COMMENTS

Protecting Cultural Property Through Provenance

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I. INTRODUCTION

Almost 1,500 years ago, a large mosaic was created in the apse of the Church of the Panagia Kanakaria in Lythrankomi, Cyprus.[1] The mosaic, depicting Jesus, the Virgin Mary, and two archangels, was surrounded by a fresco of the twelve apostles.[2] As is traditional in the Greek Orthodox Church, the congregation in this small north Cypriot town came to revere the mosaic as a holy relic.[3] Unfortunately, the priests and congregation of the Panagia Kanakaria Church were forced to flee Lythrankomi in 1976 by the occupying Turkish army.[4] Sometime in the following twelve years, the sacred mosaic was torn from its place in the church and smashed into four separate pieces.[5] It made its way into an Indiana art gallery where it was later discovered by a representative of the legitimate government of Cyprus.[6]

Though this sounds like a fantastic story of international intrigue, it is one of many that make up the third most profitable criminal market in the world: the black market in art and antiquities.[7] The mosaic falls into

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1. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 279 (7th Cir. 1990).

2. *Id.*

3. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1396 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

4. *Autocephalous Greek-Orthodox Church*, 917 F.2d at 280–81.

5. *Id.* at 281–84.

6. *Id.*

7. Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 49 n.2 (1995) (citing William Tuohy, *Picture This: Art*

a class of objects called cultural property—tangible objects of a culture's unique heritage and traditions. It includes all "property which, on religious or secular grounds, is . . . of importance for archaeology, prehistory, history, literature, art or science."[8]

Although the black market crosses national boundaries,[9] U.S. law is of great importance because the United States is a major consumer of cultural property.[10] While policymakers and courts both recognize the importance of the United States in this black market,[11] laws are strikingly inconsistent in their treatment of cultural property.[12] Once a piece of cultural property reaches the United States, its legal treatment will depend on the diplomatic relationship between the U.S. and the object's country of origin,[13] the particular type of object,[14] the scienter of the current possessor of the piece,[15] and other factors. This patchwork of regu-

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Thievery is Thriving, L.A. TIMES, Aug. 16, 1994, at H1). Art theft worldwide is estimated at $2 billion annually. *Id.*

8. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

9. International regulation takes place through the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the International Institute for the Unification of Private Law (UNIDROIT), which promote international treaties and uniform laws respectively. *See* UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG., APPROVED PROGRAMME & BUDGET 2008–2009, at 133–34, UNESCO Doc. 34 C/5 (2008), http://unesco.org (setting forth guidelines and plans of action that will be used to implement the conventions and declarations adopted by UNESCO); Statute of the International Institute for the Unification of Private Law art. 1, Mar. 15, 1940, 15 U.S.T. 2494 (declaring UNIDROIT's purpose of drafting, establishing, and facilitating uniform legislation in the field of private law). Various countries also have their own laws in place. *See, e.g.*, Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–13 (2006); Reglamento para el Uso y Conservación de las Areas, Objetos y Colecciones de Palacio Nacional [Regulations for the Use and Conservation of Places, Objects and Collections] Diario Oficial de la Federación [D.O.], 14 de Noviembre de 2000 (Mex.).

10. "The United States is a principal market for articles of archaeological and ethnological interest and of art objects . . . ." S. REP. NO. 97-564, at 23 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 4078, 4100; *see also* United States v. McClain, 545 F.2d 988, 992 n.1 (5th Cir. 1977) (characterizing the United States as an importer of ancient, oriental, and primitive art); John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1893 (1985) (characterizing the United States as a major art importing country in terms of the UNESCO Convention).

11. *See McClain*, 545 F.2d at 994 ("The apparent purpose of Congress in enacting stolen property statutes was to discourage both the receiving of stolen goods *and the initial taking*." (emphasis added)); Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430–31 (N.Y. 1991) (recognizing New York City's central role in the international art market).

12. *See infra* Part II.

13. Convention on Cultural Property Implementation Act, 19 U.S.C §§ 2601–13 (2006).

14. *See* 19 U.S.C. § 2092.

15. 18 U.S.C. § 2314; *Guggenheim Found.*, 569 N.E.2d at 429 (discussing the good faith purchaser rule).

lation leads to innocent purchasers losing valuable objects because there is no predictable way to evaluate title to cultural property.[16]

The ancient relics from the Panagia Kanakaria Church were returned to the Church of Cyprus thanks to the Cypriot government's extraordinary efforts.[17] However, similar cultural property is not always returned.[18] This Comment recommends that Congress take action to bring consistency to the treatment of cultural property in two ways. First, ownership disputes should be settled based on the quality of provenance between competing claimants, a system similar to land title registration. Provenance is the history of a piece of cultural property that shows where it came from and where it has been.[19] Second, to ensure provenance is a complete guide to title all cultural objects, both illegally exported and stolen cultural property should receive the same treatment.

Part II of this Comment discusses the history of cultural property regulation. Next, Part III addresses the current state of the law protecting cultural objects within the United States and explains the inconsistencies created under the current statutory scheme. Finally, Part IV proposes a solution that will protect interested parties.

II. A BRIEF HISTORY OF THE REGULATION OF CULTURAL PROPERTY

Theft, and theft of cultural property, has gone on for all of history.[20] In antiquity, pillage of cultural property went hand-in-hand with the conquest of new territory.[21] Indeed, empires like Rome reaped huge bounties from defeated peoples and viewed the taking of their art as a legiti-

16. *See, e.g.*, *Guggenheim Found.*, 569 N.E.2d 426; O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980).

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

18. *See, e.g.*, Tajan v. Pavia & Harcourt, 693 N.Y.S.2d 544, 546 (N.Y. App. Div. 1999) (noting Italy's failure to intervene in a customs seizure and the subsequent release of the painting at issue to another party).

19. 12 OXFORD ENGLISH DICTIONARY 710 (2d ed. 1989).

20. LEONARD D. DUBOFF ET AL., THE DESKBOOK OF ART LAW D-1 (2d ed. Mar. 2005) ("Since the earliest times"); Hawkins et al., *supra* note 7, at 49; *see also* LAW: A TREASURY OF ART AND LITERATURE 20–22 (Sara Robbins ed., Beaux Arts ed. 1990).

21. DUBOFF ET AL., *supra* note 20, at D-1 (discussing the legitimacy of conquest from the Roman perspective). "[C]onquerors took the cultural property of the losers, in the belief that the *mana*, or cultural identity and strength of the conquered, was embodied in those objects." Merryman, *supra* note 10, at 1914.

mate aspect of war.[22] That practice continued unabated through the eighteenth century.[23]

While the plundering of cultural property from conquered nations faded almost completely in the eighteenth century, Napoleon enthusiastically resumed the practice in the nineteenth.[24] The emperor filled his Musée Napoléon first with objects taken from the First and Second Estates,[25] and later with objects from the defeated cultures of Europe.[26] Napoleon's final defeat at Waterloo brought a temporary end to the appropriation of cultural property as spoils of war, and the victors at Waterloo respected the integrity of Europe's cultural heritage with certain notable exceptions.[27] At the end of the Napoleonic Wars, cultural nationalism rationalized the allies' repatriation of cultural property taken by Napoleon.[28]

Cultural nationalism is the idea that objects which are made by and for a particular people, and which are identified with that people, belong to and with them.[29] Although it represented an improvement from the previous might-makes-right approach to cultural property, cultural nationalism is subject to the same distortions because it too is based in nationalism.[30] Condemnation of takings in wartime became universal

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22. DUBOFF ET AL., *supra* note 20, at D-1; Charles De Visscher, *International Protection of Works of Art and Historic Monuments*, DOCUMENTS & ST. PAPERS, June 1949, at 821, 823 ("Rome . . . had made a systematic practice of carrying off the works of art belonging to the peoples subjugated by her.").

23. Jaroslav Folda, *Art in the Latin East, 1098–1291*, *in* THE OXFORD ILLUSTRATED HISTORY OF THE CRUSADES 151 (Jonathan Riley-Smith ed., 1995); DONALD E. QUELLER, THE FOURTH CRUSADE: THE CONQUEST OF CONSTANTINOPLE 1201–1204, at 149 (1977); Jonathan Riley-Smith, *The State of Mind of Crusaders to the East, 1095–1300*, *in* THE OXFORD ILLUSTRATED HISTORY OF THE CRUSADES, *supra*, at 75. *But see* De Visscher, *supra* note 22, at 823 (the practice was *reestablished* with the Renaissance).

24. De Visscher, *supra* note 22, at 824–25.

25. Cecil Gould, *Trophy of Conquest*, *in* LAW, ETHICS AND THE VISUAL ARTS 2 (John Henry Merryman & Albert E. Elsen eds., 4th ed. Kluwer Law Int'l 2002). The First Estate, the clergy, and the Second Estate, the nobility, of course, had the most and best property to take. *See* HISTORICAL DICTIONARY OF NAPOLEONIC FRANCE, 1799-1815, at 173 (Owen Connelly ed., 1985).

26. De Visscher, *supra* note 22, at 824–26 (specifically noting confiscation practices in the conquest of Belgium, Italy, the Netherlands, and Germany); Dorothy Mackay Quynn, *Art Confiscations of the Napoleonic Wars*, *in* LAW, ETHICS AND THE VISUAL ARTS, *supra* note 25, at 4, 7–8; Gould, *supra* note 25, at 2–4.

27. JUDITH G. COFFIN ET. AL., WESTERN CIVILIZATIONS 720 (14th ed. 2002) (discussing Napoleon's defeat at the battle of Waterloo, June 15–18, 1815); De Visscher, *supra* note 22, at 826 (discussing the peace negotiations and the return of art confiscated by Napoleon).

28. *See* De Visscher, *supra* note 22, at 826 (discussing motivations consonant with what would become known as cultural nationalism).

29. *See generally* Merryman, *supra* note 10, at 1911–12.

30. Examples include Napoleon's use of the Musée Napoléon as a propaganda symbol and Hitler's view of Aryans as the only fit race. HISTORICAL DICTIONARY OF NAPOLEONIC FRANCE, *supra* note 25, at 310–11; Quynn, *supra* note 26, at 5; DUBOFF ET AL., *supra* note 20, at D-19; De Visscher, *supra* note 22, at 825.

among great thinkers in Europe and the United States,[31] with this new idealism focusing on protecting cultural objects for the glory of the cultures that created them.[32] The allies at Waterloo promoted this new view in an attempt to protect the national prestige of the previously defeated nations by halting the appropriation of cultural property as an aspect of conquest.[33]

Cultural nationalism shifted from a nascent movement to a full-fledged goal of the allied victors of World War I. The collective treaties ending the Great War stipulated that cultural objects disbursed by time or by war should be repatriated.[34] Additionally, preference in repatriation was given to the country that controlled the region to which a cultural object's significance belonged.[35] The treaties ending World War I had significant sections dedicated to the return of cultural property acquired under a wide variety of circumstances.[36]

The darker side of cultural nationalism surfaced during World War II, and the pattern of Napoleon repeated itself.[37] The Third Reich used the conquest of "subhumans"[38] as an opportunity for acquiring cultural property. Hitler was famously interested in art and was himself a failed artist.[39] The German government saw itself as protecting the art of other countries, selectively confiscating pieces that fit Hitler's political ideals and selling or ignoring the rest.[40] Modern art was most notable among the "degenerate" forms Hitler directed be destroyed.[41]

The end to World War II marked the beginning of the current era in the protection of cultural property, one based on cultural internationalism, or the idea that cultural objects contribute to the collective culture of

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31. De Visscher, *supra* note 22, at 825–27 (citing examples of vocal opponents as Quartremère de Quincy and Daunou).

32. *See id.* at 826.

33. *See id.*

34. *See id.* at 829.

35. *Id.* This is, again, cultural nationalism at work. *See* Merryman, *supra* note 10, at 1911–12. Certain objects did, however, make their way into international trade as a result of the peace. Examples include the wings of the polyptych of the Mystic Lamb and the outer panels of The Last Supper (by Dierick Bouts). De Visscher, *supra* note 22, at 829–30.

36. *See* De Visscher, *supra* note 22, at 828–37 (discussing the postwar return of cultural property).

37. DUBOFF ET AL., *supra* note 20, at D-19. Hitler's actions can be viewed as cultural nationalism run amuck, which may contribute to the explanation of why cultural internationalism became so widely accepted by the parties involved in the direct aftermath of World War II.

38. COFFIN ET AL., *supra* note 27, at 1005–14.

39. *Id.* at 970.

40. DUBOFF ET AL., *supra* note 20, at D-19–20.

41. *Id.* at D-20.

mankind and so equally belong to everyone.[42] This new ideal was expressed in the text of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)[43] and the founding of the United Nations Educational, Scientific, and Cultural Organization (UNESCO).[44] The 1954 Hague Convention ratified what had been the norm for centuries in western warfare, violated only by Napoleon and Hitler—that destruction of cultural property during wartime should be avoided when militarily possible and that the pillage of cultural property was not a legitimate component of war.[45] The 1954 Convention directs for the protection of cultural property in the signatory parties' own territory,[46] for cooperation with local authorities in protecting cultural property in the occupied territory,[47] and for avoiding the destruction of, or damage to, cultural property as a result of military action.[48] Seizing cultural objects as spoils of war is also prohibited.[49]

A peacetime complement to the 1954 Hague Convention, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention), was completed in 1970.[50] The UNESCO Convention dealt with private acts of cultural property theft, directing implementing nations to prevent the importation of cultural property taken illicitly from other signatory nations.[51] The UNESCO Convention required signatory nations to pass laws preventing the illegal trade of cultural property,[52] regulating the legal trade of cultural property with signa-

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42. *See generally* Merryman, *supra* note 10, at 1916–17; Convention for the Protection of Cultural Property in the Event of Armed Conflict pmbl., *opened for signature* May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

43. 1954 Hague Convention, *supra* note 42. The 1954 Hague Convention was another installment in a series of similar international conventions that had occurred over the preceding six decades. De Visscher, *supra* note 22, at 837. The first Hague Conference took place in 1899; it protected historic monuments from destruction in war. *Id.* The second Hague Conference in 1907 adopted similar rules for naval confrontations. *Id.*

44. UNESCO was founded on November 16, 1945, after a conference which grew out of the Allies concern about the destruction wrought by Nazi Germany. UNESCO, The Organization's History, http://portal.unesco.org/en/ev.phpURL_ID=6207&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Apr. 7, 2009).

45. 1954 Hague Convention, *supra* note 42, res. II.

46. *Id.* art. 3.

47. *Id.* art. 5.

48. *Id.* arts. 5, 7.

49. *Id.* art. 14.

50. UNESCO Convention, *supra* note 8.

51. *Id.* arts. 2–3 ("recogniz[ing] that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of . . . cultural heritage" and proscribing such actions); S. REP. NO. 97-564, at 22 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 4078, 4099.

52. UNESCO Convention, *supra* note 8, art. 5.

tory nations,[53] and protecting the cultural property of signatory nations whose property was in danger of pillage.[54] The UNESCO Convention also outlawed the surrender of cultural property as a consequence of war.[55]

These treaties make cultural property theft a clear violation of international law. But the world has changed, and countries are no longer the primary thieves of cultural property. Looters, and those individuals to whom they sell, are now the chief cause of cultural theft. For example, during the Invasion of Iraq in 2003, it was not the invading power, the United States, that looted cultural property throughout the country, but the Iraqi people themselves: professional thieves who knew exactly what was worth taking and how to get it.[56] Facing this new, insidious black market for cultural property demands a new legislative response in the United States that recognizes individuals, not states, as the primary actors in cultural property theft.

III. THE CURRENT STATE OF U.S. LAW

Cultural property regulation in the United States has generally mirrored international trends. The relatively short history of the United States, however, makes it somewhat unique.[57] The United States has historically "[f]ocus[ed] on a relatively short segment of what might otherwise be considered its history,"[58] ignoring the Native American cultures that were on what is now U.S. territory long before 1607. Native American culture is commonly considered distinct from that of the United States.[59]

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53. *Id.* arts. 6–8.

54. *Id.* art. 9. This article provides the enabling language for the creation of the CPIA discussed in Part III.C.

55. UNESCO Convention, *supra* note 8, art. 11.

56. John F. Burns, *A Nation at War: Looting; Pillagers Strip Iraqi Museum of its Treasure*, N.Y. TIMES, Apr. 13, 2003, at A1, *available at* http://www.nytimes.com/2003/04/13/world/a-nation-at-war-looting-pillagers-strip-iraqi-museum-of-its-treasure.html.

57. France traces its independence to the breakup of the Holy Roman Empire in 843. COFFIN ET AL., *supra* note 27, at 294. England traces its history back to William the Conqueror, who arrived on the island in 1066. *Id.* at 328–29. Russia's modern history began with the rise of Ivan III (the Great) and his crowning as the first czar in 1480. *Id.* at 410. And China is perhaps the oldest of all, tracing its unification back to 222 BC, under its first Emperor, Chhin Shih Huang Ti. 1 JOSEPH NEEDHAM, SCIENCE AND CIVILISATION IN CHINA 98 (1954). However, while all of these countries had been occupied by the same people who would later form the aforementioned nations for hundreds of years prior to political unification and independence, the United States' independence in 1776 was declared by a people who had only resided in the country only since 1607, the founding of Jamestown. COFFIN ET AL., *supra* note 27, at 574, 624.

58. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 297 (7th Cir. 1990).

59. For example, there is a National Museum of the American Indian separate from the National Museum of American History among the various museums of the Smithsonian Institute.

With the international environment for cultural property regulation now established, this Part addresses the major laws protecting cultural property in the United States, in roughly chronological order. First, the Antiquities Act of 1906 protects real property from a distinctly nationalist perspective. Second, the Pre-Columbian Art Act of 1972 restricts the importation of certain artifacts; it was the first attempt to address the issues most relevant to this Comment. Third, as the enabling legislation for the UNESCO Convention, the CPIA has a unique and important place in cultural property regulation. Fourth, the NSPA, while not enacted specifically to protect cultural property, is important in the arena today because of its potential criminal sanctions. And finally, common law actions may be invoked by private parties.

A. Cultural Nationalism: the Antiquities Act of 1906

The United States' first law aimed at the protection of cultural property[60] was the Antiquities Act of 1906.[61] The Act was born of a failed effort to protect the Casa Grande Ruins in Arizona, a major Native American site, and Mount Vernon in Virginia, the home of George Washington.[62] Prior to the Antiquities Act, a private movement had sought to protect Mt. Vernon, and title was offered to both the federal government and the State of Virginia, but neither was interested in preservation.[63] Instead, title ended up in the hands of the ad hoc Mount Vernon Ladies' Association, which still owns the property today.[64] It was not until vandals damaged the Casa Grande Ruins, however, that Congress finally responded with the Antiquities Act.[65]

The Antiquities Act focuses on real property and structures owned by the United States and allows the President to create historic landmarks.[66] It authorizes the Secretaries of the Interior, Agriculture, and Defense to issue permits for scientific or educational work,[67] and creates a criminal penalty of up to a $500 fine or up to ninety days imprisonment for theft of objects or damage to anything on the land.[68] The narrow

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Compare National Museum of the American Indian, http://www.nmai.si.edu (last visited Apr. 6, 2009), *with* National Museum of American Culture, http://americanhistory.si.edu (last visited Apr. 6, 2009).

60. H.R. REP. NO. 96-1457, at 18 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6378, 6381.

61. 16 U.S.C. §§ 431–33 (2006).

62. H.R. REP. NO. 96-1457, at 18, 1980 U.S.C.C.A.N. at 6380–81.

63. *Id.*

64. *Id.*

65. H.R. REP. NO. 96-1457, at 18, 1980 U.S.C.C.A.N. at 6381. Congress also chartered the Archaeological Institute of America at the same time. *Id.*

66. 16 U.S.C. § 431.

67. *Id.* § 432.

68. *Id.* § 433.

scope and minimal penalties, however, make the Act incapable of protecting most cultural property.

In the decades following the Antiquities Act, the United States continued to regard protection of cultural property as an exclusively nationalist enterprise.[69] Federal action was limited to protecting properties identified as "nationally significant."[70] In the 1930s, for example, the Works Progress Administration, a New Deal program, hired archeologists and laborers to do historic preservation in the Midwest. Around the same time, the Historic Sites Act of 1935 directed the National Park Service to begin "identifying and evaluating *nationally* significant properties."[71] Even after World War II, the United States did not join the growing movement toward cultural internationalism: The U.S. failed to ratify the 1954 Hague Convention.[72]

B. The Pre-Columbian Art Act of 1972: A Changing Attitude

The United States first demonstrated its interest in the preservation of other cultures' heritage with the Pre-Columbian Art Act of 1972, which prohibited the importation of pre-Columbian artifacts from the Indian cultures of the Americas.[73] The Act demonstrates a shift away from cultural nationalism because it pertains exclusively to objects of *other* nations and it prohibits the import of *any* artifact which does not have an accompanying export permit from its country of origin.[74] The Act protects items that have been placed on a list created by the Secretaries of the Treasury and of State and includes "stone carvings and wall art" significant to pre-Columbian Indian cultures.[75] The listed items are proscribed from importation into the United States.[76]

However, the Act has two flaws which make it largely insignificant today. First, it is narrow in scope, applying only to "pre-Columbian monumental or architectural sculpture or mural" identified by the Secre-

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69. H.R. REP. NO. 96-1457, at 19–20, 1980 U.S.C.C.A.N. at 6382–83.

70. *Id.*

71. H.R. REP. NO. 96-1457, at 18, 1980 U.S.C.C.A.N. at 6385 (emphasis added).

72. The Senate finally ratified the 1954 Hague Convention on September 25, 2008. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, *concluded on* May 14, 1954, S. TREATY DOC. NO. 106-1(A) (2008); Conventions, http://erc.unesco.org/cp/convention.asp?KO=13637&language=E (going into force in the U.S. on June 13, 2009).

73. 19 U.S.C. §§ 2091–95 (2006).

74. *See* Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–13 (2006); National Stolen Property Act (NSPA), 18 U.S.C. §§ 2314–15 (2006). Note, the title National Stolen Property Act was revoked in 1940, but will be used in this Comment for ease of reference. *See id.* § 2314.

75. 19 U.S.C. § 2091.

76. *Id.*

taries.[77] Artifacts that are not part of the actual monumental structure, such as tools or movable property, and artifacts from new sites that could be discovered and looted before their sculpture and murals could be catalogued and identified by U.S. authorities, are unprotected. Second, the Act provids only forfeiture of proscribed items as a remedy.[78] Thus, there is little deterrent effect. The Act's ineffectiveness is emphasized by the fact that Bolivia, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, and Peru have all gone through the more arduous process of entering into agreements under the Cultural Property Implementation Act (CPIA) to protect their cultural heritage.[79]

C. Cultural Internationalism: UNESCO and the Convention on Cultural Property Implementation Act

In 1972, the United States finally joined the rest of the international community in protecting cultural property by ratifying the UNESCO Convention.[80] Although ratification would ostensibly have made the United States a leader in preventing the destruction of objects of cultural heritage, the Convention was not self-executing and had little effect without domestic legislation.[81] In considering such legislation, Congress identified the growing market in the United States as a leading cause of destruction and pillage in foreign countries, a problem that strained relations with art-exporting allies.[82] In 1982, after a series of failed bills and lengthy consultations with market experts, the Convention on Cultural Property Implementation Act (CPIA) finally gave effect to the UNESCO Convention in the United States.[83]

The CPIA has two distinct provisions. First, it prohibits the importation of any stolen cultural property identified as part of "the inventory of a museum, a religious or public monument, or a similar institution in any State Party."[84] Second, it allows the President to enter into agree-

77. *Id.* § 2092.

78. *Id.* § 2093.

79. *See infra* Part III.C.

80. UNESCO Convention, *supra* note 8. Absence from such agreements had been a trend for the United States. First, Paris was divested of the cultural property she plundered during the Napoleonic wars by the Treaty of Paris, but the U.S. was not a member of the allied powers who defeated Napoleon at Waterloo in 1815. *See supra* note 25. Later, the Central Powers were stripped of much cultural property by the treaties ending World War I, but those treaties were never ratified by the Senate. ALAN SHARP, THE VERSAILLES SETTLEMENT: PEACEMAKING IN PARIS, 1919, 39–40 (1991); De Visscher, *supra* note 22, at 829.

81. S. REP. NO. 97-564, at 21 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 4078, 4098.

82. *Id.*

83. S. REP. NO. 97-564, at 21–24, 1982 U.S.C.C.A.N. at 4098; Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (2006).

84. 19 U.S.C. § 2607. A State Party is a party to the UNESCO Convention. *Id.* at § 2601(9).

ments absolutely proscribing the import of cultural property from nations he identifies as being in danger of loss of cultural property through pillage.[85] These agreements prohibit any object which has been exported from a signatory state from being brought into the United States without a certificate of export from the signatory state.[86] Nations with which the United States has current agreements are Bolivia, Cambodia, Colombia, Cyprus (both governments), El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru.[87]

The second provision of the CPIA has a tremendous advantage over acts like the Pre-Columbian Art Act and the National Stolen Property Act because the CPIA proscribes the importation to the United States of cultural property which is *exported* from another country without a certificate of authorization from the country.[88] This higher level of protection, distinguished from the more narrow prohibition of importation of cultural property *stolen* from museums and similar institutions of signatory countries, arises only if the President enters into an agreement with the originating nation.[89] This Comment seeks to make this second aspect of the CPIA universal in U.S. law.

For the President to enter protective agreements under the CPIA, five conditions must be satisfied.[90] First, the country seeking protection for its cultural property must be a party to the UNESCO Convention.[91] Second, the President must find that the cultural property of that country is at risk of pillage.[92] Third, the country must have "taken measures consistent with" the UNESCO Convention.[93] Fourth, the Act's provisions must be both effective and as non-invasive as possible in protecting the country's cultural heritage.[94] Finally, such restrictions must be "consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and

85. *Id.* § 2602.

86. *Id.* § 2606.

87. U.S. State Dep't Bureau of Educ. and Cultural Affairs, Chart of Emergency Actions & Bilateral Agreements, http://exchanges.state.gov/culprop/chart.html (last visited Apr. 6, 2009).

88. 19 U.S.C.A. § 2606 (West 2009).

89. *Compare id.* § 2606(a) *with id.* § 2607. Presumably, the signatory state would not issue such a certificate if the object had been stolen prior to export, effectively restricting import of both stolen and illegally exported cultural property.

90. *Id.* § 2602.

91. *Id.* § 2602(a)(1).

92. *Id.* § 2602(a)(1)(A).

93. *Id.* § 2602(a)(1)(B).

94. *Id.* § 2602(a)(1)(C).

educational purposes . . . ."[95] These determinations are intended to be made with "a measure of Presidential judgment."[96]

The wide scope of the CPIA makes it an excellent model for the United States when dealing with cultural property. The CPIA recognizes the value of cultural property as part of our common heritage across borders and ethnic groups and seeks partnerships with art exporting nations to protect those objects. Under the CPIA, the Executive Branch is also active in seeking these partnerships.[97] However, like the Pre-Columbian Art Act, the CPIA is a customs act without criminal sanctions. Because the CPIA provides only for forfeiture of objects imported illegally, criminal prosecutions tend to be brought not under the CPIA but under the National Stolen Properties Act (NSPA).[98]

D. A Second Track: The NSPA

The NSPA was passed in 1919 as the National Motor Vehicle Theft Act and was intended not to protect cultural property but to catch thieves who were thwarting justice by crossing state boundaries.[99] The Act makes it illegal to transport "goods, wares, merchandise, securities or money, of the value of $5,000 or more" in interstate commerce if they have been taken illegally.[100] Congress used the term "interstate commerce" to give the statute the same broad reach as the Supreme Court's Commerce Clause jurisprudence.[101] Today, a broad range of criminal activities are prosecuted under the NSPA, including the importation of stolen cultural property into the United States.[102]

The word "stolen" in the NSPA has been interpreted to apply to objects which are taken or acquired wrongly both within and without the United States but not to objects which are exported from a foreign country in violation of that country's law.[103] Through this interpretation, the United States will impose criminal sanctions on violators of both domes-

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95. *Id.* § 2602(a)(1)(D).

96. S. REP. NO. 97-564, at 27 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 4078, 4104.

97. See *supra* note 87 and accompanying text for a list of agreements the U.S. has entered into as a result of the authority granted to the President and the Cultural Property Advisory Committee under the CPIA for the acquisition of cultural property, 19 U.S.C. §§ 2602, 2603, 2605.

98. *See, e.g.*, United States v. Schultz, 333 F.3d 393, 395, 409 (2d Cir. 2003) ("[P]assage of the CPIA does not limit the NSPA's application to antiquities stolen in foreign nations.").

99. McElroy v. United States, 455 U.S. 642, 649–50 (1982).

100. 18 U.S.C. § 2314 (2006).

101. *McElroy*, 455 U.S. at 651–53.

102. *Schultz*, 333 F.3d at 409.

103. United States v. McClain, 545 F.2d 988, 994–96 (5th Cir. 1977). The *McClain* court recited that "'stealing' is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership." *Id.* at 995.

tic and foreign laws regarding theft or wrongful conversion by prosecuting those who bring the stolen objects into the U.S., but will not impose the same criminal sanctions for similar violations of foreign customs laws.[104] Instead, importers of objects which were illegally exported from their country of origin face only seizure of objects that fall under either the Pre-Columbian Art Act or a Presidential agreement under the CPIA. This judicial interpretation of the NSPA is an impediment to what is otherwise one of the most effective laws protecting cultural property in the United States. As a criminal statute, the NSPA has one of the strongest deterrent effects, with conviction resulting in a fine and imprisonment of up to ten years[105] in addition to forfeiture.[106]

E. Common Law Actions

Apart from these federal laws, two common law actions are available as civil remedies for wronged owners: replevin,[107] an action for return of personal property, and trover,[108] an action for damages measured by the value of the property taken. Replevin is the primary common law remedy because cultural objects are non-fungible; it is the objects themselves that are desirable, not the monetary value associated with them. Despite being a common law remedy, replevin is a source of conflict among the states.

At common law, claims of ownership are conflicts of relative merit;[109] they usually involve disputes between what will be called legitimate owners, or owners, and current possessors, or possessors. For the purposes of this Comment, legitimate owners are individuals or entities whose claim to ownership predates the possession at issue, who can demonstrate a better chain of title to an object, and who never transferred title.[110] Legitimate owners' possession can either be actual, as in the case of the creator of a work of art, or constructive, as in a declaration of na-

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104. *Id.* at 996. A middle ground does exist, however, when a state demands that any cultural property that was illegally exported be forfeited and subject to the NSPA. United States v. Pre-Columbian Artifacts, 845 F. Supp. 544, 546 (N.D. Ill. 1993); *McClain*, 545 F.2d at 1000–01.

105. 18 U.S.C. § 2314 (2006).

106. *See, e.g., Pre-Columbian Artifacts*, 845 F. Supp. at 547 (denying motion to dismiss forfeiture claim).

107. BLACK'S LAW DICTIONARY 1325 (8th ed. 2004).

108. *Id.* at 1545.

109. *See* Armory v. Delamirie, (1721) 93 Eng. Rep. 664 (K.B.), *reprinted in* JESSE DUKEMINIER ET. AL., PROPERTY 96 (6th ed. 2006); DUKEMINIER ET AL., *supra,* at 97–98 (quoting Anderson v. Gouldberg, 53 N.W. 636 (Minn. 1892)).

110. The use of the word "legitimate" in legitimate owners should not be understood as a normative judgment about the merits of the two parties. Rather, it is used to provide clarity between the two terms. Legitimate owners in one dispute may be current possessors of the same object in another dispute.

tional ownership of all undiscovered antiquities within a country.[111] In contrast, current possessors are those individuals or entities whose possession comes later in time and who tend to have a more ambiguous chain of title. These possessors have not necessarily acted wrongly; they may be good faith possessors—for example, someone who purchased an object and was led to believe the piece was originally from a private collection.[112] While legitimate owners can sometimes fully trace their titles, current possessors never can because somewhere along the current possessor's chain of title the property was acquired without the full rights of ownership. Thus, because transfers of cultural property, like all transfers of property, follow the latin maxim *nemo plus juris ad alium transferre potest quam ipse habet*—no one can transfer more right from himself than he has,[113] current possessors' claims of title are limited. However, these possessors' titles can mature into good titles through the operation of adverse possession, statutes of limitations, and laches.[114]

Adverse possession, statutes of limitations, and laches all perform essentially the same function: each grants a current possessor full legal title some specified period of time after the legitimate owner's action accrues, or "come[s] into existence as an enforceable claim or right."[115] There are two competing approaches in the U.S. to setting this accrual date: the demand and refusal rule and the discovery rule.

1. The Demand and Refusal Rule

A leading case on the demand and refusal rule is the New York Court of Appeals case of *Solomon R. Guggenheim Foundation v. Lubell*.[116] In *Guggenheim*, the Guggenheim Museum initiated an action for replevin of a Chagall gouache that it believed had been stolen by a

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111. *E.g.*, United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974) ("Under [Guatemalan] law, all such artifacts are the property of the Republic, and may not be removed without permission of the government.").

112. The general scheme described is not unusual. *See* 77 AM. JUR. 3D *Proof of Facts* § 259 (2008).

113. The translation is my own.

114. While there is potential in the laches defense, it is not analyzed in either of the cases discussed here and will, therefore, not be addressed. *See* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991) (discussing that some arguments may apply to a laches defense when considered by the lower court); O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980) (not mentioning laches). *But see O'Keeffe*, 416 A.2d at 883 (Handler, J., dissenting) (noting that equitable defenses such as laches "may be raised").

115. BLACK'S LAW DICTIONARY 22 (8th ed. 2004) (defining "accrue"). This period is set by statute in both adverse possession and statutes of limitations cases and is an issue of fact in laches cases. *See id.* at 891 (defining "laches"); 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01[2] (Matthew Bender & Co. 2009) (discussing adverse possession).

116. *See* 1 JESSICA L. DARRABY, ART, ARTIFACT, ARCHITECTURE AND MUSEUM LAW § 2:65 (2008) (citing *Guggenheim Found.*, 569 N.E.2d 426).

mail room employee in the late 1960s.[117] The museum first learned that it no longer had possession of the painting in 1969 or 1970 during a decennial inventory.[118] However, it did not report the painting as lost or stolen because the museum was following a policy against publicizing art theft.[119] Later it was learned that Rachel Lubell had purchased the painting in 1967 from a gallery and displayed it in her home.[120] She pled statute of limitations and laches defenses when the museum sued in 1987.[121]

The court first drew a distinction between two types of subsequent possessors: good faith purchasers and thieves. Possession by good faith purchasers is not considered wrongful, so an action against a good faith purchaser does not accrue until a demand for return is made and refused.[122] As a consequence, the demand and refusal rule applies in this situation, and the statute of limitations is tolled until the true owner makes a request for return. In contrast, possession by a thief is wrongful from the time of the theft. Thus, an action against a thief accrues immediately, and the statute of limitations is never tolled "even if the property owner was unaware of the theft at the time that it occurred."[123]

The *Guggenheim* court considered three alternatives to the demand and refusal rule. First, it considered imposing a due diligence requirement on owners of stolen property, but rejected this rule as an undue burden on victims of art theft.[124] Second, the court considered letting the statute of limitations run from the time of the theft, regardless of who is in possession, or from the time the possessor acquired the object.[125] The court rejected this alternative as well, stating that "it would not be prudent to extend that case law and impose the additional duty of diligence before the true owner has reason to know where its missing chattel is to

117. *Guggenheim Found.*, 569 N.E.2d at 427. A gouche is "an opaque watercolor paint which usually has a pliable adhesive with the binder to retard drying." ELEANOR C. MUNRO, THE GOLDEN ENCYCLOPEDIA OF ART 271 (1961).

118. *Guggenheim Found.*, 569 N.E.2d at 428.

119. *Id.* at 431. The museum believed publicizing art theft would be detrimental to the recovery of the stolen pieces and encourages additional theft attempts. *Id.*

120. *Id.* at 427. Lubell and her husband purchased the painting from the Robert Elkon Gallery for less than ten percent of its estimated 1991 value. *Id.* at 428. The gallery's own records indicate the gouache had come from the "private collection" of the mail room clerk suspected of the theft. *Id.* While on display at the Gallery, a transparency was given to Sotheby's for an auction estimate and the gouache was identified as one missing from the Guggenheim collection. *Id.*

121. *Id.*

122. *Id.* at 429. Good faith purchasers are sometimes called bona fide purchasers.

123. *Id.*

124. *Id.* at 429–30. The court, however, did not reject this avenue of argument entirely, stating that Lubell's "contention that the museum did not exercise reasonable diligence in locating the painting will be considered by the Trial Judge in the context of her laches defense." *Id.* at 431.

125. *Id.* at 430.

be found."[126] Third, the court considered the discovery rule, but rejected it because the governor had previously vetoed a bill that would have made the discovery rule New York law.[127]

Adopting the demand and refusal rule, the Court of Appeals justified its decision in

> recognition that New York enjoys a worldwide reputation as a preeminent cultural center. To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art.[128]

In the court's opinion, tolling the statute of limitations when the object was possessed by a good faith purchaser achieved two goals. First, it placed the burden on purchasers to investigate the provenance of their purchases,[129] and second, it protected owners who have a different approach to law and order than the traditional one.[130]

The demand and refusal rule's shortcoming is that it does not give purchasers of cultural property clear guidance on what actions they should take at the time of acquisition. By tolling the statute of limitations until the possessor has knowingly acted wrongly, the demand and refusal rule functions in the same way as the knowingly adverse element of adverse possession,[131] a doctrine that exists to discourage idleness and waste rather than encourage security of title.[132] The doctrine will protect a thief by looking at her actions when she acquired title because she is knowingly adverse to the legitimate owner at that time. However, it will not protect a good faith purchaser because, although she acted with diligence when acquiring title, that same diligence precludes her from satisfying the knowingly adverse element.[133] While its goal was to give victims of theft strong protection, the court, by adopting the demand and

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126. *Id.*

127. *Id.*

128. *Id.* at 431.

129. *Id.*

130. *Id.*

131. The elements of adverse possession are possession that is continuous, exclusive, open, notorious, and hostile to the owner. BLACK'S LAW DICTIONARY 59 (8th ed. 2004). Alternative elements are "(1) hostile (perhaps under a claim of right); (2) exclusive; (3) open and notorious; (4) actual; and (5) continuous for the requisite statutory period." 16 POWELL, *supra* note 115, § 91.01[2]. Another alternative is "hostile, actual, visible, exclusive, and continuous." O'Keeffe v. Snyder, 416 A.2d 862, 870 (N.J. 1980).

132. 16 POWELL, *supra* note 115, § 91.01[4].

133. The Court of Appeals observed that the distinction between thieves and good faith purchasers that treats thieves more generously was "seemingly anomalous," but it is consistent when viewed as a question of knowing adversity to the owner. *Guggenheim Found.*, 569 N.E.2d at 429.

refusal rule, provided purchasers with little guidance and, consequently, weak protection.

2. The Discovery Rule

The leading case on the discovery rule is *O'Keeffe v. Snyder*, a New Jersey case involving the disappearance of three small Georgia O'Keeffe paintings from O'Keeffe's husband's gallery, An American Place.[134] The facts are similar to *Guggenheim*. O'Keeffe, who completed the paintings sometime prior to 1946, noticed they were not among the gallery's collection, failed to immediately report them as stolen, located them at a much later date, and sued for replevin.[135] Barry Snyder, who purchased the paintings from Ulrich Frank in 1975, traced his title through Frank's deceased father.[136] Frank himself testified to seeing the paintings in his father's apartment as early as 1941–43.[137]

Again, the issue was whether the statute of limitations barred O'Keeffe's replevin action. The Supreme Court of New Jersey recognized the problem with good faith purchasers' status: a good faith purchaser is actually more vulnerable to a replevin claim than a thief because the statute of limitations begins to run immediately upon acquisition to protect a thief but only at some later date to protect a good faith purchaser.[138] The court did not wish to punish owners who purchased in good faith, and adopted the discovery rule.[139] The discovery rule tolls the statute of limitations only until a reasonably diligent owner *should have* discovered the possessor of her property.[140] The court found that the discovery rule was more equitable because it "shifts the emphasis from the conduct of the possessor to the conduct of the owner."[141]

By focusing on the legitimate owner's conduct, the discovery rule provides only slightly more protection to innocent purchasers than the demand and refusal rule. This is because a purchase must be made in good faith for the statute of limitations to apply;[142] the purchaser earns

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134. *O'Keeffe*, 416 A.2d at 865.

135. *Id.* at 865–66.

136. *Id.*

137. *Id.* at 866.

138. *Id.* at 867–68.

139. *Id.* at 869.

140. *Id.* It is the "should have" language that concerned the New York Court of Appeals. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991). The court did not want to force all owners of art to act in the same manner. *Id.* at 431.

141. *O'Keeffe*, 416 A.2d at 872.

142. The court held that there were three findings of fact the trial court must engage in to determine whether the plaintiff, O'Keeffe, would benefit from the discovery rule:

> (1) whether O'Keeffe used due diligence to recover the painting at the time of the alleged theft and thereafter; (2) whether at the time of the alleged theft there was an effective

good faith status by diligently researching the provenance of the piece she is acquiring.[143] This emphasis protects a good faith purchaser because placing the diligence requirement on the owner makes it more likely that the good faith purchaser will uncover the cultural object's status when doing due diligence. However, the good faith purchaser is still not given clear guidance on what to look for when acquiring title—something the New Jersey court recognized but did not rectify.[144] New Jersey tried to give purchasers of cultural property more ability to act knowingly when acquiring these objects, but it still did not make clear what actions they are supposed to take to protect themselves.

IV. CONSISTENT REGULATION OF CULTURAL PROPERTY

With the inconsistent treatment of cultural property by U.S. law established, this Part proposes a two-part solution to bring consistency to U.S. law. This consistency can be achieved by, first, replacing the good faith system for resolving ownership disputes with a provenance-based system, and second, removing the legal distinction between illegally exported and stolen cultural property.

A. Part One of the Proposal: Provenance as the Measure of Ownership

Disputes between purported owners of cultural property should be settled by comparing the quality of each claimant's provenance, or chain of title, and awarding legal title and possession to the stronger claimant. Using provenance to perfect title would work with all types of cultural property because the unifying characteristic of these objects is that information is available regarding the objects' origins.[145] This characteristic both distinguishes cultural property from most other personal property (a pair of shoes is typically not worth any more or less if its origins are unknown) and also defines when an ordinary piece of personal property becomes an object of cultural value (like the ruby slippers from *The Wizard of Oz*).[146]

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method, other than talking to her colleagues, for O'Keeffe to alert the art world; and (3) whether registering paintings with the Art Dealers Association of America, Inc. or any other organization would put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner.

Id. at 870. Because O'Keeffe had registered the paintings with the ADAA, the third question essentially asks whether Snyder was a good faith purchaser. *Id.* at 866, 873.

143. *Id.* at 885.

144. *See id.* at 872.

145. *See* UNESCO Convention, *supra* note 8, pmbl.

146. "The ruby slippers worn by Judy Garland during the filming of 'The Wizard of Oz' are truly a treasure of American history. They have fascinated people for years and evoke many strong

The unique value of each piece of cultural property is similar to the non-fungible nature of real property, and a provenance-based system would function much like a land title record does today. In the United States, a title-recording system tracks ownership interests in land. Under recording statutes, any time an interest in land is created or destroyed, documentation of that transaction is submitted to a recorder's office.[147] Prospective purchasers can then view the records of a piece of land to determine the legitimacy of the title they are purchasing.[148] The system would encourage owners of cultural property to document each transfer or use of an object and retain those documents just as recording acts do for real property.[149] While the proposed system would not create a recorder's office for cultural property, it would operate under a similar principle by using the documentation each claimant could produce to determine the true owner. Such documents could include a bill of sale, export permit, or insurance policy.

The new rules could be applied prospectively to all cultural property, but would require a grandfather clause for past transactions where a reasonable buyer would not expect the need to demonstrate provenance. Even first possessors would have some documentation of their legitimate ownership, such as an excavation permit for an artifact or the artist's signature on a work of art. The rule would have to include an exception for owners who would not have reasonably been expected to produce provenance documentation to earn good faith purchaser status. This would include, for example, owners of objects of minor value because these individuals would not reasonably demand such documentation prior to passage of a provenance statute. Also, an owner whose possession predated the UNESCO Convention's requirement that all countries create an export certificate for cultural property might have cultural objects from foreign countries that reasonably lack any provenance. Such exceptions, however, have the potential to consume the benefits of a provenance-based system and must be narrowly tailored.

Once implemented, the system would be easy to apply. In the event of a conflict, each owner would present her documentation and many cases could be decided on summary judgment. In situations where documentation was incomplete or ambiguous and where the pleadings

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emotions . . . ." National Museum of American History, "Treasures of American History" FAQs, http://americanhistory.si.edu/about/faq.cfm?key=55&faqkey=136#1 (last visited Apr. 6, 2009).

147. 14 POWELL, *supra* note 115, § 83.02[1].

148. *Id.*

149. Note the similarities between the documents that would be compiled during a land title search and with this Comment's proposed provenance records. *See id.* § 82.01[4].

claimed undocumented transactions,[150] a trial would be required. In either case, the party whose documentation showed her rightful claim would win title.

1. Provenance Is More Transparent Than Good Faith

Unlike a provenance system, a system based on good faith status does not provide sufficient protection to either legitimate owners or good faith purchasers when a dispute arises. By allowing a good faith purchaser to gain superior title over an innocent victim of theft, the law puts theft victims in a vulnerable position. By requiring a good faith inquiry, the law also puts purchasers at risk for not meeting the court's standard. A provenance-based system would put all parties on advance notice regarding the requirements necessary to perfect their interests. For an illustration, consider two cases.

First, consider the events leading up to *United States v. Schultz*.[151] In *Schultz*, the defendants developed an elaborate cover, the "Thomas Alcock Collection," through which they forged provenance for Egyptian antiquities.[152] In 1991, one of the defendants, Jonathan Tokeley Parry, smuggled Egyptian artifacts out of Egypt by coating them in plastic so they would appear to be cheap collectables.[153] He brought them to England, where he removed the plastic coating and restored the artifacts using a popular 1920s restoration technique.[154] Parry and Frederick Schultz then concocted a story that a relative of Parry's, "Thomas Alcock," had brought the artifacts out of Egypt in the 1920s and had kept them in his private collection ever since.[155] The scheme was eventually uncovered, and the men were arrested and charged with dealing in stolen antiquities.[156]

Under the current system, a purchaser from Schultz's collection would not reasonably expect to find any documentation about the piece of cultural property because it would predate the UNESCO Convention's permit requirement and, according to Schultz's story, would have no sale documents because it was discovered by "Alcock." If the purchaser had the object inspected or appraised, the purchaser would be told that the piece was genuine and had been restored in a fashion consistent with its

150. Unlike land, personal property is not generally covered by the Statute of Frauds. *See* RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981).

151. 333 F.3d 393, 396–97 (2d Cir. 2003).

152. *Id.*

153. *Id.* at 396.

154. *Id.*

155. *Id.*

156. *Id.* at 398.

purported origins.[157] Under either the demand and refusal or discovery rules, this hypothetical purchaser could take no action that would protect her interest in the artifact. On the other hand, Egypt, the legitimate owner, would have to prove diligent search under the discovery rule and would have a running statute of limitations against Schultz.

By contrast, under a provenance system, a purchaser would know of the potential defect in title when she purchased the artifact and could adjust her behavior accordingly. A purchaser could either refuse to buy the object or discount her offer based on any perceived flaw in title. Egypt would also be protected because it would have stronger provenance through its own patrimony laws and evidence of the artifact's origin.[158] Egypt would be able to recover its property in a civil action, and a hypothetical purchaser would have a civil claim against the seller.

Provenance is sometimes used to prove ownership under the current good faith system, but if it was adopted as the primary measure of title, purchasers would know exactly what to look for and how to protect themselves. Such a situation arose in *An Original Manuscript*.[159] Duane Douglas bought a manuscript at a flea market in Mexico City in 1992.[160] After smuggling the manuscript into the United States, Douglas attempted to sell the manuscript to Dana Toft.[161] Douglas made representations to Toft about the manuscript, and Toft decided to purchase it for $16,000.[162] The bill of sale for the transaction stated that the manuscript "was part of the Sanchez-Flores collection between 1925 and 1972 at which time it was disbursed."[163] Because of Toft's later attempts to sell the manuscript, a buyer sent an inquiry to the Mexican National Archives, which identified the manuscript as belonging to the *Californias* collection.[164] At the request of the Mexican government, the United States instituted proceedings under the CPIA.[165]

The court found Toft lacked good faith because he was willfully blind toward the nature of the manuscript,[166] and the court granted sum-

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157. Fundamentally the same issues exist in terms of fine art. *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 865–66 (N.J. 1980). Snyder's father apparently had possession of the paintings not long after they were created. *Id.* at 866. O'Keeffe was not yet so famous that the purchaser would have been expected to carefully document his purchase.

158. *See Schultz*, 333 F.3d at 398–99.

159. United States v. An Original Manuscript Dated Nov. 19, 1778, No. 96 Civ. 6221, 1999 WL 97894 (S.D.N.Y Feb. 22, 1999).

160. *Id.* at *1.

161. *Id.*

162. *Id.* at *1, 2.

163. *Id.* at *2.

164. *Id.* at *1, 2.

165. *Id.* at *3.

166. *Id.* at *7.

mary judgment on the forfeiture claim.[167] In reaching that conclusion, the court partially relied on the total lack of provenance surrounding the manuscript.[168] Toft received representations from Douglas about the provenance of the manuscript, but did not request any documentation or seek further information about how it came into Douglas' possession.[169] Under the good faith standard, Toft had no defense.

Under a provenance system, Toft would have known to ask for documentation regarding the manuscript's time in the *Californias* collection, its sale, and its UNESCO-mandated export permit from the Mexican government. Using provenance as proof of title would have given both parties clear guidance on how to protect their property interests.

2. Provenance Is More Functional than a Stolen Property Registry

The leading alternative to good faith is the creation of a database of stolen cultural property.[170] A stolen art registry would require the victims of cultural property theft to report the loss of their property and would require the purchasers of cultural property to check the registry before completing their transactions.[171] The registry would force the marketplace to adjust because failure to participate would, generally, have serious adverse consequences.[172] A registry has the benefit of providing a quick and reliable way to check the legitimacy of any transaction before it goes through and is technically possible.[173] However, when a registry is compared to a provenance-based system, there are three clear disadvantages.

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167. *Id.* at *8.

168. *Id.* at *7. Other factors were that the sale to Toft took place in a hotel room and that the transaction was all cash. *Id.*

169. *Id.*

170. *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980); Hawkins et al., *supra* note 7, at 87–89. Both the New Jersey Supreme Court and Ashton Hawkins, former Executive Vice President and Counsel to the Trustees of The Metropolitan Museum of Art, support converting an existing private database of stolen cultural property into an official one. The New Jersey court recognized this was beyond its limited power and adopted the discovery rule as the best available alternative. *O'Keeffe*, 416 A.2d at 872. Mr. Hawkins advocates for a similar system in his article. Hawkins et al., *supra* note 7, at 88–89.

171. Mr. Hawkins' registry would protect only purchasers who "registered their stolen art soon after the theft with both law enforcement and the registry" and would grant good faith status and statute of limitations protections automatically to any purchaser who checked the registry and did not find the piece they were purchasing there. Hawkins et al., *supra* note 7, at 90.

172. Owners who did not participate in Mr. Hawkins' registry would have the statute of limitations on their claims run from the time of the theft regardless of who was in possession; purchasers who did not check the registry would automatically be considered to have failed to exercise good faith. *Id.* at 90–91.

173. *See O'Keeffe*, 416 A.2d at 872.

First, provenance is already valued because it is central to academic work and to academic use of cultural property.[174] Archeologists depend upon the preservation of provenance for their work—once an artifact is removed from the site in which it is discovered, its context is lost and a large portion of the "wealth of knowledge that is often imparted by the art"[175] is permanently destroyed. Furthermore, the Society of Professional Archaeologists directs its members to publish the information gathered from any excavation within ten years, ensuring the knowledge is preserved and shared.[176] Archaeological ethics ban publications which refer to items lacking complete provenance.[177]

Second, a registry would require a drastic shift in how the cultural property market functions. Implementing a stolen art registry would first require all currently unrecovered objects be identified and reported.[178] Buyers and sellers would have to consult the registry as part of every transaction, creating additional costs. A mandatory registry would also be a peculiarity in the law: there is no similar treatment of victims in any other area.[179]

Market practices and other areas of law are both more consistent with a provenance-based system. The system allows for compromise treatment for cultural property, somewhere between the treatment afforded to personal and to real property. Cultural property shares its nonfungible nature with real property, while still being a type of personal property.

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174. Archaeological Institute of America (AIA) publications "will not serve for the announcement or initial scholarly presentation of any object in a private or public collection acquired after December 30, 1973, unless its existence is documented before that date, or it was legally exported from the country of origin." Publication Policy for *AJA* and *Archaeology*, http://www.archaeological.org/webinfo.php?page=10040 (last visited Apr. 5, 2009). An exception may be made if, in the view of the Editor, the aim of publication is to emphasize the loss of archaeological context. *Id.*

175. *Id.*

176. THE SOCIETY OF PROFESSIONAL ARCHAEOLOGISTS CODE OF ETHICS § 6.3 (1995), *reprinted in* ARCHAEOLOGICAL ETHICS app. A at 257 (Karen D. Vitelli ed., 1996).

177. For example, the AIA instructs its members to "[r]efuse to participate in the illegal trade in antiquities derived from excavation in any country after December 30, 1970, when the AIA Council endorsed the UNESCO Convention on Cultural Property, and refrain from activities that enhance the commercial value of such objects . . . ." ARCHAEOLOGICAL INSTITUTE OF AMERICA CODE OF ETHICS ¶ 2 (1990), *reprinted in* ARCHAEOLOGICAL ETHICS, *supra* note 176, app. A at 261. *See also* KEVIN GREENE, ARCHAEOLOGY: AN INTRODUCTION 274 (4th ed. 2002) ("Public museums have a better record today for refusing to purchase items that lack proper documentation about their origins and ownership . . . .").

178. *See supra* notes 170–71 and accompanying text.

179. *Compare* Hawkins et al., *supra* note 7, at 90 (proposed stolen art registry), *with* 14 POWELL, *supra* note 115, § 82.03. Indeed, mandatory reporting is the very type of change the New York Court of Appeals wanted to avoid, and which the Guggenheim Museum resisted. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991).

Unlike a stolen property registry, a provenance-based claim to title already has a running start—many involved in the cultural property market already highly value provenance information.[180] Therefore, this Comment's proposal can be implemented immediately and have an immediate effect on the clarity of title. While a limited exemption would be necessary for some past transactions, the scope of this immediate protection is still much greater than with a stolen property registry. Certain transactions predating enactment that did not reasonably include provenance information would be exempted, but types of property for which provenance is most important—such as objects of historic significance—would already have some records. Further, transaction costs would not be an issue because documenting transactions with, for example, a bill of sale, an export permit, or a license to excavate, can be done without involving additional actions.[181]

Third, a stolen property registry is not capable of protecting all stolen cultural objects. To list an item in a stolen property registry, that item must have been in the physical custody of an owner who both knows that her property has been stolen and is in a position to report the theft to the registry.[182] Any other item would be unprotected.[183] Such a registry would not protect yet-to-be discovered artifacts from pillage and sale on the black market. Even if the government of the country from where the objects were pillaged had a law claiming ownership of all undiscovered cultural property, it could not register the theft of objects it did not know existed.[184] In this hypothetical, the country of origin is the legitimate owner but is unaware of the object's existence, let alone its theft, and is therefore unable to register it.

A system that uses provenance records as proof of title would better protect previously unidentified cultural property. Under a provenance-based system, an artifact that was recently discovered by a looter would

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180. *See* Publication Policy for *AJA* and *Archaeology*, *supra* note 174 and accompanying text. *See* Hawkins et al., *supra* note 7, at 88 (conceding that a stolen art registry could not have an immediate effect).

181. A provenance-based system could additionally be viewed as a first step toward a registration system similar to the land title registration system present in most states. This system would not require the radical shift in how cultural property is bought and sold that a registry would, and the system would recognize that cultural property occupies a peculiar position in property regulation. *See* Hawkins et al., *supra* note 7, at 89. If a registry is desired after enactment of a provenance-based system, one could easily be created by allowing owners to upload copies of their provenance documents onto a searchable Internet database.

182. *See id.*

183. *See id.*

184. *See, e.g.*, John Noble Wilford, *High in Andes, a Place That May Have Been Incas' Last Refuge*, N.Y. TIMES, Mar. 19, 2002, at F5, *available at* http://nytimes.com/2002/03/19/science/high-in-andes-a-place-that-may-have-been-incas-last-refuge.html.

appear identical to a potential purchaser to an artifact that was stolen—both would lack proper provenance. While this might not be an idea for tracking down looters, the purpose of provenance is to demonstrate that the seller has no legal interest in the object, only bare possession. By contrast, objects which had been legitimately discovered and allowed to enter the market by the appropriate government would be documented. A provenance-based system would protect a wider variety of objects.

B. Part Two of the Proposal: Import Controls

Using provenance to resolve disputes between legitimate owners and current possessors will give purely domestic transactions the increased transparency necessary to protect both purchasers and victims of theft. But alone, the provenance-based system will not bring the same desired effect to transactions in international commerce. As a major art-importing country, U.S. law must necessarily confront the international trade in cultural property and provide those purchasers with the same degree of protection.

Cultural property that is illegally exported from another country and brought to the United States should be treated identically to cultural property that was stolen abroad before being brought into the United States. This would end the United States' dependence on foreign countries' interpretation of laws protecting their cultural property, and would make provenance the full measure of title.

If cultural property continues being separated into "illegally exported" and "stolen" classifications, its provenance will not fully reflect the object's legal status. Provenance identifies legally imported property because it has export documentation which distinguishes it from stolen and illegally exported property,[185] but the provenances of stolen and illegally exported property are indistinguishable from one another because both acts take place without documentation. Provenance would not show the relevant legal status of title because the two acts receive different treatment under the current law.[186]

Eliminating this distinction would make U.S. law more consistent because domestic law would function without regard to foreign law classifications. It would bring consistency to what is already the foreign policy of the United States: "*U.S. actions in these complex matters should not be bound by the characterization of other countries*, and these coun-

185. *See, e.g.*, UNESCO Convention, *supra* note 8, art. 6 (requiring parties to create a certificate identifying that an object was exported in conformation with the party's laws).

186. United States v. McClain, 545 F.2d 988, 996 (5th Cir. 1977). *See also supra* Parts III.B–D.

tries should have the benefit of knowing what minimum showing is required to obtain the full range of U.S. cooperation."[187]

The United States has a "profound national interest in joining other countries to control the trafficking of [cultural property] in international commerce,"[188] an interest derived from the country's growing acceptance of cultural internationalist norms.[189] When considering the CPIA, the Senate recognized that the current inconsistencies are a real policy concern to art-exporting nations, and that the country's reputation was being harmed by the poor domestic response to the frequent appearance of stolen and looted cultural property in the United States.[190]

Removal of this distinction would improve transparency and predictability in both criminal and civil law. The NSPA does not apply to property illegally exported from, but not stolen in, a foreign jurisdiction. This limitation handicaps the United States' response to the outrage of its sister countries.[191] A more comprehensive ban on illegally obtained cultural property will enhance the law's general deterrent function and enable foreign nations to more freely protect their property.

The Executive Branch would also have more freedom to make policy decisions by treating "stolen" and "illegally exported" property identically. As the law stands now, illegally exported property is not "stolen" under the NSPA,[192] even though it was taken from another country in violation of their export laws. Additionally, "U.S. action" is sometimes "bound by the characterization of other countries" against Congress's wishes[193] when the executive cannot pursue prosecution to recover cultural property because of the state of foreign law.[194]

Removing the distinction between "stolen" and "illegally exported" cultural property would further the goal of predictability for all actors in the cultural property market. It would remove a distinction between two foreign law violations and result in two classes of objects which will

187. S. REP. NO. 97-564, at 27 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 4078, 4104 (emphasis added).

188. S. REP. NO. 97-564, at 23, 1982 U.S.C.C.A.N. at 4100.

189. *See supra* Parts III.A–C.

190. S. REP. NO. 97-564, at 23, 1982 U.S.C.C.A.N. at 4100 (quoting comments submitted by the Department of State); *see also* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1376 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

191. The UNESCO Convention recognizes the value of "national cultural heritage" when it obligates signatory nations to set up services to protect such objects from export when that would damage its heritage. UNESCO Convention, *supra* note 8, art. 5.

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

193. S. REP. NO. 97-564, at 27, 1982 U.S.C.C.A.N. at 4104.

194. *See, e.g.*, *McClain*, 545 F.2d at 1000–01.

likely appear indistinguishable to a potential purchaser, allowing her to make a fully-informed decision.

V. CONCLUSION

The theft of cultural property is a pervasive problem that U.S. law does not adequately address. The international community has condemned such thefts for hundreds of years, but international law alone cannot solve the problem. Unfortunately, while the United States is the leading market for cultural property, it has failed to adequately respond. While there have been many laws passed on the subject since the beginning of the twentieth century, they have led not to blanket coverage, but only a patchwork of protection.

Domestically, cultural property is best protected by the CPIA, the NSPA, and common law remedies, but each has its weaknesses. Although the CPIA lays out a clear national policy proscribing the illegal trade in cultural property, it applies only to property imported from certain nations. The NSPA, on the other hand, applies to property generally, but does not reach all cultural property because it applies only to property which was "stolen." Finally, the common law is inconsistent from state to state and does not enable those in the art market to buy with certainty. Reform is needed to correct this imbalance. This Comment proposes treating all those who come into possession of cultural property equally by evaluating their claims on grounds of provenance and by removing the distinction between "illegally exported" and "stolen" cultural property.

By requiring owners of cultural property to keep detailed provenance regarding their property, buyers will be better able to evaluate the title they are purchasing, and dealers in stolen property will be ferreted out. Cultural objects as well as their provenance will be better protected and valued because it will be in the interests of all those who come into possession of cultural objects to ensure clear provenance. The same values are advanced by ending the distinction between "illegally exported" and "stolen" property because both are likely to appear similar to a purchaser and should be treated the same to allow her to act with the maximum amount of relevant information.

Because so much of the regulation is dependent upon federal law, Congress could efficiently reform this entire area of law. The reforms proposed in this Comment can be easily and immediately enacted, bringing immediate and profound benefit to cultural property regulation.