

“Culture Weaponized: A Contrarian Theory of the Sometime Appropriateness of the Destruction, Theft and Trade of Art and Cultural Artifacts in Armed Conflict”<sup>1</sup>

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March, 2017

### Introduction

It is widely assumed that the theft of, trade in, and destruction of art and cultural artifacts in time of war are evils, and that they are and ought to be thought of as war crimes. I argue that this view needs re-examination and acknowledgment of exceptions.

### The Main Arguments Against Theft of, Trade in, and Destruction of Cultural Artifacts in Time of war

Trade in cultural artifacts is objected to on various grounds – that it incentivizes theft from and desecration of archeologically significant sites, resulting in the undocumented removal artifacts from their terroir and making their scientific investigation more

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<sup>1</sup> This paper was prepared for the conference, “The Preservation of Art and Culture in Times of War”, **Error! Main Document Only.** Claire Finkelstein, organizer, co-sponsored by the Center for Ethics and the Rule of Law (affiliated with the University of Pennsylvania Law School), and the University of Pennsylvania Museum of Archaeology and Anthropology, to be held at the latter venue on the campus of the University of Pennsylvania in Philadelphia, Pennsylvania, U.S.A., April 4-6, 2017. For helpful comments, my thanks to Sheldon Wein, L.W., and students in my classes at Dalhousie University.

difficult; that it deprives nations and peoples of their cultural heritage; and that it allows terrorists to finance their operations by sale of artifacts on the black market.

There are exceptions where such trade can be a good thing, e.g., in repatriating items to their people or nations as part of the unwinding of colonialism or the restoration of stolen property after war, in encouraging the discovery and protection of items that would otherwise be forgotten over time or damaged in war, and, when done by museums, in allowing the presentation of items testamentary of human creativity in history alongside each other where their majesty is more thoroughly evident, and in allowing a wider audience to appreciate the beauty and significance of these items (a consideration that may in some cases countermand the argument for repatriation<sup>2</sup>). Sometimes too there is simply not much ground for objection, as in the trade of curios large in number, well-understood already archeologically, and not particularly essential to the identity of any extant culture – in this case, why not permit the activity as something that contributes to the economy by providing employment, and that allows the indulgence of the tastes of collectors? Further, there are situations where regulating trade in these things would fetishize them in ways unhealthy for their originating populations. And finally, sometimes the odds of regulative attempts being successful are very small so that the

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<sup>2</sup> James Cuno argues that we should aspire to cultural cosmopolitanism and the representing of all cultures in various museums rather than repatriating cultural artifacts to their native sites, the latter being an idea problematically nationalistic. See Cuno, James. [“Culture War: The Case Against Repatriating Museum Artifacts.”](#) *Foreign Affairs* 93, no. 6 (Nov./Dec. 2014): pp. 119-124. (Required reading for this conference.)

game is not worth the candle. Which of these considerations is in play, and how decisively, is often contested in a given case.

The destruction of cultural artifacts in war is also generally disapproved of.<sup>3</sup> In the case of occupying armies, such actions are condemned on grounds of being militarily gratuitous, or worse, militarily self-defeating, interfering with winning hearts and minds – better to take extreme care against military clumsiness in respecting the objects around which cultures are organized. And when the practice of destruction is engaged in by terrorists, it is condemned for obliterating cultures in a way comparable to the genocide of a people. In both cases, it is objectionable for being destructive of the archeological record and therefore of the scientific value of these things, and for being aesthetically injurious.

The theft and destruction of these artifacts comprise, therefore, unjustifiable harms to people, cultures and to scientific and aesthetic value. And so they are actions worth the risk of loss of life to prevent, and meriting the status of war crimes -- of actions for which one ought to be prosecutable after the cessation of hostilities. There are some arguments for exceptions to these views: on some rare occasions their destruction may be

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<sup>3</sup> See Richard Goldstone, “The War Crime of Destroying Cultural Property”, International Judicial Monitor, Summer, 2016, for many good examples of war fighting by means of destroying cultural property, and for some of the standard rationales against this – e.g., its demoralizing effect and its affront to human dignity. (Required reading for this conference)

<http://www.judicialmonitor.org/summer2016/globaljudicialperspective.html>

regrettably necessary to some valuable military or humanitarian end, or their preservation may be too costly in lives and materiel.

I think these positions in certain ways undersell the meaning of cultural artifacts, in other ways, oversell it, and that we need, therefore, to re-configure the debate in starker terms.

A Master Argument for The Theft And Destruction of Cultural Artifacts Sometimes Being Appropriate in War Time: When Cultural Artifacts are Oppressive and Hegemonic

I suggest that it is true of at least some cultural artifacts that, like the cultures that create them, the artifacts are oppressive and hegemonic, and therefore fair game for destruction in war by those peoples whom they oppress.

Art and cultural objects are the infrastructures and transmitters of cultures, and cultures are, among other things, comprised of rules for the distribution of goods, for the assigning of entitlements. This is why cultures matter, morally and politically. And this is why their artifacts matter. Cultures which disentitle people among them are therefore understandable targets for the discontented, and the destruction of the infrastructures of cultures are, along with direct hostilities against ordinary members and agents of those cultures, the method of combat and redress for the disentitled when the methods approved of within civilization have failed. To these people, the memes, art and artifacts of the cultures that oppress them are weapons against them. And the destruction of these things is their counter-weapon. Indeed, because they are people without much power in civilization, this is their only counter-weapon.

Moreover, war is sometimes due to a clash of cultures, in particular, a clash between great cultures over who is entitled to what. And since each culture's artifacts can

constitute symbols of contested and often oppressing negative value to the other, again, far from being an evil or a crime, sometimes the theft or destruction of cultural artifacts is morally appropriate and necessary.

Think of Nazi architecture, art, costumes and literature: there is a strong case that the combatting of Nazism required the destruction of its cultural artifacts; and that their preservation would have been the continuation of Nazi oppression of Jews by means of the preservation of its artifacts. There is more than just hate speech; there is also such a thing as hate architecture, for example. Thus surely there could have been no well-founded objection had Jewish resistance fighters blown up Nazi statuary and other edifices in WWII. Moreover had there been a market for Nazi memorabilia, surely there could have been no good objection to the theft of and trade in this memorabilia as a means of financing resistance to the Nazi agenda. On the other hand, the opposite would be true of Nazi destruction of Jewish cultural objects to advance the Nazi agenda, and of theft of Jewish memorabilia by Nazis to finance that agenda.

Indeed, suppose some artifacts were constructed on the backs of oppressed peoples. And suppose it is the rebellion by these peoples that is the occasion of war. Then these people seizing the artifacts and selling them to finance their war of liberation is arguably a morally defensible, even obligatory act.

Another scenario that makes it problematic to universally condemn the destruction of cultural artifacts is when a given culture's artifacts literally compete for space with morally superior possible artifacts, as in occupying contested ground in competing myths of the primal right of the peoples who created these artifacts to the land on which they have been constructed. And so if one culture has better title to this ground

than the other, arguably they have a right to destroy the intruder's artifact and replace it with one of their own. There may well be examples in the Israel-Palestine conflict.

Further, sometimes an item may have both the status of cultural artifact and of something materially part of oppression. For example, arguably the Twin Towers, while icons of architectural achievement in the West, were also the seat of finance driving Western "oppression" of miscellaneous Muslim peoples in wars in the Middle East. And if we see some of what the West was doing there as unjust interference in other cultures' lives for the purpose of accessing oil, the case could be made that the destruction of these buildings was a just assault on an unjust culture by means of assault on one of its central cultural artifacts.

The justice of the attack in that last case is of course contestable. Nevertheless, the general point remains that it is doubtful whether we can decide that the destruction of a given piece of cultural property is bad without first deciding which side in a conflict is just. Sometimes it will be permissible to destroy some artifacts, possibly even obligatory, as in the Nazi case. But sometimes preservation of cultural artifacts will be obligatory, as in the preservation of indigenous art and saving it from erasure by the cultures that have sought to conquer indigenous peoples. More generally, the question of the status of the destruction of artifacts depends on the effects of their existence and whether these effects are all things considered morally good or bad.

In light of the fact revealed by the forgoing scenarios, namely, that cultural artifacts can be oppressive and hegemonic, it should be clear that it would be a mistake to issue a blanket condemnation of the theft of, trade in, or destruction of cultural artifacts. The truth is more complex. Far from its always being appropriate to censure traders in

cultural artifacts and the museum curators who buy their wares, for example, under some conditions, traders and museum curators should in fact be drafted into war efforts: sometimes theft and trade of one culture's items should be mandated as a way of helping another culture overcome unjust oppression, or as a way of protecting items of a just culture that would otherwise be lost; sometimes such theft and trade should be forbidden for being an aid to an oppressing culture.

Thus, more generally, I suggest that whether the artifacts of a given culture in war should be protected from destruction and theft depends in part on which side in the war is just. In fact, sometimes we do evil if we would protect certain artifacts; sometimes these artifacts would be well destroyed. Likewise, sometimes we do evil if we prevent the trafficking in artifacts, e.g., if the trafficking is by the oppressed, of goods built on their backs by their oppressors, and if the trafficking will help finance a just insurrection.

There will be cases, however, where, even though some cultural objects are problematic for being oppressive to another culture, they should nonetheless be preserved for their historical or aesthetic value, provided only that the items acquired can be in effect quarantined from having their toxic effects. And sometimes this can be achieved by removing the objects from the context where they are oppressive and re-contextualizing the objects with the benefit of critical analysis and historical and political perspective in museums. Thus just because an artifact has a tainting past or a problematic political consequence now, doesn't mean it must permanently have it. Just as there can be negotiations between cultures to attain a moral rapprochement in morally asymmetrical conflict, so there can be a re-situating of cultural artifacts so that their transcultural value can come to be the most salient fact about them. Perhaps the artifacts can be

contextualized, or surrounded in symbols that recognize their moral complicity – e.g., as in museums, or, if the objects remain in situ, with the affixing of plaques, or by them having become broadly condemned so that their consumers are not harmed by them. And so-contextualizing such artifacts may make permissible their preservation. In fact, if we have the power to do such contextualizing, sometimes this may in turn make preservation obligatory. For it may be that these things should be kept around as warnings and reminders (think of the preservation of concentration camps from WWII). Maybe it's OK to have morally problematic items in museums for similar reasons. In these cases, putting them in museums is a like quarantining a computer virus: in both cases, we prevent something from having its designed effect – in the case of problematic cultural artifacts, we prevent them from transmitting hate, or from perpetuating in-group out-group distinctions. Thus while some of these things are such that their continued existence, or at least omnipresence, might seem to be a kind of hate-speech, there would be the usual arguments from defenses of free speech for their preservation and for not censoring them: we need to know these ideas are out there so that we can continually evaluate them, continually refute them for those who come upon them for the first time, and so on.<sup>4</sup>

### Theft and Destruction of Cultural Artifacts as a Better Means of Warfare Than Killing and Rape

I suggest that the threat of theft and destruction of cultural artifacts can be a more humane means of leveraging towards victory in war than threats to debase, damage or destroy human life, and therefore such theft and destruction ought not necessarily to be conceived

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<sup>4</sup> My thanks to LW for suggesting many of the points in this paragraph.

as war crimes, but instead as a more ideal, more humane form of warfare, one that quite properly involves destruction of property rather than taking the lives of young, military-aged men. Indeed, it would be a happy fantasy to imagine a war fought only by violence against things, not people. This is unlikely ever to occur, of course. For wars are only over when people stop fighting, and some people will stop fighting only when they are dead. So some killing may be inevitable. Still, it would seem to be ideal to displace the locus of destruction onto inanimate things so far as possible.<sup>5</sup>

We generally make something a war crime when we want to especially disincentivize it, as at least some nations have done in signing agreements prohibiting the use of chemical weapons, land-mines, cluster munitions, blinding lasers, and as some nations are thinking of doing with autonomous weapons systems -- killer robots. Generally we put on this list things whose destruction is gratuitously out of proportion to military necessity, or unable to be selectively targeted only at military combatants, or which are likely to be a harm to people after the conflict is over.<sup>6</sup> Well, do we really want

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<sup>5</sup> One sociological factor to consider is whether destroying culturally significant objects will really advance the war effort or only make people fight harder. I imagine this will vary depending on the people, the objects, and the spirit with which the destruction is undertaken.

<sup>6</sup> It might seem odd that we would tie one hand behind ourselves in war by agreeing to constraints on how wars are to be fought. After all, surely if we are at war, anything goes. But in reality this is not true. War has many constituencies – it is really a method to the reconfiguration of peace. And unrestricted violence is not typically the best means to that end. One must win the hearts and minds of those with whom one is at war. One must

to disincentivize combat by means of theft of, trade in, or destruction of cultural artifacts? Do we want to disincentivize it compared to, say, rape or killing? Surely we would rather have wars be conducted by theft and destruction of cultural artifacts.

I can think of seven general forms of objection to this proposal, seven general argument forms for why the theft and destruction of cultural artifacts should be a war crime when ordinary killing and rape is not: a) they are worse crimes, b) they are not worse crimes but there is less good justification for engaging in them, and greater risk of them being engaged in for non-political reasons, so engaging in them should be more punished, c) the people who typically engage in them do not have the same sort of authorization to do these things as people who engage in killings (perhaps because they tend to be non-state actors who therefore do not have the authorization of a state for what they do), d) the crimes are ones more able to be deterred by being counted war crimes than would be the deterring of, say, killing, e) the crimes are of a sort that they are by nature redressable by being considered war crimes in a way that killing is not, f) they are crimes which cannot be addressed in any other way than by seeing them as war crimes while killing is not like this, or g) they are crimes for which, as a matter of real politick, greater agreement about doing something about them is possible (perhaps because, in many conflicts, all sides benefit from the preservation of these things, no matter who prevails in a given conflict).

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keep one's own population onside. One must avoid the enmity of other nations. One may want certain things from the people, places and things that constitute the enemy, its territory and its civilization's artifacts, things that require one to minimize the enemy's destruction.

Let us consider these arguments. First, are theft and destruction of cultural property greater crimes than killing and rape? Arguably not. For surely things should matter less than lives, so if anything should be a war crime, it should be the taking or debasing of life (e.g., by means of rape), not the destruction or theft of property. To be sure, things can in some sense have greater value than lives. The insured value of a building might be twenty million dollars, the insured value of a life, one million. But it doesn't necessarily follow that someone who destroys a building has done something twenty times worse than someone who takes a life. And in any case, it would be consistent with the proposal to make a theft a war crime that someone who steals or destroys something worth, say, fifty thousand dollars, something with much less insured value than a single human life, should be considered guilty of a war crime, while someone who takes a single human life would not be so considered; and this seems absurd enough.

In light of that insight, is it really permissible to have the destruction and theft of cultural artifacts be a war crime while rape is not? Even if both should be, it may be an outrage if at a given time theft is such a crime and rape not, such an outrage that maybe until rape is made such a crime, theft should not be.

But in their two commentaries on this issue, Brian I. Daniels and Helen Walasek, respectively, in effect argue that while it may seem problematic to have the destruction of cultural property prosecutable as a war crime while things like rape go unprosecuted, the destruction of cultural property should not be minimized, since it amounts to erasing the identities of peoples and should therefore be seen as analogous to the crime of genocide,

which everyone agrees is an atrocity in all meanings of the term.<sup>7</sup> In that event, even if we are right to insist that respect for persons should be primary in war time, arguably part of respecting persons would be respecting the cultural edifices into which persons have poured their labour and their financial investments, and which they have invested with symbolic value.<sup>8</sup>

Nevertheless, I would argue that a person's body and freedom should be protected over their material creations; for people can reorient their commitments to cultural objects in ways they can't to their physical welfare and freedom. It would still seem true, therefore, that rape should be prevented first, then the destruction and theft of cultural objects. So the former should be made a war-crime under international criminal law before the latter.

It might be argued that a person's body and freedom should have priority only unless they would wish otherwise. I would reply that their wishing otherwise is only an argument if the person is in a position to competently wish otherwise, something made doubtful by their very preference for the preservation of a thing over preservation of themselves.

#### Objections to Warfare by Means of Theft and Destruction of Cultural Artifacts

Many will object to this means of warfare. They would see it as approving of conduct that ought in fact to be conceived as war crime. But why should the destruction of

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<sup>7</sup> Their commentaries are in the article, "Is the destruction of cultural property a war crime?" Apollo: International Art Magazine, November 28, 2016. <http://www.apollo-magazine.com/is-the-destruction-of-cultural-property-a-war-crime/>

<sup>8</sup> Thanks to L.W. for discussion on this point.

cultural artifacts be a war crime. Because it's an atrocity? But compared to mass slaughter of actual people, this seems too strong a claim. So when proponents say theft and destruction of artifacts ought to be a war crime, they don't mean that committing these acts would be atrocious. They just mean they are not things from prosecution for which you should be legally immunized just because there was a war on.

But why not? After all, many of the people who do these things are arguably just soldiers doing what they are told.

And why should even the masterminds be punished? After all, if artifacts have value, then their destruction is a kind of harm to the enemy in war; and why shouldn't it be a permitted harm?

Maybe the argument is that it's gratuitous in war, that it isn't justified by military necessity. But arguably anything that people would rather have us not do can be made into a weapon, a thing the doing of which and the threatened further doing of which might bring about the end of the war by inducing surrender, and the kind of thing whose prospect of happening might dissuade people from war. That means the following argument should not be available: that I should get to sue for the return of my grandmother's art collection because its theft was gratuitous in the fighting of the war. For under the current proposal, it was not gratuitous. Theft is a weapon of war. And how odd if after the war I can sue for the return of an art work, and prosecute its thief, but can't bring a charge of murder against a soldier for killing someone dear to me. Odder still that there is less consensus about rape being a war crime than there is about theft of property and destruction of cultural artifacts.

It is certainly true that committing gratuitous harms in war ought to be a war crime. But committing harms by destroying cultural artifacts or by theft of cultural property isn't necessarily gratuitous – not if it was necessary to advancing a just cause in a war. To give a less problematic example of such a pretext, everyone will acknowledge that sometimes these artifacts must be used as bastions from which to fight; and that sometimes, these bastions must be destroyed in the course of justified fighting.

We sometimes see the destruction of artifacts as even more shocking than the destruction of persons. Indeed, the destruction of cultural artifacts has been described as a method of 4<sup>th</sup> generation warfare intended to shock and demoralize.<sup>9</sup> Why such destruction has this effect is not clear. Perhaps we think of artifacts as innocent things, like children, so that their destruction is especially heinous. And yet artifacts have no sentience, so this analogy is not strictly accurate – the artifacts do not suffer from their destruction, and they don't care not to be destroyed. Another possibility is that their destruction has the symbolic value of representing the destruction of the civilization and people that produced them.

However, since the destruction of artifacts is not inherently the destruction of people, nor of the totality of their culture, our reaction of outrage may be strictly out of proportion. But this is no argument against using the destruction of artifacts as a method of warfare.<sup>10</sup> In fact it may give us more reason. For we can see the destruction of

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<sup>9</sup> Department of Defense, [Cultural Property Protection - Theory](#). (n.d.), Part 1. Retrieved June 28, 2016. (Background reading for this conference.)

<sup>10</sup> For some interesting reservations about whether cultural destruction and looting ought to be seen as a war crime, and as a basis for intervention under the idea of Right to

cultural artifacts as warfare by what I have called moral pseudo-injury<sup>11</sup>, something that seems to be an injury only to those who believe something demonstrably false, or not demonstrably true, something characteristic, for example, of all religions. Destruction of something wrongly perceived to be important given false or indemonstrably true beliefs, e.g., destruction of a religious artifact, is not really a harm, since the thing that would have to exist – God – in order for it to be a harm, does not exist. This may make warfare by moral pseudo-injury morally superior to warfare by actual injury. And warfare by the destruction of cultural products mistakenly invested with meaning may therefore be a morally superior proxy for warfare by the destruction of persons.

But perhaps such injury is really more than just pseudo injury, rising instead to the level of some kind of actual injury – after all, feelings get hurt, and so on. It still does not seem as bad as physically maiming and killing living people.

Demanding the preservation of art works and cultural artifacts in time of war is rather like making the fighting of war into the functional equivalent of a neutron bomb, a bomb that, notoriously, harms people with radiation, but minimizes blast, thus saving

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Protect, see Frederik Rosén, Senior Researcher, The Danish Institute for International Studies “PAPER for UNESCO expert group meeting on Cultural Heritage Destruction and R2P” in Paris, 26 - 27 November 2015, required reading for this conference.

[http://pure.diis.dk/ws/files/402500/Frro\\_paper\\_paris.pdf](http://pure.diis.dk/ws/files/402500/Frro_paper_paris.pdf)

<sup>11</sup> See my “PTSD Weaponized: A Theory of Moral Injury”, paper mooted at the CERL conference, Preventing and Treating the Invisible Wounds of War: Combat Trauma and Psychological Injury, forthcoming, Claire Finkelstein and Evan Seamone, Eds., OUP 2018.

property. And demanding this before the criminalizing of rape and killing casts warfare into something with extremely unflattering materialistic motivations. This form of warfare has been universally condemned, in part for the reason that it would make warfighting too tempting, and grotesquely cynical and clinical.

But this may give us another possible explanation for why some seem to favour warfighting by killing over warfighting by theft and destruction of property. The explanation may, strangely, derive from notions of integrity in warfighting: we might think someone couldn't possibly have a stake in merely killing someone, therefore it must have been done for a higher cause. This is false, however; one can have a passion for someone's death on absurd pretexts. Still, someone is more likely to have a personal stake in stealing property – they might derive personal advantage from it. So that method of warfare is *prima facie* more suspicious.

But what of the destruction of property? It is less obviously something that would typically be done for merely personal gain (unless the venting of rage counts only as a personal gain, something unlikely in the typical cases, where the rage is more political or religious). And at any rate, can't we distinguish between the thief getting something out of the theft, and a state or movement getting something out of it in the course of legitimately conducting war? If so, we might purify this as a method of warfighting by taking steps to ensure that the thieving only advances legitimate political goals, and does not result in illegitimate profit, whether for individuals or states. For example, we might arrange for things stolen in war to be permanently and irrevocably warehoused so that they benefit nobody, meaning nobody illicitly profits. Wouldn't that safeguard integrity? The distinction between doing something for personal gain -- which is the motive of

crime -- and doing something to advance a political cause, is a vital one. The former is objectionable in war (crimes of desperation apart), the latter, a prima facie wartime justification for actions that in other contexts would be crimes.

One reason we don't want to damage public property generally in war is that it is needed for people's lives; and if we defeat people by destroying these things, we may wind up indirectly killing more people than necessary to win the war; and it will cost us more later when we have to help survivors re-build in the peace-time that follows. But that is not the same issue as the destruction of artifacts that are significant purely aesthetically, historically or scientifically, not functionally.

Maybe then these items should be regarded as like soldiers in armed conflict, namely, as permissible targets during war; and maybe we should regard actions against them as ones afforded the usual combatant immunity – immunity from prosecution after cessation of the conflict.

### The Objection From Cultural Genocide

The greatest objection to theft and destruction of cultural artifacts as a legitimate means of warfare is the idea that to destroy a culture's artifacts is akin to destroying a people, to genocide. This appears to be the basis for the almost universal abhorrence of this practice.

We can certainly imagine situations in which the destruction of a culture is a destruction of a people, just as we can imagine depriving a person of her right to do all of the things she would ever want to do as equivalent to a destruction of her. I suspect, however, that in some cases the deployment of this objection is due to a contestable understanding of the relation between respect for a people and respect for their cultural products.

We may tend to identify a people with its artefacts, this making us think that to destroy their physical culture is akin to the destruction of the people, of their souls. But in fact a culture and its objects are only things that structure the lives of a given people at a given time and in a given circumstance. This culture and its objects are not essential to those persons. For persons have a pre- and trans-cultural identity, and can adapt to and create different cultures as their circumstances change. Their adaptations are undertaken with a view to meeting the needs all people have – to food, water, shelter, meaningful relationships, physical safety, and so on – needs that can be satisfied by any number of specific forms of culture. To deny this is to make a kind of fetish out of cultures, to treat them as more important and valuable than they really are, to make them false ends in themselves.

Moreover, the rights people have to their artefacts and to the culture that produces them is not absolute, and it is not unconditional. People have a right only not to be unjustly deprived of these things.

And not all means of their privation is unjust. Think of fish migration making the culture of Canadian fishing villages economically unviable, the culture comprised of boat building, net weaving, the songs and lore of the sea that accompany these things, the expertise in fishing, the community bonds needed to mount fishing enterprises, the architectures that support seaside life, the traditions of property and the handing down of fishing licenses, the deriving of dignity from honest work on the sea. It is sad when these things lose their pretext, but it is not obvious that people have a right to this culture, e.g., that they would have a right to be subsidized in it. Arguably they should retrain and move on.

Or think of a culture being extinguished not by violent conflict but by, for example, critical thinking and sound argument (the project conducted and informed by philosophical reflection), as happens when religious and superstitious culture is replaced by secular and scientifically informed culture. Again, this is not obviously unjust. And it would be difficult to argue that the people to whom this is happening somehow have a right to repine in their ignorance, or to be forcefully protected from this inexorable advance of knowledge. (And certainly they would have no right to impose their culture on others.)

Or think of the extinction of a violent, aggressive culture by counter-strikes from those whom it attacks, and from resolutions to reform themselves, obvious examples being the renunciation of militaristic, expansionist cultures of conquest of Japan and Germany after WWII.

Relatedly, not all cultures even *prima facie* have a right of preservation – again, think of Nazi culture, its art, monuments, hate speech, and its artifacts of oppression, like gas chambers and concentration camps.

Further, sometimes the perception of people being massively injured by the destruction of cultural artifacts is really the perception of what is only a moral pseudo-injury, which is, recall, something that seems to be an injury only to those who believe something demonstrably false, or not demonstrably true, something characteristic, for example, of all religions. Properly seen, the theft and destruction of their “cultural property” is not much different from the theft and destruction of property simpliciter. It is not a violation of the sacred (a concept whose very intelligibility and applicability are questionable).

Matters are different, of course, if a culture has a handle on important moral truths, and if its artifacts' continued existence, and continued holding in that culture's hands, are necessary to the attainment of morally important ends. But in that case what makes the preservation of these things important is not that they are cultural products. It is that they are the incarnations and means of the right and the good. (Of course, what counts as that is precisely what is often the matter being contested in time of war.)

The Objection From the Supposed Trans-Cultural, Trans-Political Value of Cultural Artifacts

Some people argue that, regardless of the political significance and moral consequences of their existence, the artistic products of a culture have a timeless value, whether deriving from their exemplifying human creativity and ingenuity, or from their documentary and scientific importance; and that they should therefore be protected from destruction in war.<sup>12</sup> But these factors may be of lesser importance than the issues already discussed. Thus even if an artwork as such does not occupy a position on the spectrum of morally evaluable items, the effects of its existence can be so evaluated; and if the effects are bad enough then the destruction of the artwork that is the cause of these effects might be warranted. If some artifacts are instrumental to the oppression of a people, why should those people be made to pay the price of having to endure this oppression for the sake of scientific inquiry or aesthetically distanced appreciation? As Alexander A. Bauer,

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<sup>12</sup> E.g, see, Leila Amineddoleh, 'Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions', Media and Entertainment Law Journal 24 (3) 2014: 729-781.

(Required reading for this conference.)

suggests, we must always ask for whom is the preservation of cultural objects good, and by what measure.<sup>13</sup>

Powers not directly involved in conflicts must take caution in making the assessment of whether the aesthetic value of cultural artifacts outweighs whatever arguments may be made for their destruction on grounds of them forming part of a context of oppression for one of the parties in the conflict. For it is all too easy for us in the West, for example, who may think of the cultural artefacts in the East as merely of aesthetic, historical or scientific interest, rather than as tools of political oppression, to insist on their preservation.<sup>14</sup> This may be to make an aesthetical fetish of these things, and to put that value above things that in fact have a greater value – e.g., saving people

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<sup>13</sup> Alexander A. Bauer, “New Ways of Thinking about Cultural Property: A Critical Appraisal of the Antiquities Trade Debates”, 31 Fordham Int’l L.J., Volume 31 (2007-2008), pp. 690-724. (Background reading for this conference.) For example, some culturally significant objects were originally designed to deteriorate. Bauer gives this example: “the ‘war gods’ figures made by the Native American Zuni are meant to disintegrate among the elements in order to maintain balance in their lives.” (p. 701) Bauer also points out that sometimes the repatriation of artifacts is sought by groups problematically seeking “to control the discourse about their cultural legacy and suppress unwanted narratives about the objects.” (pp. 710-711)

<sup>14</sup> I can make this point in a logically extreme way: As a high status white man in the West, I have no culture. That is, my culture is invisible to me. Culture is that quaint thing that other people have. What I have is true views, good taste, and well-premised practices.

from oppression by these objects. The value these objects may have to humanity at large is at best a competitor value to the values of those directly involved in conflict; and it is not obvious that it should be the decisive value. So even if there is scientific value in relics, it doesn't follow that policy around their preservation and trade should be designed to maximize their accessibility to scientific scrutiny. Arguably science is only one value they serve, and science should yield to other values. There is nothing that makes it pre-eminent, any more than a scientific interest in my body, say, should automatically trump my rights to control what happens in and to my own body. And it is disputable whether there is a scientific value to things independently of a culture's caring about that sort of thing, which certain antiquarian, illiberal and Luddite cultures ostensibly do not.

Arguably science is only one value among many; and arguably it represents interests whose advancement would displace and violate other, morally more preeminent values. And there is no such thing as disinterested value, the value of a thing as viewed from nowhere, as Thomas Nagel has put it. At the very least, those with a scientific interest in cultural artifacts should have to negotiate their preservation and access to them with stakeholders who have other values.

I've suggested that some parties in conflicts might be justified in destroying or stealing cultural artifacts, in part because the existence of these things is a harm to them, a part of their oppression, or because the existence of these things yields a profit to others that is a consequence of the oppression of the former people. But America (and perhaps its Western allies) in this case, as in so many others, may have a special status. Just as many of the conflicts in which America finds itself are asymmetrical conflicts, conflicts with people vastly inferior to America in numbers, technology, organization and

situational advantage, so America may find itself in culturally asymmetrical conflicts, ones in which, while its culture and cultural artifacts oppress, or at least trouble, others, the reverse is not true: America is not harmed by the culture it combats, only by its agents. America is not, as a collection of persons and physical things, nor as a culture, existentially threatened by other cultures. America may therefore have a kind of duty of condescension: since it is not harmed by these things, it would be gratuitous for America to destroy or confiscate these things, and so not even the doctrine of military necessity could justify it in doing these things – in America’s case, there is no such necessity. Ironically, the very conceit that America is prone to about its own cultural exceptionalism, can result in America having a duty to obey stricter limits on how it fights wars.<sup>15</sup>

This itself raises interesting issues: ought America to be more threatened by other cultures and their artifacts? Is it from a kind of moral obtuseness that it feels unharmed by them? Is this an instance of the opposite of moral pseudo-injury, namely, moral pseudo-non-injury? After all, America is often slighted in various cultures, perhaps in ways not obvious to America. This may be part of an explanation of why America is sometimes

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<sup>15</sup> Think of the position taken in Thurlow, M. (2014). “Protecting Cultural property in Iraq: How American Military Policy Comports with International Law.” *Yale Human Rights and Development Journal*, 8 (1). (Background reading for this conference.)

Thurlow complains that American military manuals on protecting cultural artifacts don’t go far enough.

surprised by its being hated: because Americans don't see the problem, they get ambushed by anger when it's too late easily to appease it.

I wonder too whether it is not hypocrisy to see cultural artifacts as inherently innocent things therefore needing protection. For we certainly do not so see them when we are in the gun sights of warfare by means of culture. It's just that, when it's happening to us, we can't see it as mere clash of cultures. We see it as WAR.

So it is contestable (and contested by some of the parties in the conflicts that occasion this debate) that there is a trans-cultural, trans-political value to cultural artifacts, and the idea that there is such a thing may be a delusion of us in the West, a stance of privilege, and a condescension committed by people who see themselves as above the cultures and conflicts whose artifacts they prize and admire (an attitude that vanishes when we find ourselves embroiled in conflict with cultures who truly do threaten us, whence we righteously seek destruction of these cultures' artifacts). And even if there is such a trans-cultural, trans-political value, it should yield to more pressing political and moral concerns in war time.

#### The Objection From Both Sides in a Conflict Having an Interest in Preserving Cultural Artifacts, Regardless of Which Side Wins

Perhaps one idea behind its being a war crime to destroy cultural artifacts is that they have value for both sides, so both sides want these objects to survive in case they win and then get to exploit the objects. This idea is amenable to a game-theoretic analysis: since each party would like to win the conflict, thence to have exclusive use of the cultural artifacts, but since all parties benefit from the artifacts after the war regardless of who wins, the parties are in a kind of Prisoners Dilemma with each other about them. In a

Prisoners Dilemma, one party can do very well only if the other party does very poorly, but both can do quite well by making and keeping an agreement to co-operate and respect each other's interests, this shareable benefit sometimes called the co-operative surplus, while both will do quite poorly if both violate this agreement. If the relations between warring parties and cultural artefacts is as to the co-operative surplus sought in Prisoners' Dilemmas, there may be rationality to pledges to preserve artifacts, and so to laws that permit punishment for their destruction. Think of the case of two cinematic actors, fighting over a woman – Brad and Billy-Bob fighting over Angelina. They want to fight in order to settle the issue of their jealousy, but don't want the fight to so damage either of them that they can't work together in future acting projects. So they make a pact: "don't touch the face".

On the other hand, if you want something, I can harm you by actually destroying it, and can control you by threatening to destroy it. Ironically the argument that cultural artifacts are cared about by one or all sides, or that they have high intrinsic value, is an argument for both sides regarding them as potential military targets, not against. For to the degree that these things are seen as having value, to that degree the threat of their theft or destruction can be an effective extortion; and extortion, after all, is the very method of warfare.

Here we have the classic Deterrence Dilemma: can it be rational to form and fulfil a threat to do something not only other-harming but also self-harming if the other does not comply with some demand? There is academic controversy about this (centered on the theories of David Gauthier), but since at least some students of the issue think the answer is yes, let's assume that for the sake of argument. In that case, it can be leveraged

in war: one side can win if she manages credibly to convert the situation from an Assurance Game (whose structure is that each of us will refrain from doing a thing harmful to us both if each of us can be sure the other will refrain) into a Deterrence Dilemma (whose structure is that one party threatens to do something harmful to both parties unless the other party gives a concession) – the threatener must only manage to present as sincere and therefore likely to fulfil the threat. Of course, the other party can reply likewise; and if she too is credible, then the two parties are in a Mexican Standoff (a situation where neither side can gain an advantage by means of threat) or a Game of Chicken (where each side has an incentive to veer off from its threat strategy in order to avoid the catastrophe of self-defeat). And in that event, both sides have an incentive to reconfigure the situation as a Prisoner's Dilemma and to solve it by seeing it as an Assurance Game, thereby to back off the other party and to preserve the object valued by both in the conflict.

But one problem with all of this sort of thinking is that it presumes cultural objects have value to both sides no matter who wins the conflict. And this is not a relevant consideration for the most outrageous of the destroyers of cultural artifacts, namely, ISIL. ISIL does not have a stake in the preservation of cultural artifacts since it opposes these as idolatry. So there isn't the Prisoners Dilemma argument for non-destruction in that conflict.

#### The Argument Against Theft and Destruction of Cultural Artifacts From Their Uniqueness and Irreplaceability

It might be argued that stealing or destroying property is worse than killing for some less tangible reason than, say, the matter of its insurable replacement value. It might be, for

example, that it destroys a culture, or that it symbolizes a disrespect for a culture. But this would only be an argument because a culture matters to someone. Obviously cultures matter to those who participate in them, and this should count for something. But again, it is questionable whether it should count for more than the death of a person.

Suppose someone destroys the central relic of some religion, meaning that this relic can no longer be the thing around which certain cultural practices rotate. Perhaps a copy of the relic could be built, but arguably this would result in a different and less good culture, one centered on the duplicate rather than the original. Imagine some people met regularly to reminisce about John F. Kennedy Jr. while passing around the quarter that was in his pocket when he was shot. Then someone destroys the quarter. Well, one can't pass around the original quarter any more, and passing around a quarter just like the original, but that was never in J.F.K.'s pocket, wouldn't be quite the same.

Now let's make the quarter something the size of a small village – some ancient ruins, for example – and let's make the number of people who participate in the culture, the size of a small nation. Again, the destruction of this object might mean that a culture centered on some replacement object might in some sense be a different, maybe even less good culture.

Let us call such objects haecceity objects, objects which are such that their identity makes them necessarily unique – a copy of the object would not be able to play the same role as the original, because, say, of the object's unique place in history. (Haecceity is a term from that sub-field of Philosophy called Metaphysics, and it refers to the essential this-ness of an object, meant as picking out whatever it is that distinguishes the object from all other objects.) Not all objects are haecceity objects. The J.F.K. quarter

apart, money has no haecceity – one dollar bill is as good as another, and if one is damaged or destroyed, another will do just as well. Many of us have haecceity values – we care about the necessary uniqueness of certain things in our cultures. Nevertheless, in certain contexts this can seem a kind of fetish, something that should yield to other things of greater value – the saving of life and the saving of the dignity of lives.

At any rate, suppose we agree that destruction of artifacts is a kind of destruction of a culture, and so of a people: does it follow that it is bad? Only insofar as the culture and its people are good, or at least not bad. And recall too that, in spite of the arguments of the communitarians, it is too quick to identify people with their culture, as if the destruction of the latter is the destruction of the former; for culturally speaking, people are like Turing Machines: they are re-programmable; and their new culture might satisfy their needs just as well as did the old. For many of the needs of people aren't culturally relative and culturally generated. Instead the purpose of cultures is to serve the antecedent pre- or trans-cultural and common needs of people.

It can be reasonable to demand the destruction of a culture if that culture is evil. This may involve the destruction of that culture's artifacts. But this needn't amount to the destruction of that culture's people. It needn't involve their physical death, for example. And if it involves their reprogramming into a better culture, if this be cultural genocide, then not all cultural genocide is bad.

### Conclusion

Let me place my argument alongside one of the most powerful statements of the argument for criminalizing the theft and destruction of cultural artifacts, statements from Irina Bokova.<sup>16</sup> Bokova nicely states the strategy of terrorism:

*These attacks, the destruction, and the persecutions are part of the same global strategy, which I call “cultural cleansing,” intended to destroy identities, tear apart social fabrics, and fuel hatred. Such acts of destruction cannot be decoupled from the killing of people, as violent extremists attack anything that can sustain diversity, critical thinking and freedom of opinion—schools, teachers, journalists, cultural minorities, and monuments. In this context, the protection of heritage is more than a cultural issue: it is a security necessity. We see, with the Islamic State group, how terrorists use such destruction as a tactic of war to paralyze and weaken the social defences of people, to attract and recruit foreign fighters across the globe as well as to promote a fundamentalist agenda. Illicit trafficking of cultural objects is also linked to the financing of terrorism.... It is clearly stated in Article 8 of the Rome Statute of the International Criminal Court that the deliberate destruction of cultural heritage is a war crime, and should be assessed, documented, and investigated so that the perpetrators can be brought to justice in the future.*

Bokova also nicely identifies the manifesto of the extremists: “violent extremists say humanity is not a single community that shares values...world heritage does not exist...pre-Islamic heritage is idolatry...diversity is dangerous...tolerance and dialogue are unacceptable.”

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<sup>16</sup> Irina Bokova, “Fighting Cultural Cleansing: Harnessing the Law to Preserve Cultural Heritage.” Harvard International Review 36, no. 4 (Summer 2015): 40-45.

And Bokova gives the arguments for what is bad about what is done from this manifesto, and for the responses needed to deal with it, including military responses, legal reform, pre-emptive re-location of threatened objects, and so on.

I don't disagree with any of this (excepting possibly the part about criminalizing the actions involved). But I do point out that the people she is objecting to have a position, they have independent motivations towards taking this position deriving, in some cases, from their own oppression, and she leaves out that, if you really want to counter-act all of this, you need to address the oppressions that have led to it.

Much of the standard positioning that I have been disputing on these issues can be saved by adding in the assumption that we know which side in a conflict is just, and we are speaking only of what is to be done to agents who act against the justice of that side. But here we must be careful. For wars are fought precisely in the disputing of that very matter. And we have our own biases in assessing a given conflict. We are virtuously unanimous in treating the conflicts in the Middle East as involving people clearly in the wrong when, arguably, they are people legitimately fighting for righteous status against oppression. And sometimes even when they are in the wrong on a given issue, they may be justified in acting out some private anger or grievance.

No doubt some cultural artifacts have a status so innocent that the standard arguments against trade in, theft of and destruction of cultural artifacts go through. And maybe some artifacts simply are the common treasure of all human kind, and only persons evil or misguided could possibly make themselves the enemy of these objects.

But it would be a mistake to say that of all artifacts in all contexts. It is all too tempting to see those who would destroy cultural artifacts as madmen, enemies of all

people, men who should be dealt with therefore as mere criminals. But if someone is the enemy of all men, then he sees all men as his enemy; and we need to look at how someone could come to feel this way, how someone could come to think that so many of the manifestations of civilization and its history are evil, are oppressive to them. For some, to be sure, madness is the explanation – they are not in fact oppressed, they only think they are, if they think intelligibly at all. It may be thought that, for others, the explanation is that they believe the tenets of a religion that requires them to destroy anything Western, and to kill anyone not allied to their faith. But this in turn would need explanation. For many of us hold religious views that would require extremes of action, and yet we do not so act. Many of us grew up Catholic, for example, and were forbidden to engage in masturbation or pre-marital sex. And yet we all did those “evil” things. A religion may tell you to do a ridiculous thing. Whether you become a fundamentalist adherent and act on that instruction is another. Why have some chosen to act on the more ridiculous tenets of the fundamentalism in their religion? For most the explanation is that they have not been able to secure a dignified life and a fair share of the benefits of civilization. And the explanations for that are not far to seek: racism, sexism, classism, oppression by dominant religions of non-dominant religions, tribalism, colonialism, Kleptocracy, and the rule of law or its perversions that have, sometimes unwittingly, sustained these things. Then there are the people in otherwise healthy societies who for individual reasons have discontents, and who are drawn to conflict either as a way to express their anger, or in solidarity with the less powerful people of the world, people, who live in what is in effect an apartheid civilization, polities in which they are ruled by laws they do not have a full contribution in making; or they are drawn to the idea of a

great conflict between good and evil, an evil the inadequacies of their own lives lead them to posit as their cause.

My hope is that we will try better to understand these discontents, and that we will spend less of our effort on policing the preservation of cultural artifacts and art objects, and more on trying to redress the political inequities that lead to them being threatened. For if we do anything other than this, we are merely sustaining the apartheid that has birthed the violent expression of discontent. And we will thereby continue to sow the seeds which grow into this violence against people and culture. This means we must so far as possible see these actions as political, not criminal, see them as actions of war, even when they are the actions of non-state actors. And this recommends the extension of combatant immunity to what would otherwise be seen as thieves and barbarous vandals.

Postscript: The Problem of the Use of Expert Knowledge in Evaluating the Significance of An Artifact Unwittingly Being An Enabler of the Theft of Cultural Artifacts

Finally, a note on the problem of expert knowledge in evaluating artifacts. It is often thought irresponsible of those with expert knowledge to use their expertise in placing value on cultural artifacts. For this has the effect of incentivizing the theft and trade of such artifacts, something bad for reasons previously discussed. But there is a deep paradox here. After all, unless the things have known value we can't know what harm is caused by their theft or destruction, and so can't know that this is bad, and so can't know that the expert placing of values on these things is bad. If we are to preserve what deserves preserving, destroy what deserves destroying, we need expert opinion on which is which. By extension this principle might extend to a condemnation of an expert's judging that a certain building, say, is key to a certain religion, something that another

religion in conflict with the first religion might exploit militarily. Surely this can't always be wrong – imagine a defender of the Jews in WWII identifying as culturally central to Nazism certain structures, statuary, literatures, fashions and symbols. Surely this is permissible, even though it would also tell those wishing to defend the Jews what must be combatted and destroyed in their defense. Here the relevant expert opinion is less expertise on the value of curios and more expertise on the roles of objects, edifices and places in cultures and cultural identities. But in this context, surely it must be permitted. The general principle I recommend, then, is this: if an expert opinion is required for something to be properly counted as good, then experts have a moral duty to so opine. And the correct so opining identifies those things which we then have a moral duty to protect. We cannot scruple from the former activity merely because someone might in turn traduce the thing we have found to be of value. To allow that consideration to be decisive would precisely be to abdicate all matters of value to the impulses of evil. Rather than refrain from judging that a good thing is good, we should judge as good and then act against such evil impulses as would destroy it.