SYMPOSIUM

LEGAL PROTECTION OF AMERICA'S ARCHAEOLOGICAL HERITAGE

AN INTRODUCTION

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The surface layer of America's[1] archaeological heritage is its legal protection. The Archaeological Resources Protection Act of 1979,[2] which strengthens that layer, nevertheless reminds us of how starkly we expose our patrimony to the elements of greed and restless expansion. Here, it would seem, is yet another instance of the failure of law and our philosophy of values to keep up with science.

Archaeological science marches on with what may be a steady progression of discovery and excavation in this country. The media are full of engaging accounts about, for example, Wolstenholme Towne,[3] Koster,[4] western excavations such as the Dolores River Project,[5] and

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1. For stylistic reasons, the word "America" will be used to refer only to the United States, although the author acknowledges the broader geographical denotation of that word.

2. Pub. L. No. 96-95, 93 Stat. 721 (1979), (codified at 16 U.S.C. §§ 470aa-470*ll* (Supp. III 1979)).

3. Hume, *First Look at a Lost Virginia Settlement*, 155 NAT'L GEOG. 735 (1979).

4. S. STRUEVER & F. HOLTON, KOSTER—AMERICANS IN SEARCH OF THEIR PREHISTORIC PAST (1979); Webbe, *Unearthing 500 Generations of Unknown Americans*, Christian Sci. Monitor, June 20, 1979, § B, at 4. For a bibliography of scientific writings on Koster, see Schoenwetter, *Comment on "Plant Husbandry in Prehistoric Eastern North America"*, 44 AM. ANTIQUITY 600, 601 (1979).

5. For a brief summary of the Dolores project, see 44 AM. ANTIQUITY 836 (1979). Of partic-

the comprehensive study of human migration into the Western Hemisphere.[6]

Unfortunately, threats to this heritage are increasing.[7] Vandalism,[8] atmospheric pollution,[9] obliteration of desert intaglios by off-road vehicles,[10] and inundation of Indian ancestral grounds by hydroelectric projects[11] attest to the fragility of our historic and prehistoric environment. Perhaps the greatest threat of all, however, is human settlement and development:

> Even more than the tomb robber, the bulldozer imperils our archaeological heritage. The problem is universal, and as yet unsolved. Civilization spreads with rapacious speed, and consumes much that is precious as it does so. In poorer countries, economic necessity is an overriding circumstance which explains, if it does not justify, the destruction of the past. Yet if anything, the problem is more serious in wealthier countries, precisely because wealth generates the development that menaces everything hidden in the soil.[12]

Although the post-revolutionary period represents only about 1% of estimated human history on this continent, the current rate of despoliation threatens to deny us forever a coherent image of the remaining 99%.

It is important for the archaeological and legal professions to assume a joint guardianship of our heritage. The archaeological profession has acted creditably. Struggling to practice and further develop their own ethic,[13] archaeologists have also alerted the public to threats of archaeological pollution. Typically, as with underwater archaeology,[14] science appears in shining armor, but sometimes, as with the excavation of Indian burial mounds, the professional vestments seem

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ular interest to western archaeology is Frison & Zeimens, *Bone Projectile Points: An Addition to the Folsom Cultural Complex*, 45 AM. ANTIQUITY 231 (1980).

6. Canby, *The Search for the First Americans*, 156 NAT'L GEOG. 330 (1979); MacNeish, *Late Pleistocene Adaptations: A New Look at Early Peopling of the New World as of 1976*, 34 J. ANTHROPOLOGICAL RESEARCH 475 (1978).

7. UNESCO, PROTECTION OF MANKIND'S CULTURAL HERITAGE: SITES AND MONUMENTS 9 (1970).

8. *See, e.g.*, Garrett, *Grand Canyon: Are We Loving It To Death?*, 154 NAT'L GEOG. 16, 18 (1978); Smith, *Utah's Rock Art: Wilderness Louvre*, 157 NAT'L GEOG. 97, 101 (1980).

9. Smith, *supra* note 8, at 101.

10. Sheridan, *Hundreds of Thousands of Weekend Off-Road Vehicle (ORV) Enthusiasts are Destroying Part of the Desert*, SMITHSONIAN, Sept., 1978, at 66, 72.

11. Press, *A Last-Ditch Fight Against Tellico Dam*, Christian Sci. Monitor, Dec. 18, 1979, at 3, col. 2.

12. K. MEYER, THE PLUNDERED PAST 197 (1973).

13. *See, e.g.*, Rosen, *The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility*, 82 AM. ANTHROPOLOGIST 5, 15 (1980).

14. Altes, *Submarine Antiquities: A Legal Labyrinth*, 4 SYRACUSE J. INT'L L. & COM. 77 (1976); Cockrell, *The Trouble with Treasure—A Preservationist View of the Controversy*, 45 AM. ANTIQUITY 333 (1980). For recent popular accounts of marine archaeology, see Peterson, *Graveyard of the Quicksilver Galleons*, 156 NAT'L GEOG. 850 (1979); Sutton, *The Underwater Archaeologists*, SAT. REV., Jan. 6, 1979, at 34.

tarnished to Indians and archaeologists alike.[15] But where are the lawyers?

A curious feature of legal scholarship in this sphere is an abundance of writing on the international and foreign protection of cultural property,[16] with a heavy focus on the problem of pot hunting, but a dearth of writing on domestic protection, which often must respond to rather different problems. Indeed, in recent years there has been almost no legal scholarship on issues related to the American archaeological heritage.[17] Pathologists of the profession may be able to tell us why specialists in international, but not domestic, law seem to be interested in the archaeological heritage.[18] In any event, the effect of concentrating scholarship in the foreign and international context has been not only to divert attention from the domestic context and a domestic perception of the role of legal controls, but also to focus on a variety of legal techniques poorly correlated with Anglo-American property law and the distinctive threat to our heritage. As one example, Mexican legal controls, though an important topic for commentary,[19] rely upon a notion of national ownership that contradicts the more or less Lockean tenets and state prerogatives of our own property law. Under the common law, fee simple title implies subsoil ownership of the *locus in quo*; the state may assert only its powers of eminent domain.

Another distinctive feature of the American regime of archaeological protection is our reliance upon the regulation of federal lands, conveniently concentrated in the very regions of the West that are particularly rich in archaeological material. In the words of one foreign expert:

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15. Rosen, *supra* note 13, at 6.

16. Comprehensive treatments on this topic are found in L. DUBOFF, ART LAW: DOMESTIC AND INTERNATIONAL (1975); L. DUBOFF, THE DESK BOOK OF ART LAW 65 (1977); S. WILLIAMS, THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY (1978).

17. The exceptions to this general statement are principally Cooper, *Constitutional Law: Preserving Native American Cultural and Archaeological Artifacts*, 4 AM. INDIAN L. REV. 99 (1976) (a brief case commentary on the important decision in United States v. Diaz, 499 F. 2d 113 (9th Cir. 1974)); Vivian, *Archaeology, Mining, and the Law*, 22 PROCEEDINGS OF THE ROCKY MTN. MIN. L. INST. 787 (1976); Wilson & Zingg, *What is America's Heritage? Historic Preservation and American Indian Culture*, 22 KAN. L. REV. 413 (1974).

18. Translating international into domestic legislation is another problem because of domestic politics and the lobbying strength of art galleries. In 1972, by a vote of 79-0, the United States Senate gave its advice and consent to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Years later, Congress still has not approved implementing legislation to permit ratification of the treaty by the President. *See Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYRACUSE J. INT'L L. & COM. 97 (1976).

19. *See, e.g.*, A. MANERO, LA DEFENSA JURÍDICA Y SOCIAL DEL PATRIMONIO CULTURAL (1976); Gonzalez, *New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Antiquities*, 12 COL. J. TRANSNAT'L L. 316 (1973); Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 LAW. OF THE AMERICAS 68 (1975); Nafziger, *La regulacion del movimiento internacional de bienes culturales entre Mexico y los Estados Unidos*, 16 ANALES DE ANTROPOLOGÍA 123 (1979).

> In comparison with European legal systems, the American way of protecting monuments is unusual and reflects the fact that when the first legislation protecting cultural property was adopted, vast territories were owned by the federal government, especially in the West and South, where most of the protected monuments were located. The lack of great works of art explains why only historical monuments received protection under national law. Because most lands belonged to federal and state authorities, interest focused only on the monuments situated in those territories.[20]

The Archaeological Resources Protection Act of 1979[21] merits special legal exploration. The experience that prompted the Act and the resulting emphasis on precise definition of scope and terminology suggest the commonality of issues between archaeologists and lawyers. Both professions are fundamentally interested in the history of preservation law and policy,[22] the "characteristics" of preservation, the base values (protection, salvage, and management), and the functional or "anthropological" dynamics of pertinent legal terminology.[23] A key question in fashioning a protective layer of law is shared by archaeologists and lawyers alike: What is "significant"? Consider the following observation: "As the result of the archaeological profession's reorientation to meet the requirements of legal mandates and the ethics of its developing conservation philosophy, the interpretation of *significance* has become *the* focal point for archaeological decision making in the United States."[24] For lawyers, the question is the classic one of the extent to which scientific and legal definitions of significance should coincide.[25] A bidisciplinary perspective is clearly useful.

In order to stimulate useful scholarship and continuing legal reform, the Association of American Law Schools (Law and the Arts Section) covened a panel discussion that took place in Phoenix, Arizona, on January 3, 1980. The program began with a one-half hour documentary film, "Thieves of Time," which graphically highlighted the problems, principally of pillage, that American archaeology faces. The panelists then presented papers in a more or less bidisciplinary and

20. Niec, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L. REV. 1089, 1112 (1976).

21. Pub. L. No. 96-95, 93 Stat. 721 (codified at 16 U.S.C. §§ 470aa-470*ll* (Supp. III 1979)).

22. *See, e.g.*, Brew, *A Report on Salvage Archaeology and Historic Preservation in the United States*, 20 AM. COUNCIL LEARNED SOCIETIES NEWSLETTER 1, 6 (1969).

23. *See* King & Lyneis, *Preservation: A Developing Focus of American Archaeology*, 80 AM. ANTHROPOLOGIST 873, 876-78 (1978).

24. Lynott, *The Dynamics of Significance: An Example from Central Texas*, 45 AM. ANTIQUITY 117, 117 (1980) (emphasis added); *see* bibliography of writing on the issue of "significance," *id.* at 120.

25. By way of example, does the following material, deemed to be of archaeological significance, merit legal protection: "Garbage pits on the grounds of a 1920 Jersey shore hotel, and graffiti on the wall of a CCC camp. . . ."? King & Lyneis, *supra* note 23, at 879. *Cf.* Wilk & Schiffer, *The Archaeology of Vacant Lots in Tucson, Arizona*, 44 AM. ANTIQUITY 530 (1979).

comparative framework. The edited versions of these papers comprise the following symposium. Not surprisingly, the focus of these papers is on legislation and administration rather than judicial action. The common law generally has proven to be an ineffective and uncertain means for resolving the value conflicts that roil about our archaeological heritage.[26]

To begin the symposium, Paul Fish comprehensively surveys federal policy and legislation for archaeological conservation. From a professional perspective, Dr. Fish introduces his topic with valuable insights into the relevance of archaeology, the techniques of survey and excavation, and the need for conservation. As more and more people become involved in the exploration of our material history, it becomes increasingly important to explain why conservation of this public resource should receive more attention. Dr. Fish's useful description of federal legislation emphasizes the central concerns of the professional researcher. The Article concludes by forecasting the directions and implications of future federal involvement in protecting America's archaeological heritage.

Ronald Rosenberg discusses federal protection for archaeological resources, particularly in light of the Archaeological Resources Protection Act of 1979. He emphasizes, first, the need for that legislation in order to resolve the confusion created by the Ninth Circuit decision in *United States v. Diaz.*[27] That decision, conflicting with precedent elsewhere, declared unconstitutional the criminal penalty provision of the 1906 Antiquities Act.[28] Professor Rosenberg argues that after *Diaz*, some criminal law sanction had to be enacted to impede large-scale pillage of western sites. Second, the penalties created by the 1979 Act, if actually imposed, are significant and potentially deterring. Vigorous surveillance, enforcement, and prosecution are obviously crucial to the success of the statutory scheme. Third, the 1979 Act creates penalties but does not provide any funding to assist federal land managers in enforcing the law. Fourth, the legislative history of the Act illustrates an intensifying federal/state conflict over the control and use of federal land, primarily in the western states. This larger controversy finds expression in many resource-use issues including archaeological preservation. Finally, Professor Rosenberg reminds the reader that the federal law applies only to federal lands and Indian lands, thereby leaving state and privately owned land generally free of control. Left

26. *See* Rosen, *supra* note 13, at 11, 19.
27. 499 F.2d 113 (9th Cir. 1974).
28. *Id.* at 115.

for another day is the political and legal question of whether federal regulatory control is possible, or desirable, for nonfederal lands.

Sharon Williams offers a valuable comparison from a Canadian perspective. In organizing the meeting, we decided that it would be very useful to examine the legislative experience of Canada—the country with whom the United States generally seems to have the most in common culturally (including archaeologically), politically, and jurisprudentially. Professor Williams, noting that Canadian legislation is in a state of flux, examines both national and provincial measures. In examining the Cultural Property Export and Import Act of 1977, she offers the reader a model for legislation implementing the UNESCO Convention. For eight years, the United States Congress has struggled unsuccessfully to adopt such legislation. Turning to legislation more specifically addressed to the protection of immovable property, Professor Williams discusses the Historic Sites and Monuments Act and section 91 of the Indian Act, both of which confer only very limited regulatory authority. Finally, she focuses on the Quebec Cultural Property Act and other, less comprehensive provincial legislation, and concludes that the best approach to protecting the common archaeological heritage is by means of a diversity of techniques.