THE PUBLIC INTEREST IN THE RESTITUTION OF CULTURAL OBJECTS

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INTRODUCTION

The looting of archaeological sites has persisted for centuries, but since the end of World War II its scope has grown dramatically while, at the same time, the ability of scientific excavation to recover critical historical and cultural information has been revolutionized. The divergence in these two paths has made the question of preservation of the past, so that knowledge and understanding in the future can benefit, of ever greater urgency for the public interest and has led to the development of particular legal and public responses. One of these responses is the restitution of stolen and looted cultural objects to their owners. In proposing that the remedy of restitution is one of the most effective means of encouraging preservation of the past, it is necessary to examine that public interest and the methods that have evolved for effectuating it.

The word, restitution, means a remedy involving return. In discussing restitution, it is necessary to acknowledge that there are, broadly speaking, three categories of cultural objects that have been subject to claims of restitution. The first of these categories consists of art works that were created primarily for their aesthetic value and were always intended for sale as art works. These types of objects are found in public or private collections. The second category is composed of archaeological objects that are, by definition, recovered from archaeological sites or that were part of an integrated architectural monument. This category consists of objects found in public or private collections. The second category is composed of archaeological objects that are, by definition, recovered from archaeological sites or that were part of an integrated architectural monument. This category consists of

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1. Restitution of personal property can be the result of an action brought by the original owner or person with the right of possession to recover personal property. The cause of action, which may be called replevin or detinue in different states, involves an action to recover the property itself rather than its equivalent value. See Robert K. Paterson, Hitler and Picasso - Searching for "The Degenerate," 33 U. BRIT. COLUM. L. REV. 91, 99 & n.26 (1999) (distinguishing between actions in detinue and actions in conversion, for which the remedy is only monetary damages); Chauncey D. Steele IV, The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts, 23 SUFFOLK TRANSNAT'L L. REV. 667, 702 (2000) (outlining requirements for a cause of action in replevin under state statutes). Restitution can also be obtained through a forfeiture action brought by the government which then turns the object over to the original owner. Voluntary restitution of cultural objects is also achieved when the current possessor voluntarily returns it to the original owner. Restitution is particularly desirable in the case of cultural objects because of their unique nature and high significance to the culture of the nation. See Claudia Fox, The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property, 9 AM. U. INT'L L. & POL'Y 225, 236-37 (1993).
both objects that at one time may have had primarily aesthetic value and those that were created primarily for utilitarian functions. In fact, the purpose of such objects in the past may no longer be their primary characteristic today. While objects that were at one time primarily utilitarian may now be viewed as having significant aesthetic value, all objects that are part of an integrated context, including archaeological sites, now carry scientific, historic and cultural value. The third category includes ethnographic objects, which may be defined as objects that are of cultural or religious value to a non-industrialized, indigenous community. This article will focus exclusively on the public interest in the restitution of antiquities that have been looted directly from the ground. These objects raise particular problems and require a special legal and public response to resolve these problems. This article will attempt to identify the public interests in the restitution of archaeological objects and then examine the legal and public responses that have evolved to further these interests.

I. THE PUBLIC INTEREST

A. Preservation of Context

In the case of any type of cultural object or, in fact, any other type of personal property, if it is stolen, it is clear that there is a public interest in its restitution to the owner. However, the theft and looting of antiquities raise unique and compelling concerns for the public interest because, in addition to the theft itself, they involve an essential loss of context. The archaeological heritage consists of the fragile and non-renewable physical evidence of humankind's origins and behavior. Only carefully preserved, original contexts can furnish the data upon which the reconstruction of our past depends. Once this context is lost, the inherent value,
that is the historic, cultural and scientific information that informs us about the object, is irreparably injured.

In the past, collections often were built by collectors simply taking antiquities from ancient sites. What they did was perhaps not that different from what early archaeologists did and, until at least the middle of the 19th century, it was probably not that easy to tell the looters and the archaeologists apart. Even though today their methods might be criticized, it was early archaeologists, such as Heinrich Schliemann working at Troy, Sir Arthur Evans at Knossos on Crete, Sir Flinders Petrie working in Egypt and southern Palestine, and later Dame Kathleen Kenyon excavating at Jericho and Jerusalem, who gradually developed the scientific understanding of the stratigraphy of sites and the need to excavate a site layer-by-layer, with each layer representing a time period and all objects and architectural features within a layer bearing a chronological relationship that has significance for the understanding of the history, social organization, religion and cultural life of the ancient world. Today, ever more sophisticated scientific techniques as well as interdisciplinary methods of analysis are available and routinely used in the reconstruction of past civilizations.

Archaeologists and those who work in the allied physical and social sciences study the past through the careful excavation of sites and the retrieval of an array of evidence of material culture. Once objects are removed from the ground, they can be appreciated for their aesthetic appeal, but only if they are excavated scientifically can they also be appreciated for their scientific, historic and cultural values.4 It is particularly crucial that artifacts be excavated together and in association with architectural features, such as houses, industrial areas, and burials. Careful excavation allows the archaeologist to place a found object in its proper chronological sequence and context, in turn allowing the reconstruction of each of a site's time periods, the characteristics of society at those times, and the connections among objects found and sites located throughout the world. It also allows those studying past cultures to reconstruct the functions of such objects, to learn more about diet, technology, trade, settlement patterns, religion, literature—in short, to learn about every aspect of a past society. The looting of objects and the destruction of sites results in the irretrievable loss of such information.6

A second aspect of the public interest is that acceptance of undocumented antiquities allows fakes and forgeries to enter into the scholarly literature, into education and into public displays of the past through museums. If virtually an entire corpus of ancient objects is known only through examples that have appeared on the market without provenience,7 then it is impossible to know which are the

5. Id.
6. See, e.g., Jonathan S. Moore, Enforcing Foreign Ownership Claims in the Antiquities Market, 97 YALE L.J. 466, 466 (1988) (stating that "[e]ach time an antiquity is discovered and removed from a site without first being studied by anthropologists, the historical record that can be constructed through scientific evaluation of the piece in situ is destroyed.").
7. The term provenience is used in this article to indicate the modern history of an archaeological object back to its find spot in the ground. In most cases, a reliable provenience is available only if the object has been scientifically excavated and recorded. The similar term "provenance" refers to the
genuine and which are the fake, and our knowledge of the past again becomes irreparably corrupted.  

A third aspect of the public interest in the United States lies in the recognition that the United States has a valuable cultural heritage that needs international protection as well. While the concerns with preservation of archaeological context and with the ability to distinguish genuine from forged cultural objects are universal concerns, the significance of the United States' own cultural heritage has often been minimized by those who concern themselves primarily with the international movement of cultural objects. Not only does this public interest apply to products of historic time periods, but it applies with greater force to the heritage of the Native American cultures. In fact, the United States government has a particular role to play in light of its relationship to the Native American tribes and the recognition of the tribes as semi-autonomous governing entities. Much of the motivation of the United States in entering into international cooperative arrangements results from the desire and obligation of the United States to protect the physical remnants of these indigenous cultures.  

The notion that cultural objects belong to all humanity and not to a single nation is used today often as an excuse for reliance on market-based principles and as an apologetic for the wide-scale looting of archaeological sites. However, this internationalist perspective has its roots in the customary international law that developed in the 18th and 19th centuries to restrict the plunder of cultural and historical heritage. The history of the ownership of an object, but in the case of an archaeological object this history will not necessarily be complete back to the moment at which it was removed from the ground. While some writers use these terms interchangeably, this article will attempt to maintain this distinction. See Patrick J. O'Keefe, *Provenance and Trade in Cultural Heritage*, 1995 U. BRIT. COLUM. L. REV. 259, 260 (Special Issue) (defining "provenance" as including the origin, as well as the history of subsequent transactions, of an object).  


Professor John Henry Merryman of Stanford University has summarized both of these aspects of the public interest, as follows:  

The impediments to truth about cultural property come from two principal sources. One is simple lack of information: We may not know enough to attribute and interpret the object accurately. This sort of ignorance can be induced by decontextualization—for example, taking the Mayan stele from the temple separates it from the associated glyphs and images that are essential to its proper interpretation. More generally, every loss of cultural property ... impairs the quest for cultural truth. Every lost opportunity for further discovery and study of cultural objects retards the growth of knowledge about ourselves ...  

Second, counterfeits pollute the stream of information about cultural objects. They falsify history, misrepresent the culture, distort the human record.  


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artistic objects as war booty.\textsuperscript{10} This aspect of internationalism was not intended as a carte blanche for the looting of sites that goes on today, or for any derogation of national legal principles intended for the same goal—the preservation of artistic and cultural objects. Rather, this internationalist approach imposes obligations on nations to prevent destruction and plunder, both within their own borders and in territory occupied during time of war. The use today of this aspect of internationalism as a justification for the unfettered market is thus a misuse of this principle of customary international law.

\textbf{B. A Market Critique}

Despite these public interests, objects are looted from archaeological sites on a massive scale. Ancient habitation areas and burials are destroyed. Buildings and monuments are dismembered so that sections of architecture and particularly wall carvings, mosaics or paintings can be removed. Burials are looted on a large scale so that intact vases can be recovered, as ceramics from habitation areas and chance finds are often in fragments. These objects of cultural heritage then move through the market from the looter to the smuggler, eventually to auction houses and dealers, and finally to private collectors and museums in major cities of Western Europe, North America, and Asia.

Although in the past the looting of cultural objects was primarily the result of war,\textsuperscript{11} another threat appeared in the years following World War II. With the post-war expansion of wealth and economic power, particularly of the United States,

\footnotesize{\textsuperscript{10} See M. Cherif Bassiouni, \textit{Reflections on Criminal Jurisdiction in International Protection of Cultural Property}, 10 SYRACUSE J. INT'L L. & COM. 281, 288 (1983) (quoting de Vattel, mid-18th century legal writer, that art treasures should not be war booty because "they do honor to human society."); Joshua E. Kastenberg, \textit{The Legal Regime for Protecting Cultural Property During Armed Conflict}, 42 A.F.L. REV. 277, 283-87 (1997) (discussing Treaty of Vienna of 1818; the Marquis de Somer���les decision and the Lieber Code, as well as the Hague Conventions of 1899, 1907 and 1954, as sources of the phrase "heritage of mankind" as applied to cultural property and as imposing obligations on nations to protect cultural and artistic objects). See also Dalia N. Osman, \textit{Occupiers' Title to Cultural Property: Nineteenth-Century Removal of Egyptian Artifacts}, 37 COLUM. J. TRANSNAT'L L. 969, 974 (1999) (discussing the requirement that France return cultural objects to European nations in the Treaty of Vienna and that France's actions were considered to be "contrary to the principles of justice and the modern rules of war").

\textsuperscript{11} Cultural objects were looted in antiquity during wars and were considered part of the spoils that belonged to the victor. In modern times, Napoleon took art works from throughout Europe and archaeological objects primarily from Egypt. See JOHN HENRY MERRYMAN & ALBERT E. ELSEN, \textsc{Law, Ethics and the Visual Arts} 1-8 (3d ed. 1998). The large-scale looting of cultural objects during the Holocaust has received considerable attention in recent years and led, at the end of World War II, to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240 (1956), which is intended to protect cultural objects and monuments during time of war. See generally Jennifer N. Lehman, \textit{The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the Unidroit Draft Convention}, 14 ARIZ. J. INT'L & COMP. L. 527, 531-35 (1997) (discussing the Hague Convention); Kastenberg, \textsuperscript{supra} note 10, at 277 (discussing development of military and international law for protection of cultural property in time of war).}
Western Europe and Japan, the international art market has grown and flourished.\textsuperscript{12} The art market has become an even greater factor in the movement of cultural objects, one which often works in tandem with war and other misfortunes, as attested by the considerable influx of Iraqi objects on the market that coincided with the economic boycott following the Gulf War.\textsuperscript{13} The relationship between the theft of cultural objects and the market was first chronicled by Dr. Clemency Coggins who wrote in 1969 of the dismemberment of monumental sculptures in Central America and their subsequent smuggling into the United States for sale.\textsuperscript{14} A few years later, Karl Meyer documented the looting of sites in both Central America and the Mediterranean.\textsuperscript{15} Especially since the 1970s, the illicit traffic in antiquities has increased dramatically,\textsuperscript{16} due in part to the inflation of the art market and the marketing of antiquities as “investment” opportunities.\textsuperscript{17} Archaeological sites are

\textsuperscript{12} See, e.g., Folarin Shyllon, One Hundred Years of Looting of Nigerian Art Treasures 1897-1996, 3 ART ANTIQUITY AND LAW 253, 260-63 (1998) (documenting the increases in prices for which Nigerian artifacts sold in Europe and the United States from the 1960s through the 1990s).

\textsuperscript{13} Mike Toner, A World of Trouble: Where Looting is Rampant, ATLANTA J. & CONST., Sept. 19, 1999, at 2H [hereinafter Toner, A World of Trouble] (describing the looting of archaeological sites following imposition of international sanctions after the Gulf War and the appearance of Iraqi antiquities on the market, including an Assyrian wall relief that sold at auction for $11.8 million in 1994). Archaeological objects have also been looted on a large scale from Afghanistan and from the Kabul Museum during the years of warfare. See Norman Hammond, Afghanistan Fights to Save its Ancient Monuments, TIMES (London), Sept. 1, 2000. For further examples see Kastenberg, supra note 10, at 294-97 (discussing post-World War II military conflicts in light of the Hague Convention and, in particular, voluntary adherence to Hague Convention principles during the 1991 Gulf War); Lehman, supra note 11, at 535-38 (discussing looting in Kuwait and Bosnia in recent wars).

\textsuperscript{14} See generally Clemency C. Coggins, Illicit Traffic of Pre-Columbian Antiquities, 29 ART J. 94 (1969) [hereinafter Coggins, Illicit Traffic].

\textsuperscript{15} See KARL E. MEYER, THE PLUNDERED PAST (1977). For others who have since commented on and described the antiquities trade in general, see Bator, supra note 2, at 277-82, 291-92; Moore, supra note 6, at 468-70.

\textsuperscript{16} See Patrick Boylan, Illicit Trafficking in Antiquities and Museum Ethics, in ANTIQUITIES TRADE OR BETRAYED LEGAL, ETHICAL AND CONSERVATION ISSUES 94 (Kathryn Walker Tubb ed., 1995). It is sufficient to observe the size of the illegal market because, by its very nature, it is secretive. Publicly available estimates are also not clear as to whether they refer only to looted antiquities or whether they refer to the entire illegal market, including art works stolen from public and private collections. Several law enforcement agencies, including Interpol, now include the illegal art market among the top three international criminal activities, along with the international traffic in drugs and arms, and it is recognized as one of the easiest ways to launder money internationally. One estimate places the illegal art market at $2 to $6 billion annually. James Walsh, It's a Steal, TIME, Nov. 25, 1991, at 86-88. Links between the antiquities trade and the Mafia were recently documented by Italian authorities. See Rory Carroll, Tomb Raiders Plunder Italy's Past: Looters of the Night Get Rich on Worldwide Trade in Antiquities, GUARDIAN (London), June 20, 2000, at 16; Mike Toner, The Past in Peril: Buying, Selling, Stealing History, ATLANTA J. & CONST., Sept. 19, 1999, at 1H. Lynne Chaffinch, Program Manager for the Art Theft Program at the FBI, and Angela Meadows, Cultural Property Program Manager at INTERPOL-U.S. National Central Bureau, in an on-line interview stated that “internationally cultural property theft transcends into every other criminal enterprise. This has also included violent crimes, such as murder, assault and kidnapping.” In Search of Stolen Art, (transcript of Live Online discussion, Aug. 10, 2000), at http://discuss.washingtonpost.com/wp-srv/zforum/00/fbi0810.htm.

\textsuperscript{17} See Leah K. Antonio, The Current Status of the International Art Trade, 10 SUFFOLK TRANSN'TL L.J. 51, 58-59 (1986) (describing the use of art investments as tax shelters as “a prime factor for the flourishing illicit trade in stolen or counterfeit art.”); Judith Church, Note, Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in United States Courts, 30 COLUM. J. TRANSNAT'L L. 179, 183 (1992) (noting that the value of antiquities increased significantly
looted in order to supply the art market,18 and this looting affects sites throughout the world, from the United States19 to Latin America,20 Europe,21 Africa,22 and

while the value of other art works decreased in the early 1990s); Adina Kujatko, Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art, 5 U.C. DAVIS J. INT'L L. & POL'Y 59, 60-61 & nn.3 & 6 (1999) (citing the development of art-investment funds in the 1980s and attributing the increasing demand for art objects \("to many factors, including the investment interest in collecting antiques, soaring prices, the aggressive promotion by auction houses, and the difficulty of adequately policing the market.\")).

18. Professor Ricardo Elia of Boston University has described this process:

In many parts of the world, looting has reached crisis proportions. Thieves digging for marketable antiquities destroy archaeological sites and, in the process, the information they contain about ancient cultures. This irreplaceable loss of knowledge is the most important consequence of looting . . . . Collectors buying from looters feed a process that obliterates our ability to learn anything meaningful about the very cultures whose art is being gathered.


19. See Louis T. Corsiletti, Desecration of Graves Roobs Snoqualmie Tribe of History, SEATTLE TIMES, Apr. 12, 2000, at A1 (describing desecration of graves dating from the last 300 years and sale of Native American human remains on black market); Craig Garrett, Grave Raiders Clean Out Lake Erie Park, DETROIT NEWS, June 12, 2000, at 1 (describing plundering of Native American and early American sites near Lake Erie); Ken Koehn, Thieves Steal Pieces of Florida's Past, TAMPA TRIB., Mar. 12, 2000, at 1 (describing looting of archaeological sites in Florida); Mike Toner, America the Looted: Shards of the South's Past Lost to Greed, ATLANTA J. & CONST., Feb. 13, 2000, at 4C (describing looting of sites in Georgia); Mike Toner, Past in Peril: America the Looted, ATLANTA J. & CONST., Feb. 13, 2000, at 1C (describing looting throughout the United States and the significance of the accompanying loss of context, as well as the increasing prices for Native American material on the international art market). Large-scale looting of grave monuments has occurred in New Orleans' historic "cities of the dead," including both the removal of marble sculptures and the use of metal detectors to locate coins, jewelry, and smaller objects. See Patricia Leigh Brown, Stolen from the Grave for the Garden, N.Y. TIMES, Feb. 28, 1999, § 4, at 6 (also describing looting of cemeteries in other parts of the United States).

20. See Moore, supra note 6, at 466 (describing the looting of sites in Central America); Roger Atwood, Just Old Things in the Ground . . . . such is the Looters' Attitude to the Fabulous Treasures Left Behind by Ancient South American Civilizations. Is it too Late for Governments and the Art World to Save this Priceless Heritage?, SUNDAY TELEGRAPH (London), July 23, 2000, at 7 (describing looting of Inca sites in Peru); Jack Cox, Is It Art or Loot? Archaeologists Say Collecting Hurts Ancient Sites, DENVER POST, Sept. 24, 2000, at G1 (quoting archaeologists' estimates that more than 50% of "the ancient temples, graveyards and related sites in Guatemala, El Salvador and Costa Rica are so badly damaged they will never be scientifically studied."); Mike Toner, The Past in Peril: Lost Treasures of Peru, ATLANTA J. & CONST., July 11, 1999, at IP (also describing looting in Peru).

21. In the case of Italy, details as to how antiquities are smuggled out of the country through Switzerland and then to the United States became known as the result of the litigation surrounding a 4th century B.C. gold phiale illegally excavated in Sicily and subsequently purchased by New York collector, Michael Steinhardt. The case demonstrated both how antiquities are intentionally brought through Switzerland in the attempt to "launder" the object's title and how little collectors ask of their sellers concerning the legitimate background of the antiquities they acquire. United States v. An Antique Platter of Gold, known as a Gold Phiale Mesomphalos, c. 400 B.C., 991 F. Supp. 222 (S.D.N.Y. 1997), aff'd, 184 F.3d 131 (2d Cir. 1999). This case was discussed in the media in Tom Hundley, 'Tomb Robbers' Alive and Getting Very Rich in Italy; as Museums, Auction Houses and Private Collectors Turn a Blind Eye, the Trade in Stolen Antiquities Flourishes, with New York as a
Asia. Manus Brinkman, Secretary General of the International Council of Museums, described this:

Everybody knows certain things are stolen, or should know it, and yet these things still appear on the market. . . . This involves famous dealers and art houses, not just shady operators. . . . And it's not only from China. . . . It's Cambodia and Thailand, Peru and Bolivia, Nigeria and Eastern Europe.

Major Center for Buying the Treasures, CHI. TRIB., July 2, 2000, at 7C; Mike Toner, Buying, Selling, Stealing History, ATLANTA J. & CONST., Sept. 19, 1999, at 1H.

In addition, scrutiny has been focused on Italy because of its recent request to the United States for import restrictions on undocumented antiquities. It has been documented that looting affects nearly 50% of recorded sites and archaeological areas under the supervision of the Italian regional Archaeological Superintendencies. In January 1997, the contents of warehouses at the Geneva airport free transit zone, containing 10,000 Italian antiquities worth some $42.5 million, were seized. The antiquities, some of which were destined for auction at Sotheby's in London, had been illicitly excavated from sites all over Italy. Peter Watson, Sotheby's: The Inside Story 290-93 (1997) [hereinafter Watson, Sotheby's]. See also Hundley, 'Tomb Robbers' Alive and Getting Very Rich in Italy, at 7C (describing looting of archaeological sites at Morgantina, Sicily, and elsewhere in Italy, amounting to $50 to $100 million a year). Steele, supra note 1, at 667-72 (discussing looting of sites in Italy and workings of the market); Walter V. Robinson, Italy Calls N.Y. Museum's Prized Collection Stolen, BOSTON GLOBE, Apr. 17, 1998, at A1 (describing Morgantina treasure in Metropolitan Museum of Art claimed by Italy). Revelations of Sotheby's London office's dealings in illegal antiquities eventually led to the closing of its antiquities department. Atwood, supra note 20 (describing Sotheby's pull-out from the Pre-Columbian market because of questions about the legality of some of the pieces).

22. See generally Shyllon, supra note 12 (tracing the history of looting of archaeological and ethnographic objects in Nigeria beginning with the effects of British colonialism and ending with the operation of the art market in more recent years); Norimitsu Onishi, Mali's Present is Poor: Can It Build Future on Past? N.Y. TIMES, Dec. 24, 1999, at A4 (describing looting of sites in Mali); Jon Ungbo-Thomas & Peter Watson, Gangs Smuggle Best of Africa's Art to Britain, SUNDAY TIMES (London), June 4, 2000 (describing theft of antiquities from both sites and museums in Africa, particularly Nok figures from Nigeria).

23. Architectural sculptures have, for years, been looted from Cambodia, including the World Heritage site of the fabled temples at Angkor Wat. See Bonnie Burnham, Architectural Heritage: The Paradox of its Current State of Risk, 7 INT'L J. CULTURAL PROP. 149, 149-50, 162 (1998); Seth Mydans, Raiders of Lost Art Loot Temples in Cambodia, N.Y. TIMES, Apr. 1, 1999, at A4 (describing massive looting at Banteay Chhmarr). These are smuggled across the border to Thailand and from there to the market in different parts of the world. In March 2000, a 10th century marble sculpture was about to be sold at auction by Christie's in New York, when it was seized by the United States. Chinese officials recognized it from the auction catalog as one of ten that were taken by raiders who "blasted their way" into the Five Dynasties tomb of Wang Chuzei in Hebei Province, in Northeastern China, in 1994. See Julian E. Barnes, Alleging Theft, U.S. Demands Rare Sculpture Go Back to China, N.Y. TIMES, Mar. 30, 2000, at B3. At the request of the Chinese government, the United States filed a civil forfeiture suit to take possession of the sculpture, which it estimated was worth $500,000. The complaint filed by the U.S. government said that "the sculpture's stone, carving style, pigments and decoration match those of other artifacts in the tomb . . . . [T]he size of the sculpture precisely fits an empty space in the tomb." Id. See also Jo Bowman, Switch Focus to Buyers of Looted Art, Says Criminologist, SOUTH CHINA MORNING POST, June 25, 2000, at 4 (quoting University of Melbourne criminologist, Kenneth Polk, that the illegal trade in antiquities from China is worth more than U.S. $500 million a year and that "[l]ike drug trafficking, it was violent, international, relied on thriving demand and involved corruption of public officials."). Peter Watson has also documented the looting of antiquities from India. Watson, Sotheby's, supra note 21, at 246-75. See also Claudia Caruthers, International Cultural Property: Another Tragedy of the Commons, 7 PAC. RIM L. & POL'Y J. 143, 143-44 (1998) (discussing theft of a temple lintel from Thailand).

Critics of restitution say that it is not in the public interest to encourage protection of sites through the approaches to be discussed here. They posit that anything that encourages leaving cultural objects in their country of origin is anti-internationalist and parochial in perspective. These criticisms are based on the assumption that the only way to achieve internationalism is by the physical movement of objects through the commercial trade. However, by examining some of the justifications offered for this trade, we can discern many of the problems that the trade in looted and undocumented antiquities fosters and that are inimical to the very globalism we seek to achieve.

First, it is said that the market is able to find those collectors, both public and private, that are best suited to care for cultural objects. Placing a high monetary value on cultural objects is supposedly the best means of ensuring their physical protection. Yet, we should recognize that even what the market purports to do best—protect the integrity of individual objects—does not always succeed, due to both intentional and unintentional damage. For example, tomb robbers and site

with sources throughout world); Toner, A World of Trouble, supra note 13 (describing looting in Antarctica, China, Guatemala, Iraq, and Cambodia).

25. For example, James Cuno, Director of the Harvard Art Museums, was quoted as saying that restitution is “taking [the object] from the world culture to a parochial culture. What really is best for the world? Return the items and reinforce a parochial, atomized view of world culture or encourage the exposure of these items to scholarship elsewhere?” Walter V. Robinson & John Yemma, Harvard Museum Acquisitions Shock Scholars, BOSTON GLOBE, Jan. 16, 1998, at A1. The foremost advocate of what is called cultural internationalism and critic of cultural nationalism in the legal literature is John Henry Merryman, who posited that there were two perspectives for analyzing problems of movement of cultural objects, cultural internationalism and cultural nationalism. See John Henry Merryman, Two Ways of Thinking About Cultural Property, 80 AM. J. INT’L L. 831 (1986). More recently, Professor Merryman has added a third perspective, which he calls the “object/context” view. See John Henry Merryman, The Nation and the Object, 3 INT’L J. CULTURAL PROP. 61, 70 (1994); MERRYMAN & ELSEN, supra note 11, at 71-72. Of Merryman’s perspectives, this comes closest to that put forth in this article as the public interest. Merryman, however, states that the “object/context” perspective is closely allied with the nationalist view and treats them as virtually synonymous. Id. at 72. This is not necessarily the case as the primary motivations and some of the implementation of these views can differ. The recently signed bilateral agreement between Italy and the United States, discussed infra notes 211-12 illustrates that the contextual view combines elements of both Merryman’s internationalist and nationalist perspectives. Nonetheless, Merryman’s equation of the preservationist view with what he terms “cultural nationalism” results in his ignoring the internationalist or globalist aspects of the contextualized approach. Merryman suggests that an object-centered policy should be determined by the principles of preservation, truth and access. In considering preservation, however, he only considers the preservation of the single object at issue. He fails to consider whether restrictions placed on the alienability of one object may help in the preservation of other objects and sites that have not yet been looted. Merryman, supra, The Nation and the Object, at 64-65.

26. This is the “rescue” argument, by which acquirors, who usually have greater financial resources are viewed as rescuing cultural objects from others, even from the original owners. See, e.g., Karen J. Warren, A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues, in THE ETHICS OF COLLECTING CULTURAL PROPERTY WHOSE CULTURE? WHOSE PROPERTY? 1, 3 (Phyliss Mauch Messenger, ed., 2d ed. 1999). The rationale of rescue was used as early as the time of Lord Elgin as a justification for his removal of the Parthenon sculptures and is still used today as one of the reasons put forth by the British Museum for its continued possession of the sculptures. William St. Clair, The Elgin Marbles: Questions of Stewardship and Accountability, 8 INT’L J. CULTURAL PROPERTY 391, 456-57 (1999).
looters often inadvertently or intentionally destroy objects, either in order to make them transportable or simply out of ignorance.\textsuperscript{27}

Particularly for objects that end up in private collections, there are also no guarantees of appropriate conservation and objects are sometimes re-cut or altered in other ways to suit the modern decorating tastes of their owners.\textsuperscript{28} In one example, pre-Iconoclastic Byzantine mosaics, stolen from the Kanakariá Church in northern Cyprus, were removed from the curved wall of the church apse.\textsuperscript{29} Not only were the mosaics injured when the thieves removed them, but the Indianapolis dealer who purchased them, thinking that the mosaics would be more "saleable" if flattened, had a conservator reset the tiles. The restorer caused extensive damage to the individual tesserae and then reset them with Elmer's glue. In the process, many of the tiles were broken, and much of their depth and perspective lost. Thus, placing monetary value on antiquities, in fact, encourages theft and destruction as looters, well aware of their market value, seek out the most lucrative objects.\textsuperscript{30}

Second, it is said that the market serves to move objects throughout the world, thereby making them accessible to larger numbers of people. This argument always assumes a one-way flow—from areas of the world that are rich in cultural heritage to collections in a few major cities—primarily New York, London, Paris, Zurich and Tokyo. Yet the numbers of people to whom these collections are actually accessible may remain small. Some parts of the world today, because of 19th century colonialism and the 20th century market, are now almost entirely devoid of their cultural heritage\textsuperscript{31} and their people are not in a position to travel to the centers of the modern art world to see these objects.

\textsuperscript{27} See Coggins, \textit{Illicit Traffic}, supra note 14, at 94 (describing dismemberment of Maya temples, stelae and other architectural sculptures); MEYER, \textit{ supra} note 15, at 22-28 (same); Lawrence M. Kaye, \textit{The Future of the Past: Recovering Cultural Property}, 4 CARDOZO J. INT'L & COMP. L. 23, 38 (1996) [hereinafter Kaye, \textit{The Future of the Past}] (stating that "[t]he tales of smugglers dynamiting entire ancient cities to reach the specific items they want to market are legion, as are stories of the wanton mutilation of movable antiquities to make them more saleable.").

\textsuperscript{28} Sculptures robbed from New Orleans cemeteries have been used for decoration of gardens. The "worst enemies may be decorators and antiques dealers pushing the negro-politan look for the garden, the more mouldering the statuary the better. The look was in full flower in Manhattan last week at the Gramercy Garden Antiques Show, where several weeping angels—one with an $875 price tag—were spotted amid the rusting garden benches and freshly spritzed topiary." Brown, \textit{ supra} note 19, at 6.

\textsuperscript{29} Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1375-76 (S.D. Ind. 1989), aff'd, 917 F.2d 278 (7th Cir. 1990). For a detailed analysis of the work by the restorer and the damage to the mosaics, see Catherine Sease & Danáe Thimme, \textit{The Kanakariá Mosaics: The Conservators' View, in ANTIQUITIES TRADE OR BETRAYED LEGAL, ETHICAL AND CONSERVATION ISSUES} 122-30 (Kathryn Walker Tubb ed., 1995).

\textsuperscript{30} It is reported that looters, even in remote provinces of China, have been caught with Sotheby's catalogues in hand. See also Isabel Hilton, \textit{A Culture in Urgent Need of Repair: The Theft and Destruction of Tibet's Treasures is Almost Without Parallel in the 20th Century}, FIN. TIMES, Aug. 12, 2000, at W1 (quoting scholars as saying that purchase of Tibetan cultural artifacts at high prices on the Western market stimulates continuing thefts, rather than saving objects at risk of destruction); Shyllon, \textit{ supra} note 12, at 261 (stating that "[u]nfortunately the various stories about record prices being paid for antiques [from Africa in the 1960's] stimulated the search for more by dealers, who now stood to make huge fortunes from looting.").

\textsuperscript{31} See, e.g., Ungoed-Thomas & Watson, \textit{ supra} note 22 (describing the National Museum in Lagos, Nigeria, as having so few artifacts that it must display replicas).
Third, it is said that the market is able to serve an educational function and to inspire members of the public through appreciation of the object. Yet, the market’s appreciation for decontextualized objects and its emphasis on private ownership remain mired in a one-dimensional view of the value of objects as exclusively aesthetic. While scientific excavation does not impede this aesthetic value (although it undoubtedly slows down the rate at which new objects are unearthed), the unregulated market certainly impedes scientific study. Several recent studies have attempted to quantify the extent of this looting and its impact on the study of the past.  

In a landmark study published in 1993 of Cycladic figurines of the 3rd millennium B.C., Drs. Christopher Chippindale and David Gill determined that 90% of the known figurines do not have a provenience, which means that nothing is known about their archaeological contexts. At the same time, an estimated 85% of Cycladic burial sites have been destroyed by looting. These figurines have been highly prized by collectors for their eerie resemblance to modern sculptures by Moore and Modigliani, and a large number of them flooded the market in the 1960s and later. It is therefore not known which of these figurines are actually genuine and which are fake, nor do we have a very clear idea of their original meaning, beyond the aesthetic criteria that modern scholars have had to impose on them to make up for their lack of context.

A second quantitative study by Chippindale and Gill presented a comparison of several contemporary classical collections, all of which were exhibited and published in catalogues during the 1990s. The study categorized objects by the degree of certainty and specificity with which the object’s find spot was reported and the length of time during which the object had been known before the exhibition. This study indicated that 74% of the objects had no indication of archaeological origin, aside from what can be deduced from stylistic features. Only 9% of the objects have a history documented before 1945 or that can be traced back to the ground, while 74% surfaced after 1973, and 38% of the objects made their

32. Writing in 1982, Bator could point to only one systematic study, by Clemency Coggins, of looting and its effects. Bator, supra note 2, at 277. Bator discussed several of the reasons for this lack of study and stressed that even anecdotal evidence can be useful under these circumstances. Id. at 289-91.

33. Christopher Chippindale & David W.J. Gill, Material and Intellectual Consequences of Esteem for Cycladic Figures, 97 AM. J. ARCHAEOLOGY 601 (1993). These figurines are found on the Cycladic Islands of the Aegean Sea and come more typically, but not always, from graves. Id.

34. Christopher Chippindale & David Gill, Cycladic Figures: Art versus Archaeology, in ANTIQUITIES TRADE OR BETRAYED LEGAL, ETHICAL AND CONSERVATION ISSUES 131, 132 (Kathryn Walker Tubb ed., 1995) [hereinafter Chippindale & Gill, Cycladic Figures].

35. Christopher Chippindale & David W.J. Gill, Material Consequences of Contemporary Classical Collecting, 104 AM. J. ARCHAEOLOGY 463 (2000) [hereinafter Chippindale & Gill, Material Consequences].

36. Chippindale & Gill, Cycladic Figures, supra note 34, at 132.

37. Chippindale & Gill, Material Consequences, supra note 35, at 463. Much of the data presented in this article are available on line at http://www.swan.ac.uk/classics/staff/dg/looting/gc2/. The two Chippindale and Gill studies, as well as that by Salter discussed below, are also summarized in Christopher Chippindale et al., Collecting the Classical World: First Steps in a Quantitative History, 10 INT’L J. CULTURAL PROP. 1 (2001).
first appearance at the time of the exhibition in the 1990s. In a related study of London auction house catalogues published since World War II, Emily Salter found that 95% of the objects auctioned had no indication of find spot, while just under 90% of the objects had no historical information as to previous owners.

Professor Ricardo Elia of Boston University has studied the appearance of undocumented South Italian vases on the market and correlated it with the destruction of tombs documented by Italian law enforcement officials. The category of Apulian red-figured vases is stylistically distinct and comes exclusively from sites in South Italy. In addition, all known vases in both public and private collections were catalogued and published between 1978 and 1993. Professor Elia concluded that for each Apulian vase that is looted, perhaps as many as 400 other objects will also be looted with their contexts destroyed. Based on the number of vases on the market and in collections, he has suggested that thousands of tombs must have been looted to produce the known corpus of Apulian vases. This study also found that while 9347 vases were known as of 1980 (which represented approximately two hundred years of collecting activity), some 4284 new vases appeared in just the twelve years between 1980 and 1992. Of the total corpus of known Apulian vases, only 5.5% have been recovered archaeologically. Finally, a study of Sotheby’s auction catalogues revealed that between 1980 and 1993, Sotheby’s auctioned 30% of the Apulian market. Of these vases, an archaeological find spot was listed for none, and 85% had no provenance information at all.

38. Chippindale & Gill, Material Consequences, supra note 35, at 477 tbl. 6.
39. Emily Salter, Fifty Years of Antiquities in the Auction-rooms, Paper Presented at the Illicit Antiquities: The Destruction of the World’s Archaeological Heritage Conference, Sponsored by the Illicit Antiquities Research Centre at the McDonald Institute for Archaeological Research (Cambridge University, Oct. 22-25, 1999) (paper on file with author). See also Chippindale et al., supra note 35.
41. Professor Elia determined based on excavated tombs that, on average nine tombs will produce one Apulian vase (the exact numbers vary depending on the relative wealth of the individuals buried in the various tombs). Id. One tomb will contain perhaps 40-50 other objects. Id. Thus, for each Apulian vase, approximately 400 other objects would be found.
42. Id. An additional 1.4% have precisely known find spots but were not recovered archaeologically, most in 19th century removals of large tombs. Id. The rest have no contextual information. Id.
43. Id. The remaining 15% had information relating only to previous owners or sellers. Id. Elia infers that those objects for which no provenance information is given are likely to be recently looted. Id. See also Hundley, supra note 21. Sotheby’s has refuted this, explaining that provenance information is given only when it will help in marketing an object. Atwood, supra note 20 (quoting Sotheby’s official as stating that the failure to give information does not indicate that the item was taken illegally). However, recent statements from other participants in the market indicate that provenance information which will indicate to a potential buyer that the object has a legitimate background will increase its sale price and attract buyers. During hearings held by the Culture, Media and Sport Committee of the House of Commons, held on May 23, 2000, Edward Dolman, Chief Executive of Christie’s stated: “Where we can establish provenance for items we sell, of course we do as much research as we possibly can, because . . . it does in fact increase the value of the item at auction if we can give a full provenance.” Thus, Sotheby’s explanation seems at odds with these other statements. A
A similar methodology was utilized by Elizabeth Gilgan to analyze the state of cultural heritage in Belize and, more particularly, the market for antiquities from Belize in the United States. Gilgan studied auction catalogues from the 1970s through 1990s in order to identify and track the appearance of Pre-Columbian materials on the market. In this case, she noted a change in the descriptions of objects in the catalogues, as the United States gradually imposed import restrictions on Pre-Columbian artifacts from the neighboring countries of Guatemala and El Salvador, so that they could elude detection as illegal imports.

These quantitative studies, which are a burgeoning area of research for scholars who are concerned with the preservation of cultural heritage, have gone a long way to fill the gaps noted by Professor Paul M. Bator in 1982. They document both the looting of sites and the correlations with the appearance of particular categories of objects on the market in the past three decades. They also document that both the aesthetic and intellectual understandings of the past become distorted beyond any recognition through the pillage of sites and the loss of original context.

Fourth, it is said that source nations have an excess of cultural objects and are not capable of caring for those they have. However, the museums of North America and Western Europe are also filled with art works and antiquities, which are often in storage, displayed occasionally, sometimes uncatalogued, and not necessarily accessible to either the general public or for scholarly research. This may well be part of good museum practice, but museums in archaeologically-rich countries also have reasons for what is displayed or not, and for keeping excavated material in the region, and they should not be singled out for practices that are normal elsewhere. Nor should they be subject to demands to “sell off” similar cultural objects.

full transcript of the testimony and documents presented during these hearings is available on line in the index for July 25, 2000 available at http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/cmcumeds.htm.


45. Id. Maya cultural remains are found in the five modern countries of Mexico, Guatemala, Belize, Honduras and El Salvador. Id. During the decade of the 1980's, Sotheby’s catalogues routinely described Maya artifacts as originating from the Petén region in Guatemala. Id. According to Gilgan, after the United States imposed import restrictions in 1991 on undocumented material from Guatemala, the catalogue descriptions changed to the use of “Lowlands”—a vaguer geographic area that could apply to any of the five countries in which Maya culture had flourished. Id. This generic description makes it difficult to determine the actual sources of these objects. It also points out the need for a regional approach to the implementation of the UNESCO Convention so that the use of such terminology to obfuscate the origin of antiquities will no longer succeed in subverting the import restrictions agreed to by the United States.

46. Several smaller studies indicate similar statistics. For example, in another study by Elia of eight collections of Pre-Columbian antiquities containing 2300 objects, not a single object had been obtained from a legal excavation. Elia, Chopping Away Culture, supra note 18, at D1.

47. At the time of the criticism of the Brooklyn Museum’s show “Sensation,” it was suggested that rather than accept city funding, the museum should sell off some of the antiquities in its collection. John Tierney, Open Market for Artifacts Aids All Sides, N.Y. TIMES, Sept. 30, 1999, at B1. The museum displays less than 10% of its 1.5 million objects from Egypt and other ancient civilizations. Id. However, both curators and archaeologists were horrified at the suggestion. Id.
objects, a practice that would be considered questionable by reputable museum professionals in this country.  

Even if one were to posit a world in which countries rich in cultural resources might decide to enter into a legal market, what little evidence there is indicates that such a legal trade would not stop the looting. In those countries that have permitted a legal trade to be conducted, sites were still looted.  

According to a study by Dr. Patrick O’Keefe, it is as likely that an influx of objects on the market will stimulate additional demand as it is to satisfy the current demand. In addition, individuals and institutions with considerable wealth and prestige to back them will not be content with anything less than the unique, “museum-quality” piece; unfortunately, one must loot many tombs and possibly destroy many cultural objects with less aesthetic appeal in the search for the exact right piece to satisfy a “high-end” collector.

This lack of accountability in the functioning of the art market is fostered by a number of quirks in both the national and international legal regimes. For example, the fact that one nation does not enforce another nation’s export controls and that there are significant differences between the common law and civil law systems allows for the “laundering” of antiquities through countries such as Switzerland.

48. For example, the Association of Art Museum Directors establishes strict guidelines for the deaccessioning of works from art museum collections. Its Professional Practices in Art Museums states:

Disposal of works of art from a museum’s collection by sale, exchange, or otherwise, requires particularly rigorous examination and should be pursued with great caution. Although there are circumstances in which disposal of works of art can contribute to the strengthening of a collection, such disposal must be related to the museum’s written policy, rather than to the exigencies of the moment. The procedure for any deaccessioning and sale or exchange should be at least as strict as that for purchasing works of art. The Director must provide full justification to the Board, with whom final action rests, and the reasoning should be recorded with particular care. Because development of the collection was the initial intent of the donor of an object or the funds for acquisition, the monies (principal and interest) received from the sale of any accessioned work of art must be used only to acquire other works of art.


49. For example in Israel, the only country in the Middle East to permit a legal trade in antiquities, a crate containing ancient artifacts looted from sites throughout Israel and destined for the United States was intercepted. Israel Seize Looted Artifacts, ASSOC. PRESS, Aug. 30, 1999, at A14. The opinion of local officials is that the existence of a legal market encourages the looting and makes it easier for smugglers to trade in stolen antiquities. Id. See also Patrick J. O’Keefe, TRADE IN ANTIQUITIES: REDUCING DESTRUCTION AND THEFT 67 (1997) (citing examples of Peru and the United States in which a legal market does not deter the looting of sites) [hereinafter O’KEEFE, TRADE IN ANTIQUITIES]; Arieh O’Sullivan, Tourist Caught Smuggling Antiquities, JERUSALEM POST, Aug. 30, 1999, at 4 (describing the increase in site looting in anticipation of the millennium); Deborah Sontag, Stealing Millennial Loot, From 2 Millenniums Ago, N.Y. TIMES, Nov. 12, 1999, at A4 (describing an increase in looting because of expected increase in tourism during millennium).


51. Id. at 69.

52. See Steele, supra note 1, at 687-88 (describing differences in civil and common law countries in ability to transfer title to stolen property and role of Switzerland in “laundering” title); Fox, supra note 1, at 255 (same). See also Winkworth v. Christie’s Ltd, 1 All E.R. 1121 (1980) (British court recognizing passage of good title in Italy of painting stolen in England, sold in Italy, and subsequently brought back to England). Although Switzerland has traditionally been a major transit point for stolen
Some professional organizations have passed codes of ethics and professional conduct that attempt to fill these lacunae in the law. However, these codes lack any enforcement mechanisms and professional organizations are reluctant to expel or discipline their membership. The art market has been able to appeal successfully to the large emphasis put on a free market in the United States and the fact that the United States has relatively few import or export controls. Yet, an unfettered trade in undocumented antiquities does not bring the same public benefits as does free trade in ordinary commercial goods. Finally, those who engage directly in the art market and who benefit pecuniarily from it, primarily dealers and auction houses, have been able to associate themselves sufficiently with public institutions, such as museums, that they have taken on an altruistic and educational facade as well.

It should be clear that restitution is not done as a favor to a particular foreign country. The public interest of both the United States and foreign countries lies in protecting our mutual cultural heritage. It falls to the nation-state, through its laws and international agreements, to protect that heritage and while it has not always been a perfect guardian of the past, it is where legal authority resides and the source from which legitimate authority will come, if the cultural heritage is to be preserved for future generations.

If it is agreed that there is a strong public interest in the preservation of archaeological sites and in their scientific excavation, the question is what can and should be done. Because demand for antiquities is increasing and the number of antiquities with documented provenience is finite, sites are looted so as to increase supply and thereby satisfy the demand. The only way to decrease the looting of sites is therefore to decrease the demand for undocumented antiquities at the end-point of the market. There are two ways of accomplishing this. First, legal consequences should be imposed, primarily through the remedy of restitution, on the consumers of undocumented antiquities. Second, through public awareness and understanding of the problem, voluntary actions that would result in a reduction in pillaging would become more prevalent. Particularly in the realm of public education, our museums as educational institutions should be taking a leadership role.

II. LEGAL RESPONSES

A. In General

The first set of responses is legal, focusing on the deterrence provided through consequences for theft. As with any other form of personal property, if an antiquity is stolen, the legal response is restitution to the original owner. The public policy here is so strong that stolen objects are always returned, even if they have been and looted cultural objects, its anticipated adherence to the UNESCO Convention could change that significantly.

53 The Anglo-American common law rule is generally known as the nemo dat quod non habet rule—no one can give what one does not have. It is codified in the United States in the Uniform
sold to a bona fide purchaser, unless the cause of action has been barred by the statue of limitations. However, in order to protect archaeological objects while they are still in the ground, deterrence to the looting itself is required, necessitating additional, particularized national and international legal responses.

Many archaeologically-rich nations as early as the 19th century passed laws vesting ownership of certain categories of antiquities in the national government. Thus, theft occurs when archaeological objects are removed without permission from the ground of a nation with ownership laws (which are to be clearly

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Commercial Code, which states: "A purchaser of goods acquires all title which his tranferor had or had power to transfer . . ." U.C.C. § 2-403(1) (2000). It is codified as applied to goods in England in the Sale of Goods Act, 1979, c. 54, § 21(1) (Eng.). See Janet Ulph, Good Faith and Due Diligence, in INTERESTS IN GOODS 403-404 (Norman Palmer & Ewan McKendrick eds., 2d ed. 1998). See also Bator, supra note 2, at 288-89; Moore, supra note 6, at 471.

54. Good faith is relevant in cases of entrustment. U.C.C. § 2-403(2) (2000) states: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." Good faith enters the picture because a buyer in the ordinary course of business is defined, in part, as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party . . ." U.C.C. § 1-201(9) (2000). Good faith may also be relevant under some state formulations of the statute of limitations defense or the equitable defense of laches. See, e.g., Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991) (determining whether laches will bar an owner's claim to recover stolen painting, found both the purchaser's efforts in searching title and the owner's conduct will be considered). The commercial law of the United States is moving toward placing the burden, as well as the risk of loss, in ascertaining the background of objects on purchasers. To establish good faith, purchasers increasingly must demonstrate that they have undertaken an affirmative search commensurate with the value and relative rarity of the item being purchased, demanding demonstration of the object's legality. This reflects the view that the purchaser can decide whether to enter the market and which objects to buy and is therefore in the best position to influence the market and to avoid loss. Moore, supra note 6, at 476-80 & 476 n.55 (stating that "the most effective means of slowing new thefts is to place liability for the purchase of stolen antiquities on buyers" and that "it is more efficient to police the activities of antiquity purchasers . . ."). In complying with the codes of ethics, this requirement to demonstrate due diligence should be even clearer. For extensive discussion of the obligation of due diligence, see Marilyn E. Phelan, Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork, 23 SEATTLE U. L. REV. 631 (2000).

55. The application of the statute of limitations and, in New York, the equitable defense of laches to bar recovery of stolen art works by their original owner has received considerable attention both in the courts and in law review literature. Because the statutory time period is relatively short and art objects are easily hidden, the essential question is when should the statute of limitations start to run if the original owner has not been able to bring a suit for replevin, usually because the location of the object or the identity of the current possessor is not known. See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990) (applying a discovery rule to determine accrual of the owner's cause of action); O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980) (same); Guggenheim, 569 N.E.2d at 430 (applying New York's demand-and-refusal rule and the equitable defense of laches in determining the accrual of the cause of action); Steven A. Bibas, The Case Against Statutes of Limitations for Stolen Art, 103 YALE L.J. 2437 (1994); Fox, supra note 1, at 237-47; Patty Gerstenblith, The Adverse Possession of Personal Property, 37 BUFF. L. REV. 119 (1989); Stephan J. Schlegelmilch, Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule, 50 CASE W. RES. L. REV. 87 (1999).

56. The first regulation of cultural property dates to the prohibition in 1464 of Pope Pius II on the export of works of art from the papal states. Bator, supra note 2, at 313. The Italian legislation vesting ownership of antiquities in the national government dates to 1902. Turkey passed a law vesting ownership of antiquities located on public land in 1906. Decree of Antiquities, Art. 4 (1906) (cited in Ergun Öztunay, Protection of Cultural Heritage in Turkish Private Law, 6 INT'L J. CULTURAL PROP. 278, 278 (1997)). The United States enacted its Antiquities Act in the same year.
distinguished from export controls). As an example, the United States enacted the Antiquities Act in 1906 vesting ownership of antiquities found on federal and tribal land in the national government, and most state governments have followed suit, as applied to state-owned land. It is clear today that such laws are used as one of the most effective methods to reduce incentives to purchase undocumented antiquities and thus to prevent the looting of archaeological sites. Because of the significance of these laws in the deterrence of looting of sites, they will be discussed in greater detail in the next section.

The second legal response is to smuggling—that is, the illegal export or import of antiquities without a required permit. Many archaeologically-rich nations have enacted strict export controls for their cultural property, as another method to curb looting of sites. Smuggling can also occur when an object is brought into a country if it has not been properly declared in compliance with that country’s import regulations. Two international conventions which call upon the States parties to respect each other’s export restrictions on cultural property, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO Convention”) and the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects (“Unidroit Convention”), have been promulgated.

The third element is illegal excavation. Almost everyone at least purports to agree that this is the heart of the matter, and yet illegal excavation by itself does not produce “tainted” objects. It is relatively easy today to document whether a cultural artifact originated from a permitted excavation. The truth is, however, that this point is often ignored. The 1995 Unidroit Convention attempts to change this by equating illegal excavation with theft, when this is consistent with national laws. Yet both the art market community and the leading museum associations, as well as several individual museums, voiced significant opposition to this provision at the time of the final negotiations for the Unidroit Convention.

59. Export controls can take considerably different forms. Some countries, such as England, maintain a system of first refusal, requiring that objects of significance to the nation be offered first to local institutions. Other countries require export licenses and grant relatively few.
62. Article 3(2) states: “For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.” Available at http://www.unidroit.org/english/conventions/c-cult.htm.
63. THE AMERICAN ASSOCIATION OF MUSEUMS, ET. AL., STATEMENT OF POSITION OF CONCERNED MEMBERS OF THE AMERICAN CULTURAL COMMUNITY REGARDING THE UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGLY EXPORTED CULTURAL OBJECTS (May 31, 1995) (available from the Connecticut Journal of International Law). Among those who submitted this statement were: the American Association of Museums, the Association of Art Museum Directors, the
B. The McClain Doctrine

1. The McClain Decision and its Progeny

Because antiquities taken from a country which vests ownership in the national government are stolen, the foreign government may seek restitution in a U.S. court or some other remedy may be granted under the National Stolen Property Act [NSPA]. In the mid and late 1970s, the Ninth and Fifth Circuits held that the national ownership laws of Guatemala and Mexico, respectively, created the type of ownership for which the remedy of restitution would be granted if antiquities were taken without permission from these countries. The latter case, involving Pre-Columbian antiquities taken from Mexico, gave its name to the “McClain doctrine.”

In the earlier of the two cases, United States v. Hollinshead, the Ninth Circuit held, with little discussion, that the taking of part of a Maya stele from Guatemala constituted theft. The defendants were convicted of conspiracy to transport stolen property in interstate commerce in violation of the NSPA. Utilizing the definition of “stolen” given in the NSPA, the appellate court accepted the concept that property owned by a foreign national government and removed without consent was stolen property under the law of the United States. The only significant issue on appeal was whether the defendants knew, as required by the NSPA, that the stele was stolen property. The court concluded that despite some question about the nature of the instructions given to the jury, the evidence that the defendants knew the stele was stolen was compelling.

More extensive discussion of these issues is found in the two appellate decisions of United States v. McClain. The defendants had been convicted under

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Art Dealers Association of America, the National Association of Dealers in Ancient, Oriental and Primitive Art, Christie's, Inc., Sotheby's, Inc., the Metropolitan Museum of Art, and the Museum of Fine Arts, Boston. Id.

64. 495 F.2d 1154 (9th Cir. 1974). This case is discussed by Bator, supra note 2, at 345-46; William J. Hughes, United States v. Hollinshead: A New Leap in Extraterritorial Application of Criminal Laws, 1 HASTINGS INT'L. & COMP. L. REV. 149 (1977).

65. Hollinshead, 495 F.2d at 1154 (citing to U.S.C. § 2314). The defendants had arranged to acquire Pre-Columbian artifacts from Central America, with the primary evidence focusing on the Machaquila Stele 2, “a rare and choice item worth many thousands of dollars... found in a Mayan ruin in the jungle of Guatemala [and] cut into pieces...” Id. at 1155. The various co-conspirators had engaged in an elaborate sequence of events apparently designed to allow the stele fragments to be smuggled out of Guatemala through Belize and brought into the United States undetected by United States Customs officials, including their packaging in boxes marked “personal effects.” Id.

66. Id. at 1156. The NSPA defines “stolen” as: “acquired or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, with the intent to deprive the owner of the benefit of ownership.” Id.

67. The trial court had received expert testimony that the law of Guatemala regards all such artifacts as the property of the Republic and that they cannot be removed without the permission of the government. Id. at 1155. The appellate court did not consider any further the question of whether such property should be classified as stolen under United States law. Id.

68. Id. at 1156.

69. 545 F.2d 988 (5th Cir. 1977) (“McClain I”); 593 F.2d 658 (5th Cir. 1979) (“McClain II”). The McClain decisions are discussed by Oliver Metzger, Note, Making the Doctrine of Res Extra
the NSPA of conspiring to transport in interstate commerce Pre-Columbian artifacts stolen from Mexico.\footnote{At least two of the defendants knew Clive Hollinshead, the defendant in \textit{United States v. Hollinshead}, who, despite the fact that he was on probation, was supposed to supply several of the artifacts that the defendants in \textit{McClain} were attempting to sell. \textit{McClain II}, 593 F.2d at 659 n.1.} The first issue addressed by the court was whether the artifacts were "stolen" for purposes of an NSPA prosecution.\footnote{\textit{Id. at} 992.} To answer this, the court gave extended consideration to the definition of "stolen" under the NSPA and concluded that it should be given a broad meaning.\footnote{\textit{Id. at} 994-97. The court began with the definition given by the Supreme Court in interpreting the Motor Vehicle Theft Act that the term "does not refer exclusively to larcenously taken automobiles." \textit{Id. at} 995 (citing \textit{United States v. Turley}, 352 U.S. 407, 411 (1957)). Earlier cases involving the NSPA had held that Congress intended the NSPA to "reach all ways by which an owner is wrongfully deprived of the use or benefit of the use of his property" and that stealing "is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership." \textit{Id. at} 995 n.6 (citing \textit{Lyda v. United States}, 279 F.2d 461 (5th Cir. 1960)); \textit{Crabb v. Zerbst}, 99 F.2d 562, 565 (5th Cir. 1939). \textit{See also} \textit{United States v. Handler}, 142 F.2d 351 (2d Cir. 1944). The court balanced this broad construction against the need in our society to give criminal statutes a narrow interpretation when they are ambiguous yet still concluded that the NSPA applied to cultural objects stolen from foreign governments. \textit{McClain I}, 545 F.2d at 995-96.} The court explicitly rejected two additional arguments pertaining to the application of the NSPA under these circumstances. The defendants argued that the court was enforcing foreign law. To this the court answered that Congress had chosen "to protect property owners living in states or countries hampered by their borders from effectively providing their own protection."\footnote{\textit{Id. at} 996. The court made a direct comparison of the NSPA's purpose to facilitate prosecution in one state for a theft that had occurred in another state with its purpose to facilitate prosecution in the United States for a theft that had occurred in a foreign nation. \textit{Id.}} In a related argument, the defendants claimed that the NSPA prosecution was actually the enforcement of a foreign nation's export controls. The Fifth Circuit rejected the argument by pointing out that the general rule concerning export controls was not relevant to the situation in which art objects or artifacts had been declared to be the property of a foreign nation.\footnote{\textit{Id. at} 996-97. The Fifth Circuit recognized that this general rule concerning enforcement of foreign export regulations could be altered through specific statutes or treaties and pointed to the 1972 Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act, 19 U.S.C. §§ 2091-2095. \textit{Id. at} 996 n.14. This rule has been further altered by the Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 et seq. \textit{See infra note} 95.} The second major argument raised by the defendants was that Mexican law did not clearly vest ownership of antiquities in the national government. The appellate court reviewed Mexican law concerning ownership and regulation of antiquities and held that Mexican law did not clearly vest ownership until its 1972 legislation; it therefore remanded to the

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district court for a jury finding as to exactly when the artifacts at issue were exported from Mexico.76

Upon remand, the jury again convicted the defendants and they again appealed to the Fifth Circuit, raising many issues similar to those the Fifth Circuit had addressed in McClain I. In McClain II, the court reversed the defendants' conviction on the substantive charge concerning the antiquities that were already in the United States because it had not been adequately established at trial whether these antiquities had been taken out of Mexico after the effective date of the 1972 Mexican vesting statute which, the court held, was the first legislation to clearly vest ownership in the Mexican government.77 However, the court allowed the conviction for conspiracy to stand because it was clear that the defendants had conspired to continue to remove antiquities from Mexico that were obviously subject to the 1972 law.78

The McClain cases clearly establish certain principles. The primary principle is that legislation may vest ownership of antiquities in the national government, regardless of whether the government has ever had actual possession of the objects. Such ownership legislation is recognized as an act inherent in the notion of sovereignty and it is regarded as an aspect of comity among nations. If an act of conversion, such as export without required permission, is taken after the effective date of the ownership legislation, then this is theft and the antiquities are considered stolen property under the NSPA.79 The McClain cases did, however, establish certain safeguards, as well.80 First, the ownership legislation must be sufficiently clear so as to provide adequate notice of its effect, at least in the context of a criminal prosecution, which McClain was. Second, the antiquities at issue must be proven to have been found within the modern territory of the nation which has declared ownership. Third, the act of conversion must have taken place after the effective date of the vesting legislation.81 This is essentially what has become

76. McClain I, 545 F.2d at 997-1004.
78. Id. at 671-72.
79. In McClain II, the court stated:

[In addition to the rights of ownership as understood by the common law, the N.S.P.A. also protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government. Moreover, the earlier panel [in McClain I] had considered the evidence of the 1972 statute, its legislative history and UNESCO negotiations, holding nevertheless that neither statute nor treaty nor our historical policy of encouraging the importation of art more than 100 years old had the effect of narrowing the N.S.P.A. so as to make it inapplicable to artifacts declared to be the property of another country and illegally imported into this country. Id. at 664 (citing McClain I, 545 F.2d at 994-97).]

80. Rosecrance, supra note 69, at 324-26 (discussing the strict requirements established by the McClain courts).
81. McClain and the NSPA also require scienter in cases that involve criminal prosecution. See Fox, supra note 1, at 232-36 (discussing the difficulty of establishing scienter in stolen art cases because of destruction of evidence, secrecy and numerous sales transactions); Paige Margules, International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions, 15 Suffolk Transnat'l L.J. 609, 645 (1992) (noting that the scienter requirement makes prosecution under the NSPA "difficult"). Despite the difficulty of
known as the McClain doctrine, and while it has been tested in several subsequent cases, no court that has considered it has disapproved or even questioned its inherent validity.

Foreign countries that have attempted to recover stolen antiquities based on national ownership laws have had varying amounts of success because of the difficult evidentiary standards that are required under the McClain doctrine. In Peru v. Johnson, the government of Peru attempted to recover Inca antiquities from a dealer in California. While recognizing the validity of the McClain doctrine, the court held that Peru was unable to establish that the antiquities had originated within its modern territory because the Inca culture spanned several modern countries. A similar result occurred in the case involving the Sevso Treasure, a hoard of Roman objects found in Central Europe. In that case also, the jury found that it could not be determined exactly where the objects originated, in part because the territory of the Roman Empire encompassed forty modern nations and in part because insufficient evidence concerning the circumstances of the hoard’s discovery was presented at trial. Nonetheless, successful claims to ownership of antiquities have been brought since the time of the McClain decisions by Guatemala, Turkey, and Italy.

83. Johnson, 720 F. Supp. at 812. See also Kaye, The Future of the Past, supra note 27, at 27 (noting Peru’s failure to present eyewitness or other evidence that the objects in question had come from specific sites in Peru). In a discussion that was similar to the McClain court’s review of Mexican law, the trial court also determined that Peru’s vesting laws before 1985 were not sufficiently clear in vesting ownership of antiquities in the national government. Johnson, 720 F. Supp. at 812-15. However, it is possible that the court applied the wrong standard in evaluating Peru’s laws, as Peru v. Johnson was a civil case, while McClain involved a criminal prosecution, which requires a higher standard of clarity.
86. United States v. Pre-Columbian Artifacts, 845 F. Supp. 544, 547 (N.D. Ill. 1993) (stating that “while traveling in foreign commerce, the artifacts were stolen in that they belonged to the Republic, not the person who unlawfully possessed the artifacts”). This case is unusual in that Guatemala’s claim to ownership seemed to have been based on its law that provided that protected objects became the property of the government through automatic confiscation upon illegal export. Id. at 547; see also Kaye, Art Wars, supra note 57, at 82.
87. Turkey v. OKS Partners, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass. June 8, 1994) (holding that Turkish law vesting ownership of antiquities in the national government supported claims for replevin, conversion and right to possession). This case was ultimately settled with the restitution of nearly 1700 coins to the Turkish government. Anne E. Kornblut, In Settlement, Koch to Return Coins to Turkey, BOSTON GLOBE, March 5, 1999, at A1. In an article published before the settlement, this case was discussed by Peter K. Tompa, Ancient Coins as Cultural Property: A Cause for Concern, 4 J. INT’L LEGAL STUD. 69, 85-93 (1998) (suggesting that coins because they lack uniqueness or rarity should not be protected as cultural property). Another case involving the claim of the Turkish Republic to the Lydian hoard, which was in the possession of the Metropolitan Museum of Art in New York, was also settled and implicitly recognized the ownership rights of the Turkish government in antiquities found in Turkey. Kaye, Art Wars, supra note 57, at 82 (stating that “the out-of-court resolution was prompted in great part by the likely success of Turkey in establishing its right to
2. In Defense of the McClain Doctrine

Despite its success in the courts, the McClain doctrine has been the subject of much discussion and often criticism, primarily by the art market community and the two museum organizations, the American Association of Museums, and the Association of Art Museum Directors. These criticisms, which have remained essentially the same for more than twenty years from the time of the McClain litigation through the Antique Platter case, focus on three arguments: first, that

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recover the Hoard objects at trial). A different aspect of this case involving the statute of limitations was considered in Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990). For further discussion of this case, see Lawrence M. Kaye & Carla T. Main, The Saga of the Lydian Hoard Antiquities: from UDelta to New York and Back Again and Some Related Observations on the Law of Cultural Repatriation, in ANTIQUITIES TRADE OR BETRAYED LEGAL, ETHICAL AND CONSERVATION ISSUES 150 (Kathyn Walker Tubb ed., 1995). However, in a Swiss decision, grave stelai taken from Turkey were not returned because the court held that the Turkish government had waived its ownership rights in the stelai by failing to recover them once their discovery had been reported. For criticism of this decision and fuller discussion of the applicable Turkish law, see Sibel Ozel, The Basel Decisions: Recognition of Blanket Legislation Vesting State Ownership over the Cultural Property Found within the Country of Origin, 9 INT'L J. CULTURAL PROP. 315 (2000).

88. In United States v. An Antique Platter of Gold, 991 F. Supp. 222 (S.D.N.Y. 1997), the United States forfeited a gold phiale of the 4th century B.C. which had been found in Sicily. In upholding the forfeiture, the District Court based its decision on two reasons. First, the court held that the phiale had been illegally imported into the United States because of misrepresentations on the customs forms. Id. at 228-30. Second, the court held that the phiale was owned by the Italian government based on the Italian cultural patrimony laws vesting ownership in the government; thus the phiale was stolen property under the NSPA. Id. at 231-2. The District Court explicitly relied on the McClain cases for this part of its decision. The Second Circuit, on appeal, explicitly affirmed the first holding and did not need to reach the McClain issue. This decision will be discussed at greater length, infra pages 223-25.


91. Id.

92. The American Association of Dealers in Ancient, Oriental and Primitive Art filed an amicus brief in the original McClain litigation, opposing the convictions and the legal principles on which they were based. McClain I, 545 F.2d 988, 991 n.1. In a section of the brief quoted in the court's decision, the Association made clear its interest: “The livelihood of the members of the association will be drastically affected if the convictions are upheld.” Id. At the same time the Association attempted to represent the interests of museums (a quite distinct constituency but one upon which many dealers are surely dependent, again, for their livelihood) in stating:

The art institutions of the United States have been able to assemble and exhibit ancient, oriental and primitive art only because it has been entirely lawful under United States law to collect such material, whether or not it was exported from another country in compliance with that country's export restrictions.

Id. In 1995, the auction houses, dealers, museum associations and several individual museums joined in a statement opposing the Unidroit Convention, see THE AMERICAN ASSOCIATION OF MUSEUMS, ET AL., STATEMENT OF POSITION OF CONCERNED MEMBERS, supra note 63, at 1. More recently, a coalition of museum organizations led by the AAM and, perhaps ironically, without the support of the dealers' association, filed an amicus brief in the Antique Platter case, arguing essentially that if the forfeiture were permitted under the McClain doctrine this would place the collections of many museums in the United States at risk of similar forfeiture actions. Brief of Amici Curiae Am. Ass'n of Museums, et al. in Support of the Appeal of Michael H. Steinhardt, reprinted in 9 INT'L J. CULTURAL PROP. 76, app. I (2000) [hereinafter AAM Brief].
these vesting laws are, in fact, export controls and the latter are not enforceable
absent a specific agreement between the United States and the foreign nation;
second, that this application of the NSPA is preempted by other statutes; third, that
these vesting laws violate the public policy of the United States. Each of these
arguments will be considered in turn.

a. Export Controls

The first of these arguments centers on the idea that the vesting laws are, in
fact, export controls in disguise, and, because it is said that one nation's export
controls are generally not enforced by other foreign nations, the vesting laws
should not be recognized in United States courts as a basis for ownership. Yet,
export controls and national vesting laws are clearly not the same and, where export
controls or regulations have been at issue, courts have been able to distinguish them
from vesting laws. Furthermore, this aspect is dealt with through the McClain
requirement that the vesting law operate so as to vest ownership of antiquities in the

F.3d 131 (2d Cir. 1999).
94. See Fitzpatrick, supra note 89, at 867; AAM Brief, supra note 92, at app. I.
95. Export controls are not generally considered to be enforceable by another nation absent some
specific legislation or agreement to do so. Bator, supra note 2, at 287-88 (asserting that neither the
United States nor any other major art-importing nation enforces a foreign country's export controls).
Some more recent commentary casts some doubt on this proposition. See, e.g., Robert K. Paterson, The
Legal Dynamics of Cultural Property Export Controls: Ortiz Revisited, 1995 U. BRIT. COLUM. L. REV.
241, 249-50 (Special Issue) [hereinafter Paterson, Legal Dynamics]. In the United States, this general
rule as applied to art works or antiquities was first altered by the Treaty of Cooperation with the United
States of America and the United Mexican States Providing for Recovery and Return of Stolen
No. 7088, 1971, and subsequently by statute, Regulation of Importation of Pre-Columbian Monumental
§§ 2091-2095 (2001)). See Clemency Coggins, United States Cultural Property Legislation:
Observations of a Combatant, 7 INT'L L. CULTURAL PROP. 52, 54-55, 63-64 (1998) [hereinafter Coggins,
Cultural Property Legislation]; Metzger, supra note 69, at 620; Naizger, Underlying
Constitutionalism, supra note 9, at 588-89; Bruce Zagaris & Jessica Resnick, The Mexico-United States
Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of
States cooperation with Mexico in restitution of stolen cultural property). The import of archaeological
materials was further regulated by treaty with Peru, Agreement between the United States and Peru for
the Recovery and Return of Stolen Archeological, Historical and Cultural Properties, Sept. 15, 1981,
U.S.-Peru, 33 U.S.T. 1607. See also 19 U.S.C. §§ 2091-2095. This rule was changed significantly by
the United States' implementation of the 1970 UNESCO Convention through the Cultural Property
Implementation Act, 19 U.S.C. §§ 2601 et seq. Despite this implementation, the United States must
still enter into individual bilateral agreements with other States party to the UNESCO Convention.
At this time, the United States has bilateral agreements for import controls on undocumented
archaeological or ethnological objects with seven foreign nations (El Salvador, Guatemala, Peru,
Canada, Mali, Nicaragua and Italy) and has imposed emergency import restrictions for certain materials
from Cyprus and Cambodia. For a list of current import restrictions and information concerning and
database illustrating the designated archaeological and ethnologic materials subject to import
restrictions pursuant to the CPIA, see the web page of the Cultural Property Advisory Committee
available at: exchanges.state.gov/education/culprop.
96. See McClain I, 545 F.2d 988, 996 (5th Cir. 1977); Kaye, Art Wars, supra note 57, at 80.
Export controls are typically required in addition to, not in place of, vesting laws, under McClain. See
Rosecrance, supra note 69, at 325.
national government in a clear and unambiguous manner and to give notice to U.S. citizens who might be adversely affected by these laws in a criminal prosecution, such as *McClain*. This distinction was made and applied in *McClain* itself where the Fifth Circuit examined the various Mexican laws to determine which was sufficiently clear in its vesting effect. This was also an issue in *Peru v. Johnson*, where the court held that Peru’s older laws were not sufficiently clear in vesting title in antiquities in the national government.

The distinction was also clearly made by a British court in *Attorney-General of New Zealand v. Ortiz*. In that case, carved Maori wood panels had been smuggled out of New Zealand and were ultimately purchased by a European dealer and collector, George Ortiz. The New Zealand laws at that time provided for forfeiture of protected categories of ethnographic objects in the national government at the time such an object was illegally exported from the country. The court thus characterized the law as an export regulation because it took effect only at the moment of illegal export, rather than a vesting law, and so denied New Zealand’s claim for restitution. Thus, this argument is not a reason to deny recognition to foreign vesting laws but is, instead, consonant with the *McClain* requirement that courts must examine the relevant foreign statutes carefully to be certain that they are in fact vesting laws, rather than export controls.

b. Preemption

The second argument put forward against the *McClain* application of the NSPA to stolen antiquities is that the *McClain* doctrine was preempted by the Convention

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100. Id. at 812-15.
102. The statute thus had only extraterritorial effect. Leigh, supra note 101, at 632. See also O’Keefe, *Export and Import Controls*, supra note 101, at 362-64 (criticizing statement in *Ortiz* that public laws of foreign countries will not be enforced). Revisions to the laws of New Zealand protecting cultural property have been proposed in reaction to the outcome of the *Ortiz* decision. Paterson, *Protecting Taonga*, supra note 101, at 118-19.
103. Paterson, *Legal Dynamics*, supra note 95, at 249. The court did, however, state that recovery would be allowed in a case in which the object is acquired by the national government through either nationalization or actual possession. *Attorney-General of New Zealand*, 2 All E.R. at 99; see also Nafziger, Legal Framework, supra note 101, at 798.
on Cultural Property Implementation Act [CPIA].\(^{105}\) The CPIA was enacted in 1983 as the United States' implementation of the 1970 UNESCO Convention.\(^{106}\) The CPIA provides a mechanism by which foreign nations that are party to the UNESCO Convention may request that the United States recognize their export controls for certain categories of archaeological and ethnographic objects.\(^{107}\) The argument that has been made in support of preemption is that the CPIA was intended by Congress to be the sole expression of the policy and response of the United States toward the question of international movement in looted and undocumented archaeological and ethnographic objects.\(^{108}\)

However, this preemption argument is not correct.\(^{109}\) First is the statement in the Senate Report that was part of the legislative history of the CPIA that the CPIA "neither pre-empts State law in any way, nor modifies any Federal or State remedies that may pertain to articles to which [the Act's] provisions ... may apply."\(^{110}\) Second, the proponents of the preemption argument twice introduced legislation in the Senate after enactment of the CPIA that would have prohibited the application of the NSPA to archaeological objects, thereby effectively overruling McClain.\(^{111}\)
This demonstrates that at the time the CPIA was enacted and for several years later it was the clearly accepted view of all those involved in these issues that the McClain doctrine was not preempted by the CPIA. It was only years later, after the legislative attempts to amend the NSPA had failed, that the argument was put forward that the CPIA by itself and without any additional legislation preempted the McClain doctrine. That neither of these attempts to amend the NSPA succeeded further demonstrates that the McClain doctrine and the CPIA can work together and are not mutually exclusive in confronting the problem of looted and undocumented antiquities.

The third argument against preemption is simply that the McClain doctrine and the CPIA differ in their fundamental requirements and therefore work primarily in different contexts. As has previously been discussed, McClain works only where the foreign nation has vested ownership of cultural objects in the national government. The CPIA, however, works pursuant to either a bilateral agreement or in emergency conditions to give effect to a foreign nation's export controls without the prerequisite of a national vesting law, which is necessary to the McClain doctrine.

The fourth argument against preemption is the fact that several district courts have continued to rely on McClain even after enactment of the CPIA, thus demonstrating its continuing validity. In addition, the Second Circuit recently well-connected and influential the community of dealers, private collectors and museums is, thereby indicating the likelihood that similar legislation to reverse the effects of the McClain doctrine and other efforts to impose the consequences of looting on purchasers will continue to be pursued in the future. 112.

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112. See Fitzpatrick, supra note 89, at 864 & n.28 (noting that the CPIA “Senate Report concluded that passage of the Cultural Property Law itself does not repeal or alter the NSPA, S. Rep. No. 564” (emphasis in original)). In 1989, the then president of the American Association of Dealers in Ancient, Oriental and Primitive Art, Douglas C. Ewing, acknowledged that separate amendments to the NSPA were required to alter the effect of the McClain doctrine. Douglas C. Ewing, What is “Stolen”? The McClain Case Revisited, in The Ethics of Collecting Cultural Property 177, 182 (Phyllis Mauch Messenger ed., 2d ed. 1999).

113. See, e.g., AAM Brief, supra note 92.

114. Rosecrance, supra note 69, at 332-36 (viewing the full variety of United States legislation, including ARPA, NSPA and CPIA, as complementary in the United States’ approach to combating looting of archaeological sites world-wide).

115. Rosecrance, supra note 69, at 344 n.207. The difference is illustrated by the example of Canada. Canada does not have a vesting law, but it does have export controls. The United States and Canada entered into a bilateral agreement under the CPIA in 1997. See Agreement between the Government of the United States of America and the Government of Canada concerning the Imposition of Import Restrictions on Certain Categories of Archaeological and Ethnological Material, reprinted in 8 INT’L J. CULTURAL PROP. 245 (1999); Francis P. McManamon & Veletta Canouts, Commentary (United States), reprinted in 8 INT’L J. CULTURAL PROP. 245, 270 (1999); David A. Walden, Commentary (Canada), reprinted in 8 INT’L J. CULTURAL PROP. 245, 258 (1999). Thus, the McClain doctrine would not apply to cultural objects illegally excavated in Canada, absent some other basis for ownership. However, undocumented cultural objects that are subject to the bilateral agreement could be seized in the United States and returned to Canada. For discussion of Canada’s cultural property laws, particularly the Cultural Property Export and Import Act, see Ian Christie Clark, The Cultural Property Export and Import Act of Canada: Legislation to Encourage National Cooperation, 15 N.Y.U. J. INT’L L. & POL. 771 (1983).

116. These cases are discussed, supra notes 82, 86-88 & accompanying text. Two of these cases were appealed to the circuit courts. In Peru v. Johnson, the Ninth Circuit did not question the continued viability of the McClain doctrine. 933 F.2d 1013 (1991). The Second Circuit’s decision in
gave approval to the continued reliance on *McClain* by the Customs Service\textsuperscript{117} in the *Antique Platter*\textsuperscript{118} decision. The District Court for the Southern District of New York, in *Antique Platter*, explicitly relied on the *McClain* doctrine in its alternative holding that the phiale was owned by the Italian government and that its removal without permission of the government was therefore theft.\textsuperscript{119} To understand the intersection between the *McClain* doctrine and the Second Circuit opinion in the case, it is necessary to examine the facts of the case more closely.\textsuperscript{120}

The case involved the restitution of a gold phiale, a large open bowl, of the late 4th or early 3rd century B.C. Not only was the phiale smuggled out of Italy, but it was brought into the United States illegally because the importer listed Switzerland as the country of origin (instead of Italy) and the value as $250,000 (instead of the approximate $1.2 million paid by the collector).\textsuperscript{121} The United States Government alleged and the District Court held, first, that the phiale had been imported illegally into the United States due to these materially false statements on the Customs forms,\textsuperscript{122} and second, that the phiale was stolen property because it had been taken from Italy in violation of that country's national ownership law.\textsuperscript{123}

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\textsuperscript{117} Customs' reliance on the *McClain* case has been criticized continuously by the art market community. See Fitzpatrick, supra note 89, at 864-94 (criticizing the 1982 Customs' Directive, which focused on Pre-Columbian antiquities); McAlee, *The McClain Case*, supra note 90, at 829-38. These criticisms are discussed and refuted by Rosecrance, supra note 69, at 337-41.


\textsuperscript{119} *Antique Platter*, 991 F. Supp. at 231.

\textsuperscript{120} The facts of the case are summarized in the district court opinion. *Id.* at 224-27.

\textsuperscript{121} *Id.* at 226. The dealer, Robert Haber, explained that the designation of Switzerland as the country of origin was actually the mistake of the shipping agent who copied the information from the letterhead of the Swiss dealer through whom Haber had arranged the transaction. Robert Haber, *The Steinhardt Phiale: a Trading History*, ART NEWSPAPER (London), June 1999, at 4. Neither this letter nor any other publication explains why the value of the phiale was also misstated. *Id.* Additionally, neither court relied on this misstatement in its decision. *Antique Platter*, 991 F. Supp. at 228; *Antique Platter*, 184 F.3d at 138.

\textsuperscript{122} The materially false statements on the Customs forms violated 18 U.S.C. §§ 542 and 545. *Antique Platter*, 991 F. Supp. at 230, 231. The District Court held that Italy is in fact the country of the phiale's origin and not Switzerland, through which the phiale passed for a short time en route from Italy to New York. *Id.* at 229-30. The requirement of listing the true country of origin is likely to have some effect on the operation of the art market which has for years passed objects through countries like Switzerland in order to "launder" the object and give it a legitimate background. With facts that are remarkably similar to those of the *Antique Platter* case, in 1969 the Boston Museum of Fine Arts purchased an unknown Raphael portrait. Bator, supra note 2, at 280 n.11. Although it was claimed that the painting had been purchased from a private collector in Switzerland, it was actually purchased in Italy and smuggled out of the country. *Id.* It also turned out that the museum curator had failed to declare the painting when bringing it into the United States, and this formed the basis for seizure by the Customs Service. *Id.* at 280 n.11, 287 n.30.

\textsuperscript{123} *Antique Platter*, 991 F. Supp. at 231-32. The court cited 18 U.S.C. § 2314, which criminalizes the "transfer[ ] in interstate or foreign commerce [of] any goods, wares, merchandise or money, of the value of $5,000 or more, knowing the same to have been stolen . . . ." *Id.* at 231 n.34.
The Second Circuit Court of Appeals affirmed the District Court's holding on this basis but decided not to reach the District Court's second holding that the phiale was stolen property. Yet the Second Circuit's decision gives indirect validation to the McClain doctrine. To constitute smuggling, the misrepresentation of the country of origin had to be "material." Much of the argumentation at the appellate level concerned the question of whether this misrepresentation was, in fact, material and by what standard materiality is to be judged.

In determining that the misrepresentation was material, the Second Circuit held that the identification of Italy would have alerted customs officials to the possibility that the phiale was stolen because Italy's vesting laws are widely known. In fact, much of the argument presented by the collector and by the American Association of Museums in its amici curiae brief relied on the idea that the misstatement was not material because Italy did not have a valid claim of ownership. Thus, the question of materiality and the legitimacy of the McClain doctrine were inextricably linked. In its holding on the materiality question, the Second Circuit relied specifically on Customs Directive No. 5230-15, which advises Customs officials to determine whether property is subject to a claim of foreign ownership and to seize that property.

124. Antique Platter, 184 F.3d at 134. This decision not to reach the McClain issue is not an indication of disagreement with the District Court's holding. Id. Rather, it was a display of judicial economy and efficiency in that the entire case could be resolved on the more straightforward issue of the phiale's smuggling into the United States.

125. Id. at 135-36.

126. Id. at 137-38.

127. Id. at 137. The court stated:

For a trier of fact to determine whether a statement can significantly affect the importation process, it need ask only whether a reasonable customs official would consider the statements to be significant to the exercise of his or her official duties...

Customs Directive No. 5230-15, regarding the detention and seizure of cultural property, fatally undermines Steinhardt's contention that listing Switzerland as the country of origin was irrelevant to the Phiale's importation. The Directive advised customs officials to determine whether property was subject to a claim of foreign ownership and to seize that property. An item's country of origin is clearly relevant to that inquiry. Steinhardt contends, however, that the Directive does not cover the Phiale and, therefore, the misstatements could not have been material because there was no legal basis for the Phiale's seizure. We disagree. The Directive provides a basis for seizing cultural property under the NSPA in the seizure provisions of 19 U.S.C. § 1595a(c). Seizure of the Phiale would clearly be authorized by this provision under United States v. McClain, which held that violations of a nation's patrimony laws are covered by the NSPA. Because Steinhardt asserts that McClain was improperly decided, he claims that the customs officials lacked a statutory basis to seize the Phiale.

This argument, however, misperceives the test of materiality. Regardless of whether McClain's reasoning is ultimately followed as a proper interpretation of the NSPA, a reasonable customs official would certainly consider the fact that McClain supports a colorable claim to seize the Phiale as having possibly been exported in violation of Italian patrimony laws. Indeed, the Directive explicitly references the McClain decision and informs officials that if they are unsure of the status of a nation's patrimony laws, they should notify the Office of Enforcement. Knowing that the Phiale was from Italy would, therefore, be of critical importance.

Id. at 136-37.
The Second Circuit thus approved of the notion that the McClain decision would have provided a reasonable and legitimate basis for Customs to have seized the phiale and, furthermore, that it would also have been a basis for considering the phiale to be stolen property under Italy's cultural patrimony laws. Thus, although the Second Circuit did not need to reach the District Court's holding that the phiale was, in fact, stolen property, it did approve the essential elements of the McClain doctrine in affirming the District Court's determination of the materiality of the statement of the phiale's country of origin. The Second Circuit's reasoning and its reliance on the Customs Directive in its analysis of the materiality requirement thus explicitly discredit the argument that McClain was preempted by the CPIA or is no longer valid precedent, particularly in light of the fact that this precise argument was made to the court by both the appellant and the amici curiae.

c. Public Policy

The third argument against the McClain doctrine is that it violates the public policy of the United States. This argument is fairly complex as it is essentially a catch-all for several arguments, all of which presume to articulate some aspect of the public policy of the United States. This discussion will address this argument in three categories.

(1) Free Trade

The first of these arguments focuses on the general policy of the United States to encourage free trade. The United States has traditionally encouraged free trade and has had relatively few import or export controls, except for goods that are considered to implicate the national security or economy. In the realm of art works and cultural objects, this has been particularly true. There are few, if any, restrictions on the importation of art works that are more than one hundred years old, as embodying the policy of the United States toward free importation of art works. See McAlee, Boston Raphael, supra note 69, at 587-69. See also Bator, supra note 2, at 314; Nafziger, Underlying Constitutionalism, supra note 9, at 581-82 (noting the imbalance in United States policy of cooperating with other nations in restricting the import of archaeological objects but limiting restriction

128. See AAM Brief, supra note 92, at 77.
129. See, e.g., John Henry Merryman, Cultural Property Ethics, 7 INT'L J. CULTURAL PROP. 21, 22-24 (1998) (analogizing the policy favoring free movement of peoples to a policy favoring free movement of goods). While free movement of ordinary commercial goods is considered beneficial in most contexts, Merryman fails to distinguish between art works and commercial goods. He also fails to distinguish clearly between export controls and national vesting laws.
130. James J. Fishman & Susan Metzger, Protecting America's Cultural and Historical Patrimony, 4 SYRACUSE J. INT'L L. & COM. 57, 71 (1976) (discussing the Export Administration Act, 50 U.S.C. §§ 2401-2420 (1970), which prohibits the unrestricted export of materials, information and technology if they have a significant military impact or might adversely affect the national security or economy of the United States); Craig M. Bargher, The Export of Cultural Property and United States Policy, 4 DEPAUL-LCA J. ART & ENT. L. 189, 197-98 (1994) (noting that exports have been controlled primarily only after World War II for the purpose of containing the spread of Communism and protecting American global power). Many types of goods are excluded or restricted as imports, including drugs, controlled substances, and treasonous or obscene materials.
131. Critics of the McClain doctrine often cite the Payne-Aldrich Tariff Act of 1909, ch. 6, 36 Stat. 11, 81-82, which eliminates any tariff on the importation of art works that are more than one hundred years old, as embodying the policy of the United States toward free importation of art works. See McAlee, Boston Raphael, supra note 69, at 587-69. See also Bator, supra note 2, at 314; Nafziger, Underlying Constitutionalism, supra note 9, at 581-82 (noting the imbalance in United States policy of cooperating with other nations in restricting the import of archaeological objects but limiting restriction
direct export controls on indigenous cultural property. The only import controls are those that have resulted from bilateral agreements pursuant to the CPIA and other specific treaties, or those based in violations of other statutes, such as the NSPA. However, the policy reasons for encouraging free trade in most commodities simply do not apply to an allegedly free trade in cultural objects.

The reasons for encouraging free trade in ordinary commodities center on the notion that the world is becoming an integrated market and that by allowing goods to circulate freely there will be more economic productivity, more jobs will be created and the economies of different nations will be stabilized. None of these reasons for encouraging free trade in commodities, however, applies to the trade in undocumented cultural objects. Perhaps the most obvious reason is that archaeological objects are not produced or manufactured today and therefore their consumption through the market does not create jobs or any other form of wealth that can be spread throughout a nation’s economy or among nations. To the extent that wealth is created, it remains restricted to a narrow band of society (museums and private collectors) and the merchants (dealers and auction houses) who conduct this trade. While the presence and growth of public collections in museums do have a positive effect on the economy of the region in which they are located through tourism and, in fact, archaeological sites themselves can have such a positive effect through archaeological or cultural tourism, free trade in cultural objects in which they are bought and sold is not necessary to this type of positive economic effect. Interchange, which can be accomplished through loans and traveling exhibitions, accomplishes this type of movement even better than the private market. To the extent that the sale of looted artifacts benefits the local population, this economic benefit is dwarfed by the gains made by the middlemen in the later sequences of an object’s movement from point of discovery ultimately to private collector or museum in the United States or Western Europe. Furthermore, such economic benefit is not sustainable. On the other hand, local museums and cultural tourism provide a sustainable form of economic benefit to local populations.

of its cultural objects); James F. Fitzpatrick, Stealth Unidroit: Is USIA the Villain? 31 N.Y.U.J. INT’L L. & POL. 47, 48-49 (1998). However, the policies underlying an exemption from import duty seem irrelevant to the questions of theft and looting of sites, about which the McClain doctrine is concerned.

To state, as Bator did, supra note 2, at 314 n.71, that the United States has neither any regulation of cultural property nor any form of export regulation in its laws, is clearly incorrect. Regulation of cultural property in the United States was achieved, even at the time that Bator wrote, through the Antiquities Act of 1906, ARPA and the statutes adopted universally by the states. See infra notes 56, 146 and accompanying text concerning the federal Acts. Since that time additional protection has been achieved through the Native American Graves Protection and Repatriation Act [NAGRA], 25 U.S.C. §§ 3001-3013 (1994), and the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106 (1994). See Nafziger, Underlying Constitutionalism, supra note 9, at 583-86. In addition, export controls are effected indirectly through such statutes as ARPA and NAGPRA, in that the prohibited trafficking includes export. Id. at 583-84. However, there do not seem to be any export controls on cultural property independent of violations of other statutes. Some commentators have noted the lack of export controls for United States cultural property and have advocated implementation of limited controls. See Antonia M. DeMeo, More Effective Protection for Native American Cultural Property Through Regulation of Export, 19 AM. INDIAN L. REV. 1, 70 (1994) (advocating the adoption of express export regulations to restrict export of significant cultural property); Fishman & Metzger, supra note 130, at 58, 70-74 (suggesting adoption of controls similar to those used in Great Britian). For discussion of British export controls, see Richard Crewdson, Waverley Adrift, 6 INT’L J. CULTURAL PROP. 353 (1997).
The unique nature of cultural objects and their differences from ordinary commodities was, in fact, noted in the Senate Report which accompanied the enactment of the CPIA:

The increasing demand in recent years for archaeological and ethnological materials and antiquities has spurred . . . a great increase in the international exchange of such materials. But unlike other commodities, increased or new production of these articles cannot rise to meet the demand. Instead, the increased supply results from the sales of known artifacts and those newly recovered from archaeological sites. The unique origin and character of these articles raises serious trade issues distinct from the normal concerns of the reciprocal trade agreements program or U.S. trade law.133

Other international trade agreements also treat cultural objects in a distinct category from other forms of commodities. The Treaty of Rome, establishing the European Union, the General Agreement on Tariffs and Trade [GATT], and the North American Free Trade Agreement [NAFTA] all have as one of their primary goals the encouragement of free trade by removal of export controls.134 Yet all three provide an exemption in some form from the principle of free movement of goods for cultural objects in recognition of the fact these are different from ordinary commercial goods and their free movement does not further the same policies.135

135. GATT Article XX(t), 55 U.N.T.S. 194, 262, contains an exemption from the limitation on export controls for measures “imposed for the protection of national treasures of artistic, historic or archeological value.” Article 2101 of NAFTA provides that the exemptions of GATT Article XX apply. Paterson, Legal Dynamics, supra note 95, at 244-45. Similarly, Article 36 of the Treaty of Rome permits exemption from the principle of free movement of goods for national restrictions that protect “national treasures.” MERRYMAN & ELSEN, supra note 11, at 72. This exception provides the basis for the European Union’s Directive and Regulation, which limit the export of cultural property within the Union and from the Union to other nations, respectively. A question could arise as to whether the various forms of national export regulations exceed the exemptions of these international agreements because while the agreements speak in terms of “national treasures” it might be suggested that some export regulations go beyond this concept. Steven Charnovitz, A Critical Guide to the WTO’s Report on Trade and Environment, 14 ARIZ. J. INT’L & COMP. L. 341, 344-45 (1997) (discussing Article XX exceptions for environmental protection). This question does not seem to have been addressed by any international tribunal. It is also not relevant to the viability of the McClain doctrine, which addresses questions of national ownership rather than export controls. The discussion of these trade agreements merely illustrates that the policy underlying free trade does not apply when other policies such as cultural preservation and environmental protection are implicated. Paterson, Legal Dynamics, supra note 95, at 244-45.
(2) Property, Possession and Ownership

The second argument addressing McClain and the public policy of the United States centers on notions of property law and ownership—that is, the question of whether the foreign nation has an ownership interest, by virtue of its vesting laws, even if it has not taken actual or physical possession of or registered the cultural objects. Many of the cultural property vesting laws of foreign nations apply to antiquities of defined categories regardless of whether they were found on private or public land. By their very nature, most of the antiquities at issue were never in the actual possession of the governments in which ownership is vested. This is essential because the point of the vesting laws is to prevent looting of unexcavated sites. It is therefore obvious that the antiquities have never been in the actual possession of anyone at least from the time of antiquity, until they are looted by thieves. If the vesting laws are to work to prevent this type of destruction, then they must apply even though the government has never had the objects in its actual possession. On the other hand, these buried archaeological objects may be considered to be in the constructive possession of the government.

The idea that the recognition of constructive possession as the basis for ownership is inimical to the property law of the United States is, however, without basis. If ownership is awarded based only on actual or physical possession, essentially the rule of capture, then this leads to economic inefficiencies and over-exploitation of resources. This inefficiency can be alleviated by recognition of

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136. The attorney who represents the National Association of Dealers in Ancient, Oriental and Primitive Art criticized the McClain case because it permits property to be characterized as stolen “without proof that the property was ‘stolen’ in any conventional common law sense, namely, that it had been taken from one who had reduced the property to possession.” Fitzpatrick, supra note 89, at 863. The Association had argued in its amicus brief in the McClain case that “ownership” requires more than “a mere legislative claim of dominion.” See also Bator, supra note 2, at 350 (stating that “[a] blanket legislative declaration of state ownership of all antiquities, discovered and undiscovered, without more, is an abstraction—it makes little difference in the real world.”); McAlee, The McClain Case, supra note 90, at 824-26 (stating that undiscovered antiquities at issue in McClain “had not been ‘stolen’ in any conventional sense”); McAlee, Boston Raphael, supra note 69, at 581. As will be demonstrated below, however, this position contradicts long-held notions of the common law of property and equivalent legislative enactments of the United States.

137. As the Fifth Circuit stated in McClain, “possession is but a frequent incident, not the sine qua non of ownership, in the common law or the civil law.” McClain I, 545 F.2d at 992. See also Rosecrance, supra note 69, at 326-28. “Occupancy” or possession is considered one of the primary explanations of how property, both personal and real, is first reduced to private ownership. See Richard Epstein, Possession as the Root of Title, 13 GA. L. REV. 1221 (1979); Richard A. Posner, Savigny, Holmes, and the Law of Economics of Possession, 86 VA. L. REV. 535, 543 (2000) (stating that possession is “undoubtedly the earliest form or precursor of property”); Carol M. Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73, 74 (1985).

138. Posner, supra note 137, at 551. Posner posits two polar systems of property rights, one in which ownership is based only on a system of paper titles (the most extreme form of constructive possession) and the other based only on physical possession. Id. at 552. He asserts that both are inherently inefficient. Id. A system in which ownership is based only on physical possession “entails heavy investments in the maintenance of such use. It also makes no provision for rights to future, as distinct from present, use . . . . This system encourages wasteful present use as a method of staking a claim to the future use of the [resource].” Id. He suggests, therefore, that the most efficient regime for property rights is a mixed one that combines both physical and constructive possession as possible bases for ownership. Id. See also Dean Lueck, The Rule of First Possession and the Design of the
ownership based on constructive possession, at least for those types of personal property, such as non-fugitive resources, for which constructive possession is an appropriate mechanism. In the Anglo-American system of property law, ownership of personal property is determined through the law of finds. According to the common law of finds, archaeological objects are most likely to be classified as "embedded" property, ownership of which is assigned to the owner of the real property in which the personal property is embedded. This is done in recognition of the real property

Law, 38 J.L. & ECON. 393, 394 (1995) (noting that "first possession has the potential to dissipate wealth--either from a wasteful race to claim an asset or as a rule of capture that leads to overexploitation . . . .").

139. The notion of constructive possession has its limits in that the law must be able to determine when one has constructive possession. Posner, supra note 137, at 561. Rose, relying on Blackstone, concludes that the "common law defines acts of possession as some kind of statement . . . . [T]he acts must be a declaration of one's intent to appropriate." Rose, supra note 137, at 77. In drawing an analogy to the requirement of notice in the doctrine of adverse possession, Rose states, "[p]ossession now . . . look[s] even more like something that requires a kind of communication, and the original claim to the property looks like a kind of speech, with the audience composed of all others who might be interested in claiming the object in question." Id. at 78-79. See also Posner, supra note 137, at 561 (emphasizing that the significance of physical control is its ability to give notice). In providing illustrations of various forms of constructive possession, the court in Pierson v. Post determined when constructive possession equals ownership. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). This emphasis on notice or a clear statement of ownership accords well with the requirements of the McClain doctrine.

140. Natural resources found on one's property are thus considered to be in one's constructive possession and is the basis for claiming ownership rights in the resource. Rose, supra note 137, at 73-76. Lueck, supra note 138, at 416-17 (noting that landowners have ownership of the subsurface minerals attached to their land and may exploit them as they see fit); id. at 424 (noting that in England ownership of living stocks of game was assigned to the owner of large landholdings as a way of substantially reducing costs). See also Rosecrance, supra note 69, at 331 (noting that several foreign countries have nationalized subsurface mineral resources, whether discovered or not, on public and private land).

141. Lueck, supra note 138, at 413-14 (noting that economic efficiency results from recognition in some cases of first possession without physical possession as the basis for ownership).


143. Archaeological finds may also be considered to be abandoned property, which was traditionally given to the finder. See e.g., Charrier v. Bell, 496 So.2d 601, 604 (La. Ct. App. 1986). Abandoned property is property to which the original owner has relinquished all right, title, claim and possession with the intention of terminating ownership but without vesting ownership in anyone else. Such property is considered unowned and is thus subject to appropriation by the first person who reduces it to possession. Id. at 605. However, if the finder was engaging in trespass then the finder loses any right to the personal property through possession. Id. at 606. By classifying archaeological objects as either embedded or abandoned, however, it is not here intended to suggest that Native American groups have relinquished their link or their ownership or possessory rights to those objects of sacred and cultural significance to them. Id. at 604-05. The court in Charrier specifically stated that "[t]he intent in interring objects with the deceased is that they will remain there perpetually, and not that
owner’s constructive possession of everything contained on and below the surface of the land. Archaeological objects could also be classified as treasure trove which, in its common law definition, includes only gold and silver objects intentionally hidden by the original owner who was prevented from returning to reclaim it. The legal regime for the protection of archaeological objects in the United States has evolved considerably during the past century and is, in many significant respects, not that different from the comparable legal regimes in other countries. The common law of finds has been largely abrogated in the United States as applied to archaeological objects. The Antiquities Act of 1906 and the Archaeological
Resources Protection Act of 1979 [ARPA]\(^{149}\) vested control and ownership of archaeological objects found on land owned or controlled by the federal government in the federal government.\(^{150}\) As embedded property, archaeological objects would belong to the federal government as owner of the land. Nonetheless, the Antiquities Act and ARPA eliminate the necessity of determining how to characterize the objects within the common law classifications of finds, thus considerably clarifying and furthering the goals of archaeological preservation. The common law of finds still remains relevant to those archaeological objects that do not fit ARPA's definition of an archaeological resource.\(^{151}\) For example, in *United
States v. Shivers, 152 it was held that the federal government owned objects that were found on federal land and that were of historic interest but which were not old enough to fit ARPA’s definition of archaeological object. 153

Every state has also abrogated the law of finds as applied to state-owned and controlled lands, vesting control over excavations and ownership of archaeological objects in the state government. 154 The extension of state control over cultural objects that are located on private land has been more circumscribed because of concern for the limitations imposed by the Takings Clause of the Fifth Amendment. 155 However, approximately half of the states now control and protect

2101-2106m (1994), which abrogated the law of finds and salvage and transferred title to abandoned shipwrecks to state governments in the hope that they would regulate salvage for purposes of historic and archaeological preservation. However, the scope of the act was considerably diminished in the Supreme Court decision, California and State Lands Comm’n v. Deep Sea Research, Inc., 523 U.S. 491 (1998). An international convention to address the underwater cultural heritage has also been in discussion for several years under the auspices of UNESCO. The most recent information concerning the draft Convention is available at: www.unesco.org. Although highly relevant to questions of archaeological and historic preservation, the subject of submerged archaeological resources will not be addressed further in this article because it raises of host of other complex legal issues. Some of the recent literature on the subject includes: Carla J. Shapreau, The Brother Jonathan Decision: Treasure Salvor’s “Actual Possession” of Shipwreck Gives Rise to Federal Jurisdiction for Title Claim, 7 INT’L J. CULTURAL PROP. 475 (1998); Paul Fletcher-Tomenius, et. al., Salvor in Possession: Friend or Foe to Marine Archaeology, 9 INT’L J. CULTURAL PROP. 263 (2000). 152. 96 F.3d 120 (5th Cir. 1996).
153. Id. at 123-24.
154. See ALA. CODE, § 41-3-1 (2000) (reserving right to the state to explore “all aboriginal mounds and other antiquities, earthworks, ancient or historical forts and burial sites . . . subject to the rights of the owner of the land . . .”); FLA. STAT. § 267.061(1)(b) (2000) (declaring that “all treasure trove, artifacts, and such objects having intrinsic or historical and archaeological value which have been abandoned” belong to the state); CONN. GEN. STAT. § 10-390 (1999) (prohibiting any person to “excavate, damage or otherwise alter or deface any archaeological or sacred site on state lands” unless in accordance with a permit); N.Y. EDUC. LAW § 233-4 (McKinney 1999) (stating “no person shall appropriate, excavate, injure, or destroy any object of archaeological and paleontological interest, situated on or under lands owned by the state of New York, without the written permission of the commissioner of education”); OR. REV. STAT. § 358.920(4)(a) (1999) (requiring archaeological objects found on public land be delivered to the state, which acts as steward of the objects). See also Gerstenblith, Identity and Cultural Property, supra note 142, at 596-600. For protection of archaeological resources in general under state statutes, see CAROL L. CARNETT, A SURVEY OF STATE STATUTES PROTECTING ARCHAEOLOGICAL RESOURCES, Preservation Law Reporter: Special Report, 3 Archeological Assistance Study (National Trust for Historic Preservation; United States Department of the Interior, National Park Service, Cultural Resources, Archeological Assistance Division 1995). Some states do allow individuals or institutions to maintain possession of archaeological objects, even though ownership is vested in the state government, subject to various conditions. See, e.g. MINN. STAT. ANN. § 138.37(1) (2000) (allowing a non-state archaeologist to be custodian of objects and data collected at a state archaeological site, but requiring reversion to the state if “the custodian is not properly caring for them or keeping them conveniently available for study.”). 155. The Fifth Amendment states that the federal government may not take private property “for public use, without just compensation.” U.S. CONST. amend. V. It was made applicable to state governments through the Due Process Clause of the 14th Amendment. U.S. CONST. amend. XIV. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 239 (1897) (holding that “the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and . . . any attempt so to do . . . would be wanting in that ‘due process of law’ required by [the Fourteenth Amendment]”). State law regulation of burials, human remains and associated funerary objects found on private property does not implicate the Takings Clause because these are not subject to private ownership. U.S. CONST. amend. V. HUGH V. BERNARD, THE LAW OF DEATH AND DISPOSAL OF THE DEAD 16 (1979) (citing WILLIAM BLACKSTONE, COMMENTARIES, 429); MIKE PARKER
Native American burials located on private land. While not necessarily vesting ownership in the state government, these statutes generally recognize a right of restitution to lineal descendants or culturally affiliated tribes, thus denying ownership of the cultural objects to the real property owner in which the burials are located. In response to the critics of McClain, it is apparent that both the

Pearson, The Archaeology of Death and Burial 191 (1999). The next of kin has a right to protect the body and to determine its disposition but no ownership rights. See, e.g., Bogert v. City of Indianapolis, 13 Ind. 134, 138 (1859). See also Sarah Harding, Justifying Repatriation of Native American Cultural Property, 72 Ind. L.J. 723, 767 (1997) (stating that "[t]here are no conventional property rights in human remains.").


158. Four of these statutes have been subject to constitutional challenge. See, e.g., Hunziker v. Iowa, 519 N.W.2d 367, 370-73 (Ia. 1994); State v. Lightle, 944 P.2d 1114 (Wash. Ct. App. 1997); Whitacre v. State, 619 N.E.2d 605 (Ind. Ct. App. 1993), aff'd, 629 N.W.2d 1236 (Ind. 1994); Thompson v. City of Red Wing, 455 N.W.2d 512, 516 (Minn. Ct. App. 1990). Whitacre v. State is particularly interesting in that the owners purchased the land specifically for the purpose of conducting archaeological excavations. Whitacre, 619 N.E.2d at 608. In holding that the statute covered private as well as public land, the appellate court stated:

the state may regulate activities on private property that affect our historical and archeological culture; thus, the state is better able to discover and preserve more of our heritage. This is the purpose of the Act and is best effectuated by construing the Act to include private, as well as state owned, property.

Id. at 608.
common law and the statutory law in the United States recognize constructive possession as a basis for ownership. Furthermore, in some cases, state regulation of archaeological sites, primarily burials, has extended its reach to private land, as well.

(3) Takings Clause Policy

This leads to the third reason that is often asserted in criticism of the McClain doctrine in that it allegedly constitutes a violation of the Takings Clause of the Fifth Amendment. The reasoning behind this argument is a bit unclear but seems to rely on the notion that one who acquires a cultural object even in violation of a national vesting law has good title. The acquirer is then denied this title through application of the McClain doctrine. This simply returns to the question discussed earlier of whether one who acquires a stolen antiquity has good title. On its simplest level this argument is circular because, if one has not acquired good title, then there can be no deprivation. On a more complex level, this argument may be that because the United States does not vest ownership of all antiquities found on private land in the government, then when foreign governments do so and the United States recognizes this as a basis for ownership, then the United States has effected a taking of private property or at least has violated the policy underlying the Fifth Amendment's Takings Clause. This argument reaches to the heart of the nature of property ownership and its integral relationship to national sovereignty.

159. See AAM Brief, supra note 92, at app. 1.
160. By discussing the private ownership of cultural objects and its relationship to the policies underlying the Takings Clause, this author does not intend to assert that cultural objects are always subject to private ownership. See U.S. Const. amend. V. The discussion here is simply an attempt to refute the argument that national vesting laws violate the policies of the Takings Clause without assuming or advocating that the question of disposition of cultural objects should be determined in reference to that policy, even within the United States. Rather, it is necessary to acknowledge that cultural objects, at least under some circumstances, should be considered a special category of property—one that may not be alienable or capable of commodification or that may be considered group or communal property. See Christopher S. Byrne, Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?, 8 J. ENVT'L. L. & LITIG. 109, 121 (1993); Jonathan Drimmer, Hate Property: A Substantive Limitation for America's Cultural Property Laws, 65 TENN. L. REV. 691, 728-37 (1998) (discussing theories of property law, inalienability of cultural property and suggesting that it may be communal property, not subject to private ownership); Walter R. Echo-Hawk, Museum Rights v. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 441-44 (1986) (discussing the communal nature of property ownership under Native American law and its recognition in United States and tribal law courts); Roger W. Mastalir, A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law, 16 FORDHAM INT'L L.J. 1033 (1993); Metzger, supra note 69, at 621-23, 642-44 (noting that most foreign countries restrict the alienability of cultural property and discussing United States law regarding alienability); John Moustakas, Note, Group Rights in Cultural Property: Justifying Strict Inalienability, 74 CORNELL L. REV. 1179 (1989); Osman, supra note 10, at 980-82 (discussing group ownership of cultural objects in the context of Egyptian antiquities). The group or communal nature of Native American cultural and sacred objects has received some recognition in the courts. See, e.g., Onondaga Nation v. Thacher, 61 N.Y.S. 1027 (Sup. Ct. 1899) (recognizing tribe's communal ownership of Wampum war belts), aff'd, 65 N.Y.S. 1014 (App. Div. 1900), aff'd, 62 N.E. 1098 (N.Y. 1901). For consideration of inalienability of personal property in other contexts, see Margaret Jane Radin, Market-Inalienability, 100 HARV. L.
While legal philosophers have debated for centuries whether the right to property is a natural right, which preceded the formation of nations, or whether property can exist only as a function of government and the laws it promulgates to protect property rights, it is clear that the nation defines property as an inherent incident of its sovereignty and utilizes its legal regime to protect it. While as both an historical and philosophical matter, and as the result of the development of the law to achieve equitable, utilitarian and efficiency goals, private property has developed as an almost universally-respected institution, the sovereign nation has always been able to adjust the exact boundaries between private and public property. There is no doubt that different nations and different legal traditions have chosen to draw those boundaries in different places. However, within the framework of international and national legal systems, those lines dividing public and private property are recognized by other nations, as a result of comity and of respect for the inherent authority of sovereign nations in accordance with the act of state doctrine. Thus, if one nation chooses to nationalize a particular form of

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161. The notion of property itself is the subject of debate among legal scholars and requires some definition. While "property" is most commonly thought of as the thing that is owned, its legal definition more typically focuses on property as a concept that defines the relationship among people with respect to a thing. See Stephen R. Munzer, *The Acquisition of Property Rights*, 66 NOTRE DAME L. REV. 661, 664 (1991) (defining property as both objects and a "bundle of claim-rights, liberties, powers and immunities"); Joseph W. Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURIS. 217, 244 (1993) (defining property law "in legal realist terms as rules regulating relationships among people with regard to control of valued resources . . . and differ[ing] depending on the social content and relationships at issue."); Jeremy Waldron, *Property, Justification and Need*, 6 CAN. J.L. & JURIS. 185, 188 (1993) (defining the ownership of property as "the idea of one person being in charge of a resource and free to use or dispose of it as she pleases.").

162. See, e.g., L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L L. REV. 263 (1997) (relying on the legal philosophers Hobbes, Bentham, Hume and Rousseau that property can exist only within the legal framework of civil and political society). According to Singer, the existence of property imposes rights on the owner and responsibilities on non-owners, which are enforced by the government and that therefore private property cannot exist without a government to enforce the system. Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 47 (1991) (noting that "the legal system makes constant choices about which interests to define as property. . . . [a]nd the pattern of protection and vulnerability is a result of a historical and social context which has created different opportunities . . . .'').

163. Singer, *supra* note 162, at 41-42 (describing how the state makes choices as to what will be considered private and what public property).

164. According to Posner, Savigny accepted the idea under German and Roman law that buried treasure could be owned by someone other than the landowner because the treasure and the land were severable. Posner, *supra* note 137, at 544.

165. Under the act of state doctrine, the legality of an official act taken by a foreign sovereign in its own territory will not be questioned. World Wide Minerals Ltd. v. Republic of Kazakhstan, 116 F. Supp. 2d 98, 104 (D.D.C. 2000). The courts are "preclude[d] . . . from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). The United States Supreme Court has recognized that the jurisprudential foundation for the act of state doctrine has evolved over the years. In the past, it was considered to be an expression of international law, based on principles of international comity, but has more recently been described as "reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs."
property within its own internationally recognized borders, other nations will grant deference to that determination. These generally accepted principles apply equally in the context of laws vesting ownership of cultural objects in the national government and of other laws determining how the cultural heritage should be conserved for the future.

Examples of the application of the act of state doctrine may be found even within the cultural property context. *Stroganoff-Scherbatoff v. Weldon* involved art works that had been appropriated by the Soviet Union after the 1917 revolution. The works were subsequently sold at auction in Berlin on behalf of the Soviet government and years later were brought to New York after various transfers. The plaintiff in the case claimed to be the direct descendant of the original owners of the works and attempted to recover them. The court held, however, that the act of state doctrine, which applies where the foreign government is recognized by the United States at the time of the lawsuit and the taking of the property occurred within the territorial boundaries of the foreign sovereign, precluded the court from engaging in an independent examination of the validity of the taking of the property. The act of state doctrine was utilized again by the


166. In several cases in which the act of the foreign sovereign involved nationalization of property, United States courts refrained from interfering, even if the taking allegedly violated customary international law. *See Sabbatino*, 376 U.S. at 433 (rejecting the defendant's claim because it would have required holding that Cuba's expropriation of privately-owned goods located in Havana was void); Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918) (refusing to question title of one who purchased from Mexico as this would have involved declaring Mexican government's prior seizure of property ineffective); Ricaud v. American Metal Co., Ltd., 246 U.S. 304, 310 (1918) (same). The property must be located within the sovereign territory at the time of expropriation for the act of state doctrine to apply. Bandes v. Harlow & Jones, 852 F.2d 661, 666-67 (2d Cir. 1988) (refusing to apply act of state doctrine when property was located in United States at time of confiscation). According to the Restatement, if the property is located within the United States at the time of expropriation, then United States courts will give effect to the foreign government's action only if the acts are consistent with United States law and policy. Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965). However, if the property is located within the (foreign) acting state at the time of nationalization, then the act of state doctrine "requires a court to disregard [United States] public policy to give effect to the foreign law." *Restatement, Third, Foreign Relations Law of the United States, § 443, Reporter's Note 1 and comment b* (1986).

167. *See Kaye, Art Wars, supra note 57, at 80 (stating that not upholding foreign vesting laws "would be an unacceptable interference with the prerogative of a sovereign state to determine its respective rights and those of its citizens concerning the ownership of its cultural heritage."); Metzger, supra note 69, at 651 (stating that [foreign governmental expropriations of cultural property . . . are not reversible by a United States court . . . .); Rosecrance, supra note 69, at 323 (discussing deference granted to foreign laws). But see Church, supra note 17, at 195-96 (criticizing use of act of state doctrine in this context).*


169. Id. at 21.

170. Id. at 20-21. The court relied on United States Supreme Court precedent, see *supra* notes 165-66 and accompanying text. It also relied on *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), finding that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." The court also relied on an earlier British decision with similar facts, which refused to question the validity of the appropriation of furniture and art objects by the Soviet government. *Princess Paley Olga v. Weiz*, [1929] 1 K.B. 718 (Eng.) (discussed in *Stroganoff-Scherbatoff*, 420 F. Supp. 18, 21-22 (S.D.N.Y. 1976)). *Stroganoff-Scherbatoff*, 420 F. Supp. at 20.
Second Circuit in *Kunstsammlungen zu Weimar v. Elicofof*\textsuperscript{171} as one of several bases to conclude that two Dürer paintings that had at one time been owned by the Grand Duchess of Saxony-Weimar had become the property of the Land of Thuringia and subsequently of the plaintiff-museum.\textsuperscript{172} There are limits to the application of the act of state doctrine, but these would not apply to the type of vesting laws under discussion here.\textsuperscript{173}

\textsuperscript{171} 678 F.2d 1150 (2d Cir. 1982).

\textsuperscript{172} Id. at 1160. The context in which the act of state doctrine arose did not apply directly to an alleged expropriation of the paintings but rather to the payment of an annuity that had been promised to the Duke at the time that he transferred part of his art collection to the government. Id. In the suit, the Duchess had cross-claimed for payment of the annuity, which had stopped in 1945. Id. at 1159-60. The court relied on the act of state doctrine and principles of sovereign immunity to hold that a 1948 Act of the Land of Thuringia that extinguished the debt under the earlier agreement was an act of state and therefore the Duchess could not seek compensation in a United States court. Id. at 1160. Furthermore, the Second Circuit held that application of the act of state doctrine did not grant extraterritorial effect to the expropriation decree because the situs of the annuity claim was in Thuringia. Id. at 1160 & n.17. This provides an additional parallel because, under the requirements of the *McClain* doctrine, an antiquity must be within the foreign country at the time the vesting law takes effect for a United States court to consider the antiquity to be the property of the foreign country. See supra notes 83-85 on other grounds, and accompanying text.

\textsuperscript{173} See generally Menzel v. List, 267 N.Y.S.2d 804, 813-18 (Sup. Ct. 1966) (discussing exceptions to the act of state doctrine), rev'd on other grounds, 298 N.Y.S.2d 979 (App. Div. 1969). For the most part, the expropriations of art works and other assets during the Holocaust are not legitimated under the act of state doctrine because these expropriations did not generally satisfy the requirements of the doctrine. See id. This was recognized as early as the decision in *Menzel v. List*, which involved a Chagall painting taken from a Jewish couple in Belgium. Id. The act of state doctrine did not apply because the appropriation occurred outside of German sovereign territory (i.e., in Belgium) and because it was carried out by the Einsatzstab der Dienststellen des Reichsleiters Rosenberg, an organ of the Nazi Party, rather than by the sovereign government itself. Id. at 813-18. The court in *Menzel* listed four criteria for applicability of the doctrine: the taking must be by a foreign sovereign government; the taking must be within the territorial limits of that government; the foreign government must be extant and recognized by this country at the time of suit; the taking must not be violative of a treaty obligation. Id. at 813. In *Menzel*, none of these four criteria was satisfied. Id. In an earlier case involving assets taken from a German Jew within Germany, the Second Circuit had held that the act of state doctrine did apply and dismissed a complaint brought to attempt to recover some of these assets. Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246, 249-50 (2d Cir. 1947); Bernstein v. N.V. Nederlandsche-Amerikaansche, etc., 173 F.2d 71 (2d Cir. 1949), amended by 210 F.2d 375 (2d Cir. 1954). However, in a third suit, Bernstein was able to obtain a statement from the Department of State that the policy justifications for the application of the act of state doctrine were not relevant to these circumstances and so the Second Circuit held that the District Court could examine the legitimacy of the acts of the Nazi officials. Bernstein, 210 F.2d at 375. This gave rise to what the *Menzel* court called the “Bernstein exception” indicating that the act of state doctrine did not apply to the acts of the Nazi regime. *Menzel*, 267 N.Y.S.2d at 818. This possible shift in the rationale for the doctrine seems to be reflected in the Supreme Court’s discussion in *W.S. Kirkpatrick*. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l, 493 U.S. 400, 404 (1990). It is also possible that the act of state doctrine should not have applied in *Bernstein*, even without the statement of the Department of State, as the Nazi regime was no longer the recognized government of Germany by the time suit was brought. See also Metzger, *supra* note 69, at 651-53 (discussing both *Menzel* and *Bernstein*). Metzger suggests that even if a particular governmental regime is no longer extant at the time of suit, the doctrine may still require that American courts should not examine the acts of the prior government because the goal of avoiding embarrassment to the executive’s ability to conduct foreign policy might still apply and this would further implicate the state succession doctrine. *Id.* However, no such case seems to have been decided in a United States court at this time. In *W.S. Kirkpatrick*, 493 U.S. at 409-10, the act of state doctrine did not apply because the foreign government official had acted as the result of a bribe and this was therefore not an official government action. Metzger, *supra* note 69, at 652-53.
In the United States, the boundaries have shifted between public and private property and different restrictions have been placed on the alienability and permissible uses of cultural objects. The laws of the United States have evolved regarding the law of finds and cultural objects. Before passage of the Antiquities Act of 1906, there were some circumstances under the law of finds in which an individual who found archaeological objects on federal land might have been granted an ownership interest in the object. The same could have happened with respect to objects found on state-owned land. However, federal and state law changed that, vesting ownership in the respective government entities without any violation of the Takings Clause.174

The Takings Clause of the Fifth Amendment limits the extent of interference by the government with private property unless the government is willing to compensate the owner.175 Most of the jurisprudence regarding the Takings Clause applies to restrictions on the use of land, but only when the value of the land has been entirely eliminated through government regulation has the Supreme Court recognized the land owner’s claim to compensation based on a regulatory taking.176 On the other hand, the goals of historic preservation have been recognized as legitimate exercises of the government’s authority177 and several exceptions to the holding in Lucas make it likely that government regulation of land for the purpose of archaeological preservation, if carefully constructed, can avoid a successful claim of inverse condemnation through a regulatory taking.178

Furthermore, although there is little case law addressing the question of whether government restrictions on the use of personal property would constitute a taking, some indication of the Supreme Court’s view on this is available. In the Supreme Court decision, Andrus v. Allard,179 a prohibition on the commercial sale of objects that incorporated parts of eagles and other protected species was validated, even though the ban applied to bird parts that had been obtained before enactment of the legislation protecting the species.180 The decision held that this...
legislation was not a taking because it allowed other uses for the objects, including
donation to a museum, other forms of gratuitous transfer, and exhibition. In
Lucas v. South Carolina Coastal Council, Justice Scalia distinguished Andrus
based on the type of property (personal in Andrus, real in Lucas) and seemed to
open the door to a broad range of regulation of personal property, including the
possibility of rendering the property "economically worthless," without such
government action constituting a taking based on the owner's expectations.

The result in Andrus and its subsequent rehabilitation in Lucas indicate that
governmental regulation could significantly alter the common law rules applying to
personal property ownership, particularly in a context of cultural resource
protection which has policy goals that are similar to those of environmental
protection and endangered species protection, which was at issue in Andrus itself.
These two Supreme Court decisions permit the law to cast a wide net around
individual cultural objects, thereby allowing governmental regulation to protect a
larger whole in order to ensure fulfillment of such public interests.

These examples and discussion of the limited application of the Takings Clause
policies in the area of personal property demonstrate that the McClain doctrine
violates neither the substance of the Takings Clause nor its underlying policies.
The criteria for such national ownership laws, particularly the requirement that they
operate in a prospective manner, guard against any constitutional question.

The McClain doctrine may alter the rights that might have been obtained in cultural

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181. Id. at 65-67 (citing Penn Central that the Takings Clause is not violated when an owner is
denied the most profitable use of property). In Hodel v. Irving, 481 U.S. 704, 719 (1987), Justice Scalia
wrote in a concurring opinion that the result in Hodel effectively limited Andrus to its particular factual
circumstances, but in Lucas, Justice Scalia took a different perspective on the continuing validity of

of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the
possibility that new regulation might even render his property economically worthless (at least if the
property's only economically productive use is sale or manufacture for sale)." Id. See also Glenn P.
Sugameli, Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to
Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule," 29 ENVT'L. L.
939, 985-87 (1999) (noting that the Lucas exemption for regulation of personal property has been
applied in defeating takings challenges to regulations protecting endangered species).

183. The Supreme Court accepted the legitimacy of an overall ban on the sale of artifacts
containing eagle parts even when it could be proved that the artifacts were created before enactment of
the legislation protecting the endangered species. Andrus, 444 U.S. at 58. Congress had the authority
to choose any means it thought effective in combating evasion of the underlying statutory provision—
that is, to protect the species—even if the means were not the most narrowly tailored that might have
been devised. Id. at 58-59.

184. The prospective nature of such laws accords with the antecedent law exception articulated by
Justice Scalia in Lucas. Lucas, 505 U.S. at 1029. According to Justice Scalia, limitations on the use of
land in place before an owner acquires the land cannot effect a taking because the buyer takes subject to
all laws and restrictions in existence at the time of the acquisition. Id. (stating that a regulation that
entirely eliminates the economic value of land "cannot be newly legislated or decreed (without
compensation), but must inhere in the title itself, in the restrictions that background principles of the
State's law of property and nuisance already place on ownership."). As McClain requires the national
ownership law to be in effect before the antiquity is taken, any purchaser of the antiquity takes title
subject to the national ownership law. McClain I, 545 F.2d at 1003.
objects and recognized by the law in the past, but it does not alter existing rights with respect to such objects.

Another example may be found in the British law regarding treasure trove. Treasure trove consists of objects of gold and silver intentionally hidden by the owner with the intent of returning to reclaim it. In Britain, treasure trove belongs to the Crown, although the finder who promptly reports the discovery may be given a reward. Treasure trove was strictly defined based on the content amount of precious metal. For example, in Attorney General of the Duchy of Lancaster v. G.E. Overton (Farms) Ltd., the court refused to classify a hoard of almost 8000 third-century Roman coins as treasure trove because its silver content ranged from less than 1% to approximately 18%. As a result, the coins were given to the landowner. This decision and the definition of treasure trove received significant criticism in that they were too restrictive and could result in the division of single archaeological finds between the Crown and either the landowner or the finder. Furthermore, the original rationales for the doctrine seemed anachronistic, and the doctrine was not well-suited to accomplish goals of archaeological preservation.

In 1996, the common law of treasure trove was abolished through adoption of the Treasure Act 1996, which altered significantly the definition of treasure trove to include: any object which is at least 300 years old and, if not a coin, consists of at least 10% gold or silver by weight; coins at least 300 years old with a gold or silver content of at least 10% by weight; if there are ten or more coins, then the metallic content is ignored, and any object found with geographic and temporal proximity to an object in the first two categories. Perhaps of even greater significance is the power given to the Secretary of State to designate, by order, "any class of object which he considers to be of outstanding historical, archaeological or cultural importance."

The enactment of this statute presents another example of a nation shifting the boundaries between public and private property for the purposes of encouraging archaeological and historical preservation and in a manner which

186. [1982] Ch. 277 (Eng. C.A. 1981) (holding that treasure trove would have to have a minimum silver content of 50%).
187. Id. at 292.
188. See Norman E. Palmer, Treasure Trove and Title to Discovered Antiquities, 2 INT’L J. CULTURAL PROP. 275, 278-81 (1993) (arguing that such a division diminished the historical value of the collection as a whole; also criticizing the requirement of establishing the owner’s intent to return as too difficult to establish, thereby also diminishing the ability to preserve the finds). The original rationales for the doctrine to raise revenue for the government and to increase respect for the Crown are generally regarded as no longer relevant. Izuel, supra note 142, at 1668-69.
189. Carleton, supra note 185, at 344.
190. Id. The Act also expands the category of people to whom a reward may be paid but maintains the voluntary character of the payment. It also creates an offense for failure to report the find and imposes up to three months’ imprisonment and/or a fine of up to £5,000 upon conviction. See also Church, supra note 17, at 194 (regarding treasure trove concept in England and Denmark as related to national ownership laws); Rosecrance, supra note 69, at 328-31 (noting that earlier changes in treasure trove may be viewed as precursors to national ownership laws).
would be broadly considered as reasonable and not violative of any underlying constitutional policy of the United States.

This extensive review of the McClain doctrine, as a particularized legal response to the problem of looting of archaeological sites, illustrates that none of the reasons put forward for questioning its legitimacy is valid. Legal responses alone are not, however, sufficient in attempting to combat this problem. Public responses in terms of education and leadership by public institutions are also necessary.

III. THE PUBLIC RESPONSE

A. Public Opinion

This raises the question of the second response—that of public awareness and education. The position of the American public and its perception of where its interest lies are clear. A survey by Harris Interactive was commissioned by several archaeological organizations and federal agencies. This survey explored public attitudes concerning several aspects of archaeology, including the public's awareness of archaeology, its perceived value, and the role of archaeology in education. When asked to indicate what value archaeological sites hold for them, 99% of respondents indicated that the value of sites is educational and scientific. Ninety-four percent indicated that their value is also aesthetic or artistic; 93% indicated personal heritage value, and 88% indicated spiritual value. On the other hand, 73% indicated that sites had monetary value, presumably reflecting the respondents' awareness that objects removed from sites are sold on the market. Finally, 59% indicated that sites had political value. While all of these values are relatively high, it is clear that non-monetary values are given greater significance.

In turning to issues that directly affect the question of restitution, the responses were even more illuminating. A strong majority of respondents (90%) thought that laws should prevent the general public from importing artifacts from a country that does not want those artifacts exported. It is important to reiterate that this response concerns export laws and not national ownership laws, so the respondents were not considering the implications of theft. In a similar vein, a total of 92% of respondents indicated their disagreement with the statement: "Museums and

192. Id.
193. Id.
194. Id.
195. Id.
196. Id.
197. Id.
198. Id.
individuals should be able to buy archaeological objects from abroad even if they were taken out of the country of origin without the country's permission.\textsuperscript{199}

B. Museums as Public Institutions

Museums and other public educational institutions have a particular role and responsibility to play in eliminating the pillage of sites. As was previously discussed, the scientific excavation of archaeological sites is primarily of educational value. What can be learned from decontextualized objects is of relatively little value. Museums must take seriously their role as educational institutions and as standard-bearers for the highest ethical conduct in our society. To accomplish this, museums must do more than follow the minimum that the law requires.

One of the biggest problems is the gap between what the law in the United States requires and the violation of the laws of other nations. This lacuna is often filled by ethical codes of conduct. For example, the Code of the International Council of Museums states:

Museums should recognize the relationship between the market place and the initial and often destructive taking of an object for the commercial market, and must recognize that it is highly unethical for a museum to support in any way, whether directly or indirectly, that illicit market.

A museum should not acquire, whether by purchase, gift, bequest or exchange, any object unless the governing body and responsible officer are satisfied that the museum can acquire valid title to the . . . object in question and that in particular it has not been acquired in, or exported from, its country of origin and/or any intermediate country in which it may have been legally owned (including the museum's own country), in violation of that country's laws.\textsuperscript{200}

Museums in the United States should adhere to these ethical requirements. Instead, the two leading museum organizations in the United States, the American Association of Museums and the Association of Art Museum Directors, largely

\textsuperscript{199} Id. This survey also indicates a significant need for increased education of the American public. When asked about their knowledge of the existing legal structure, the respondents demonstrated little awareness of the laws already in place for protecting archaeological sites in the United States. See id. For example, less than one-quarter of respondents (22%) knew of any laws protecting shipwrecks; only 24% knew of laws protecting unmarked human burial sites; only 23% knew of laws concerning the buying and selling of artifacts, and only 28% knew of laws protecting archaeological sites. Id. Increased awareness and education of the American public and of the public in other countries seeking to protect their cultural resources would result in more voluntary measures and probably in greater efficacy of law enforcement efforts.

sidestep the issue in their respective codes. The AAMD Professional Practices in Art Museums states only:

The Director must not knowingly acquire or allow to be recommended for acquisition any object that has been stolen, removed in contravention of treaties and international conventions to which the United States is a signatory, or illegally imported into the United States.201

The AAMD Code thus ignores the issue of illegal excavation and illegal export from the country of origin, relying solely on the minimum that United States law requires. It also seems to permit museum directors to act out of willful ignorance, forbidding only those actions which the director knows are illegal. The AAM Code of Ethics is even vaguer. It states: "[T]he museum ensures that: . . . acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials."202 It establishes no specific standards of conduct and requires no due diligence or effective search on the part of the museum in acquiring objects. Some individual museums in the United States have adopted their own codes and these vary considerably in their specificity and in their interpretation. However, in developing, interpreting and applying codes of ethics,203 it is not enough for a museum to take the position that the object is legitimate so long as there is no evidence to the contrary. In fulfilling their public responsibilities, it is crucial that museums take on an affirmative obligation of due diligence in ascertaining that archaeological objects come from legitimate and scientific excavation.

201. ASS'N OF ART MUSEUM DIR., PROFESSIONAL PRACTICES IN ART MUSEUMS 7-8 (1992).
202. AMER. ASSN OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS § (2000). The vagueness of these codes stands in sharp contrast to the recent guidelines developed by both the AAMD and AAM with regard to museums' acquisition and current holding of art works that may have been looted during the Holocaust. The guidelines of both organizations are available on their web sites: www.aamd.org/guidelines.htm; www.aam-us.org/nazi-guidelines.htm. The promulgation of these guidelines illustrates that when sufficient public pressure is brought to bear, museums will respond and that they are, in fact, capable of exhibiting much higher levels of due diligence than is often applied to antiquities.
203. There is considerable variation in the codes of ethics of different museums in the United States and, even more significant, variation in the way the codes are interpreted and carried out. Some museums have adopted strict codes and some museums enforce them diligently. See, e.g., Mike Toner, The Past in Peril: Carlos Museum Tempers Desire to Acquire; Coveting Thy Neighbor's Past, ATLANTA J. & CONST., Nov. 7, 1999, at SQ [hereinafter Toner, Carlos Museum] (describing the policies of the Michael C. Carlos Museum at Emory University to examine carefully any new ancient material, purchased or donated, unless its recent history can be sufficiently documented). In 1995, the Getty Museum adopted a strict code applying to new acquisitions after that date. Acquisitions must be made in accordance with the UNESCO Convention and classical antiquities must have a documented provenance and come from existing, published collections known before 1995. Mike Toner, The Past in Peril: Coveting Thy Neighbor's Past, ATLANTA J. & CONST., Nov. 7, 1999, at 1Q [hereinafter Toner, Coveting Thy Neighbor's Past]; Suzanne Muchnic, Getty to Return 3 Acquisitions to Italy, L.A. TIMES, Feb. 4, 1999, at A1. One of the first museums in the country to adopt a strict code was the Harvard University Art Museum which adopted its code in 1971. See Robinson & Yemma, supra note 25, at A1. However, the enforcement of its code has recently come under criticism after the purchase of fragments of Greek pottery. See id.
Unlike private collectors, museums are public charitable organizations with the purpose of furthering educational and scientific values. As such, the museum and its Board of Trustees owe a fiduciary duty to the public. When the museum ignores the educational and scientific value of cultural objects, then it is arguably committing a breach of these public obligations. One can also question whether museums are fulfilling their educational and charitable missions and their tax-exempt purposes under the Internal Revenue Code through such actions. In recent years, several of the most prominent museums in the United States, particularly the Metropolitan Museum of Art in New York and the Boston Museum of Fine Arts, have had claims for significant archaeological objects from foreign countries and have sometimes returned them, thus incurring financial losses. Yet, for those who fear that a policy of restitution would empty the museums of the United States this has not occurred and is unlikely to do so.

This leads us finally to the necessity of fostering a new “culture” of collecting, one which focuses on the full story which cultural objects can tell. A major step in altering this culture of collecting would be to place a moratorium on the acquisition of antiquities. Such a moratorium would grant the time, space and funds needed for museums to examine their own collections and to develop cooperative arrangements with both foreign museums and smaller museums in the United States.
States. It would likely also create a deterrent to private collecting of undocumented antiquities, if collectors could no longer be assured of a sizeable charitable tax deduction and the prestige that accompanies such donations.

CONCLUSION

Restitution is today one of the most effective means available to deter the pillage of sites. It may someday be replaced by a global perspective that focuses on a cooperative, largely inter-institutional approach, which would bring many public benefits. First, a cooperative approach ensures that the world's artistic and cultural heritage really does circulate throughout the world, rather than remaining in a few well-endowed institutions and private collections. Second, it allows these institutions to move away from reliance on the market which has often furnished aesthetically-pleasing, costly but unprovenanced objects whose story is muted for lack of scientific and historical context. Third, it permits the museums of Western Europe and North America to enter into mutually beneficial partnerships with the institutions and governments of other nations, rather than perpetuating an antagonistic stalemate. Exchange of objects allows sections of the same object or several objects which originally formed a single corpus to be reunited. It also allows objects to be viewed through new eyes, and not only have advances in conservation techniques resulted, but new discoveries have been made when objects are placed on loan with different institutions.

Professor Willard Boyd, former President of the Field Museum of Natural History in Chicago, has described this needed transformation as follows:

Traditionally, museums have stressed the benefits of the "movement" of objects without adequate regard for the detrimental aspects of movement from the point of view of others. Certainly, the cross-cultural transfer of the human ideas surrounding objects is regarded positively in an age of communication. However, the movement of objects that results in cultural and environmental loss, destruction, and desecration cannot be justified. Museums must realign their acquisition and retention policies to promote cultural understanding and respect for the objects and ideas of others. An ethical attitude requires that we do so.

An illustration of this new culture, which could be termed cultural globalism and which places contextualism at the heart of its policy, may be found in the recent

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209. In a recognition that outright ownership is not the only way for museums to offer quality art and archaeology to its public, Maxwell Anderson, former director of the Michael C. Carlos Museum, initiated a program of inter-museum loans. Toner, Carlos Museum, supra note 203. This gives each museum access to material that it cannot afford to purchase or would not wish to purchase because of the questionable background of so many objects currently on the world market. Id.

bilateral agreement\textsuperscript{211} entered into by the United States and Italy pursuant to the CPIA. While this agreement imposes United States import restrictions on undocumented antiquities, it also addresses the interchange of archaeological objects for the enhancement of scientific and cultural understanding in a number of ways. These include two particularly innovative features: Italy's agreement to use its best efforts to encourage this interchange through long-term loans of objects from Italian museums to museums in the United States and encouraging joint participation of American museums and universities in excavation projects with the possibility that some of the excavated objects would be given on loan to the American participants.\textsuperscript{212} These are both elements that are very desirable in an internationalist or global perspective. Longer terms for loans are necessary to make it economically feasible for American museums to engage in such loans. The provision allowing loans of newly excavated material is a reminder of the system that was in wide usage until the 1970s under which foreign institutions that engaged in excavation projects would be given a portion of the objects recovered. While it is no longer realistic to expect nations to distribute their cultural objects to foreign institutions, the loan mechanism should provide an incentive to engage in these collaborative projects and will give an opportunity for newly excavated objects to be viewed in the United States.

The elements of this globalized, contextual perspective include international loans for exhibition purposes, longer-term loans for those museums that agree to abide by national and international laws, as well as ethical standards, and international collaborations ranging from excavation to conservation and site preservation and interpretive projects. Once this happens, then it will become possible to increase the free exchange of cultural materials which will, in turn, enhance the acquisition of scientific and cultural knowledge, as well as the appreciation of aesthetic values. Then, perhaps, the remedy of restitution for cultural objects will no longer be required in order to advance the public interest in preservation of the past.

\textsuperscript{211} The full text of the United States-Italy agreement may be found at exchanges2.state.gov/education/culprop/it01agr.html.
\textsuperscript{212} \textit{Id.} Art. II para. E.