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MORE EFFECTIVE PROTECTION FOR NATIVE AMERICAN CULTURAL PROPERTY THROUGH REGULATION OF EXPORT

Antonia M. De Meo*

Brothers, — You see this vast country before us, which the Great Spirit gave to our fathers and us; you see the buffalo and deer that now are our support. — Brothers, you see these little ones, our wives and children, who are looking to us for food and raiment; and you now see the foe before you, that they have grown insolent and bold; that all our ancient customs are disregarded; the treaties made by our fathers and us are broken, and all of us insulted; our council fires disregarded, and all the ancient customs of our fathers; our brothers murdered before our eyes, and their spirits cry to us for revenge. Brothers, these people from the unknown world will cut down our groves, spoil our hunting and planting grounds, and drive us and our children from the graves of our fathers, and our council fires, and enslave our women and children.

— *The Prophecy of Metacomet*¹

Let us now not also take their past from them . . .

I. Introduction

Cultural property provides cultural, religious, historic, artistic, and scientific information about its creators and the context of its creation.² Often it forms the

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The author dedicates this article to her grandmother, Mrs. Orpha E. Basinger, who celebrates her one hundredth birthday at the time of this publication. The author admires Mrs. Basinger because she continually, even at age 100, strives for greater knowledge and learning. The author thanks Kristine Olson Rogers for her thoughtful advice and comments. The author is grateful to Ms. Rogers for her mentoring, support, and positive feedback which gave the author the encouragement she needed to make this article and law school a successful experience.

1. THOMAS E. SANDERS & WALTER W. PEEK, *LITERATURE OF THE AMERICAN INDIAN* 249 (1973). Metacomet was one of the sons of Osamekun, Massassoit of the Wampanoag Nation, who gave the Plymouth colonists the land now Massachusetts and Rhode Island. After Massassoit Osamekun died, the English conferred on Metacomet the title of Prince Philip. He attempted to keep peace between colonists and Native Americans, but unrest resulted in a war named for him, King Philip's War. The war ended in 1676 when Metacomet died. With the end of this war, organized Native American resistance in New England also ended. *Id.* at 248-49.

2. Recognizing that the modern concept of property is a European creation, the term "cultural

national patrimony of its creators and offers invaluable information to others. It is a basis of communication between different cultures because it speaks in a universal language and tells the story of past civilizations. Most people and governments generally agree that cultural property deserves protection and preservation and that it is the responsibility of national governments to oversee this protection.³ However, governments disagree on which types of cultural property should be protected and preserved, who should control it, and at what expense it should be protected.

One aspect of the international controversy surrounding cultural property protection and preservation concerns export regulations. Many art-rich, third world countries have strict export regulations or total export prohibitions, while art-poor, importing countries encourage free trade. The United States is in the midst of this controversy because we are both a major art importing nation and a nation incurring significant loss due to the pillaging of Civil War and Native American sites.⁴ Traditionally our laws have supported free trade.⁵ However, recently Native Americans have effectively lobbied government to gradually change our laws to offer more protection to cultural property. Still, we have no express export regulations. Some recent laws effectively limit export in particular circumstances involving criminal activity.⁶ This is a good start, but more should be done if we intend to preserve our cultural heritage for future generations.

II. Background

A. Definition of Cultural Property

Cultural property encompasses a variety of objects in many different sizes, shapes, and forms. For example, it may be baskets, pottery, masks, tapestries,

property" is used in this article to denote resource, item, object, heritage, artifact, etc., generally and interchangeably unless otherwise specifically defined in the discussion. "Cultural property" is not intended to imply property law concepts and "cultural resource" is not intended to imply natural resource law concepts. The author hopes that Native Americans do not take offense at the use of any of these imperfect terms.

3. See Earle A. Partington & Yves-Louis Sage, *The American Response to the Recovery of Stolen and Illegally Exported Art: Should the American Courts Look to the Civil Law?*, 12 COLUM.-VLA J.L. & ARTS 395 (1988).

4. See Aaron Sugarman, *The Treasures of America . . . Looted!*, CONDÉ NAST TRAVELER, July 1992, at 81, 85, 120; Derek V. Goodwin, *Raiders of the Sacred Sites*, N.Y. TIMES, Dec. 7, 1986, § 6 (Magazine), at 65.

5. Karen S. Jore, *The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit From Ineffective Laws Governing Cultural Property?*, 13 BROOK. J. INT'L L. 55, 80 (1987).

6. Archaeological Resources Protection Act of 1979 (ARPA), Pub. L. No. 96-95, 93 Stat. 721 (codified at 16 U.S.C. §§ 470aa to 470mm (1988)); Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), Pub. L. No. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. §§ 3001-3013, 18 U.S.C. § 1170 (Supp. II 1990)).

sculptures, or engravings.⁷ There is no universally accepted definition.⁸ It may be described as archaeological resources, antiquities, artifacts, art, cultural items, cultural resources, *objets d'art*, or relics.⁹ Generally, it is anything exhibiting physical attributes assumed to be the results of human activity.¹⁰ Within the broad scope of cultural property, however, are objects which are invaluable to particular groups of peoples because of their cultural or religious significance. These objects represent the cultural heritage of their creators and are in fact the cultural patrimony of these people. They offer their creators' descendants a "tangible connection to their cultural history,"¹¹ provide inspiration for creativity, and offer a means of communication between different peoples.¹²

[C]ultural property is the product and witness of the different traditions and of the spiritual achievements of the past and is thus an essential element in the personality of the peoples of the world . . . it is indispensable to preserve as much as possible, according to its historical and artistic importance, so that the significance and message of cultural property become a part of the spirit of peoples who thereby may gain consciousness of their own dignity¹³

Most civilizations have some form of cultural patrimony. For Americans an example is the Liberty Bell,¹⁴ for Greeks the Elgin Marbles,¹⁵ for Israelis

7. 1 LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE, DISCOVERY AND EXCAVATION 149-87 (1984). This chapter, titled "Content of the Archaeological Heritage," examines many different types of cultural property and explains the significant characteristics. See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, art. 1, Nov. 4, 1970, 823 U.N.T.S. 231, 234, reprinted in 10 I.L.M. 289, 289 (1971) (United Nations Educational, Scientific and Cultural Organization (UNESCO)) [hereinafter UNESCO Convention]. See also the implementing legislation enacted in 1983, Convention on Cultural Property Implementation Acts, Pub. L. No. 97-446, 96 Stat. 2351 (codified at 19 U.S.C. §§ 2601-2613 (1988)).

8. 1 PROTT & O'KEEFE, *supra* note 7, at 7. For a discussion of cultural heritage, see *id.* at 7-11.

9. See 16 U.S.C. § 432 (1988); 19 U.S.C. § 2601(2), (6) (1988); 16 U.S.C. § 470bb(1) (1988); 25 U.S.C. § 3001(3) (Supp. II 1990); UNESCO Convention, *supra* note 7, at art. 1.

10. Lorrie D. Northey, *The Archaeological Resources Protection Act of 1979: Protecting Prehistory for the Future*, 6 HARV. ENVTL. L. REV. 61, 63 (1982) (quoting ROBERT C. DUNNELL, SYSTEMATICS IN PREHISTORY 117 (1971)).

11. Jore, *supra* note 5, at 57-58.

12. 1 PROTT & O'KEEFE, *supra* note 7, at 8.

13. *Id.* at 9 (quoting the Preamble to the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works).

14. John H. Merryman & Albert E. Elsen, *Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects*, J. ARTS MGMT. & L., Fall 1982, at 5, 8 [hereinafter Merryman & Elsen, *Hot Art*].

15. The Elgin Marbles are carvings from the Parthenon which were removed and taken to Great Britain in the 1800s. The Greeks repeatedly demand their return, and controversy surrounds the rightful ownership of these precious objects. KARL E. MEYER, THE PLUNDERED PAST 170-80

the Dead Sea Scrolls,¹⁶ for Hungarians the Crown of St. Stephen.¹⁷ These are extreme and popular examples, but not all cultural patrimony is so easily identifiable to the public. Often outsiders consider the cultural patrimony of foreign cultures to be collectible art — a commodity to be traded for profit in both licit and illicit markets.¹⁸ This is precisely the situation Native Americans face: many of their cherished patrimonial objects, including Zuni war gods, Hopi ceremonial masks, and Iroquois wampum belts, are traded in the international art market, thus scattering them throughout the world in museums and private art collections.¹⁹

B. Protection of Cultural Property During War and Peace

Throughout history objects and sites of cultural significance have been pillaged and desecrated. In times of unrest it was common practice for conquerors to pillage their enemy's property. One French commander commented that, "[a]ntiquity is a garden that belongs by natural right to those who cultivate and harvest the fruit."²⁰ Napoleon was famous for his pillaging; in fact, the Louvre in Paris is filled with art looted from neighboring occupied countries.²¹ Yet, for as long as looting has occurred, it has been condemned, at least by the pillaged countries.

It was not until the mid-eighteenth century that the law gradually began to recognize the importance of preserving cultural property.²² Over the next 150 years protection of cultural property and preservation of all peoples' inalienable rights to their cultural heritage became fundamental principles to international regulation of armed conflicts.²³ Unfortunately, these principles had little effect on curtailing actual looting during war times. In World War II the Nazis systematically plundered public and private cultural property throughout Europe.²⁴ But then, in 1945, international laws were actually

(1973); 1 JOHN H. MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 4-13 (1987) [hereinafter 1 MERRYMAN & ELSEN, VISUAL ARTS].

16. MEYER, *supra* note 15, at 183.

17. Merryman & Elsen, *Hot Art*, *supra* note 14, at 8.

18. See generally MEYER, *supra* note 15. For a discussion of recent disputes over controversial objects of art and cultural patrimony, see *Collectors or Looters?*, ECONOMIST, Oct. 17, 1987, at 117.

19. Michael Haederle, *War Gods are Finally at Peace*, L.A. TIMES, Aug. 12, 1991, at E1; Marilynn S. Mason, *Ceremonial Masks Return Home*, CHRISTIAN SCI. MONITOR, June 12, 1991, at 14; Robert Suro, *Zunis' Effort to Regain Idols May Alter Views of Indian Art*, N.Y. TIMES, Aug. 13, 1990, at A1; Goodwin, *supra* note 4, § 6 (Magazine), at 65-66.

20. MEYER, *supra* note 15, at 64-65.

21. *Id.* at 65; see also 1 MERRYMAN & ELSEN, VISUAL ARTS, *supra* note 15, at 15-19 (reprinting CECIL GOULD, TROPHY OF CONQUEST 13, 30, 41-43, 48 (1965)).

22. 1 MERRYMAN & ELSEN, VISUAL ARTS, *supra* note 15, at 14; M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. & COM. 281, 288 (1983).

23. Bassiouni, *supra* note 22, at 289.

24. *Id.* at 292; 1 MERRYMAN & ELSEN, VISUAL ARTS, *supra* note 15, at 20-22 (reprinting

enforced, and several major Nazi war criminals were prosecuted for this pillaging. The destruction of cultural property was finally established as a war crime.²⁵

A recent example of international concern for cultural property during war times occurred in 1991 during the Gulf War, when the United States and allied forces used "smart bombs" to carefully avoid cultural and religious targets in the Middle East.²⁶ In an interview with Peter Jennings for ABC News, General H. Norman Schwarzkopf explained that pilots were required to incur greater risks by flying at lower altitudes to increase precision "in order to avoid destroying these religious shrines . . . [and] minimize damage of this nature."²⁷ (Interestingly, while the United States expended great efforts, both human and financial, to preserve our enemy's sacred sites and cultural property abroad, no such equal efforts are expended at home to preserve Native American sacred sites and cultural property from desecration.)

Curtailing pillaging during peaceful times is arguably even more problematic than curtailing it during times of war because it is private individuals rather than nations that sponsor the looting and desecration of cultural property.²⁸ Public perception of the danger to cultural property is greater during war times because the destruction is often more visible and public opinion is easily swayed against the enemy. However, during peaceful times enforcement is more difficult. There is an elaborate subculture of pothunters digging for artifacts, trafficking for profit, and effectively avoiding law enforcement.²⁹ Frequently damage to cultural property is not discovered

1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 29, 55-56, 58-60 (1948)).

25. Bassiouni, *supra* note 22, at 293; 1 MERRYMAN & ELSÉN, VISUAL ARTS, *supra* note 15, at 22-23 (reprinting 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1948)). Currently the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict governs the protection of cultural property during conflicts. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 (1956) (United Nations Educational, Scientific and Cultural Organization (UNESCO)) (often referred to as the 1954 Hague Convention). For discussion of related international laws, see Bassiouni, *supra* note 22, at 294-96.

26. In response to a critical human rights report after the war, the Foreign Office issued a response that "[t]he allies . . . went to great lengths to avoid civilian, cultural and religious targets." Michael Binyon, *Gulf Allies Blamed for Needless Civilian Deaths*, THE TIMES (London), Nov. 18, 1991, available in LEXIS, Nexis Library, MAJPAP File.

27. *World News Tonight with Peter Jennings: Special Edition* (ABC News television broadcast, Jan. 27, 1991), available in LEXIS, Nexis Library, Transcript File; see also Walter V. Robinson, *U.S. Bombs Oil Pumps to Fight Spill*, BOSTON GLOBE, Jan. 28, 1991, at National/Foreign 1.

28. See Bassiouni, *supra* note 22, at 298.

29. Ann M. Early, *Profiteers and Public Archaeology: Antiquities Trafficking in Arkansas*, in THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 39 (Phyllis Mauch Messenger ed., 1989) [hereinafter WHOSE PROPERTY?]; Spencer P.M. Harrington, *The Looting of Arkansas*, ARCHAEOLOGY, May-June 1991, at 23.

immediately, and the public is unaware of the amount of damage or the value of the objects and sites destroyed.³⁰ Additionally, damage may occur from "innocent" sources, including natural conditions, environmental pollution, urban development, and farming.³¹ But it is damage caused by looters that is the most disturbing and towards which our laws are directed,³² (*See figure 1*). However, because looters are often members of the local community stealing under the guise of recreational archaeology or treasure hunting, the public often does not view their activities as damaging or illegal.³³

C. International Art Market and Its Effects on Native Americans

The growth of the international art market contributes to public misconceptions concerning cultural property. Attending auctions has become a social event, and museums promote art to the public through extravagant, well-publicized exhibitions. Furthermore, auctions have encouraged and publicized record prices for art. The postwar art boom is said to have begun in Paris in 1952 when a Cezanne painting sold for the equivalent of over \$94,000 at auction.³⁴ By 1961 over \$2 million had been paid for a sculpture at auction. As prices continued to rise, art became a popular investment. *Fortune* magazine concluded as early as 1955 that art "can be the most lucrative

30. Early, *supra* note 29, at 48; *see also* James A.R. Nafziger, *Comments on the Relevance of Law and Culture to Cultural Property Law*, 10 SYRACUSE J. INT'L L. & COM. 323, 328 (1983) (arguing in favor of increased public consciousness and education).

Even Native American cultural property owned by the government is not exempt from damage due to ignorance or lack of concern. In 1987 auditors for the Interior Department's inspector general concluded that many irreplaceable artifacts managed by the National Park Service were "rusting and rotting" or "stored in conditions that invite theft or deterioration . . . , subject to mildew, excessive humidity, freezing and insects." Furthermore, records were inaccurate or missing. Jack Anderson & Joseph Spear, *U.S. Heirlooms Missing, Audit of Parks Shows*, NEWSDAY, Jan. 6, 1987, at 52, available in Westlaw, PAPERS database.

Additionally, in 1990 the Interior Department discovered that hundreds of objects in their own offices had been stolen and mishandled. Apache baskets were used as trash cans and planters, and Navajo rugs were nailed to walls and used for floor coverings. A total of 162 art objects are missing and presumed stolen. Philip Shenon, *Interior Department Says 357 Pieces Are Missing From Its Art Collection*, N.Y. TIMES, Aug. 18, 1990, § 1, at 8.

These reports are particularly disturbing. One may expect mishandling from criminals, but not from government officials entrusted with caretaking. Clearly cultural property should be returned to Native Americans who cherish it and will properly care for it in accordance with culture and tradition.

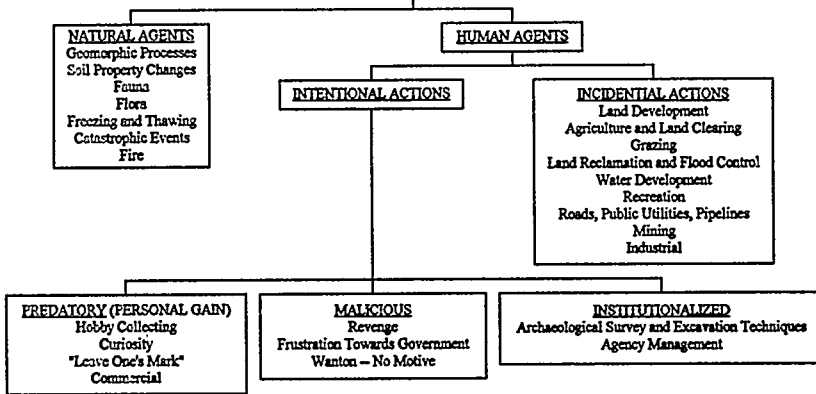
31. Grace Glueck, *Should Trade in Ancient Artifacts Be Restricted?*, N.Y. TIMES, June 5, 1984, at C13.

32. Paul R. Nickens, *The Destruction of Archaeological Sites and Data*, in PROTECTING THE PAST '73, 76-77 (George S. Smith & John E. Ehrenhard eds., 1991).

33. Early, *supra* note 29, at 40. Early's article examines the subculture of pothunters in Arkansas in detail.

34. MEYER, *supra* note 15, at 4. For an in-depth history of the modern art market, see PETER WATSON, FROM MANET TO MANHATTAN: THE RISE OF THE MODERN ART MARKET (1992).

FIGURE 1.
ARCHAEOLOGICAL SITE AND DATA DESTRUCTION



Pothunting statistics for federal lands in the U.S. fiscal years 1985 to 1987.

Source: Paul R. Nickens, *The Destruction of Archaeological Sites and Data*, in *PROTECTING THE PAST* 73, 75 (George S. Smith & John E. Ehrenhard eds., 1991) (citing Archaeological Assistance Division, National Park Service).

investment in the world.³⁵ Some believe the market may have finally peaked in May 1990, when a Van Gogh painting sold for \$82.5 million and a Renoir painting sold for \$78.1 million at auction.³⁶ Most of all, it is this overwhelming increase in the prices paid for art that has singularly resulted in tremendous amounts of desecration, destruction, and theft of art and artifacts throughout the world.³⁷ In fact, the total value of art and artifacts internationally trafficked has risen to over \$1 billion annually, second only to narcotics trafficking.³⁸ With so much money at stake it is no wonder that an international black market for art and artifacts thrives.³⁹

35. MEYER, *supra* note 15, at 3-4.

36. Godfrey Barker, *Gloom at the Top Hammers Art Profits*, DAILY TELEGRAPH, Sept. 17, 1991, at 1; Dominic Loehnis & Nicholas Farrell, *Picture Looks Grim for Art World Collectors Hold Their Breath as Auction Tests Collapsing Market*, SUNDAY TELEGRAPH (London), Nov. 3, 1991, at 3; see also WATSON, *supra* note 34, at 25-26; Maggie Malone & Kideko Takayama, *A Japanese Buying Spree: The Tycoon Who Spent \$160 Million at Auction*, NEWSWEEK, May 28, 1990, at 75.

Sadly, *Newsweek* reported that the Japanese businessman who purchased these paintings plans to warehouse them for as long as 10 years. *Id.* Two weeks earlier, the *New York Times* had reported that, according to the businessman's bidder, the paintings would eventually be in a Japanese museum. Rita Reif, *\$82.5 Million Van Gogh Sets Auction Record*, N.Y. TIMES, May 16, 1990, at A1.

37. MEYER, *supra* note 15, at 5-6; see CULTURAL PROPERTY ADVISORY COMM., LOOTING, THEFT AND SMUGGLING: A REPORT TO THE PRESIDENT AND THE CONGRESS 1983-1993, at 23, 25 (1993) [hereinafter ADVISORY COMMITTEE].

38. James A.R. Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 INT'L LAW. 835, 835 (1985) (citing PETER WATSON, THE CARAVAGGIO CONSPIRACY (1984)).

39. ADVISORY COMMITTEE, *supra* note 37, at 25.

Looting of cultural property in the United States is out of control. Pothunters systematically destroy vast acres of public and private land searching for valuable artifacts. Many of our public parks bear scars from this looting.⁴⁰ The region suffering the greatest amount of damage is the Southwest, where Native American sites are prime targets for pillaging.⁴¹ The effects of this pillaging are dramatic: "Looted sites are unmistakable: littered with smashed shards of Indian pottery, thousand-year-old pueblo walls reduced to refuse piles, scattered beer cans, and plastic garbage bags."⁴² In their quest for artifacts, pothunters often dig up Native American human remains and leave the skeletons scattered on the ground.⁴³ This destruction is horrific, inhumane, and intolerable to anyone concerned with preserving the dignity and culture of Native Americans. One commentator wrote:

Every archaeological site is like a time capsule, and each contains in varying degrees unique evidence about our past. When such a time capsule is destroyed, either by a looter or a bulldozer, the loss is total. One cannot grow another Indian mound. And yet, the tempo of destruction is presently so great that by the end of the century most remaining important archaeological sites may well be plundered or paved over. We face a future in which there may be no past beyond that which is already known and excavated. Or equally sad, what is left may be so ruinously mutilated as to afford only a forlorn fragment of a vanished legacy.⁴⁴

Experts have concluded that the recent interest in Native American artifacts is due to the increased popularity of Native American art in the international market. In 1971 the first major auction of Native American art was held in New York City. Record prices left the art world stunned, perked the interest of investors, caught the attention of pothunters, and resulted in a modern wave of destruction to Native American sites.⁴⁵ Prices for Native American cultural property have since skyrocketed. A Mimbres pot recently sold for \$88,000 at auction,⁴⁶ three ceremonial masks for almost \$40,000, and an

40. Sugarman, *supra* note 4, at 85, 120.

41. *Id.* at 81. For a discussion of desecration of Navajo, Zuni, and Abenaki sites, see Deborah L. Nichols et al., *Ancestral Sites, Shrines, and Graves: Native American Perspectives on the Ethics of Collecting Cultural Properties*, in *WHOSE PROPERTY?*, *supra* note 29, at 27.

42. Sugarman, *supra* note 4, at 82.

43. *Id.* at 84-85. When the author discovered skeletal remains left scattered by pothunters, he carefully reburied them. *Id.*

44. MEYER, *supra* note 15, at xii-xiii.

45. Goodwin, *supra* note 4, § 6 (Magazine), at 65.

46. Spencer P.M. Harrington, *Buying and Selling the Past*, *ARCHAEOLOGY*, May-June 1991, at 29.

Alaskan hair ornament for \$46,000.⁴⁷ The highest price paid at auction for a Native American artifact is \$522,500 for a Navajo man's wearing blanket. This blanket is now considered to be worth over \$1 million.⁴⁸ Although not all objects are worth this much, the increase in price is still significant and provides sufficient incentive to pothunters and investors. In 1991 an art dealer explained that baskets worth \$100 two years ago, may now sell for \$300, and are estimated to be worth \$1000 in two years.⁴⁹ Annual sales for Native American art and artifacts in the international black market has been estimated at \$25 million, with primary markets in Japan and Europe, specifically Germany.⁵⁰

This increase in the monetary value of Native American cultural property is not a blessing to Native Americans. Many of the objects bought and sold in the art market are patrimonial objects, and Native American culture, religion, and tradition require that they remain in the possession of Native Americans to be used for cultural and religious purposes.⁵¹ To Native Americans, religion and culture are inextricably intertwined.⁵² Without their cultural patrimony and religious icons, Native Americans cannot perform essential religious and cultural rituals. As a result, they believe their societal health suffers, their existence is threatened, and the future of their heritage is doomed.⁵³ To Native Americans the looting of their cultural patrimony is both destructive and sacrilegious.⁵⁴ Furthermore, the objectification of their sacred objects into *objets d'art* in the international market is insulting and disturbing.⁵⁵

47. Sugarman, *supra* note 4, at 124.

48. Danielle A. Warnes, *Law May Boost American Indian Art*, USA TODAY, May 16, 1991, at 4B.

49. *Id.*

50. Goodwin, *supra* note 4, § 6 (Magazine), at 84; PAUL M. BATOR, THE INTERNATIONAL TRADE IN ART 18 (1983). General statistics regarding the international black market in art are difficult to obtain. Neither the International Foundation of Art Research nor the Federal Bureau of Investigation's National Art File compile statistics beyond their own files. Author's telephone inquiries to International Foundation of Art Research and Federal Bureau of Investigation, National Art File, in Washington, D.C. (July 8, 1993).

51. See Suro, *supra* note 19, at A1.

52. VINE DELORIA, JR., GOD IS RED (1973) (explaining Native American religion and beliefs in comparison to Christianity); see, e.g., *id.* at 247; see also Vine Deloria, Jr., *Sacred Lands and Religious Freedom*, NARF LEGAL REV. (Native American Rights Fund, Boulder, Colo.), Summer 1991, at 1 (vol. 16, no. 2).

53. Steven Platzman, *Objects of Controversy: The Native American Right to Repatriation*, 41 AM. U. L. REV. 517, 519-21 (1992); DELORIA, GOD IS RED, *supra* note 52, at 297-98. Deloria explains that to Native Americans healing is a ceremonial practice, a form of religious experience. Religion, culture, community, land, and healing powers are all essential, related elements to Native American existence. *Id.*

54. Nichols, *supra* note 41, at 29; Vine Deloria, Jr., *A Simple Question of Humanity: The Moral Dimensions of the Reburial Issue*, NARF LEGAL REV. (Native American Rights Fund, Boulder, Colo.), Fall 1989, at 1 (vol. 14, no. 4).

55. See generally Nichols, *supra* note 41; DELORIA, GOD IS RED, *supra* note 52, at 248;

A typical example of desecration to Native American cultural patrimony is the theft of Zuni war gods. The Zunis carve war gods each year during special religious ceremonies. "Each [war god] serves as guardian for the tribe until he is relieved by a new one, and then the old ones must remain there, contributing their strength until they go back to the earth."⁵⁶ Zunis believe that if the war gods are removed from their places they will play tricks, such as cause sicknesses or earthquakes. Unfortunately, since the nineteenth century, war gods have been collected by scholars and museums as beautiful art objects.⁵⁷ During the past decade the Zunis have successfully campaigned for the return of many of their precious war gods. They have retrieved most war gods held by American museums and collectors, but there are still others held abroad in Europe. Even with the publicity surrounding the return of many war gods, still, three more were stolen in December 1990.⁵⁸

Proper export regulations are needed to prevent other war gods from being sold and trafficked internationally because once war gods are possessed in foreign countries, it is nearly impossible for Zunis to retrieve them. By passively allowing Zuni war gods and other Native American patrimonial objects to be internationally traded, the federal government indirectly threatens Native American existence. The loss of a patrimonial object or sacred site for Native Americans is the same as the loss of a religious icon for Catholics or the Holy Lands for Israelis.⁵⁹ Yet, this Native American loss has so far been ignored by the federal government.

D. Preservation Concerns

It is a national embarrassment that "[f]or every dollar spent on the acquisition of art, less than a penny is spent for its preservation."⁶⁰ One expert wrote:

The next fifty years — some would say twenty-five — are going to be critical in the history of American archaeology. What is recovered, what is preserved, and how these goals are accomplished, during this period will largely determine *for all time* the knowledge available to subsequent generations of Americans concerning their heritage from the past.⁶¹

Deloria, *Sacred Lands*, *supra* note 52, at 1.

56. Suro, *supra* note 19, at A1 (quoting Pesancio Lasiloo, Zuni lieutenant governor).

57. *Id.*

58. Haederle, *supra* note 19, at E1. War gods have sold for \$40,000 in the United States and are estimated to be worth \$80,000-\$100,000 in Europe. *Id.*

59. For other familiar comparisons to Western and Biblical culture and religion, see Deloria, *Sacred Lands*, *supra* note 52, at 3-5.

60. MEYER, *supra* note 15, at 80.

61. *Id.* at 201 (quoting Dr. Charles R. McGimsey III, director of Arkansas Archaeological Survey). This prediction was made almost 25 years ago, yet history is already sadly proving the author's insight correct. See *supra* notes 40-43 and accompanying text.

Part of what is needed to ensure the protection of cultural heritage is more governmental recognition and action to solve the problem.⁶² One possible, and perhaps necessary, solution is effective, express export regulations to protect cultural patrimony. These regulations should be inclusive enough to protect cultural heritage without unduly restricting benign art trade in crafts and duplicate objects. However, cultural patrimony must be defined and identified by the cultural group which it represents. Thus, our government needs to work together with the sovereign Native American tribal governments to ensure that their cultural patrimony is preserved for future generations of Native Americans.

With this background of the controversy concerning the protection and preservation of Native American cultural property, this article will now turn to a discussion of the theoretical bases to our laws and then to a discussion of the actual protections offered by our laws.

III. Theory

Laws regulating cultural property represent the government's best attempt at curbing activities perceived to endanger cultural heritage.⁶³ The problem of adequately protecting and preserving Native American cultural heritage is a complex one. The government must balance the interests of several often ideologically opposed parties: Native Americans, who desire control over their heritage; archaeologists and scientists, who desire information and knowledge; the art community (including museums, auction houses, gallery owners, and individual collectors) which desires profit and free access to the world's art treasures; and international governments, who desire beneficial trade relations.⁶⁴ In order to fully understand America's position regarding Native American cultural property and its preservation and protection, it is important to consider the perspectives of each interested party. Our laws represent an attempt by legislators to balance these conflicting interests into an integrated solution.⁶⁵ However, so far the solution has not been wholly successful: the

62. The Cultural Property Advisory Committee recently acknowledged that "the United States of America must continue to lead the world in protecting and preserving the cultural heritage of all people. The world's cultural resources are finite and non-renewable and should be treated with the same respect and concern that we show for our natural environment." ADVISORY COMMITTEE, *supra* note 37, at 2. However, with respect to protecting Native American artifacts the Committee recommended only that the government use diplomatic pressure to encourage other art importing nations to adopt the UNESCO Convention. *Id.* at 10. See *infra* part IV.A.3 (discussing the UNESCO Convention).

63. John E. Peterson, II, *Dance of the Dead: A Legal Tango for Control of Native American Skeletal Remains*, 15 AM. INDIAN L. REV. 115, 135 (1990).

64. See Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Items*, 24 ARIZ. ST. L.J. 79, 86-94 (1992); MEYER, *supra* note 15, at 170-97.

65. See Roger Anyon, *Protecting the Past, Protecting the Present: Cultural Resources and*

United States government needs to act quickly to adequately preserve Native American cultural heritage before it is lost forever.

Subpart A considers the motivations of individual participants: the pothunter, the collector, the curator, the archaeologist, the Native American. Subpart B addresses the federal government's traditional theoretical position. Subpart C broadly explores the major theoretical positions of other international governments. And lastly, subpart D offers future suggestions that consider the different perspectives of all the interested parties.

A. *Individual Participants' Motivations*

In 1793 Thomas Jefferson excavated the property surrounding Monticello, his private residence in Virginia, to discover the origins of mound sites on his property. For these excavation efforts, Jefferson was named the "father of American archaeology."⁶⁶ He espoused a model plan for archaeology based on pursuing a strategy, testing hypotheses, and publishing results. However, the "father of American archaeology" neglected conservation in his model plan.⁶⁷

Many individuals involved with archaeology since Jefferson have also neglected conservation concerns, and as a result, America's archaeological sites are a quickly diminishing resource.⁶⁸ One explanation for this is that the American public in general is not concerned with conservation of cultural property. Collecting artifacts is associated with wealth, culture, prestige, and status.⁶⁹ "[M]uch of the public . . . condones the looting of archaeological sites . . . , both as a means of supplementing personal income and as a personal hobby."⁷⁰ Many looters believe they have a right to collect artifacts, and the activity is a favorite family pastime.⁷¹

American Indians, in PROTECTING THE PAST, *supra* note 32, at 215. "[A]dequate protection will require a comprehensive integration of multiple cultural viewpoints about the importance of cultural resources . . ." *Id.*

66. Edward Friedman, *Antecedents to Cultural Resource Management*, in PROTECTING THE PAST, *supra* note 32, at 27, 27 (citing THOMAS F. KING ET AL., ANTHROPOLOGY IN HISTORIC PRESERVATION: CARING FOR CULTURE'S CLUTTER 12 (1977) and GORDON R. WILLEY & JEREMY A. SABLOFF, A HISTORY OF AMERICAN ARCHAEOLOGY 138 (1973)).

67. *Id.*

68. See William D. Lipe, *A Conservation Model for American Archaeology*, in CONSERVATION ARCHAEOLOGY: A GUIDE FOR CULTURAL RESOURCE MANAGEMENT STUDIES 19 (Michael B. Schiffer & George J. Gumerman, eds., 1977).

69. Thomas F. King, *Some Dimensions of the Pothunting Problem*, in PROTECTING THE PAST, *supra* note 32, at 83, 88.

70. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS: CULTURAL RESOURCES: PROBLEMS PROTECTING AND PRESERVING FEDERAL ARCHAEOLOGICAL RESOURCES 61 (Dec. 1987) (GAO/RCED-88-3).

71. *Id.* at 27. One ranger with the Bureau of Land Management confessed that he used to dig for antiquities before becoming a ranger. "It was an accepted fact of life . . . to go out on a Sunday afternoon with your family and dig for antiquities." Norm Brewer, *Black Market in Artifacts Thrives*, IDAHO STATESMAN (Boise, Idaho), July 13, 1986, at 1A. Another admitted

1. *The Pothunter*

The financial incentive is the primary motivation for the pothunter to dig for artifacts.⁷² Native American artifacts demand high prices in both legitimate and black markets: a single earthenware jar may be in the range of \$10,000 or more.⁷³ Obviously, there is great potential for personal financial gain. Furthermore, there is a direct correlation between the amount of pothunting and the general economy of the locale; for example, rising unemployment in the Southwest has resulted in increased pothunting.⁷⁴ In some remote areas there is no sufficient source of income other than selling archaeological resources.⁷⁵ And, in more populated areas, even greater amounts of destruction occur due to the increased number of participants searching for the same limited supply of resources.⁷⁶

While economic necessity may offer some justification for destruction of archaeological sites, these problems are not solved in wealthier communities: "wealth generates the development that menaces everything hidden in the soil."⁷⁷ So, the economic incentives are not easily cured. It is unlikely that the pecuniary value of these artifacts will decrease such that they will no longer be profitable to market. Furthermore, it is just as unlikely that local development projects will be curtailed merely to preserve artifacts.

2. *The Collector*

Like the pothunter, the collector is driven partly by the prospects of financial gain, and also by the desire to possess beautiful, exotic objects. Additionally, many collectors believe they are saving objects from obscurity.⁷⁸ Experts have concluded that the underlying motivations are "the need for possession, the need for spontaneous activity, the impulse to self-advancement, and the tendency to classify things," and "the love of beauty."⁷⁹

pothunter who dug with his family for recreation explained, "[w]e never figured anything was wrong. . . . We figured the federal land was our land." *Id.* at 5A.

72. For a more detailed explanation of pothunters and their network, see Early, *supra* note 29. For a good discussion of the effects of looting in Arkansas, see Harrington, *Looting, supra* note 29.

73. Sugarman, *supra* note 4, at 120. See generally Sid Kane, *The Big — And Illegal — Business of Indian Artifacts*, N.Y. TIMES, Sept. 7, 1986, § 3, at 13. Not all artifacts, however, are this valuable. Many bowls sell for less than ten dollars. U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 28-29.

74. KING ET AL., *supra* note 66, at 86-87.

75. *Id.*

76. Northey, *supra* note 10, at 69.

77. MEYER, *supra* note 15, at 197.

78. Early, *supra* note 29, at 44. Lord Elgin, who as British ambassador excavated the Acropolis and removed the Elgin Marbles to England, represents the archetypal collector; he "saw himself as a savior of antiquity while at the same time having an eye to future market values." MEYER, *supra* note 15, at 170-75, 179.

79. MEYER, *supra* note 15, at 188 (describing reports from two French analysts, Dr. Henri

Unfortunately, collectors' desire for possession directly conflicts with Native Americans' need to maintain control over their heritage. Furthermore, collectors' criteria for collecting is often merely personal taste rather than scholarly, cultural, or religious value. Collectors primarily value an object's artistic beauty, rather than its potential for scientific information (gleaned from the objects' archaeological context) or cultural significance.⁸⁰

3. *The Curator*

The motivations of the collector are closely related to the motivations of the museum curator. Both are "friends of the past," and both desire acquisition of beautiful objects. Frequently, however, the curator is a frustrated collector who lacks the personal finances to satisfy his desire to collect; so, instead, the museum curator collects on behalf of the public. Thus, he has the additional justification of serving the public and the advancement of art.⁸¹ Curators believe that they have a responsibility to preserve and exhibit artifacts to educate and benefit the public.⁸² Additionally, museums contribute to the general economy by promoting tourism.⁸³

While museums indeed provide an important public service, they are often ideologically in conflict with both archaeologists and Native Americans. Like collectors, museums desire possession of artifacts, but this conflicts with the Native Americans' need to possess the objects they created for cultural and religious purposes. Furthermore, one expert, both a museum director and an archaeologist, explained:

An object of scientific interest should not be considered primarily as an art work. Yet museums, which are supposed to educate the public, often contribute to the idea that such and such a culture is represented only by uniquely beautiful objects. . . . In fact, the picture the public builds of ancient cultures can be permanently distorted when the past is consistently presented as a kaleidoscope of masterpieces.⁸⁴

Codet in 1921 and Rene Brimo in 1938, respectively).

80. *Id.* at 187, 189-90.

81. *Id.* at 191-92.

82. Bowen Blair, *Indian Rights: Native Americans Versus American Museums — A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 128 (1979).

83. MEYER, *supra* note 15, at 196.

84. *Id.* at 195 (quoting a speech by Hugues de Varine-Bohan, director of the International Council of Museums). However, the museum community believes it performs an important public service. The president of the Metropolitan Museum of Art, William B. Macomber, commented, "We [the international museum community] are not the enemy; we are every bit as important in preserving cultural patrimony as the great zoos of the world are in protecting and preserving endangered species." Glueck, *supra* note 31, at C13.

Thus, while museums preserve artifacts and educate the public, they also contribute to public misconceptions about cultural property. The public needs to understand the broader significance of cultural property in its archaeological context, not just appreciate the beauty of great works of art. Without such an understanding, museums merely fuel the market demand for exotic objects, and the destruction of archaeological sites will inevitably continue.

4. *The Archaeologist*

Archaeologists⁸⁵ participate in the quest for artifacts to obtain information and knowledge. They desire a greater understanding of the past and its relationship to the present. Archaeologists study all aspects of archaeological resources: the objects, their sites, the relationship between objects and sites, and the environment. Through this study and analysis, archaeologists are often able to reconstruct how people lived in history.⁸⁶ Archaeologists are "interested in the story that the remains and artifacts can tell."⁸⁷

In general, archaeologists have encouraged preservation of Native American culture.⁸⁸ However, archaeologists, like collectors and museums, also desire possession or access to remains and artifacts so that they may continue to learn from objects as scientific techniques advance. This desire directly conflicts with Native Americans' goals for repatriation and reburial.⁸⁹ Nevertheless, archaeologists' involvement is scientifically important, and society benefits from their research and study. "To say that this knowledge would be insignificant is to say that human behavior is a worthless subject for study."⁹⁰ Archaeologists' search for information and knowledge should be encouraged, but it should also be compatible with other important, competing interests of Native Americans and museums.⁹¹

5. *The Native American*

The final and most important individual participant is the Native American. The objects in question are the human remains of their ancestors and artifacts they created for cultural and religious purposes. In order for the objects to

85. Fifteen years ago an anthropology professor anticipated the current crisis situation for archaeological resources and sites. He advised archaeologists to focus on resource conservation and assume responsibility over all resources in order to decrease the rate of loss. See Lipe, *supra* note 68.

86. Northey, *supra* note 10, at 62-65.

87. Marsh, *supra* note 64, at 87.

88. Peterson, *supra* note 63, at 122.

89. See Geoffrey Cowley, *The Plunder of the Past*, NEWSWEEK, June 26, 1989, at 58.

90. MEYER, *supra* note 15, at 209 (in reference to the study of classic Mayan civilization).

91. See Cowley, *supra* note 89, at 58. In addition to being culturally significant to Native Americans, archaeological resources and sites are important to environmental studies because there is a correlation between sites and certain particularized environmental data. Lipe, *supra* note 68, at 28.

serve their intended purposes, they must remain in their original or intended sites.⁹² In almost all circumstances, excavation and display of Native American cultural property is contrary and offensive to their communal and religious uses of the land and the objects.⁹³ According to the chairman of the Shoshone-Paiute Tribe, "Native Americans have always been repulsed by the raiding of their ancestors' resting grounds."⁹⁴ Native Americans believe "that the disturbance of the dead or of religious objects, alters, destroys, or desecrates some relationship with the spirit world. Therefore, the dead should not be disturbed even if knowledge of the past could be gained thereby."⁹⁵

Cultural resources represent the heritage, cultural identity, religion, and history of Native Americans, as peoples and as sovereign tribes, and preservation of these resources is essential to the future existence of all Native American culture.⁹⁶ It is important to emphasize that Native Americans are both individuals and sovereign nations⁹⁷ — and it is as both individuals and as sovereigns that Native Americans require possession and preservation of their cultural property.⁹⁸ Native Americans do not merely desire possession of their cultural property, as the other participants do, they need possession to preserve their race, nationality, and way of life. And, as admitted in U.S. House and Senate reports, "America does not need to violate the religions of her native peoples. . . . There is room for and great value in cultural and religious diversity. . . . We would be the poorer if these American Indian religions disappeared from the face of the Earth."⁹⁹

92. Anyon, *supra* note 65, at 216.

93. Northey, *supra* note 10, at 65 & n.26; Peterson, *supra* note 63, at 120.

94. Sam Quinones, *Vandals, Thieves Continue to Defile Indian Gravesites*, IDAHO STATESMAN, July 13, 1986, at 1A, 4A (quoting Whitney McKinney, chairman of the Shoshone-Paiute Tribe).

95. Peterson, *supra* note 63, at 120 (quoting C. Dean Higginbotham, *Native Americans Versus Archaeologists: The Legal Issues*, 10 AM. INDIAN L. REV. 91, 92 (1982)).

96. Anyon, *supra* note 65, at 221.

97. For a discussion of tribal sovereignty, see INDIAN TRIBES AS SOVEREIGN GOVERNMENTS (1988) [hereinafter INDIAN TRIBES]. For a discussion of Hawaiian sovereignty, see Charles F. Wilkinson, *The Idea of Sovereignty: Native Peoples, Their Lands, and Their Dreams*, 13 NARF LEGAL REV. (Native American Rights Fund, Boulder, Colo.), Fall 1988, at 1 (vol. 13, no 4).

98. Native Americans may regulate inheritance and their internal and social relations. Walter R. EchoHawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 443 (1986). Regulation of cultural property seems to fall clearly within these powers.

Walter EchoHawk, Senior Staff Attorney with the Native American Rights Fund in Boulder, Colorado, believes religion is the most crucial issue for Native Americans today. Maggie Rivas, "On the Side of Hope"; *Indians Endeavor to Save Tribal Identities*, DALLAS MORNING NEWS, Oct. 11, 1992, at 1A. Preservation of Native American cultural property is essential to the future of Native American religion because their culture and religion are inseparable.

Recently, Native Americans have actively called for recognition of their status as sovereign nations; they have also specifically emphasized their "right to preserve their cultural identities." Michael S. Serrill, *Struggling to be Themselves*, TIME, Nov. 9, 1992, at 52.

99. H.R. REP. NO. 1308, 95th Cong., 2d Sess. 3 (1978); S. REP. NO. 709, 95th Cong., 2d

The motivations of each participant, the pothunter, the collector, the curator, the archaeologist, and the Native American, offer some justification for their respective behaviors to further their differing interests at the expense of other participants. Unfortunately, each participant (except, ironically, the Native American, whose cultural heritage is at stake) views the past as property,¹⁰⁰ and each participant (including the Native American) desires possession of or control over this past property. While Native Americans clearly have the most urgent and persuasive claims to possession of their cultural resources, archaeologists and museums also have significant claims that deserve some recognition.¹⁰¹ A hierarchy of interests seems obvious: Native Americans first and foremost, archaeologists second, public art institutions and museums third, private collectors fourth, and pothunters nowhere.¹⁰² However, adequate national protection for Native American cultural property should consider the valid and differing viewpoints of each participant in an integrated solution to the problem.¹⁰³

B. The Federal Government's Traditional Theory

The United States' traditional perspective on cultural property preservation and protection has been a *laissez-faire* policy because the problem involves trade relations and import and export regulations.¹⁰⁴ This policy, which promotes free trade of art, has at least been applied consistently: in most circumstances American laws do not significantly restrict import or export of cultural property.¹⁰⁵ The United States is one of the only countries that has failed to regulate cultural property¹⁰⁶ because historically we have been the major art importing nation.¹⁰⁷ Some authorities approximate that ninety percent of the foreign artifacts sold in America are stolen or illegally exported goods. As a result, the United States has been critically described as the "dumping ground" for stolen art.¹⁰⁸ There is, however, a direct correlation between international art trade and archaeological site destruction. Looters are

Sess. 3 (1978), *quoted in* Vine Deloria, Jr., *Sacred Lands and Religious Freedom*, NARF LEGAL REV. (Native American Rights Fund, Boulder, Colo.), Summer 1991, at 1 (vol. 16, no. 2).

100. MEYER, *supra* note 15, at 203.

101. Anyon, *supra* note 65, at 221.

102. The author, even with an interest and background in art history, cannot deny that the interests of Native Americans and archaeologists must come before the art community and private citizens.

103. Anyon, *supra* note 65, at 215.

104. Jore, *supra* note 5, at 80.

105. SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 130 (1978).

106. BATOR, *supra* note 50, at 38.

107. Merryman & Elsen, *Hot Art*, *supra* note 14, at 18-19.

108. Lee Ann Houseman, Comment, *Current Practices and Problems in Combatting Illegality in the Art Market*, 12 SETON HALL L. REV. 506, 540 (1982).

motivated by the high prices paid for artifacts in the international market.¹⁰⁹ As a result, when America promotes (or fails to restrict) the art market, it effectively encourages looting of archaeological resources both abroad and at home.¹¹⁰

The United States supports its *laissez-faire* policy by two arguments: first, government restrictions on alienation of personal property are adverse to a free enterprise system; and second, strict restrictions on art export only increase the price of art on the black market and encourage continued illegal activity.¹¹¹ Additionally, scholars and the art community justify promoting free trade by arguing that cultural property belongs to and enriches all mankind, not just those nations controlling land rich in archaeological resources. This is a popular theory espoused by most art importing nations.¹¹² Other justifications emphasize that international free trade in art opens communication between nations, encourages artistic creativity, and increases opportunities to understand different cultures.

The United States has continued its general support for the *laissez-faire* policy because it viewed itself as an art importing nation. We have ignored our rich supply of Native American artifacts and have profited from free trade in art at the risk of losing a valuable cultural heritage.¹¹³ As we begin to recognize the necessity of immediate protection and preservation of our cultural property, we are coincidentally gradually abandoning our prior theoretical arguments and changing to a perspective similar to that espoused by major art resource countries, as discussed in subpart C.

America's changing perspective is apparent in the enactment of the American Indian Religious Freedom Act of 1978 (AIRFA), in which the government establishes a policy to protect and preserve Native Americans' freedom of religion through access to religious sites, possession of sacred objects, and freedom to ceremonial worship.¹¹⁴ AIRFA recognizes a relationship between the object and its culture that deserves protection. Furthermore, AIRFA implies that restrictions on the alienability of cultural property that further the goal of Native American possession of sacred objects should be promoted.¹¹⁵

109. BATOR, *supra* note 50, at 25.

110. See Houseman, *supra* note 108, at 542.

111. *Id.* at 540-41. The art community frequently argues that restrictions on free trade will "only divert the trade to other countries, the market is not infinite in capacity." However, "[e]liminating one segment will reduce the demand as a whole . . ." Ellen Herscher, *International Control Efforts: Are There Any Good Solutions?*, in WHOSE PROPERTY?, *supra* note 29, at 117, 124.

112. Karen J. Warren, *A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues*, in WHOSE PROPERTY?, *supra* note 29, at 1, 5-6.

113. See James J. Fishman & Susan Metzger, *Protecting America's Cultural and Historical Patrimony*, 4 SYRACUSE J. INT'L L. & COM. 57, 58-59 (1976).

114. 42 U.S.C. § 1996 (1988).

115. John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74

However, AIRFA does not go so far as to "create a cause of action or any judicially enforceable individual rights" for Native Americans.¹¹⁶ Legislative history indicates that AIRFA merely ensures that the government not burden Native Americans' freedom of religion without first deciding that this right must yield to a more important concern.¹¹⁷ AIRFA indicates a new perspective for American policy for religious protection, but is only an initial step toward change. The government must do more to effectuate a substantive change that will indeed protect and preserve Native American cultural heritage.¹¹⁸

C. Other Nations' Theories

In general, foreign nations can be classified as either art importing nations, like the United States, or art exporting nations, also referred to as art resource nations. Without discussing the particulars of any individual country, it is possible to summarize the major theoretical arguments espoused by most countries in each of the two opposing categories.¹¹⁹ The basic controversy concerns who owns the past. In an extremely simplified analysis, most art importing nations theorize that "everyone owns the past," the past is "humanity's past," while most art resource nations theorize that the past is owned by its representative group, usually the nation, which claims national patrimony over artifacts.¹²⁰

1. Art Importing Nations' Arguments

One commentator, Professor Warren, classifies the theories espoused by art importing nations into six major arguments. Each argument attempts to justify unlimited trade in cultural resources and continued possession of imported property.

First, the *rescue argument*: if importing countries failed to rescue cultural resources from their countries of origin, these resources would be destroyed

CORNELL L. REV. 1179, 1220-21 (1989); see also The National Historic Preservation Act of 1966, 16 U.S.C. § 470 (1988 & Supp. IV 1992) (recent amendment requiring a study of antiquities trafficking and consultation with Native Americans, thus implying the importance of protecting Native American antiquities, i.e., cultural property, from illegal activities).

116. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1987). Even Justice Brennan in the dissent agrees with this proposition. *Id.* at 471 (Brennan, J., dissenting).

117. *Id.* at 455; 124 CONG. REC. 21,444 (1978).

118. For a discussion of proposed amendments to AIRFA, see Kristen L. Boyles, Note, *Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act*, 76 CORNELL L. REV. 1117 (1991).

119. For information regarding individual nations and further analysis of general theories, see Warren, *supra* note 112, at 1; BATOR, *supra* note 50, at 18-59. See generally Fishman & Metzger, *supra* note 113, at 58; Merryman & Elsen, *Hot Art*, *supra* note 14.

120. Warren, *supra* note 112, at 2-3. Ms. Warren is a philosophy professor specializing in ethics and social philosophy, environmental ethics, and feminism. The author relies on her article heavily in this section.

by the elements, pothunters, or war. The rescue mission forms the basis for ownership rights to cultural property because of the values preserved, the costs incurred, and the benefits gained.¹²¹

Second, the *foreign ownership argument*: cultural resources were removed from their countries of origin legally; therefore, the importing nation has valid ownership claims to them. The issue here is whose law controls ownership and removal of the cultural property.¹²²

Third, the *humanity ownership argument*: cultural property has artistic, intellectual, and educational value to all mankind; therefore, it cannot be owned by any one nation but is the property of all humanity and everyone has an equal claim to it.¹²³

Fourth, the *means-ends argument*: free trade in cultural property promotes art appreciation, artistic creativity, education, scholarship, knowledge of different cultures, and open communication between nations. Art serves as a "good will ambassador" and benefits all countries in some utilitarian manner.¹²⁴

121. *Id.* at 3-4 (noting that collectors and, ironically, some pothunters justify their activities with this argument); Early, *supra* note 29, at 45.

122. Warren, *supra* note 112, at 4-5. This was the central issue in the dispute over ownership of early Christian Byzantine Mosaics in Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990). Four mosaics were stolen from the Greek-Orthodox Church in 1979 by Turkish vandals during civil war in Cyprus. The Turkish Cypriots formed their own government and currently control northern Cyprus, while the Greek Cypriots control southern Cyprus. The United States only recognizes the Greek Cypriot government. *Id.* at 280-81.

The Church claimed ownership to the mosaics because a thief can only acquire possession not title to stolen goods. When a thief passes the stolen goods to a bona fide purchaser (here, the defendant, Goldberg), the purchaser also acquires only possession because the thief has no title to pass to him. *Id.* at 290-91. However, the defendant argued that because the Turkish Cypriots formed a government, and it was their military that removed the mosaics, the Turkish Cypriot military did acquire title. *Id.* at 291-92. Nevertheless, the United States does not recognize this Turkish Cypriot government, and the court refused to view this government as a *de facto* government. *Id.* at 292-93. Therefore, the defendant was ordered to return the mosaics to the Church, the rightful owner. *Id.* at 293-94. Thus, a prior independent decision by Congress not to recognize the Turkish government in Cyprus determined that the removal of the mosaics from the Church was "illegal" and that the Church still held title to the mosaics.

123. Warren, *supra* note 112, at 5-6. This theory was promoted by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Merryman & Eisen, *Hot Art*, *supra* note 14, at 12 (quoting the 1954 Convention as stating that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind . . . preservation of the cultural heritage is of great importance for all peoples of the world"), and the 1972 Convention on the Protection of the World Cultural and Natural Heritage, Herscher, *supra* note 111, at 120 (quoting the 1972 Convention as stating that "deterioration 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").

124. Warren, *supra* note 112, at 6-7; Houseman, *supra* note 108, at 541. This is a common argument espoused by the United States and the art community. Cf. BATOR, *supra* note 50, at 30-31 (arguing that "[a]rt as a good ambassador" is also a reason art resource countries may

Fifth, the *scholarly access argument*: museum curators, educators, scholars, and other authorized persons have a responsibility to preserve cultural resources for the public, but in order to fulfill this duty they must have free access to the resources.¹²⁵

And sixth, the *encouragement of illegal activity argument*: restrictions on free trade of art only encourage illegal activity; pothunting increases and the black market flourishes. As a result, trade restrictions are unjustified because they encourage the very illegal activity that should be discouraged. A related argument is that free trade restrictions merely divert the trade to other markets.¹²⁶

Each of these arguments supports importing nations' claims to free trade in cultural property and retention of imported property. However, each argument opens a myriad of problems and may be countered by equally persuasive arguments offered by art resource nations to promote restrictions on alienation and repatriation of exported property.

2. Arguments for Art Resource Nations

Professor Warren explains three major arguments for cultural property retention and export restrictions by art resource nations.

First, the *cultural heritage argument*: indigenous people and countries of origin have a right to possess cultural property that is essential to their heritage and identity and that symbolizes shared values, experiences, and beliefs. A country's national patrimony includes property with unique historic, religious, and cultural significance: this property educates a nation's citizens about who they are and what they believe.¹²⁷

Second, the *country of origin ownership argument*: cultural property is owned by its country of origin. This is simply a claim to ownership of the past based solely on the original location of the property.¹²⁸ Ironically, under this argument the descendants of colonizers may claim ownership to native artifacts.¹²⁹

promote export to stimulate interest, understanding, and admiration in their country, resulting in increased tourism and study of their art and culture).

125. Warren, *supra* note 112, at 7. This is another primary justification offered by the art community.

126. *Id.* at 7-8; Merryman & Elsen, *Hot Art*, *supra* note 14, at 16 (explaining that "the absence of a licit market insures the existence of an illicit one, with the usual consequences: loss of control over a traffic that, if licit, could be regulated").

127. Warren, *supra* note 112, at 8-9; BATOR, *supra* note 50, at 28; *see also* Merryman & Elsen, *Hot Art*, *supra* note 14, at 8. One obvious and extreme American example is the Liberty Bell. *Id.* While American cultural property is usually primarily cultural and historic, Native American cultural property is almost always cultural, historic, and religious.

128. Warren, *supra* note 112, at 9.

129. Consider, for example, that in Latin America the descendants of Spanish conquistadors, who destroyed the Maya, Aztec, and Inca empires, are claiming a superior right to the cultural property of these very civilizations. Glueck, *supra* note 31, at C13.

Third, the *scholarly and aesthetic integrity argument*: activities which move cultural property decrease their scholarly value and aesthetic integrity. A related argument emphasizes concern for the safety of cultural property from potential damage or loss. For example, by separating related artifacts or breaking apart monuments, valuable archaeological information and artistic beauty are destroyed; thus, these activities are contrary to preservation concerns.¹³⁰

One additional argument for art resource nations, suggested by other commentators, is the *economic interest argument*: if cultural property will not bring a price on the open market equal to its full financial value, then it should be retained by its country of origin to prevent economic loss. In computing this value it is essential to consider all the benefits of ownership, including the object's influence on tourism and its psychological and social effects on society.¹³¹

Just as with the art importing arguments, the success of these art resource arguments depends on the particular circumstances. A justification can be found for almost any position; therefore, nations need to carefully balance the competing interests and establish an integrated strategy to promote the most important concerns.

3. Nonrenewable Resource Argument

A final theory, the non-renewable resource argument, falls outside the importing nation/resource nation classification scheme; it focuses on preservation rather than property rights. Cultural property is a non-renewable environmental resource like endangered species; it cannot be replenished once it is destroyed.¹³² Furthermore, looting destroys much of the opportunity for archaeological study from the site even if stolen objects are later recovered, which is unlikely.¹³³ Mankind should be the custodian over cultural property, guarding and protecting it from potential extinction. No one nation or people own the past, but all are collectively responsible for its protection and preservation for future generations.¹³⁴

130. Warren, *supra* note 112, at 9-11; *see also* Merryman & Elsen, *Hot Art*, *supra* note 14, at 9-11 (supporting the return of the Elgin Marbles to the Parthenon).

131. Merryman & Elsen, *Hot Art*, *supra* note 14, at 10; BATOR, *supra* note 50, at 27 (further explaining that "[i]f the price realized on export equals or exceeds the fair value of the work (including its nonmonetary or social value), then the national wealth remains intact"). For an in-depth discussion of market and trade considerations, *see* Moustakas, *supra* note 115, at 1179. Moustakas argues persuasively that "the marketplace is a flawed device for the distribution and disposition of some types of cultural property." *Id.* at 1183 n.12.

132. Warren, *supra* note 112, at 19; MEYER, *supra* note 15, at 203; WILLIAMS, *supra* note 105, at 108. For a discussion of the rights of future generations to cultural property, *see* Moustakas, *supra* note 115, at 1205 n.107, 1208 n.114, 1212 nn.132-33, 1213 nn.134-36, 1214 nn.137-38 and accompanying text.

133. U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 10; Lipe, *supra* note 68.

134. Warren, *supra* note 112, at 19.

This preservation theory should be considered in relation to all other potential justifications for government action or inaction regarding cultural property. Dismissing preservation concerns may have drastic consequences for future generations.¹³⁵ One commentator has predicted that "in our lifetime we may see [cultural heritage] dwindle meaninglessly away, not so much because anyone has willed it, but because not enough people are aware the problem exists, as the destruction of American Indian sites all too clearly suggests."¹³⁶ Any successful solution to this problem will surely balance the practical, theoretical, and ethical concerns of the interested parties with the ultimate goal of preservation of cultural heritage.

D. Suggestions for the Future

For such a complex problem, it is impossible to prescribe any strategy that will work unilaterally. Arguably, when approaching the problem of preserving Native American cultural heritage, it will be difficult if not impossible to formulate a solution that will benefit all of the interested parties; consequently, we must decide which interests are most deserving of recognition.

Of the individual participants — the pothunter, the collector, the curator, the archaeologist, and the Native American — Native Americans, as individuals and as sovereign nations, have the most valid claims to their cultural heritage. Native American tribes represent the lineal descendants of these cultural objects. The items in question are the human remains of their ancestors and religious and cultural objects made by their hands. Furthermore, possession of these objects is essential to the continued existence of Native American culture.¹³⁷ (This reasoning follows the cultural heritage argument espoused by art resource countries.¹³⁸) Archaeologists and museum curators also have secondary, valid claims to possession of Native American cultural

135. *But see* Merryman & Elsen, *Hot Art*, *supra* note 14, at 18 (suggesting that art resource nations with an abundance of archaeological resources and a poor economy should "mine" these resources to the international art market as a source of income).

136. MEYER, *supra* note 15, at 203-04. Another commentator vividly describes the potential future:

If we leave an environment to [future generations] that is fit for pigs they will be like pigs; their tastes will adapt to their conditions. . . . Suppose we destroyed all of our literary, artistic, and musical heritage; suppose we left to future generations only potboiler romances, fluorescent velvet paintings, and disco songs.

We would then surely ensure a race of uncultured near-illiterates.

Mark Sagoff, *We Have Met the Enemy and He is Us or Conflict and Contradiction in Environmental Law*, 12 ENVTL. L. 283, 300 (1982), *quoted in* Moustakas, *supra* note 115, at 1217.

137. *See* Suro, *supra* note 19, at A1.

138. Native Americans could base their claims on any of the art resource or non-renewable resource arguments since all persuasively apply to their perspective. *See supra* notes 127-31 and accompanying text.

heritage since they educate and enrich the public with these objects. (They would most likely base their claims on the scholarly access argument.¹³⁹)

Reconciling these competing interests is not easy, however, because Native Americans need near-exclusive control over their heritage to preserve their culture, religion, and way of life for future generations of Native Americans. Human remains should be reburied, and cultural objects should remain in their environmental context and be used for the religious and cultural purposes for which they were created.¹⁴⁰ Ultimately, decisions regarding cultural property must rest with the respective Native American tribe, which has the right of self-government over its people, including specific rights to regulate inheritance and internal and social relations.¹⁴¹

Perhaps a careful limitation on what items are considered "cultural property" would offer a compromise for the competing interests: Native Americans could retain control over "essential" cultural objects,¹⁴² according to their definition of essential, while museums and archaeologists retain duplicate or less important objects.¹⁴³ Additionally, some type of time-sharing arrangement could be possible between the parties for certain objects over which Native Americans do not need exclusive, continued control.¹⁴⁴ Or, Native Americans could loan certain objects to museums for limited time periods for a fee, like other nations loan art and artifacts for special exhibitions.

In balancing the competing (and unequal) interests, commentators do not agree on a model solution, but there are clearly unsuccessful strategies that should be avoided. First and foremost, total export bans have proven unsuccessful for Western nations.¹⁴⁵ Additionally, selective export prohibitions are usually unsuccessful. Practically, it is impossible to enforce such embargoes; the export prohibitions merely shift trade to the black market

139. Again, there are other arguments that could apply, for example, the human ownership or means-ends arguments. See *supra* notes 123-25 and accompanying text.

This article has suggested a hierarchy of interests: first Native Americans, second archaeologists, third public museums, fourth private citizens. See *supra* note 102 and accompanying text.

140. See Suro, *supra* note 19, at A1; Nichols, *supra* note 41, at 35.

141. EchoHawk, *supra* note 98, at 443-44; INDIAN TRIBES, *supra* note 97, at 35-36; Serrill, *supra* note 98, at 52. See *supra* note 2.

142. Cf. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (Supp. II 1990) (defining cultural items as associated funerary objects, unassociated funerary objects, sacred objects, or cultural patrimony).

143. Andre Emmerich, a New York dealer in pre-Columbian art commented, "most early tombs [contain] the equivalents of today's Coca-Cola bottles and 7Up cans, as well as assembly line devotional objects." Glueck, *supra* note 31, at C13. Undoubtedly, this comment is somewhat true; however, it is important that Native Americans define their own cultural property so that a supposed expert does not mislabel a necessary object, for example, a knotting string.

144. BATOR, *supra* note 50, at 89-90. See *supra* note 2.

145. Herscher, *supra* note 111, at 122.

and encourage illegal activity. The supply of desired objects is limited, thereby increasing their value and in turn providing further incentive for pothunters and commercial traffickers to engage in illegal activity.¹⁴⁶

Most commentators agree that some form of licit market is necessary to avoid the undesirable consequences of an increased black market. (The Indian Arts and Crafts Act, discussed in part IV, could play an important role here.¹⁴⁷) The problems surrounding the creation of an adequate licit market involve how to define and control the licit market while still providing adequate protection to endangered cultural property.¹⁴⁸ Commentators agree that it is unrealistic to expect wealthy art importing nations to cooperate with art resource nations to enforce restrictive strategies that do not in some manner permit trade in art.¹⁴⁹ Yet, an international cooperative effort is essential for the success of any strategy.¹⁵⁰

Somehow the federal government must reconcile the interests of competing and unequal parties and find a satisfactory, integrated solution to the problem of preservation and protection of Native American cultural heritage. The loss of such a culture would have lasting effects on both present and future generations of Native Americans and all other Americans.

[O]ne can manifestly contend that if the remains of the past should disappear, our lives will be poorer in ways that the statistician can never measure — we will live in a drabber world, and will have squandered a resource that enlivens our existence, offers a key to our nature, and, not least, acts as a psychic ballast as we venture into a scary future.¹⁵¹

With this background in the motivations, incentives, theories, and potential consequences for all interested parties, this article will now analyze the specific protections currently provided by American laws.

IV. The Law

There are no laws in the United States that expressly prohibit export of cultural property.¹⁵² However, two recent laws expressly prohibit trafficking, and thus effectively regulate the export of cultural resources that fall within their scope.¹⁵³ Historically, the United States has viewed itself as a major

146. *Id.* at 122.

147. 25 U.S.C. § 305 (1988). See *infra* notes 308-22 and accompanying text.

148. Herscher, *supra* note 111, at 125. See *supra* note 2.

149. Houseman, *supra* note 108, at 565.

150. *Id.* at 565-67. For an analysis of specific foreign export restrictions and suggested strategies, see BATOR, *supra* note 50, at 34-51.

151. MEYER, *supra* note 15, at 208-09.

152. Karen D. Vitelli, *Issues in Archeology: The ABCs of the Antiquities Market*, EARLY MAN MAG., Spring 1982, at 29, 31.

153. Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee (1988); Native

art-importing nation, not as an art resource nation; consequently, export laws have been considered an unnecessary hindrance to international trade. Unfortunately, this viewpoint fails to recognize the precious, yet unprotected, Native American cultural resources that have been lost and destroyed while the government fails to effectively act on their behalf, choosing instead to protect an open market and free trade. Finally, the law is beginning to change as American society and federal and state governments respond to the pleas of Native Americans to protect these invaluable objects of cultural, historic, religious, artistic, and scientific significance.¹⁵⁴

While regulating trafficking is important to cultural property preservation, it is also important to regulate export in general. Cultural property leaves the United States not only by illicit theft and trafficking, but also by licit auctions and private sales. Laws limiting trafficking address one avenue for loss but leave other avenues open for continued future loss. Since there are no express export laws, it is necessary to consider the whole body of cultural property law, which includes various related statutes, to understand exactly which items are protected under which circumstances. "In general, this area of law represents a response to activities perceived to be threatening or endangering the nation's cultural heritage."¹⁵⁵ Subsequent laws and amendments have resulted from changing perceptions, gradually expanding the law to offer more and more protection.¹⁵⁶ Still, more protection is needed, especially to save Native American cultural heritage.

Subpart A discusses background cultural property laws and highlights the gaps and problems of these laws in protecting Native American cultural property. Subpart B summarizes the current laws that are used to prosecute illegal activities concerning cultural property, specifically as they are applied to protect Native American resources, with special emphasis on the trafficking provisions and how these provisions may be applied to regulate export also.

A. *Background Cultural Property Law*

1. *Antiquities Act*

Congress has acknowledged the importance of preserving cultural property for most of the twentieth century. However, until recently, the laws Congress enacted to promote this preservation have been largely ineffective, especially for preserving Native American cultural property.¹⁵⁷ The first such

American Graves Protection and Repatriation Act of 1990, 18 U.S.C. § 1170 (Supp. II 1990).

154. See Larry Witham, *Indians' Political Muscle Flexed Over Past 20 Years*, WASH. TIMES, July 23, 1991, at A5.

155. Peterson, *supra* note 63, at 135.

156. *Id.*

157. For a discussion of laws protecting Native American religious and cultural interests, see Peterson, *supra* note 63 (regarding human remains and funerary objects); Platzman, *supra* note 53 (regarding repatriation). See generally Dean B. Suagee, *American Indian Religious Freedom*

preservation law, the Antiquities Act, was enacted in 1906.¹⁵⁸ It provides for the prosecution of any person "who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity" situated on United States government lands without permission from the appropriate governmental authority.¹⁵⁹ While the Antiquities Act provides for preservation of "objects of antiquity" in general, it fails to specifically provide for Native American rights to own and dispose of their own artifacts.¹⁶⁰ Instead, excavations are permissible only if they benefit museums or educational institutions.¹⁶¹ Furthermore, since the Antiquities Act fails to mention sale, purchase, transfer, or transport of artifacts, it is impossible to use the Antiquities Act to prosecute unwanted export of objects. Protection under the Antiquities Act is limited to destruction or removal of antiquities located on federal lands.¹⁶²

It was not until 1974 that the Court of Appeals for the Ninth Circuit tested the effectiveness of the criminal provisions of the Antiquities Act in *United States v. Diaz*.¹⁶³ Unfortunately, the *Diaz* court declared the Antiquities Act unconstitutionally vague because it failed to define important terms such as "ruin" and "object of antiquity"; consequently, it provided insufficient notice to potential offenders.¹⁶⁴ If the court had restricted its holding to the specific

and Cultural Resources Management: Protecting Mother Earth's Caretakers, 10 AM. INDIAN L. REV. 1 (1982). See *supra* note 2.

158. Ch. 3060, 34 Stat. 225 (1906) (codified at 16 U.S.C. §§ 431-433 (1988 & Supp. IV 1992)). For a more detailed analysis of the Antiquities Act and its historical foundations, see Kristine Olson Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 ENVTL. L. & LITIG. 47 (1987). Regarding protection of Native American artifacts, see Blair, *supra* note 82, at 133-38.

159. 16 U.S.C. § 433 (1988 & Supp. IV 1992). Section 431 of the Antiquities Act authorizes the President to declare as national monuments certain historic landmarks located on federally owned or controlled land, and section 432 provides for permits to be granted to properly qualified institutions for "examination of ruins," "excavation of archaeological sites," and "gathering of objects of antiquity," provided these permitted activities benefit museums or scientific or educational institutions. *Id.* §§ 431-432.

160. The Antiquities Act has also been criticized by leading proponents for Native American rights because it includes Native American human remains in the category of protected archaeological resources, rather than protecting these remains according to common law principles applied to other human remains; in effect, this law fails to recognize deceased Native American ancestors as human beings. Jack F. Trope & Walter R. EchoHawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 42-43 (1992).

161. EchoHawk, *supra* note 98, at 449.

162. See 16 U.S.C. § 433 (1988 & Supp. IV 1992).

163. 499 F.2d 113 (9th Cir. 1974). Defendant was charged with a violation of § 433 of the Antiquities Act for appropriating masks three or four years old from a cave on an Apache Indian Reservation. The masks were considered sacred objects and were used by the Apaches in religious ceremonies. *Id.* at 114.

164. *Id.* at 114-15. Specifically, the statute did not define the age of an item that constituted an "object of antiquity," nor did it define prohibited uses of the object; as a result, a person of

facts of the case (which involved objects only four years old), perhaps the Antiquities Act could have been effectively applied in other prosecutions in which the status of the object as an antiquity was not under debate.¹⁶⁵ Technically, the Antiquities Act is only unconstitutional in the Ninth Circuit; however, since most of the artifacts requiring protection are located on lands in this circuit, the ruling is significant.¹⁶⁶ Consequently, most subsequent attempts to protect Native American objects have not been prosecuted under the Antiquities Act, but under the statutes discussed in subpart B.¹⁶⁷

2. National Historic Preservation Act

Chronologically, the next important statute offering protection to cultural property is the National Historic Preservation Act of 1966 (NHPA), as amended.¹⁶⁸ NHPA specifically declares that "the historical and cultural

common intelligence could not be held responsible for knowing that masks four years old were covered by statute. *Id.*

165. See Rogers, *Visigoths*, *supra* note 158, at 63; see, e.g., *United States v. Jones*, 449 F. Supp. 42 (D. Ariz. 1978). The *Jones* case involved the theft of various Indian artifacts from Indian ruins in the Tonto National Forest. The defendant was charged with theft and malicious mischief violations because the Antiquities Act had been found unconstitutionally vague in *Diaz*, but then the court dismissed these charges holding that the defendant should have been prosecuted under the Act because his acts were within those intended to be exclusively prosecuted under the Antiquities Act. *Id.* at 45-46. This ruling left artifacts in the Ninth Circuit wholly without protection, and on appeal the ruling was reversed. One week later ARPA was enacted. A new trial date was set, but the defendants opted in favor of a plea bargain under ARPA. In the end, each defendant served no more than one year in prison and paid a \$1000 fine. Rogers, *Visigoths*, *supra* note 158, at 66-68.

166. H.R. REP. NO. 311, 96th Cong., 1st Sess. 24 (1979), reprinted in 1979 U.S.C.C.A.N. 1709, 1727 (letter from Patricia M. Wald, assistant attorney general). The Antiquities Act has been upheld in the Tenth Circuit. *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979) (upholding the Antiquities Act because the objects in question were 800 to 900 years old, and a person of ordinary intelligence would know that such objects are included in the term "antiquity"). The *Smyer* court also stated that vagueness must be considered in reference to the specific conduct charged against the defendant. *Id.* at 941.

167. Furthermore, penalties under the Antiquities Act are insufficient — a fine of not more than \$5000, or six months imprisonment, or both. 18 U.S.C. §§ 3571(b)(6), 3581(b)(7) (1988). Considering a pothunter may receive \$5000 for just one pot, these penalties do not offer sufficient deterrence. See Northey, *supra* note 10, at 71; Sherry Hutt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 ARIZ. ST. L.J. 135, 140 (1992).

168. 16 U.S.C. §§ 470 to 470w-6 (1988 & Supp. IV 1992). For a detailed analysis of NHPA, its application to Indian lands, and protection of artifacts, see H. Barry Holt, *Archaeological Preservation on Indians Lands: Conflicts and Dilemmas in Applying the National Historic Preservation Act*, 15 ENVTL. L. 413 (1985). For a general in-depth analysis of NHPA, see John M. Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31 (1976). For discussion of related statutes, including the Reservoir Salvage Act of 1960 (16 U.S.C. §§ 469 to 469c-1 (1988)), the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4370 (1988)), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §§ 469 to 469c-2 (1988)), see Rogers, *Visigoths*, *supra* note 158, at 58-61; H. MARCUS PRICE III,

foundations of the Nation should be preserved as a living part of our community life."¹⁶⁹ NHPA establishes a comprehensive preservation scheme directed toward protecting sites, structures, and objects of historic, archaeological, and cultural significance that would qualify for inclusion in the National Register of Historic Places;¹⁷⁰ that is, sites and structures that "possess integrity of location, design, setting, . . . [and] workmanship," and that are associated with events or persons significant to our history, or that may yield important historic or prehistoric information.¹⁷¹

Certainly, Native Americans may have qualifying burial and ceremonial sites declared historic places in accordance with NHPA, and thereby gain greater federal protection for these sites. However, NHPA only offers protection against damage from undertakings by the federal government,¹⁷² not against thievery by pothunters.¹⁷³ Because NHPA, like the Antiquities Act, does not cover the sale, purchase, transfer, or transport of artifacts, it cannot be used to prevent unwanted export and effective loss of invaluable cultural property.¹⁷⁴ However, NHPA is significant in that it is the first preservation law to require Native Americans to participate in the decision-making process for protection of their artifacts as historic objects.¹⁷⁵

DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 26-29 (1991).
See supra note 2.

169. 16 U.S.C. § 470(b)(2) (1988).

170. 16 U.S.C. § 470a(a) (1988 & Supp. IV 1992).

171. 36 C.F.R. § 60.4(a) (1993).

172. 16 U.S.C. § 470f (1988); Peterson, *supra* note 63, at 141.

173. Recent amendments to NHPA, signed by President George Bush on October 30, 1992, will provide valuable information regarding illegal trafficking in antiquities. Section 4015 of the amendments, titled "Interstate and International Traffic in Antiquities," authorizes the appropriation of "not more than \$500,000" for study and report on "the suitability and feasibility of alternatives for controlling illegal interstate and international traffic in antiquities." National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, § 4015, 106 Stat. 4753, 4762-63 (codified at 16 U.S.C. § 470h-5 (Supp. IV 1992)). In conjunction with this study, the Secretary is instructed to consult with federal agencies responsible for antiquities, state preservation officers, related state and international organizations, Indian tribes, and other interested persons. Thus, the study should provide Congress with a comprehensive analysis of illegal trafficking in Native American cultural property, both interstate and internationally, and possible solutions as suggested by all interested parties. *Id.*

This amendment is the result of a two-year battle led by Sen. Wyche Fowler (D-Ga.) to attempt to establish a national registry of antiquities. Telephone interview with David Brooks, Staff Member of the Subcommittee on Public Lands, National Parks, and Forests of the Senate Committee on Energy and Natural Resources (Nov. 11, 1992). Although it is unlikely that such a registry will be created because of the practical difficulties and differing political opinions, if it were, it would be an essential resource to effective enforcement of theft laws and possible export regulations for art and antiquities.

174. *See* 16 U.S.C. §§ 470 to 470w-6 (1988 & Supp. IV 1992).

175. 16 U.S.C. § 470-1 (1988). ARPA requires notification to relevant Native American tribes in its permitting procedure, and NAGPRA requires consultation with or consent from Native American tribes in its permitting procedure. 16 U.S.C. § 470cc(c) (1988); 25 U.S.C. §

Native Americans need to be involved in the decision-making process so that our laws identify and adequately protect the cultural objects Native Americans consider essential to their heritage.

3. UNESCO Convention and Cultural Property Implementation Act

In 1970, the United Nations Economic, Scientific and Cultural Organization (UNESCO) held a conference which forms the legal foundation for modern international legislation governing the import and export of cultural property, namely the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Convention).¹⁷⁶ Throughout the Convention, cultural property is broadly defined as property "specifically designated by each State as being of importance for archeology, prehistory, literature, art or science and which belongs to" one of a list of eleven categories.¹⁷⁷

Briefly,¹⁷⁸ the major substantive provisions of the Convention provide for all signing nations to act to prevent their institutions from acquiring illegally exported cultural property (art. 7(a)), to recover and return imported, stolen cultural property (art. 7(b)), and to participate in multilateral action in crisis situations to prevent injury to cultural heritage of other signing nations (art. 9).¹⁷⁹ Other provisions in the Convention include commitments to oppose practices that encourage impoverishment of cultural heritage (art. 2), establish national protective services for cultural heritage (art. 5), prohibit export of cultural property without export certificates (art. 6), and restrict illegal

3002(c) (Supp. II 1990). See *infra* notes 214-17, 286 and accompanying text. When NHPA, ARPA, or NAGPRA requires federal agencies to cooperate or participate with Native Americans, it is important to remember that Native American tribes are sovereign nations; therefore, agencies should treat Native American tribes as foreign governments, not merely as individual citizens. See also NHPA Amendments of 1992, 16 U.S.C. § 470-1 (1988 & Supp. IV 1992) (declaring, as a policy of the federal government, to cooperate with Indian tribes and assist Indian tribes to expand their historic preservation programs and activities); *id.* § 470a(d) (establishing a new program to assist Indian tribes preserve their historic properties); *id.* § 470a(j) (establishing a comprehensive preservation education and training program that requires consultation with tribal organizations); *id.* § 470h-2(a) (requiring each federal agency to consult with Indian tribes and the private sector when carrying out historic preservation planning activities); *id.* § 470h-4(b) (requiring the Secretary to encourage protection of Native American cultural items); *id.* § 470i (requiring one member of the Advisory Council on Historic Preservation to represent Indian tribes).

176. See UNESCO Convention, *supra* note 7.

177. *Id.* at art. 1.

178. This is a brief, skeletal summary of the Convention; for more detailed analyses, commentaries, and related materials, see MEYER, *supra* note 15, at app. F; WILLIAMS, *supra* note 105, at 170-200 (chapter 5, "Protection of Cultural Property Rendered by International Agreements and Recommendations"); BATOR, *supra* note 50, at app., *Herein of the UNESCO Convention*; Jore, *supra* note 5.

179. UNESCO Convention, *supra* note 7, at arts. 7, 9; BATOR, *supra* note 50, app., at 103, 106.

movement of cultural property through education and information (art. 10).¹⁸⁰ In addition to these specific provisions, any "import, export or transfer of ownership of cultural property effected contrary to . . . [the] Convention" is expressly declared "illicit."¹⁸¹

While the United States Senate ratified the Convention in 1972, subject to one "reservation" and six "understandings" which clarify certain problematic provisions to make them consistent with American law and ideology,¹⁸² the Convention did not take legal effect in the United States until 1983 when Congress enacted the Convention on Cultural Property Implementation Act (CPIA).¹⁸³ CPIA primarily implements articles 7(b) and 9 of the Convention, which provide for recovery and return of stolen, imported cultural property and assistance in crisis situations to prevent irreparable harm to cultural heritage of other signing nations. However, CPIA differs from the Convention in that export provisions are limited, if not arguably lacking: in CPIA the United States retains the right to unilaterally decide when and if to impose export controls on American cultural property. Additionally, CPIA must be compatible with existing national laws and remedies¹⁸⁴ (which do not regulate the export of cultural property unless it is also stolen property), including the National Stolen Property Act discussed in subpart B. In summary, CPIA prohibits import of illegally exported and stolen artifacts in certain circumstances and is devoted to curtailing the pillage of archaeological sites in other countries.¹⁸⁵ Unfortunately, CPIA does not extend this same

180. UNESCO Convention, *supra* note 7, at arts. 2, 5-6, 10; BATOR, *supra* note 50, at 101-02.

181. UNESCO Convention, *supra* note 7, at art. 3.

182. 1 MERRYMAN & ELSÉN, VISUAL ARTS, *supra* note 15, at 95-96 cmts. 1-3.

183. 19 U.S.C. §§ 2601-2613 (1988). For a discussion on CPIA and its problems, see Leah A. Hofkin, *The Cultural Property Act: The Art of Compromise*, 12 COLUM.-VLA J.L. & ARTS 423 (1988); ADVISORY COMMITTEE, *supra* note 37, at 4. The impact of CPIA for protection of American cultural property is greatly limited because other major art-importing nations (including France, Japan, Switzerland, West Germany, and the United Kingdom) have failed to sign the Convention. Moustakas, *supra* note 115, at 1181-82 n.5. Canada is the only other major art-importing nation to sign the Convention, but interestingly, Canada, like the United States, has cultural property from North American Indians to protect from illegal trade and export. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 n.4, 843. For a discussion of Canada's legislation implementing the Convention and effecting import and export of cultural property, see Aaron Milrad, *The Cultural Property Export and Import Act*, 19 J. ARTS MGMT. & L. 15 (1989).

184. Barbara B. Rosecrance, Note, *Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 CORNELL INT'L L.J. 311, 317-19 (1986). For a detailed analysis of CPIA in conjunction with other related national laws, see generally Rosecrance, *supra*, and Ann Guthrie Hingston, *U.S. Implementation of the UNESCO Cultural Property Convention, in WHOSE PROPERTY?*, *supra* note 29, at 129.

185. Rosecrance, *supra* note 184, at 335; see also *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d. 278 (7th Cir. 1990). This case involved a replevin action for the return of four Byzantine mosaics over 1400 years old which

protection to the cultural resources and archaeological sites located within the United States.¹⁸⁶

This history of recognizing the necessity to preserve and protect objects of cultural, archaeological, historic, artistic, and religious significance, combined with recent information regarding the extensive pillage of American cultural heritage (especially Native American cultural heritage), has prompted the United States to finally begin to take action to protect its own cultural property.¹⁸⁷ The discussion that follows shows how current law is applied to actively protect the cultural heritage of Native Americans, specifically to prevent unauthorized and unwanted trafficking and export.

B. Laws Applied to Protect Cultural Property

1. National Stolen Property Act

The National Stolen Property Act (NSPA)¹⁸⁸ is one general, federal, criminal law that has been successfully applied to prosecute theft of cultural property. It applies to persons who knowingly transport or possess stolen property worth at least \$5,000 and involved in interstate or foreign commerce. Penalties are a fine of not more than \$10,000, ten years imprisonment, or both.¹⁸⁹ The two primary cases prosecuted under NSPA have both involved

had been stolen from the Church in 1979 by vandals. The mosaics were purchased by the defendant for over \$1 million from an art dealer who purportedly found them amidst rubble. Under both Indiana and Swiss law the church retained valid title to the mosaics, enforceable in U.S. federal court for their return. *Id.* at 291. Judge Cudahy, in his concurring opinion, specifically applied CPIA to this case. He challenged the judiciary to "attempt to reflect in its decisionmaking the spirit as well as the letter of an international agreement to which the United States is a party. . . . [T]he policy that [CPIA] embodies is clear: at the very least we should not sanction illegal traffic in stolen cultural property that is clearly documented as belonging to a public or religious institution." *Id.* at 296-97 (Cudahy, J., concurring). Furthermore, he reasoned that the mosaics should be returned to the Church both because the Church is "their rightful owner" and "as a reminder that greed and callous disregard for the property, history and culture of others cannot be countenanced by the world community or by this court." *Id.* at 297.

186. The Cultural Advisory Committee recently completed a report of findings and recommendations based on ten years of the CPIA. The Committee recommends that the government increase diplomatic pressures, Congress amend the CPIA, U.S. Customs Service provide stronger training programs, and the Committee support educational programs. ADVISORY COMMITTEE, *supra* note 37, at 3.

187. See Cowley, *supra* note 89, at 58.

188. 18 U.S.C. §§ 2314-2315 (1988 & Supp. II 1990). For a thorough analysis of NSPA, relevant cases, and CPIA, see Rosecrance, *supra* note 184. Crimes to cultural property may also be prosecuted under other general criminal statutes: 18 U.S.C. § 641 (1988) (embezzlement and theft), *id.* § 1361 (destruction of government property or malicious mischief), *id.* § 1163 (embezzlement and theft from Indian tribal organizations), and *id.* § 371 (conspiracy to commit offense or defraud the States). CAROL CARNETT, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, TECHNICAL BRIEF NO. 11, LEGAL BACKGROUND OF ARCHAEOLOGICAL RESOURCES PROTECTION 4 (1991).

189. 18 U.S.C. § 2314 (1988). "Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise . . . of value of \$5,000 or more, knowing the

imported, stolen cultural property.¹⁹⁰ NSPA is difficult to apply because of its strict scienter requirement that persons involved in the crime know that the property in question is in fact stolen.¹⁹¹ Defendants need not, however, know that their activities with this stolen property constitute interstate commerce.¹⁹²

It is this scienter requirement that was central to the controversial holdings in the *United States v. McClain* cases, in which the defendants illegally exported pre-Columbian artifacts from Mexico and imported them into the United States.¹⁹³ The defendants argued that applying NSPA to foreign exports violated constitutional due process for vagueness: potential offenders could not be expected to be familiar with foreign theft laws. However, "[t]he court reasoned that the statute's specific scienter requirement eliminates the possibility that a defendant is convicted for an offense he could not have understood to exist."¹⁹⁴

Furthermore, the court explained that "a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen', within the meaning of [NSPA]."¹⁹⁵ This declaration of national ownership must be definitive:

same to have been stolen, converted or taken by fraud . . ." *Id.* "Whoever receives, possesses, conceals, stores, barter[s], sells, or disposes of any goods, wares, or merchandise . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . ." 18 U.S.C. § 2315 (1988 & Supp. II 1990).

190. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (*McClain I*); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) (*McClain II*).

191. 18 U.S.C. §§ 2314-2315 (1988 & Supp. II 1990); Houseman, *supra* note 108, at 544, 546. "Knowingly" applies both to the prohibited activities and the status of the property as stolen; thus, NSPA defines a specific intent crime because it requires knowledge of illegality — it is the status of the property as stolen that makes the activities prohibited.

192. EDWARD J. DEVITT ET AL., 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL § 17.02, at 617-18 (4th ed. 1987).

193. *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (*McClain I*); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) (*McClain II*). This case has two decisions: first the court remanded the case for a jury decision based on appropriate jury instructions, then the court finally decided to overturn the conviction because the Mexican government failed to definitively declare national patrimony until 1972. *McClain I*, 545 F.2d at 1003-04; *McClain II*, 593 F.2d at 670-71. For criticism and argument over the case, see, e.g., Douglas C. Ewing, *What Is "Stolen"? The McClain Case Revisited*, in *WHOSE PROPERTY?*, *supra* note 29, at 177; Rosecrance, *supra* note 184.

194. *McClain II*, 593 F.2d at 665.

195. *McClain I*, 545 F.2d at 1000-01. The court further stated that *United States v. Hollinshead* supports the "conclusion that a declaration of national ownership suffices to render an illegally exported item 'stolen.'" *Id.* at 1001 n.28. In *Hollinshead*, the defendant was successfully prosecuted under NSPA for importing a known and recorded pre-Columbian stela from Guatemala into the United States. The court stated "that it was not necessary for the government to prove that appellants knew the law of the place of the theft" but only that they knew the stela was stolen; because there was no question on this point, defendants were found

"[NSPA] cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature."¹⁹⁶ Thus, *McClain* concludes that where a foreign country declares national ownership over cultural property, and this property is subsequently illegally exported from the country, the property will be considered stolen when imported into the United States, and NSPA may be used to prosecute this theft. But export regulations alone, without a definitive state declaration of ownership, will not render this same imported property "stolen" under NSPA.¹⁹⁷

State declarations of ownership of cultural property are often referred to as umbrella statutes and generally include claims to discovered and undiscovered artifacts.¹⁹⁸ A nation's claim to ownership is based solely on these legislative, self-declarations of ownership, not on possession or mere export regulations.¹⁹⁹ "[T]he United States' ability to declare national ownership and subsequently prosecute dealers in Indian artifacts under the NSPA is analogous" to the holding in *McClain* that validated Mexico's right to claim ownership over pre-Columbian artifacts.²⁰⁰

However, the United States has not as yet passed an umbrella statute protecting all cultural property as national patrimony, nor has it applied NSPA at home.²⁰¹ One commentator suggests that "[t]he limited scope of United States' antiquity laws might be explained by the fact that there is a sufficient domestic market for Indian artifacts such that umbrella statutes, designed to prevent the export of antiquities, are unnecessary."²⁰² Clearly, this is no

guilty. *United States v. Hollinshead*, 495 F.2d 1154, 1155-56 (9th Cir. 1974). Interestingly, some of the defendants in *McClain II* "knew Hollinshead and were aware of his conviction" *McClain II*, 593 F.2d at 659 n.1.

196. *McClain II*, 593 F.2d at 671.

197. *McClain I*, 545 F.2d at 1002-03; see also Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 471-76 (1988) (discussing umbrella statutes, NSPA, and common law replevin).

Illegal export alone may be sufficient to cloud the title on an imported object, thus preventing any sale to reputable art institutions or dealers. *Id.* at 483.

198. Moore, *supra* note 197, at 470 & n.25.

199. *McClain I*, 545 F.2d at 1002.

200. Moore, *supra* note 197, at 481. To clarify, while the *McClain II* court overturned the conviction, they clearly held that Mexico's declaration of ownership is valid; the conviction would have held had Mexico enacted a clear declaration of national ownership earlier. *McClain II*, 593 F.2d at 670-71.

201. There have been no cases tried under NSPA regarding interstate trafficking or illegal export of American cultural property. This may be the result of politics. Senator Daniel Patrick Moynihan proposed an amendment to NSPA which would have excluded cultural property from enforcement under NSPA. Moore, *supra* note 197, at 476-77; see also Ellen Herscher, *The "McClain Override" Bill*, S.605; *Hearings Held*, 12 J. FIELD ARCHAEOLOGY 469-77 (1985). This amendment did not pass nor is it likely that a similar one would pass in the future. Perhaps there has been a conscious effort by law enforcement not to use NSPA for cultural property, since there are now other applicable statutes, as discussed *infra*, making such an amendment unnecessary.

202. Moore, *supra* note 197, at 481 n.80.

longer true, given the current information regarding foreign interest in Native American artifacts, increasing export of these artifacts, and widespread pillage of Native American and other archaeological sites within the United States.²⁰³

2. *Archaeological Resources Protection Act*

The Archaeological Resources Protection Act (ARPA) specifically addresses preservation and protection of archaeological resources.²⁰⁴ It has been the primary statute used to prosecute illegal activities harming cultural property since its enactment in 1979.²⁰⁵ ARPA explicitly defines its purpose as "to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands . . ."²⁰⁶ This purpose is based on Congressional findings which concluded that:

- (1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;
- (2) these resources are increasingly endangered because of their commercial attractiveness; [and]
- (3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage . . .

. . .²⁰⁷

In 1993, at the time of this writing, these findings still present an accurate picture of the fate of cultural property, but the situation is improving. ARPA does cure significant problems with the Antiquities Act. It offers an effective mechanism for prosecution of trafficking in cultural property separate from NSPA. But ARPA also has problems concerning effective protection of Native American artifacts specifically.²⁰⁸

One of the primary criticisms of ARPA concerns the definition of "archaeological resource."²⁰⁹ The term is defined as "any material remains

203. Constance Lowenthal, *The Best Countries for Selling Stolen Art*, ARTNEWS, Oct. 1992, at 158; Sugarman, *supra* note 4, at 80; Cowley, *supra* note 89, at 58.

204. Archaeological Resources Protection Act of 1979, as amended in 1988, 16 U.S.C. § 470aa-mm (1988). For a discussion of the legislative history and 1988 amendments to the ARPA, see Rogers, *Visigoths*, *supra* note 158; Annetta L. Cheek, *Protection of Archaeological Resources on Public Lands: History of the Archaeological Resources Protection Act*, in PROTECTING THE PAST, *supra* note 32, at 33.

205. Unfortunately, actual convictions and sentences under ARPA are "not impressive." Rogers, *Visigoths*, *supra* note 158, at 61 & n.96.

206. 16 U.S.C. § 470aa(b) (1988).

207. *Id.* § 470aa(a)(1)-(3).

208. See Blair, *supra* note 82, at 143.

209. Hutt, *supra* note 167, at 136-37.

of past human life or activities which are of archaeological interest" and "at least 100 years of age."²¹⁰ While this term has not been declared unconstitutionally vague like the terms in the Antiquities Act, still ARPA's "archaeological resource" does not offer sufficient protection to Native American artifacts.²¹¹ Native Americans view the importance of an item by its cultural, religious, or historical significance rather than its age. For example, a forty year-old sacred Zuni War God, essential to Zuni religious practices, would not be protected under ARPA.²¹² Furthermore, ARPA, like the Antiquities Act, includes human remains in the definition of "archaeological resource." This definition is insulting because it fails to recognize deceased ancestors as human beings, but instead continues to label them as resource materials.²¹³

ARPA does, however, recognize the special rights of Native Americans to access their artifacts and includes them in regulated procedures. For example, when permits are issued to excavate on Indian lands, the individual or tribe²¹⁴ controlling the land must approve the permit. When permits are

210. 16 U.S.C. § 470bb(1) (1988). For more detailed definitions of terms, see the 1984 Uniform Regulations of ARPA, 18 C.F.R. § 1312.3 (1992); 32 C.F.R. § 229.3 (1993); 36 C.F.R. § 296.3 (1993); 43 C.F.R. § 7.3 (1993). The legislative history indicates that "only artifacts of true archaeological interest will be considered 'archaeological resources.'" 125 CONG. REC. S14,719, S14,722 (1979) (testimony from Mr. Hatfield). Note that ARPA's "material remains" includes more objects than the Antiquities Act's "objects of antiquities"; however, ARPA's limitation that these remains be of "archaeological interest" excludes some objects of antiquities covered by the Act. Furthermore, ARPA limits protected remains to those "at least 100 years of age" while the Act has no age limitation (although this lack of definition caused the Act to be declared unconstitutional in the 9th Circuit). Northey, *supra* note 10, at 76; United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).

211. "[T]he primary legal attacks on ARPA have concerned the definition of 'archaeological resource.'" Kristine Olson Rogers & Elizabeth Grant, *Model State/Tribal Legislation and Jury Education: Co-Venturing to Combat Cultural Resource Crime*, in PROTECTING THE PAST, *supra* note 32, at 47, 48 (quoting Rogers, *Visigoths*, *supra* note 158, at 70); see also United States v. Austin, 902 F.2d 743, 744-45 (9th Cir. 1990), *cert. denied*, 498 U.S. 874 (1990). Austin was convicted for eight counts under ARPA and appealed, claiming that ARPA is "unconstitutionally vague." *Id.* at 744. Austin's challenge failed, and the court held that ARPA is neither unconstitutionally overbroad nor vague. *Id.* at 744-45. "The statute provided fair notice that it prohibited the activities for which Austin was convicted." *Id.* at 745.

212. Blair, *supra* note 82, at 143.

213. See Hutt, *supra* note 167, at 136-37; Trope & EchoHawk, *supra* note 160, at 42-43.

214. When statutes refer to Indian tribes, it is important to remember that these tribes are sovereign nations and should be treated as such. For a discussion of Indian sovereignty, see INDIAN TRIBES, *supra* note 97.

In a government publication, an archaeologist for the Bureau of Indian Affairs optimistically declares, "[t]he Federal government is encouraging tribes to assume responsibility for their own affairs. Relations with tribes are government to government. When a Federal agency engages in archaeology on Indian lands, its dealings with tribal governments are much like those with state or municipal governments, but not entirely." Donald R. Sutherland, *Federal Archaeology in Indian Country*, C.R.M. BULL., July 1988, at 19. The author acknowledges that agencies "must" consider Native American religious concerns in archaeological permitting procedures on all lands.

issued to excavate on public lands, notice must be given to Indian individuals or tribes whose religious or cultural interests might be affected by the activities authorized by the permit.²¹⁵ Furthermore, ARPA requires that agencies consult with Indian tribes and consider the American Indian Religious Freedom Act (AIRFA)²¹⁶ while writing the Uniform Regulations.²¹⁷

AIRFA states that it will be the policy of the U.S. government to protect and preserve freedom of religion by "access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."²¹⁸ While Native American involvement in ARPA procedures is necessary to provide proper protection for their cultural heritage, the involvement provided for is still not enough. The forty year-old Zuni War God, an essential object to Zunis' freedom to worship (theoretically protected by AIRFA²¹⁹), is not protected by ARPA.²²⁰

ARPA protects archaeological resources located on public and Indian lands and whenever a state or local law is violated.²²¹ Public and Indian lands include all lands owned or administered by the federal government and lands of Indian tribes or individuals held in trust by the federal government or

However, then the author describes Native American concerns for protection of artifacts as "mundane." He claims, "[i]n general, apart from sacred beliefs, Indian attitudes towards Federal archaeology differ little from those of any other American citizen. They range all the way from indifference to a full fledged desire to be in charge." *Id.*

This short article typifies the obstacles Native Americans face in attempting to gain governmental protection for their cultural patrimony. Like the author, the government and many Americans do not understand the native perspective. Native religious beliefs are inseparable from native culture. DELORIA, *GOD IS RED*, *supra* note 52, at 247. Native Americans are hardly indifferent to preserving their archaeological artifacts since these objects represent the future of their heritage. See Trope & EchoHawk, *supra* note 160, at 36. Native American tribes do not merely desire to be in control, but as sovereign nations, they have the right to self-government. INDIAN TRIBES, *supra* note 97, at 33-39. In the words of Wilma Mankiller, Principal Chief of the Cherokee Nation, in 1991, "I believe that the rights of tribes . . . are inherent, and that when we talk about our rights as tribal people, we should be talking about the rights we have had since time immemorial . . ." *Tribal Sovereignty*, 18 NARF LEGAL REV. 1 (Native American Rights Fund, Boulder, Colo.), Winter/Spring 1993, at 1 (vol. 18, no. 1).

215. 16 U.S.C. § 470cc(c), (g)(2) (1988). Northey, *supra* note 10, at 110.

216. 42 U.S.C. § 1996 (1988).

217. 16 U.S.C. § 470ii(a) (1988).

218. 42 U.S.C. § 1996 (1988). AIRFA does not create any private rights of action or other mechanisms to enforce this sweeping policy declaration. Boyles, *supra* note 118, at 1127. For discussions concerning application of AIRFA, see *id.* (regarding sacred sites); EchoHawk, *supra* note 98, at 451-52 (regarding museum rights to sacred objects).

219. AIRFA is only a statement of governmental policy, it creates no legally enforceable rights. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988). See discussion *supra* part III.B.

220. See 42 U.S.C. § 1996 (1988); Blair, *supra* note 82, at 143.

221. 16 U.S.C. § 470ee (1988). For a more detailed discussion of land and ownership issues, see *infra* part V.

"subject to a restriction against alienation."²²² ARPA protects archaeological resources on public or Indian lands from all excavation, removal, and damage conducted without an ARPA permit or in violation of any other federal law.²²³

Additionally, ARPA protects archaeological resources involved in interstate or foreign commerce if these resources were obtained in violation of state or local law,²²⁴ provided the law violated is related to the general protection of objects (for example, theft, trespass, or conversion laws).²²⁵ The ARPA does not limit protection to resources located on public and Indian lands; therefore, resources on state or private lands are also protected by ARPA if involved in interstate or foreign commerce and obtained in violation of state or local law.²²⁶

The major provisions of ARPA provide for the issuance of permits for authorized excavation of archaeological resources and imposition of penalties for unauthorized excavation and trafficking.²²⁷ Agencies issue permits for all authorized excavation, removal, and associated activities affecting archaeological resources from public or Indian lands.²²⁸ Conversely, ARPA prohibits: (1) unauthorized or attempted²²⁹ unauthorized excavation, removal, damage, alteration, or defacement of any archaeological resource located on public lands or Indian lands; (2) trafficking in archaeological resources obtained in violation of ARPA or any other provisions of federal law; and (3)

222. 16 U.S.C. §§ 470aa(b), 470bb(4) (1988).

223. *Id.* §§ 470cc(a)-(b), 470ee.

224. 16 U.S.C. § 470ee(c) (1988). The statute specifically speaks to archaeological resources "excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law." *Id.*

225. *United States v. Gerber*, 999 F.2d 1112, 1116 (7th Cir. 1993). The state or local law need not be expressly directed toward protection of cultural property because "[a] law that comprehensively protects the owner of land from unauthorized incursions, spoilsations, and theft could well be thought to give all the protection to be buried antiquities that they need . . ." *Id.* Therefore, violations of state or local theft, trespass, or conversion laws would trigger application of ARPA. *Id.*

226. 16 U.S.C. § 470ee(c) (1988). The nature of the state or local law violated is irrelevant — any violation is sufficient to trigger application of ARPA. *Gerber*, 999 F.2d at 1116.

227. 16 U.S.C. §§ 470cc-470gg (1988). For a thorough and detailed analysis of ARPA, see Northey, *supra* note 10.

228. 16 U.S.C. § 470cc (1988).

229. *Id.* § 470ee. Congress specifically amended ARPA to prohibit the "attempt" to excavate, remove, damage, alter, or deface archaeological resources because they wanted to make it possible to prosecute looters before actual damage is inflicted upon the resources, thereby affording greater protection and encouraging enforcement of the law. S. REP. NO. 566, 100th Cong., 2d Sess. 4 (1988), reprinted in 1988 U.S.C.C.A.N. 3983, 3986 (statement of William L. Rice, Deputy Chief, Forest Serv., U.S. Dep't of Agric.); CARNETT, *supra* note 188, at 9. However, Congress failed to define "attempt." Rogers & Grant, *supra* note 211, at 48.

trafficking in interstate or foreign commerce in archaeological resources obtained in violation of any state or local law.²³⁰

Criminal "trafficking" under ARPA includes sale, purchase, exchange, transport, receipt, or offer to sell, purchase, or exchange protected archaeological resources.²³¹ ARPA does not expressly prohibit "export" of cultural property. However, because the prohibition on trafficking is expressly applied to foreign commerce, this provision acts as a limitation on export to the extent the activity is defined as illicit trafficking. Thus, ARPA does provide the first significant limitations to freedom of export.²³²

An ARPA crime is a general intent crime requiring the defendant to "knowingly" perform prohibited activities.²³³ That is, the defendant must only have the intent to excavate or remove archaeological resources, not the intent to perform an illegal activity. And, the defendant need not know the object he is removing is an "archaeological resource" under ARPA. This crime is easier to prosecute than specific intent crimes (like those under NSPA) which require that the defendant intended to break the law. The "knowing" mental state does not apply to every element of an ARPA crime, however. "'Knowingly' refers to the actions of the person, and [ARPA] was designed only to punish those that knowingly excavated, removed, or otherwise defaced any archaeological resource. . . . [K]nowledge that the person was on public [or Indian] land at the time of the offense is not an essential element of the offense," but is only a jurisdictional element not requiring any mental state.²³⁴ Likewise, the provision triggering ARPA when any state or local law is violated is jurisdictional, provided the defendant has the required mental state of the applicable state or local law to indeed be in violation of it.

ARPA provides for both felony and misdemeanor prosecutions and penalties are serious. If the commercial value of the archaeological resource involved in the crime plus the cost of restoration and repair is under \$500, and it is the defendant's first offense, then the crime is a misdemeanor: maximum penalties are one year imprisonment, a fine of \$100,000, or both.

230. 16 U.S.C. § 470ee(a)-(c) (1988).

231. *Id.* § 470ee(b)-(c). "It takes little imagination to see how ARPA *might* be made the basis for a nationwide system of export controls indistinguishable from those in other nations." I MERRYMAN & ELSÉN, VISUAL ARTS, *supra* note 15, at 75 (emphasis added). Unfortunately, ARPA does not take this extra step of establishing comprehensive export regulations. But prohibiting illicit trafficking is an important first step for effective cultural resource protection.

232. Merryman, *supra* note 183, at 851 n.74.

233. 16 U.S.C. § 470ee(d); H.R. REP. NO. 311, 96th Cong., 1st Sess. 11 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1714.

234. *United States v. Kohl*, No. 85-10044, slip op. at 5 (D. Idaho Feb. 13, 1986). There was no question in this case that the defendant excavated archaeological resources. He claimed, however, that he did not know he was on public land. The court held that ARPA places the burden of making sure the law is not violated on the person who chooses to engage in activities prohibited by ARPA. *Id.* Therefore, the defendant was convicted. *Id.* at 6.

However, if it is a second offense or the value plus restoration and repair is over \$500, then the crime is a felony: maximum penalties are five years imprisonment, a fine of \$250,000, or both.²³⁵ In addition, ARPA provides for forfeiture of all vehicles and equipment used in connection with any prohibited activities.²³⁶ The government may further assess a civil penalty against an ARPA violator. The amount of the penalty is related to the commercial value of the archaeological resource plus the cost of restoration and repair. Subsequent offenses may double the penalty.²³⁷

Significantly, ARPA does not distinguish between archaeological resources obtained illegally before or after its date of enactment (1979).²³⁸ ARPA contains no "grandfather" clause exempting archaeological resources illegally excavated prior to 1979 from criminal trafficking prohibitions.²³⁹ Consequently, resources obtained in violation of any existent law, federal, state, or local, are protected by ARPA to the extent they are involved in criminal trafficking. For example, resources obtained in violation of the Antiquities Act prior to 1979 are still protected by ARPA if they are trafficked, even in the Ninth Circuit where the penalty provisions of the Antiquities Act have been declared unconstitutional.²⁴⁰

The legislative history indicates that ARPA is intended to be compatible with all existing criminal laws, and criminal sanctions may be combined as long as each law applies to the resource and activity in question. "Although as a matter of departmental policy, we would prosecute all violations of . . . [ARPA] under enforcement provisions of [ARPA], we should have the Title 18 alternative available, in case any 'loopholes' are discovered in [ARPA]."²⁴¹ Hopefully, by combining ARPA with other federal laws, all avenues for illegal export of archaeological resources obtained from public and Indian lands will be closed.²⁴²

235. 16 U.S.C. § 470ee(d) (1988); 18 U.S.C. § 3571(b)(5) (1988).

236. 16 U.S.C. § 470gg(b) (1988).

237. *Id.* § 470ff(a).

238. Northey, *supra* note 10, at 80.

239. ARPA only exempts archaeological resources in *lawful* possession prior to 1979. 16 U.S.C. § 470ee(f) (1988); Rogers, *Visigoths*, *supra* note 158, at 73 (citing ROBERT COLLINS, U.S. DEPT OF AGRIC., THE MEANING BEHIND ARPA: HOW THE ACT IS MEANT TO WORK 7 (1980) [hereinafter COLLINS]). Collins was a drafter of ARPA.

240. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

241. H.R. REP. NO. 311, 96th Cong., 1st Sess. 25 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1728 (letter from Patricia M. Wald, assistant attorney general). It is also worth noting that ARPA provides for both criminal and civil penalties which may be aggregated. 16 U.S.C. §§ 470ee, 470ff (1988); Rogers, *Visigoths*, *supra* note 158, at 80 (quoting COLLINS, *supra* note 239, at 7).

242. Relevant Title 18 laws include: 18 U.S.C. § 641 (1988) (embezzlement and theft), *id.* § 1361 (destruction of government property or malicious mischief), *id.* § 1163 (embezzlement and theft from Indian tribal organizations), and *id.* § 371 (conspiracy to commit offense or defraud the States). CARNETT, *supra* note 188, at 4.

Additionally, by combining ARPA with state and local laws, it is also possible to limit trafficking of artifacts obtained from private and state lands. While ARPA does not limit its jurisdiction over archaeological resources involved in commerce to violations of state and local cultural property laws (the statute says "any" state or local law²⁴³), these cultural property laws provide significant added protection to resources. One commentator who analyzed the relevant state statutes found that:

State statutes in force as of July 1990, fall into five categories that reinforce or complement ARPA:

1. Restrictions on sales of antiquities or forgeries (14 States);
2. Laws to discourage activities that damage archaeological resources on private land (11 States);
3. Mirror ARPA statutes, including penalty provisions (37 States);
4. Penalties for disturbances of marked and unmarked burial sites (11 States) . . . ;
5. Statutes providing for acquisition of real property or artifacts.²⁴⁴

These state statutes complement ARPA and increase protection to archaeological resources. By providing for this combination of various federal, state, and local laws, ARPA provides significant protection to Native American cultural resources and effectively limits export of some of these cultural resources for the first time in American legal history.²⁴⁵

ARPA does not, however, technically prohibit mere possession of illegally obtained artifacts. This was a conscious omission by Congress to protect "holders of archaeological resources obtained before the effective date of . . . [ARPA]."²⁴⁶ Congress clarified that "a person may own, possess, buy, sell, trade or exchange archaeological artifacts if held prior to the enactment regardless of origin or proof of ownership" *provided* such resources were not

243. 16 U.S.C. § 470ee(c) (1988); *United States v. Gerber*, 999 F.2d 1112, 1116-17 (7th Cir. 1993). The *Gerber* court limited "state or local law" to laws "related to the protection of archaeological sites or objects." *Id.* at 1116.

244. CARNETT, *supra* note 188, at 6. For a brief summary of each state's laws and a table summary, see PRICE, *supra* note 168, at 43-115 & app.

245. Merryman, *supra* note 183, at 851 n.74; see 16 U.S.C. § 470ee (1988). The primary problems will be evidentiary and enforcement: how to prove who has valid title and from what land the artifact was excavated or removed, and how to obtain convictions for offenders. These problems are discussed *supra* part V.

246. S. REP. NO. 179, 96th Cong., 1st Sess., 8 (1979. This report accompanied Senate Bill 490, but the House bill was passed in lieu of Senate bill). See also 16 U.S.C. § 470ee(f) (1988). Trafficking in archaeological resources obtained in violation of the ARPA permit procedures shall not apply to "any person with respect to an archaeological resource which was in the *lawful* possession of such person prior to October 31, 1979." *Id.* (emphasis added).

illegally excavated or removed.²⁴⁷ One commentator suggests that "no person could be in [legal] possession of any artifact taken without a permit from federal lands prior to 1979 without violating general criminal statutes and regulations prohibiting theft and destruction of governmental property," so this exclusion effectively omits no one.²⁴⁸ Because ARPA incorporates all existent laws yet contains no exemption or "grandfather" clause,²⁴⁹ any artifact excavated at any time from federal or Indian lands without permission cannot be legally possessed²⁵⁰ — thus, in effect, only legally obtained artifacts may be legally possessed.

There is still a potential loophole, however. The problem regarding possession is primarily evidentiary.²⁵¹ If the artifact is proven to have been stolen, then despite any pre-ARPA possession, the current or future possessor cannot engage in any subsequent prohibited activities with the artifact. However, if the artifact merely has questionable title or unknown origin, then the owner might be free to sell, transport, or export it.

Consider the consequences for one illegal possessor who lost possession of artifacts with no recourse. Robert Wilson, a U.S. Forest Service employee, testified on behalf of the defense in a criminal trial prosecuted under ARPA for damage to an archaeological site.²⁵² His testimony was offered to prove the defendants had not caused all the damage alleged, and the defendants were acquitted.²⁵³ In his testimony, however, Wilson also admitted that he had removed artifacts from a cave on federal land prior to the enactment of ARPA and that he still possessed some of these artifacts.²⁵⁴

247. S. REP. NO. 179, 96th Cong., 1st Sess., 8 (1979).

248. Rogers, *Visigoths*, *supra* note 158, at 73. Robert Collins, an ARPA drafter, confirmed, "[o]ne cannot have 'lawful' possession of an archaeological resource that has been taken illegally from Federal property. Therefore, one cannot traffic in illegally obtained artifacts at any time after the date of the enactment of . . . [ARPA], even though he had possession of the artifact prior to . . . [ARPA]'s passage." *Id.* (quoting COLLINS, *supra* note 239, at 6-7).

249. *See supra* notes 238-40 and accompanying text.

250. Rogers, *Visigoths*, *supra* note 158, at 73.

251. *See infra* part V.B.

252. Testimony of Robert Wilson, *United States v. Barnes & Bender*, CR No. 81-119-BE, exhibit D (Or. Dist. May 1982).

253. Findings and Recommendation, *Wilson v. Turner*, Civ. No. 84-6503-KF (Or. Dist. Oct. 1985).

254. Testimony of Robert Wilson at D-6, D-23, D-27, *Barnes & Bender* (CR No. 81-119-BE). Needless to say, it reflects poorly on the U.S. government when government employees are involved in illegal looting. In 1987 another U.S. Forest Service officer was prosecuted under ARPA for appropriating Native American pottery he found on government land. He claimed he did not know keeping the pottery was a crime since he had not dug it out of the ground, but rather found it uncovered. He plead guilty to a misdemeanor and was sentenced to probation on the condition that he quit his job. Bill Ott, *Judge Tells Forester Who Took Indian Artifact To Quit His Job*, SAN DIEGO UNION, Apr. 7, 1987, at B1.

Following the trial, the U.S. Forest Service directed Wilson to return all the artifacts in his possession to the Bureau of Land Management.²⁵⁵ In return, Wilson was not prosecuted for his ARPA violations. However, Wilson filed a civil suit for damages against the U.S. Attorney and various federal agency employees claiming conspiracy and deprivation of personal property and liberty.²⁵⁶ Wilson conceded that his artifacts were government property, but argued that he had obtained them lawfully because the penalty provisions of the Antiquities Act (the only cultural property law in effect at the time he obtained the artifacts) had been declared unconstitutional in the Ninth Circuit.²⁵⁷

The judge granted summary judgment against Wilson, explaining that the federal government retains ownership rights to all artifacts on federal land. Joint ownership is not possible. Therefore, "the government's taking of the artifacts does not violate Wilson's Fifth Amendment rights because he had no property interest in them."²⁵⁸ Likewise, any person who possesses artifacts obtained in violation of any law at any time, has no property rights in these artifacts, and the government may require their return. The illegal possessor may lose possession of his artifacts at any time with no recourse, provided it can be shown that his possession is indeed illegal. The rights of the illegal possessor hinge on the evidence available against him regarding the origin of the artifact possessed.

It has been suggested by some commentators that ARPA is an umbrella statute for the United States, that it assumes national ownership over all presently discovered or undiscovered artifacts located on or in public and Indian lands.²⁵⁹ This is not the case.²⁶⁰ If ARPA were an umbrella statute, this complex analysis of the body of cultural property law would be unnecessary, because export of all cultural property would be clearly regulated and the state of the title of the exported object would be irrelevant. To the contrary, no definitive assertion of ownership or national patrimony exists in the language of the statute.²⁶¹

For ARPA to be an enforceable umbrella statute, it would have to include a clear pronouncement of national ownership.²⁶² ARPA does state that "archaeological resources which are excavated or removed from public lands will remain the property of the United States,"²⁶³ but this merely restates a

255. Findings and Recommendation at 4-5, *Wilson* (Civ. No. 84-6503-KF).

256. See Complaint for Damages and Declaratory and Injunctive Relief, *Wilson v. Turner*, Civ. No. 84-6503-KF (Or. Dist. Nov. 1984).

257. Findings and Recommendation at 9, *Wilson* (Civ. No. 84-6503-KF). For further discussion on the Antiquities Act of 1906, see *supra* notes 157-67 and accompanying text.

258. Findings and Recommendation at 10, *Wilson* (Civ. No. 84-6503-KF).

259. Moore, *supra* note 197, at 480-88; Rosecrance, *supra* note 184, at 345.

260. See Rogers, *Visigoths*, *supra* note 158, at 105 n.348.

261. See *id.*

262. See *United States v. McClain*, 593 F.2d 658, 671 (5th Cir. 1979).

263. 16 U.S.C. § 470cc(b)(3) (1988). For more discussion, see Suagee, *supra* note 157,

basic presumption of property law that the government is the custodian over public lands and the resources below the surface, unless someone else holds valid title to these resources.²⁶⁴ ARPA does not affect ownership rights of archaeological resources: those resources located on public lands are still owned by the government, those located on Indian lands are still owned by the respective Indian tribes or individuals, and those located on other lands are still owned according to property law principles.²⁶⁵ Even though ARPA is not an umbrella statute, it is still an effective mechanism for protection of cultural property. By incorporating all violations of federal, state, and local laws involving archaeological resources into its criminal provisions, ARPA extends protection to many archaeological resources without expressly limiting export.

3. *Native American Graves Protection and Repatriation Act*

As indicated by its name, the Native American Graves Protection and Repatriation Act (NAGPRA)²⁶⁶ provides further protection for some Native American cultural property and human remains by regulating ownership, disposition, trafficking, and most significantly, repatriation of Native American cultural property or human remains in the possession of a federal agency or museum.²⁶⁷ While a full discussion of repatriation is beyond the scope of this paper, Native Americans can significantly reduce the possibility of losing their cultural property by reclaiming as many objects as possible under NAGPRA's repatriation provisions.²⁶⁸ The best protection for Native American artifacts is to keep them from being removed from Indian land;²⁶⁹ once removed, the second best protection from the Native American perspective is to repatriate them.

at 39.

264. 1 PROT & O'KEEFE, *supra* note 7, at 307-11. There is significant dispute over what evidence suffices to overcome the presumption of federal ownership of cultural property discovered on public land. See generally EchoHawk, *supra* note 98.

265. See ARPA Uniform Regulations: 18 C.F.R. § 1312.13(a)-(b) (1992); 32 C.F.R. § 229.13(a)-(b) (1993); 36 C.F.R. § 296.13(a)-(b) (1993); 43 C.F.R. § 7.13(a)-(b) (1993); 125 CONG. REC. 17,391, 17,394 (1979) (testimony of Rep. Udall). For a general discussion on property law principles applied to cultural property internationally, see 1 PROT & O'KEEFE, *supra* note 7, at 306-21.

266. 25 U.S.C. §§ 3001-3013 (Supp. II 1990); 18 U.S.C. § 1170 (Supp. II 1990).

267. 25 U.S.C. §§ 3002, 3005 (Supp. II 1990); 18 U.S.C. § 1170 (Supp. II 1990); H.R. REP. NO. 877, 101st Cong., 2d Sess. 21-22 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4380 (letter from Robert D. Reischauer, director, Congressional Budget Office).

268. See 25 U.S.C. § 3005 (Supp. II 1990); Platzman, *supra* note 53; Francis P. McManamon & Larry V. Nordby, *Implementing the Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 217 (1992); June Camille Bush Raines, Comment, *One is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639 (1992).

269. Peterson, *supra* note 63, at 148.

NAGPRA is the result of a long battle by Native Americans, their tribal governments, and the Native American Rights Fund to protect their ancestors' graves from desecration, repatriate their ancestors' remains, and "retrieve stolen or improperly acquired religious and cultural property."²⁷⁰ NAGPRA addresses each of these concerns in an effort "to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian, and Native Hawaiian lands."²⁷¹ As a result of this input from Native Americans, NAGPRA is the first cultural property law to be written from the Native American perspective, focusing on essential objects of cultural patrimony rather than prohibited activities.²⁷²

"In interpreting NAGPRA, it is critical to remember that it must be liberally interpreted as a remedial legislation to benefit the class for whom it was enacted."²⁷³ In summary,²⁷⁴ the major provisions of NAGPRA define cultural property and ownership rights, inventory and summarize cultural property possessed by federal agencies or museums, call for repatriation of cultural property from federal agencies or museums, create a review committee to oversee inventory and repatriation procedures, establish civil penalties for museums who fail to comply with NAGPRA, authorize grants to implement NAGPRA, and provide criminal penalties for illegal trafficking in cultural property and human remains.²⁷⁵

NAGPRA provides detailed definitions of critical terms, namely "burial site," "cultural affiliation," "cultural items" (including "associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony"),²⁷⁶ "Native American," "Native Hawaiian," and "right of possession."²⁷⁷ These definitions are the result of input from representatives

270. Trope & EchoHawk, *supra* note 160, at 36; see also Henry Sockbeson, *Repatriation Act Protects Native Burial Remains and Artifacts*, NARF LEGAL REV. (Native American Rights Fund, Boulder, Colo.), Winter 1990, at 1 (vol. 16, no. 1); Raines, *supra* note 268.

271. H.R. REP. NO. 877, 101st Cong., 2d Sess. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4367.

272. See Trope & EchoHawk, *supra* note 160, at 76.

273. *Id.* at 76. The authors are prominent supporters of NAGPRA, involved in the legislative drafting and negotiating processes. Mr. EchoHawk is Senior Staff Attorney with the Native American Rights Fund in Boulder, Colorado. Mr. Trope was formerly Senior Staff Attorney for the Association on American Indian Affairs in New York, New York, and continues to represent clients on Indian matters. *Id.* at 35.

274. For more detailed analyses of NAGPRA and related issues, see Trope & EchoHawk, *supra* note 160 (regarding background and legislative history); Platzman, *supra* note 53 (regarding repatriation from museums); Marsh, *supra* note 64 (regarding protection of archaeological sites).

275. 25 U.S.C. §§ 3001-3013 (Supp. II 1990); 18 U.S.C. § 1170 (Supp. II 1990).

276. NAGPRA carefully distinguishes between human remains and funerary objects (25 U.S.C. § 3001(3) (Supp. II 1990)), thereby curing a major criticism of both the Antiquities Act and ARPA, that is, lack of respect toward deceased ancestors' remains. Hutt, *supra* note 167, at 136-37; Trope & EchoHawk, *supra* note 160, at 42-43.

277. 25 U.S.C. § 3001 (Supp. II 1990). For the purposes of this chapter, the term —

of Congress, Native Americans, and the art community.²⁷⁸ Understanding these definitions is crucial to understanding NAGPRA because like all the cultural property laws discussed herein, NAGPRA only protects its specifically defined items. The legislative history explains:

(1) "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) "cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) "cultural items" mean human remains and —

(A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, . . . except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects,

(B) "unassociated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, . . . and the objects can be identified . . . as related to specific individuals or families or to known human remains or . . . as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group . . .

(13) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. . . . The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body . . . is deemed to give right of possession to those remains

Id. For discussion on the definitions, see Platzman, *supra* note 53, at 517-21; Trope & EchoHawk, *supra* note 160, at 61-68.

278. For legislative history on the definitions, see H.R. REP. NO. 877, 101st Cong., 2d Sess. 14-15 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4373-74; S. REP. NO. 473, 101st Cong., 2d Sess. 6-9 (1990); 136 CONG. REC. H10,985, H10,988, H10,990-91 (daily ed. Oct. 22, 1990); 136 CONG. REC. S17,173, S17,176 (daily ed. Oct. 26, 1990).

This legislation does not include every basket, every pot and every blanket ever made by Indian hands. It refers to human remains, funerary objects, and only the most sacred of religious items which were taken from a tribe without permission.²⁷⁹

* * *

These definitions do not include objects which were created for a purely secular purpose, such as for sale or trade in Indian art. The definitions include objects which are necessary for the continuing practice of native American religion, funerary objects and objects that are of central cultural importance to the tribe such that they cannot be owned, alienated or conveyed by any individual. The scope of these definitions is a very limited one. In this way the bill provides adequate protections to native American grave sites while still allowing private collectors to pursue their pastimes.²⁸⁰

Significantly, NAGPRA, unlike ARPA, contains no age requirement in its definitions of cultural items, but rather defines them from the Native American perspective based on personal and sacred value.²⁸¹ This perspective specifically addresses the problems surrounding the Zuni's efforts to reclaim their War Gods and protects all significant cultural and religious objects.²⁸² Still, the definitions carefully exclude objects "created for purely a secular purpose, including the sale or trade in Indian art" in an effort to avoid any unnecessary adverse impact on Native American art trade.²⁸³ (In this way, NAGPRA is consistent ideologically with the Indian Arts and Crafts Act of 1990, discussed *infra*.) Thus, the definitions are precise enough to avoid the vagueness problems of the Antiquities Act, inclusive enough to sufficiently protect Native American cultural heritage, and still exclusive enough to allow benign art trade to flourish.²⁸⁴

NAGPRA specifically provides for native ownership of human remains and cultural items. In this sense, it is the closest of American laws to an umbrella statute; however, NAGPRA is not technically an umbrella statute because it vests ownership of cultural property and human remains in Native Americans, not the federal government. All human remains and cultural items excavated

279. 136 CONG. REC. H10,985, H10,988 (daily ed. Oct. 22, 1990) (testimony of Rep. Campbell). NAGPRA protects human remains, funerary objects, sacred objects, and cultural patrimony. 25 U.S.C. §§ 3001(3), 3002(c) (Supp. II 1990); 18 U.S.C. § 1170 (Supp. II 1990).

280. 136 CONG. REC. S17,173, S17,176 (daily ed. Oct. 26, 1990) (testimony of Sen. McCain).

281. Hutt, *supra* note 167, at 142.

282. 136 CONG. REC. S17,173, S17,177 (daily ed. Oct. 26, 1990) (testimony of Sen. Domenici).

283. S. REP. NO. 473, 101st Cong., 2d Sess. 7 (1990).

284. Platzman, *supra* note 53, at 543-44; S. REP. NO. 473, 101st Cong., 2d Sess. 7 (1990).

or discovered on federal or tribal lands after the enactment of NAGPRA, November 16, 1990, are owned by Native Americans, either the lineal descendants, the tribe occupying the land, or the tribe with the closest cultural affiliation.²⁸⁵ Excavation or removal of human remains or cultural items from federal or tribal lands requires a permit issued in accordance with ARPA and proof of consultation or consent from the appropriate Indian tribe.²⁸⁶

Like ARPA, NAGPRA prohibits illegal trafficking in protected cultural property.²⁸⁷ Criminal offenders of NAGPRA may receive maximum penalties of one year in prison, fines of \$100,000, or both for the first offense and five years in prison, fines of \$250,000, or both for subsequent offenses.²⁸⁸ NAGPRA specifically prohibits the knowing sale, purchase, use for profit, or transport for sale or profit of any "human remains of a Native American without the right of possession to those remains" or "any Native American cultural items obtained in violation of [NAGPRA]."²⁸⁹ Human remains are distinguished from other cultural items in these trafficking provisions.²⁹⁰ The provisions regarding trafficking in cultural items pertain only to objects prospectively acquired in violation of NAGPRA; consequently, trafficking of cultural items is prohibited only to the extent the items were originally removed from federal or tribal lands after November 16, 1990, without an ARPA permit or tribal consent.²⁹¹ Added protection, however, is

285. 25 U.S.C. § 3002(a)-(b) (Supp. II 1990).

286. *Id.* § 3002(c).

287. Tribes actively protest the sale, auction, and marketing of Native American artifacts by the major art auction houses. In response, some auction houses give a percentage of the proceeds from these auctions to Native American foundations. Nevertheless, these monetary grants do not curtail this "licit" trafficking in Native American cultural property and Native Americans are not satisfied. Marsh, *supra* note 64, at 103.

288. 18 U.S.C. § 1170 (Supp. II 1990). Trope & EchoHawk, *supra* note 160, at 73. One commentator suggests that NAGPRA's prohibitions will probably not dramatically reduce looting and trafficking. Looters and pothunters are driven by greed, and enforcement mechanisms are not effective enough to provide sufficient deterrence. What is needed is a strategy "that chokes off the lucrative market." Marsh, *supra* note 64, at 131.

289. 18 U.S.C. § 1170 (Supp. II 1990).

290. *Id.* § 1170. This distinction is the result of compromise negotiations in the legislative process. The civil provisions provide full protection to both human remains and cultural items; however, some protection for cultural items was sacrificed in the criminal provisions in order to guarantee full protection in the civil repatriation provisions. As a result, when it is not possible to successfully prosecute a NAGPRA offense to cultural items criminally, prosecutors should look to civil penalties. Telephone Interview with Walter R. EchoHawk, Senior Staff Attorney, Native American Rights Fund, in Boulder, Colo. (Mar. 3, 1993). See 18 U.S.C. § 1170 (Supp. II 1990); 25 U.S.C. §§ 3002-3005, 3007 (Supp. II 1990).

291. See Trope & EchoHawk, *supra* note 160, at 73-74; 18 U.S.C. § 1170 (Supp. II 1990); 25 U.S.C. §§ 3001(3), (13), 3002(c) (Supp. II 1990). The provision describing "intentional removal from or excavation of Native American cultural items from Federal or tribal lands" permits such activity only with (1) an ARPA permit, (2) tribal consultation or consent, (3) ownership and right of control, and (4) proof of consultation or consent. 25 U.S.C. § 3002(c) (Supp. II 1990).

given to human remains. NAGPRA prohibits trafficking in all wrongfully acquired human remains, "regardless of when and where obtained, including those removed prior to the enactment of NAGPRA."²⁹² This broad protection prohibits trafficking in all human remains acquired without the right of possession from all lands, including state and private lands. Thus, human remains are contraband to all wrongful possessors. NAGPRA is the first law to extend significant protection to human remains located on private and state lands without a requirement that the remains be involved in interstate commerce, as required by ARPA.²⁹³

Criminal trafficking under NAGPRA is a general intent crime and requires that the offender "knowingly" perform the prohibited activities.²⁹⁴ "Knowingly" should apply only to the prohibited activities and not the lack of right of possession, which conversely should be viewed only as a jurisdictional requirement.²⁹⁵ The right of possession is intended to be

292. Trope & EchoHawk, *supra* note 160, at 73.

293. Hutt, *supra* note 167, at 142; *see* 18 U.S.C. § 1170(a) (Supp. II 1990); 16 U.S.C. § 470ee(c) (1988). It is very important to carefully determine first what type of object is in question, human remains or other cultural items, and then to look at the applicable prohibitions. One commentator inaccurately combined the differing provisions and concluded that the NAGPRA bans trafficking of both human remains and cultural items obtained at any time without the right of possession. Leonard D. DuBoff, *Protecting Native American Cultures*, OR. ST. B. BULL., Nov. 1992, at 9, 11-12. This is misleading and overinclusive because trafficking of cultural items is only banned if the items were prospectively obtained in violation of NAGPRA. 18 U.S.C. § 1170(b) (Supp. II 1990).

The same commentator further concluded that NAGPRA does not restrict excavation or transfer of items acquired from private land. DuBoff, *supra*, at 12. By a technical reading of the statute this is true, but it is also misleading. Human remains acquired from private land without the right to possession may not be sold, purchased, used for profit, or transported for sale or profit. 18 U.S.C. § 1170(a) (Supp. II 1990). Presumably, it will be rare that a person acquire remains for purposes other than the prohibited activities. But, like ARPA, NAGPRA does not extend to prosecute persons who do indeed merely possess these remains or give them away as pure gifts. Hutt, *supra* note 167, at 145. Gifts exempt from criminal liability create no financial incident or benefit. *Id.* For example, a transfer between museums for exhibit or study causes no liability, but a donation for which a charitable income tax deduction is taken does cause liability. And, whenever, by whomever, human remains are trafficked or otherwise used for financial benefit, the parties involved may be prosecuted. *Id.*

Protection from excavation and transfer of other cultural items, however, does not extend to private and state land because the applicable trafficking provision only pertains to items acquired in violation of NAGPRA (rather than items acquired without the right to possession, that is, without tribal consent). NAGPRA only prohibits excavation and removal from public and tribal lands without an ARPA permit and tribal consent after the date of its enactment. 18 U.S.C. § 1170(b) (Supp. II 1990); 25 U.S.C. § 3002(c) (Supp. II 1990).

294. 18 U.S.C. § 1170 (Supp. II 1990).

295. Confusingly, there is a statement in the legislative history that implies that "knowingly" should apply also to the lack of right of possession. "As is consistent with current Federal criminal law, the term 'knowingly' . . . refers not only to anyone who 'sells, purchases, uses for profit, or transports for sale or profit,' but also to those without the right of possession." 136 CONG. REC. H10,985, H10,989 (daily ed. Oct. 22, 1990) (testimony of Rep. Campbell). However,

"similar to the transfer of title to other forms of property . . . consistent with general property law."²⁹⁶ The Antique Tribal Art Dealers Association (a strong opposer to NAGPRA) suggests that the trafficking provisions do not provide sufficient protection to bona fide purchasers. However, given the express importance of legal excavation of cultural property, it is likely that "courts may hold that all purchasers have notice and buy at their own risk unless proper inquiry regarding the provenance of the artifact is made."²⁹⁷ In the words of a museum curator, "Unless you're naive or not very bright, you'd have to know that much ancient art is stolen."²⁹⁸ Furthermore, it is an accepted legal principle that defendants may not avoid guilty knowledge in order to escape prosecution.²⁹⁹ Thus, it is likely that courts will consider

if the mental state is applied to the lack of right of possession, the crime becomes a specific intent crime (more difficult to prosecute successfully), not a general intent crime, because the defendant would be required to have knowledge of illegality.

Additionally, applying the mental state requirement to both elements of the crime is illogical because "right of possession" is only an element of illegal trafficking of human remains, not other cultural items. Therefore, while NAGPRA extends more protection to human remains by not restricting acquisition prospectively from its enactment date, this interpretation would make the crime more difficult to prosecute by converting the crime into a specific intent crime requiring a knowing mental state of the status of ownership rights to the remains.

Furthermore, all other federal cultural property laws create general intent crimes (contrary to the substantive effect of the quoted statement). Thus, to actually be consistent with the body of cultural property laws, the "right of possession" must be a jurisdictional requirement only and therefore not subject to the same mental state requirement. *United States v. Kohl*, No. 85-10044, slip op. at 3-4 (D. Idaho Feb. 28, 1986) (explaining the jurisdictional analysis in detail). Many general federal criminal laws, like NSPA, are specific intent crimes (usually signalled by the word "willful"); however, the purpose of cultural property laws is to offer added protection to cultural property, especially by lowering mental state requirements to encourage successful prosecutions and offer more deterrence.

296. 136 CONG. REC. S17,173, S17,176 (daily ed. Oct. 26, 1990) (testimony of Sen. McCain).

297. DuBoff, *supra* note 293, at 13. Consider the advice given by the court in dicta to dealers in a recent case involving an international transaction to purchase stolen mosaics (tried under a state replevin law):

[W]e should note that those who wish to purchase art on the international market, undoubtedly a ticklish business, are not without means to protect themselves. . . .

[D]ealers can (and probably should) take steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like.

Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 294 (7th Cir. 1990).

298. MEYER, *supra* note 15, at 123 (quoting John D. Cooney, curator of ancient art at the Cleveland Museum, Mar. 1972).

299. For commentary and criminal jury instructions regarding Deliberate Ignorance, see 1 EDWARD J. DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL* § 17.09 (4th ed. 1992). For civil jury instructions regarding Duty of Inquiry, see 3 EDWARD DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL* § 72.07 (4th ed. 1987).

traffickers to have knowledge of the status of ownership rights whenever they fail to properly investigate the provenance of cultural items or human remains.

It is Congress' intent that NAGPRA be implemented in combination with other laws³⁰⁰ to curtail the black market in Native American cultural property. Specifically, NAGPRA is intended to be "fully consistent" with ARPA.³⁰¹ NAGPRA actually protects more cultural property than ARPA because most likely any object that qualifies as an archaeological resource will also qualify as a cultural item, but the converse is not necessarily true because of ARPA's 100 year-old age requirement.³⁰² Therefore, archaeological resources are protected by both NAGPRA and ARPA trafficking provisions and penalties may be combined — traffickers may face fines, imprisonment, and forfeiture of vehicles.³⁰³ ARPA's catch-all trafficking provisions apply to all archaeological resources obtained in violations of any federal, state, or local law. Thus, cultural property over 100 years old and of archaeological and cultural interest receives extensive protection under the law, while property less than 100 years old receives slightly less but still significant protection.³⁰⁴

Since NAGPRA addresses sale, purchase, and transport of cultural property, it, like ARPA, acts as an effective limitation on export. The legislative history indicates that NAGPRA is intended "to prevent the interstate sale of Native American remains,"³⁰⁵ but foreign sale is not discussed. Because transfer is not expressly included in the prohibited activities, a potential loophole exists for cultural items or human remains to be given away as pure gifts to persons or institutions outside the United States.³⁰⁶

Hopefully, by combining NAGPRA, ARPA, and other federal laws governing stolen property or property lacking valid title (like NSPA), potential loopholes for trafficking in all Native American cultural property will be closed. The only qualification for simultaneous prosecution is that the cultural property in question fall within the scope of definitions of each criminal statute.³⁰⁷ The combination of ARPA and NAGPRA offers the most

300. NAGPRA also works in combination with NHPA regarding, for example, discovery of human remains and cultural items recovered during archaeological investigations and undertakings conducted under NHPA. For more information, see Memorandum from Robert D. Bush, Executive Director, Advisory Council on Historic Preservation, to State and Federal Historic Preservation Officers (July 3, 1991), *reprinted in* 24 ARIZ. ST. L.J. 505 (1992).

301. S. REP. NO. 473, 101st Cong., 2d Sess. 10-11 (1990).

302. *See* 16 U.S.C. § 470bb(1) (1988); 25 U.S.C. § 3001(3) (1988).

303. 16 U.S.C. § 470ee(b)-(d) (1988); 18 U.S.C. § 1170 (Supp. II 1990).

304. *See* 16 U.S.C. § 470ee (1988); 18 U.S.C. § 1170 (Supp. II 1990).

305. H.R. REP. NO. 877, 101st Cong., 2d Sess. 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4382 (letter from Robert W. Page, Assistant Secretary of the Army (Civil Works), and C. Edward Dickey, Acting Principal Deputy Assistant Secretary (Civil Works)).

306. 18 U.S.C. § 1170 (Supp. II 1990). *See* discussion *supra* note 293.

307. Hutt, *supra* note 167, at 141.

effective and extensive limitation on export of cultural property. Effectively, without express export prohibitions, the government has indeed significantly regulated alienability rights and export of many important items of Native American cultural property.

4. *Indian Arts and Crafts Act*

The laws discussed thus far indicate that the federal government has gradually expanded protection of cultural property in an effort to preserve American and Native American cultural heritage, even though this expansion has favored restrictions on alienation of cultural property instead of free trade.³⁰⁸ But one recently amended law indicates a contradictory position. The Indian Arts and Crafts Act of 1990 (IACA)³⁰⁹ intends "to promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian arts and craftsmanship."³¹⁰ This Act, designed to expand the market for Native American products, seems directly in conflict with preservation and protection of Native American cultural property.³¹¹

The presence of IACA in the body of cultural property law indicates that the federal government is engaged in a careful balancing between preservation and free trade.³¹² Only those artifacts that fit precisely within definitions of applicable protectionist statutes are subject to restrictions on alienation, leaving those artifacts not legislatively determined to be in need of protection available for free trade. This notion is compatible with American export

308. See 16 U.S.C. § 470aa-470ll (1988), 25 U.S.C. §§ 3001-3013 (Supp. II 1990); 18 U.S.C. § 1170 (Supp. II 1990). See also discussions *supra* on ARPA and NAGPRA. "When viewed together, [ARPA and NAGPRA] illustrate the growth of America's willingness to recognize the rights of Native Americans to possess their cultural heritage." Platzman, *supra* note 53, at 537.

309. 25 U.S.C. § 305 (1988); 18 U.S.C. §§ 1158-1159 (1988 & Supp. II 1990). IACA was originally enacted in 1935.

310. 25 U.S.C. § 305a (1988).

311. The legislative history does indicate a desire "to support the preservation and evolution of tribal cultural activities." H.R. REP. NO. 400(I), 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 6382, 6383.

312. Cf. H.R. REP. NO. 311, 96th Cong., 1st Sess. 20 (1979), reprinted in 1979 U.S.C.C.A.N. 1709, 1722. Explaining the language used in ARPA regarding the permit procedure in § 470cc:

Archaeological excavation is itself a process of study that destroys the resource. Because of this, and because archaeological resources are finite and non-refinable, the objective should be to manage these resources for their long-term conservation while at the same time allowing the necessary consumption of them in the interests of advancing knowledge about the past or to illustrate or interpret to the public and the human history of this nation. The purpose . . . is to strike a balance between this generation's consumption and of the archaeological resources on Federal lands and the conservation of these resources for future generations

Id.

theory discussed in part III. By keeping some objects available for trade, the black market for art may be controlled, and the government will have a greater chance for successful protection of true objects of cultural heritage.³¹³ Furthermore, with IACA, the government may protect both consumers and Native Americans by ensuring that those Indian objects available for trade are in fact genuine and the proceeds from sales indeed benefit Indian tribes rather than commercial counterfeiters.³¹⁴

Specifically, IACA calls for the creation of the Indian Arts and Crafts Board to perform eleven specified duties concerning Indian products, including: market research into the best opportunities for arts and crafts sales, technical research and experimentation, loan recommendations to further arts and crafts production and sales, "trademarks of genuineness and quality for Indian products," standards and regulations for trademarks, registering of trademarks with the U.S. Patent and Trademark Office free of charge, and defense of trademarks in the courts.³¹⁵ These functions are subject to the qualification that "nothing . . . shall be construed to authorize the Board to . . . deal in Indian goods."³¹⁶

One significant deficiency of IACA concerns the lack of definition of "Indian product"; IACA calls for this term to be defined by agency regulations, but no such regulations have been written yet.³¹⁷ Legislative drafters were conscious of potential overbreadth concerning regulated activities which might offer offenders a constitutional defense,³¹⁸ but likewise the Board must carefully define those objects subject to regulation to avoid constitutional vagueness.³¹⁹

IACA provides for both civil and criminal penalties for persons who counterfeit or falsely represent Indian products. The criminal penalties are

313. See BATOR, *supra* note 50, at 42-43. Granted, the intent of IACA is "to prevent the passing off of non-Indian produced goods as Indian produced." H.R. REP. NO. 400(I), 101st Cong., 2d Sess. 10 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6382, 6389 (letter from Carol T. Crawford, Assistant Attorney General). IACA does encourage authentic Indian produced goods to remain on the market, but by limiting the counterfeit market it is possible that the value of authentic goods will increase and the black market will thrive as well.

314. H.R. REP. NO. 400(I), 101st Cong., 2d Sess. 4-5 (1990) *reprinted in* 1990 U.S.C.C.A.N. 6382, 6383-84. Counterfeiters are annually "siphoning an estimated \$40 to \$80 million from the genuine manufacturers' markets." *Id.* at 5, *reprinted in* 1990 U.S.C.C.A.N. at 6384.

315. 25 U.S.C. §§ 305, 305a (1988).

316. *Id.* § 305a.

317. *Id.* § 305e(d)(2).

318. H.R. REP. NO. 400(I), 101st Cong., 2d Sess. 10-11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6382, 6389-90 (letter from Carol T. Crawford, Assistant Attorney General).

319. See *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974). IACA can be distinguished from cultural property law in general because it is aimed at contemporarily produced Indian arts and crafts. However, without a proper definition for Indian product, a potential offender could argue that the 40-year-old Zuni War God or the four-year-old Apache mask are Indian crafts, whose sale should be promoted, rather than cultural property deserving protection.

especially serious: a maximum \$250,000 fine, five years in prison, or both for the first offense, and a maximum \$1,000,000 fine, fifteen years in prison, or both for subsequent offenses.³²⁰ IACA requires knowing conduct for the crimes of counterfeiting and misrepresentation of Indian products.³²¹ Therefore, these are general intent crimes (like ARPA and NAGPRA) and only require offenders to have the intent to perform the prohibited activities. Throughout the entire history of IACA, since its original enactment in 1935, no violations have ever been prosecuted. The severe penalties cannot deter offenders until they are effectively enforced. Unfortunately, the Board's next budget contains no money for the expanded duties granted under the 1990 amendments. So, as one commentator analogized, this Act is currently merely a "paper tiger."³²²

It is difficult to reconcile all the laws effecting cultural property. American export theory indicates a desire to encourage free trade, but the government is also concerned with preserving and protecting cultural heritage. It is this conflict of ideologies that causes the body of cultural property law to be complex and confusing. Central to every dispute over cultural property is an evidentiary question concerning the state of its title or provenance.³²³ In general, when a possessor holds legal title to an object, he is free to sell, transfer, transport, or export the object, interstate and internationally.

As will be discussed in part V, however, ownership of Native American cultural property is a complex question.³²⁴ Many Native American objects possessed by non-Native Americans have questionable title at best. If title to cultural property is retained by Native Americans, and they desire protection and preservation for the property, then the government should, and it clearly is attempting to, enforce restrictions on alienability sufficient to protect the property regardless of negative effects on free trade.

However, this may not be enough to ensure that valuable cultural heritage is not lost. American laws only protect wrongfully obtained artifacts; therefore, objects that cannot be proven to have been wrongfully obtained are

320. 18 U.S.C. §§ 1158-1159 (1988 & Supp. II 1990); 25 U.S.C. §§ 305d-305e (1988). Note the severity of these penalties compared to penalties under ARPA and NAGPRA. See *supra* notes 235-36, 288 and accompanying text. Civil penalties include injunctive or other equitable relief, treble damages, and punitive damages. 25 U.S.C. § 305e(a)-(b) (1988).

321. 18 U.S.C. §§ 1158, 1159(b) (1988 & Supp. II 1990). The prior version of § 1159 required willful conduct for the crime of misrepresentation of Indian products. The amendments changed the crime from specific intent (like NSPA) to general intent, thus making it easier to prosecute. 18 U.S.C. § 1159 (1988 & Supp. II 1990).

322. DuBoff, *supra* note 293, at 14.

323. See *id.* "The new laws place a premium on the knowledge of the provenance of Indian art and artifacts." *Id.* However, "[n]o transfer of title or deed comes with the purchase of fine American Indian art or historic antiquities discovered on public lands. Instead, dealers provide . . . provenance, or information on the origin of the article. Sometimes it is issued in writing, more often not." Goodwin, *supra* note 4, § 6 (Magazine), at 84.

324. See generally EchoHawk, *supra* note 98.

without protection. The time has come for Congress to offer additional protection for cultural property by enacting definitive, express export restrictions to protect all important (culturally, religiously, historically, and scientifically important, as defined by the significant interested parties) American and Native American cultural heritage regardless of provenance. In this manner, all legal loopholes for potential loss would be closed and the future of American cultural heritage would be preserved.

This article will now turn to a discussion of the major problems concerning application of our cultural property laws, that is, evidentiary problems related to ownership rights and enforcement problems. The first step is to enact laws that protect valuable cultural property, and the second step is to ensure that these laws indeed effectuate this necessary protection.

V. Application

ARPA and NAGPRA provide significant and effective national protections for cultural property and offer some limitations to export. Under these laws, however, it is essential to determine from where the cultural property in question was excavated (public, Indian, or private land) because these land differentiations result in different protections under the laws. Especially for Native American cultural property, ownership presumptions based on location may not be accurate. Thus, Native Americans may need to prove their ownership rights to cultural property. Additionally, application of ARPA and NAGPRA is hampered by insufficient and incompetent enforcement. Needless to say, these enforcement mechanisms need to be immediately improved so that our laws will provide real protection for cultural property, not merely idealistic policy statements.

A. Ownership Issues

1. Public and Indian Lands

Both ARPA and NAGPRA provide significant protection to cultural property excavated from public or Indian lands. Each law, however, uses slightly different terminology to describe essentially the same types of land. Regarding public or federal lands, ARPA defines "public lands" as lands owned and administered by the federal government as part of the national park, wildlife refuge, or forest systems, plus all other lands to which the government holds fee title.³²⁵ NAGPRA defines "federal lands" as all lands, other than tribal lands, owned and controlled by the government.³²⁶

Regarding Indian or tribal lands, ARPA defines "Indian lands" as lands of Indian tribes or individuals held in trust by the government or subject to a

325. 16 U.S.C. § 470bb(3) (1988).

326. 25 U.S.C. § 3001(5) (Supp. II 1990).

restriction against alienation imposed by the government.³²⁷ NAGPRA defines "tribal lands" as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.³²⁸ Especially since ARPA and NAGPRA may be applied in combination, and since a violation of NAGPRA will trigger ARPA trafficking provisions as a violation of any federal law,³²⁹ potential problems created by these different land descriptions should disappear. Violations to cultural property that occur on land falling within any one of the land categories should trigger full federal protection.

Specifically, ARPA protects archaeological resources located on public or Indian lands from any excavation, removal, damage, alteration, or defacement.³³⁰ Furthermore, ARPA protects archaeological resources excavated or removed from public or Indian lands in violation of any federal, state, or local law against trafficking.³³¹ Likewise, NAGPRA provides protections against trafficking and illegal excavation or removal to cultural items on federal or tribal lands, and additionally to human remains on all lands.³³²

One primary distinction between ARPA and NAGPRA, however, concerns ownership rights to cultural property excavated from public and Indian lands. Under ARPA, archaeological resources excavated or removed from public lands "remain the property of the United States."³³³ Native Americans merely have the right to be notified when an ARPA permit for excavation is issued which may harm a religious or cultural site.³³⁴ ARPA does not grant Native Americans the right to claim ownership to cultural property excavated from public lands, even though some of this property might be their cultural patrimony. On Indian lands ARPA provides that excavation permits may only be issued with Indian consent and in accordance with any conditions requested by Indians.³³⁵ Even on Indian lands, however, ARPA does not vest ownership rights in Native Americans.³³⁶

Conversely, NAGPRA does specifically vest ownership and control of Native American human remains and cultural items excavated or discovered

327. 16 U.S.C. § 470bb(4) (1988).

328. 25 U.S.C. § 3001(15) (Supp. II 1990).

329. 16 U.S.C. § 470ee(b) (1988); 25 U.S.C. § 3002(c) (Supp. II 1990).

330. 16 U.S.C. § 470ee(a) (1988).

331. *Id.* § 470ee(b)-(c).

332. 18 U.S.C. § 1170 (Supp. II 1990); 25 U.S.C. § 3002(b) (Supp. II 1990).

333. 16 U.S.C. § 470cc(b)(3) (1988).

334. *Id.* § 470cc(c).

335. *Id.* § 470cc(g).

336. Tribal laws regulating ownership rights to cultural resources excavated from Indian lands should be valid; however, many tribes have not enacted such laws. Thus, courts may look to federal common laws as supplementary authority for answers to any ambiguities in federal laws regarding ownership rights to cultural property. Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151, 166-67 (1992).

on federal or tribal lands in Native Americans.³³⁷ At last our law acknowledges the inherent right of Native Americans to own their cultural patrimony, at least when it is located on public or Indian lands. And, since ARPA incorporates all other existent laws into its trafficking provisions, and NAGPRA is the most recent cultural property law,³³⁸ ownership questions should be resolved in accordance with NAGPRA.

2. *Private and State Lands*

Protection for cultural property on private and state lands is more limited than on public and Indian lands. Neither ARPA nor NAGPRA explicitly provides protection to cultural property on private and state lands, but in application their protections do, in limited circumstances, extend to these lands. ARPA prohibits trafficking in archaeological resources obtained in violation of any federal, state, or local law.³³⁹ Additionally, NAGPRA prohibits trafficking in all Native American human remains without a right of possession, regardless of where the human remains were buried.³⁴⁰ Thus, on private and state lands, human remains are fully protected under the law, but other cultural property must have been involved in some type of criminal activity, a violation of state cultural property laws or other general laws, in order to trigger federal protections.

Recently in *United States v. Gerber*,³⁴¹ Judge Richard Posner, writing for the Court of Appeals for the Seventh Circuit, explained that in order for a violation of state or local law on private land to trigger application of ARPA, the violation must be "related to the protection of archaeological sites or objects."³⁴² However, application is not so limited that only violations of state or local cultural property laws trigger ARPA, rather violations of theft, trespass,

337. 25 U.S.C. § 3002(a) (Supp. II 1990). Prior to NAGPRA, potential disputes over ownership of cultural property on public lands was possible, although none existed on record. For further discussion, see EchoHawk, *supra* note 98, at 448-51.

338. 16 U.S.C. § 470ee (1988); 25 U.S.C. §§ 3001-3013 (Supp. II 1990); 18 U.S.C. § 1170 (Supp. II 1990).

339. 16 U.S.C. § 470ee(b)-(c) (1988); *see United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

340. 18 U.S.C. § 1170(a) (Supp. II 1990).

341. 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

342. *Id.* at 1116. During construction of a highway on private land, workmen discovered a site now known as the Hopewell burial mound. One workman bulldozed an area and took the artifacts he unearthed. For \$6000 the workman sold these artifacts and revealed the location of the site to the defendant in *Gerber*. Thereafter, the defendant returned to the site and excavated hundreds of artifacts. The defendant admitted to committing criminal trespass and conversion and to transporting some of the artifacts in interstate commerce. *Id.* at 1114. The defendant was convicted of a violation of 16 U.S.C. § 470ee(c) (1988).

On appeal the defendant argued that either § 470ee(c) does not apply to the archaeological resources removed from lands other than federal or Indian lands or it is only triggered by violations of state or local cultural property laws. *Gerber*, 999 F.2d at 1113. The *Gerber* court rejected both of these arguments. *Id.* at 1116-17.

or conversion laws would also be sufficient. "A law that comprehensively protects the owner of land from unauthorized incursions, spoliations, and theft could well be thought to give all the protection to buried antiquities that they need."³⁴³ Thus *Gerber* clarifies that when a wrongdoer enters another's private land and removes or excavates archaeological resources, ARPA may be applied against the wrongdoer.³⁴⁴ However, no court has applied ARPA against a landowner who excavates cultural property from his own land.

Traditionally, American property law vests ownership of everything beneath or on the surface of private property in the landowner. Consequently, landowners have legally removed Native American artifacts from their land and sold them to collectors or museums.³⁴⁵ Most landowners do not believe it is looting to dig up a grave in their own backyard and then keep or sell the burial artifacts. Thus, it is the concept of the sanctity of private property that makes full protection and preservation of cultural property so problematic.³⁴⁶

One solution is that private archaeological organizations attempt to purchase important sites located on private lands in order to preserve the resources.³⁴⁷ Additionally, in Arkansas,³⁴⁸ the state legislature annually appropriates money to fund a group of professional archaeologists who perform research on recorded sites, counsel amateurs, and lecture the public. This group has been very successful at involving the public in protecting their archaeological sites; however, a primary obstacle is still the sanctity of private land. According to an administrator, "Landowners still have control over their land, and there's no way that making a righteous plea about preserving the past is going to get through to everybody."³⁴⁹

State laws may offer additional protections to cultural property,³⁵⁰ but not all states have chosen to enact such laws. Just over half the states in America prohibit private landowners from excavating unmarked burial grounds on their

343. *Gerber*, 999 F.2d at 1116-17.

344. *Id.* "[T]here is no right to go upon another person's land, without his permission, to look for valuable objects buried in the land and take them if you find them." *Id.* at 1116.

345. *EchoHawk*, *supra* note 98, at 445. For a general discussion on international finders laws, see 1 *PROTT & O'KEEFE*, *supra* note 7, at 306-21.

346. See *Harrington*, *Looting*, *supra* note 29, at 24.

347. *Herscher*, *supra* note 111, at 118.

348. Kentucky also has an effective archaeological preservation program. See A. GWYNN HENDERSON, KENTUCKY NATURE PRESERVES COMMISSION, *THE KENTUCKY ARCHAEOLOGICAL REGISTRY: CITIZEN-BASED PRESERVATION FOR KENTUCKY'S ARCHAEOLOGICAL SITES* (1988). The Kentucky Archaeological Registry provides protection to archaeological sites through education, citizen involvement, and management assistance. Outstanding citizen commitment is recognized by personal awards. *Id.* at v.

349. *Harrington*, *Looting*, *supra* note 29, at 25.

350. For a discussion of model state cultural property legislation and cites to many state cultural property laws, see *Rogers & Grant*, *supra* note 211. For a summary of each state's grave and burial laws and a summary table, see *PRICE*, *supra* note 168, at 43-115 & app.

private property.³⁵¹ Some states regulate the sale or purchase of artifacts, others prohibit activities causing damage to artifacts, and still others regulate public health and thereby extend protection to cultural resources.³⁵²

A primary obstacle to laws providing more extensive protections to cultural property on private lands is that these laws may violate the Takings Clause of the Fifth and Fourteenth amendments to the Constitution.³⁵³ Many of the state laws which do extend some protections to private land are relatively new and have not yet been tested in the courts.³⁵⁴ Native Americans argue that they were forced to leave their lands and move to reservations by the United States government. Subsequently, their lands passed to private landowners, and now their sacred burial grounds are being desecrated and their patrimonial objects scattered throughout the world.³⁵⁵ Native Americans never abandoned their sacred objects; thus, private landowners may obtain possession but not valid title.³⁵⁶ Without valid title to cultural property, landowners have no Fifth Amendment claims if their rights to this property are regulated or otherwise restricted.³⁵⁷ Additionally, the government should have a duty to protect Native American cultural property since they forced Native Americans to leave this property behind, unprotected against ignorant or insensitive future landowners.³⁵⁸

B. Evidentiary Issues

While NAGPRA does finally vest ownership rights to cultural property on federal and tribal lands in Native Americans,³⁵⁹ ownership disputes will likely still abound. The law fails to clearly define ownership rights to cultural property excavated prior to NAGPRA's date of enactment in 1990 or excavated from private and state lands. Thus, in order to protect and preserve cultural property currently in the possession of non-Native Americans, Native Americans may be forced to prove their ownership rights to controversial cultural artifacts.

1. Proving Ownership Without Provenance

Proving ownership rights to cultural property is problematic primarily because no documentary evidence of title is required for possession or transfers.

351. Harrington, *Looting*, *supra* note 29, at 24, 30.

352. *Id.* at 30; Carnett, *supra* note 188, at 5; PRICE, *supra* note 168, at 43-115 & app.

353. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. For a discussion of NAGPRA and its takings implications, see Johnson & Haensly, *supra* note 336; PRICE, *supra* note 168, at 38-39.

354. Harrington, *Looting*, *supra* note 29, at 30.

355. EchoHawk, *supra* note 98, at 446.

356. Johnson & Haensly, *supra* note 336, at 159.

357. See Johnson & Haensly, *supra* note 336, at 156-59.

358. See Sen. Pete V. Domenici, *Preface B*, in *PROTECTING THE PAST*, *supra* note 32, at v, vi.

359. 25 U.S.C. § 3002(a) (Supp. II 1990).

Therefore, provenance is the only potential evidence of an object's history and ownership rights.³⁶⁰ However, even provenance may be difficult to obtain because dealers, auction houses, and museums rarely obtain or disclose such information. And, when provenance is disclosed it is often incomplete because, according to custom, as few questions as possible are asked to avoid uncovering undesirable information about art and artifacts.³⁶¹ It is precisely this hidden and avoided "undesirable" information that in many cases would prove that Native Americans still retain valid title to their cultural property, regardless of who has possession.

Recently Sotheby's put three ceremonial masks up for auction in New York City. Prior to the auction, both the Hopi and Navajo tribes requested that Sotheby's withdraw these objects because of their cultural and religious value. The Navajos explained, "any sale of sacred paraphernalia of Native Americans is highly disrespectful and a major assault in the destruction of Native American religion."³⁶² Yet, based on a "business decision," Sotheby's refused the tribes' requests and sold the masks. The tribes could not use NAGPRA to initiate legal action because the masks were excavated and purchased prior to 1990. In their defense, Sotheby's emphasized that neither tribe had made a claim of ownership to the masks.³⁶³ However, the tribal art specialist did state that in the future Sotheby's will "require sellers of such masks to provide proof of purchase or, if none exists, to sign an affidavit stating that the objects had not been bought from a museum."³⁶⁴ Fortunately, this story has a happy ending: the purchaser of the masks decided to return them to the tribes, their rightful owners.³⁶⁵

In this situation, it would be difficult for the Native American tribes to prove their ownership over the masks. There is no available provenance, and the seller was anonymous — these are common obstacles. However, Native Americans do have some persuasive arguments. First, if Native Americans can prove that the object in question was stolen, then title remains vested in the original Native American owner.³⁶⁶ However, proving theft may be an

360. Goodwin, *supra* note 4, § 6 (Magazine), at 84-85.

361. BATOR, *supra* note 50, at 84 & n.146; ADVISORY COMMITTEE, *supra* note 37, at 25.

362. *Three Indian Masks Sold*, DAILY SPECTRUM (St. Georges, Utah), May 25, 1991 (on file with the *American Indian Law Review*).

363. *Id.*

364. Rita Reif, *Buyer Vows to Return 3 Masks to Indians*, N.Y. TIMES, May 22, 1991, at C11. Dealers often require sellers to sign printed forms declaring that purchased objects were obtained from private land. In this manner, "a seller involved in illegal activities furnishes the proof of a 'legitimate' transaction" to protect the buyer. Sugarman, *supra* note 4, at 121-22.

365. Reif, *Buyer Vows*, *supra* note 364, at C11; *Woman Plans to Return Masks*, DAILY SPECTRUM (St. Georges, Utah), May 25, 1991 (on file with the *American Indian Law Review*); Rita Reif, *With Indian Art, the Exhibit Could Be In Court*, N.Y. TIMES, June 2, 1991, § 2, at 37.

366. Peterson, *supra* note 63, at 132; Moore, *supra* note 197, at 471; Lowenthal, *supra* note 203, at 158. This is the basic principle in common law countries. However, in civil law countries, bona fide purchasers obtain good title and there are statutes of limitations to restrict recovery

insurmountable barrier.³⁶⁷ In such situations, Native Americans may alternatively be able to prove the object in question is inalienable property of the tribe, or that the property was neither abandoned nor transferred by them. In each of these situations, the tribe retains ownership rights. The following subparts discuss these alternative arguments.

2. Proving Ownership Through the Nature of the Property

When using the nature or status of cultural property as a basis to prove ownership rights, it is initially important to identify what type of cultural property is under dispute: human remains, funerary objects, sacred objects, cultural patrimony, or other cultural property. Human remains and funerary objects are treated differently than other types of cultural property. Generally, under common law they are "quasi property," and descendants have limited property interests to ensure reinterment.³⁶⁸ Therefore, unless possessors are descendants of the deceased person from whose grave the funerary objects were excavated, technically they lack ownership interests in the objects.³⁶⁹ Native Americans who can prove they are lineal descendants retain the ownership interests. However, many objects cannot be traced back to a specific individual's grave; therefore, there is no opportunity for Native Americans to show a direct lineal relationship and thereby claim ownership over disputed objects.³⁷⁰

For sacred objects and cultural patrimony, Native Americans retain ownership rights because the objects are communal property of the tribe.³⁷¹ This would most likely be the best argument for the masks. Regardless of whether this communal property was originally sold by an individual Native American or stolen, the Native American tribe retains ownership rights. Communal property is not ordinary personal property. It is owned collectively by the entire tribe, and no one individual member has the right to sell, trade, or give it away.³⁷² It is inalienable unless the tribe as a whole gives

from bad faith purchasers. *Id.*

367. Leo J. Harris, *From the Collector's Perspective: The Legality of Importing Pre-Columbian Art and Artifacts, in WHOSE PROPERTY?*, *supra* note 29, at 155, 160.

368. Johnson & Haensly, *supra* note 336, at 156.

369. *Id.* at 156-57; PRICE, *supra* note 168, at 23-24; EchoHawk, *supra* note 98, at 447-48, 450 ("[W]e cannot agree that ownership of [burial goods] may be acquired by reducing them to possession . . . when and if removed, [these objects] rightfully belong to the descendants if they be known." (quoting *Charrier v. Bell*, Civ. No. 5552 (20th Jud. Dist. La., Mar. 18, 1985), *aff'd*, 496 So. 2d 601 (La. Ct. App. 1986))).

370. Native American tribes may be able to claim ownership by showing only distant kinship. EchoHawk, *supra* note 98, at 450. The court in *Charrier* did not require the Tunica tribe to show a "perfect chain of title." The tribe satisfied proof of descent because they were "an accumulation of the descendants of former Tunica Indians." *Charrier v. Bell*, 496 So. 2d 601, 604 (La. Ct. App. 1986).

371. For a good discussion on communal property, see Moustakas, *supra* note 115.

372. EchoHawk, *supra* note 98, at 441-42; Johnson & Haensly, *supra* note 336, at 158-59.

permission to transfer title and relinquishes their rights. Therefore, present possessors will rarely, if ever, have valid title to sacred and patrimonial objects because title remains always vested in the tribe, absent express evidence to the contrary.³⁷³

For Native American cultural property that is neither funerary objects nor sacred or patrimonial objects, property rights are governed by tribal laws. Such cultural property may be sold or given away by an individual Native American provided he has the right to convey good title under tribal law.³⁷⁴ Therefore, if the masks fell into this final category of cultural property, it is unlikely that the Native American tribes would be able to sufficiently prove their ownership interests without an express tribal law clarifying the property rights.

3. *Proving Ownership Through Lack of Abandonment*

Another argument for Native Americans pertains to all types of cultural property and is based on the concept of abandonment. As previously stated, landowners generally have ownership rights to everything found on or in their land;³⁷⁵ however, this principle does not apply when the found property was never abandoned by its previous rightful owner. Abandonment only occurs when an owner voluntarily and intentionally relinquishes all property and ownership rights to property without vesting these rights in another person.³⁷⁶ The property in question must have been deserted with the intent to abandon.³⁷⁷ It is likely in disputes over ancient artifacts that a court might assume the objects were abandoned.³⁷⁸ However, Native Americans have a persuasive explanation. Since they were forcibly removed from their lands by the United States government, they did not voluntarily and intentionally leave their cultural property; therefore, the property is not abandoned, and they retain rightful title.³⁷⁹

In a case between the Tunica Tribe and an amateur archaeologist to resolve ownership rights to Tunica burial objects excavated from personal property with the landowner's permission, the court concluded that the goods were not abandoned and that Tunicas still retained good title because the tribe had relinquished immediate possession of the goods for only religious, moral, and spiritual purposes.³⁸⁰ The court explained, "the fact that the descendants or fellow tribesmen of the deceased Tunica Indians resolved, for some customary, religious or spiritual belief, to bury certain items along with the

373. Suro, *supra* note 19, at A1. Zuni war gods are classic examples of communal property.

374. EchoHawk, *supra* note 98, at 443.

375. 1 PROTTE & O'KEEFE, *supra* note 7, at 309.

376. Johnson & Haensly, *supra* note 336, at 159.

377. 1 PROTTE & O'KEEFE, *supra* note 7, at 318.

378. *Id.* at 310.

379. See EchoHawk, *supra* note 98, at 446.

380. Charrier v. Bell, 496 So. 2d 601, 604-05 (La. Ct. App. 1986).

bodies of the deceased, does not result in a conclusion that the goods were abandoned.³⁸¹ In order to abandon their artifacts, the Tunicas must have relinquished their possession with the intent to allow the first finder to acquire rights to the artifacts.³⁸² In accordance with this case, most Native Americans will also be able to show that their burial goods were only relinquished for religious purposes; therefore, abandonment is not applicable and the tribe retains ownership rights to the objects.

4. Unequal Positions in Commercial Transfers

Often in cases where there is evidence that Native Americans transferred cultural property to non-Native Americans, the perceptions of the parties involved in the transactions are vastly different. Historically, transfers were predominantly one-way — from Native Americans toward non-Native Americans. Over time Native Americans lost tremendous amounts of their cultural property in these unequal trades.³⁸³ An historian describes the commercial practices:

[T]he entire process can also be viewed as an unequal trading relationship, the product of a colonial encounter in which, in the long run, the terms of trade were stacked in favor of those who were part of the dominant economic system, tilted toward those whose economic system generated a surplus of the cash upon which all had come to depend. The Indian economy's own surplus, not inconsequential, was most often expended upon conspicuous status consumption, upon blankets, pans, flour, sewing machines, and other trade goods.³⁸⁴

Often Native Americans did not interpret transfers as freely negotiated because they were a subjugated people. Exchanges and sales were not transactions with which Native Americans were familiar. Although the market is a recognized and revered institution in American life, there was no functional equivalent in Native American life. Native Americans often did not understand the finality of the transactions which resulted in invaluable cultural losses.³⁸⁵ It seems vastly unfair to withhold invaluable cultural patrimony from Native Americans based on such questionable transfers.³⁸⁶

381. *Id.* at 604.

382. *Id.* at 605.

383. Trope & EchoHawk, *supra* note 160, at 43-44; DOUGLAS COLE, CAPTURED HERITAGE: THE SCRAMBLE FOR NORTHWEST COAST ARTIFACTS 310-11 (1985).

384. COLE, *supra* note 383, at 311.

385. Robert Adams, *Smithsonian Horizons: Repatriation of Native American Remains and Artifacts*, SMITHSONIAN, Oct. 1990, at 10.

386. When museum records exist for Native American art, these records often indicate that the property was purchased or given to the museum. However, because of the questionable nature

5. Widespread Falsification

A final evidentiary dilemma to consider when attempting to prove ownership rights to cultural property is the prevalence of fake artifacts and falsified documentation in the art world. Sotheby's tribal art specialist estimates that of the artifacts he sees from Mississippi, 80% are fakes. Another dealer generally warns that there are more fake artifacts than there are genuine artifacts on the market.³⁸⁷ Furthermore, according to one museum curator, 95% of ancient artifacts in the United States are smuggled goods. Another museum curator adds that 90% of the certificates of origin for ancient artifacts are unreliable.³⁸⁸ While the exact percentages are subject to much dispute in the art world, it is apparent that falsification proliferates. Furthermore, this falsification is known throughout the art business and is arguably routine practice.³⁸⁹ Overall, it is best to always investigate the authenticity of documentation and artifacts.

Proving ownership rights to Native American cultural property is clearly problematic; however, due to the lack of available provenance and the abundance of falsified documentation, Native Americans' best arguments are those that rely on the status of the objects, explaining that title to certain cultural objects remains indefinitely with lineal descendants or the tribe. Ideally the burden should rest on third parties rather than on Native Americans to prove ownership rights,³⁹⁰ especially for patrimonial objects. Perhaps as the revolutionary civil repatriation provisions of NAGPRA are acted upon, arguments in favor of Native American ownership rights will gain acceptance and proof of ownership will be a less problematic issue.

C. Enforcement Problems

The final major problem hampering the effective application of all cultural property laws is the general inadequacy of enforcement mechanisms. Yet, without effective enforcement, our laws offer no deterrence to criminals and little protection to cultural property. According to one commentator, "the scale of the enforcement effort is so modest that it is like countering a forest fire with a water pistol."³⁹¹ Insufficient

of many purchase transactions, museums should bear the burden of proving their ownership. EchoHawk, *supra* note 98, at 441.

387. Harrington, *Buying and Selling*, *supra* note 46, at 29.

388. MEYER, *supra* note 15, at 123-24; *see also* Moore, *supra* note 197, at 470 n.22.

389. MEYER, *supra* note 15, at 123-24.

390. *See* EchoHawk, *supra* note 98, at 441.

391. MEYER, *supra* note 15, at 150. Even though this quotation is twenty years old, it still an accurate depiction. *See also* Sugarman, *supra* note 4, at 120 (stating that, according to a U.S. Forest Service archaeologist, "It's like having a city with a million people and one policeman. The robbers are going to have a field day"); BATOR, *supra* note 50, at 34-37 (discussing enforcement problems generally).

manpower and financial resources exist to adequately police archaeological sites, and furthermore, looting often occurs at previously unknown sites.³⁹²

1. Inadequate Surveillance

In America, even when the location of sites is known, patrolling them is nearly impossible due to the large number of sites located on vast and rugged terrain.³⁹³ In the Southwest, the region with the highest rates of destruction, one ranger estimates that on every square mile of land there are two archaeological sites. Yet, he alone polices a region equal to the size of the state of Delaware.³⁹⁴ In fact, in the entire Southwestern region, including eight states approximately equal to one-fifth the entire United States, there are only ten Forest Service agents to police the abundant destruction.³⁹⁵ A further complication is that for some known endangered sacred sites constant surveillance, if even possible, would disrupt Native American tradition.³⁹⁶

2. Lack of Judicial Deterrence

Not surprisingly, there are very few prosecutions for crimes to cultural property and sites. In the above-mentioned ranger's region in 1987, 100 cases of vandalism were reported, but there were no criminal prosecutions.³⁹⁷ In fact, as of 1990 only 58 cases total had been prosecuted under ARPA, and only 11 of these resulted in jail sentences. Even in these 11 cases, however, punishments were insignificant: the longest jail sentence was eighteen months.³⁹⁸ Not only is it difficult to obtain enough evidence to prosecute an artifact trafficker, but once at trial, courts do not seem sympathetic to the cause. According to an Assistant United States Attorney, "many of the judges don't feel that looting is such a bit deal. They don't understand why taking pots off the land is so important."³⁹⁹ Yet, without serious action from the courts, the laws have no deterrent effect.⁴⁰⁰

Consider the events surrounding *United States v. Jones*.⁴⁰¹ U.S. Forest Service agents arrested three pothunters they observed digging Native

392. Moore, *supra* note 197, at 470.

393. U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 26. Criminals may also tempt guards to permit prohibited activities with large bribes because the potential trafficking profits are much higher than one guard's salary. BATOR, *supra* note 50, at 36.

394. Sugarman, *supra* note 4, at 84.

395. Goodwin, *supra* note 4, § 6 (Magazine), at 66.

396. Mason, *supra* note 19, at 14.

397. Sugarman, *supra* note 4, at 84.

398. Rogers, *Visigoths*, *supra* note 158, at 68; Sugarman, *supra* note 4, at 82.

399. Kane, *supra* note 73, § 3, at 13. One judge sentenced an admitted pothunter, caught with over \$2 million worth of stolen artifacts, to only probation when ARPA permitted as much as \$20,000 in fines and 10 years in prison. Goodwin, *supra* note 4, § 6 (Magazine), at 88.

400. Kane, *supra* note 73, § 3, at 13.

401. 449 F. Supp. 42 (D. Ariz. 1978), *rev'd*, 607 F.2d 269 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980).

American artifacts on federal land. Because ARPA had not yet been enacted and the Antiquities Act had been declared unconstitutionally vague in the Ninth Circuit, the pothunters were indicted under NSPA. The defendants moved to dismiss the indictments and the court granted the dismissal, concluding that Congress intended the Antiquities Act to be the exclusive law for enforcement of crimes against cultural property.⁴⁰² This ruling left the Ninth Circuit with no means by which to prosecute prohibited acts against cultural property. Fortunately, the court realized its error and reversed the ruling one week prior to the enactment of ARPA.⁴⁰³

Following the enactment of ARPA, a new trial was set. The pothunters, however, anxious to avoid the new strict penalties of ARPA, negotiated plea bargains. One pothunter received six months in prison, probation, and a \$1000 fine; another, one year in prison (the maximum for a misdemeanor) and a \$1000 fine; and the third, one and one-half years in prison (the longest sentence given under ARPA) and a \$1000 fine.⁴⁰⁴

In another case, *United States v. Barnes & Bender*,⁴⁰⁵ three pothunters were caught in the act of digging Native American artifacts on federal land. At trial, however, in order to prove the defendants had not caused all the alleged damage to the site, the defense submitted evidence from numerous witnesses who also admitted to digging at the site. One particularly damaging witness was a U.S. Forest Service agent.⁴⁰⁶ The case quickly turned into a trial of government employees. In his closing argument, the defense attorney explained, "It's the professional archaeologists and the government experts and the agents of the government and the police and law enforcement community against the people who go out and dig and explore and want to learn about archaeology on their own."⁴⁰⁷ Even with strong evidence that defendants had indeed violated ARPA, the defendants were acquitted and the judge even returned the Native American artifacts to them over pleas of outrage from Native Americans.⁴⁰⁸

3. Lack of Financial Resources

Agencies rightfully argue that they do not have sufficient financial support to provide adequate enforcement.⁴⁰⁹ Often low annual budgets only provide

402. Rogers, *Visigoths*, *supra* note 158, at 66-67.

403. *United States v. Jones*, 607 F.2d 269 (9th Cir. 1979); Rogers, *Visigoths*, *supra* note 158, at 67.

404. Rogers, *Visigoths*, *supra* note 158, at 67-68.

405. CR No. 81-119-BE (D. Or. May 1982).

406. Lynell Schalk, *Operation Save: An Integrated Approach to Protecting the Past*, in *PROTECTING THE PAST*, *supra* note 32, at 209, 209-11. *See supra* notes 254-58 and accompanying text.

407. Schalk, *supra* note 406, at 210.

408. *Id.* at 209.

409. Examples of botched enforcement efforts due to insufficient funds to provide for all the

enough money for salaries for a few precious agents, while pothunters are organized into professional networks.⁴¹⁰ Criminal traffickers in cultural property are often also involved in other profitable illegal activities, for example, drug trafficking, burglary, alien smuggling, and native plant trafficking.⁴¹¹ Utah's State archaeologist explains, "We're at war and we are losing. We're dealing with hard-core criminals, and those guys [in Washington] think we're talking about arrowhead collectors."⁴¹² Without the necessary support and funding from the federal government, agency employees cannot effectively perform their jobs and protect precious artifacts.

4. Problems for Enforcing Export Regulations

Since enforcing criminal prohibitions against trafficking in cultural property is clearly difficult, it is likely that enforcing potential export regulations would also be challenging. Native American cultural property is exported out of the United States in various manners, both licit and illicit. Legal export occurs by auctions, museum deaccessioning, and private sales and transfers to international buyers. These legal avenues of trade are almost wholly without regulation, yet they also result in tremendous loss of cultural property. Consider, for example, the Native American ceremonial masks discussed *supra*. The tribes had no legal recourse to withdraw the masks from auction. Fortunately, the ultimate buyer was sympathetic to their pleas and returned the masks to them.⁴¹³ Yet, more frequently, unsympathetic international buyers win the auction bids, and priceless cultural objects are lost forever.

necessary details for success are embarrassing. In the 1980s 36 valuable Mimbres pots were stolen in New Mexico. After effective investigation, the FBI miraculously recovered all 36 pots in San Francisco. The agents meticulously followed all the necessary evidentiary procedures and then shipped the pots back to New Mexico. Upon arrival, however, it was discovered that 21 pots had been irreparably smashed because they had been shipped in cardboard boxes, wrapped in newspapers, and sent through U.S. regular mail without even a "fragile" label. Government agencies now attempt to educate their agents about how to properly handle precious artifacts. Jay Miller, *How Not To Smash A Case*, SANTE FE, Sept. 1988 (on file with the *American Indian Law Review*).

In 1981 in New Jersey silver artifacts were stolen from a historical site. The thief was caught and prosecuted. Logically, the court based its valuation of the objects on their recorded appraisals. However, the appraisals were 21 years out of date so the objects' recognized value was only a mere fraction of its actual current worth. Anderson & Spear, *supra* note 30, at 52.

410. Kane, *supra* note 73, § 3, at 13.

411. U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 61.

412. Goodwin, *supra* note 4, § 6 (Magazine), at 66.

413. See Reif, *Buyer Vows*, *supra* note 364, at C11; Reif, *Indian Art*, *supra* note 365, § 2, at 37; *Woman Plans to Return Masks*, *supra* note 365 (on file with the *American Indian Law Review*).

Auction houses and dealers protect themselves against ownership and authenticity disputes by qualifying assertions of authenticity to avoid liability for express warranties under state laws.⁴¹⁴ In fact, all Sotheby's and Christie's auction catalogues include a printed statement disclaiming all representations or guarantees of authenticity or legality of art dated prior to 1870.⁴¹⁵ Museums, dealers, and auction houses are also protected by certificates of authenticity.⁴¹⁶ However, certificates accompanying foreign or illegally obtained artifacts are unreliable due to the common practice of falsifying documentation. Additionally, for years our museums have refused to return foreign cultural property, insisting that fault for the loss lies with the country of origin which failed to adequately protect their national patrimony.⁴¹⁷ Ironically, we are now left with our own words. Without export regulations, buyers absorb all the risks and little effective protection is granted to Native American cultural property.

Even if we did decide to regulate export, the United States currently has no mechanisms to do so. Customs checks occur upon entering a country, not upon exiting; therefore, the burden of enforcing export regulations falls upon importing countries.⁴¹⁸ Unfortunately, many international countries, including the United States, will not enforce export prohibitions unless there is also an ownership claim to the artifact, and even then enforcement is unlikely.⁴¹⁹ NAGPRA should provide the basis for such an ownership claim since it expressly vests ownership to Native American cultural property in Native Americans.⁴²⁰

Still, we should not rely on other countries to police our cultural heritage. Our own customs finds it difficult to adequately search for illegally imported artifacts. Customs officers are criticized for lacking the expertise to distinguish between legal and illegal goods. Often smugglers declare low value or misdescribe artifacts in order to make them appear as inexpensive, recently manufactured items. In response, customs officials emphasize the complicated, underground network of criminal traffickers.⁴²¹ When false

414. Jore, *supra* note 5, at 74-76.

415. Charles S. Koczka, *The Need For Enforcing Regulations on the International Art Trade, in WHOSE PROPERTY?*, *supra* note 29, at 185, 192.

416. Jore, *supra* note 5, at 76.

417. MEYER, *supra* note 15, at 70.

418. Arlen F. Chase et al., *Archaeology and the Ethics of Collecting*, *ARCHAEOLOGY*, Jan.-Feb. 1988, at 56, 87.

419. See BATOR, *supra* note 50, at 11; Moore, *supra* note 197, at 470.

420. 25 U.S.C. § 3002 (Supp. II 1990).

421. John Spano, *U.S. Works to Stem Flow of Contraband Artifacts*, *L.A. TIMES*, Oct. 23, 1988, pt. 1, at 3; see Moore, *supra* note 197, at 472. The Cultural Property Advisory Committee recommends that the U.S. Customs Service provide stronger training programs for its agents and create a data retrieval system for timely access to seizure information. *ADVISORY COMMITTEE, supra* note 37, at 3, 12.

categorization or value is discovered, however, violators may be fined the amount of the object's true value and the object may be confiscated.⁴²²

5. *Suggestions for More Effective Enforcement*

The most frequently suggested solution to assist enforcement is to educate the public about the importance and urgency of protecting our cultural property.⁴²³ Especially in order to increase the likelihood of guilty verdicts in criminal prosecutions, it is essential that jurors perceive crimes against cultural property as serious crimes with personal ramifications,⁴²⁴ not as merely treasure hunting adventures. Native Americans should be involved and visible in public education efforts so that the public may perceive the victimization caused by cultural property crimes. Education should begin early, even at the grade school level,⁴²⁵ so that future pothunters and innocent treasure hunters are sensitive to the potential damage they could cause. Public outreach programs may encourage citizens and amateur archaeologists to volunteer as site watchdogs.⁴²⁶ "The more people gain from a positive experience of archaeology, the more likely they will be to ultimately embrace and support the goals of preservation."⁴²⁷

Other suggestions to improve the effectiveness of enforcement efforts are hampered by practical and financial constraints. Possibilities⁴²⁸ include the establishment of a national strike force against cultural property trafficking similar to the national campaign waged against drug trafficking.⁴²⁹ Or, a tax could be imposed on imported or exported art and artifacts, with the proceeds used to fund further enforcement efforts.⁴³⁰ In this way, those who benefit

422. Moore, *supra* note 197, at 472 n.36.

423. ADVISORY COMMITTEE, *supra* note 37, at 3.

424. U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 27.

425. Rogers & Grant, *supra* note 211, at 56.

426. *Id.* at 57-59.

427. Shereen Lerner, *Saving Sites: Preservation and Education*, in *PROTECTING THE PAST*, *supra* note 32, at 103, 108.

428. Foreign countries' export controls, especially Canada, Great Britain, and France, may provide model laws. See generally BATOR, *supra* note 50, at 37-51; Nafziger, *Int'l Penal*, *supra* note 38, at 844-45; P.J. O'Keefe, *Export and Import Controls on Movement of the Cultural Heritage: Problems at the National Level*, 10 SYRACUSE J. INT'L L. & COM. 353 (1983); Lowenthal, *supra* note 203, at 158.

429. See Goodwin, *supra* note 4. The author estimates start-up costs at \$2 million to \$5 million.

430. See MEYER, *supra* note 15, at 119-20. In 1971 Robert Hughes of *Time* suggested a "conservation tax" of 5% on every work of art sold at auction for more than \$100,000. He wrote, "most of all, it could mitigate the crushing sense of waste and meaninglessly flamboyant consumption that anyone who cares about art and its priorities is apt to feel when reading about record auction prices." *Id.* at 119.

Another idea is a tourist tax. Any adult entering a country on a pleasure trip would pay a nominal fee. These funds would be distributed among the country's public art institutions and an international preservation or enforcement fund. *Id.* at 120.

from the art trade would also contribute to its preservation. Another suggestion is to establish a national register of art and artifacts.⁴³¹ This idea was recently the impetus to amendments to NHPA which appropriate money for a report on antiquities trafficking.⁴³² A final⁴³³ suggestion is to establish a customs check on exported artifacts. However, this would require express and detailed export regulations and appropriate agency guidance to ensure that art trade is not unduly restricted. Export of important cultural property should be restricted, while less important and duplicate art objects should be traded freely, so as to not encourage the black market.

Express export regulations could be modeled after foreign regulations: the French system is "based on a comprehensive inventory of non-exportable property;" the British system "based on a governmental option to purchase any object headed for export;" and the Canadian system based on a "control list and system of export permits."⁴³⁴ Every system has its drawbacks, but as the United States government balances the interests of free trade against the protection of cultural heritage, the balance should tip in the favor of preserving the past for future generations. If enforcement mechanisms are not made immediately effective, there will be nothing left to protect, and the loss will be felt by everyone.

VI. Conclusion

Aside from the technical and practical legal obstacles to effective protection and preservation of Native American cultural property, the most

Canada's Cultural Property Export and Import Act (CPEIA) established a fund to purchase important works of art to ensure their availability to the public. Furthermore, the tax incentives in the CPEIA make it almost as attractive for a collector to donate art to a public institution as to sell the art. Milrad, *supra* note 183, at 32.

Professor Bator discourages using tax incentives and charitable deductions to prevent art institutions from acquiring illegal art. "The purpose and effect of the additional tax would be to prohibit and to punish, not to regulate the cost of doing business . . . why should we proceed by indirection? All we would be doing is to introduce a further untidy complication into the tax code, and this on grounds having nothing to do with taxation." BATOR, *supra* note 50, at 87.

431. Houseman, *supra* note 108, at 554. The success of a national registry would be dependent on full cooperation from the art community because art and all art transactions would need to be recorded with the registry. While a registry may be satisfactory for contemporary art, it could not guaranty authenticity of older art. *Id.*

432. NHPA Amendments of 1992, 16 U.S.C. § 470h-5 (Supp. IV 1992). For further discussion, see *supra* note 173.

433. Other possible solutions may be creative penalties — fines used to fund further enforcement, confiscated objects donated to public museums, rewards for discovering missing art, or community service in public art institutions (e.g., for art dealer defendants). See Nafziger, *Int'l Penal*, *supra* note 38, at 845.

434. *Id.* at 844. See generally Milrad, *supra* note 183 (discussing Canada's new law); Fishman & Metzger, *supra* note 113, at 59-62 (summarizing various export laws as of the mid-1970s).

pervasive hindrance is public ignorance. It is difficult for non-Native Americans to fully comprehend the value of Native American cultural property. Mainstream American culture and religion are separable, having no objects that are symbolic of the entire way of life.

Throughout the research for this article, the author searched for some comparable American object to use as an example. The only one found is the Liberty Bell.⁴³⁵ While many Americans would take great nationalistic offense at the desecration, destruction, or theft of the Liberty Bell, few feel a personal connection to the Liberty Bell and few could describe its national significance. The Liberty Bell does not have the religious, spiritual, and cultural significance comparable to a Zuni war god or other Native American cultural property.

In order to understand the plight of Native Americans, Americans need to personalize the issue. Consider, for example, how dehumanizing theft is in general. Now imagine a treasured family heirloom, the family Bible, or the portrait of your great-grandfather is stolen and your home ransacked. Many years later you learn that this item was sold to an international collector and is irretrievable due to international laws.⁴³⁶ How would you feel? . . . This is only one part of the loss experienced by Native Americans. Their cultural property not only has personal and historic significance, it is also fundamental to their religious and cultural beliefs. A senior bow priest for the Zuni Tribe described the return of a war god: "It's like a child that has been lost, out wandering around, finally returned to its homeland."⁴³⁷

If Americans could begin to empathize with Native Americans, then the biggest obstacle to the cultural preservation problem would be solved. Citizens would stop collecting artifacts for sport, report more occurrences of archaeological site destruction, and return more guilty verdicts as jurors. So far, however, Americans do not empathize enough to make a real difference. As a result, the federal government must offer protection to Native Americans through adequate laws to deter people from acting immorally and inhumanely.

Immediate governmental action is necessary to effectively preserve Native American cultural property. Admittedly, this is a complicated issue with many differing perspectives and competing interests. Both ARPA and NAGPRA provide significant protections for cultural property, but these protections are

435. Merryman & Elsen, *Hot Art*, *supra* note 14, at 8. Some Americans might think that the American Flag is an example of American cultural property, but because the American Flag is a duplicate, mass-produced product, it is not technically cultural property. Particular, unique, historic flags might qualify as cultural property, but the author did not find any authority that expressly noted such flags as examples.

436. International countries that follow civil law have statutes of limitation that prohibit recovery of stolen property: in Italy ten years, in Switzerland five years, and in Japan only two years. After this period the original owner may not recover his property. Lowenthal, *supra* note 203, at 158.

437. Haederle, *supra* note 19, at E1.

effective only within U.S. borders. In order to ensure that cultural property is also protected in international markets, and to avoid loss of important patrimonial objects, we need to enact express export regulations. Native American culture cannot survive without access to its religious and ceremonial objects. Furthermore, all Americans will benefit from the preservation of cultural resources, even those too ignorant to recognize the importance of cultural preservation.

Surely, assisting Native Americans in preserving their rich and distinct cultural heritage justifies restrictions on destruction, removal, possession, transfer, export, and trafficking of their cultural resources, especially since these resources are ultimately necessary to preserve that heritage and culture. Of all who seek possession of Native American cultural resources, Native Americans alone have the requisite personal and religious interest in preserving the resources, but they are currently powerless to adequately protect these objects. Without federal intervention, these resources will remain unprotected and will ultimately be lost forever.