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THE PROTECTION OF CULTURAL PROPERTY AND THE PROMOTION OF INTERNATIONAL TRADE IN ART

Suppose, for example, that the city of Sparta were to become deserted and that only the temples and foundations of buildings remained, I think that future generations would, as time passed, find it very difficult to believe that the place had really been as powerful as it was represented to be.

—Thucydides¹

I. INTRODUCTION

Some time in the early sixth century, A.D., an artist (or artists) painstakingly affixed thousands of small colored pieces of glass, tesserae, to the apse of the Church of the Panagia Kanakaria in the village of Lythrankomi on the Mediterranean island of Cyprus.² The original mosaic depicted a variety of Christian religious figures, including a very rare portrait of Jesus as an adolescent,³ flanked by apostles James and Matthew.⁴ A substantial portion of this mosaic survived religious wars,⁵ the eighth century scourge of Iconoclasm,⁶ looting, and deterioration.⁷ During their 1500 years of existence, the mosaics came to have “an invaluable and irreplaceable significance to Cyprus’ cultural, artistic, and religious heritage.”⁸ Indeed, an active congregation worshiped at the Kanakaria Church until 1976.⁹ Between 1974 and 1976, however, almost all of the Greek Cypriot population of Lythranmoki fled from the cultural,

1. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (Rex Warner trans. 1954) (1984).

2. William H. Honan, *Court to Say Who Owns 6th Century Church Art*, N.Y. TIMES, May 17, 1989, at A1.

3. *Id.*

4. *Id.*

5. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1375 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990).

6. During the period of Iconoclasm, a series of edicts by the Byzantine Emperors called for the removal of religious art and images so that the objects themselves would not become pagan-like idols of veneration. William H. Honan, *Deciding How Diligent Art Collectors Have To Be*, N.Y. TIMES, June 4, 1989, at A7.

7. *Church of Cyprus*, 717 F. Supp. at 1377.

8. *Id.* at 1378.

9. *Id.* at 1379.

political, and religious oppression of the occupation forces of the Republic of Turkey.¹⁰ At some time in the 1970s, four of the mosaics were cut from the apse of the Church at Kanakaria, shuttled through a shady network of European antiquities dealers, and sold at a Swiss airport to an American art dealer.¹¹

This story exemplifies the plight of many ancient art treasures: An object of important cultural significance maybe lost to an invading army, a natural disaster, or time.¹² Opportunists see something of timeless value that can be acquired at a bargain (or for no cost at all) in the chaos of war,¹³ through the corruption of petty officials,¹⁴ in unguarded archaeological dig-sites,¹⁵ or in local sites unknown to scholars and

10. *Id.*

11. William H. Honan, *Details of Mosaics Purchase Emerge in Indiana Trial*, N.Y. TIMES, June 2, 1989, at C20; William H. Honan, *Clashing Views on Purchases of Mosaics*, N.Y. TIMES, June 6, 1989, at C17.

12. See generally, LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* (1977); JOHN H. MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS AND THE VISUAL ARTS* (1979).

13. See, e.g., *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990); *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988); see also John Dornberg, *The Mounting Embarrassment of Germany's Nazi Treasures*, ART NEWS, Sept. 1987, at 330.

In 1990, another case of wartime plundering made headlines. William H. Honan, *Germans to Get Priceless Gospels Lost in '45*, N.Y. TIMES, May 1, 1990, at A1 [hereinafter *German Art*]. In the last days of World War II, Lieutenant Joe Meador, an American serviceman with a penchant for fine arts, moved with his unit into the small central German town of Quedlinburg, in Saxony-Anhalt State. William H. Honan, *A Trove of Medieval Art Turns Up in Texas*, N.Y. TIMES, June 14, 1990, at A1 [hereinafter *Medieval Art Turns Up*]. In an abandoned mine shaft, Meador found a horde of rare and valuable jewels and medieval art, including a ninth century illustrated manuscript in a jewel-encrusted gold and silver binding, a silver reliquary inlaid with enamels and precious stones, gold and silver crucifixes, and a 16th century Carolingian version manuscript of the Four Gospels (one of only three such manuscripts still in existence), which was described as having "no parallel." Grace Glueck, *Significance of the Works that Vanished from Mine*, N.Y. TIMES, June 15, 1990, at C22. When the artworks were discovered to be missing, the United States Army investigated, but dropped its investigation when Quedlinburg became part of East Germany in 1949. *Medieval Art Turns Up*, *supra*. Meador took the artifacts back to Texas where they remained for 45 years. *Id.* In 1990, Germany sought return of the artworks. William H. Honan, *Bank in Texas Admits It Has Missing German Art Treasures*, N.Y. TIMES, June 19, 1990, at C18. Meador's heirs and the bank where the treasures were stored were sued by the German government. *Id.* The case was ultimately settled out of court for three million dollars and the treasures were returned to Germany. William H. Honan, *Looted Treasures Returning to Germany*, N.Y. TIMES, Jan. 8, 1991, at C11.

14. See, e.g., *United States v. McClain*, 593 F.2d 658, 660-63 (5th Cir. 1979).

15. See, e.g., Chester F. Gorman, *A Case History: Ban Chiang*, 1 ART RES. NEWS 10,

government administrators.¹⁶ Typically, these objects make their way into the private collections or museums of art-importing countries such as the United States, West Germany, England, or Japan.¹⁷

What is unusual about the Kanakaria mosaics, however, is that an American court ordered that they be returned to the Church of Cyprus.¹⁸ Requests for repatriation, though frequently brought, rarely succeed.¹⁹ Although the decision to return these treasures is a positive step toward recognition of the cultural property claims of foreign nations, it does not preclude the possibility that a legitimate trade in artifacts and antiquities could exist. In *Government of Peru v. Johnson*,²⁰ another recent American case, the court rejected, on evidentiary grounds, the contention that any trade in a nation's cultural property was necessarily illegal merely because the source country's "umbrella statute" states that the source country owns all artifacts found in its territory.²¹

This note supports the emerging American judicial policy toward repatriation of cultural property, as represented in the *Church of Cyprus* case,²² because it implements positively the goal of protecting cultural property, without unduly restricting a free international trade in art. This note will attempt to show that acceptance and use of the types of legislation and institutions involved in the recovery of the Kanakaria mosaics, and rejection of the export regulations involved in the *Johnson*

13 (1981); William D. Montalbano, *Big Business: Art Thieves Find Italy Is a Gold Mine*, L.A. TIMES, Aug. 25, 1988, at A1.

16. See, e.g., *McClain*, 593 F.2d at 660-63.

17. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 292 (1982); Johnathan Kandell, *How a Grave Looter at a Mexican Site Drools over Relics*, WALL ST. J., Sept. 8, 1988, at A1.

18. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990).

19. See, e.g., *Collectors or Looters*, ECONOMIST, Oct. 17, 1987, at 117, 118 (chart cataloguing requests for return of cultural property during last 15 years); *Trial Ordered in Suit over Silver at Sotheby's*, N.Y. TIMES, Nov. 9, 1990, at C30; *Iraq's Heritage*, WALL ST. J., Nov. 22, 1989, at A7; Roberto Suro, *Italy Seeks Origins of Getty Acquisition*, N.Y. TIMES, Aug. 6, 1988, at A22; Joel Brinkley, *Israel Chides State Dept. Aide For Removing Antique Coins*, N.Y. TIMES, May 21, 1988, at A13; Howell Raines, *Egyptians Claim Lost King Tut Treasures*, N.Y. TIMES, Mar. 10, 1988, at C1; Barbara Crossette, *Thais Accuse U.S. of Theft of Temple Art*, N.Y. TIMES, Feb. 10, 1988, at A11. *But see* Roberto Suro, *Zunis' Effort To Regain Idols May Alter Views of Indian Art*, N.Y. TIMES, Aug. 13, 1990, at A1.

20. *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd sub nom. Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

21. *Id.*

22. *Autocephalous Greek-Orthodox Church of Cyprus v. Golberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990).

decision,²³ facilitate the preservation of legitimate cultural property. By removing export barriers and narrowing the class of protected cultural property, the visibility and accessibility of artwork can be promoted. In addition, if museums, universities, and art dealers are allowed to participate in the recovery of antiquities, looting of sites may be reduced, and proper excavation may be conducted by trained archaeologists. In this way, worldwide appreciation and understanding of the art and culture of other nations can be enhanced.

Section II of this note will examine the mechanics of the illicit trade in antiquities and cultural property. Section III will analyze the policy reasons that justify both free trade in art and the protection of cultural property. Section IV will summarize and compare the existing international laws regarding the special problem of cultural property. It will also examine the types of institutions dedicated to the preservation or recovery of stolen art and antiquities. Finally, Section V will look closely at the reasoning, fairness, and effect of the *Church of Cyprus* and *Johnson* decisions, as well as offer some suggestions for a distinction between cultural property and other antiquities.

II. THE ILLICIT TRAFFIC IN ANTIQUITIES AND CULTURAL PROPERTY: THE MOVEMENT FROM POOR TO RICH

Although one of the core problems in analyzing the trade in antiquities and cultural property is the paucity of information on it,²⁴ there were some signs in the late 1980s that this market was booming.²⁵

23. *Government of Peru*, 720 F. Supp. at 810.

24. Bator, *supra* note 17, at 289-90.

25. William Grimes, *The Antiquities Boom: Who Pays The Price?*, N.Y. TIMES, July 16, 1989, at 17 (Magazine); Aric Press et al., *The Hot World of Stolen Art*, NEWSWEEK, Jan. 20, 1989, at 60; William M. Carley, *Gang of Local Boys Shows How Easy Art Theft Can Be*, WALL ST. J., Feb. 21, 1990, at A1.

The Institute For Art Research ("IFAR"), 46 E. 70th St., New York, N.Y. (IFAR), is an institution founded in the 1970s devoted to the recovery of stolen artworks. Telephone interview with Constance Lowenthal, Executive Director of IFAR (Sept. 29, 1989). IFAR's activities include: acting as a registry and an art theft archive, operating an art authentication service, and publishing *IFAR Reports* ten times annually. *Id.* *IFAR Reports* has a regular column describing thefts in the antiquities field. *Id.*

In addition, the *Journal of Field Archaeology* deemed the crisis of antiquities theft serious enough to establish "The Antiquities Market" as a regular feature, analyzing developments in the law of cultural property. *See, e.g.*, Ellen Herscher, *Antiquities Market and Commentary on the Illicit Trade in Trade Antiquities*, 13 J. FIELD ARCHAEOLOGY 330 (1986).

For example, in 1989, the head of a Cycladic Greek statue sold at Sotheby's in New York for \$2.09 million.²⁶ In 1988, the Cultural Property Advisory Committee of the United States Congress estimated the global trade in art treasures to be a \$1 billion per year industry.²⁷ There is clearly a lot of money to be made in the antiquities trade, and it is this potential for profit that motivates all the parties in the illicit chain of commerce, from the Peruvian Indian who loots graves, to the dealer in Geneva.²⁸

A. Looting

Looting is easy and profitable in many countries throughout the world. In places such as Italy, Turkey, Mexico, Southeast Asia, and Central America, there are "literally thousands of unknown or unexcavated archaeological sites."²⁹ A local inhabitant of a rural area may be one of only a few people in the entire world to know of an archaeological site, and he may tap such a private treasure-hoard to supplement an otherwise meager income.³⁰ Being an amateur, the inhabitant is duped into selling the retrieved objects at far below their actual value.³¹ There is little hope that looting at this level can ever be controlled, except possibly by removing the incentives to loot.³²

A more serious threat comes in the form of organized, professional looting teams.³³ Some looters have a finely tuned system for pillaging entire archaeological sites.³⁴ Modern technological methods make thefts

26. Grimes, *supra* note 25, at 17-18.

27. Kandell, *supra* note 17, at A1.

28. See Carley, *supra* note 25, at A1; Montalbano, *supra* note 15, at A1.

29. Bator, *supra* note 17, at 290; Montalbano, *supra* note 15, at A1.

30. Roberto Suro, *A Race for Artifacts Pits Sicilians Against Scientists and Officials*, N.Y. TIMES, Aug. 17, 1988, at C1. "Impoverished farmers in Sicily . . . loot excavations for the same reasons peasants in South America grow cocaine: the monetary incentives are created by a market far away that has grossly exaggerated what was a small part of the local culture." *Id.* (quoting Graziella Fiorentini, Superintendent of Archaeology at Agrigento).

31. Kandell, *supra* note 17, at A25.

32. Compare with Hester Davis, *Looting and the Law*, ARCHAEOLOGY, July 8, 1989, at 22-23 (discussing the legislative challenges created by the haphazard looting of the Slack Farm site in Northern Kentucky).

33. Barbara B. Rosecrance, Note, *Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 CORNELL INT'L L.J. 311, 314 (1986).

34. See, e.g., Sari Gilbert, *Pompeii: Rifling the Ruins*, WASH. POST, Apr. 4, 1977, at D1 (describing how a group of looters stole an ancient fresco from an abandoned church by removing the entire wall on which the work had been painted).

quicker and more efficient, and the destruction of valuable data absolute.³⁵ Yale University archaeologist Eric von Euh reported on at least one sophisticated operation at work between New York and Central America.³⁶ The looters used portable generators, power tools, and ultra-sensitive metal detectors; they even carved landing-strips out of the dense jungle to accommodate the DC-3 cargo aircraft used to remove the artifacts.³⁷ Indicative of the massive scale of some looting operations is the well-known destruction of the great Mayan stone monuments, *stelae*, in the 1960s and 1970s.³⁸ Some of these excellent examples of pre-Columbian art were forty feet tall and weighed five tons; some were even registered as national monuments.³⁹ It is inconceivable that the decorated exteriors of these works could have been removed and concealed without a sophisticated theft operation.

Another on-site problem that makes the looting of artifacts possible is the inability of local police to protect the multitude of known dig-sites.⁴⁰ Police official Joaquin Garcia Barcena, remarking on the 35,000 sites in Mexico alone stated that "[t]he entire Mexican army could not guard that many sites."⁴¹ The problem of inadequate protection is not confined to Mexico, of course, because developing nations worldwide do not regard police protection of such sites as a high priority.⁴²

Finally, it should be noted that the theft of antiquities and cultural property is not exclusively done by pillage. Museums, private collectors,

35. Montalbano, *supra* note 15, at A1 (describes how local inhabitants of an Italian site use metal detectors to find artifacts; and a proposal by one government employer to scatter thousands of metal washers on the ground to frustrate looters).

36. Yates, *Treasures of the Maya*, reprinted in *Convention on Cultural Property Implementation Act: Hearings on H.R. 5643 and S. 2261 Before the Subcomm. on International Trade of the Senate Committee on Finance*, 95th Cong., 2d Sess. 25 (1978) [hereinafter *1978 Hearings*].

37. *Id.*

38. *See* Bator, *supra* note 17, at 277-80.

39. *Id.* at 278.

40. *Id.* at 292. "Looting of archaeological materials is made possible by the fact that the countries involved provide services for protection and preservation of archaeological remains that are inadequately financed, poorly organized, and often corrupt." *Id.*

41. Kandell, *supra* note 17, at A25.

42. Bator, *supra* note 17, at 311-12; Stanley Meisler, *Art & Avarice*, L.A. TIMES, Nov. 12, 1989, at 8 (Magazine). Even in the United States, protection of valuable art work is not considered a high police priority. Larry Tye, *Epidemic of Art Thefts Is Largely Ignored*, PHILA. INQUIRER, May 29, 1990, at 1C.

As an alternative, some countries enact umbrella statutes, which deem anything found on or below the territory of a state to be the property of the state. For a more extensive discussion, *see infra* part IV. B.

and churches with good title frequently have their art treasures stolen.⁴³ The international stolen art trade has become a billion-dollar illegal business, second only to narcotics trafficking.⁴⁴

B. *The Value of Antiquities*

The grime and filth of the looted site is well behind the artifact when it is put on a pedestal and offered for sale at an auction house, but the motivation that brought the artifact to the block stays with the item—ancient works of art can be extremely valuable.⁴⁵ Some experts believe that the lasting value of antiquities is understood best against less enduring and less stable forms of investment.⁴⁶ The Art Dealers Association of

43. Bator, *supra* note 17, at 293. The traffic in such art is minimized, though not eliminated, by the registry system that worked so well for the Church of Cyprus. *See id.* at 313. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990).

In the case of well-known artworks, the possibility of resale is substantially lessened by the fame of the work. Few could afford to buy *La Gioconda*, and those who could might become suspicious that it was being offered for sale at all. In 1911, *La Gioconda* was stolen effortlessly from the Louvre. Copies were sold to co-conspirators, while the real *Mona Lisa* languished in a Paris apartment. Judith Hennessee, *Why Great Art Always Will be Stolen (and Seldom Found)*, CONNOISSEUR, July 1989, at 42-46; *see also* Alan Riding, *9 Impressionist Paintings Recovered in Corsica*, N.Y. TIMES, Dec. 7, 1990, at C33 (the Monet masterpiece "Impression Sunrise," which gave Impressionism its name, was tracked to Corsica partly on a tip that it was being offered for sale to wary Japanese art dealers); Michael Ruane, *No Contest Is Plea on Theft of Rare Books*, PHILA. INQUIRER, Nov. 3, 1990, at B1 (a thief working inside the University of Pennsylvania's Van Pelt library was caught when trying to peddle rare books to a Philadelphia dealer); William H. Honan, *Most Masterpieces Are Too Hot for the Thieves that Take Them*, CHI. TRIB., Mar. 25, 1990, at C4 ("Masterpieces are not usually primary targets for theft because they are so difficult to dispose of."); Renee Graham, *Art Stolen from the Gardner Museum Was Uninsured*, BOSTON GLOBE, Mar. 20, 1990, at A1. Stolen art was also "unsalable." *Id.* (quoting Constance Lowenthal, executive director of the International Foundation for Art Research, a New York organization, which documents art thefts).

44. Daniel Golden, *Hot Art*, BOSTON GLOBE, Feb. 12, 1989, at 16 (Magazine). Note that this article appeared just one month before thieves made their way into Boston's Isabella Stewart Gardner Museum and walked off with \$200 million of art masterpieces. Andy Dabilis & John Ellement, *\$200 Million Art Theft in Boston*, BOSTON GLOBE, Mar. 19, 1990, at A1.

45. Grimes, *supra* note 25. In 1990, however, market prices began to slide. *See* Peter Schjeldahl, *Art Gavel Comes Down Hard*, VILLAGE VOICE, Nov. 27, 1990, at 123; Carol Vogel, *Auction Houses Glitter Dim and Sellers Look to Dealers*, N.Y. TIMES, Nov. 20, 1990, at A1; Alexandra Peers, *Art Dealers See Shift as Buyers Turn Cautious*, WALL ST. J., Oct. 15, 1990, at C1.

46. One dealer in antiquities, Andre Emmerich, dates the boom in the ancient art market to October 17, 1987, the day the stock market crashed. Grimes, *supra* note 25, at 25; *see also* Carley, *supra* note 25.

America estimates that less than two percent of living artists' works will ever appreciate; whereas there is a strong belief that the value of classical art and antiquities will stay constant or increase.⁴⁷ Sotheby's Art Index, which attempts to quantify the value of various types of art, has rated classical art works as far better investments than contemporary pieces.⁴⁸ With museum-quality artifacts selling at \$20,000 and up, many neophyte investors find themselves priced out of the market most likely to appreciate.⁴⁹ The percentage of would-be legitimate purchasers of antiquities who turn to the illicit market is impossible to estimate, but it seems probable that enough do to drive the illicit market.⁵⁰

47. Alexandra Peers, *Investing in Art Can be Tricky Business*, WALL ST. J., Nov. 28, 1988, at C1. Less than 0.1% of contemporary art has any resale value at all. *Id.*

48. *Sotheby's Art Index: Critics Say it May be More Art than Index*, WALL ST. J., Mar. 23, 1989, at C1.

49. Peers, *supra* note 47.

50. Kandell, *supra* note 17. It should be noted that dealers and private collectors are not the only parties that involve themselves in the traffic of illicit art. Some museums, acting in good faith (and others who do not), occasionally acquire items from sellers with less than perfect title because of their exceptional rarity, importance, or value.

For example, in 1969, the Boston Museum of Fine Arts acquired a previously unknown portrait by Raphael, claiming that it was purchased from a collector in Switzerland. An investigation revealed that it was purchased from an art dealer with several convictions for selling antiquities to foreigners for export. MERRYMAN & ELSEN, *supra* note 12, at 2-7 through 2-13. As the facts became clear, the United States Customs Service became involved, and they seized the painting for failure to declare its value. DuBoff, *supra* note 12, at 99-100. When the artwork was returned to Italy, the museum had lost its painting, a great deal of money, and the gloss of its professional reputation. Bator, *supra* note 17, at 280 n.11.

The "Euphronios Krater" episode, involving the Metropolitan Museum of Art, is another example of museum involvement with some shady middlemen trafficking illegally removed art. DUBOFF, *supra* note 12, at 122-24; MERRYMAN & ELSEN, *supra* note 12, at 2-26. The Krater, a ceremonial vase, was acquired by the museum in 1972. DUBOFF, *supra* note 12, at 122. Although officials of the museum claimed that the vase was sold by a collector in Lebanon, charges were made that the piece was looted from an Etruscan grave in 1971, and passed through a Roman intermediary. *Id.* The museum denied all charges, and the piece remained in its possession. *Id.* See Ashton Hawkins, *The Euphronios Krater at the Metropolitan Museum: A Question of Provenance*, 27 HASTINGS L.J. 1163 (1976); Nicholas Gage, *Met Finds Purchase Legal*, N.Y. TIMES, Mar. 7, 1974, at 50.

The Metropolitan Museum of Art was also involved in the case of the Swampuram Nataraja. Bator, *supra* note 17, at 281 n.13. A private collector wished to exhibit the Nataraja, a statue of great significance in a Hindu temple, at the museum. *Id.* Announcement of the display attracted the attention of the government of India, who pressured the museum to cancel the show. *Id.* The incident was settled out of court in 1976. *Id.* The statue was returned to India in 1985. *Collectors or Looters*, *supra* note 19, at 118.

For another episode involving a museum, see the description of the Afo-A-Kom's sojourn from the Cameroonian royal compound to a Dartmouth College art exhibit and back. DUBOFF, *supra* note 12; see also Suro, *Italy Seeks Origins of Getty Acquisition*, *supra* note 19

Middlemen profit most from the illicit trade in antiquities because an object may pass through many hands. Furthermore, because middlemen deal in an air of secrecy,⁵¹ an object's title can become so obscured that the eventual good faith purchaser truly can be unaware of the prior misdealings.⁵² If this good-faith purchase is made in a jurisdiction with a favorable purchasing law, such as Switzerland,⁵³ the property-law sleight of hand is complete: the artifact, far removed from the scene of pillage, with no record tracing it to its provenance, cannot be pinpointed as an illicitly-acquired item, even by artistic or archaeological experts.⁵⁴

Some measures have been designed to deter these middlemen from their trade. Typical of these measures is the so-called "umbrella statute,"⁵⁵ which declares all antiquities of a certain age found on or under a country's territory to be the property of that state.⁵⁶ Under such a statute, any removal of an artifact is necessarily illicit.⁵⁷ These measures have not been overwhelmingly successful as deterrents.⁵⁸ Despite the United States recognition by treaty of the cultural property

(discussing the Getty acquisition of a classical Greek statue).

51. Grimes, *supra* note 25, at 17-18.

52. J. Robert Horton, *Some Significant Cases in Art Dealer-Buyer Law*, N.Y. L.J., Apr. 20, 1990, at 5; J. Robert Horton, *Beyond Cyprus v. Goldberg: Recommendations for Dealers*, N.Y. L.J., Apr. 27, 1990, at 5; *see, e.g.*, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*, 717 F. Supp. 1374, 1394-95 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990); *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. Sup. Ct., 1980).

53. For a discussion of the Swiss doctrine of good-faith purchase, *see Church of Cyprus*, 717 F. Supp. at 1394-1400.

54. *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd sub nom. Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

55. DuBOFF, *supra* note 12, at 71; *see* LYNDEL V. PROTT & PATRICK J. O'KEEFE, 1 LAW AND THE CULTURAL HERITAGE 31-55 (1984); SHARON A. WILLIAMS, THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY 108-10 (1978).

For example, the class of Panama's cultural property subject to its pertinent statute is defined as follows: "National archaeological collections or objects, whether publicly or privately owned." *Panama: Panama Law No. 14, May 5, 1982*, in HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY 165 (Prepared for UNESCO by Lyndel V. Prott & Patrick J. O'Keefe 1988) [hereinafter CULTURAL PROPERTY HANDBOOK]. The hallmark of the umbrella statute is overbroad classification. *Id.*

56. *See, e.g., Egypt: Law on the Protection of Antiquities*, in CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 70; *New Zealand: Historic Places Act of 1980*, in CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 155; *see also* Rosecrance, Note, *supra* note 33, at 329 n.135. (the compendium of national statutes).

57. WILLIAMS, *supra* note 55, at 106-09.

58. Grimes, *supra* note 25, at 24. *But see* Jonathan S. Moore, Note, *Enforcing Foreign Ownership Claims*, 97 YALE L.J. 466 (1988).

claims of Mexico,⁵⁹ Peru,⁶⁰ Guatemala,⁶¹ and others,⁶² the worldwide traffic in pre-Colombian antiquities has not abated.⁶³ A former United States dealer in antiquities has said, referring to the pre-Colombian trade: "It all goes to Geneva now. Don't kid yourself. The market continues, but not here."⁶⁴ The government of Israel experimented with the opposite approach toward umbrella statutes by permitting "the sale and export of original antiquities for fear the trade would otherwise disappear into the black market and become impossible to control."⁶⁵

But the questions remain: Why should cultural property be protected, and under what conditions should culturally-distinctive artifacts be allowed to leave their country of origin?

III. POLICY REASONS FOR REPATRIATION, PROTECTION, AND TRADE

Repatriation of cultural property is a cause that stirs many emotional responses.⁶⁶ The reasons behind these responses can be

59. Treaty of Cooperation Between the United Mexican States and the United States of America Providing for Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, July 17, 1970, United States-United Mexican States, 22 U.S.T. 494 [hereinafter United States-Mexico Treaty].

60. Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 14, 1981, United States-Peru, 33 U.S.T. 1607 [hereinafter United States-Peru Agreement].

61. *United States: Executive Agreement Respecting Cultural Property*, Aug. 22, 1984, in CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 229.

62. The United States also recognizes the cultural property claims of other nations. UNESCO Convention on the Illicit Movement of Art Treasures, Nov. 14, 1970, 823 U.N.T.S. 231, *reprinted in* 10 I.L.M. 289 [hereinafter UNESCO Convention]; United States Implementation of the Convention on Cultural Property, Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350-63 (1983) (codified as amended at 19 U.S.C. §§ 2601-2613 (Supp. 1988)) [hereinafter CPIA]. Nations whose cultural property is covered by CPIA include Canada, Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Panama, Peru, and Venezuela. CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 229.

63. Grimes, *supra* note 25, at 25.

64. *Id.* at 24 (quoting art dealer André Emmerich).

65. *Collectors or Looters*, *supra* note 19, at 118. Although Israel's antiquities law has some overbroad characteristics of the typical umbrella statute, its actual operation is quite different. *Id.*; see *Israel: Israel Antiquity Law 5738-1978*, in CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 112. Any person licensed to trade in antiquities can export items freely. *Israel Antiquity Law §15*, in CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 112. However, the Director of Antiquities maintains authority to overrule any sale or export. *Israel Antiquity Law § 19*, in CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 112.

66. John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1883

religious,⁶⁷ patriotic,⁶⁸ or even political.⁶⁹ However, apart from these appeals, which are basically rooted in emotion, there are many substantive justifications in favor of protecting cultural property and limiting trade in artifacts.

A. Antiquities as Art

Many antiquities are artistic treasures; others are artifacts of ancient cultures valued more because of their age and rarity than their beauty.⁷⁰ Yet those antiquities of special beauty, unity, significance, or exposure are universally regarded as works of fine art, and as such, should be afforded a special status in any system that regulates cultural property. Professor Bator, in a seminal work, highlights a number of relevant values that should be considered in determining which antiquities to protect.⁷¹

(1982); see also Ann P. Prunty, Note, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing Its Marbles*, 72 GEO. L.J. 1155, 1155 n.6 (1982).

67. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1392-1400 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990). Note the unusual case of the Nataraja reported by Stephen E. Weil, *Who Owns The Nataraja?* 88 ART NEWS 188 (May 1989). In this case, India undertook a replevin action in Great Britain for the recovery of a bronze Hindu icon depicting Shiva as Lord of the Dance. *Id.* The goddess of the temple from which the icon was stolen was named as one of the plaintiffs. *Id.* The British High Court of Justice held that under Indian law, the legal fiction of the goddess as plaintiff was no different from the fiction of the corporation in the west. *Id.*

68. See Merryman, *supra* note 66, at 1155-56 (discussing the pleas of Greek Minister of Culture Mercouri for the return of the Elgin Marbles); see also *Czech Art Sale*, WALL ST. J., Nov. 14, 1989, at A18. During the swell of patriotism that accompanied the Czech democracy movement of late 1989, a plan to sell the state art collection through Christie's auction house provoked concern that the Czech cultural legacy was being sold out. *Id.* The plan was quietly dropped. *Czechoslovakia Backs Down*, WALL ST. J., Dec. 14, 1989, at A17; see also Michael Kimmelman, *In a Freer State, a Cultural Heritage At Risk*, N.Y. TIMES, May 6, 1990, at H31 (discussing the effect of the collapse of Polish communism on Poland's art community); Constance Lowenthal, *Art for America's Sake*, WALL ST. J., July 26, 1989, at A10.

69. See Stephen Brookes, *A Lucrative Crime and a Costly Epidemic*, INSIGHT ON THE NEWS, May 7, 1990, at 13. In 1974, members of the IRA broke into the home of an English nobleman and stole more than a dozen paintings marked for the National Museum; they vowed to return the paintings only if several IRA prisoners being held in Britain were released. *Id.* The thieves were captured, and the paintings recovered a week later. *Id.* But the paintings were stolen again in 1986, and some are still missing. *Id.*

70. *1978 Hearings*, *supra* note 36, at 51 (the testimony of André Emmerich, calling the contents of early tombs "the cultural equivalents of Coca Cola Bottles, Seven-Up Cans and mass-produced rosary beads.").

71. Bator, *supra* note 17, at 294-310.

First, it can easily be shown that some works of art lose their meaning when separated from their intended structural whole; the example of the Mayan *stelae* destroyed by looters is an excellent case in point.⁷² The beauty of the unified work is lost forever, and it cannot be recaptured. For this reason, works on a monumental and architectural scale, the movement of which would cause irreparable damage, should first and foremost receive protection from mutilation and destruction.⁷³ Second, objects intended to be displayed as a set, or in a collection, or as a complex, lose part of their aesthetic integrity when displayed separately.⁷⁴ These works should be protected as well.

In addition, there is a strong presumption that artwork is preserved so that it "can be seen and known and studied, so that it can exercise its power over us, and add to our store of knowledge."⁷⁵ Preservation of works on a monumental scale, such as the Parthenon, or the Sphinx of Giza, is easy to justify: They enrich the patrimony of their respective nations and advance appreciation of a culture for both scholars and the public. There is no question of the visibility or accessibility of the Parthenon or the Sphinx.⁷⁶ These works are highly visible, both locally and internationally, and they are equally accessible to the local inhabitants and curious tourists. Lack of visibility or accessibility could never be

72. *Id.* at 296. Inscribed sections of the *stelae* were divided to make the art "go around," in the hope of making more money through a series of small sales. *Id.*

73. *Id.* at 296-97.

What, precisely, is the relationship between the fundamental value of preserving works of art from destruction or physical mutilation, and the rules and practices of the international trade in art? It is often assumed that preservation requires all art should stay at home, immobile. That assumption is, of course, false. The aim of preservation can be threatened by the international movement of art; but it can be, and often has been, promoted by it.

In the case of monumental and architectural art, the interest of preservation clearly creates a strong presumption against its movement. As we have learned from the sordid tale of the Mayan monuments, it is usually impossible to move enormous monuments without mutilating them; the temptation to take the cheap shortcut and to fragment the work to obtain its most marketable parts becomes overwhelming.

Id.

74. An example would be viewing one panel of a set of tapestries intended to create a visual narrative.

75. Bator, *supra* note 17, at 299.

76. *Id.* The mosaics of Kanakaria exemplify these important values. For example, the Temple of Dendur, an Egyptian temple built around 15 B.C. and slated for demolition in the 1960s, can be viewed at the Metropolitan Museum of Art on the First Floor of the Sackler Wing. Metropolitan Museum of Art Brochure (on file with the *New York Law School Journal of International and Comparative Law*.)

used to justify removal and relocation of such monuments.⁷⁷ A different situation exists, however, in the case of easily movable cultural property and undiscovered antiquities.⁷⁸ Newly-discovered portable artifacts not displayed for centuries are sometimes better served by removal to a museum or other forum for appreciation.⁷⁹ Against Bator's values of visibility and accessibility, it is not reasonable that a new discovery, if properly removed, should languish in the government storeroom of an art-rich nation when it could be studied and observed abroad.⁸⁰

B. Antiquities As History

The pillage of archaeological sites steals opportunities to learn about our past. As *Government of Peru v. Johnson* illustrated, it is impossible for a trained expert to identify with certainty the provenance of an artwork merely from its distinctive characteristics.⁸¹ Valuable information can be lost when the origin of an artifact cannot be ascertained because of illicit removal. "Poor people dig because they dream that one lucky find can change their lives. They do enormous archaeological damage."⁸²

The need of archaeologists to understand history by finding it where it is hidden does not compete well with the market demand for antiquities.⁸³ Because proper excavation demands the careful skill of highly-trained professionals, only a small portion of available sites can ever be treated correctly. Thus, inflated market prices fuel illicit looting—to the loss of archaeology.⁸⁴ The hope of saving archaeological evidence through policies of prevention and deterrence (by making looting a crime and moving antiquities illegal) has not eliminated pillage.⁸⁵ A possible solution is for those parties with the most to gain from archaeological recovery—museums, universities, collectors, dealers,

77. Bator, *supra* note 17, at 299; *see also* Meisler, *supra* note 42.

78. For a good analysis of these problems, *see* Moore, Note, *supra* note 58, at 473-74.

79. Bator, *supra* note 17, at 300. "Everyone should be able to experience a Maya sculpture by visiting a nearby museum; but we should preserve the possibility of the special experience available to the passionate connoisseur who will undertake a difficult expedition to see a magnificent *stela* at a remote Guatemalan site." *Id.*

80. *Id.* at 299.

81. *Government of Peru v. Johnson*, 720 F. Supp. 810, 818-19 (C.D. Cal. 1989), *aff'd sub nom.*, *Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

82. Montalbano, *supra* note 15.

83. Bator, *supra* note 17, at 301.

84. *Id.* at 302.

85. Grimes, *supra* note 25.

archaeologists, and site-governments—to cooperate. They may be able to diffuse pillage by joining under a common aegis in venture capital arrangements.⁸⁶ In this way, the archaeological evidence could be preserved by those best equipped to do so.

C. *Antiquities as Commodities*

The law cannot ignore the deep meaning of certain objects to a nation's cultural patrimony.⁸⁷ Works of art, unique geological structures and other objects laden with significance by the duration of their exposure, become patriotic symbols of national pride. Americans who would balk at the suggestion of removing one of the busts from Mount Rushmore for installation on a mountain in Japan should be sensitive, for example, to the claims of Greece; friezes that decorated the Parthenon were taken by Lord Elgin, with the approval of an occupation government, and removed to the British Museum, where they remain today.⁸⁸ "[T]he art of a society is both a manifestation and mirror of its culture, and . . . the existence and awareness of a common culture is intimately tied to the existence and awareness of a sense of community."⁸⁹

Artistic treasures are not only valued by citizens of the country in which they were produced.⁹⁰ Indeed, the value of an object will often increase by leaving the country.⁹¹ The worldwide dissemination of a nation's culture by the export of a limited number of artifacts can fulfill transnational goals of interest in, and increased understanding of, that country's unique history and character.⁹² Export of art can stimulate foreign curiosity and respect for a country.⁹³ The importer of art and antiquities, of course, benefits in a variety of ways: the cultural patrimony

86. Data on such operations have been difficult to gather. The Metropolitan Museum of Art has assembled its Egyptian collection "during forty years of museum-sponsored excavations." Metropolitan Museum of Art Brochure (New York City) (on file with the *New York Law School Journal of International and Comparative Law*).

Also note that modern trends in archaeology lessen the importance of vases, jugs, and other works classified in the art world as Fine Arts. See Kandell, *supra* note 17. Instead, emphasis has turned towards the excavation of anthropological evidence, which can best be found in ecological indicators, such as latrines, charred furnace remains, and compost heaps. *Id.* at A25.

87. Bator, *supra* note 17, at 304.

88. See Merryman, *supra* note 66, at 1881-83.

89. Bator, *supra* note 17, at 304.

90. *Id.* at 306.

91. Kandell, *supra* note 17.

92. Bator, *supra* note 17, at 303-05.

93. *Id.*

is enriched,⁹⁴ and its citizens are educated in a way that would otherwise require travel abroad.⁹⁵ Also, "a general human value in broadening tastes and sympathies"⁹⁶ attaches to any discussion of the movement of cultural property. These reasons give some insight into why art is such a valued commodity throughout the world.

IV. CULTURAL PROPERTY AND ANTIQUITIES: THE LEGAL RESPONSE

Art-rich countries, many of which suffer from civil strife and poor economic conditions, treat their archaeological deposits as they would any other natural resource: they attempt through legislation to keep the wealth at home and away from foreigners who would exploit it.⁹⁷ Art importers traditionally have been reluctant to enforce foreign ownership claims, but some art-importing nations have begun to recognize the rights of other nations to preserve certain artworks as part of a general human obligation toward art.⁹⁸ The interplay of these two conflicting motivations has created a maze of unilateral, bilateral, and multilateral restrictions on the international trade in art and antiquities.⁹⁹ Together with self-regulating bodies and institutions,¹⁰⁰ these measures constitute the legal response to the crisis in international cultural property regulation.

94. *Id.* at 303 (discussing the Elgin Marbles as part of Great Britain's patrimony).

95. *Id.* at 306.

96. *Id.* at 307-08.

97. Compare the statutory provisions cited *supra* notes 55 & 59 with CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz ed. 1982). Burma, Cape Verde, Chile, Costa Rica, Greece, and Guatemala all have provisions in their constitutions which declare all resources in the earth to be the property of the state. *Id.*

For example, COSTA RICA CONST. art. 121(14) states: "The following may not be permanently removed from ownership by the state: . . . b. Beds of coal, wells, and deposits of petroleum, and any other hydrocarbons, as well as any radioactive minerals existing in the country." COSTA RICA CONST. art. 121(14), reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (1982). With regard to cultural property, see *Costa Rica: Law No. 6703 on the Protection of Cultural Heritage*, January 19, 1982, in CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 55, which renders all archaeological objects found in the soil that pre-date the Spanish conquest to be the property of the state.

98. Bator, *supra* note 17, at 312-13.

99. See generally CULTURAL PROPERTY HANDBOOK, *supra* note 55 (describing national and international legislation on movable cultural property); WILLIAMS, *supra* note 55.

100. See, e.g., IFAR, *supra* note 25.

A. International Law

In 1970, the United Nations Educational, Scientific and Cultural Organization promulgated the Convention on the means of prohibiting the illicit import, export, and transfer of ownership of cultural property (the "UNESCO Convention").¹⁰¹ The UNESCO Convention was an attempt to create a multilateral import-export net to control the trade in cultural property.¹⁰² One of the central purposes of the UNESCO Convention was to quash the pillage of archaeological sites.¹⁰³ However, certain inadequacies in the drafting and construction of the UNESCO Convention, as well as refusal by some art importing countries to agree to all the terms and conditions of the document, have often undermined these purposes.¹⁰⁴

One of the major failings of the UNESCO Convention is that its definition of cultural property includes just about every conceivable item of artistic value.¹⁰⁵ Such items must be designated as being "property which, on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art, or science."¹⁰⁶ The rhetoric of this Convention, in effect, has contributed to its failure; countries have, in their designations of cultural property, created a stasis in the legal export of nearly all man-made artifacts over 50, 75, or 100 years of age.¹⁰⁷ The States Parties to the UNESCO Convention have effectively sustained a black market by attempting to diffuse it.¹⁰⁸

101. UNESCO Convention, *supra* note 62 pmb1.

102. UNESCO Convention, *supra* note 62.

103. *Id.* pmb1.

104. *See* Prunty, Note, *supra* note 66.

105. UNESCO Convention, *supra* note 62, art. 1, subsecs. (a)-(k). Examples of the breadth of this language include: "antiquities more than one-hundred years old" and "objects of ethnological interest." *Id.*

106. *Id.*

107. *See* Bator, *supra* note 17, at 315. "Embargo, whether explicitly or administratively imposed, is the dominating philosophy of almost all the states rich in antiquities and archaeological materials, including the Mediterranean region, the Middle East, and the nations of Central and South America." *Id.*

108. *Id.* at 317. "The ineffectiveness of embargo: Ten easy lessons on how to create a black market." *Id.*

The UNESCO Convention operates when a State Party has made a designation of certain items as cultural property.¹⁰⁹ Such property is then supposed to be protected by a government agency established for that purpose.¹¹⁰ Such an agency should maintain an inventory of cultural property, and supervise archaeological sites.¹¹¹ Each State Party is also guided to introduce export certification procedures, which would give state approval to removal of cultural property.¹¹² Article 7 of the UNESCO Convention establishes guidelines for import controls, which include the prohibition of receiving cultural property, and repatriation at the request of the State Party from which the property was stolen.¹¹³ This fleeting provision demonstrates the inadequacy of the UNESCO Convention towards dispute resolution.

Article 17, section 5, is the only other provision in the UNESCO Convention relating to dispute resolutions. "At the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, UNESCO may extend its good offices to reach a settlement between them."¹¹⁴

There is good reason to criticize the effect, though not the intention, of the UNESCO Convention. Its provisions tend to stagnate any legitimate trade in art. Indicative of this condition is that among art importing nations only the United States and a few other countries have adopted the UNESCO Convention,¹¹⁵ and only with reservations.¹¹⁶ The provisions of the UNESCO Convention, like other UNESCO efforts, in effect favor state control of resources and severely restrict a free market.¹¹⁷

109. UNESCO Convention, *supra* note 62, art. 1.

110. *Id.* art. 5.

111. *Id.*

112. *Id.* art. 6.

113. *Id.* art. 7.

Note that article 7(b)(i) requires States Parties to: "prohibit the import of cultural property stolen from a museum or religious or secular public monument" *Id.* In addition, article 11 regards as illicit "[t]he export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power" *Id.* art. 11. Both provisions seem to apply to the Kanakaria mosaics, and both Cyprus and the United States have adopted the UNESCO Convention. Cyprus, however, could not qualify under the unique American implementation of the UNESCO Convention. See *infra* part IV.C. (2)(d).

114. UNESCO Convention, *supra* note 62, art. 17(5).

115. Lowenthal, *supra* note 68.

116. See CPIA, *supra* note 62.

117. See Robert K. Pear, *U.S. Won't Rejoin Unesco Deriding Agency as Inept*, N.Y. TIMES, Apr. 17, 1990, at A1; *No Tears for UNESCO*, WALL ST. J., Nov. 1, 1989, at A14.

*B. The Law of Art-Exporting Countries:
Embargo and the Umbrella Statute*

Export regulation is the most pervasive means by which art-rich countries attempt to regulate the flow of artifacts from their territory.¹¹⁸ These regulations take many forms, and usually favor keeping art and artifacts within the source country.¹¹⁹ Often, the export of cultural property is prohibited by umbrella statutes.¹²⁰ A secondary level of regulation exists in the form of export license screening.¹²¹ In some countries, such as Great Britain, the application for an export license is reviewed by an expert adviser, who assesses the artifact according to certain statutory categories.¹²² The philosophy behind the umbrella statute is twofold: first, nations that enact such statutes endeavor to deter the pillage of archaeological sites by making export illegal; second, they hope to keep the nation's cultural wealth within its borders.¹²³ Umbrella statutes fail to achieve both of these goals by engendering an illegal market and narrowing the supply of artwork and artifacts to the legitimate market.¹²⁴ Because many art-rich countries do not have an antiquities market at home, any attempt to sell an item at its actual worth must occur abroad, where its price and value is determined.¹²⁵ "Most current export controls are self-destructive. The international black market thrives because no alternative is allowed to exist for either buyers or sellers, so that all economic incentives are pushed in favor of the illegal trade."¹²⁶ Furthermore, the breadth of some umbrella statutes creates a *de facto* embargo.¹²⁷ Because little attempt is made statutorily to distinguish

118. Bator, *supra* note 17, at 313.

119. See PROTTE & O'KEEFE, *supra* note 55, at 34-55.

120. See, e.g., *Guinea: Statute No. 56-1106, Nov. 3, 1956*, concerning the protection of natural monuments, sites and monuments of historical, scientific, artistic or scenic character, the classification of historical, scientific or ethnographic objects, and the regulation of excavation, in CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 94.

121. In England, for example, export licenses must be obtained for certain classes of artworks. If these licenses are denied, export can still be accomplished if no public museum or institution offers to buy the work at market value. See *United Kingdom: Import, Export and Customs Powers (Defence) Act of 1939 as implemented by the Export of Goods (Control) Order 1985, as amended*, in CULTURAL PROPERTY HANDBOOK, *supra* note 55, at 224-25.

122. *Id.*

123. Bator, *supra* note 17, at 314-20.

124. See Grimes, *supra* note 25.

125. Bator, *supra* note 17, at 318.

126. *Id.*

127. *Id.* at 315.

between items significant to the present society, and items of general historical interest, both are prey to looting and export.¹²⁸

Selective export screening has had some success because it limits the items to be protected to a distinct class of antiquities and artworks constituting "cultural patrimony."¹²⁹ The success of these limited export regulations, however, has been greatest only in countries that do not have serious looting problems.¹³⁰ How successful these measures would be in archaeologically-rich nations remains to be seen.¹³¹

C. *The Law of Art-Importing Countries: Treaties, Legislation, and Judicial Policy*

1. Treaties

Some sixty countries are parties to the UNESCO Convention.¹³² Most of the countries approving of this Convention are the art-rich countries; few art-importing countries have joined.¹³³ The notable exception among art-importers is the United States, which joined after more than a decade of hesitation.¹³⁴

Art-importing nations have not been willing to assent to the Convention because of a general reluctance to restrict their art markets.¹³⁵ Recognition of cultural property claims would be required each time a site-country declares that it is in a state of emergency due to archaeological pillaging under article 9 of the UNESCO Convention.¹³⁶

Bilateral treaties, however, give nations more control over foreign policy affecting domestic markets. The United States, long reluctant to enter the UNESCO Convention, made several treaties and executive orders regarding the protection of cultural property.¹³⁷

128. *Id.*; see also Grimes, *supra* note 25.

129. England and Japan have had great success in limiting the illicit trade in artifacts. Bator, *supra* note 17, at 319-25. Whether the methods used in these countries can work equally as well in artifact-rich countries is not known. *Id.*

130. C. Franklin Sayre, Note, *Cultural Property Law in India and Japan*, 33 U.C.L.A. L. REV. 851 (1986).

131. Bator, *supra* note 17, at 324.

132. Lowenthal, *supra* note 68.

133. *Id.* France, West Germany, Switzerland, and Japan are not parties to the UNESCO Convention. *Id.*

134. CPIA, *supra* note 62.

135. Bator, *supra* note 17, at 326.

136. UNESCO Convention, *supra* note 62, art. 9.

137. United States-Mexico Treaty, *supra* note 59; United States-Peru Agreement, *supra* note

2. Legislation

Legislative attempts to limit the trade in cultural property in art-importing countries has not been very vigorous.¹³⁸ The United States legislature has enacted four national statutes that seek to diffuse the international trade in cultural property.

a. The Pre-Colombian Act of 1972

The Pre-Colombian Act of 1972 was a unilateral effort to stop the destruction of pre-Colombian monuments.¹³⁹ The Act prohibits the import of pre-Colombian *stelae* and is applicable regardless of whether the *stelae* were stolen.¹⁴⁰ If the monuments were "subject to control by the country of origin" (if they were protected by an umbrella statute) and lacked a proper export certification, the United States could seize the *stelae* and return them to the country of origin.¹⁴¹

b. The National Stolen Property Act

The National Stolen Property Act ("NSPA") prohibits the transportation of items valued at more than \$5000 which are known "to have been stolen, converted or taken by fraud."¹⁴² Judicial interpretation of this statute has affirmed the foreign ownership rights of property taken in violation of that country's legislative declaration of ownership.¹⁴³

c. The Archaeological Resources Protection Act

The Archaeological Resources Protection Act protects cultural and archaeological resources in the United States and on Indian reservations.¹⁴⁴

60.

138. Bator, *supra* note 17, at 327.

139. Act to Prevent Importation of Pre-Colombian Monumental or Architectural Sculpture or Murals, Pub. L. 92-587, 86 Stat. 1296 (1972) (codified at 19 U.S.C. §§ 2091-2095 (1988)) [hereinafter Pre-Colombian Act of 1972].

140. *Id.*

141. *Id.*

142. National Stolen Property Act, ch. 33, § 3, 48 Stat. 794 (1934) (current version at 18 U.S.C. §§ 2314-2315 (1982)) [hereinafter NSPA].

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

144. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721

d. The Cultural Property Implementation Act

The Cultural Property Implementation Act ("CPIA") endorses the significant provisions of the UNESCO Convention.¹⁴⁵ Nevertheless, the United States retained some powers that full endorsement of the UNESCO Convention would have taken from it. Of special importance is section 303 of CPIA, which requires countries seeking the help of the United States to submit requests in writing, accompanied by factual documentation.¹⁴⁶ In addition, the requirement that United States import controls must be applied in concert with the import regulations of other art-importing countries calls the seriousness of this Act into question.¹⁴⁷

3. Judicial Policies and Decisions

Judicial policies and decisions developed in art-importing countries toward cultural property have been of great importance in the repatriation of art. The decisions have been a significant means by which art-importing countries have maintained discretionary control in granting cultural property claims.¹⁴⁸ Interpretation of statutes and use of common-law property doctrines in some art-importing nations have resulted in the fair adjudication of claims relevant to the degree of involvement or culpability of the parties.¹⁴⁹

The decision by the Court of Appeals for the Ninth Circuit in *United States v. Hollinshead*¹⁵⁰ is an example of how judicial policy has given backbone to a statute—in this case the NSPA. The defendant Hollinshead was caught trying to sell a well-known Guatemalan *stelae* to the Brooklyn Museum.¹⁵¹ His conviction at trial was affirmed for several

(1979) (codified at 16 U.S.C. § 470aa-ll (1985)).

145. CPIA, *supra* note 62.

146. *Id.*

147. See Ellen Herscher, *Senate Holds Hearings on Cultural Property Repose Act*, 13 J. FIELD ARCHAEOLOGY 332 (1986).

148. Bator, *supra* note 17, at 345; *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1375 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990); *Kingdom of Spain v. Christie's*, [1986] 1 W.L.R. 1120; *Attorney General of New Zealand v. Ortiz*, [1983] 2 All E.R. 93.

149. Bator, *supra* note 17, at 345.

150. *Hollinshead*, 495 F.2d at 1155.

151. Bator, *supra* note 17, at 345.

reasons.¹⁵² First, there was a finding that the defendant knew that the *stelae* was illegally exported¹⁵³ (in fact, mutilated and looted) in violation of Guatemalan law.¹⁵⁴ Second, Guatemala had registered the *stelae* as a national monument and had made a diligent effort to locate and recover the *stelae*.¹⁵⁵ Indeed, the evidence indicated that Guatemala had acted promptly to recover the *stelae*.¹⁵⁶ The damaged *stelae* was returned ultimately by the United States Customs Service.¹⁵⁷

Although the controlling law in *Hollinshead* was the NSPA (which provided for a penal sentence),¹⁵⁸ also present were common-law elements of fairness toward the country attempting to recover its patrimony. Those elements included: that the party attempting to recover its property use reasonable diligence to secure its return;¹⁵⁹ that the plaintiff, upon discovering the whereabouts of the property, act within a reasonable period of time to recover it;¹⁶⁰ and that the mere fact that the property was illegally exported, standing alone, does not cast a cloud on the ownership rights of the exporter.¹⁶¹

The importance of judicial policy in the area of stolen cultural property is illustrated by the threshold question confronting any court in an international case for recovery: Whose law applies? When not guided by treaty, courts must decide whether the law of the exporting country or the law of the importing country should control.¹⁶² With a wide range of law from which to choose, courts can decide the case according to the merits, and support their conclusions with a wide variety of rules.¹⁶³

152. *Hollinshead*, 495 F.2d at 1156.

153. *Id.*

154. *Id.*

155. Bator, *supra* note 17, at 346.

156. *Id.*

157. *Id.*

158. NSPA, *supra* note 142.

159. O'Keefe v. Snyder, 416 A.2d 862 (N.J. Sup. Ct. 1980).

160. *Id.*

161. The conviction of *Hollinshead* was affirmed under the NSPA, not because Guatemalan law made the stolen object the property of the state, but because the defendant, conscious of Guatemalan ownership, conspired to steal the object. "Appellants' knowledge of Guatemalan law is relevant only to the extent that it bears upon the issue of their knowledge that the *stelae* was stolen." *United States v. Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974).

162. *See, e.g., Jeanneret v. Vichey*, 693 F.2d 259 (2d Cir. 1982); *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y.), *rev'd*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988).

163. *Elifocon*, 678 F.2d at 1150. The court there considered 19th century German dynastic

4. Registries and Due Diligence

An important fact which the courts of art-importing countries look for in evaluating the claims of victims of art theft is the diligence of the claimants in attempting to recover the property.¹⁶⁴ An objective criterion for measuring whether the victims have met this burden is if they have registered the stolen objects with one of the various national or international institutions tracking stolen art.¹⁶⁵ Such institutions often play a valuable role in the recovery of stolen art.¹⁶⁶

The International Criminal Police Organization (INTERPOL) was established in 1923 for the purpose of coordinating the activities of law-enforcement officers engaged in the prevention of international crime.¹⁶⁷ INTERPOL is administered in each nation under the police structure of the host country.¹⁶⁸ The INTERPOL General Secretariat publishes annually a compendium of items reported stolen or illicitly acquired.¹⁶⁹ This list is then sent out to various other groups interested in the recovery of stolen art, such as the International Foundation for Art Research ("IFAR") and the Art Dealers Association of America ("ADAA").¹⁷⁰ The coordinated efforts of these groups sometimes results in the recovery of cultural property and antiquities.¹⁷¹

Although the recovery rate for stolen art is a paltry twelve percent,¹⁷² after-the-fact recovery adjudication frequently hinges on the diligence of the plaintiff.¹⁷³ A strong presumption that the party hoping

law, the law of an American military occupation force, and modern American property doctrines to reach the conclusion that an Albrecht Dürer masterpiece should be returned to Germany. For a guide through the legal maze of this case, see Kent L. Killelea, Note, *Property Law: International Stolen Art*, 23 HARV. INT'L L.J. 466 (1982).

164. *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. Sup. Ct. 1980).

165. *Id.*; see also *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1380 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990).

166. Pam Lambert, *Magazine of Art and Larceny*, WALL ST. J., July 22, 1988, at A16.

167. Jane Griffin Yeingst, *INTERPOL's Stolen Art Program*, 14 J. FIELD. ARCHAEOLOGY 222 (1987).

168. *Id.*

169. *Id.*

170. *Id.* at 223.

171. Lambert, *supra* note 166.

172. Lowenthal, *supra* note 68.

173. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1380 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir.

to recover is serious in his or her claim is created by documentation of the object before it is lost,¹⁷⁴ in concert with registration of the object with one of the worldwide agencies that track stolen art.¹⁷⁵ "Through wider publicity these [stolen artworks] may be recognized, reported and recovered."¹⁷⁶

V. THE REASONING, FAIRNESS, AND EFFECT OF THE *GOLDBERG* AND *JOHNSON* DECISIONS

A. *Church of Cyprus v. Goldberg*

Peg Goldberg is an Indianapolis art dealer who went to Europe in 1988 to buy a painting by Amadeus Modigliani.¹⁷⁷ When the deal fell through, her contact in Europe instead offered her four early Christian mosaics.¹⁷⁸ Andyn Dikman, a Turk living in Munich, was the seller.¹⁷⁹ Representations were made to Ms. Goldberg that the mosaics had been properly exported from Cyprus.¹⁸⁰ The sale of the mosaics occurred in a Swiss airport, without passing through Swiss customs.¹⁸¹ Conflicting testimony was heard at trial on whether Ms. Goldberg contacted any stolen art registries, or the customs offices of any of the countries involved.¹⁸² Back in Indiana in late 1988, Ms. Goldberg *did* contact the Getty Museum in California (through an intermediary) in an attempt to resell the mosaics.¹⁸³ Dr. Marion True of the Getty Museum reported the whereabouts of the mosaics to Drs. Karageorghiou and Papageorghiou, two Cypriot art historians, who, with the Cyprus Government, commenced efforts to secure the mosaics' recovery.¹⁸⁴

1990); *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. Sup. Ct. 1980).

174. Yeingst, *supra* note 167, at 224. "Ultimately, the best protection for any valuable property is documentation prior to loss." *Id.*

175. *See, e.g.*, 717 F. Supp. at 1374, 1380.

176. Yeingst, *supra* note 167.

177. *Church of Cyprus*, 717 F. Supp. at 1381.

178. *Id.*

179. *Id.*

180. *Id.* at 1382.

181. *Id.*

182. Constance Lowenthal, *Custody Battle over Byzantine Mosaics*, WALL ST. J., July 28, 1989, at A8.

183. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1382 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990).

184. *Id.*

Judge Noland of the Indiana District Court reasoned that the law of Indiana, and not Switzerland, Northern Cyprus, or Cyprus, was applicable because Indiana was the jurisdiction with the "most significant contacts."¹⁸⁵ Because Indiana has the "discovery" rule, the six-year statute of limitations for stolen movable property did not bar the suit.¹⁸⁶

These findings were determinative of the outcome of the case. Under Swiss law, a good-faith purchaser is able to obtain title to a stolen object under certain circumstances.¹⁸⁷ Under Indiana law, a thief can never pass good title.¹⁸⁸ Application of Indiana law made the critical issue of the trial a question of fact. The finding that the export licenses shown to Ms. Goldberg did not refer to the mosaics she purchased cast doubt on whether the mosaics were legitimately removed.¹⁸⁹

Furthermore, the constant diligence of the Church of Cyprus and the Republic of Cyprus, from the moment they learned that the mosaics were missing, attested that the original owners never intended to relinquish possession.¹⁹⁰ Use of international registries, such as UNESCO and IFAR, and dissemination of news about theft to parties reasonably calculated to assist in their recovery, worked to bring the mosaics back.¹⁹¹

The mosaics were legitimately called cultural property. Unlike newly-excavated antiquities, these mosaics were an integral part of the cultural life of a Cypriot community.¹⁹² They were accessible and visible in the Lythranmoki area until political and religious oppression forced the Cypriot population to leave in the 1970s.¹⁹³

The effect of the *Church of Cyprus* decision is that it will be harder for an American dealer to obtain legitimate possession of stolen cultural property through the use of surrogate jurisdictions.¹⁹⁴ Furthermore, it encourages governments who desire to protect certain cultural property to

185. *Id.* at 1393-94.

186. *Id.* at 1385.

187. Richard Walker & Lisbet Nilson, *Rightful Owners*, ART NEWS, Oct. 1989, at 51.

188. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1398 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990).

189. *Id.* at 1382.

190. *Id.* at 1398.

191. *Id.* at 1389.

192. *Id.* at 1378-79.

193. Recall the discussion of accessibility and visibility in Bator, *supra* note 17, at 299-301; and *infra* part III.A.

194. Walker & Nilson, *supra* note 187, at 51 (quoting Thomas R. Kline).

document that class of items, and to disseminate information through the registry system if they are stolen.¹⁹⁵

B. Government of Peru v. Johnson

Reliance on legislation that declares all pre-Colombian artifacts found in the territory of Peru to be the property of the state, and an overbroad definition of cultural property, are two of the reasons that the Government of Peru failed to recover eighty-nine artifacts seized by the United States Customs Service from Los Angeles antiquities dealer, Benjamin Johnson.¹⁹⁶

The defendant art dealers in this case acquired 353 pre-Colombian artifacts some time in the 1980s.¹⁹⁷ Peru could not prove at trial that the artifacts came from its territory or that they were removed after 1929, the year in which its first umbrella statute was enacted.¹⁹⁸ An obstacle to Peru's recovery was its own laws regarding cultural property.¹⁹⁹ The controlling Peruvian law did not differentiate between those pre-Colombian artifacts owned by the state, and those objects which could remain in the private possession of individuals.²⁰⁰ Peru's national registry for pre-Colombian artifacts—a book at the National Museum of History—was inadequate to provide insight into who originally owned, found, or excavated the artifacts.²⁰¹

The *Peru v. Johnson* decision illustrates that a blanket claim of ownership, standing alone, is not sufficient to substantiate ownership of cultural property in a foreign court. Otherwise, nearly every piece of art exported from a country would be subject to such a claim.²⁰² If a country as rich in antiquities and short on protective resources as Peru, however, chose to differentiate, on the basis of visibility and accessibility, those objects constituting an integral part of the community's collective consciousness from the rest of the many artifacts buried in its territory, the

195. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1374 (S.D.Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990).

196. *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd sub nom. Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

197. *Id.* at 814.

198. *Id.* at 813.

199. *Id.* at 813-15.

200. *Id.*

201. *Id.* at 813.

202. *Id.* at 814-15.

legitimacy of their ownership claims would be bolstered.²⁰³ The designation of a limited class of objects as cultural property in a sophisticated registry system, and the lifting of its overbroad ownership claim to all pre-Colombian artifacts, could create a protectable class of cultural property.²⁰⁴ This difference between cultural property and antiquities could result in a legitimate antiquities market and a controlled and recognized order of cultural property.²⁰⁵

VI. CONCLUSION

The inability of umbrella statutes to diffuse the looting of archeological sites suggests that it is necessary to reevaluate their usefulness. The willingness of art-importing countries to recognize cultural property claims in which the sought-after object was extant and recognized in the community compels consideration of the need for a legal distinction between cultural property and antiquities. The value of the international registry system in recovering cultural property is evidenced by the success of the Church of Cyprus in recovering the Kanakaria mosaics.

If export barriers are removed, and the class of protected cultural property is narrowed, antiquities and other art-objects can become more visible and accessible to an appreciative public. And if museums, universities, and dealers are allowed to participate in the recovery of antiquities, looting of sites can be reduced and proper excavation can be conducted by trained archaeologists. In this way, a worldwide appreciation and understanding of the art and culture of other nations can be enhanced.

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203. Compare *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1380 (S.D. Ind. 1989), *aff'd*, 917 F.2d 270 (7th Cir. 1990) (particularly the court's discussion of the cultural significance of the mosaics to the local population) with *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd sub nom.*, *Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

204. See Bator, *supra* note 17, at 346.

205. *Id.* at 359.

