PROTECTION OF CULTURAL PROPERTY

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Conferences such as this and writings in American law journals have played important roles in shaping the youthful, though certainly not juvenile, field of cultural property law. I am going to talk specifically about the international aspects of that law. John Merryman, in particular, has been a leader in this field, by virtue of his own scholarship and his generous encouragement of others in conferences such as this. I have been particularly impressed by John's insistence in his writings on a contextual, case-by-case analysis of cultural property claims. In addition, John and another influential scholar, Paul Bator, have firmly established a framework for analyzing competing interests and values—the essence of contemporary cultural property law. Accordingly, the job of international law is to define those interests clearly in need of support and cooperation by the international community and to reconcile those interests with national laws.

Paul Bator emphasizes the universality of the common cultural heritage by asking whether Keats of English literary fame could have ever written the Ode on the Grecian Urn without the urn. At this point, I am going to follow John Merryman's usual leadership by offering my only cultural property law joke which relates to that same poem. It is actually borrowed from the comedian Lily Tomlin, who asked, "If beauty is truth, and truth beauty, why don't more people have their hair done in the law library?" In any event, these lines of Keats are not all you need to know about international cultural property law. I propose briefly to summarize this law, to describe several recent developments and to suggest some ways to improve the legal regime. In my judgment, it is a good regime; it has developed quickly, but it is basically a good one that simply needs greater support and encouragement. I hope I am not contributing to the disaster to which Steven Brezzo referred by suggesting the need for more legal enforcement! But then, one might say, that's my job as a lawyer and law teacher.

Until 1970, the international law of cultural property was largely

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limited to certain provisions for the protection of cultural property in the time of war under the Hague Conventions of 1899, 1907 and 1954. Then, largely in response to growing cultural nationalism, to a burgeoning antiquities market and to an unprecedented peacetime hemorrhaging of entire cultural patrimonies, the current framework for the protection of cultural property quickly developed. From the United States viewpoint, the hard law that has emerged—just in the last fifteen years—consists principally of six elements. The first and foremost is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of the Ownership of Cultural Property, as implemented by special legislation.[1] Despite the United States Senate's advice and consent in favor of the Convention very early in the 1970's, this country did not become a party to it until President Reagan ratified it upon congressional approval of implementation law that took many years of effort. The UNESCO Convention provides for a system of export certification, to which the United States has not consented, for a commitment by parties to further develop their written inventories of cultural property, for controls on the importation of stolen material from established institutions and for a very important provision—Article 9—which provides for cooperation in responding to an emergency request by any other party to the treaty which contends that its cultural property is in jeopardy.

The second piece of legislation enacted in 1973 is the law regulating the importation of pre-Colombian, monumental or architectural sculpture or murals.[2] It prohibits the importation of large monuments, stelae, murals and fragments of them from certain Western Hemispheric countries without a permit from the country of origin.

Third, there are several bilateral treaties of cooperation beginning with Mexico in 1971 that provide for the recovery and return of stolen archeological, historical and cultural properties.[3] These treaties require each party State to prosecute individuals for stealing cultural property from the territory of the other party State.

Fourth is the National Stolen Property Act,[4] which has been

1. 19 U.S.C. §§ 2601-2613 (1982).
2. 19 U.S.C. §§ 2091-2095 (1982).
3. *See, e.g.*, Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, United States-Mexico, Mar. 24, 1971, 22 U.S.T. 494, T.I.A.S. No. 7088, 791 U.N.T.S. 313.
4. 18 U.S.C. §§ 2311-2320 (1982 & Supp. III 1985).

used for many purposes but in particular in the two rather spectacular, and perhaps too often written about, cases of *Hollinshead*[5] and *McClain*.[6] In those cases, the National Stolen Property Act was used to prosecute individuals for having taken property out of Guatemala and Mexico, respectively, contrary to the laws of these countries. The National Stolen Property Act was thereby applied by defining theft according to the law of the country of origin.

Fifth, there are also the standard U.S. customs requirements for proper declarations and evaluation. The final element is our extradition law, which is available to extradite individuals, that is, to require the return of individuals for prosecution under cultural property law.

That is basically the framework, at least the hard law framework, of internationally related cultural property law in this country. Certain other instruments may be of interest. These include the 1972 Convention on Protection of the World Cultural and Natural Heritage and several regional instruments, including a Western Hemispheric treaty, the Treaty of San Salvador, to which the United States is not a party. The latter contains some rather extreme provisions for honoring the cultural property laws of other countries. Another regional instrument is a European convention for governing the import and export of cultural property. There are also provisions in the comprehensive Law of the Sea Treaty, to which the United States is not a party, which address the ownership, protection and recovery of shipwrecks on the continental shelf.

Besides this hard law, there is a body of soft law including resolutions of the United Nations General Assembly, UNESCO resolutions and some norms articulated by nongovernmental organizations such as ICOM, that is, the International Council of Museums, all of which help to define and provide a kind of vocabulary and institutional framework for restitution of property and for avoiding more formal methods of dispute resolution under "harder" law. I should also mention certain institutions, such as Interpol and the International Foundation for Art Research in New York, which track stolen property and otherwise provide some support and enforcement of international cultural property law. Turning to recent developments, the legislation implementing the UNESCO Convention contains two major provisions, one to implement the UNESCO

5. United States v. Hollingshead, 495 F.2d 1154 (9th Cir. 1974).
6. United States v. McClain, 545 F.2d 988 (5th Cir. 1977), *subsequent opinion at* 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 444 U.S. 918 (1979).

Treaty by prohibiting importation of items stolen from institutions abroad and another to implement the provision I described earlier that permits other countries to request the United States to take measures to respond to pillage when their cultural patrimony is claimed to be in jeopardy. There has been but one such request so far, by the government of Canada. The nature of the claim is a little unclear because it is still confidential. It appears to be a rather pervasive claim that native Canadian heritage is in jeopardy, as evidenced by the illegal export of certain archeological objects, principally to the United States. In talking to government officials in Washington just this last week [November 1986], I learned that the request has been referred back to the Canadian government for further elaboration. Whatever might result, there has at least been this one request, the response to which could be either a denial or, if it is a positive response, a commitment by the United States to recognize and enforce a list of items that may not be imported into the United States without a special permit from Canada.

Another recent development of some real interest is the growing concern in this country about the export of our cultural heritage. We tend to think of ourselves as an art poor country; we have been preoccupied, certainly we academics and lawyers, about the legal constraints on the importation of cultural property into this country. There is, however, a fairly recent perception that the American Indian heritage in the Southwest is being jeopardized by taking it from public lands and exporting it to Germany, Japan and other countries. The United States government is concerned. There is a draft by the General Accounting Office which takes up this problem. It is not yet released for publication, but I think it is of some particular interest because it shifts our focus a bit from the problem of *importation* into an "art poor" country to the realization that we may be an art rich country and need to be concerned about the pillage and wrongful *exportation* of our own cultural heritage.

I would mention also, as a recent development, what I think is a growing intention by governments to educate others about their cultural property laws. When I was in Korea recently, I found a little brochure in my hotel room. It was inside a folder that contained the usual material one gets about local attractions, hotel restaurants and so forth. The brochure provided information on taking and not taking antiquities and artifacts out of Korea along with addresses and telephone numbers for further information. It is not just the usual information about taking shampoo and towels out of the ho-

tel! I don't know how representative this is, but it is obviously an expression of strong interest in educating visitors on national cultural property law.

Another recent development is a somewhat greater inclination towards inter-institutional cooperation, return, restitution, exchanges and long-term loans of cultural property. This is occurring despite the substantial problems to which Steven Brezzo specifically referred. All of these developments are positive.

On the negative side, I think there are some rear guard legislative efforts to undermine the positive law. Fortunately, these efforts so far have failed, but they still pose a clear and present danger. I will just mention two. One is a federal bill which, if enacted, would have prevented prosecution, such as in the *McClain* case, where the claim of ownership is based on a foreign governmental declaration of ownership or its functional equivalent. Fortunately, that bill failed. A second legislative effort is the proposed repose legislation at state and federal levels, according to which the claims of foreign governments alone would be restricted to very short statute of limitations periods.[7] The effort seems to be in response to the fears of many collectors and museums that their collections would be put in imminent jeopardy if foreign governments are permitted to exercise their cultural property laws to claim objects reposed in this country for substantial periods of time. Extremely short periods of time are established under the proposed legislation. Fortunately, the bill has failed thus far in Congress. The bill is also badly drafted.

I might also add that in 1985, I was on a panel discussing the proposed legislation with Ashton Hawkins, the general counsel and vice-president of the Met in New York and a proponent of repose legislation. I suggested to him, more or less, that if efforts were to be made to reform laws, they should be made in Albany, not in Washington, D.C. That is, if efforts were to be made to correct problems raised by state statues of limitations, they should be done at the state, not at the federal, level. The next thing I heard, a few months later, was that, indeed, a bill was pending in Albany. It was later passed by the New York legislature, at which point several of us went into action writing letters to Governor Cuomo. We letter-writers now take some credit for the governor's veto of the repose provision in a larger bill last July [1986].

What are the proposed improvements in the law? I will just men-

7. *See supra* article by Professor Nafziger.

tion that there are some real improvements which can be made to further protect the interests of collectors and museums in the sphere of private international law or conflict of laws dealing with jurisdiction, choice of law and enforcement of foreign judgments. You are not all lawyers and I don't want to put any of you to sleep, whether or not you are lawyers, with technicalities; but I think that this clearly is an area of law that makes it very difficult for museums and collectors to exercise their legitimate rights to claims. I would also say we need some further refinement of the law of restitution.

One might question the return to Greece of the Elgin Marbles in the British Museum, as John Merryman has very eloquently done in an article I recommend to you that was recently published in the *Michigan Law Review*.[8] One might also question Pakistan's claim to the return of the diamond that is the centerpiece of the British crown or, probably of some special interest to us lawyers, the claim of Iraq to the return of the Code of Hammurabi in France. On the other hand, we might legitimately question whether it is equitable for most Peruvian textiles to repose abroad or for the British to turn down the Nigerian request for returning just some, not all, of the Benin Bronzes which, after all, had been captured during a punitive expedition by the British during the colonial era. One might also ask whether the British Museum needs all of its 90,000 African artifacts, many resulting, of course, from colonial coercion. On the other hand, one might question whether the basement of Peru's National Archeology and Anthropology Museum is the best place for some two or three thousand mummy bundles or whether the Egyptian Museum needs to hoard its artifacts in duplicate, many of which are never seen nor readily available to scientists.

Clearly, we need some standards. What should they be? On the one hand, I think it is ridiculous to argue that all objects should remain in the countries of origin, let alone that they should be restored or returned to those countries in all cases. A shortage of cultural property is usually not the issue. Many countries are storehouses of repetitive artifacts which are often on display and disintegrating. We need to further define the concept of *genuine significance*. That is, we need to determine which objects are important enough to require restitution and return. Certain schemes that conservationists of archeology have developed for scarce re-

8. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1880 (1985).

sources can be recycled, I think, to further develop the standards we need. For example, cultural objects might be classified under four catagories with respect to claims of restitution and return: First would be those objects whose long-term retention by the country of origin is imperative for reasons of cultural heritage; second would be those whose retention for medium-range research needs and viewing is important, but not essential; third would be those whose short-term retention is necessary for documentation and temporary display; and fourth would be those which are expendable. It may seem like common sense; but it is the kind of approach, the kind of standards, I think, that are really quite needed to further refine the international law of restitution.

Further improvements will require money—of which it is always said that there is all too little. There needs to be, of course, more financial assistance, perhaps through some institution such as ICOM or UNESCO, to assist economically poor, but often art rich, countries. This may, however, be wishful thinking in our current era. Some real efforts have been made along the lines that Steven Brezzo and others have suggested to try to make it easier for museums and other institutions and collectors to engage in exchange and long-term loans without the many threats, legal and otherwise, that such projects and programs may pose.

In conclusion, to return to Keats, it may be that a thing of beauty is a joy forever, its loveliness increases. But all too often in our day and age, the truth of this statement, I think, may depend on international cooperation and law.