place of abuse, a symbol of man's power over woman, or the end result of an unfeeling capitalist society.[122]

Schnably is correct that a true consensus is exceedingly rare in the real world, perhaps even nonexistent. However, there are moral principles that are so fundamental and so widely adhered to that they are easy to identify and can be considered loci of objective moral consensuses in the cultural property context. An example of such a principle is a belief or practice that is recognized as a *jus cogens* norm of customary international law. The following Part explains the significance of *jus cogens* norms and argues that they may be deemed principles for which there exist objective moral consensuses for the purposes of applying Radin's theory.

IV
CUSTOMARY INTERNATIONAL LAW AS OBJECTIVE MORAL CONSENSUS

A. Definition of Jus Cogens

The two sources of international law are agreements among nations, such as treaties and conventions, and customary international law, which generally governs all states with limited exceptions.[123] A

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[121] *Id.*

[122] *Id.* at 372–73.

> Why do so many people tend to identify with their homes? The assertion that this identification is healthy reflects, in large part, the structural factors that make the home and family life appear to be a 'haven in a heartless world.' Behind this popular sentiment lies an implicit acknowledgement of the fragmentation, degradation and powerlessness that confront many people at work and in other aspects of public life. . . . [T]he gender roles associated with the traditional family [are not] somehow natural or spontaneous creations. As feminists have noted, the family is in important senses a creation of the law, which has given powerful support to men's authority within the home. And surely many women's embrace of the domestic roles traditionally accorded them had much to do with their exclusion from the workplace or confinement to lower-paying jobs.

Id.

[123] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987) [hereinafter RESTATEMENT (THIRD)].

norm rises to the level of customary international law when it satisfies a two-pronged test: "[F]irst, most countries must at least purport to follow the norm, and second, they must do so out of a sense of legal duty or *opinio juris*."[124] The "general practice of states" necessary to satisfy the first prong may take several forms. It includes diplomatic acts, local public policy, and "what states do in or through international organizations."[125] The practice can be a recent development or of long duration.[126]

> Although customary law may be built by the acquiescence as well as by the actions of states and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures. Historically, such dissent and consequent exemption from a principle that became general customary law has been rare.

Id. (citation omitted). *See generally* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985) (describing ability of states to dissent from evolving norms of customary international law).

[124] Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1273 (1991); *see, e.g.*, RESTATEMENT (THIRD), *supra* note 123, § 102(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 130 (1999) ("Most international lawyers agree that customary international law results from the co-existence of two elements: first, the presence of a consistent and general practice among States; and, secondly, a consideration on the part of those States that their practice is in accordance with law."); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 53 (2d ed. 1993) ("An international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law."); Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT'L & COMP. L.Q. 501 (1995) ("Doctrine generally holds that customary international law results from (a) the uniform and consistent conduct of States, undertaken with (b) the conscious conviction on the part of States that they are acting in conformity with law, or that they were required so to act by law.").

[125] RESTATEMENT (THIRD), *supra* note 123, § 102 cmt. b, n.2.

> The United Nations General Assembly in particular has adopted resolutions, declarations, and other statements of principles that in some circumstances contribute to the process of making customary law, insofar as statements and votes of governments are kinds of state practice and may be expressions of opinio juris. The contributions of such resolutions and of the statements and votes supporting them to the lawmaking process will differ widely, depending on factors such as the subject of the resolution, whether it purports to reflect legal principles, how large a majority it commands and how numerous and important are the dissenting states, whether it is widely supported (including in particular the states principally affected), and whether it is later confirmed by other practice.

Id. n.2 (citations omitted).

[126] *Id.* It is not required that a practice be universally followed, "but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law." *Id.* § 102 cmt. b.

The second prong maintains that even if a practice is widely followed, it will not constitute customary international law if "states feel legally free to disregard" it.[127] Thus, a practice followed merely as a matter of courtesy or habit is not customary international law. The circularity inherent in these requirements (how can practice be based on a sense of legal obligation *before* it becomes law?) has resulted in many theoretical debates, yet the existence of such customary norms is widely accepted.[128]

There is much disagreement as to *which* specific norms qualify as customary international law.[129] While it is generally agreed that the law of immunities, for instance, derived its authority from customary international law,[130] the status of many guiding principles is up for debate. To ensure that only the norms that reflect the greatest consensus are used to judge the health of Radinesque claims, only those norms that are argued to be *jus cogens* will be considered.

Unlike other principles of customary international law, which "have equal authority"[131] with law made by international agreement and which may be superceded by interstate agreements, *jus cogens*, or peremptory norms, permit no derogation.[132] As set forth in the

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127 *Id.* § 102 cmt. c ("Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; opinio juris may be inferred from acts or omissions.").

128 *Id.* § 102 n.2. "Perhaps the sense of legal obligation came originally from principles of natural law or common morality, often already reflected in principles of law common to national legal systems" and "practice built on that sense of obligation then matured into customary law." Or "[p]erhaps the definition reflects a later stage in the history of international law when governments found practice and sense of obligation already in evidence, and accepted them without inquiring as to the original basis of that sense of legal obligation." *Id.* (citations omitted).

129 Daniel M. Bodansky, *The Concept of Customary International Law*, 16 MICH. J. INT'L L. 667, 667–68 (1995) ("Although the concept of customary international law is elusive, some norms have clearly emerged internationally through a customary lawmaking process. The law of diplomatic immunities is one of the best examples."); Samuel Estreicher, *The New York University-University of Virginia Conference on Exploring the Limits of International Law: Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT'L L. 5, 6–7 (2003) ("The literature on [customary international law] is a daunting one that could fill many Alexandrian libraries. Most of it is concerned with the epistemic question of how to determine whether a practice in fact reflects customary law.").

130 ERNEST SATOW, A GUIDE TO DIPLOMATIC PRACTICE chs. XVI, XVII (Nevile Bland ed., 4th ed. 1957) (discussing customary international law regarding diplomatic immunities).

131 RESTATEMENT (THIRD), *supra* note 123, § 102 cmt. j.

132 *Id.* The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order and the observance of which can be required by all members of the international community. *See also* Pamela J. Stephens, *A Categorical Approach to Human Rights Claims:* Jus Cogens *as a Limitation on Enforcement?*, 22 WIS. INT'L L.J. 245, 255 (2004).

Vienna Convention on the Law of Treaties,[133] in order to achieve *jus cogens* status, a norm of customary international law, as well as its peremptory character, must be "accepted and recognized by the international community of States as a whole."[134] The specific content of the *jus cogens* doctrine is contested,[135] yet as long as a principle is so widely accepted that there is a legitimate argument that it has achieved *jus cogens* status, there is (what approaches) an objective moral consensus that it should be followed.

Although the drafters of the Law of Treaties decided against providing examples of *jus cogens* norms in the body of the law, leaving "the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals,"[136] they set forth in their commentary the following examples of treaties that would violate the most "obvious and well-settled rules of *jus cogens*":[137]

> (A) a treaty contemplating an unlawful use of force contrary to the principles of the Charter;
> (B) a treaty contemplating the performance of any other act criminal under international law; and
> (C) a treaty contemplating or conniving at the commission of acts such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to co-operate.[138]

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133 Vienna Convention on the Law of Treaties, *supra* note 33, at 331.

134 *Id.* It seems, however, that acceptance "by the international community of States as a whole" means by "a very large majority" of states. *See Report of the Proceedings of the Committee of the Whole*, U.N. Doc A/CONF.39/11 (1968). Dissent by "a very small number" of states is not fatal to the designation. *Id.*

135 Just as with customary international law generally, there are some norms that are unquestionably part of the *jus cogens* doctrine and others about which there is some disagreement. The content of the doctrine evolves over time. As a norm is developing, jurists argue over whether it has achieved *jus cogens* status. Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 427–29 (1989).

136 Egon Schwelb, *Some Aspects of International* Jus Cogens *as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 963 (1967).

> [T]he Commission gives two reasons for not identifying any rules of *jus cogens*. First, the mention of some cases might lead to misunderstanding as to the position concerning other cases. Secondly, an attempt to draw up, even on a selective basis, a list of rules of *jus cogens* might find the Commission engaged in a prolonged study of matters which fall outside the scope of the draft articles.

Id.

137 Stephens, *supra* note 132, at 253 (citing 1963 Y.B. INT'L L. COMM'N (I), cmt. to draft art. 50, para. 3).

138 *Id.* The Restatement offers the following examples of *jus cogens* in the customary international law of human rights:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
> (a) genocide,
> (b) slavery or slave trade,

Additionally, the drafters note that "'treaties violating human rights, the equality of States or the principle of self-determination' might conflict with peremptory norms."[139]

The above examples, which include prohibitions against slavery, genocide, the use of force, and activities which violate the principle of self-determination, are at the core of the *jus cogens* doctrine. They are valued by so many people across different cultures that there is an objective moral consensus—or the closest thing to it—that violating them is wrong. If an object is bound up with the identity of a cultural group in a way that violates one of these norms, promotes practices that violate one of these norms, or purposefully expresses adherence to contrary beliefs, then that claim to the property is fetishistic, and it should not be protected against the healthy claims of other groups.

B. Applying Jus Cogens *Norms to the Repatriation Debate*

Before engaging the Parthenon Marbles case study, it is helpful to look at the *jus cogens* norms in light of another example. In one of the most interesting applications of the personality theory to the repatriation debate, Jonathan Drimmer contends that the United States should not return to Germany Nazi artwork confiscated by the U.S. military after World War II because the German claimants' relationship with that property is necessarily fetishistic.[140] Drimmer does not consult customary international law to make this judgment. Instead, he maintains that a theme of encouraging multiculturalism underlies cultural property laws and that this theme is obviously violated by

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(c) the murder or causing the disappearance of individuals,

(d) torture or other cruel, inhuman, or degrading treatment or punishment,

(e) prolonged arbitrary detention,

(f) systematic racial discrimination

RESTATEMENT (THIRD), *supra* note 123, § 702.

139 1963 Y.B. INT'L L. COMM'N (I), INT'L L. COMM'N (I), cmt. to draft art. 50, para. 3.

140 Drimmer, *supra* note 24, at 749–53, 759 (arguing that when "the United States concludes that a cultural property helps to instill the dangerous values of an eliminationist group, and that a denial of access will help prevent those values," repatriation claims should be denied).

> [The works at issue] were primarily created by German artists during the 1930s and 1940s and glorify many of the central tenets of the Third Reich or Nazi culture. The United States seized and still refuses to return these cultural properties—despite lawsuits from original owners, pleas from the artists, and official requests by the German government—out of a fear that allowing the German people access to them could help revive the violent eliminationism that became manifest in Nazi Germany and even potentially contribute to the rise of a Fourth Reich.

Id. at 694–95.

"objects that promote violent cultural intolerance or unbridled ethnocentricity."[141]

Precisely because of the essential role that cultural property plays in the preservation of group identity, a refusal to repatriate property that is deemed dangerous to both group members and others can be a way of changing the character of the group for the better. "Denying group members access to cultural properties threatens the group's shared norms and its members' common identities. Accordingly, a refusal to repatriate cultural properties can diminish the dominant tenets that bind a violently intolerant culture, both in the group as a whole and in its individual constituents."[142]

Drimmer argues that the return of artwork that was produced by and glorifies Nazi culture,[143] a culture built on hatred and bigotry, is antithetical to the goals of repatriation laws. Appealing to such underlying values is a logical move; however, Drimmer's argument would be better served by reliance on a *jus cogens* norm, such as the prohibition of genocide. Multiculturalism, "premised, in part, on the belief that all cultures are of equal value,"[144] is widely valued, but unless one locates authority for it in customary international law, there is no way to gauge *how* widely it is held.

Customary international law adds legitimacy to discussions concerning Radinesque claims to cultural property. *Jus cogens* is a comprehensible body of norms, the very existence of which is premised on consensus-like respect. The doctrine is sufficiently coherent and well established to provide standards for judging whether a property claim is fetishistic and for assessing the validity of that judgment. In this case, the *jus cogens* prohibition against genocide is evidence of an objective moral consensus that genocide is wrong, and any relationship with property that condones it is fetishistic. Under this analysis,

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141 *Id.* at 752–53.

> From the perspective of encouraging multiculturalism, a group cannot be deemed to possess a healthy self-constitution if safeguarding its ideals would encourage the violent destruction of other groups; such a group not only would fail to flourish in a global economic and cultural environment, but would decrease diversity by threatening the continued existence of other groups.
>
> *Id.*

Drimmer uses the following definition of multiculturalism: "aspiring toward a plurality of cultures with [all] members [of society] seeking to live together in amity and mutual understanding with mutual cooperation, but maintaining separate cultures." *Id.* at 726 (quoting R. HAVIGHURST, ANTHROPOLOGY AND CULTURAL PLURALISM: THREE CASE STUDIES, AUSTRALIA, NEW ZEALAND, AND USA 3 (1974)).

142 *Id.* at 756.

143 For a description of the works in question, see *supra* note 140.

144 *Id.* at 726.

the Germans' repatriation claim should not be treated as "personal" and should fail.

The following discussion analyzes the Greek and British claims to the Parthenon Marbles in light of the *jus cogens* norm of self-determination.

C. *Parthenon Marbles*

If the Greeks were the only group whose identity was bound up with the Marbles, then this would be an easy case: The Greeks would prevail. The Greek claim for the sculptures does not violate any *jus cogens* norms, and, as such, their relationship with the Marbles is most likely healthy and thus deserving of greater protection than "fungible" British claims.

However, if we accept that the Marbles are bound up with both Greek and British groupness, then the only way to decide between them is to identify one of the claims as fetishistic. For this we turn to customary international law. Does the British claim to the Marbles violate a *jus cogens* norm? The Marbles were removed from the Acropolis in Athens by the British diplomat, Lord Elgin, while Britain was an imperial power and Greece was occupied by the Turks. The Marbles rest now in the British Museum amidst a collection of treasures from around the world that celebrates the mightiness and reach of the British Empire. The *jus cogens* norm most relevant under these circumstances is the right to self-determination, the ideal that "no class of people has the inherent right to oppress another."[145] If the essence of the British claim to the Parthenon Marbles is antithetical to the principle of self-determination, then it is fetishistic and fails vis-à-vis a healthy Greek claim.

At its most basic, self-determination is "[t]he right to decolonization and attainment of self-government" for "[p]eoples inhabiting colonial territories."[146] When Woodrow Wilson formally introduced the concept to the international scene in 1919, he described self-determination as "the right of every people to choose the sovereignty under which they shall live, to be free of alien masters, and not to be handed about from sovereignty to sovereignty as if they were property."[147] Various United Nations resolutions and declarations have since elabo-

[145] Richard Wilner, *Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination*, 1 U.C. DAVIS J. INT'L L. & POL'Y 297, 304 (1995).

[146] Laurence S. Hanauer, *The Irrelevance of Self-Determination to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. 133, 155 (1995).

[147] Eric M. Amberg, *Self-Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839, 842 (1985).

rated on the principle, and state practice has supported it.[148] "[O]ver seventy territories and former colonies have been decolonized since 1946, with many of them becoming sovereign states and members of the United Nations."[149] Additionally, the right to self-determination has become "one of the most often invoked human rights of international law."[150]

Whether the British claim violates this principle depends on whether the claim is based on practices that oppress another cultural group or whether it promotes beliefs that endorse that type of oppression. In 1801, the Greeks were an ethnic minority within the vast Ottoman Empire, as they had been for four hundred years.[151] It was at this time that Lord Elgin sought and was granted a permit by the Ottomans to examine the Parthenon and its art. Whether this narrow authority contemplated the resulting removal of large parts of the Parthenon's structure is hotly debated.[152] In any case, the Greeks were not consulted about the sculptures' removal before Elgin loaded his cargo aboard a ship and set sail for England, where the British Parliament eventually voted to purchase the sculptures from Elgin.[153] Today the Marbles stand in the British Museum as a monument to British colonial imperialism. For many, they have become symbolic of the British power to control the people of their once-numerous territories.

The circumstances surrounding the acquisition of the Marbles and Britain's continued possession of them support labeling the British claim as fetishistic.[154] However, the case for dismissing the British claim is weaker than the case for dismissing the German claim to Nazi memorabilia, and it illustrates the limits of applying the *jus cogens* framework. For instance, while there is "doctrinal con-

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148 Hanauer, *supra* note 146, at 155 (citing individual General Assembly Resolutions, Charter, human rights covenants, and I.C.J. advisory opinions as working to establish right of self-determination as customary international law).

149 Inge V. Porter, *Two Case Studies in Self-Determination: The Rock and the Bailiwick*, 4 SAN DIEGO INT'L L.J. 339, 359 (2003).

150 *Id.* at 341. The current debate is whether the right attaches "only to those peoples within existing colonial boundaries" or if it attaches to all "peoples." Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 29 (1992).

151 Merryman, *supra* note 9, at 1897.

152 *See id.*; Moustakas, *supra* note 3, at 1198 n.82. For a comprehensive history of the Parthenon Marbles, see generally CHRISTOPHER HITCHENS, THE ELGIN MARBLES (1987).

153 *See* Moustakas, *supra* note 3, at 1198 n.82.

154 While it may seem that the principle of self-determination will always counsel toward repatriating cultural property, the principle will not resolve disputes between two colonized peoples, or between two colonizers. Without reference to another *jus cogens* norm, perhaps those disputes would not be solvable under this model.

sensus"[155] that self-determination is a basic principle of customary international law, there is still debate as to whether self-determination has generated the agreement required to reach *jus cogens* status. Furthermore, the principle of self-determination was not a norm of customary international law when Lord Elgin took the Marbles in the early 1800s. Lastly, it was not the British, but the Turks, who ruled the Greek people at that time.

While these points reveal the weaknesses of the case against the British, they are not fatal. Self-determination may not be universally accepted as *jus cogens*, but it is considered *jus cogens* by many, including the United Nations drafters of the Law of Treaties.[156] And even though the Greeks were colonized by the Turks, not the British, it was Britain's status as an imperial power that enabled Lord Elgin to elicit whatever permission the Ottomans granted.[157] Overall, the British claim has unhealthy aspects to it and should fail.

CONCLUSION

Both Radin and Moustakas maintain that their theories can be used to decide between rival claimants.[158] However, as discussed above, a dispute between two parties making Radinesque claims is difficult to resolve, first and foremost because neither personhood nor grouphood theory has offered an elaborate explanation of when a claim is fetishistic. This Note has suggested one way to resolve disputes between claimants by appealing to *jus cogens*. *Jus cogens* will not help in every case, and the standards may often be difficult to apply. The doctrine is useful, however, because it provides an analytical framework for identifying what constitutes objective moral consensus across many cultures and for thinking about cultural property disputes generally.

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155 *See, e.g.*, Hanauer, *supra* note 146, at 155 ("[The United Nations Charter, human rights covenants, General Assembly resolutions, and I.C.J. opinions] have, over time, rendered the right to self-determination a fundamental principle of customary international law."); Edward A. Laing, *The Norm of Self-Determination, 1941–1991*, 22 CAL. W. INT'L L.J. 209, 209 (1992) ("There is an apparent doctrinal consensus that the right of self-determination of people and nations is recognized by international law."); Porter, *supra* note 149, at 359 ("[A]lthough it is debatable whether self-determination has become a *jus cogens*, it has undoubtedly achieved the status of customary international law.").

156 *See supra* note 139 and accompanying text.

157 At the time Elgin sought permission to examine the Parthenon, the Ottomans were "eager to establish friendly relations with England." Merryman, *supra* note 9, at 1901. "Elgin himself acknowledged that he was making little progress in the negotiations . . . until the Ottomans suddenly began showering all kinds of favors on their British allies [after news reached the Ottomans of British success against the French in Egypt]." *Id.* at 1902.

158 *See supra* note 22.