

AMERICAN TOOLS TO CONTROL THE ILLEGAL MOVEMENT OF FOREIGN ORIGIN ARCHAEOLOGICAL MATERIALS: CRIMINAL AND CIVIL APPROACHES

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I. INTRODUCTION

Vast amounts of undiscovered or incompletely studied cultural materials¹ from earlier civilizations still exist throughout the world.² In recent years, an increasing international trade in antiquities has caused many valuable, unstudied objects to be moved from their original locations.³ Only a small fraction are moved legally, however; the majority of artifacts are excavated, transported, and sold illegally.⁴ The information lost through this illicit movement pre-

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1. "Cultural materials" include artifacts from civilizations that illustrate their architecture, textiles, tools, weapons, sculpture and engraved objects. See C. WINICK, *DICTIONARY OF ANTHROPOLOGY* 44 (1970). This article focuses on archaeological cultural materials or "antiquities."

2. See, e.g., G. CLARK, *WORLD PREHISTORY: A NEW OUTLINE* 4 (1969); J. MELLAART, *CATAL HUYUK: A NEOLITHIC TOWN IN ANATOLIA* 24 (1967) (addressing the study of Near Eastern prehistoric civilizations); K. MEYER, *THE PLUNDERED PAST* 185, 198 (1973) (discussing the excavation of Mexican and Californian archaeological sites).

3. K. MEYER, *supra* note 2, at xiv (speculation in works of art is becoming a big business); Coggins, *Archaeology and the Art Market*, 175 *SCI.* 263, 263 (1972); Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 *ART. J.* 94, 94 (1969) [hereinafter cited as Coggins, *Illicit Traffic*] ("In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated, and illicitly exported from Guatemala and Mexico in order to feed the international art market."); Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 *LAW. AMERICAS* 68, 68 (1975) [hereinafter cited as Nafziger, *Controlling*] ("The massive plundering of Mexican archaeological sites, of which there are thousands, has been going on for about a dozen years."); Palmer, *Introduction, Symposium: Legal Aspects of the International Traffic in Stolen Art*, 4 *SYR. J. INT'L L. & COM.* 51, 51 (1976) ("Along with real estate and gold, art more than ever before has come to be regarded as a hedge against inflation and a highly sought-after commodity."); Comment, *Legal Approaches to the Trade in Stolen Antiquities*, 2 *SYR. J. INT'L L. & COM.* 51, 52 (1974) ("the illicit international trade in antiquities offers high rewards and has created vested interests in its perpetuation" with prices of antique art objects increasing 90-95% in 1973 alone).

4. Reinhold, *Theft and Vandalism: An Archaeological Disaster*, *EXPEDITION*, Summer 1973, at 2 (The demand and buying power of the public and museums have "created a bull market for ancient art and a flourishing worldwide traffic in antiquities, much of it clandestine."). See K. MEYER, *supra* note 2; Coggins, *Illicit Traffic*, *supra* note 3; Nafziger, *Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process*, 2 *DEN. J. INT'L L. & POL'Y* 231, 231 (1972) [hereinafter cited as Nafziger, *ICOM*] (citing the "massive looting, scarring,

sents a problem of international concern.⁵ The initial movement of unstudied materials from their natural settings causes the greatest cultural loss. Unscientific removal irreparably obscures all information derived from associated materials.⁶ Moreover, careless and destructive handling often accompanying the illicit movement of materials after removal further limits our knowledge and appreciation of earlier civilizations.⁷ It is the unstudied nature of the archaeological materials that is at issue here. The dramatic loss of information and the rate of physical destruction that accompanies illicit movement separates archaeological materials from other more commonly stolen materials and makes their recovery and return difficult and, at best, incompletely remedial. The ultimate solution is to prevent illicit removal of the archaeological materials.

The best solution to this international problem would logically involve international cooperation⁸ with national actions⁹ so as to

destruction, and international smuggling of the artistic and archaeological heritage of national patrimonies"); Comment, *supra* note 3, at 52.

5. See Nafziger, *UNESCO-Centered Management of International Conflict over Cultural Property*, 27 HASTINGS L.J. 1051 (1976) [hereinafter cited as Nafziger, *UNESCO*]; Comment, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L.J. 537, 540 (1971). The United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a Convention concerning the protection of the world's cultural and natural heritage. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, done Nov. 23, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226, (ratified by the United States, Dec. 7, 1973, entered into force Dec. 17, 1975), reprinted in 11 INT'L LEGAL MAT'LS 1358 (1972) [hereinafter cited as 1972 UNESCO Convention]. The preamble states, in part, "[d]eterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world . . ."

6. COMMUNICATIONS RESEARCH MACHINES, INC., ANTHROPOLOGY TODAY 204, 208 (1971) ("proper study of a site involves recording not only the exact location of the objects found and details of their associations with other objects, but also the countless details he has observed while digging, even though no specimens are involved"); G. WILLEY & P. PHILLIPS, METHOD AND THEORY IN AMERICAN ARCHAEOLOGY (1958); Coggins, *Illicit Traffic*, *supra* note 3; Merryman, *The Protection of Artistic National Patrimony Against Pillaging and Theft*, in ART LAW: DOMESTIC AND INTERNATIONAL 233, 234 (L. DUBOFF ed. 1975); Nafziger, *Controlling*, *supra* note 3, at 69. For example, the stratigraphic method of determining relative chronology and reconstructing detailed cultural information of a past civilization is based on study of contextual, spatial and temporal relationships among cultural materials.

7. Coggins, *Illicit Traffic*, *supra* note 3, at 94 (In preparing the face of a stolen "stele" for transportation, the inscriptions on the side and back often are cut off and destroyed; stolen monumental facades usually are cracked into pieces to facilitate transportation, often reducing them to rubble of minimal artistic, economic and archaeological value. Stelae (singular: stele or stela) are single stone monuments that are usually rectangular in shape and covered with writing or art.); Merryman, *supra* note 6, at 234; Nafziger, *Controlling*, *supra* note 3, at 69 (monuments often are divided for easier transport leaving their pictographic message garbled or lost).

8. Nafziger, *UNESCO*, *supra* note 5, at 1051. For a brief summary of the history of international controls over the flow of cultural property, see *Proceedings of the Panel on the*

avoid merely shifting undesired movement of archaeological materials from countries with strict regulations to those with more lenient rules.¹⁰ Domestic efforts alone, although necessary, are insufficient to adequately control the international traffic in art treasures.¹¹

U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 4 SYR. J. INT'L L. & COM. 97, 99 (1976) [hereinafter cited as *Proceedings*].

"[N]ew forms of international cooperation, not controls, are needed to alleviate current inequities in art. No single nation can deal effectively with these problems; public and private sectors must work together as well as nation with nation." Palmer, *supra* note 3, at 53.

Although international efforts can mitigate or eliminate jurisdictional problems involved in controlling the illicit movement of cultural materials, the bulk of any enforcement problem with any sanction in this area derives from problems in identifying cultural materials as stolen and proving their provenance and time of removal. Enforcing criminal sanctions raises the additional barriers of proving scienter, at least in the United States and related legal systems. None of these problems can be reached, even by international agreements, without extensive study of the cultural materials that are likely to be illicitly moved.

What international agreements can do is eliminate the jurisdictional problems accompanying enforcement of national laws. They can reduce the significance of determining from which country specific objects come, by making the laws and procedures uniform with respect to cultural materials. International agreements can enhance cooperative study, enforcement of the various national laws relating to the control of the movement of cultural materials, joint recovery efforts, and pooling of related information.

9. The basic remedy available to foreign nations seeking to control and deter the exportation of cultural materials owned by that nation is their own laws. For instance, each country could explicitly declare national ownership of all non-privately owned cultural materials. Such foreign laws are, however, likely to exacerbate the black market problem. For further discussion, see Macrory, *The Pre Columbian Art Caper*, DISTRICT LAW., Summer 1977, at 19, 23.

10. K. MEYER, *supra* note 2, at 168 (quoting a personal communication from columnist J. Alsop: "In addition, pre-Columbian objects also command very high prices in Europe, especially in Germany and Switzerland. Unless a self-denying ordinance is truly international, in fact, it will merely have the effect of denying the United States what other people will then snap up."); Nafziger, *Controlling*, *supra* note 3, at 77; Comment, *supra* note 3. See K. MEYER, *supra* at 169 ("[T]he Japanese dealers and collectors are going through the art market like voracious, but indiscriminating vacuum cleaners."); Merryman, *supra* note 6, at 241 ("It is abundantly clear that national laws [like those of Italy] do not effectively prevent or control the international traffic in art treasures and antiquities."); Comment, *supra* note 5, at 555 ("Acceptance [of the 1970 UNESCO Convention] by only a few countries may only divert the flow of illicitly exported goods from ratifying to non-ratifying countries."); Comment, *supra* note 3, at 51 n.1 (noting that the cities of London, Paris, Tokyo and Zurich are significant centers of trade of stolen antiquities); *Proceedings*, *supra* note 8, at 111, 119.

11. SENATE COMM. ON FINANCE, IMPORTATION OF PRE-COLUMBIAN SCULPTURE AND MURALS; CUSTOMS PORT SECURITY; JUDICIAL REVIEW IN COUNTERVAILING DUTY CASES, S. REP. NO. 1221, 92d Cong., 2d Sess. 2 (1972) [hereinafter cited as SENATE REPORT, IMPORTATION]; Nafziger, *Controlling*, *supra* note 3, at 77 (multinational treaties are necessary to prevent a simple diversion of the materials from the United States to other countries); Nafziger, *ICOM*, *supra* note 4, at 232 ("Most countries have their own legal controls over international traffic in art treasures. It is clear, nevertheless, that by themselves, domestic government controls, based upon criminal and antiquity laws, civil suits, policing of sites, border controls, taxation,

Every nation has cultural materials which together form man's cultural heritage. The ultimate movements of these materials is itself often international. The irreparable damage caused by the initial illicit movement of cultural materials is an international problem requiring an international solution.

International efforts to reduce the illicit movement of cultural materials have taken several forms, but, to date, none has adequately controlled the illicit movement of cultural materials.¹² The United Nations, through the United Nations Educational, Scientific and Cultural Organization (UNESCO)¹³ has sponsored two international multilateral treaties to deal with the protection of the world's cultural heritage.¹⁴ Unfortunately, only the UNESCO Con-

duties, tariffs and the like are insufficient." (footnotes omitted)). For a detailed discussion of the designing, development, and implementation of a comprehensive State Antiquities act, designed to control and enhance the study and movement of archaeological materials, using Arkansas legislation as an example, see C. MCGIMSEY, *PUBLIC ARCHAEOLOGY* (1972).

12. International legal controls to protect cultural materials have been developing steadily but remain generally inadequate and unevenly applied. Nafziger, *UNESCO*, *supra* note 5, at 1051 (discussing the shortcomings of UNESCO's handling of the dispute over Israel's archaeological excavations in Jerusalem). See Comment, *supra* note 5, at 537 ("international control over the importation of such [cultural] property has been virtually nonexistent").

13. Alpert, *The Role of UNESCO in the Protection of Artistic National Patrimony Against Pillage and Theft*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 269 (L. Duboff ed. 1975). Two of the stated purposes of UNESCO are to "give fresh impulse to popular education and to the spread of culture" and to "maintain, increase and diffuse knowledge; by assuring the conservation and protection of the world's inheritance of . . . works of art and monuments of history and science, and . . . by encouraging cooperation among the nations in all branches of intellectual activity . . ." Constitution of the United Nations Educational, Scientific and Cultural Organisation, art. I (2), *done* Nov. 16, 1945, 61 Stat. 2495, T.I.A.S. No. 1580, 4 U.N.T.S. 275 (entered into force Nov. 4, 1946).

Education is also one of the stated purposes of the 1972 UNESCO Convention, *supra* note 5, art. 27 (1)-(2) and the Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property, art. 10, *done* Nov. 14, 1970, *reprinted in* 10 INT'L LEGAL MAT'LS 289 (1971) [hereinafter cited as 1970 UNESCO Convention].

Teaching about the enhanced value of the materials *in situ* and about the costs to each individual nation of illicit movement of cultural materials is the key to future success. Until the problem is recognized, it can not be fully treated. For a remarkable example of the potential practical effect of education in minimizing the illicit movement of cultural materials, see J. FONTEIN & T. WU, *UNEARTHING CHINA'S PAST* 18 (1973) ("It is in educating the Chinese people in a new attitude toward the preservation of the cultural relics of their own past and in enlisting their help to achieve this aim that the communist rulers of China have been remarkably successful.").

14. The 1972 UNESCO Convention and the 1970 UNESCO Convention provide a framework for an international solution to the illicit movement and destruction of cultural material. Article 7 of the 1972 Convention focuses on efforts to conserve and identify the world cultural heritage. The 1972 UNESCO Convention defines cultural heritage as monuments, groups of buildings, and sites, and is limited to these categories of heritage and natural heritage. It mandates that each state party to the Convention will identify, preserve, and transmit to posterity that heritage to the best of its ability. The Convention then specifies the breadth

vention dealing with monuments, groups of buildings, and sites is in effect, while the Convention dealing with smaller cultural materials is neither ratified by the United States nor yet in force.¹⁵ Nevertheless, several limited bilateral and multilateral agreements directed at particular areas of concern are in force.¹⁶ For example, the

of efforts to be brought to bear on the problem (legal, scientific and financial measures). It states in part: "For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage." 1972 UNESCO Convention, *supra* note 5, art. 7. For a general discussion of the goals and mandates of the 1972 UNESCO Convention see the accompanying UNESCO Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage (adopted on Nov. 16, 1972), UNESCO Doc. 17c/107 (1972), *reprinted in* 11 INT'L LEGAL MAT'LS 1367 (1972) (unilateral actions to preserve antiquities are duties owed by the nation in possession of the antiquities to the rest of mankind). See Comment, *supra* note 3, at 54-56.

For a discussion of the 1970 UNESCO Convention, see Nafziger, *Controlling*, *supra* note 3, at 74; Comment, *supra* note 5, at 538-41 (background, history and discussion of the Convention). For a discussion of the drafting and ratification of the final version of the Convention, see Rogers & Cohen, *infra* note 25, at 317; Note, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL'Y INT'L BUS. 932 (1973). The 1970 UNESCO Convention outlines a series of desirable goals, defines the illicit acts that may affect cultural materials, and details the general agreement among signatory nations to enforce the goals and discourage the illicit acts. Articles 7-9 of the 1970 UNESCO Convention establish guidelines for the enabling legislation of the signatory countries. See Comment, *supra* note 5, at 549-53.

Although fashioned as international measures, the Conventions impose upon the individual subscribing nations the responsibility for enacting enabling legislation and local component plans. The Conventions' effectiveness depends upon their wide acceptance and continual refinement by the signatory nations. Unfortunately, ratification of the Convention and enactment of the necessary legislation has been inadequate. *Proceedings*, *supra* note 8, at 98. Through January 1, 1976, although 25 countries had ratified or adopted the 1970 UNESCO Convention, no major art importing country had enacted the necessary enabling legislation. Consequently, the effects of the Convention remain minimal. *Id.*

15. Drafts of the necessary implementing legislation for the 1970 Convention have been submitted to Congress on three occasions. H.R. 11754 and S. 2677, 93d Cong., 1st Sess. (1973); H.R. 14171, 94th Cong., 2d Sess. (1976); H.R. 5643, 95th Cong., 1st Sess. (1977). See *Proceedings*, *supra* note 8, at 98 n.5 (H.R. 14171 is reprinted at 135-39); Comment, *supra* note 3, at 56.

According to the most recent version of H.R. 5643, H.R. REP. NO. 615, 95th Cong., 1st Sess. (1977), under specific circumstances, the President will have the power to enter into bilateral and multilateral restricted import agreements upon the request of other countries for periods of less than 5 years duration to protect jeopardized cultural property. Materials imported in contravention of such agreements will be subject to seizure and judicial forfeiture. If the importer establishes his status as a bona fide purchaser, without knowledge or reason to believe the item was stolen, the importer will be reimbursed his purchase cost unless the United States establishes that as a matter of law or reciprocity the claiming state would return the article to the United States without requiring payment of compensation. For a summary of comments and literature pertaining to one of the enabling bills submitted to Congress, see SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., 2D SESS., WRITTEN COMMENTS ON H.R. 14171 (Comm. print 1976).

16. Although an international convention of global scope would solve most effectively the problem of cultural thefts, the lack of favorable international response to such efforts suggests

United States-Mexico Treaty concerning cultural materials provides for the recovery and return of limited categories of archaeological properties stolen from Mexico.¹⁷ Treaties like the United States-Mexico Treaty build and test international principles and focus efficiently on particular problems or situations unique to the particular countries. In addition, some governments have taken internal

that initially a more local approach to the problem will be required. Article 9 of the 1970 UNESCO Convention expressly encourages bilateral and regional treaties. 1970 UNESCO Convention, *supra* note 13. The most recent version of the United States' enabling legislation for the 1970 UNESCO Convention would also allow bilateral agreements in certain circumstances. See note 15 *supra*.

Each potential solution to the illicit movement problem depends for success on international cooperation, national acceptance and secure funding. By pooling cultural and capital resources voluntarily and by balancing mutual interests, two or more cooperating nations may solve basic problems more easily than would several countries working individually. The United States and other capital-rich countries, for example, could play a major role in helping art rich countries study and develop awareness of their heritage. In return, the art rich countries could allow a steady stream of cultural exhibits to help refine the capital rich countries' awareness of international cultural heritage. Comment, *supra* note 5, at 541 (the preamble to the 1970 UNESCO Convention encourages the interchange of cultural materials between nations). See, e.g., Nafziger, *Controlling*, *supra* note 3, at 75.

The European Convention on the Protection of the Archaeological Heritage, May 1969, Europ. T. S. No. 66, provides an example of a regional treaty that expressly recognizes the seriousness of uncontrolled archaeological excavation and movement of cultural materials. The Convention focuses on controlling excavation and movement of cultural materials, encouraging exchange of cultural materials and information bearing on cultural materials, and facilitating cooperation in matters relating to cultural materials among signatory members of the Council of Europe. Because the issues dealt with have a limited scope, more local significance, and fewer competing national interests, treaties such as the Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, United States-Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088, 791 U.N.T.S. 313 (entered into force March 24, 1971), *reprinted in* 9 INT'L LEGAL MAT'LS 1028 (1970) [hereinafter cited as United States-Mexico Treaty], can be implemented rapidly with more limited controversy. Hopefully, many agreements with small scopes can be consolidated into a comprehensive treaty fully acceptable to all nations. Bilateral and regional alternatives mitigate the jurisdictional difficulties of unilateral provisions such as the NSPA. See notes 95 & 111 *supra* and accompanying texts.

17. E.g., United States-Mexico Treaty, *supra* note 16. The treaty is limited to "pre-Columbian" articles "of outstanding importance to the national patrimony, including stelae and architectural features such as relief and wall art . . . that are the property of federal, state, or municipal governments or their instrumentalities . . ." *Id.*, art. I, para. 1. Paragraph 2 provides some flexibility in the scope of pre-Columbian materials covered by the treaty. See Comment, *supra* note 3, at 58.

Under this treaty, the United States government represents Mexico as the plaintiff in civil actions to recover limited categories of stolen cultural property, thereby saving the Mexican government the cost and potential procedural difficulties of litigating in the United States. For additional discussion of this treaty and other means of controlling the movements of cultural materials, see Nafziger, *Controlling*, *supra* note 3, at 73; Comment, *New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Antiquities*, 12 COLUM. J. TRANSNAT'L L. 316 (1973).

steps to prevent the removal of their national cultural treasures.¹⁸ International cooperation need not be limited to the government level; many non-governmental organizations have passed resolutions and taken some steps, such as self-regulation by museums, toward controlling the illicit movement of cultural materials.¹⁹ Non-governmental input provides a healthy complement to national and international governmental efforts, because cultural heritage transcends traditional notions of ownership and title.²⁰

Despite these international efforts, however, foreign origin archaeological materials continue to be moved illicitly into the United States. Because it appears that the international agreements may not achieve their intended effects for some time, the United States, as an influential world leader, should first examine the legal tools presently available to it to effect a second-best solution within the United States, and then decide whether the available tools are in net effective enough toward a solution of any part of the destructive excavation and movement of foreign origin archaeological materials to warrant application.

Available to the United States are numerous state civil recovery

18. See B. BURNHAM, *THE PROTECTION OF CULTURAL PROPERTY* (1974) (summarizing, in English, the texts of the legislation of over 130 countries governing the discovery, ownership, circulation and sale of cultural property).

19. Such nongovernmental cooperation ranges from international nongovernmental organizations, such as the International Council of Museums, to national nongovernmental organizations, and even includes voluntary private bilateral agreements. Nafziger, *ICOM*, *supra* note 4, lists and describes the goals, efforts and effects that many of the nongovernmental organizations have had in this effort. Professor Nafziger emphasizes the successes of the International Council of Museums, concluding that such international nongovernmental organizations have a very important present and future role. *Id.* at 253. Merryman, *supra* note 6, at 242, discusses three means which art exporting nations may have of protecting their cultural and artistic treasures: hiring local antiquity hunters to work as salaried controlled excavators for the state, releasing for sale or trade duplicate specimens from museum stocks, and aggressively pursuing its remedies in art importing nations either via existing laws or through the exporting nation's lobbying power. Palmer, *supra* note 3, at 54, discusses four legitimate intranational and international means of bringing art and people together: public media, exchange of scholars and specialists, commercial transactions, and loan exhibitions. Intermuseum agreements, for instance, may ameliorate significantly illegal trafficking by having each museum agree not to acquire items of doubtful or illicit provenance. *United States v. McClain*, 545 F.2d 988, 997 n.14 (5th Cir. 1977); Nafziger, *Controlling*, *supra* note 3, at 75. See Hamilton, *Museum Acquisitions, The Case for Self-Regulation*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 347 (L. Duboff ed. 1975); Nafziger, *Article 7(a) of the UNESCO Convention*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 387 (L. Duboff ed. 1975).

20. C. MCGIMSEY, *supra* note 11, at 6 ("Legal possession does not automatically carry with it the right of destruction, and no individual or corporate body possesses the right permanently to deprive the public of any significant part of that heritage."); Nafziger, *ICOM*, *supra* note 4, at 232.

statutes allowing the owner to recover property shown to be stolen.²¹ Also potentially available are civil damages statutes, allowing the owner to collect consequential and associated damages resulting from the theft.²² A recent United States customs law relating only to pre-Columbian monumental or architectural sculpture mandates the seizure and return at the owner's expense of any of these classes of property shown to be "stolen."²³

This article will focus on the merits of criminal sanctions, under the National Stolen Property Act (NSPA),²⁴ as applied toward the control of the movement of foreign origin archaeological materials in the United States. Recently, United States authorities have used the NSPA in two reported cases to prosecute Americans engaged in the transportation in foreign and interstate commerce of illicitly removed cultural materials.²⁵ Prosecution has been based on NSPA

21. See notes 131-39 *infra* and accompanying text.

22. See notes 155-61 *infra* and accompanying text.

23. See note 92 *infra*.

24. 18 U.S.C. §§ 2311-2318 (1976). Throughout this article reference to the National Stolen Property Act (NSPA) corresponds only to §§ 2314 and 2315.

Section 2314 provides:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted, or taken by fraud . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 2314 (1976).

Section 2315 provides:

Whoever receives, conceals, stores, barter, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan of any goods, wares, or merchandise, or securities, of the value of \$500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 2315 (1976).

The other sections of the Act refer to general definitions (§ 2311), stolen vehicles (§§ 2312-2313), stolen cattle (§§ 2316-2317), and phonograph records bearing forged or counterfeit labels (§ 2318).

Until 1973, the NSPA was applied in only two reported cases involving foreign situs theft, neither of which involved foreign situs archaeological theft or illicit movement of stolen artifacts. *United States v. Rabin*, 316 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 815 (1963); *United States v. Greco*, 298 F.2d 247 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962).

25. Several American citizens have been convicted under the NSPA in three recent archaeological theft cases. See *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *United States v. Brown*, (D. Ark. 1973) (unreported). *McClain* and *Hollinshead* are discussed in the text. In *United States v. Brown*, a federal grand jury in Arkansas indicted Harry K. Brown in May, 1973, on charges of conspiring to transport a stolen artifact in interstate commerce. The FBI found and impounded a Mayan stele originating in Guatemala in Brown's home. The indictment alleged that Brown had shipped the stele to Key West, Florida and offered to sell it to the Denver Art Museum. Brown pleaded guilty, was fined \$2,500 and was placed on probation for three years. The stele was turned over to the Guatemala government. The case is described in K.

provisions that prohibit the transportation,²⁶ sale, or receipt²⁷ of goods known to be stolen.

In the first case, *United States v. Hollinshead*,²⁸ a federal grand jury indicted Clive Hollinshead, an art "dealer," for transporting and conspiring to transport stolen property in interstate commerce. Hollinshead allegedly had traveled to British Honduras, negotiated with several persons for the purchase of a well-studied Mayan stele, returned to the United States and took possession of the stele which had been cut into pieces and smuggled out of Guatemala via British Honduras.²⁹ Although Hollinshead argued that he thought the stele had come legally from British Honduras,³⁰ the stele clearly had been removed recently from Guatemala in violation of a Guatemalan law that prohibited export of nationally owned archaeological materials without government approval. Several government witnesses testified that Hollinshead had characterized the stele as smuggled from Guatemala.³¹ Hollinshead was convicted by the district court and fined \$5,000 for conspiring to move, and actually moving the stele in United States interstate commerce.³²

In the second case, *United States v. McClain*,³³ a district court convicted and sentenced five people to two 3-year terms of imprisonment each for receiving and selling "stolen" non-monumental pre-Columbian antiquities originating in Mexico, and conspiring to transport this "stolen" property in foreign and interstate commerce. On appeal, the decision was reversed and the case remanded for a retrial.³⁴ The defendants allegedly admitted that several groups were acquiring pre-Columbian artifacts in Mexico and shipping them to the defendants in the United States. Government witnesses

MEYER, *supra* note 3, at 33; Rogers & Cohen, *Art Pillage—International Solutions*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 315, 321 (L. Duboff ed. 1975); Comment, *supra* note 3, at 59.

26. 18 U.S.C. § 2314 (1976).

27. 18 U.S.C. § 2315 (1976).

28. 495 F.2d 1154 (9th Cir. 1974), *discussed in Note, United States v. Hollinshead: A New Leap in Extraterritorial Application of Criminal Laws*, *HASTINGS INT'L & COMP. L. REV.*, Spring 1977, at 149 (Inaugural Issue).

29. 495 F.2d at 1155.

30. Brief for Appellant at 15-17, *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

31. Brief for Appellee at 29-31, *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

32. *Id.* at 4. Hollinshead was not convicted for the theft of the stele. The court of appeals affirmed. 495 F.2d 1154 (9th Cir. 1974).

33. 545 F.2d 988 (5th Cir. 1977).

34. *Id.*

described the defendants' characterization of the artifacts as "stolen" or "smuggled."³⁵ Although it was reasonably clear that the artifacts had been illegally exported,³⁶ the court of appeals held that the government had not proved that the Mexican government owned the property, and that such a determination was necessary before the property could be considered "stolen" under the NSPA.³⁷ The appellants argued in part that the lower court misapplied a series of five Mexican statutes that altered the legal capacity of private individuals to own archaeological materials.³⁸ Only the latest law declares that the Republic of Mexico owns all pre-Columbian artifacts.³⁹ The court ruled that the dates of initial private ownership and initial export from Mexico were critical in determining the Mexican Government's rights to the artifacts under the applicable law. Since the prosecutor did not enter these dates into evidence, the applicable Mexican law could not be ascertained and the case was remanded for retrial on this issue.⁴⁰

In addition to the NSPA, state penal statutes prohibiting the receiving of stolen property⁴¹ may be helpful in combating the illicit movement of foreign cultural materials.⁴² However, no reported foreign situs archaeological theft or illicit movement of archaeological material cases have been brought under a state statute.

While use of the NSPA presents a new approach to the problem of illicit movement of cultural materials, its application is limited

35. Brief for Appellee at 4-7, *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

36. 545 F.2d at 993.

37. *Id.* at 1003.

38. *Id.* at 997-1003. The five Mexican statutes were dated 1897, 1930, 1934, 1970 and 1972.

39. Federal law on Archaeological, Artistic and Historic Monuments and Zones, Articles 16, & 27-29, 312 D.O. 16 (Mexico 1972).

40. 545 F.2d at 1003.

41. Receiving stolen property is outlawed in every state. Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 MICH. L. REV. 1512, 1543 n.185 (1976). State legislation is comprehensively analyzed in THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMM'N ON THE OFFICE OF ATTORNEY GENERAL, LEGISLATIVE RESPONSES TO DEALING IN STOLEN GOODS 33-37 (Dec. 1975).

42. State penal statutes would be subject to the same arguments made in this article. However, these statutes are made even less attractive as a result of their lack of uniformity with respect to their content and resulting penalties. See, e.g., CAL. PENAL CODE §§ 27, 496-497, 778a, 789 (West 1977); N.Y. PENAL LAW §§ 165.40, 165.45, 165.50, 165.55, 165.60, and 165.65 (McKinney 1975). California has some interesting statutes supporting jurisdiction over extraterritorial crimes provided there is some minimal contact with California. See CAL. PENAL CODE §§ 27, 788a & 789 (West 1977). For a discussion of these statutes, see Schwab, *Have Crime, Will Travel*, 50 CAL. ST. B.J. 30 (1975). State and local laws generally provide for the seizure of stolen property without requiring knowledge on the part of the possessor that the object is stolen. Comment, *supra* note 3, at 59.

to cases involving easily proved thefts. This article assesses the applicability and effectiveness of the NSPA in cases of illicit movement in the United States of cultural materials "stolen" from their foreign situs origins. The article focuses on "archaeological theft," most clearly illustrated in the case of persons taking nationally owned archaeological materials without permission, usually from their original situs in a state preserve, as opposed to "simple theft" or "illegal export."⁴³ Simple theft is a matter of a person taking property from a private owner.⁴⁴ Illegal export is a statutory crime usually independent of theft.⁴⁵ No United States criminal statute specifically prohibits the importation of illegally exported cultural materials.⁴⁶ Archaeological theft and simple theft should not be confused with illegally exported cultural materials. The NSPA reaches only "stolen" property. It does not apply to cultural materials illegally exported but not stolen.⁴⁷ Unless the state retains property rights or interests in the material illegally exported, no theft occurs under American standards by the mere removal; the case is simply one of "illegal exportation" with no "stolen property" involved.⁴⁸

43. See J. MERRYMAN & A. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 141 (temp. ed. 1975).

44. *Id.*

45. *Id.*

46. See *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977).

47. *Id.* at 1000-01.

48. *Id.* at 997-1004. The *McClain* court held that although the materials involved were illegally exported, they were not necessarily stolen. The question was whether the applicable Mexican law actually declared government ownership of the artifacts, or only restricted their export. If the latter interpretation applied, the case would be one not of archaeological theft, but rather merely of illegal export and the NSPA would not be applicable. "[R]estrictions on exportation are just like any other police power restrictions. They do not create ownership in the state." *Id.* at 1002.

The case of the "Boston Raphael" provides a good example of illegal exportation without theft. Italian law prohibited the export of privately owned works of art that were classified as "national treasures." An Italian sold a painting so classified to an American who allegedly smuggled it out of Italy and into the United States. J. MERRYMAN & A. ELSÉN, *supra* note 43, at 141, 151-62. The 1970 UNESCO Convention does not reach cultural materials that have not been stolen. The Convention applies only to cultural materials exported contrary to the laws of the country of origin. 1970 UNESCO Convention, *supra* note 13, art. 7(a); Nafziger, *ICOM*, *supra* note 4, at 238.

Some governments allow private domestic ownership of any antiquities but prohibit their export, other states limit or prohibit exports and in addition retain all property rights in the antiquities. For a list of countries and their various claims of ownership of cultural materials, see B. BURNHAM, *supra* note 18; K. MEYER, *supra* note 2. For instance, the Turkish Government owns, by law, all antiquities in that country and prohibits their export without a license. B. BURNHAM, *supra* at 146. The Mexican National Cultural Patrimony Act of 1970 was a less restrictive statute that allowed private ownership of cultural materials but prohibited their export without express governmental permission. 545 F.2d at 999. The current 1972 law makes all archaeological materials the inalienable property of the government. Federal Law on

Part II analyzes the difficulties in applying the NSPA to archaeological material stolen at a foreign situs, pointing to the additional difficulties in interpreting and enforcing a statute not drafted to deal with this specific problem. It is argued that the inherent limitations of the NSPA with respect to the illicit movement of archaeological materials prevent it from being a significant tool for controlling the movement of cultural materials. This discussion stresses the difficulties in recognizing unstudied archaeological materials as missing from their origins and if located, identified as "stolen." The scienter requirement further reduces the chances of conviction. Part III notes that while no American effort alone can control the illicit movement of archaeological materials, the presently available civil remedies under federal and state statutes of damages and recovery of stolen property are broader reaching, potentially more effective and efficient American tools to help control the illicit movement of archaeological materials in the United States.

II. DIFFICULTIES IN APPLYING THE NSPA TO THE ILLICIT MOVEMENT OF FOREIGN ORIGIN ARCHAEOLOGICAL MATERIALS IN THE UNITED STATES

A. Statutory Interpretation Problems

Illicit movement of archaeological materials easily falls within NSPA prohibitions.⁴⁹ Provided the defendant knows the property to have been stolen, converted or taken by fraud, mere transportation⁵⁰ of "stolen" property⁵¹ to the United States, or the receipt, conceal-

Archaeological, Artistic, and Historic Monuments and Zones, art. 27, 312 D.O. 16 (Mexico 1972). For a discussion of the 1972 Law, see Nafziger, *Controlling*, *supra* note 3, at 71.

The United States has limited statutes that protect American antiquities located on lands owned or controlled by the government. The statutes do not, however, prohibit the exportation or importation of antiquities. 16 U.S.C. §§ 431-433 (1976); C. MCGIMSEY, *supra* note 11. There have been no reported applications of the NSPA to archaeological thefts within the United States.

49. *United States v. McClain*, 545 F.2d 988, 994 (5th Cir. 1977); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

50. 18 U.S.C. § 2314 (1976).

51. *Id.* §§ 2314-2315. The term "stolen" has no common law derivative and usually is construed broadly by American courts. *United States v. Turley*, 352 U.S. 407, 417 (1957) ("stolen" includes all felonious takings and is not limited to common law larceny); 545 F.2d at 995. *See, e.g., United States v. Anderson*, 532 F.2d 1218, 1227 (9th Cir.), *cert. denied*, 429 U.S. 839 (1976) ("'stolen' means acquired or possessed, as a result of some wrongful or dishonest act or taking whereby a person wilfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership"); *Lyda v. United States*, 279 F.2d 461 (5th

ment, storage, barter or sale⁵² while the property is in interstate or foreign commerce, violates the statute.⁵³ Despite the apparent ease with which the statute may seem to apply to foreign origin archaeological materials, the NSPA was drafted to deal with a very different problem, namely, theft of standard, modern commercial goods clearly "owned" and "possessed" by some person or corporation before their theft.⁵⁴

When a court applies the NSPA to property stolen within the United States, it must establish and define the elements of transportation, bartering or selling, "stolen" property, and scienter.⁵⁵ Although a foreign situs archaeological theft has several elements in common with such cases, determining the operative definition of "stolen" and proving the defendant's knowledge that the property was stolen presents unusual difficulties.⁵⁶ Because the NSPA was not drafted with foreign archaeological thefts in mind, its legislative history provides little help in interpreting the statute. The potential conflict between a broad interpretation of the NSPA by the courts and United States foreign policy efforts at solving the worldwide problem of illicit movement of archaeological materials presents a final consideration in applying the NSPA to movements of foreign origin archaeological materials in the United States.

1. THE NSPA LEGISLATIVE HISTORY: A POOR INTERPRETATIONAL AID

Congress intended the NSPA to reach organized criminals who steal property in one state of the United States and sell it to persons in different states.⁵⁷ Congress also intended the NSPA to reach

Cir. 1960) (section 2314 reaches all ways by which owners are wrongfully deprived of the use or benefit of their property).

52. 18 U.S.C. § 2315 (1976).

53. In addition, the aggregate value of the stolen property must exceed \$5000 to bring charges under the NSPA. 18 U.S.C. §§ 2314-2315 (1976). Value, the price a willing buyer would pay a willing seller, may be determined at any time during the receipt or concealment of the stolen property. 545 F.2d at 1004.

54. See text accompanying notes 57-58 *infra*.

55. See, e.g., *Pearson v. United States*, 378 F.2d 555, 560 (5th Cir. 1967); *United States v. Tannuzzo*, 174 F.2d 177, 180 (2d Cir.), *cert. denied*, 338 U.S. 815 (1949).

56. See text accompanying notes 65-89 & 108-112 *infra*.

57. *United States v. Sheridan*, 329 U.S. 379 (1946); *United States v. Patten*, 345 F. Supp. 967 (D.P.R. 1972); *Cooper v. North Jersey Trust Co.*, 226 F. Supp. 972 (S.D.N.Y. 1964); H.R. REP. NO. 1599, 73d Cong., 2d Sess. 3 (1934); 78 CONG. REC. 6981 (1934) (characterizing the NSPA legislation as anti-gangster and anti-racketeer). See Note, *supra* note 28, at 170. Congress' purpose in passing the NSPA was to discourage both the receiving of stolen goods and their initial taking. 545 F.2d at 994. It was originally drafted as an extension of the provisions of the National Motor Vehicle Theft Act of 1919, 18 U.S.C. § 2312 (1976)

thefts of material moving in interstate or foreign commerce.⁵⁸ The recorded legislative history of the NSPA and its various amendments do not mention foreign situs thefts.⁵⁹ Congress simply never contemplated including or excluding foreign situs thefts, archaeological or otherwise, within the scope of the NSPA.⁶⁰

Courts often look to legislative intent in the face of a statute's

(NMVTA). For a brief review of the legislative history and purpose of the NMVTA, see *United States v. Turley*, 352 U.S. 407, 413-17 (1957); Annot., 56 A.L.R.2d 1309 (1957).

The NSPA has been used in some foreign commerce cases. In two cases, courts convicted defendants under the NSPA of receiving and/or transporting in interstate and foreign commerce Canadian bonds that they knew to have been stolen in Canada. *United States v. Rabin*, 316 F.2d 564 (7th Cir.), cert. denied, 375 U.S. 815 (1963); *United States v. Greco*, 298 F.2d 247 (2d Cir.), cert. denied, 369 U.S. 820 (1962). In each case the court had to decide whether the NSPA applied to bonds stolen beyond the territorial limits of the United States. Both courts held that the NSPA applied whenever the courts determined that the materials were stolen in another country. 316 F.2d at 566; 298 F.2d at 251. As the *McClain* court explained, "The Republic of Mexico, when stolen property has moved across the Mexican border, is in a similar position to any state of the United States in which a theft occurs and the property is moved across state boundaries." 545 F.2d at 994. *Contra*, Note, *supra* note 28.

58. H.R. REP. NO. 1599, 73d Cong., 2d Sess. 3 (1934); 78 CONG. REC. 8777-78 (1934).

59. Note, *supra* note 28, at 170. One express exception was an amendment to extend the NSPA to any property seized in violation of law or confiscated by a foreign government. For the clearest discussion of the amendment, see *Extending the National Stolen Property Act to Confiscated Property: Hearings on H.R. 9669 Before Subcomm. No. 3 of the Comm. on the Judiciary of the House of Representatives*, 77 Cong., 3d Sess. (1940); 86 CONG. REC. 12971-98 (1940). The debate on the amendment focused on American owned commercial property and raw materials that a foreign government confiscated and then tried to sell in the United States. The amendment did not pass.

60. Note, *supra* note 28, at 170. Foreign situs archaeological thefts generally are thefts of foreign situs items that may then be put into United States foreign commerce. One case has held that Congress intended the NSPA to apply to acts committed in a foreign country intended to have an injurious effect on United States foreign commerce. *United States v. Braverman*, 376 F.2d 249, 251 (2d Cir.), cert. denied, 389 U.S. 885 (1967). In *Braverman*, the court held that the cashing of counterfeit money orders drawn on an American bank in a foreign country constituted transportation of stolen property in United States foreign commerce. The United States was directly and clearly injuriously affected in a manner predetermined at the time of the extraterritorial act of cashing the money orders. *Braverman* knew when he cashed the counterfeit money orders in Brazil that he was putting them into United States foreign commerce because they ultimately had to be paid in New York by the bank against which they were drawn. *Id.* The only possible value of the stolen goods derived from their potential entrance into United States foreign commerce.

In the foreign situs archaeological theft cases, however, no clearly injurious and predetermined effect on United States foreign commerce analogous to cashing the counterfeit money orders takes place at the time of any alleged "theft." The value of the particular goods may be captured independent of their future entry into United States foreign commerce. The *Braverman* decision is therefore too limited to support the general application of the NSPA to foreign situs archaeological theft cases insofar as it requires a direct or proximate injury on United States foreign commerce. The *Braverman* rationale can support applying the NSPA to thefts perpetrated with the intent to enter the cultural materials into United States foreign commerce. Proof of such intent may be impossible however.

ambiguity.⁶¹ Alternatively, even when the facts clearly fit within the letter of a statute, a court may refuse to apply the statute because to do so would not be "within its spirit, nor within the intention of its makers."⁶² Because Congress never specifically considered the application of the NSPA to foreign situs archaeological thefts,⁶³ legislative intent is unclear and neither of these two court practices can be of substantial application.

Statutes are often applied to situations not specifically contemplated by their framers. However, enforcement difficulties are encountered and policy considerations are raised in applying the NSPA to movement of foreign origin archaeological materials in the United States which are absent in usual NSPA cases. For instance, application of the NSPA to movement of foreign origin archaeological materials raises considerations of national versus international interests in the distribution and degree of freedom of movement of art.⁶⁴ Because the NSPA legislative history and policy provides an inadequate rationale for its application to such movements, its applications should be evaluated and alternative solutions should be considered.

2. DETERMINING WHETHER CULTURAL GOODS ARE "STOLEN" WITHIN THE MEANING OF THE NSPA

Determining whether property has been stolen so that the NSPA may be applied⁶⁵ presents a difficult task in the context of movement of foreign origin archaeological materials within the United States.⁶⁶ Nations have ownership and theft laws that often differ from United States' statutes.⁶⁷ Courts attempting to choose and apply the myriad possible laws could face a very difficult task. At least one author has characterized the application of the NSPA to foreign situs thefts as improper since the property has not been stolen within the territorial jurisdiction of the United States.⁶⁸ This

61. *E.g.*, 545 F.2d at 996.

62. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

63. See note 59 *supra* and accompanying text.

64. See Bator, *Regulation and Deregulation of International Trade in ART LAW: DOMESTIC AND INTERNATIONAL* 299 (L. Duboff ed. 1975); Merryman, *supra* note 6, at 233.

65. For a discussion of the "stolen" requirement, see Blakey & Goldsmith, *supra* note 41, at 1551.

66. See notes 65-89 and accompanying text.

67. See note 18 *supra*. For instance, many countries (e.g., Afghanistan, Honduras, Peru and Thailand) assert national "ownership" or "protection" of all cultural materials, but recognize the right of private ownership of them.

68. Note, *supra* note 28.

view ignores other ways of characterizing the application of the NSPA, such as that by the *McClain* court. *McClain*⁶⁹ has simplified these difficulties by holding that courts should apply the broad American definition of theft⁷⁰ and use foreign local ownership laws to determine whether foreign origin archaeological materials have been "stolen."⁷¹

a. Use of Foreign Ownership Laws

The *McClain* court's decision to use foreign ownership laws to apply the NSPA furthers the protection of the owner's recognized property rights worldwide.⁷² However, the foreign nation either must recognize private ownership of the archaeological material in question or claim national ownership before the material may qualify as stolen under the NSPA.⁷³ *McClain* holds that when local foreign laws do not recognize government or private ownership of archaeological cultural materials,⁷⁴ uncontrolled excavation or exportation of cultural materials from such countries does not violate the NSPA because the materials are not stolen from an "owner."⁷⁵ The *McClain* decision seeks to assure that persons will not be convicted under the NSPA when the removal of archaeological materials does not violate foreign penal codes. Such was the reason for remanding *United States v. McClain*, to determine whether the defendants had by their actions violated a Mexican statute.⁷⁶

69. 545 F.2d 988 (5th Cir. 1977). For a discussion of *McClain*, see text accompanying notes 33-40 *supra*.

70. See note 51 *supra*.

71. 545 F.2d at 1001-02. The *McClain* court rejected the argument that reference to foreign standards of ownership in the application of the NSPA to foreign thefts makes the Act void for vagueness since the "scienter requirement eliminates the possibility that a defendant is convicted for an offense he could not have understood to exist." *Id.* at 1002 n.30. What really is at issue here, is the application of the NSPA to the results of a foreign theft.

72. *Id.* at 996. Although the *McClain* court asserted that legislators intended the NSPA to protect owners of property worldwide, the court did not support its assertion. No legislative materials dealing with the NSPA mention foreign situs thefts. See note 59 *supra*.

Requiring the court to look beyond the familiar American statutes increases the burden on the court. Prosecuting attorneys and defense counsel should be able to apprise the court of the applicable foreign statutes, however.

73. 545 F.2d at 1000-01. A simple declaration of ownership is adequate. However, the *McClain* court carefully noted that the NSPA would not apply to property regulated, but not owned, by the government. 545 F.2d at 1002. The *McClain* court also held that possession of the material was not a necessary element of "ownership." 545 F.2d at 992.

74. See B. BURNHAM, *supra* note 18; K. MEYER, *supra* note 2, at 240-53. Note that many foreign statutes dealing with national ownership of cultural materials were not enacted until well into the 20th century. Consequently, a vast number of culturally important artifacts have been legally moved and exported, and are presently in museums and private collections.

75. 545 F.2d at 1001-02.

76. *Id.* at 1003.

When relying on foreign ownership laws to support NSPA prosecutions, determining the date of removal is of paramount importance. Changes in foreign ownership laws in recent years have created special problems in interpreting and applying foreign laws. First, the applicable foreign ownership laws must be identified.⁷⁷ Because the date of removal is often uncertain, such identification may prove troublesome. The *McClain* case was remanded to determine when the artifacts were removed and, when removed, which of the five successive Mexican antiquities laws governed.⁷⁸ Even when the correct foreign law has been isolated, it may be broader or narrower than American ownership statutes.⁷⁹ Problems in translating foreign statutes and international cultural connotative and denotative differences increase the difficulty in interpreting foreign laws that vest ownership of cultural materials.⁸⁰

Applying foreign ownership laws causes one final difficulty. The *McClain* court's holding requires only violation of private or national ownership rights for the NSPA to be applicable.⁸¹ The trans-

77. See, e.g., *id.*

78. *Id.* at 1000.

79. Incongruity between American and foreign descriptions of ownership is likely to cause confusion, exacerbated by changes of foreign laws.

For an example of the uncertainty arising from the recognition of a foreign state's laws, see the discussion in *McClain* of the various interpretations of the often revised Mexican Antiquities Statute. 545 F.2d at 997-1000.

The 1972 Mexican Antiquities Statute, for example, recognizes the private right to possess and to transfer cultural materials, but excludes the right to export them. 312 D. O. 16 (Mexico 1972). At the same time, the statute establishes national ownership of all archaeological materials. 545 F.2d at 1000. Other countries claim less comprehensive government ownership of cultural materials. B. BURNHAM, *supra* note 18. The American Antiquities Act of 1906 declares antiquities on lands owned or controlled by the government of the United States to be government property. 16 U.S.C. §§ 431-433 (1976). The Act does not provide for a separation of ownership and possession interests in cultural materials.

80. Macrory, *supra* note 9, at 21; see, e.g., 545 F.2d at 1000. In *McClain*, conflicting translations of various Mexican statutes formed a critical element of appeal. The court noted that the potential culture-supplied connotations of the laws are discernible and understandable only after a careful study of the entire culture and are potentially misleading after a partial reading of the statute out of context. The various words that can be translated into "ownership" provide a specific example. See B. BURNHAM, *supra* note 18, at 29, 88 (in Afghanistan, property is under the "protection and surveillance of the state"; in Hungary, all outstandingly important items are *museum* pieces, whether in public or private possession, and are protected by the state with rights of usage and conservation reserved by the state).

Recognizing these foreign law interpretational difficulties, the *McClain* court noted that, in general, penal laws should be construed strictly, 545 F.2d at 995 (citing *United States v. Boston & M.R. Co.*, 380 U.S. 157, 160 (1965)), and that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 545 F.2d at 995 (quoting *Rewis v. United States*, 401 U.S. 808 (1971)). Uncertainty in the application of foreign statutes also bears upon proving scienter, an element of the NSPA discussed below. See notes 108-18 *infra* and accompanying text.

81. 545 F.2d at 1001.

actional setting of NSPA prosecutions is the prosecution of a trafficker in stolen goods in the United States. However, when the NSPA is applied to foreign situs archaeological thefts from nations which allow private ownership, but prohibit export of archaeological materials, the action closely resembles United States enforcement of a foreign law prohibiting export,⁸² counter to the expressed American policy against enforcement of foreign penal laws.⁸³ As the *McClain* court properly notes, however, any apparent "enforcement of foreign laws" occurs only as a by-product of the prosecution of violations of the NSPA.⁸⁴ Prosecution under the NSPA can be distinguished from simple enforcement of the foreign law. Whether an item is owned by a foreign nation and exported in violation of foreign laws, and whether the defendant knew it was "stolen," are two separate questions involving different evidentiary issues. Both questions must be satisfactorily answered for conviction under the NSPA. The *McClain* court relied on the specific requirement of scienter to avoid unjust convictions under the NSPA as interpreted to use foreign ownership laws and the broad American definition of theft.⁸⁵

82. *Id.* at 1002; Macrory, *supra* note 9, at 21. Actually the *McClain* court could have interpreted the NSPA to establish a more limited duty to protect foreign governments. The court stated that governments had done as much as was reasonably possible by declaring ownership of all cultural materials and prohibiting their exportation. 545 F.2d at 1001. However, the court might have required governments to unite possession and ownership, or to at least manifest prior possession or perfected interest. Under the *McClain* interpretation, the NSPA applies to property a foreign government has never physically possessed, identified, catalogued, known about or for which it has never otherwise specifically accounted. The alternate interpretation, while providing more certain identification and thus facilitating recovery of stolen property, would not protect the majority of foreign situs archaeological property which remains unstudied. See notes 99-107 *infra* and accompanying text.

83. The United States has a long-standing policy of not executing the penal laws of another country. *Testa v. Katt*, 330 U.S. 386, 393 n.10 (1946); *The Antelope*, 23 U.S. (10 Wheaton) 66 (1825); RESTATEMENT (SECOND) CONFLICTS OF LAW § 89 (1971) (no action will be entertained on a foreign penal cause of action); Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44, 46 (1974); Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932); Note, *supra* note 28. For a discussion of this policy in the context of foreign situs archaeological theft, see *Proceedings*, *supra* note 8, at 112 ("American courts are reluctant to defer to the laws of another nation where they prejudice the rights of the United States or the rights of its citizens, *Emory v. Greenough*, 3 U.S. (3 Dall.) 369 (1797), or where the law contravenes an established policy (such as encouraging importation of ancient artifacts), *Loughian [sic] v. Loughian [sic]*, 292 U.S. 216 (1933).").

84. 545 F.2d at 996. To the extent the defendant does not know the foreign law, a court will not enforce the foreign law at all. Scienter is discussed at notes 108-18 *infra* and accompanying text.

b. Application of the American Definition of Theft

The *McClain* court's decision to apply the American definition of theft⁸⁶ to cases of foreign situs removal of archaeological materials supports the intent of the NSPA to protect owners of property.⁸⁷ The American definition of the term "stolen" has been interpreted to mean "acquired or possessed, as a result of some wrongful or dishonest act or taking whereby a person wilfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership."⁸⁸ The American definition of theft, tempered by the requirements of ownership and scienter adequately protects persons rightfully possessing property against unjust application of the NSPA.⁸⁹ Use of the American definition of theft rather than diverse foreign definitions also allows the scienter requirement to be applied more uniformly and proved more easily.⁹⁰

3. NSPA APPLICATION TO MOVEMENT OF ARCHAEOLOGICAL MATERIALS: LIMITING THE DIPLOMATIC NEGOTIATING POSITION?

Applying the NSPA broadly under the *McClain* interpretation to foreign situs archaeological thefts conflicts with present approaches and may conflict with future approaches by the United States toward an international solution.⁹¹ Broad application limits

85. 545 F.2d at 1001 n.30.

86. See note 51 *supra* and text accompanying note 70 *supra*.

87. See note 72 *supra* and accompanying text. In addition, the single American definition of "stolen" can be interpreted and applied more easily than the various foreign statutes or concepts of "stolen." See notes 77-79 *supra* and accompanying text.

88. *United States v. Anderson*, 532 F.2d 1218, 1227 (9th Cir.), *cert. denied*, 429 U.S. 839 (1976). See note 51 *supra*.

89. 545 F.2d at 1002 n.30. In any case, the NSPA cannot reach non-prohibited, unsupervised excavation in countries in which the local government "owns" archaeological materials but nonetheless consents to private possession and movement of the material. Such consent negates any notion of theft by excavation under the American definition of theft.

90. See note 87 *supra*.

91. In negotiating the 1970 UNESCO Convention, *supra* note 13, one of the basic United States principles was that the United States was "not prepared to give the rest of the world a blank check in that [the United States] would not automatically enforce, through import controls, whatever export controls were established by the other country" except within the narrow limits of Article 9. *Proceedings*, *supra* note 8, at 114. See note 14 *supra*. The current United States diplomatic position is that the United States "should cooperate with foreign countries to put some limitation on the illicit traffic in cultural property, and that [the United States] should actively seek to encourage these countries to liberalize their legislation where it unduly restricts the international circulation of cultural property." *Proceedings*, *supra* note 8, at 113. On this issue, see Bator, *supra* note 64, at 305 (American or international adoption of a blank check rule barring the import of anything that has been exported illegally

the negotiating position of the State Department in establishing, by international agreement, the details of protection of cultural materials. For instance, NSPA application differs in scope from the customs regulations⁹² and international instruments concerning the protection of cultural materials to which the United States is a party.⁹³ Each instrument narrowly defines the categories of antiquities covered and specifies the limited legal sanctions the United States will bring to bear. By contrast, the NSPA applies a potentially far more powerful sanction to all categories of cultural materials and, as interpreted in *McClain*, encourages blanket foreign ownership laws.⁹⁴ Unfortunately, blanket foreign ownership laws and export bans together often lead to the creation of black markets for cultural materials.⁹⁵

The theft and removal of cultural materials from their country of origin is an international problem. The NSPA, however, is a national statute, with prosecution dependent upon Justice Department interpretation. To the extent that NSPA prosecutions interfere with or retard efforts at a more comprehensive solution to the entire movement of foreign origin archaeological materials problem, prosecution should be reconsidered.

B. NSPA Enforcement Difficulties

The NSPA must be enforced effectively in order to deter the inflow and movement of stolen archaeological materials within the United States and thereby contribute toward the ultimate deter-

would be substantially undesirable and an administrative nightmare so long as some art exporting countries are thinking in terms of an embargo of cultural materials).

92. United States Customs Law, 19 U.S.C. §§ 2091-2095 (1976), regulates the importation of pre-Columbian monumental or architectural sculpture or murals. This statute, the 1970 UNESCO Convention, and the United States-Mexico Treaty all have provisions regarding cultural property defined by the instrument and foreign statutes as stolen. Instead of criminal provisions, in each case return of the property is called for.

93. *E.g.*, United States-Mexico Treaty, *supra* note 16; 1970 UNESCO Convention, *supra* note 13. The State Department does not favor criminal penalties for the importation of illegally exported cultural materials. The Department does favor seizures and forfeitures of specific materials listed by the Secretary of the Treasury or specifically included in agreements between the United States and other State Party signatories to the 1970 UNESCO Convention. See *Proceedings*, *supra* note 8.

94. See *Macrory*, *supra* note 9, at 23. Several countries have already brought their antiquities under the protection of the NSPA by declaring ownership of all cultural materials. They have also prohibited exportation of the materials without government permission. Examples of such nations include Algeria, Egypt, Greece, Honduras, and Turkey. *Id.* at 23 n.7.

95. *Bator*, *supra* note 64, at 304; *Nafziger*, *Controlling*, *supra* note 3, at 71. Such extreme foreign laws limiting the dispersion of cultural materials may not be in the United States' overall interest. *Bator*, *supra* at 304. See note 64 *supra*.

rence of the destructive initial movement of cultural materials. The NSPA's deterrent effect, however, diminishes in direct relation to its enforcement difficulties and the improbability that the NSPA will reach all the parties to the illicit movement of the cultural materials.⁹⁶ Enforcement problems begin with inadequate study of archaeological materials to facilitate recognition of stolen materials and proof of scienter.⁹⁷ NSPA application may also have a counter-productive effect on the highly visible members of society who handle the bulk of cultural materials. Antiquity dealers, scholars, and museum staff members, upon whose expert knowledge, services, and cooperation successful enforcement of the NSPA may depend, can be unnecessarily alienated by overly aggressive enforcement of these criminal provisions.⁹⁸ The enforcement difficulties accompanying NSPA application to movement of foreign origin archaeological materials in the United States accentuate the need for alternative solutions.

1. THE UNSTUDIED NATURE OF ARCHAEOLOGICAL MATERIALS HAMPERS THEIR RECOGNITION AS STOLEN

As discussed above, applying the NSPA to the movement of foreign origin archaeological materials requires an initial determination of which country's ownership statutes pertain and whether any property has been "stolen."⁹⁹ To answer the first question, a court must be able to determine the country of origin and date of initial private ownership or export of the cultural materials. In *United States v. Hollinshead*, a crucial question in determining theft was whether the more stringent Guatemalan ownership law applied or whether the object originated in British Honduras and may not have

96. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 287 (1968).

97. Also, the NSPA can reach only persons with minimal jurisdictional contacts with the United States. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). See *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself.").

98. These antiquity dealers, scholars, and museum staff members are easily reached by civil suits for the return of the stolen materials since they are usually easy to locate and continued employment is substantially dependent on reasonable cooperation with law enforcement officials. See notes 131-45 *infra* and accompanying text; Comment, *supra* note 3, at 65. Increasing the burden on these persons in their efforts to ensure that they are not even appearing to be associated with stolen goods, by an aggressive enforcement of the NSPA with its broad definition of stolen goods, may discourage these persons from undertaking many of the services they presently undertake.

99. *United States v. McClain*, 545 F.2d 988, 1003 (5th Cir. 1977). See notes 65-90 *supra* and accompanying text.

been "stolen."¹⁰⁰ In *United States v. McClain*, the dates of initial ownership and export were critical in determining which of the five different Mexican antiquities laws governed.¹⁰¹

Unfortunately, the academic community has catalogued or studied only a small percentage of the monuments and archaeological sites known to exist in the world.¹⁰² As a result, the provenance and date of export of particular objects often cannot be pinpointed once they have been removed from their natural settings. Additionally, many cultures spanned land areas that now encompass several modern states, making it impossible to identify certain materials as having originated in a particular country and thus "owned" under that country's law.¹⁰³ Finally, since many countries only recently have passed legislation addressing the issues of theft and the national ownership of cultural materials,¹⁰⁴ an unstudied object could have been removed from the country before the effective date of any government ownership statute.¹⁰⁵ Proving an archaeological material was illegally removed and hence "stolen" under the NSPA is a more complex and difficult procedure than proving a normal commercial good to have been stolen.¹⁰⁶ No American statutory solution can correct this problem of lack of study of archaeological materials.¹⁰⁷

100. *United States v. Hollinshead*, 495 F.2d 1154, 1154 (9th Cir. 1974). In *Hollinshead*, since Guatemalan law was more stringent than Honduran law, the origin of the article in question was crucial to determine whether the object was stolen.

101. See 545 F.2d 988 (5th Cir. 1977). See note 38, *supra*.

102. See note 2 *supra*. The existence of small, portable art objects such as statuettes, clay tablets, jewelry, and vases compounds the problem. The portability and sheer volume of these art objects makes them difficult to discover and trace while in transit.

103. The Mayan culture spanned many of the present nations of Central America and Mexico. This has resulted in present difficulties in attributing unstudied Mayan materials to a specific source nation. See, e.g., K. MEYER, *supra* note 2, at 15.

Trade is an additional source of legitimate doubt as to provenance of cultural materials. For instance, there were trade exchanges among Old World civilizations such as the Hittites and Egyptians, the Minoans and the Mycenaeans of Greece and even between the Mycenaeans and the contemporary Western Europeans. See R. EHRICH, *CHRONOLOGIES IN OLD WORLD ARCHAEOLOGY* (1965).

104. See 545 F.2d at 1000. See note 74 *supra*.

105. E.g., 545 F.2d at 1001. See K. MEYER, *supra* note 2, at 15 (describing an art dealer who explained that he would escape the 1970 UNESCO Convention rules by convincing royalty to swear that antiquities the dealer sold had been in their family collections for centuries).

106. Blakey & Goldsmith, *supra* note 41, at 1516, 1602. It is difficult to identify stolen property under any circumstances, but especially so when a fence sells the goods to unsuspecting customers, thus effectively destroying the evidence of the theft. "A civil plaintiff generally finds it difficult to establish that his property has been converted since receivers legitimize and dispose of the goods rapidly." *Id.*

107. International cataloging and study of cultural materials will increase buyers' and

2. THE UNSTUDIED NATURE OF ARCHAEOLOGICAL MATERIALS INCREASES SCIENTER PROOF PROBLEMS

Once the correct ownership laws have been identified and the property has been characterized as stolen, conviction under the NSPA still requires proof of scienter: that the defendant knew the cultural material was stolen¹⁰⁸ or inferred the theft from the circumstances.¹⁰⁹ The special characteristics of unstudied materials make meeting the burden of proof on this issue quite difficult.¹¹⁰ Significant academic ambiguity concerning an artifact's country of origin or date of initial private ownership or export reduces the likelihood that an individual defendant had the necessary scienter independently of a confession.¹¹¹

Those persons who actually remove archaeological goods and traffic in them quite likely meet the scienter standards. The NSPA generally will not reach these persons, however, because they often lack the minimal contacts with the United States needed to be subject to American jurisdiction.¹¹² As the connection between the final holder and the original thief becomes more tenuous, the likelihood that the holder of cultural materials knew, or more importantly, the likelihood that such knowledge can be proven, diminishes.¹¹³ Even archaeologists and other experts may only suspect that an object is stolen.¹¹⁴ Indeed, in the only three NSPA convictions involving movement of foreign origin archaeological materials, either public descriptions of the object were enough to strongly imply knowledge of the theft or the defendants admitted that they knew the objects were stolen.¹¹⁵

governments' ability to identify stolen materials. B. BURNHAM, *THE ART CRISIS* 27 (1975) ("Art recoveries result more often from recognition of a stolen object when it is offered for sale than from tracking a thief."). Local foreign national thieves will theoretically be affected by effective prosecution of archaeological thefts because such enforcement is likely to diminish their market.

108. The NSPA requires that the defendant knew that the goods had been stolen, converted, or taken by fraud. 18 U.S.C. §§ 2314-2315 (1976). See, e.g., *United States v. Tanuzzo*, 174 F.2d 177, 180 (2d Cir.), cert. denied, 338 U.S. 815 (1949). For a discussion of the scienter requirement, see Blakey & Goldsmith, *supra* note 41, at 1558.

109. *United States v. Werner*, 160 F.2d 438, 441-42 (2d Cir. 1947).

110. One source has characterized proof of scienter as the chief difficulty in applying the NSPA effectively. Comment, *supra* note 3, at 59.

111. See notes 77-80 & 99-105 *supra* and accompanying texts.

112. See note 97 *supra*.

113. Blakey & Goldsmith, *supra* note 41, at 1562 (a master fence is well insulated from leaving detectable direct evidence that can be used to establish the requisite state of mind).

114. The line between "knowing" and "suspecting" would be decided by a court as a mens rea proof question.

115. See note 25 *supra* and the text accompanying notes 28-40 *supra*.

Confusion over the kind of knowledge necessary to meet the NSPA scienter requirement further hinders enforcement. The requirement can be interpreted to require one of two different kinds of knowledge: knowledge that the article was illegally exported from a country, or knowledge that the property was taken from an actual owner.¹¹⁶ These two interpretations differ substantially. As discussed in the introduction, illegal export is normally a separate crime from stealing from an owner.¹¹⁷ Application of the NSPA is predicated on the existence of property stolen from an owner; exportation is irrelevant except as evidence of theft in the case of nationally owned materials. Mere scienter of illegal export would not necessarily ensure that the defendant knew the object was "stolen" from an owner, a basic element in the American definition of theft.¹¹⁸ A scienter interpretation requiring only "knowing that the material was exported illegally" would broaden the reach of the NSPA. However, such an interpretation would weaken the major safeguard, scienter, against unjust convictions in the United States for foreign situs acts which the *McClain* court cited in support of the use of foreign ownership laws and the broad American definition of theft in enforcing the NSPA.¹¹⁹

The unstudied nature of archaeological materials and the NSPA's stringent scienter requirement limit the capacity of the NSPA to convict all the people involved in the illicit movement of cultural materials. A weaker scienter standard alone cannot cure the deficiency and creates the spectre of unjust convictions in addition. This suggests that to better control the illicit movement of archaeological materials in the United States there is a need for, in addition to increased worldwide study of cultural materials, a legal

116. *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), did not reach this issue. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), reached but did not settle the issue. The *Hollinshead* court, however, held that the defendant need not know the actual law of the place of the theft so long as the property was stolen and he or she knew it was stolen. 495 F.2d at 1154. On its facts *Hollinshead* was an easy case, distinguishable from cases involving the theft of unstudied materials. In *Hollinshead*, the stele was a well-known, magnificent stele cut into 19 pieces and exported under circumstances which led the *McClain* court to comment that "[a]nyone would have known that it was stolen." 545 F.2d at 1001 n.28. The applicable foreign concepts of ownership for the stele were comparable to the general American concepts of ownership. In *McClain*, however, the foreign and American concepts of ownership were not necessarily comparable, and the case was remanded to determine the ownership issue before reaching the scienter issue.

117. In the case of theft from a nation allowing only internal private ownership, illegal export and theft coincide. See, e.g., 545 F.2d 988 (5th Cir. 1977); notes 45-48 *supra* and accompanying text.

118. See 545 F.2d at 995; Macrory, *supra* note 9, at 23.

119. 545 F.2d at 1001-2 n.30 ("the specific scienter requirement eliminates the possibility that a defendant is convicted for an offense he could not have understood to exist").

tool with a minimal or no scienter requirement instead of applying the NSPA.

3. THE ORIGINS OF UNSTUDIED MATERIALS CAN EASILY BE FALSIFIED

To avoid conviction for possessing stolen materials, a person has an incentive to obscure the origin of property that has been stolen. When the stolen property is cultural material, this problem has critical importance. Any obscurity of cultural information is intellectually costly and a major element in the overall problem of illicit movement of foreign origin archaeological materials. The true origin of unstudied cultural materials can be easily concealed.¹²⁰ When similar cultural materials are found in several modern countries with varying national laws defining ownership of cultural materials, the problem of concealment of the origins of cultural materials is acute. For example, many Central American nations have archaeological materials similar to Mexico's that are being moved illicitly in similar manners to the same markets.¹²¹ Some individuals smuggle archaeological materials from country to country in order to fake provenance or otherwise benefit from more lenient laws.¹²² For instance, the old Mexican antiquities statutes¹²³ were more lenient than the present Guatemalan statute, which dates from 1947.¹²⁴ Thus, artifacts originating in Guatemala and moved after 1947, but attributed to Mexico before 1972 would not be "stolen" under the NSPA.¹²⁵ A person need only forge documents or other evidence to support allegations of ownership before the effective dates of restrictive statutes. Once this has been done, and the materials can not be proven to be stolen, the holders will escape prosecution under the NSPA.¹²⁶ For example, one art dealer was going to have members of royal families swear that various antiquities had been in their family collections for centuries.¹²⁷

The NSPA, therefore, effectively puts a premium on the falsification and destruction of the history of cultural materials and even the mutilation of readily recognizable objects. The incentives thus created contravene common sense and the express goal of numerous

120. See notes 103 and 105 *supra*.

121. See K. MEYER, *supra* note 2, at 240.

122. 495 F.2d 1154 (9th Cir. 1974).

123. 545 F.2d at 997-1000.

124. See B. BURNHAM, *supra* note 18, at 85.

125. See note 25 *supra* and text accompanying notes 33-40.

126. See, e.g., 545 F.2d 988 (5th Cir. 1977). See note 105 *supra*.

127. K. MEYER, *supra* note 2, at 15. See note 105 *supra* and accompanying text.

international efforts¹²⁸—the protection of cultural materials.¹²⁹ But, no solution involving penalties for possession or handling recognizable property can avoid this problem.¹³⁰

III. CIVIL REMEDIES ARE MORE EFFICIENT THAN CRIMINAL SANCTIONS TO CONTROL THE ILLICIT MOVEMENT OF ARCHAEOLOGICAL MATERIALS IN THE UNITED STATES

Civil action recovery of stolen property provides an effective additional deterrent to the importation of, and trade in, illegally moved cultural materials.¹³¹ A foreign government can generally judicially recover stolen property that it locates in the United States only by bringing a civil action for recovery,¹³² even though a criminal conviction of theft or for handling "stolen materials" may have a collateral estoppel effect in a subsequent civil action to recover the property.¹³³ Property "stolen" under criminal law is "stolen" for civil recovery purposes, thus the same problems in ascertaining the stolen nature of foreign origin archaeological materials under the NSPA will be important in civil recovery and damages cases. The foreign government can, of course, purchase the artifact from a willing seller or in the case of special bilateral agreements, such as the United States-Mexico Treaty,¹³⁴ request the United States government to intercede on its behalf in recovery actions.¹³⁵ The scarcity of reported cases suggests a greater reliance on private negotiations than on judicial relief in recovering important cultural property.¹³⁶

128. See, e.g., 1970 UNESCO Convention, *supra* note 13; United States-Mexico Treaty, *supra* note 16.

129. In addition, regardless of whether the criminal is caught and punished, once the initial, unstudied movement takes place, the cultural damage is done. See notes 6-7 *supra* and accompanying text.

130. See Fishman & Metzger, *Protecting America's Cultural and Historical Patrimony*, 4 SYR. J. INT'L L. & COM. 57, 69 (1976).

131. Blakey & Goldsmith, *supra* note 41, at 1601.

132. See, e.g., *Guatemala v. Hollinshead*, No. 6771 (Super. Ct. Los Angeles, Cal., filed Dec. 29, 1971), reprinted in F. FELDMAN & S. WEIL, *ART WORKS: LAW, POLICY, PRACTICE* 597-609 (1974).

133. Blakey & Goldsmith, *supra* note 41, at 1604 n.481. Most courts have rejected extension of a collateral estoppel effect to subsequent civil cases because of the absence of mutuality. However, some jurisdictions have not followed this reasoning, and have allowed prior criminal judgments to be admitted into evidence in civil cases. FED. R. EVID. 803 (22), Advisory Committee notes, at 132 (West 1975).

134. See note 16-17 *supra*.

135. See note 17 *supra* and accompanying text; Comment, *supra* note 3, at 60, 65.

136. Comment, *supra* note 3, at 60.

The standard civil conversion action in state court¹³⁷ allows the foreign state, in cases in which it can successfully assert ownership of the stolen property, to recover the property without compensating the current holder,¹³⁸ thus providing its own incentives for application and a deterrent to handling stolen property.¹³⁹

A. *Civil Recovery Is Preferable to Criminal Sanctions*

Civil recovery suits are preferable to criminal actions in the area of illicit movement of archaeological materials for three basic reasons: (1) civil sanctions encourage victims to sue converters, thus increasing the chances of discovering the various persons in the chain from owner to holder and thereby increasing the costs to the thieves, in avoiding suit and in the increased resulting penalties; (2) civil sanctions are more broadly applied than criminal sanctions and therefore may reach some persons not otherwise reachable by criminal sanctions; and (3) most of the constitutional protections allowed a criminal defendant are not allowed a civil defendant, thus the civil plaintiff is favored over the prosecutor in sanctioning holders of stolen materials.¹⁴⁰ The plaintiff need only prove ownership to have the material returned; scienter need not be proved.¹⁴¹ The in-

137. See, e.g., CAL. PENAL CODE § 496 (West Supp. 1977); ARIZ. REV. STAT. ANN. § 13-621 B (West Supp. 1977). There is no federal statute providing for civil recovery of stolen property.

138. In most American jurisdictions recovery is possible under the common law grounds of conversion; a *bona fide* purchaser who receives goods from one who has stolen them, or merely has no power to transfer them, becomes a converter when he takes possession. RESTATEMENT (SECOND) TORTS § 229, Comment h (1965).

139. Successful recovery from private collectors by countries of origin would undermine the economic safety of investing in antiquities. This "would have a chilling effect on the security-conscious investors who stimulate the smuggling of the finest pieces." Comment, *supra* note 3, at 63.

State laws providing for the recovery of stolen property by the rightful owner generally do not require that the holder know that an object is stolen before requiring return to its owner. *Id.*, at 59. See *Schumann-Heink & Co., Inc. v. United States Nat. Bank*, 108 Cal. App. 223, 230, 291 P. 684, 686 (1930) (a mere thief cannot pass title to stolen articles). See, e.g., UCC § 2-403 (1972 version); CAL. COM. CODE § 2403 (West Supp. 1977).

140. Blakey & Goldsmith, *supra* note 41, at 1601. In addition, civil recovery suits do not involve problems of legislative history or potential interference with the operations of the State Department. Such problems are common with respect to the application of the NSPA in this area.

141. Blakey & Goldsmith, *supra* note 41, at 1602. A successful civil recovery suit entitles the plaintiff to recover the property or the fair market value of the property at the time and place of conversion. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 403 (1973); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 123, at 463 (1935). However, because of the problem in proving that the defendant stole goods other than those in the defendant's possession, the plaintiff's recovery is practically limited to the market value of the goods actually in the defendant's possession. Blakey & Goldsmith, *supra*, at 1602.

creased likelihood of penalty, due to the deletion of the scienter requirement, may make civil recovery a more meaningful deterrent to trafficking of cultural materials in the United States than the NSPA presently is.¹⁴²

This forced return of commercially valuable cultural materials may be, in itself, an adequate encouragement to museums, art dealers, and private collectors to deal much more carefully with archaeological materials. In *United States v. Hollinshead*,¹⁴³ for example, while the government was getting a criminal conviction with a fine of \$5,000, the government of Guatemala settled a civil action for the return of the stele. The value of the stele was allegedly over \$200,000.¹⁴⁴ Successful recoveries hopefully will cause buyers and sellers of cultural materials in general to be more alert to the provenance of the archaeological materials they handle. Perhaps the sellers may be forced by market pressure to document by warranty the provenance in some manner acceptable to the buyers. Such indirect deterrence may also slow the initial movement of the antiquities not reachable directly by United States statutes.

The basic initial result is the return of the object to the owner. But, additionally, over a series of successful recoveries of cultural materials, a corpus of evidence may be developed on which successful NSPA convictions may be based.¹⁴⁵ For instance, identifiable dissatisfied customers may be the first step toward determining a pattern of activity of one or more illicit transporters of archaeological materials. Thus, despite the problems discussed below, civil recovery is probably a more efficient general use of United States Government resources than application of the NSPA at this time to control the illicit movement of foreign origin archaeological materials.

B. Some of the Same Limitations of the NSPA Apply to Civil Remedies

Unfortunately, civil recovery too has some limitations. The basic limitation of the preponderance of unstudied cultural materi-

142. See note 139 *supra*.

143. 495 F.2d 1154 (9th Cir. 1972).

144. Answer in *Guatemala v. Hollinshead*, No. 6771, paragraph VIII (Super. Ct. Los Angeles, Cal., filed Dec. 29, 1971), reprinted in F. FELDMAN & S. WEIL, *ART WORKS: LAW, POLICY, PRACTICE* 597, 603 (1974).

145. See Blakey & Goldsmith, *supra* note 41, at 1607 ("plaintiffs' attorneys may supply law enforcement officials with information to help convict receivers in the hope of benefitting by collateral estoppel from a criminal prosecution").

als often prevents the recognition of property as stolen and the determination of its provenance.¹⁴⁶ As noted under the NSPA, no American action alone can alleviate this limitation which leaves criminal and civil remedies, as national efforts, second best to international solutions.

Civil suits are rarely brought because they are expensive, time-consuming, and possibly embarrassing for a foreign nation to bring in United States courts.¹⁴⁷ *Guatemala v. Hollinshead* vividly illustrates the problem with pursuing a civil remedy.¹⁴⁸ The facts are the same as those of the *Hollinshead* facts recounted in the introduction. This civil suit to recover the stele, filed in 1971, was finally dismissed on October 19, 1976; the stele was returned to Guatemala. On the other hand, *McClain* involved many undescribed small archaeological materials.¹⁴⁹ No civil action to recover the items has yet been brought. The United States could partially alleviate these problems by encouraging civil recovery actions by agreeing, in general or specifically in treaties, to represent national or private owners of stolen cultural property in civil actions for recovery. Such is the case for specific types of monuments and particularly important studied artifacts under the United States-Mexico Treaty¹⁵⁰ and the United States customs regulations dealing with pre-Columbian monuments.¹⁵¹ No changes in the normal burden of proof or Federal Rules of Civil Procedure need be attempted, nor are any likely to be politically acceptable in the United States at this time; each plaintiff should be bound to prove his ownership before recovery is allowed.

Normally, theft victims merely recover from their insurance companies, which then pass the costs along to a larger risk pool rather than aggressively pursuing the thieves.¹⁵² Thus, normally the deterrence expected from private law enforcement is not realized.¹⁵³ This avenue of recovery is not available to foreign nations whose

146. Blakey & Goldsmith, *supra* note 41, at 1516, 1602. See notes 99-107 *supra* and accompanying text.

147. SENATE REPORT, IMPORTATION, *supra* note 11; Nafziger, *Controlling*, *supra* note 3, at 73. See Rogers & Cohen, *supra* note 25, at 322; Comment, *supra* note 3, at 53 ("The possibility of retrieval by the country of origin depends on its ability to discover the whereabouts of the pieces, prove a claim that the object originated within its borders, and that it was exported in violation of its laws, or was stolen.").

148. See note 132 *supra* and accompanying text.

149. 545 F.2d at 992 ("terra cotta figures and pottery, beads, and a few stucco pieces").

150. See note 17 *supra*.

151. See note 92 *supra*.

152. Blakey & Goldsmith, *supra* note 41, at 1602.

153. *Id.* at 1603.

archaeological materials have been stolen, because they, as a rule, hold no insurance on unstudied, unexcavated archaeological materials and there is no insured pool to absorb the risks. Further, as noted above, the initial movement of archeological materials causes irreparable intellectual losses. These arguments point to the desirability of the employment of civil remedies for remedying the damages to the extent feasible and developing a corpus of information and pattern of enforcement to deter the initial destructive acts.

C. Other United States Government Interventions to Promote Civil Sanctions

Other American interventions that might be politically acceptable include encouraging civil recovery actions through the statutory award of legal fees from the losing party, for at least the plaintiff as a private attorney general,¹⁵⁴ or either party if prevailing in such a civil recovery suit. Similarly, the United States Government could underwrite awards of legal fees for successful plaintiffs in such actions. Both measures would be designed especially to encourage civil suits to recover less valuable stolen properties which might not normally warrant the necessary expenditures of legal fees and costs to recover. By making the loser pay the winner's costs of litigation, as well as forfeit the item if the holder loses, an added incentive to research provenance carefully before buying or litigating possession is provided. The other side of the argument is that any such incen-

154. For a discussion of the history and details of the private attorney general exemption to the rule that each party absorbs his costs of litigation, see Note, *Attorney Fee Awards and the Public-Interest Litigant*, 65 KENTUCKY L.J. 562 (1976). *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), held that express congressional authorization was needed for courts to award attorney's fees to plaintiffs in "private attorney general cases."

A reasonable statute applicable to civil cases involving movement of foreign origin stolen archaeological materials would be:

Unless contrary to existing statutory provision or considerations of justice demand otherwise, the court shall award reasonable attorneys' fees to a prevailing party whose status as a private attorney general under this statute has been established. To be considered a private attorney general, a party by carrying on his lawsuit must have (1) conferred a substantial benefit on the public or a significant class thereof, and (2) substantially vindicated an important public right or policy whose full effectuation of necessity depends both upon private vindication and an award of fees to make such private vindication economically feasible.

Note, *supra* at 590 (the elements of this proposed statute are reasonably discussed throughout the Note).

For a discussion of the awarding of reasonable attorney's fees and other reasonable expenses for participation in proceedings before federal regulatory agencies and for other purposes, see *Public Participation in Government Proceedings: Act of 1976: Hearings on S. 2715 before the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. (1976).

tives must be carefully controlled so as not to encourage an undue number of suits whose sole or basic intent is to harrass particular individuals.

A second potential intervention is the development of a federal civil damages recovery statute or the application of state civil damages recovery statutes.¹⁵⁵ This cause of action is rarely successful because of the difficulties in establishing the requisite aggravated state of mind.¹⁵⁶ The Model Theft and Fencing Act¹⁵⁷ provides an example of a possible federal civil damages recovery statute, based on the federal antitrust statutes. The Model Act attempts to encourage the realization of the deterrence value of private enforcement by financial incentives, yet minimize the inequities of excessive liability.¹⁵⁸ The Model Act would impose civil liability for damages if the plaintiff establishes the receipt or handling of stolen property, requisite scienter, and the ownership of the property by a preponderance of the evidence. Preponderance of the evidence represents a significant reduction from the level of proof required under criminal law, "beyond a reasonable doubt," and thus enables more converters to be sanctioned civilly than under criminal laws.¹⁵⁹ It is of course possible for a defendant convicted of a violation of the NSPA to also be sued civilly for return of the stolen property or its fair market value, as well as for civil damages. The Model Act would give collateral estoppel effect to issues resolved in criminal actions in subsequent civil cases as an incentive to ensure the bringing of civil actions after criminal actions. As a further incentive to the bringing of civil actions for damages, the Model Act would allow treble damages (actual damages including consequential and incidental losses), reasonable attorney's fees, and costs of investigation and litigation.¹⁶⁰ The treble damages and attorney's fee feature suggest that if the Act were passed, a significant growth of private attorney's specializing in recoveries of archaeological materials would occur.¹⁶¹

155. *E.g.*, CAL. PENAL CODE § 496 (West Supp. 1977); ARIZ. REV. STAT. ANN. § 13-621 B (West Supp. 1977). Both statutes subject criminal receivers to civil liability for treble damages, court costs and reasonable attorney's fees.

156. Blakey & Goldsmith, *supra* note 41, at 1602. See D. DOBBS, *supra* note 141, § 3.9, at 205; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 9-10 (4th ed. 1971).

157. Reprinted as Appendix B in Blakey & Goldsmith, *supra* note 41, at 1620-26. The act is discussed in fair detail in Blakey & Goldsmith, *supra*, at 1603-08.

158. Blakey & Goldsmith, *supra* note 41, at 1606.

159. *Id.* at 1603.

160. Model Theft and Fencing Act § 10, *reprinted in* Blakey & Goldsmith, *supra* note 41, at 1624.

161. Blakey & Goldsmith, *supra* note 41, at 1607.

IV. CONCLUSION

Archaeological materials illicitly removed from foreign countries continue to be moved in great quantities in the United States despite several international efforts to control the problem. The United States Government has expended significant efforts in two cases seeking criminal convictions under the NSPA of Americans accused of transporting archaeological materials illegally in the United States. This article suggests that government resources may be better focused in assisting foreign nations to recover the stolen property by United States Government assisted civil suits.

NSPA prosecutions offer the hope of quick and relatively inexpensive deterrence of the illicit movement of cultural materials. The only two reported court cases brought under the NSPA suggest, however, that because the NSPA is jurisdictionally limited to the United States, its effective range of application is limited. Peculiar enforcement difficulties in proving archaeological materials to be stolen and known to be stolen further limit its usefulness to only the most easily proven cases of illicit movement of archaeological materials.

From the start, the NSPA is a second best solution since the best solution to the international problem logically involves international cooperation, which as yet has not materialized. The NSPA alone cannot deter effectively the basic and most important damage caused by the illicit movement of cultural materials; the irreparable loss of cultural information that occurs when the object is first moved from its natural setting. Instead, the NSPA as a national statute focuses on the movement of the antiquities across United States borders and state lines¹⁶² after the bulk of the irreparable damage has been done.¹⁶³ The Act's criminal penalties, like any penalty, may encourage the material's physical destruction or the obfuscation of its provenance, both to the greater detriment of society than normally experienced with destruction of stolen, modern, replaceable goods.

Finally, the *McClain* court's present broad interpretation of the NSPA may hamper future State Department efforts to achieve effective international agreements in this area by narrowing their

162. See notes 5-7 & 25 *supra* and accompanying text. Recent United States Customs regulations, and to a lesser extent the United States-Mexico Treaty, also focus on the international movement of archaeological materials. See notes 92 and 16-17 *supra*.

163. See note 6 *supra* and accompanying text.

negotiating room.¹⁶⁴ The NSPA, as interpreted in *McClain*, can not be improved significantly by amendment because of its inherent limitations when applied to the movement of archaeological materials in the United States. *McClain* has applied the very broad American definition of theft. No amendments to the NSPA can change foreign standards of ownership nor the general inability to positively identify unstudied cultural materials as stolen or determine their provenance. An amendment could reduce the scienter requirement from knowledge of the "stolen" nature of the item, but such an amendment would not be in keeping with general American criminal law and would presumably be very difficult to pass. Thus, the NSPA should not be amended, but should only be applied in the most easily proven cases of theft. Rather, domestic legislative and legal assistance efforts should be applied toward encouraging civil recovery of stolen cultural property.

No simple solution to the complex illicit movement of archaeological materials problem exists. Any alternative solution necessarily must contain elements of weakness in common with NSPA application,¹⁶⁵ especially those stemming from the abundance of unstudied archaeological materials.

Practical immediate American efforts to help control the illicit removal of archaeological materials can involve several different directions. First, all likely solutions to the problem will depend on increased study of the cultural materials to enable them to be identified as missing, traced to their present location and recognized as stolen. Increased American support of existing national and international programs of study could reduce this obstacle to the effective control of illicit movement of cultural materials. Second, civil recovery of cultural materials is a much more broadly applicable American tool than the NSPA to sanction the illicit movement of cultural materials in the United States, because civil recovery does not require the proof of scienter that the object was stolen. Shift of emphasis of United States Government support from criminal cases to civil recovery of stolen cultural materials may then produce a greater deterrent of the illicit movement of cultural materials. Third, the best solution to the entire problem of movement of cultural materials lies in extensive international cooperation. The

164. See notes 91-95 *supra* and accompanying text.

165. For instance, any criminal or civil penalty for the illegal possession of cultural materials provides an incentive to falsify or destroy the history and identity of cultural materials of questionable or illegal origin.

United States and other art-importing countries have yet to ratify the 1970 UNESCO Convention and pass the necessary enabling legislation. The United States can actively work to make the UNESCO conventions operative and effective. In the interim, immediate, but limited progress can be pursued via bilateral and regional international agreements.