INTRACTABLE PROBLEMS AND MODEST SOLUTIONS: THE ILLICIT ANTIQUITIES TRADE BETWEEN THE UNITED STATES AND MEXICO

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I. INTRODUCTION

On July 5, 2017, the United States filed a civil complaint against Hobby Lobby for the forfeiture of thousands of ancient artifacts illegally smuggled into the United States.[1] The artifacts originated in the Middle East, in modern-day Iraq, and were smuggled through several countries (namely, the United Arab Emirates and Israel) before ultimately arriving to the end-buyers in the United States.[2] These artifacts—consisting of cylinder seals, clay bullae, and cuneiform tablets and bricks—were shipped in packages labelled "tile samples."[3] The artifacts had

1. Press Release, Department of Justice, U.S. Attorney's Office, E.D.N.Y., United States Files Civil Action to Forfeit Thousands of Ancient Iraqi Artifacts Imported by Hobby Lobby (July 5, 2017), https://www.justice.gov/usao-edny/pr/united-states-files-civil-action-forfeit-thousands-ancient-iraqi-artifacts-imported [hereinafter Hobby Lobby Press Release].

2. *Id.* Technology, in particular, the Internet, has facilitated the ease of these transactions. Campbell, *infra* note 192, at 130–31.

3. Hobby Lobby Press Release, *supra* note 1.

highly suspicious provenance, and Hobby Lobby ignored the risk that the items had been looted from war-torn Iraq.[4] Ultimately, U.S. Customs and Border Protection seized the artifacts, and the Federal District Court in the Eastern District of New York found for the United States, resulting in a $3 million fine of Hobby Lobby and a requirement that the company submit reports on any additional cultural property acquisitions.[5]

The Hobby Lobby incident is the latest iteration of an on-going crisis of cultural property theft, wherein antiquities are looted from source countries and transported through clandestine means to ultimately be sold to collectors and museums in wealthy market countries.[6] Close attention has been paid to destabilized regions in Iraq and Syria—both antiquities-rich and in the middle of civil wars—because of the persistent confluence of conflict and looting.[7]

The United States was one of the first market countries to join in the international efforts to limit the illicit antiquities

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4. *See id.* ("an expert on cultural property law retained by Hobby Lobby warned the company that the acquisition of cultural property likely from Iraq, . . . carries a risk that such objects may have been looted from archaeological sites in Iraq."). "Provenance" may cover two distinct concepts, one is the archaeology of an artifact (where and how it is deposited) and collecting history (documented and authenticated trail of transfer from the archaeological site, through individual hands, and into public collections); David W. J. Gill, *Thinking About Collecting Histories: A Response to Marlowe,* 23 INT'L J. CULTURAL PROP. 237, 237 (2016). By "provenance," this comment primarily means collecting history, but does not imply that the archaeology of an artifact is irrelevant.

5. *Id.*

6. *See* MARA WANTUCH-THOLE, CULTURAL PROPERTY IN CROSS-BORDER LITIGATION: TURNING RIGHTS INTO CLAIMS 21–22 (2015) (describing scholarly terminology in the antiquities trade). In the parlance of cultural property law, there are two kinds of nations: source nations and market nations. *Id.* Mexico, Greece, Egypt, and India are source nations. *Id.* France, Germany, Japan, Switzerland, and the United States are market nations. *Id.*; *see generally*, J.H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 AMER. J. INT'L L. 831, 833 (1986) (discussing differences between market and source nations and cultural nationalism and internationalism).

7. *See, e.g.*, *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 280–282 (7th Cir. 1990) (illustrating how armed conflict creates the conditions for antiquities looting); Steven Lee Myers & Nicholas Kulishjan, *'Broken System' Allows ISIS to Profit From Looted Antiquities*, N.Y. TIMES (Jan. 9, 2016), https://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html (highlighting the Islamic State's efforts to raise money by taxing excavations or undertaking excavations themselves in order to traffic antiquities).

trade, even as other market countries, like Great Britain and Germany, resisted the international efforts of source countries.[8] The United States' attention to the serious issue began, not with the Middle East, but with the United States' southern neighbor, Mexico, in the 1970s.[9] With nearly half a century of efforts to inhibit the illicit antiquities trade between the U.S. and Mexico, not to mention several other Latin American countries, U.S.–Mexico policy needs an assessment as to whether current laws, regulations, and enforcement structures are working and how they might be altered to better serve shared policy goals.[10] Because only a fraction of Mexico's cultural antiquities is recovered, though, the current relationship likely needs legal and policy reworking.[11] This comment argues that the law focuses primarily on repatriation of antiquities and does not do enough to control demand by altering the way in which museums and collectors ultimately purchase antiquities.

This comment first surveys the general problem that cultural property law poses for the law and its enforcement. It is written

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8. *See, e.g.*, Patty Gerstenblith, *Recent Developments in the Legal Protection of Cultural Heritage, in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 68, 76 (Neil Brodie et al. eds., 2006) (mentioning that, in comparison to the United States' early ratification of the UNESCO Convention in 1972, it took until the early 2000s for the United Kingdom to ratify).

9. *See, e.g.*, Jamison K. Shedwill, *Is the "Lost Civilization" of the Maya Lost Forever?: The U.S. and Illicit Trade in Pre-Columbian Artifacts*, 23 CAL. WEST. INT'L L.J. 227, 227–30 (1992) (detailing the origins and history of the United States' attention to the illicit trade in pre-Columbian artifacts). The article responsible for shedding light on the epidemic of looting in Mexico and Guatemala was Clemency Coggin's article in *Art Journal*, which highlighted, even then, the perverse incentives museums and collectors have when purchasing illegally-acquired antiquities. Clemency Coggins, *Illegal Traffic in Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969).

10. Current bilateral agreements between the United States and Latin American countries exist between Belize, Bolivia, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, and Peru. *Bilateral Agreements*, BUREAU OF EDUC. AND CULTURAL AFF., https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements (last visited Nov. 13, 2017). Additionally, Mexico and the United States have their own individual treaty on antiquities, the Treaty of Cooperation, *infra* note 58.

11. Tania L. Montalvo & Arturo Daen, *Only a Fraction of Mexico's Stolen Cultural Antiquities Are Recovered*, INSIGHT CRIME (Nov. 3, 2016), http://www.insightcrime.org/news-analysis/only-a-fraction-of-mexico-s-stolen-cultural-antiquities-are-recovered. The problem is not solely a matter of changing United States policy either. In 2014, Mexico's Instituto Nacional de Antropología e Historia (INAH) "recorded 11 separate incidents in which a total of 23 pieces were stolen . . . The [Attorney General's Office] did not initiate a single investigation during this period." *Id.*

with close attention to United States law and policy, looking particularly at what the United States can do in order to help curb the illicit antiquities trade between the United States and Mexico. Section II covers the multi-layered, if somewhat disjointed, legal framework in the form of multilateral treaties and agreements, bilateral treaties and agreements between the United States and Mexico, Mexican law, and the United States statutes and case law. The goal is to weave a coherent thread through each of the distinct areas of law in order to discover holes within the current regulatory regime. Section III analyzes current developments in criminology, sociology and anthropology related to criminal trafficking networks of illicit antiquities and how those developments relate to the overarching policy goals that the United States and Mexico ought to pursue in order to dismantle them. Lastly, the comment examines current proposals to curb the trade, ranging from education, to market liberalization, to alterations of provenance analysis.

II. BACKGROUND

This section splits the law covering cultural property between international, bilateral, domestic statutory, and domestic case law. Section A treats the international legal aspects of the protection of cultural property to which the United States and Mexico are parties, paying particular attention to the UNESCO Convention on cultural property and the 1970 Treaty on cultural property between the United States and Mexico. Section B covers the development of Mexican law on cultural property, focusing on the 1972 law on cultural patrimony. Section C addresses the patchwork of U.S. statutes that apply to cultural property. Lastly, Section D delves into key cases that apply U.S. statutes and case law, illustrating ways in which Mexico can recover cultural property and the United States can inhibit the illegal antiquities trade.[12]

A. *International Law*

1. UNESCO Convention and the Adoption by the United

12. Section D covers the National Stolen Property Act as well because its application to the antiquities trade is through case law rather than executive action.

States

In 1960, the United Nations Educational, Scientific and Cultural Organization (UNESCO) determined that the illicit art and antiquities trade required direct address and began producing a report on the matter with the intent to develop a convention.[13] Eventually, a committee produced a draft of the convention in 1969, which "contained a number of very stringent obligations, including a commitment by art-importing countries to enforce other countries' export control laws . . . no reservations to the convention would be permitted."[14] Market countries protested against these measures, resulting in a compromise draft, which became, on November 14, 1970, the Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the Convention").[15]

Richard Nixon submitted the Convention to Senate for ratification, and the Senate ratified it in 1972, with one reservation and six understandings.[16] The understandings required that Congress implement portions of the Convention by legislation. Thus, the Convention did not come into effect in the United States until 1983 with the passage of the Cultural Property Implementation Act (CPIA).[17]

In particular, Articles 7(b) and 9 of the Convention required

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13. UNESCO Res. 4.412, 11th Session, at 50 (1960), http://unesdoc.unesco.org/images/0011/001145/114583e.pdf; Marina Papa Sokal, *The U.S. Legal Response to the Protection of World Cultural Heritage*, *in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 36 (Neil Brodie et al. eds., 2006).

14. Sokal, *supra* note 13, at 36.

15. UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Arts. 7, 15 (Nov. 14, 1970), http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter UNESCO Convention]; Sokal, *supra* note 13, at 37.

16. Sokal, *supra* note 13, at 37 (citing 118 CONG. REC. 27925 (1972)); Susan Keech McIntosh, *Reducing incentives for illicit trade in antiquities: the US implementation of the 1970 UNESCO Convention*, in ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY 241, 241 (Neil Brodie & Kathryn Walker Tubb eds., 2001).

17. 19 U.S.C. § 2601–2613. Sokal, *supra* note 13, at 37; McIntosh, *supra* note 16, at 241; *see also Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep't of Homeland Sec.*, 698 F.3d 171, 175–77 (4th Cir. 2012) (providing a concise history and overview of the CPIA).

implementation.[18] In short, Article 7(b) requires that a State Party must prohibit importation of cultural property stolen from a museum or monument of another State Party, and the State Party must take steps to recover it.[19] 7(b)(i) prohibits "[the importation] of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party . . . provided that such property is documented as appertaining to the inventory of that institution."[20] The provision does not protect newly discovered archaeological sites.[21] Rather, it seems that the Convention contemplates the kinds of looting that occur in conflicts, such as in Iraq and Syria, where museums and monuments are ransacked, but it could also cover simple thefts from those places as well.[22] Article 7(b)(ii) requires a State Party to "take appropriate steps to recover and return any such cultural property [listed in 7(b)(i)]" at the request of a State Party.[23] These two provisions are presumably covered by the National Stolen Property Act (NSPA), which provides for the prosecution of individuals who knowingly transport or conspire to transport stolen property across state lines or national boundaries.[24]

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18. UNESCO Convention arts. 7, 15; Sokal, *supra* note 13, at 37 ("The United States understands the provisions of the Convention to be neither self-executing nor retroactive.").

19. 19 U.S.C. § 2601(9); Sokal, *supra* note 13, at 38–40 ("[A State Party is]any nation which has ratified, accepted, or acceded to the Convention.").

20. UNESCO Convention art. 7(b)(i).

21. Sokal, *supra* note 13, at 39.

22. Robert M. Poole, *Looting Iraq*, SMITHSONIAN MAG., Feb. 2008, https://www.smithsonianmag.com/arts-culture/looting-iraq-16813540/; James Harkin, *The Race to Save Syria's Archaeological Treasures*, SMITHSONIAN MAG., Mar. 2016, https://www.smithsonianmag.com/history/race-save-syrias-archaeological-treasures-180958097/; *see also* Autocephalous Greek Orthodox Church, 917 F.2d 280–282 (7th Cir. 1990) (the pillage of a national church in Cyprus would also fall under the category of a religious public monument).

23. UNESCO Convention art. 7(b)(ii); Sokal, *supra* note 13, at 39.

24. 18 U.S.C. § 2314–2315; Sokal, *supra* note 13, at 39–41. The congressional hearings on the CPIA occurred "a mere three months after the *McClain* decision," which found that a foreign country's national patrimony laws defined whether a foreign country had a property interest in allegedly stolen cultural material. *Id.* at 40. If a foreign patrimony law was valid, then the NSPA would apply. Given the context of the passage of the CPIA, it is reasonable to assume that Congress covered Article 7 via the NSPA. *Id.* at 40–41. *Contra* Pearlstein, *infra* note 313, at 595–96 (arguing that Article 7 implementation in its current form was a legislative fluke).

In reality, the CPIA really implements Article 9 of the Convention and accomplishes three objectives in doing so:[25]

(1) The Executive is given the power to impose import restrictions on "[certain] categories of archaeological or ethnological material subject to pillage that jeopardizes the national cultural patrimony of a source country which is also a State Party to the [C]onvention."[26]

(2) The import restrictions take the form of either "a multilateral accord with the source country and other market countries" or temporary emergency restrictions between the U.S. and the source country.[27]

(3) Lastly, the CPIA creates the Cultural Property Advisory Committee (CPAC), which "makes recommendations on requests for protection received by the government from source countries who are also parties to the Convention."[28]

Two concerns of art dealers motivated some of the mitigating factors of the CPIA: that the Executive Branch would have too much discretion to enter into bilateral and multilateral agreements to impose import restrictions and that other art-importing countries would take over the 'abandoned' supply as a result of those restrictions.[29] Hence, strenuous informational requirements are imposed on source countries to even garner the possibility of import restrictions.[30] Generally, those restrictions must

25. McIntosh, *supra* note 16, at 241 (citing Paul M. Bator, *An Essay on the International Trade in Art*, 34 STANFORD L. REV. 275–384 (1982)).

26. 19 U.S.C. § 2602(a); McIntosh, *supra* note 16, at 241.

27. McIntosh, *supra* note 16, at 241.

28. *Id.*; 19 U.S.C. § 2605. CPAC consists of three archaeologists or ethnologists, two museum representatives, three art or antiquities dealer representatives, and three representatives of the general public. Sokal, *supra* note 13, at 44. All members are appointed by the President to three-year terms (two-year terms prior to 1987). *Id*; *see* Banta, *infra* note 290, at 1140–41 (critiquing CPAC and arguing for more review of CPAC and its import restrictions).

29. Sokal, *supra* note 13, at 42. Even 35 years after the passage of the CPIA, proponents of market liberalization still make similar arguments. *See* Pearlstein, *infra* note 313, at 595–96 (arguing in favor of dealer and collector lobbyist amendments to the CPIA).

30. *See* 19 U.S.C. § 2602 (listing the what a requesting Party must show in order to be considered for import restrictions).

be part of a broader multinational effort to restrict the importation of certain types of cultural property from the source country.[31]

CPIA Overview (19 U.S.C. §§ 2601–2613)[32]

Definitions	
19 U.S.C. § 2601	
Import Restrictions	
19 U.S.C. § 2602	Agreements with State Parties to impose import restrictions
19 U.S.C. § 2603	Emergency import restrictions
19 U.S.C. § 2604	Designations of materials covered by the restrictions
19 U.S.C. § 2605	Creation of the Cultural Property Advisory Committee
19 U.S.C. § 2606	Function of import restrictions and the role of Customs
19 U.S.C. § 2608	Temporary disposition of seized items
19 U.S.C. § 2609(b)	Returnee of forfeited items
19 U.S.C. § 2609(1)	Burden of proof for importer
Stolen Cultural	
19 U.S.C. § 2607	Forbids import of stolen cultural property
19 U.S.C. § 2608	Temporary disposition of seized items
19 U.S.C. § 2609(c)	Returnee of forfeited items
19 U.S.C. § 2610(2)	Burden of proof for importer
Exemptions	
19 U.S.C. § 2611	

A source country must provide information to show that: (1)

31. Sokal, *supra* note 13, at 42.
32. *Id.* at 39.

the cultural patrimony (archaeological or ethnological) is "in jeopardy of pillage";[33] (2) it made efforts to protect the cultural patrimony;[34] (3) "import restrictions . . . would be of substantial benefit in deterring a serious situation of pillage" and "remedies less drastic . . . are not available";[35] (4) the restrictions are in the general interest of the international community in the interchange of cultural property;[36] and (5) other market countries with substantial importation must be considering similar import restrictions.[37] Any resulting import restrictions last for a five-year period and may be extended after that time.[38]

CPIA also provides for emergency implementation of import restrictions under § 2603.[39] Emergency implementation can be done on a more-or-less bilateral basis so long as a State Party submits a request for the restrictions and provides information justifying the emergency restrictions.[40] An "emergency situation" involves either "newly discovered" material in danger of "pillage, dismantling, dispersal or fragmentation"; material "identifiable as coming from any site of . . . high cultural significance" in jeopardy; or "part of the remains of a particular culture or civilization" in jeopardy and reaching "crisis proportions."[41] Information related to each of these criteria must be submitted by the requesting

33. 19 U.S.C. § 2602(a)(1)(A); McIntosh, *supra* note 16, at 242. "Archaeological" means an object of cultural interest, that is at least 250 years old, and is normally discovered through digging and exploration. 19 U.S.C. § 2601(2)(C)(i). "Ethnological" means an object that is the product of a nonindustrial society and is important to the cultural heritage of a people. 19 U.S.C. § 2601(2)(C)(ii).

34. 19 U.S.C. § 2602(a)(1)(B); McIntosh, *supra* note 16, at 242.

35. 19 U.S.C. § 2602(a)(1)(C)(i)–(ii); McIntosh, *supra* note 16, at 242.

36. 19 U.S.C. 2602(a)(1)(D).

37. 19 U.S.C. § 2602(c)(1); McIntosh, *supra* note 16, at 242. If there is a nation with a significant import trade in the cultural material and that nation is "not implementing, or is not likely to implement, similar restrictions," the President may still enter into an agreement if the noncompliant nation's restrictions are not essential to deter serious pillage, and the import restrictions, in concert with another nation or nations' import restrictions "would be of substantial benefit in deterring a serious situation of pillage." 19 U.S.C. § 2602(c)(2)(a)–(b). The President "shall" suspend import restrictions if a number of parties with significant importation of cultural property have failed to implement similar restrictions—it is not discretionary. 19 U.S.C. § 2602(d).

38. 19 U.S.C. § 2602(b), (e).

39. 19 U.S.C. § 2603.

40. 19 U.S.C. § 2603(c)(1).

41. 19 U.S.C. § 2603(a)(1)–(3).

State Party as in § 2602.[42]

Once the President determines, on the basis of consultation with CPAC, that the criteria of § 2602 or § 2603 are met, the Secretary of the Treasury, in consultation with the Secretary of State, promulgate a list of materials of the State Party that are covered by the agreement and subject to import restrictions.[43] More recently, U.S. Customs created a website to aid in determining whether imported materials are covered by import restrictions.[44]

The import restrictions themselves mean that any designated archaeological or ethnological material may not be imported unless the State Party issues a certification for exportation.[45] Additionally, the restricted material may enter the country if the importer has evidence that the object left the country of origin before the date of the import restrictions or that the material left the country of origin more than ten years before the material entered the United States, provided that neither the importer nor any related person acquired an interest in the material more than one year before the entry date.[46] This last provision prevents creating retroactive import restrictions, and the ten-year requirement assumes that import restrictions will be used for more immediate problems related to pillage.[47] The ten-year limit means that, under the CPIA, items removed from a country more than ten years ago may be imported into the U.S., notwithstanding import restrictions, so long as the interest in the artifact was recently acquired.[48] Additionally, the part related to interest acquisition prevents someone in, say, Switzerland from holding the property in a warehouse for a number of years, then importing it into the

42. 19 U.S.C. § 2603(c)(1).

43. 19 U.S.C. § 2604.

44. McIntosh, *supra* note 16, at 243. The website includes "photographic examples" of protected categories of materials. *Id.* The photo guides for import restrictions are now housed under the Bureau of Educational and Cultural Affairs' website. *Photo Guides for Import Restrictions*, U.S. DEP'T ST., BUREAU EDUC. & CULTURAL AFF., https://eca.state.gov/cultural-heritage-center/cultural-property-protection/photo-guides-import-restrictions.

45. 19 U.S.C. § 2606(a).

46. 19 U.S.C. § 2606(b)(2); Sokal, *supra* note 13, at 46.

47. 19 U.S.C. § 2606(b)(2)

48. 19 U.S.C. § 2606(b)(2).

United States.[49]

Lastly, there are several complex exemptions. Marina Sokal categorizes them in the following way. A piece of cultural property will not be restricted or subject to the stolen property provision in § 2607:

(a) If it has been imported into the United States for temporary exhibits;[50]

(b) If it has been held by a recognized U.S. museum or similar institution for at least three years, was purchased innocently, and was on exhibit for at least one year or contained in a published catalogue for at least two years or was sufficiently publicized at the time of acquisition;[51]

(c) If it has been within the United States for at least ten years and exhibited in a recognized museum or similar institution for at least five years;[52]

(d) If it has been within the United States for at least ten years and the country of origin has received or should have received fair notice about its location; or[53]

(e) If it has been within the United States for at least twenty years and was purchased innocently.[54]

Under the CPIA, and subject to the above exemptions, "U.S. Customs can, at any time that it has sufficient reason to believe that an object was imported to the US without a proper export permit after the date import controls went into effect, seize the

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49. 19 U.S.C. 2606(b)(2)(A); *see* Peter Watson, *Convicted Dealers: What We Can Learn, in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 93–97 (Neil Brodie et al. eds., 2006) (detailing the extensive collections held in multiple warehouses across the world by convicted art dealers).

50. 19 U.S.C. § 2611(1); Sokal, *supra* note 13, at 46.

51. 19 U.S.C. § 2611(2)(A); Sokal, *supra* note 13, at 46. "Similar institutions" includes religious or secular monuments. *See* 19 U.S.C. § 2611(2)(A) ("recognized museum or religious or secular monument or similar institution"). This provision sidesteps the now apparent issue of unprovenanced museum acquisitions. *See* Elizabeth Marlow, *What We Talk About When We Talk About Provenance: A Response to Chippindale and Gill,* 23 INT'L J. CULTURAL PROP. 217, 229–32 (2016). (providing a technical analysis of the problems of provenance, display, and cataloguing).

52. 19 U.S.C. § 2611(2)(B); Sokal, *supra* note 13, at 46. This provision does not protect non-innocent parties who are caught exhibiting the art in a museum or similar institution.

53. 19 U.SC. § 2611(2)(C); Sokal, *supra* note 13, at 46.

54. 19 U.SC. § 2611(2)(D); Sokal, *supra* note 13, at 46.

object."[55] In addition to these domestic enforcement mechanisms, the CPIA encourages source countries' development of self-help and fosters "a real partnership between the US and a source country towards a common goal of reducing the looting and site destruction produced by the illicit trade."[56]

These exemptions may create the impression that the CPIA would conflict with the NSPA because the lenient presumptions in § 2611 should prevent museums and collectors from being subject to the stolen property provisions in § 2607. As mentioned, that provision is presumably already operationalized in the NSPA.[57]

2. Treaty of Cooperation Between the United States and Mexico (1970)

In 1970, the United States and Mexico entered into the Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties (Treaty of Cooperation).[58] The Treaty of Cooperation narrowly preceded the finalization of the 1970 UNESCO Convention and preceded the United States' implementation of the Convention by thirteen years.[59] The treaty aims to encourage "protection, study and appreciation" of "archaeological, historical and cultural properties,"

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55. McIntosh, *supra* note 16, at 242; *see, e.g.*, *United States v. An Original Manuscript Dated Nov. 19, 1778*, 1999 WL 97894 (S.D.N.Y. 1999) (demonstrating how seizure pursuant to the CPIA occurs in practice). A suit under 19 U.S.C. § 2609 is often brought in concert with 19 U.S.C. § 1595a(c) (forfeiture and other penalties under the Tariff Act of 1930) and/or 18 U.S.C. § 981 (criminal forfeiture for offenses against a foreign nation).

56. McIntosh, *supra* note 16, at 243.

57. Sokal, *supra* note 13, at 40–41. Any suggestion that the CPIA impliedly repeals *McClain*'s application of the NSPA to stolen antiquities must overcome the presumption against implied repeals.

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

59. Ryan D. Phelps, Note, *Protecting North America's Past: The Current (and Ineffective) Laws Preventing the Illicit Trade of Mexican Pre-Columbian Antiquities and How We Can Improve Them*, 94 TEXAS L. REV. 785, 792 (2016). Impetus for the UNESCO Convention itself arose out of Mexico's prompting for an international address of the illicit antiquities trade in 1960. Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 149 (2003).

particularly pre-Columbian artifacts.[60]

In addition to encouraging archaeology, the circulation and exhibition of art, and the "legitimate international commerce in art objects," the treaty commits both the United States and Mexico "individually and, as appropriate, jointly" to deter illicit excavations and theft or cultural property.[61] Article III is of key importance and echoes the UNESCO Convention and the CPIA.[62] Article III requires a request, with "documentation and other evidence" to be made in order for the other party to deploy its "legal means . . . to recover and return" stolen properties removed after July 17, 1970.[63] The requesting party must show that the property was stolen in order to warrant the other party's enforcement of the treaty.[64] Assuming the requesting party can produce the evidence, the requested party must recover the property.[65] If the requested party cannot, then the requested party must "institute judicial proceedings" to recover the property.[66] Nevertheless, the Treaty of Cooperation does not prevent theft, but concentrates on the recovery of stolen materials.[67] Additionally, the Treaty of Cooperation has rarely been utilized by the United States in the seizure of stolen cultural property. Rather, the CPIA and NSPA have been utilized far more often.[68] Mexico could invoke the treaty to avoid the stringency of the informational requirements of the CPIA.

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60. Treaty of Cooperation, *supra* note 58, pmbl., art. I.

61. *Id.* art. II.

62. *Compare, id.* art. III, *with* 19 U.S.C. § 2602 (requests for legal action by another party require substantial documentation by the requesting country).

63. Treaty of Cooperation, *supra* note 58, art. III.

64. *Id.*

65. *Id.*

66. *Id.* (the United States' Attorney General is authorized to file a *civil action* in federal court for the recovery of the property).

67. *See* Phelps, *supra* note 59, at 794 n. 59 (citing Bruce Zagaris & Jessica Resnick, *the Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT'L & COMP. L. 1, 68 (1997)).

68. *See, e.g.*, *McClain*, 545 F.2d 988 (5th Cir. 1977) (involving Mexican law and the transportation of stolen antiquities but does not mention the Treaty of Cooperation).

B. Mexican Law

Mexico's national cultural patrimony laws are of central importance to understanding the interaction of U.S.-Mexico law.[69] Subject to a few caveats, Mexico's laws essentially "declare that all antiquities of a certain age or older, whether discovered or still buried, held in public or private hands, are national property."[70] Mexico began regulating its monuments and cultural property in 1897,[71] and the latest stage of Mexico's cultural patrimony law arrived in 1972.[72] The history shows increasing government intervention in the exportation of cultural property in general as a result of the increase in looting and pillage.[73]

The law in 1930 established moveable and immovable artifacts as "monuments" subject to export controls, and prohibited the exportation of movable and immovable monuments.[74] Important monuments recovered from nationally authorized excavations and monuments recovered by "unauthorized means" counted as national property.[75] In 1934, the law expanded to create a registry for private archaeological property, and any "objects not registered within the statutory period were presumed to originate from archaeological monuments, and therefore their export was prohibited."[76] The 1970 Law preserved the 1934 Law, but

69. *See McClain*, 545 F.2d 988, 996–97 n.14, 1003 n.32 (discussing Mexico's cultural patrimony law in depth for the first time).

70. Leslie S. Potter & Bruce Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 THE TRANSNAT'L LAWYER 627, 667 (1992).

71. Ley Sobre Monumentos Arqueológicos, Diario Oficial de la Federacion [DOF] 11-05-1897, (Mex.); *see* Potter & Zagaris, *supra* note 70, at 667–68 (explaining that all archaeological monuments in Mexico became the property of the nation, and exportation of movable archaeological objects required authorization).

72. Ley Federal Sobre Monumentos y Zonas Arqueológicos, Artísticos, e Históricos [LMZAA], Diario Oficial de la Federación [DOF], 06-05-1973, últimas reformas DOF 13-06-2014 (Mex.) [hereinafter Law of 1972].

73. Potter & Zagaris, *supra* note 70, at 667–670; *see* Phelps, *supra* note 59, at 792 (discussing Mexico's hand in catalyzing the UNESCO Convention).

74. Ley Sobre Protección y Conservación de Monumentos y Bellezas Naturales, art 1, art 19, Diario Oficial de la Federación [DOF], 31-01-1930 (Mex.) [Law of 1930]; Potter & Zagaris, *supra* note 70, at 668.

75. Law of 1930, art. 27.; Potter & Zagaris, *supra* note 70, at 668 n. 241.

76. Ley Sobre Protección y Conservación de Monumentos Arqueológicos e Históricos, Poblaciones Típicas y Lugares de Belleza Natural, arts 9, 12, 23, 82 Diario Oficial de la Federación [DOF], 19-01-1934 (Mex.); Potter & Zagaris, *supra* note 70, at 668–69.

allowed ownership of non-unique or rare movable objects to be transferred, and "permanent export" was allowed subject to governmental authorization.[77]

The 1972 Law established that all movable and immovable archaeological monuments were the property of Mexico, establishing more far-reaching export embargo.[78] Very few exceptions to the 1972 Law exist, and even privately owned historical and artistic monuments can only be temporarily or permanently exported with a proper permit.[79] The 1972 Law became the basis of heated debate during the *McClain* case and surrounding the passage of the CPIA.[80] Establishing state ownership of cultural property was essential to a determination that artifacts were stolen in the first place, not just violations of export restrictions, and thus subject to seizure, return, and criminal prosecution.[81] Despite criticism of Mexico's cultural patrimony law, the 1972 Law gives the United States (and by proxy, Mexico) a potent weapon to use in prosecutions under the National Stolen Property Act for the theft of and transport of stolen property within the United States.[82]

C. Other United States Statutes

1. Pre-Columbian Antiquities Act of 1972

The Pre-Columbian Antiquities Act of 1972 prohibits the importation of pre-Columbian murals and sculptures from Mexico, Latin America, Central America, and the Caribbean.[83] The Act

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77. Ley Federal del Patrimonio Cultural de la Nación, arts 53–54, 303 Diario Oficial de la Federación [DOF], 16-12-1970 (Mex.); Potter & Zagaris, *supra* note 70, at 669.

78. Law of 1972, art. 27; Potter & Zagaris, *supra* note 70, at 669; *see* United States v. McClain, 593 F.2d at 671 (5th Cir. 1979) (establishing in United States law that only Mexico's 1972 cultural patrimony law establishes national ownership over archaeological monuments but not any previous law).

79. Law of 1972, art. 16. Exceptions include: Presidential permission, cultural exchange, gifts to foreign government, and scientific study. *Id.* art. 16; Potter & Zagaris, *supra* note 70, at 669–70.

80. *See McClain,* 545 F.2d 988, McIntosh, *supra* note 16, at 241.

81. *See supra* text accompanying note 24 (describing the discussions surrounding the CPIA in light of the *McClain* decision).

82. 18 U.S.C. § 2314–15. Potter and Zagaris argue that the 1972 Law created a black market through its complete prohibition of the exportation of archaeological materials. Potter & Zagaris, *supra* note 70, at 670.

83. 19 U.S.C. § 2095(3)(A)(i).

was passed in reaction to "the pillage of ancient archeological sites and Mayan stela in Mexico and Central America,"[84] particularly in relation to embarrassing news about American museum and collector involvement.[85] Additionally, it arose in the context of growing attention to the illegal trade of cultural property—within a year of the formation of the Treaty of Cooperation Between the United States and Mexico and the first proposal of the UNESCO Convention.[86]

The Pre-Columbian Antiquities Act empowers the Secretary of the Treasury, after consulting with the Secretary of the State, to create a list of pre-Columbian artifacts to be restricted from importation.[87] The operative portion of the act states that no pre-Columbian artifact on the list promulgated by the Secretary of the Treasury may be imported to anywhere, including the United States, from the country of origin, unless the government of the country of origin issues a certification of the lawful exportation of the pre-Columbian artifact.[88]

In order to show that one has certification to import the artifact, one must either (1) show certification, (2) give evidence that the exportation of the artifact was before the effective date of the Act, or (3) provide evidence that the artifact is not on the Secretary's list.[89] While the importer is attempting to produce sufficient evidence to allow import, a customs officer will take the artifact into custody, and from that point the importer has ninety days to produce proof necessary for certification purposes.[90]

The statute does not cover every piece of cultural property

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84. Shedwill, *supra* note 9, at 243 (citing 3 LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE: MOVEMENT 598 (1989)).

85. *See* Asif Efrat, *Protection against Plunder: The United States and the International Efforts against Looting of Antiquities* 5 (Cornell Law Faculty Working Papers, Working Paper No. 47, 2009) (discussing the emergence of American interest in antiquities looting).

86. *See id.* at 86. (noting that no other country had passed legislation addressing the pillage of Mayan sites and that passage of the Act came on the heels of the United States' rejection of the first draft of the UNESCO Convention).

87. 19 U.S.C. § 2091. This makes it run parallel to the CPIA and provides a route for import restrictions that require far fewer bureaucratic hoops than the CPIA.

88. 19 U.S.C. § 2092.

89. 19 U.S.C. § 2092(b)(1)–(3).

90. 19 U.S.C. § 2092

from pre-Columbian cultures. Rather, the statute covers pre-Columbian monumental or architectural sculptures or murals, meaning any stone carvings or wall art which are the product of pre-Columbian Indian culture, that were fixed or immobile, and were subject to export control by the country of origin.[91] Additionally, it is worth noting that the Pre-Columbian Antiquities Act is rarely litigated; in fact, the only case the mentions it in any detail is *United States v. McClain*, a case which centers on the National Stolen Property Act.[92] Nevertheless, some assert that the Act has been a success in curbing the flow of Mayan objects into the United States.[93]

D. *Case Law*

This section is split between National Stolen Property Act litigation and common law replevin claims, both of which are the most prominent means by which source countries are able to recover their cultural property.

1. Cases Applying the National Stolen Property Act

The National Stolen Property Act is a federal criminal statute that applies to the illegal transportation, or conspiracy to transport, stolen property across state or national boundaries.[94] It is utilized to prosecute dealers and smugglers in the following cases.

a. *United States v. Hollinshead*

Hollinshead laid the stage for *McClain* with its application of

91. 19 U.S.C. § 2095(3)(A)–(B) (mentioning that fragments of the covered cultural property are covered as well, not just the whole of the property). In particular, movable objects are entirely absent from this act. Thus, while the act conceivably deters the destruction of pre-Columbian sculptures, it would not deter the transportation of smaller objects of archaeological or ethnological interest.

92. *McClain*, 545 F.2d 996 n.14,1003 n.32.

93. Shedwill, *supra* note 9, at 244 (citing William D. Rogers, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL'Y INT'L BUS. 932, 969 (1973)). As with much criminal activity and trafficking, it is worth taking such optimistic assessments with a grain of salt. *See* Jessica Dietzler, *On 'Organized Crime' in the illicit antiquities trade: moving beyond the definitional debate*, 16 TRENDS IN ORGANIZED CRIME 329, 330–331 (2013) (highlighting the lack of definitive knowledge about the scope, the lack of knowledge about organized criminal elements, etc.).

94. 18 U.S.C. § 2314

the NSPA to stolen foreign artifacts.[95] Fell and Hollinshead, co-conspirators, were convicted under § 2314 of the NSPA for conspiracy to transport stolen property in interstate commerce and for causing stolen property to be transported.[96] In short, Hollinshead conspired to procure rare and expensive pre-Columbian artifacts in Guatemala to sell in the United States.[97] One particularly valuable stele was cut into pieces, packed away into crates labelled "personal effects" in a fish-packing plant in Belize, and shipped to Florida but addressed to Hollinshead in California.[98] Hollinshead and Fell were both present at the packing along with bribed Guatemalan officials.[99] After several failed attempts to sell the artifacts throughout the United States, the artifacts finally made it to Hollinshead, who also tried to sell them in California.[100]

At issue on appeal was a jury instruction about the presumption of knowledge of foreign law, of which there is none.[101] However, there was sufficient evidence from bribery, false packaging, etc., to establish that the defendants were aware that their activity was illegal.[102] Independently, though, under § 2314, the United States had to "prove that appellants knew that the stele was stolen," but the prosecution did not have to prove that the defendants knew where the artifacts were stolen.[103] Consequently, the government did not need to prove that the conspirators knew the law of the place of the theft.[104] Therefore, the conspirators' knowledge of Guatemalan law was only relevant to the extent that it would help establish that they knew the artifacts were stolen for the purposes of prosecution under the NSPA.[105]

In sum, federal law controls the question of whether an item

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95. United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974); United States v. McClain, 545 F.2d 988 (1977), 593 F.2d 658 (1979).

96. 18 U.S.C. § 2314; *Hollinshead*, 495 F.2d at 1155.

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

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1155–56.

103. *Id.* at 1156 (citing McAbee v. United States, 434 F.2d 361, 362 (9th Cir. 1970)).

104. *Id.* at 1156.

105. *Id.*

was stolen and subject to a prohibition on transportation under the NSPA.[106] However, local law—whether of a state or foreign country—controls whether anyone has a property interest such that the artifact could even be stolen in the first place.[107]

b. *United States v. McClain*

Within the case law surrounding the application of the NSPA, it is clear that a serious hurdle for enforcement is proving that the individual "knows that the property was obtained by theft," or otherwise knows that the property was stolen.[108] Whereas facts like those in *Hollinshead* make it easier to impute knowledge on the part of the defendants, cases wherein the defendants are far removed from the initial transfer of artifacts out of the country make knowledge that the artifacts were stolen far more difficult.[109]

Nevertheless, where chains of transfer are not at issue, *McClain* stands as the touchstone for applying the NSPA to foreign art theft.[110] *McClain* found five defendants guilty of violations of the NSPA for stealing pre-Columbian artifacts from Mexico, transporting them to the United States, and subsequently attempting to sell them to an undercover agent.[111] Ultimately, the court held that the cultural patrimony law of Mexico, which declared ownership of all cultural property in 1972, was a sufficient

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106. United States v. Portrait of Wally summarizes the division of laws that apply,

> Under both the *McClain* cases . . . federal law controls the question of whether an item is stolen, and local law . . . controls the analytically prior issues of (a) whether any person or entity has a property interest [in] it. These issues are wholly distinct from the question of the conditions under which a once-stolen item ceases to be stolen. The answer to the latter question is determined by federal law and not local law.

105 F. Supp. 2d 288 (S.D.N.Y. 2000).

107. *Id.*

108. Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1851 (2009); *see* 18 U.S.C. § 2314–15 (*scienter* requirement); Phelps, *supra* note 59, at 798 (same).

109. Phelps, *supra* note 59, at 798. Imagine that if through the chain of transfer of an artifact one did not inquire as to the provenance of the item one was buying. There would be a plausible excuse that one did not have knowledge that the item was stolen, and could therefore escape criminal liability.

110. United States v. McClain, 545 F.2d 988 (5th Cir. 1977), 593 F.2d 658 (5th Cir. 1979).

111. United States v. McClain, 545 F.2d 988, 991–93 (5th Cir. 1977) [hereinafter *McClain I*].

declaration of ownership to trigger the NSPA and uphold the conviction of the defendants for conspiracy.[112]

In *McClain I*, the court reviewed the district court's jury instruction, which interpreted Mexican law since 1897 as having declared all pre-Columbian artifacts property of the Mexican government, except where the government had granted license or permission "to a private person to possess, transfer, or export the artifacts."[113] The Fifth Circuit indicated that *McClain* turned, not on whether the artifacts were exported without permission from the Mexican government (which was clearly true), but whether the artifacts "were knowingly 'stolen' within the meaning of the National Stolen Property Act."[114] For the artifacts to be stolen, they had to have been the property of the Mexican government in the first place, not merely exported illegally, but the U.S. presented little evidence about how or when the artifacts were acquired and exported.[115]

The defendants argued that the Mexican declarations of ownership were of insufficient specificity to assert property rights claims over the artifacts for the purposes of the NSPA and mere illegal exportation of the artifacts was also insufficient to show that the artifacts were stolen.[116] Additionally, they argued that Mexico's laws since 1897 were insufficient to vest the Mexican government with ownership of the artifacts.[117] The court agreed with the appellants except when it came to the passage of the Mexico's 1972 patrimony law.[118] In light of the assertion of ownership rights over all pre-Columbian artifacts, except those covered by a grandfather clause protecting pre-existing private ownership rights, the court held that "a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen,'

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112. *See United States v. McClain*, 593 F.2d at 671–72 (5th Cir. 1979) [hereinafter *McClain II*] ("The evidence is massive that appellants knew and deliberately ignored Mexico's post-1972 ownership claims.").

113. *McClain I*, 545 F.2d at 992, 993.

114. *Id.* at 992.

115. *Id.*

116. *Id.* at 994.

117. *Id.*

118. *Id.* (discussing Law of 1972).

within the meaning of the National Stolen Property Act."[119]

Because of the broad meaning of the term "stolen," the court attempted to balance the interests of foreign governments in recovering their stolen property with the rule of lenity.[120] The court rejected the appellants' argument that the federal court's recognition of the patrimony law of the Mexican government would amount to allowing the meaning of the term "stolen" to shift depending on the meaning of foreign laws.[121] The main backstop against such a result is the scienter requirement under the National Stolen Property Act, which requires knowledge that the good was stolen.[122] Regardless of the shifts in foreign law, so long as a defendant has knowledge that the goods are stolen, even if he or she does not have specific knowledge of the foreign law, then the defendant has met the scienter requirement under the NSPA.[123]

On appeal again, *McClain II* reversed convictions on the substantive counts under the NSPA but affirmed the conspiracy charge, finding only harmless error on those counts.[124] The conspirators had clearly intended to transport more stolen antiquities across the U.S.-Mexico border, and the conspirators "knew and deliberately ignored Mexico's post-1972 ownership claims."[125]

After *McClain*, and before the passage of the CPIA, museums and dealers worried that *McClain* would impose serious criminal and civil liabilities upon them as the result of foreign patrimony

119. *McClain I*, 545 F.2d at 1000–1001.

120. *Id.* at 995, 1001. *McClain I* points out that common law has no accepted meaning for "stolen." 545 F.2d at 995. The term "steal" "first denoted in general usage a taking through secrecy, as implied in 'stealth' or through stratagem . . . Expanded through the years, it became the generic designation for dishonest acquisition, but it never lost its initial connotation." *United States v. Turley*, 352 U.S. 407 (1957) (quoting *Boone v. United States*, 235 F.2d 939, 940 (4th Cir. 1956)).

121. *McClain I*, 545, F.2d at 1001 n.30.

122. *Id.*

123. *Id.* at 1001–1002. *McClain I* was remanded so that the jury could make all the relevant inferences about *when* the artifacts were exported, which was exceedingly relevant to determining whether the artifacts were state-owned property at the time, and thus stolen under the NSPA. *Id.* at 1003–1004.

124. *McClain II*, 593 F.2d at 671 (reversing the other counts on the basis of jury instructions related to Mexico's cultural patrimony laws, earlier versions of which were too vague to determine whether Mexico had a vested property interest in the antiquities prior to 1972).

125. *Id.*

laws—essentially amounting to a claim that *McClain* would impose strict liability for the possession of stolen cultural property.[126] Of course, the real risk would be if museums and dealers were aware of the illegal sourcing of their cultural property, and therefore viewed McClain as a threat to business as usual.[127]

c. *Government of Peru v. Johnson*

Government of Peru v. Johnson is not, strictly speaking, about the NSPA. Rather, it illustrates one of the problems of provenance in the context of proving that a government has a property interest in the allegedly stolen materials.[128]

In *Johnson*, Peru attempted to sue Johnson and his co-defendants and obtain an order from the court for the return of 89 Peruvian artifacts.[129] Peru failed, however, to demonstrate their ownership of the artifacts with any certainty.[130] Peru provided no direct evidence that the artifacts were actually from Peru.[131] The Peruvian government's primary evidence came from a Peruvian archaeologist, who testified that each of the artifacts must have come from sites in Peru.[132] The court was not convinced, noting that, "[t]he fact that the subject items are identifiable with excavation sites in modern Peru does not exclude the possibility that they are equally similar to artifacts found in archaeological monuments in Bolivia and Ecuador."[133]

The court concluded that Peru could not establish that it owned the artifacts at the time of exportation, which depended, in part, on the lack of clarity of the country's patrimony laws.[134] The court noted that changes in the laws also added an additional layer of indeterminacy to an inquiry into whether the Peruvian

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126. Sokal, *supra* note 13, at 41; Pearlstein, *infra* note 312, at 595–96.

127. Pearlstein, *infra* note 312, at 595 (During debates over the CPIA, the dealers and museums were so worried about *McClain* that they sought to amend the CPIA in order to explicitly overturn *McClain*).

128. *See* Gill, *supra* note 4, at 237 (discussing the difference between archaeology and collecting history).

129. Government of Peru v. Johnson, 720 F.Supp. 810, 811 (C.D. Cal. 1989).

130. *Id.* at 815.

131. *Id.* at 812.

132. *Id.*

133. *Id.* Additional customs documents for some of the items even indicated that they were from Colombia. *Id.*

134. *Id.* at 812–13.

government owned the artifacts when they were exported.[135] While the cultural patrimony clause in question was passed in 1929, the law contained a registration policy for artifacts, which the court could not determine was ever implemented.[136] Furthermore, the repeal and replacement of the 1929 law in 1985 rendered uncertainty about how ownership for potentially unregistered artifacts was affected.[137] These observations culminated in the court's conclusion that the legal uncertainties within Peru's laws and application of laws resulted in uncertainty as to ownership, on top of the open question about where the artifacts were excavated in the first place.[138]

The general thrust in the court's assessment of Peru's arguments was that Peru's laws seeking to protect artistic and cultural property did not establish ownership over artifacts because it never sought to assert ownership rights over the property so long as it never left the country, even though the property was held by private persons.[139] The court thus considered the laws to be, in effect, no more than export restrictions, an exercise of police powers, rather than an assertion of ownership by the state.[140]

McClain and *Government of Peru*, taken together, indicate the importance of clarity in drafting and implementation of cultural patrimony laws.[141] A government's expression of its property rights over cultural property can be rendered ambiguous by changes in law, as well. It seems reasonable to assume that change in law would result in a change in legal effect, so a claim that the rights to cultural property ownership were the same

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135. *Id.* at 813–14.
136. *Id.* at 813.
137. *Id.*
138. *Id.* at 812–15.
139. *Id.* at 814.
140. *Id.* (citing *McClain I*, 545 F.2d at 1002).
141. *McClain II*, 593 F.2d at 670. As *McClain II* put the matter,

> "[i]t may well be as testified so emphatically by most of the Mexican witnesses, that Mexico has considered itself the owner of all pre-Columbian artifacts for over 100 years. If so, however, it has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens."

Id. The clarity of the law is important to establish a property interest of the state, not with regard to whether defendants *understand* the law.

prior to a drastic change in a cultural patrimony law as those afterwards would likely fail to convince a U.S. court.[142] This is especially true in a criminal prosecution, where the rule of lenity will construe ambiguous laws in the strictest way possible in favor of defendants.[143]

d. *United States v. Schultz*

The latest iteration of the NSPA and the *McClain* doctrine was *United States v. Schultz* in 2003.[144] For years, Frederick Schultz and his coconspirators, Parry (a British national) and Farag (an Egyptian national), smuggled and sold antiquities out of Egypt.[145] The case involved the conviction of Schultz for conspiracy to receive stolen Egyptian antiquities that had been transported in interstate and foreign commerce.[146] While the conviction was nominally for conspiracy to commit an offense against the United States (18 U.S.C. § 371), the underlying offense was the violation of the NSPA.[147]

Schultz and Parry entered into an ongoing business relationship to smuggle antiquities out of Egypt.[148] Of note, Schultz, with the help of Parry, smuggled the head of a statue of Pharaoh Amenhotep III into the United States after the head was first smuggled from Egypt to England by Parry and Farag in 1991.[149] Schultz and Parry corresponded extensively about smuggling antiquities, even after Parry's arrest in Great Britain—hardly a

142. *See Government of Peru*, 720 F.Supp at 812–14.

143. *McClain I*, 545 F.2d at 1001.

144. United States v. Schultz, 333 F.3d 393 (2d Cir. 2003).

145. *Id.* at 395–97. Smuggling entailed doctoring and concealing antiquities, forging invoices, creating false provenances, bribing the Egyptian antiquities police, receiving confiscated antiquities from the Egyptian police, and purchasing antiquities from Egyptian villagers. *Id.* at 396–97.

146. *Id.* at 395.

147. *Id.* ("The underlying substantive offense was violation of 18 U.S.C. § 2315, the National Stolen Property Act."); 18 U.S.C. § 371 concerns conspiracy to commit an offense against the United States, the substantive offense is the receipt of stolen goods which have crossed a United States boundary. 18 U.S.C. § 2315 (2013).

148. They would claim that the sculpture had been exported from Egypt in the 1920s and kept in a fictional private collection in England. *Schultz*, 333 F.3d at 396.

149. *Id.* Jonathan Parry, a British national and the man who smuggled the head out of Egypt, had coated the head in plastic to make the head "look like a cheap souvenir, then removed the plastic coating once the sculpture was in England." *Id.*

wise choice.[150] According to the Second Circuit, "[t]heir letters indicate an awareness that there was a great legal risk in what they were doing," and money was exchanged for the purpose of continued smuggling.[151]

Schultz's awareness of the illegality of the smuggling proved important for meeting the scienter requirement within the NSPA.[152] Egypt's cultural patrimony law functioned similarly to Mexico's in that all those antiquities owned prior to 1983 had to be registered and their export was restricted.[153] Those antiquities recovered after 1983 are the property of the Egyptian government.[154]

The Second Circuit followed the *McClain* court in answering the question, "whether an object is 'stolen' within the meaning of the NSPA if it is an antiquity which was found in Egypt after 1983 and retained by an individual . . . without the Egyptian government's consent."[155] The court answered in the affirmative based on the testimony of Egyptian government officials that the patrimony law vested the Egyptian government with "absolute and true ownership of all antiquities found in Egypt after 1983."[156] Since the antiquities were Egypt's property, and the objects were not merely unlawfully exported, the Second Circuit agreed that Schultz had violated the NSPA.[157]

The Second Circuit also addressed the amici about risks posed to antiquities dealers by the *McClain* doctrine.[158] The court

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150. *Schultz*, 333 F.3d at 397–98.

151. *Id.* at 398.

152. *See, e.g.*, *Hollinshead*, 495 F.2d at 1155–56 (allowing the inference from bribery of government officials and concealment of the antiquities to knowledge of the illegality of the action).

153. *Schultz*, 333 F.3d at 398.

154. *Id.*

155. *Compare id.* at 399, 403–404, 410, *with McClain I*, 545 F.2d at 1000–1001 (*McClain* concedes there is in common law definition of "stolen," but in order for an object to be stolen, it must first be the property of the foreign government and taken without that government's consent).

156. *Schultz*, 333 F.3d at 401 ("even when a person is acquitted [for violating Egypt's patrimony law], if the person is found to possess an antiquity, that antiquity is seized and retained by the government").

157. *Id.* at 416.

158. *Id.* at 410.

acknowledged that the ruling created a "barrier to the importation of cultural property owned by a foreign government," but the "mens rea requirement of the NSPA [would] protect innocent art dealers who unwittingly receive stolen goods."[159]

Lastly, the Second Circuit clarified the relationship between the NSPA and the CPIA.[160] It noted that the CPIA did not affect any of the remedies available in state or federal courts.[161] The Second Circuit stated:

> The CPIA is an import law, not a criminal law . . . It may be true that there are cases in which a person will be violating both the CPIA and the NSPA when he imports an object into the United States. But it is not inappropriate for the same conduct to result in a person being subject to both civil penalties and criminal prosecution.[162]

As it stands, *Schulz* demonstrates the strength of the NSPA and the parallel role it plays alongside the CPIA for returning artifacts to source countries.

2. Replevin Claims

Relief under the CPIA and the NSPA are not the only ways of recovering stolen cultural property. As noted in Schultz, countries are free to pursue state replevin claims to recover property that is rightfully theirs.[163]

a. *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg*

Autocephalous Greek Orthodox Church of Cyprus v. Goldberg involves the theft of a 1400-year-old mosaics from a church on the island of Cyprus in the midst of the Cypriot Civil War.[164] When the priests of the Church of Panagia Kankaria in Turkish-occupied northern Cyprus were forced to flee in 1976, the mosaics

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159. *Id.*

160. *Id.* at 408–409.

161. *Id.* at 409 (noting that the potential overlap between the CPIA and the NSPA is no reason to limit the reach of the NSPA).

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

163. *See id.* at 408 (noting that foreign countries retain the ability to pursue actions for civil penalties under state law).

164. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 280–81 (7th Cir. 1990) [hereinafter *Church of Cyprus*].

were intact.[165] After mass evacuations of Greek Cypriots from Turkish-occupied areas, the Republic of Cyprus and the Church of Cyprus began to hear reports of looting, vandalizing, and destruction of Greek Cypriot churches and monuments.[166] Eventually, in November 1979, the Republic's Department of Antiquities received word that the Panagia Kankaria had been looted and that the valuable and recognizable mosaic had been removed from the church.[167] The Republic and the Church of Cyprus "took immediate steps to recover [the mosaics]" by contacting a multitude of organizations and experts throughout the world in order to reach those people who would most likely be "involved in any ultimate sale of the mosaics."[168]

Goldberg, an Indiana art dealer and gallery operator, through meetings with Dutch art dealers in Europe and one California attorney, managed to purchase these mosaics in 1988.[169] Afterwards, Goldberg tried to sell the mosaic to the Getty Museum, which refused and reported to the Republic's Department of Antiquities that the mosaics had surfaced.[170] The Church of Cyprus and the Republic of Cyprus then demanded that Goldberg return the mosaics, Goldberg refused, and the Republic and the Church of Cyprus sued in the Southern District of Indiana.[171]

After determining that Indiana's law would apply to the

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165. *Id.* at 280; Jason McElroy, *The War Against the Illegal Antiquities Trade: Rules of Engagement for Source Nations*, 27 HASTINGS COMM. & ENT. L.J. 547, 559 (2005).

166. *Church of Cyprus*, 917 F.2d at 280–81; McElroy, *supra* note 165, at 559.

167. *Church of Cyprus*, 917 F.2d at 281; McElroy, *supra* note 165, at 559–60.

168. *Church of Cyprus*, 917 F.2d at 281. The Republic and the Church of Cyprus' contracts included UNESCO,

> the International Council of Museums; the International Council of Museums and Sites; Europa Nostra (an organization devoted to the conservation of the architectural heritage of Europe); the Council of Europe; international auction houses such as Christie's and Sotheby's; Harvard University's Dumbarton Oaks Institute for Byzantine Studies; and foremost museums, curators, and Byzantine scholars throughout the world.

Id.

169. *Id.* at 281–283. Goldberg contended that she had contacted UNESCO and the International Foundation for Art Research, a New York Organization "that collects information concerning stolen art," but the trial judge was skeptical about the veracity of that testimony. *Id.*at 283. It seems that Goldberg attempted to create the image of an art buyer doing her due diligence, indicating she was aware that these mosaics were stolen. *See id.* (noting Judge Noland's skepticism of Goldberg's testimony).

170. *Id.* at 283; McElroy, *supra* note 165, at 560.

171. *Church of Cyprus*, 917 F.2d at 283–284.

Church of Cyprus' replevin claim against Goldberg, the court had to decide whether the statute of limitations had run on the replevin claims.[172] Indiana had a six-year statute of limitations once the replevin claim accrued, so if the claim accrued when Cyprus heard the mosaic had been stolen, then their claim would have run.[173] Fortunately, Indiana's general statute of limitations had a discovery rule, whereby the statute of limitations would not begin to run until the plaintiff discovered that he or she had a cause of action and knew that the injury was caused by the act of another.[174] In addition, Indiana had a recognized doctrine of fraudulent concealment, which holds that "a defendant who has by deceit or fraud prevented a potential plaintiff from learning of a cause of action cannot take advantage of his wrongdoing by raising the statute of limitations as a bar to plaintiff's action."[175]

The primary factual determination to be made in applying these two doctrines is whether the plaintiff exercised diligence in investigating a cause of action.[176] The trial court found that Cyprus' cause of action did not accrue until the Getty Museum notified Cyprus that the mosaics were in Goldberg's possession in Indiana and that Cyprus had exercised due diligence in searching for the mosaics.[177] The Seventh Circuit further noted that the discovery rule implied specificity about the identity of the mosaic's possessor because "a plaintiff cannot be said to have 'discovered' his cause of action until he learns enough facts to form its basis,

172. The Seventh Circuit's review of the district court's jurisdictional and choice of law determinations highlights the complications implicit in trying to determine which country's law will apply along the chain of transactions in the movement of illegal antiquities. *Church of Cyprus*, 917 F.2d at 286 (applying Indiana choice of law rules and Switzerland's choice of law rules under a "most significant contacts" test to determine that Indiana's law of replevin will apply).

173. *Id.* at 287–88 ("a cause of action accrues when the plaintiff ascertains, or by due diligence could ascertain, actionable damages").

174. *Id.* at 288; McElroy, *supra* note 165, at 561 (citing Tarquin Preziosi, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225, 237 (1997)).

175. *Church of Cyprus*, 917 F.2d at 288.

176. *Id.*

177. *Id.* at 289.

which must include the fact that the works are being held by another and who, or at least where, that 'other' is."[178] In other words, the plaintiff must actually be able to pursue its cause of action; if it does not know the identity of the current possessor of the property, it could not press its claim.

After Cyprus had established that its claim was not barred by the statute of limitations, it had to prove (1) that it had title or right to possession; (2) that the property was unlawfully detained; and (3) that the defendant wrongfully held the property.[179] Cyprus managed to establish all three factors because of its ability to accurately identify the mosaics as coming from the Panagia Kankaria, which the state owned.[180] The Church of Cyprus, and therefore the Panagia Kankaria, had the right to own, regulate, and register its property, rendering the determination of the replevin elements relatively easy.[181] The hurdle for many replevin claims is the statute of limitations because so many antiquities end up underground for so long. States with discovery rules make it easier to press these claims, but due diligence requirements will hinder idle states in reclaiming property.

b. *Solomon R. Guggenheim Foundation v. Lubell*

As *Church of Cyprus* demonstrates, alternatives exist for source countries attempting to reclaim their cultural property beyond the NSPA, federal laws, treaties and agreements source countries can utilize state court systems to launch replevin suits against dealers and collectors.[182] In *Lubell*, the Guggenheim

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178. *Church of Cyprus*, 917 F.2d at 289 (citing O'Keeffe v. Snyder, 416 A.2d 862, 869–70 (1980)). As to the due diligence requirement, this is a very fact-specific inquiry, which ultimately leads to uncertainty for source countries attempting to recover their cultural property. *See Church of Cyprus*, 917 F.2d at 289 (noting that due diligence involves contextual analysis and weighing the credibility to witnesses testifying to what they knew and when they knew it).

179. *Church of Cyprus*, 917 F.2d at 290. Since replevin is a state law claim, the particular elements may differ from state to state. The trial judge was particularly thorough for giving an alternative analysis based entirely on Swiss law (the possible alternative body of law applicable under choice of law rules in Indiana). *Id.* at 291.

180. *Id.* at 285; McElroy, *supra* note 165, at 562.

181. McElroy, *supra* note 165, at 561–62.

182. *See Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y. 1991) (involving the Guggenheim Foundation's replevin claim against a good faith purchaser of a stolen piece of art).

Foundation sued Lubell and her deceased husband under a theory of replevin for the return of the Chagall gouache worth $200,000 on the grounds that the painting had been stolen from the Guggenhiem in the late 1960s.[183] The Lubells purchased the painting from a gallery in New York in 1967 and kept it in their home until the Guggenheim demanded its return in 1986.[184] The question on appeal was whether the Guggenheim's claim was barred under the statute of limitations because they had not abided by the demand and refusal rule under New York law.[185]

Traditionally, the demand and refusal rule requires the plaintiff to have demanded the return of the possession and the defendant to have refused to return the item before the statute of limitations could run.[186] The Second Circuit, in applying New York law in *DeWeerth v. Baldinger*, added an additional due diligence requirement to the demand rule.[187] The due diligence requirement was designed by the Second Circuit to provide some assurance to good faith purchasers that an original owner could not, out of the blue, reclaim property from the purchaser because it had been stolen.[188] The *Lubell* court concluded, contrary to the Second Circuit, that there was no due diligence requirement to the demand rule in New York because New York had chosen to afford the most protection possible to true owners of stolen property.[189]

The *Lubell* court specifically notes that New York had not adopted a discovery rule for replevin because Governor Cuomo took the recommendations of the United States Departments of State and Justice and the United States Information Agency that a discovery rule would hinder foreign governments' opportunities

183. *Id.* at 427.

184. *Id.*

185. *Id,*; McElroy, *supra* note 165, at 562.

186. McElroy, *supra* note 165, at 562.

187. *See* DeWeerth v. Baldinger, 836 F.2d 103, 104 (2d Cir. 1987) (holding that the due diligence requirement under the New York demand rule required that a person exercise reasonable diligence in locating the work after its disappearance).

188. McElroy, *supra* note 165, at 562.

189. *Lubell*, 569 N.E.2d at 430.

"to receive notice of a museum's acquisition and take action to recover it" before the statute of limitations had run.[190] Despite the rejection of Lubell's argument that the statute of limitations had run under the reasonable diligence rule (because there was no diligence rule), the court noted that the trial judge should consider the reasonableness of the museum's actions on remand for the purposes of Lubell's laches defense.[191]

III. ANALYSIS

This section first details current research on antiquities trafficking in order to determine whether the current legal and policy regime is sufficient to combat it. Actual deterrence of trafficking or control of demand is lacking. Instead of treating the trafficking of antiquities as organized crime, law enforcement, policymakers, and scholars should view the traffickers as part of a transnational criminal network.[192] Next, the section offers policy proposals for each of the four parts of the illicit antiquities trafficking network between the United States and Mexico. It focuses on late-stage intermediaries (art dealers) and collectors (including museums) with the goal of curbing demand for antiquities and increasing accountability on the part of collectors.[193]

A. *Current Knowledge of Trafficking Networks in the United States and Mexico*

Empirical research on antiquities trafficking networks is

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190. *Id.*; Irvin Molotsky, *3 U.S. Agencies Urge Veto of Art-Claim Bill*, N.Y. TIMES, July 23, 1986, http://www.nytimes.com/1986/07/23/arts/3-us-agencies-urge-veto-of-art-claim-bill.html. A discovery rule entails that the statute of limitations begins to run from "the time that the owner discovered or reasonably should have discovered the whereabouts of the work of art that had been stolen." *Lubell*, 569 N.E.2d at 430 (citing *O'Keefe v. Snyder*, 416 A.2d 862 (Sup. Ct. N.J. 1980)).

191. *Lubell*, 569 N.E.2d at 431. Concordantly, source countries must not wait too long before asserting their claims despite New York's liberal rules for the statute of limitations on replevin claims.

192. Peter B. Campbell, *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, 20 INT'L J. CULTURAL PROP. 113, 114–15 (2013).

193. *See* Neil Brodie & Blythe Bowman Proulx, *Museum Malpractice as Corporate Crime? The Case of the J. Paul Getty Museum*, 37 J. CRIME & JUSTICE 399, 413 (2014) (noting the "developing consensus" of policy proposals aiming to discourage demand rather than protecting archaeological sites in source countries).

scant.[194] The trade is understood to be widespread and highly lucrative, but as with other trafficking markets, pinpointing the major players, their scope, and the actual value of the trafficking is difficult.[195] Whether the antiquities trafficking is tied to organized crime, and if so, to what extent, has dominated the discussions of the agencies, institutions, scholars and advocates.[196] To make matters worse, there is no agreed definition of organized crime.[197] Instead, the best way to think of illicit antiquities trafficking is in terms of criminal networks.[198]

What is the difference between organized crime and criminal networks? Criminal networks "are typically composed of interchangeable participants collaborating together when mutually beneficial with limited complexity and no central organization."[199] Organized crime, on the other hand, typically involves a hierarchy, where those lower on the chain are subject to a monopoly, long-term agreements, and sanctions for those who challenge the hierarchy.[200] There is little reason to think this is the nature of antiquities trafficking in general.[201] Rather, antiquities traffick-

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194. Because of their black-market nature, the initial stages of antiquities trafficking are little researched, and research tends to focus on the visible aspects—those subject to prosecution—amongst late-stage dealers and collectors. *See, e.g.*, Brodie & Proulx, *supra* note 193, at 403–407 (focusing on the Getty curator, Marion True, and her testimony about acquisition processes at the Getty, complicity of museum officers, etc.).

195. In 2004, UNESCO valued the transnational trade in antiquities at $2.2 billion. UNESCO, *International Flows of Selected Cultural Goods and Services, 1994–2003: Defining and Capturing the Flows of Global Cultural Trade*, UNESCO (2005), http://unesdoc.unesco.org/images/0014/001428/142812e.pdf.

196. Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 INDIANA L. REV. 601, 602 (2012).

197. *Id.* at 604 ("The UN definition of organized crime is broader than the FBI definition in the respect that it includes antiquities crime motivated by non-monetary benefits such as ideology."). *See* Dietzler, *supra* note 93, at 330 (discussing the ways in which the illicit antiquities trade is not like stereotypical organized crime and the evolution of the term itself).

198. Campbell, *supra* note 192, at 114.

199. *Id.* at 118.

200. *Id.*

201. *The Exploitation of Cultural Property: Examining Illegal Activity in the Antiquities and Art Trade Before the Subcomm. on Terrorism and Illicit Finance of the H. Comm. on Financial Services*, 115th Cong. 1–3 (2017) (statement of Brian Daniels, Research Associate, Smithsonian Institute).

ing involves opportunistic networks of rational actors who organize, but do not centralize, around network specializations.[202]

This explains why antiquities trafficking networks feature four components: (1) diggers linked to an "organized" criminal element; (2) the criminal element linked to the "Janus figure," who joins the criminal component and the gray market together; (3) the Janus figure linked to art dealers in market countries; and (4) art dealers linked to the end-market of museums and collectors.[203] Thus, there are roughly four stages in a network: looting, early middleman (transporter), late middleman (launderer), and the collector.[204] The unique features of the antiquities trade—finite supply, increasing profits from source to market, and the

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202. Campbell, *supra* note 192, at 114–15. To add some detail to the opportunistic model: "looting choices are made in a culturally situated social space where personal decisions are cast in light of personal and group-based historical influences." Simon Mackenzie & Tess Davis, *Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network*, 54 BRITISH J. CRIMINOLOGY 722, 737 (2014). There are certain pathways or unique skillsets required to fill the various roles in a trafficking network. Campbell, *supra* note 192, at 116–117; *see* Donna Yates, *Illicit Cultural Property from Latin America: Looting, Trafficking, and Sale*, *in* COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD'S HERITAGE 33, 38–40 (France Desmarais ed., 2015) (providing another short case study and discussing late-stage looting in Guatemala, following the same model put forward by Mackenzie and Davis).

203. Mackenzie & Davis, *supra* note 202, at 723. Mackenzie and Davis' own research suggests an empirical verification of the of the network model as opposed to the organized crime model. *Id.* at 737.

> The high-level international policy discourse of illicit antiquities regulation has been criticized in similar terms for reliance on and promulgation of a language of organized criminal underworld, when equally if not more important must be questions of corruption, complicity and facilitation of illicit trade by apparently legitimate actors.

Id. at 724. The Janus figure involves a network player who operates in the liminal space between a criminal underworld and a more-or-less legitimate market. "Janus was the Roman god of passages, both topographical and temporal. The word, itself, is linked with janus "archway" and janua "passage, gate" and can refer to the god and to the passageways connected with him." *The Temple of Janus (Janus Geminus)*, ENCYCLOPEDIA ROMANA, http://penelope.uchicago.edu/~grout/encyclopaedia_romana/imperialfora/nerva/geminus.html (last updated Apr. 1, 2017).

204. Campbell, *supra* note 192, at 116. The Janus figure is usually the launderer because he or she has ties to the more straight-forwardly criminal element as well as ties to collectors and auction houses. Mackenzie & Davis, *supra* note 202, at 723.

need to launder goods to obtain legitimacy—create various network roles.[205]

As the law stands, and perhaps because of the nature of trafficking itself, the last two elements—the dealers, museums and collectors—are the focus of restrictions, lawsuits, and prosecution.[206] The objects emerge at the point in the chain of the transaction, so naturally that is the point at which Customs, law enforcement, and foreign government attention come into play. The focus of the law is on recovery and return of stolen materials.[207] Prevention of digging and looting in the first place remains elusive.[208]

The looters themselves are generally local people, with local knowledge, living in impoverished areas.[209] The looters rarely realize much of the profit that results from the sale of the antiquities at the end-market.[210] Rather, as the antiquity moves through the four stages of the trafficking network, profit margin increases

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205. Campbell, *supra* note 192, at 117. Trafficking in antiquities involves passing the objects through a series of portals, laundering the goods, and blurring "the lines between illegal and legal markets and between criminal and legitimate participants." Morag M. Kersel, *From the Ground to the Buyer: A Market Analysis of the Trade in Illegal*, *in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 188, 189 (Neil Brodie et al. eds., 2006).

> [Material] must at some point enter the market as legitimate commodities in order for the goods to realize their full economic value. Savvy antiquities collectors understand the importance of provenience. This need for the assurance of good title (at least in appearance) has created specialized market nations, the main purpose of which is to act as a transit point from the archaeologically right country to the buying country.

Id.

206. *See, e.g.*, *Church of Cyprus*, 917 F.2d at 281, 293–94 (concerning an art dealer and gallery owner facing prosecution and eventual restrictions for purchasing stolen artifacts); *Lubell*, 569 N.E.2d at 427 (concerning a lawsuit against art collectors who were unaware they purchased a stolen painting).

207. *See, e.g.*, Treaty of Cooperation, *supra* note 58, art. III (focusing on the recovery of stolen antiquities but leaves vague the measures the United States and Mexico are to take to prevent looting in the first place).

208. *See* Yates, *supra* note 202, at 42 (discussing ineffectiveness of current international measures to eliminate illicit antiquities market).

209. *See, e.g.*, Mackenzie & Davis, *supra* note 202, at 730–31 (describing the local village labor used by Cambodian military groups in looting ancient sites).

210. *See* Jessica Dietzler, *On 'Organized Crime' in the illicit antiquities trade: moving beyond the definitional debate*, 16 TRENDS IN ORGANIZED CRIME 329, 330–331 (2013) (noting that looters "only receive around 1% of the overall profit made at the close of a sale.").

as does the specialized knowledge needed to fill the role.[211] Notable sites are located by locals, "either people living in a nearby village or those who move through the jungle or desert as part of their subsistence activities."[212] The locals, after finding a site, will either sell the information or loot the sites on their own.[213]

Early stage traffickers have local ties and arrange transport in country, often through corruption, in order to ship the antiquities on to a later stage.[214] In the case of the Mexico, local police corruption has been a persistent problem, so local police are likely implicated in the illegal transport of antiquities.[215] Speculation surrounds the extent to which drug trafficking networks and antiquities trafficking networks overlap.[216] Movement of Mexican drug cartels into archaeological sites has been documented, and other armed groups and criminal networks exist along the Mexico-Guatemala border.[217] The confluence of organized looting efforts, armed groups, drug trafficking, and political corruption could justify a connection between drug trafficking and antiquities trafficking.[218] Nevertheless, one scholar contends that,

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211. Campbell, *supra* note 192, at 116.

212. Yates, *supra* note 202, at 37.

213. *Id.*

214. In the case of the theft of the Machaquilá Stela 2 in Guatemala, the stela was stored in a fish-packing plant and concealed in a shrimp shipment to Miami. *Id.* at 37–38 (citing William J. Hughes, United States v. Hollinshead*: A New Leap in Extraterritorial Application of Criminal Laws,* 1 HASTINGS INT'L & COMP. L. REV. 149, 149 (1977)).

215. *See Hollinshead*, 495 F.2d at 1155–56 (mentioning the inference from bribery of government officials); Paul Imison, *Mexico's Efforts to Tackle Police Corruption Keep Failing*, VICE NEWS (Mar. 21, 2016), http://news.vice.com/article/mexicos-efforts-to-tackle-police-corruption-are-failing (highlighting the problematic connections between municipal police and drug cartels).

216. Donna Yates, *Displacement, Deforestation, and Drugs: Antiques Trafficking and Narcotics Support Economies in Guatemala, in* CULTURAL PROPERTY CRIME: AN OVERVIEW AND ANALYSIS OF CONTEMPORARY PERSPECTIVES AND TRENDS 23, 23–24 (Joris Kila & Marc Balcells eds., 2015).

217. *Id.* at 28.

218. *Id.* at 31. Yates' analysis centers on Guatemala, but there is no reason to think that drug trafficking networks in Guatemala end there. Rather, the linkages between drug trafficking networks in Guatemala and Mexico can justify an inference that pre-Columbian antiquities trafficking networks also run from Guatemala, through Mexico, and into the United States. *See* Christopher Woody, *Cocaine Seizures Are At a 10-Year High in Latin American Trafficking Hub*, BUSINESS INSIDER (Jan. 5, 2017, 4:08 PM), http://www.businessinsider.com/guatemala-cocaine-trafficking-seizures-10-year-high-2017-1 (showing that drug trafficking networks extend from Guatemala, through Mexico, and into the United States).

"based on the available evidence, it seems most likely that the actual cartels are not actively or specifically engaging in the looting of Maya sites or the trafficking of Maya antiquities."[219] Of course, one should not expect to see a full-scale organized criminal effort to loot antiquities, if antiquities trafficking involves antiquities networks rather than organized crime.[220] As further research on this segment of the antiquities trafficking network comes to light, scholars, policymakers, and law enforcement should continue to be wary about links between these drugs and antiquities, since antiquities trafficking networks are characterized by opportunism.[221]

Knowledge about dealers often comes from court cases and convictions. Dealers are a "chokepoint" within trafficking networks because they have the necessary expertise and connections with collectors to make them the most specialized segment of the network.[222] A common feature of dealers is that they often launder goods through countries with lax laws covering the import and export of cultural property.[223] One convicted Italian dealer, Giacomo Medici, would sell objects to Sotheby's and later purchase those same objects back from the auction house.[224] Upon repurchasing the objects, Medici left the Sotheby's labels on the

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219. Yates, *supra* note 202, at 34.

220. Campbell, *supra* note 192, at 116–18. Instead, we should expect to see opportunistic behavior from cartels rather than sustained engagement in the antiquities trade.

221. *Id.* at 114–16

222. *Id.* at 118.

223. In particular, in all of Peter Watson's case studies of convicted dealers, Switzerland was a staging post to launder goods along the way. Peter Watson, *Convicted Dealers: What We Can Learn, in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 93, 93 (Neil Brodie et al. eds., 2006). Hong Kong and Argentina are also laundering points as well. Kersel, *supra* note 205, at 189 (citing Christine Alder & Kenneth Polk, *Stopping This Awful Business: The Illicit Traffic in Antiquities Examined as a Criminal Market,* 7 ART, ANTIQUITY AND LAW 35–53 (2002)). Goods laundered from the Middle East and the Mediterranean region would be likely to go through Switzerland, but it is unclear that cultural property stolen from Mexico would be transported to Switzerland for laundering and then imported back into the United States. Mexico is not an "art market state" by which goods are laundered, but is a "geographically advantaged state" because of the border it shares with the United States. *See* Kersel, *supra* note 205, at 189, 191–92 (describing the two kinds of intermediary states before arriving in the final market).

224. Watson, supra note 223, at 94.

objects with the intent "to 'launder' illicit objects through the auction house, making it appear to the gullible that he had bought these objects on the 'open' market, and . . . the function of the auction market is to set prices."[225] By using the auction houses for some objects, prices can be set for the more worthwhile objects held in dealers' warehouses.[226]

The inventories held by these convicted dealers are astounding. Medici had nearly ten thousand objects in his warehouse, and Robin Symes, a British dealer, had seventeen thousand objects spread across twenty-nine warehouses.[227] Symes valued his own collection at $250 million.[228] Even if overvalued by double, these objects are of much higher value than those typically sold at auction, and the supply alone far exceeds what appears at the major auctions over many years.[229] If most objects never see the open market, that would counter the theory "that a tighter control of the antiquities market would only succeed in driving that market 'underground'" because the market is already underground.[230]

Lastly, the purchasers of antiquities themselves deserve attention. They are museums and private collectors. Museums and collectors, with exception, are characterized by a widespread culture of impunity with respect to foreign patrimony laws and a belief that purchasing illegal antiquities for "safe keeping" is a public service.[231] Even though there have been revisions to existing museum collecting policies—particularly discouraging the acquisition of unprovenanced artifacts—many museums continue to lack clear acquisition policies.[232]

The impetus for many of these revisions was the trial of Marion True, the former curator for the J. Paul Getty Museum, and

225. *Id.*

226. *Id.* at 95.

227. *Id.* at 93–95.

228. *Id.* at 95.

229. *Id.* at 94–95 (speculating that the best objects do not appear at auction but remain in the dealer's inventory).

230. *Id.* at 95. Watson's extrapolations are based on the observation that the major auction houses have a combined eight antiquities auctions per year in London and New York—four thousand lots total, with 2.5 items per lot. In total, that means that ten thousand antiquities are auctioned every year. *Id.*

231. Brodie & Proulx, *supra* note 193, at 400.

232. Neil Brodie & Colin Renfrew, *Looting and the World's Archaeological Heritage: The Inadequate Response, in* 34 ANNUAL R. OF ANTHROPOLOGY 343, 344–45 (2005).

her compatriots.[233] In short, the Getty, which was the wealthiest collecting institution in the United States in the mid 1980s, came under fire, with True subject to criminal prosecution in Italy.[234] The Getty ultimately had to return 46 antiquities worth $17 million to Italy, which the museum claimed it had acquired by negligence.[235] After True's trial in Italy in 2005, many other prominent museums' collections were brought to light, revealing that "many antiquities acquired from 1970 onwards . . . had been illegally excavated in Italy and exported."[236] Marion True continued to complain that the Getty abandoned her after she was charged, even though it was clear that True was aware that the antiquities she acquired were stolen.[237] It was not as if True had duped the Getty's board either; there was a memo revealing that the Getty's officers were well aware that the antiquities were stolen and knew that several artifacts were illegally excavated and smuggled out of Italy by career criminals.[238] True verified that the whole corporate body was active in acquiring trafficked antiquities, and many of the illegal antiquities that were ultimately repatriated had been purchased prior to True's term at the Getty.[239]

What was the Getty's policy at the time this all happened? Relating to acquisitions:

> [The Getty would] presume an object was on the market legitimately unless it could be proven otherwise by an authority outside the Getty. It was clearly inappropriate in circumstances where guarantees of legal trade and ownership were known to be forged and most antiquities were illegally excavated and traded clandestinely, so that it would be unlikely for authorities in countries of

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233. *See* Brodie & Proulx, *supra* note 193, at 403–407 (discussing the background of True's trial and the connections to the board of the Getty Museum).

234. *Id.* at 400.

235. *Id.* at 404 n. 13.

236. *Id.* at 400–401.

237. *Id.* at 410.

238. *Id.* at 404 (noting that those career criminals were members of the Italian mafia).

239. *Id.* at 401; *see generally* Laetitia La Follette, *Looted Antiquities, Art Museums and Restitution in the United States Since 1970*, 52 J. CONT. HIST. 669, 677 (2016) (discussing how Marion True's indictment and protection of Native American heritage have led to forcing museums' hand in repatriating stolen cultural property).

origin to have knowledge of theft or trafficking.[240]

What motivates this laissez faire approach to collection? Brodie and Proulx suggest we ought to think of illegal acquisition of antiquities by museums as corporate crime.[241] In short, museums will take ethical and legal shortcuts in a competitive market place to meet their business mandates.[242] In the museum market place, the goals are more visitors and greater prestige, which in turn results in more money given for the acquisition of new, high-quality pieces of art.[243] From the perspective of criminal pathologies, criminally tolerant organizations will attract people prone to criminal pathologies or, on the other hand, the goals of the business and particular cultural situations encourage and foster criminal conduct.[244] Ultimately, the collecting mission and financial ability of many of these museums "are likely to attract curators or other officers with a personality or psychology already inclined toward compulsive collecting."[245] Thus, both the policies and the personnel are given to taking legal shortcuts in pursuit of the organization's ultimate goals. This is not to impugn the character of museum officers and staff. Rather, it is merely meant to demonstrate the confluence of factors at play within a collecting subculture that may encourage criminal behavior and lead to the

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240. Brodie & Proulx, *supra* note 193, at 405. The Getty's stated policy now requires that all acquisitions be accompanied by provenance, and "[n]o object will be acquired without assurance that good title can be transferred. The Museum shall rigorously research the provenance of a work of art prior to acquisition to determine that it is possible to obtain good title." The J. Paul Getty Trust, *J. Paul Getty Museum Collection Policy* 3 (2016), http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf. Whether the policy is actually followed, since acquisitions are normally opaque, remains to be seen.

241. Brodie & Proulx, *supra* note 193, at 402, 415 n.10 (citing Stuart Green, *The Concept of White Collar Crime Law and Legal Theory,* 8 BUFFALO CRIM. L. REV. 1–34 (2004)).

242. *Id.* at 402–403.

243. *Id.* at 403.

244. *Id.* at 409. This would include a psychological compulsion to collect. *Id.* at 410.

245. *Id.* at 411.

maintenance of high demand in the market for illicit antiquities.[246] Such cultures of criminality and impunity should be curtailed. One hopes that ethical guidelines promulgated by international organizations and museums themselves are not just for show.

In sum, three criminogenic aspects of museum culture can be teased out: (1) institutional pressures on museum officers to violate the law in order to further the institution's goals (i.e., collecting greater numbers of prestigious antiquities); (2) museum culture that tolerates, condones, or inculcates wrongdoing, like the Getty's long tradition of countenancing the acquisition of illicit antiquities; (3) the tendency of museums to attract and employ curators with "morally flexible attitudes toward wrongdoing."[247]

What are some of the common stories that dealers and collectors tell to sidestep the high probability that they are acquiring illicit antiquities? Ricardo Elia identifies several myths persistent within the antiquities market, which are worth keeping in mind.[248] First, Elia describes the myth of the old collection,

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246. Closer attention is worth paying to museums in the United States with extensive collections of pre-Columbian artifacts, such as the Denver Art Museum, the Metropolitan Museum of Art, and the Museum of Fine Arts, Boston. Ellen Von Weigand, *Recovering Ancient America: The Ten Best Places to See Pre-Columbian Art*, THE CULTURE TRIP (Jan. 13, 2017), https://theculturetrip.com/south-america/articles/recovering-ancient-america-the-ten-best-places-to-see-pre-columbian-art/. In 1989, the Museum of Fine Arts, Boston director stated in a moment of startling clarity that,

> Museum professionals are acquirers; we are inherently greedy collectors. Most of us go into the profession because the desire to accumulate and bring together objects of quality is in our blood. . . . And to consciously or intentionally turn down a highly desirable object we can afford to buy on the basis that we suspect that it might have been removed illegally from its country of origin—and also knowing that it will end up in a collection of a rival institution or unscrupulous private collector is a very hard thing to do.

Alan Shestack, *The Museum and Cultural Property: The Transformation of Institutional Ethics*, *in* THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 93, 97–98 (Phyllis Mauch Messenger ed., 1989).

247. Brodie & Proulx, *supra* note 193, at 413.

248. Ricardo J. Elia, *Mythology of the Antiquities Market*, *in* CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION AND COMMERCE 239–256 (James A.R. Nafziger & Ann M. Nicgorski eds., 2009). According to Elia, myth fills "an indispensable function: it expresses, enhances, and codifies belief; it safeguards and enforces morality; it vouches for the efficiency of ritual and contains practical rules for the guidance of man." *Id.* at 243 (citing BRONISLAW MALINOWSKI, MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS 101 (1954)).

whereby dealers attempt to attribute the provenance to old collections in order to bypass the cultural patrimony laws in many countries.[249] Think, for example, of Mexico's cultural patrimony laws. Because the law only renders antiquities the property of the state, at least definitively, in 1972, then dealers will attribute the provenance of the antiquity to a collection older than that date.[250] This creates the impression that the artifact was outside of Mexico before it was theft to export it—to say nothing of violating export restrictions themselves. Old provenance is thus a convenient, though discredited, way of laundering cultural property because it creates plausible deniability for purchasers of illegal antiquities.[251]

Second, the myth of the chance find serves as an explanation for collectors who worry about being caught up in the traffic of stolen antiquities.[252] The myth promulgates the idea that antiquities just surface, that a farmer stumbled upon it in his field, and that collectors are better protectors of cultural properties than source countries.[253] However, the view has several issues, the chief of which is that too many new antiquities appear on the market for them all to be chance finds.[254] Additionally, it sidesteps the fact that countries, like Mexicò, have mandatory reporting laws

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249. *Id.* at 244.

250. *Id.* at 245; *see McClain II*, 593 F.2d at 671 (noting that, because of ambiguities in Mexico's earlier cultural patrimony laws, the court could not say that they vested property ownership in Mexico until the 1972 law).

251. Elia, *supra* note 248, at 245. Old provenance is "something of a joke since Karl Meyer exposed them back in 1973 in *The Plundered Past* as a convenient way for dealers to 'launder' objects that are in fact looted and smuggled." *Id.* (citing KARL MEYER, THE PLUNDERED PAST: THE TRAFFIC IN ART TREASURES 15, 40, 90 (1973)).

252. Elia, *supra* note 248, at 247.

253. *Id.* As Elia puts it,

> Finds appear accidentally, almost magically, and certainly not as a result of targeted plunder. The Myth of the Chance Find also puts the blame squarely on the source countries, which will treat an innocent finder as a thief, or will confiscate a farmer's land, and in any case will not offer a reasonable incentive for the finder to report the find. Finally, the myth validates the collecting enterprise, because given the unfavorable situation in the source country, the finder may be tempted to destroy the object or site; in these cases the collector becomes the savior by placing a value on chance finds that result in their being rescued from oblivion.

Id.

254. *Id.*

for any chance finds that render the digging and exportation illegal exercises in dominion of natural patrimony.[255]

The myths that museums and collectors tell are important for determining how to approach regulation, particularly as it relates developing provenance for antiquities, a key feature of curbing the illicit antiquities trade on the demand side. With each of these segments of the trafficking network in mind, the next section proceeds to weigh various policy suggestions in light of the realities of trafficking on the ground.

B. Policy Goals

The goal of any legal regime covering the illicit antiquities trade should be three-fold. First, because the historical and archaeological value of cultural property comes from its place in situ, Mexico has to find ways to keep the materials in the ground by keeping sites monitored and discovering new archaeological sites before diggers. Second, market countries must do more to limit the market for illicit antiquities and control demand. Lastly, market countries must create, supplement, and preserve avenues for the recovery of stolen and illegally exported cultural property. This section examines the Mexican enforcement situation, the problem of provenancing artifacts for museum acquisitions, and concludes with an examination of recently suggested improvements to U.S. law in particular.

The law covering the United States and Mexico and pre-Columbian antiquities is complex and developing. The problem of the illicit antiquities trade is global in scope, but implicates even state law claims in the United States.[256] Post-colonial concern with the repatriation of cultural property significantly shaped the

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255. Law of 1972, art. 21; Elia, *supra* note 248, at 248; Potter & Zagaris, *supra* note 70, at 670.

256. *See, e.g.*, *Church of Cyprus*, 917 F.2d at 290 (seeking to reclaim their property, the Church of Cyprus brought a suit in Indiana).

development of law in the middle of the twentieth-century.[257] Hence, the legal focus has been on recovery and return of property rather than the prevention of pillage in the first place.[258] That approach has been criticized, not only because it tends to allow archaeological knowledge to be destroyed, but because some see it as ultimately ineffective.

> Regional instability from the narcotics and people trafficking, government failure and corruption, globalization and neoliberalism, developmental inequality and deforestation are what perpetuate on-the-ground threats to Latin American cultural property . . . [I]f the goal is to protect Latin American cultural property on the ground, we must make people less poor, make people less insecure, and make Latin American governments less corrupt and more capable . . . [B]road international measures that are meant to focus on the source-end of the illicit antiquities market are likely to do very little as the underlying problems that cause cultural property threats will remain.[259]

Given the endemic problems in market countries, like Mexico, which create the conditions for looting, it may ultimately be more effective to police market country demand. That is not to say that efforts to police archaeological sites and ports of entry are pointless, but the conditions at play in Mexico should encourage sobriety about a focus on source country solutions.

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257. Lyndel V. Prott, *UNESCO International Framework for the Protection of the Cultural Heritage*, *in* CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION AND COMMERCE 257, 259 (James A.R. Nafziger & Ann M. Nicgorski eds., 2009). Resurgent national identities in the wake of decolonization—which continues today—have led to a desire on the part of former colonies to reclaim cultural property. *See, e.g.*, Charlotte Edwardes & Catherine Milner, *Egypt Demands Return of the Rosetta Stone*, THE TELEGRAPH (July 20, 2003) (Egypt sought the return of the Rosetta Stone—claimed by the French in 1799—from the British Museum). http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/1436606/Egypt-demands-return-of-the-Rosetta-Stone.html.

258. The CPIA does provide for situations of "pillage," which has proven flexible enough to handle non-conflict-related looting. *See* 19 U.S.C. § 2602(a)(1)(A) (requiring that the cultural property must be subject to pillage to warrant import restrictions). However, the CPIA did not help prevent the looting in the first place, which is generally left up to the source country. *See* 19 U.S.C. § 2602 (a)(1)(B) (requiring the requesting source country to have taken steps to protect the cultural patrimony in the first place).

259. Yates, *supra* note 202, at 42.

1. Mexico and Stolen Antiquities: Poverty, Trafficking, and Corruption

In the Mexican context, the supply-side of the antiquities trafficking equation, management of archaeological sites is the biggest obstacle. Because archaeological sites are often in poor, rural, and remote areas, unknown to authorities, or of relatively low priority, they are vulnerable to opportunistic looting and to trafficking.[260] Because Mexico's cultural patrimony law is as strong as it can get (rendering all newly excavated artifacts property of the state), Mexico must improve enforcement mechanisms, particularly with regard to proactively policing its cultural sites.[261] However, because of persistent corruption and ineffectual policing, prospects for controlling the supply of antiquities is particularly dim, especially given higher safety priorities related to drug cartels.[262]

a. Law Enforcement?

Some developments have taken place in Mexico on the enforcement front. In 2014, Mexican President Enrique Peña Nieto swore in a new Gendarmerie, a five thousand-officer arm of the federal police, tasked with combatting violent crime in high-crime areas that lacked federal police presence.[263] In August 2017, the National Gendarmerie took on a new focus: protecting archaeological sites and art history in partnership with the National Institute of Anthropology and History and the National Institute of Fine Arts.[264] Unfortunately, the Gendarmerie, which was expected to grow eight times since its inception, still has only about five thousand officers.[265] With a mandate to cover crime from

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260. *Id.*

261. Law of 1972, art. 27, 29 (showing that newly excavated archaeological monuments are property of the State).

262. *See* JUNE S. BEITTEL, CONG. RES. SERV., MEXICO'S DRUG TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF RISING VIOLENCE 1 (2011) (discussing the rapid increase in violence in Mexico and the targeting of public officials).

263. Randal C. Archibold, *Elite Mexican Police Corps Targets Persistent Violence, but Many Are Skeptical,* N.Y. TIMES (Aug. 22, 2014), https://www.nytimes.com/2014/08/23/world/americas/familiar-flaws-seen-in-mexicos-new-elite-police-force.html.

264. *Archaeology Becomes Focus of Gendarmerie,* MEXICO NEWS DAILY (Aug. 26, 2017), https://mexiconewsdaily.com/news/archaeology-becomes-focus-of-gendarmerie/.

265. *Id.*

train robberies, to illegal logging in monarch butterfly habitats, to ending illegal fishing, it is unclear how diligently the Gendarmerie will pursue its new mandate.[266] The prospects are not good. In a 2015 audit of the Federal Police as a whole, the police conducted 116 operations to prosecute crimes—down from 404 operations in 2012.[267] The persistent problems with police corruption in Mexico will likely undermine efforts to police archaeological sites that have already been located, to say nothing about locating new sites that have not yet been subject to pillage.[268]

b. Education?

A recent comment on pre-Columbian antiquities has recommended alterations of existing U.S. treaties with Mexico in order to implement education initiatives in rural areas of Mexico, to tourists, to potential smugglers, and museum officials.[269] However, most of these suggestions will likely have little effect on the trafficking of illicit antiquities.[270] Nor is there much data available on the effectiveness of existing provisions that require the implementation of educational initiatives.[271] The most questionable recommendation is the implementation of educational programs in rural areas of Mexico, it mostly assumes that the choice to loot has to do with ignorance or could be solved by education.[272] Ra-

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266. *Id.*

267. *Auditor Finds Issues with Gendarmerie*, MEXICO NEWS DAILY (Feb. 21, 2017), https://mexiconewsdaily.com/news/auditor-finds-issues-with-gendarmerie/. Interestingly, new recruits and members of the Gendarmerie were given trustworthiness tests in an effort to weed-out possible corruption; only sixteen percent of those evaluated passed the test. *Id.*

268. *See* Alasdair Baverstock, *Mexican Forces Raid Police Precinct, Find 20 Officers Had Drug Trafficking Ties*, FOX NEWS (May 26, 2016), http://www.foxnews.com/world/2017/05/26/mexican-forces-raid-police-precinct-find-20-officers-had-drug-trafficking-ties.html (highlighting persistent problems of corruption in the Mexican police force). Corruption is not limited to local police, however, but runs all the way up through governorships as well. Elisabeth Malkin, *Corruption at a Level of Audacity "Never Seen in Mexico,"* N.Y. TIMES (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/world/americas/in-mexico-mounting-misdeeds-but-governors-escape-justice.html.

269. Phelps, *supra* note 59, at 801–805.

270. *Id.* at 803–804 (acknowledging the risk these policies will be ineffectual).

271. *Id.*

272. *Id.* at 804.

ther, the choice to loot has everything to do with convenient economic choices.[273] The compensation is not immense, but poverty alters the economic calculus, and the total cultural impact of looting is hardly apparent to looters.[274]

Additionally, recommended education for would-be smugglers, art dealers, and museums would be a waste. Given the criminal element already at play in much of the smuggling, an attempted education program of criminals or grey market players will not alter their economic calculus either.[275] How would one even locate those individuals in the first place? Furthermore, museums are also the most informed about laws surrounding acquisitions and are fully capable of educating themselves anyway.[276] Given museum resistance to recommendations about provenance, more education is unlikely to make a difference.

Nevertheless, some dimensions of Phelps' suggestions are worth noting. He suggests revising the Pre-Columbian Act to provide further education to border patrol agents along the U.S.–Mexico border.[277] Customs agents are the first line of defense against cultural property trafficking, so keeping them constantly updated and informed about the types of items that are illegally trafficked is worthwhile in recovering antiquities and insuring they do not make it to market.[278]

2. The United States Market: Dealers and Museums

In 2012, the United States repatriated four thousand looted antiquities to Mexico.[279] Many of these objects were smuggled by

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273. *See* Yates, *supra* note 202, at 42 (discussing the problems of economic development as a causal factor in looting in rural areas).

274. *See* Brodie & Renfrew, *supra* note 232, at 348 ("It has, however, been well documented . . . that it is not the looters themselves who reap the full financial benefit of their activities. The price of the objects in question increase as they move up the chain.").

275. Phelps, *supra* note 59, at 805.

276. *Id.*

277. *Id.* at 802.

278. *See ICE Returns Stolen and Looted Archeological Art and Antiquities to Mexico*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Oct. 24, 2012), https://www.ice.gov/news/releases/ice-returns-stolen-and-looted-archeological-art-and-antiquities-mexico [hereinafter ICE Press Release] (discussing a massive return of antiquities—seized by U.S. border agents—to Mexico).

279. *Id.*; Derek Fincham, *U.S. Repatriates 4,000 Looted Antiquities to Mexico*, ILLICIT CULTURAL PROP. (Oct. 26, 2012), http://illicitculturalproperty.com/u-s-repatriates-4000-looted-antiquities-to-mexico/.

completely innocuous means. For example, three pre-Columbian statues were found during an inspection of an individual crossing the Lincoln-Juarez Bridge, and another pre-Columbian statue was discovered hidden in the trunk of a person's vehicle entering the Del Rio (Texas) Port of Entry from Mexico.[280] These seizures, unfortunately, do not address the underlying problems of the antiquities because they target object recovery rather than arrests, prosecutions, or market reform.[281] With the size of the illicit antiquities trade, most artifacts will not be recovered or repatriated.[282] The greatest progress in combatting the illegal antiquities trade in the United States will not come from continuing enforcement efforts of customs officials. Rather, increasing the transparency of antiquities markets and addressing issues of provenance will have a greater effect. Antiquities collectors, dealers, and the auction houses that assist them are often hidden behind a veil of anonymity.[283] Of course, any suggestion of regulation of a market with an already restricted supply must contend with the possibility that the elimination of supply to meet the demand of collectors could result in more, rather than less, illegal trade.[284]

a. Provenance

Art museums are subject to perverse incentives when it comes to protecting other countries' cultural property. As in the case of Marion True, curators have an interest in overlooking problems of provenance, especially if punishment is rare and curators have the ability to operate with impunity.[285] Neil Brodie describes the dilemma for curators in this way:

> [A]rt museum directors are responsible to their boards of trustees and can be fired if strict adherence to an ethical acquisition policy causes desirable pieces to be passed over. . . . In answer to this, it has been argued that in law trustees have a fiduciary obligation to ensure that the museum they serve does not incur a financial loss

280. ICE Press Release, *supra* note 278.

281. Fincham, *supra* note 279.

282. Brodie & Renfrew, *supra* note 232, at 348.

283. Paul M. Bator, *An Essay on the International Trade in Art,* 34 STANFORD L. REV. 275, 360 n. 146 (1982); Kersel, *supra* note 205, at 194.

284. PAUL M. BATOR, THE INTERNATIONAL TRADE IN ART 49 (1983).

285. Brodie & Proulx, *supra* note 193, at 409–10.

> through having to deaccession material for purposes of restitution, as has happened several times in recent years. This obligation can only be met by the implementation of acquisitions policies that embody strong diligence procedures to guard against the acquisition of illegal material.[286]

Museums and collectors need stricter provenance standards and must set reasonable acquisition goals so as not to require deviant behavior to achieve them.[287] External experts on museum boards, independent audits, and full publication of all acquisitions along with their provenance would increase transparency and encourage museums to abide by their own stated acquisition policies.[288] Even those otherwise hostile to essentially every legal development to curb the international antiquities trade agree that stricter provenance standards need to be adopted for museums, dealers, and auction houses.[289]

On one level, alteration of the practices surrounding provenance involves a cultural change. Traditionally, the art trade has been secretive and opaque, even within the legitimate elements of the trade.[290] The lack of transparency is probably only encouraged by the scienter element in the NSPA; the opaquer the transaction, the greater the plausible deniability concerning

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286. Neil Brodie, *Introduction, in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 1, 17 (Neil Brodie et al. eds., 2006).

287. Brodie & Proulx, *supra* note 193, 413–14; *see* Claire L. Lyons, *On Provenance and the Long Lives of Antiquities*, 23 INT'L J. CULTURAL PROP. 245, 245, 249 (discussing the technical debates and troubles surrounding provenance, especially linguistic slippage in the use of the term).

> Provenance research involves collating internal records, checking references to sales catalogues, inventories, and antiquarian publications, and deciphering inscriptions and labels that sometimes adhere to artifacts. Having to contend with poor record keeping and eccentric attributions helps develop an intuitive grasp of the antiquities trade and the personalities that operate within it. Often the trail goes cold before the most recent purchase.

Id. at 249. Incomplete provenances are especially bad in the pre-Columbian art market. Nord Wennerstrom, *Provenance Puffery at Upcoming Pre-Columbian Art Auction*, NORD ON ART (Jan. 15, 2013), https://nordonart.wordpress.com/2013/01/15/provenance-and-pedigree-more-like-puffery-at-upcoming-pre-columbian-art-auction/.

288. Brodie & Proulx, *supra* note 193, at 413.

289. Cornelius Banta, Jr., *Finding Common Ground in the Antiquities Trade Debate to Promote Pragmatic Reforms*, 53 HOUSTON L. REV. 1113, 1139–40 (2016).

290. Bator, *supra* note 284, at 311.

knowledge of whether the antiquities were stolen.[291] In order to combat the don't-ask-don't-tell policy endemic to the art trade, changes to museum and collector provenance standards need to be made. In particular, more scrutiny is needed into date of discovery, date of export, and chain of title. With the level of sophistication in laundering of antiquities, museums and collectors must be exceptionally diligent to ensure that their purchases are of legitimate antiquities.

Museum acquisition policies have thankfully developed in recent years. The MET now has a publicly available acquisition policy, which specifically addresses provenance.[292] In addition to including provenance within the criteria considered, the museum has given some detail about how provenance is determined.[293] With respect to archaeological materials and ancient art in particular, "the Museum will require sellers, donors, and their representatives to provide all information of which they have knowledge, and documentation that they possess," and the MET "normally shall not acquire a work unless provenance research substantiates that the work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970."[294] Ultimately, however, that word: "normally" seems to be far more of a caveat

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291. *See* 18 U.S.C. § 2314 (Providing that fines shall be imposed upon those "knowing the same to have been stolen").

292. *Collection Management Policy*, THE MET (Sept. 8, 2015), https://www.metmuseum.org/about-the-met/policies-and-documents/collections-management-policy [hereinafter, MET Collection Policy]. Part of the policy relates to "publication history," which may be a way for the museum to skirt otherwise ethical provenance requirements. *Id.* Renfrew argues that "some museums consider it one of the criteria for acquisition that an unprovenanced piece has already been publicly exhibited and published in a major museum exhibition," which amounts to laundering the reputation of the piece to make it more amenable for public display without protest. Colin Renfrew, *Museum Acquisitions: Responsibilities for the Illicit Traffic in Antiquities, in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 245, 245 (Neil Brodie et al. eds., 2006). It is worth noting, encouragingly, that in the intervening years since Renfrew's writing, the MET went from having no stated acquisition policy to producing one publicly on its website. *See id.* (requesting that the MET produce an acquisitions policy).

293. MET Collection Policy, *supra* note 292, at (D)(1)(a) (listing ownership history, countries located, exhibition history, publication history, ownership claims, searching stolen art databases, and circumstances of offer as criteria for consideration).

294. *Id.* at (D)(3)(a)–(b).

than at first blush because the MET "may make an informed judgment" even when the evidence is scant whether the acquisition was outside its probable country of origin before 1970 and creates special exceptions for works that were promised as gifts to the museum prior to 2008.[295] Those works that are acquired without complete documented history, including gifts, are supposed to be posted with identifying information on the Association of Art Museum Directors' website as well as the Museum's website.[296]

The MET is only one useful and highly visible example of some of the changes that have occurred to make museum acquisitions more transparent than they were.[297] Nevertheless, under the law, there is little incentive for the purchaser to inquire deeply into provenance outside of mitigating risk of having to restitute cultural property.[298] Despite stringent ethical requirements from the International Council of Museums and with some flagship museums leading the way in ethical collecting, the persistent lack of transparency protecting transactions in art may render public policy changes irrelevant.[299]

Two approaches exist for due diligence in the provenance of antiquities. The first is the soft approach, which essentially follows the path museums have been on. By applying cultural pressure, museums will publicly require more documentation in order to make an acquisition or accept a gift.[300] This approach centers on the creation and promulgation of ethical guidelines from membership organizations like the American Alliance of Museums (AAM) or the International Council of Museums (ICOM). Some deride the soft approach for its reliance on "ineffectual and obtuse codes of ethics" and encourage the "introduction of doubt into the

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295. *Id.* at (D)(3)(c).

296. *Id.* at (D)(3)(d).

297. *See* Ralph Frammolino, *Acquisition Guidelines*, SMITHSONIAN MAG., (November 2011), https://www.smithsonianmag.com/history/acquisition-guidelines-107940667/; *see also Acquisition Policy*, MIT MUSEUM, https://mitmuseum.mit.edu/services/acquisition-policies.

298. Mary McKenna, Comment, *Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property*, 12 U. PA. J. INT'L BUS. L. 83, 112–13 (1991) (referring to *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987)).

299. *See* International Council of Museums, *Code of Ethics for Museums* art. 2.3 (2004), http://archives.icom.museum/ethics.html#section2 ("Due diligence in this regard should establish the full history of the item from discovery or production.").

300. Renfrew, *supra* note 292, at 247–48.

market," particularly by providing a platform for source countries to challenge the authenticity or legality of cultural property on the market.[301]

On the opposite end of the spectrum is the presumption that antiquities offered to museums without full provenance and documentation ought to be presumed to have been excavated and exported illegally. This approach is not necessarily a legal presumption; rather it is a presumption that museums might adopt based on the number of illegal antiquities on the market. The strong response requires that a museum will not acquire an antiquity whose provenance is not fully documented.[302] Why is this presumption justified? Nearly "70% of archaeological objects that come onto the market or that are contained in recently assembled collections are without any indication of provenance."[303] The counterpoint is that "unprovenanced" can mean that the vendor is confidential, or sources are required to be kept secret, but the fact of an opaque market is likely insufficient to account for such a high percentage, especially given the number of stolen antiquities recovered by police every year.[304] The best way to curb acquisitions of illegally excavated and exported antiquities is to create

301. Yates, *supra* note 202, at 42.
302. Brodie & Renfrew, *supra* note 232, at 350.
303. *Id.* at 347.
304. *Id.*

a presumption that the artifact was illegally excavated and exported unless proven otherwise.[305] Whether that presumption could be implemented through a soft approach remains to be seen, and of course whether the political will exists for a legislative approach is, as always, an open question.[306] Nevertheless, by galvanizing consumer and public awareness around the reasonableness of such a presumption and the likelihood that an antiquity was illegally acquired, it may be possible to implement a cultural shift to acquisitions that has the same effect.[307]

b. The State of the Law

Lastly, in coming full circle, this section examines some of the legal changes that have been on offer in recent years, some of which focus on the liberalization of the antiquities market. On the whole, market liberalization seems, intuitively, to be the last thing that the antiquities market needs, given that it has been unwilling and unable to rid itself of the glut of illegally acquired, exported, and imported antiquities.

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305. Simon Mackenzie, *Do We Need A Kimberley Process for the Illicit Antiquities Trade?: Some Lessons to Learn from a Comparative Review of Transnational Criminal Markets and Their Regulation, in* COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD'S HERITAGE 151, 151–53 (France Desmarais ed., 2015). The market could implement the Kimberley Process for antiquities. According to Mackenzie,

> The Kimberley Process is an import-export chain-of-custody certification scheme which requires participating governments to certify the origin of rough diamonds with the aim of preventing conflict diamonds entering the global market. The certification process requires that rough diamonds must move through the international market with standardized certificates. These include information such as the identities of the exporter and importer, and the value of the shipment. Member States are required to ensure that no shipment of rough diamonds is imported from or exported to a non-Kimberley country.

Id. at 152. Problems exist with the Kimberley Process—problems suffered by the antiquities trade—which may render it a non-starter if those problems could not be overcome. *Id.* at 159. For example, the process suffers from low governmental interest, vested industry interests, industry secrecy, corruption, lack of public scrutiny, etc. *Id.* Since all of these problems are present in the antiquities trade as well, there is good reason to think that conclusion is justified. *Id.*

306. Additionally, what would the presumption do to litigation and the *scienter* requirement in the NSPA? One could argue that the presumption that an antiquity is stolen would undermine the traditional *mens rea* requirement for criminal liability.

307. *See* Mackenzie, *supra* note 305, at 159–60 (discussing the parallels between the guilt strategy, the illegal trade in wildlife, and antiquities).

One position put forward by Cornelius Banta recommends implementing major changes to the CPIA and the *McClain* doctrine, which were recommended by dealer and collector lobbyists when the CPIA was initially debated.[308] Additionally, it recommends passing the Moynihan Amendment, which would have overturned the *McClain* decision by statute.[309] These reforms are in the service of the creation of a large "licit market" in antiquities.[310] Essentially, the recommendations amount to implementing every major policy wish of the museum and dealer lobbyists surrounding the passage of the CPIA, a prospect that ought to alarm those concerned with curbing demand for antiquities.[311]

The Moynihan Amendment would have overturned *McClain* in order to allegedly harmonize the NSPA and proposed-CPIA.[312] The NSPA was thought to be too broad of a tool to police the illegal antiquities trade.[313] The application would have been cabined to antiquities that were shown to be looted from a specific site or that had been documented as stolen from an inventory—a particularly high bar.[314] However, the scienter requirement found in the NSPA, and in the deployment of the NSPA in *McClain* and *Schulz*, should be sufficient to prevent the prosecution of end-buyers of antiquities; there is always plausible deniability of knowing that the object was illegally excavated and exported.[315]

The expansion of a so-called licit market in antiquities along with the dismantling of criminal and civil penalties and import

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308. Banta, *supra* note 289, at 1134, 1140.

309. *Id.*

310. *Id.* at 1137–40. Banta argues that *McClain* has essentially been ineffective and has merely pushed antiquities trading to be *more secretive*. *Id.* at 1134 (citing Derek Fincham, *Why U.S. Criminal Penalties for Dealing in Illicit Cultural Property are Ineffective, and A Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 645 (2007)).

311. Sokal, *supra* note 13, at 39–41.

312. William G. Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 CARDOZO ARTS & ENT. L.J. 561, 595–96 (2014); Banta, *supra* note 289, at 1142–43.

313. *Id.* at 595 n. 76.

314. *Relating to Stolen Archeological Material: Hearing on S. 605 Before the S. Subcomm. on Crim. Law of the S. Comm. on the Judiciary*, 99th Cong. 4–5 (1985) (statement of Sen. Daniel Moynihan); Pearlstein, *supra* note 312, at 596 n. 78; Banta, *supra* note 289, at 1143.

315. *McClain I*, 545, F.2d at 1000-01; Sokal, *supra* note 13, at 39–41.

restrictions would result in the creation of massive space for illegal antiquities—that is, antiquities taken in contravention of foreign property law—to be trafficked with impunity. Banta assumes that the rollback of regulation and criminal penalties would somehow allow for a legitimate market to develop, but it would require ignoring the cultural patrimony laws of source countries.[316] This suggestion misunderstands what *McClain* and *Schulz* actually held. Neither case allows foreign law to determine the meaning of "stolen."[317] The court in Portrait of Wally discussed the distinction thusly: "Under both the McClain cases . . . federal law controls the question of whether an item is stolen, and local law . . . controls the analytically prior issues of . . . whether any person or entity has a property interest [in] it."[318]

On a more basic level, the idea of a large licit antiquities market relies on the assumption that there would be licit antiquities if the CPIA and NSPA were rolled back. Of course, it would require every source country to repeal their cultural patrimony laws. The *McClain* doctrine is a natural outworking of common law principles related to the meaning of the word "stolen."[319] Banta argues accordingly that the NSPA "should only apply to antiquities taken from an individual who has a real possessory interest in the object."[320] It is unclear what he means by this. It could mean that no one owns the antiquities that have not yet

316. Banta, *supra* note 289, at 1144 ("the [proposed] bill would ensure U.S. citizens are not held criminally liable under a foreign country's law for 'stealing' goods that ran against the common-law sense of the term."); *see* Watson, *supra* note 223, at 95 (arguing that most antiquities remain underground and have been underground before current law developed, challenging the hypothesis that the law is pushing antiquities underground). The hope for market liberals seems to be that once markets are liberalized, illegally-acquired antiquities will no longer be illegal, and the antiquities stored up in warehouses will be unleashed on the market. *See* Banta, *supra* note 289, at 1142–43.

317. *See Schultz*, 333 F.3d at 409–10; *McClain I*, 545 F.2d at 1000–03.

318. *Portrait of Wally*, 105 F. Supp. 2d at 292.

319. *McClain I*, 545 F.2d at 992

320. Banta, *supra* note 289, at 1144 n. 267. One might assume that "individual" applies to museums (corporate persons, but not individuals) as well as private collectors (true "individuals"). Whether a sovereign has a real possessory interest over antiquities located on public lands may be worth examining further. Presumably a Mexican citizen living in Mexico and in possession of an unregistered antiquity would have some possessory interest in the property, even though the property is that of the Mexican government. *See* Potter & Zagaris, *supra* note 70, at 668–69 (discussing Mexico's patrimony law). The real possessory interest of the individual (like a lease) would not necessarily overcome the presumption that the true owner is the Mexican government.

been excavated—or at least it would in effect because the national patrimony laws of Mexico would cease to define property ownership.

From Banta's standpoint, greater access to licit antiquities will reduce looters and destructive collection of antiquities.[321] However, tapping into cultural resources as if they were any other resource would require significant periods of archaeological study of the archaeological sites. Dismantling monuments and statuary would amount to destroying the site and render further research on the site impossible. Additionally, Mexico would have to have an extensive regulatory apparatus to police the sites, prioritize those individuals who are authorized to legally exploit resources, and continued policing of sites to ensure that excavation is conducted according to the law.[322] Why is cultural artifact exploration in liberalized markets problematic?

> From the standpoint of the archaeologist or anthropologist, it is not simply the artifacts themselves that are important, but the information which their study and publication can offer when taken into consideration along with the detailed circumstances of their discovery. By rewarding looters through the acquisition of "unprovenanced" material, museums are directly subscribing to the ongoing process of clandestine excavation and hence to the destruction of the contextual information which is the central component of the world's archaeological heritage. By allowing the acquisition of such material, museum directors and trustees are betraying the principle that archaeological heritage should not be destroyed.[323]

Distaste for CPIA import controls does not just come from

321. Banta, *supra* note 289, at 1139.

322. Cultural internationalists are remarkably tone deaf to post-colonialism and indigenous interests in the preservation of cultural property. *See* Catherine Bell, *Repatriation of Cultural Material to First Nations in Canada: Legal and Ethical Implications*, *in* CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION AND COMMERCE 81, (James A.R. Nafziger & Ann M. Nocgorski eds., 2009) (discussing post-colonialism in the context of repatriating stolen artifacts).

323. Brodie & Renfrew, *supra* note 232, at 349.

those who want a legitimate antiquities market.[324] Donna Yates, a critic of recent approaches to the antiquities trade, argues that object-specific legislation, rather than location-specific legislation, is preferable.[325] Because the location of origin of many cultural artifacts from Central and South American countries are difficult to locate, object-specific legislation can ban whole classes of objects that come from a certain region, thus avoiding the problem of determining the source country.[326] As it now stands, the CPIA can only place restrictions on classes of artifacts coming from individual countries, but types of artifacts do not conveniently fall within modern national borders.[327] Therefore, a reexamination of the 1972 Pre-Columbian Act may help spur more object-specific bans, which is likely an easier avenue for import controls than the onerous process under the CPIA.[328]

During the CPIA drafting process, Mark Feldman, the originating drafter of both the Pre-Columbian Act, the Treaty of Cooperation, and the CPIA, proposed a bilateral option for import controls.[329] Ultimately, that provision did not end up in the CPIA, but in light of the Pre-Columbian Act, Mexico likely would not benefit

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324. Banta critiques the lack of reporting requirements and review of import restrictions put in place by CPAC through the CPIA import restriction application process.. Banta, *supra* note 289, at 1141. Regardless of the merits of this complaint, Mexico can still utilize the Treaty of Cooperation and the Pre-Columbian Act to do many of the things that other countries can only accomplish via the CPIA.

325. Yates, *supra* note 202, at 42.

326. *Id.*; *see Government of Peru*, 720 F.Supp. at 812 (observing the trouble created for proving Peruvian ownership of the artifacts because similar artifacts had been excavated in other countries). Additionally, object-specific *export* limitations for source countries may help avoid the problem that Paul Bator identified as early as 1982: "[t]he broader and more inclusive the embargo, the more difficult it is, physically and economically and politically, to enforce effectively." Bator, *supra* note 284, at 319. If import controls are *too* broad, they ultimately become too cumbersome to enforce and can even create perverse incentives by pushing people into a black market. *Id.* at 317.

327. *See Government of Peru*, 720 F. Supp. at 812 (noting the ambiguity of the artifacts' country of origin because they were similar to artifacts found in countries around Peru).

328. 19 U.S.C. § 2091; Yates, *supra* note 202, at 42.

329. Mark B. Feldman, *Comments by Mark Feldman Prepared for Symposium: Reform of U.S. Cultural Property Policy: Accountability, Transparency, and Legal Certainty*, Committee for Cultural Policy (Apr. 10, 2014), https://committeeforculturalpolicy.org/comments-by-mark-feldman-prepared-for-symposium-reform-of-u-s-cultural-property-policy-accountability-transparency-and-legal-certainty/.

greatly from bilateral import controls. The Pre-Columbian Act already allows import restrictions on monumental or architectural sculptures or murals that were fixed or immobile, including fragments of the sculptures or murals as well.[330] Movable objects are left uncovered, unfortunately, but amending the Pre-Columbian Act to include them could strengthen Mexico's access to import controls.[331]

Pre-Columbian artifacts are not the only antiquities worth protecting in Mexico. Recently, demand for Spanish colonial art has risen, which has led to looting of churches in Central and South America, with the primary markets in Spain and the United States.[332] The relative invisibility of Spanish colonial art in the literature on Mexican antiquities—most attention is paid to pre-Columbian artifacts—warrants a reassessment of the trafficking of these artifacts. One difference from pre-Columbian artifacts, however, is that Spanish church art is more visible, whereas many pre-Columbian artifacts are discovered in remote areas at little known sites.[333] This renders recovery of Spanish religious art more amenable to replevin suits like those in *Church of Cyprus*.[334] This is an area of Mexican antiquities that is unprotected by the CPIA and the Pre-Columbian Act.[335] The Treaty of Cooperation does cover "art objects and religious artifacts of the colonial periods," but the art must be of "outstanding importance to the national patrimony" in order to invoke the treaty for the art's return.[336] The subjective standard may make colonial art unrecoverable outside general Customs seizures or NSPA and replevin claims.

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330. 19 U.S.C. § 2092, 2095.

331. 19 U.S.C. § 2095(3)(A), (B); *see supra* note 85 (accompanying text).

332. Kersel, *supra* note 205, at 190.

333. Forrest D. Colburn, *From Pre-Columbian Artifact to Pre-Columbian Art*, 74 REC. OF THE ART MUSEUM, PRINCETON U. 36, 37–38 (2005).

334. *Church of Cyprus*, 917 F.2d at 290. Visibility of the art and the ability for government officials to spread word to other governments, institutions, auction houses, and museums increases the likelihood of locating the art and recovering it. *Id.*

335. The Pre-Columbian Act only applies to pre-Columbian antiquities (obviously), but the definitions of "archaeological" or "ethnological" under the CPIA do include colonial religious art found in churches in Mexico. 19 U.S.C. § 2601(2).

336. Treaty of Cooperation, *supra* note 58, art. 1.

IV. CONCLUSION

Given the foregoing, one can see that the law and policy surrounding the antiquities trade is clearly a patchwork, which largely developed during the glut of interest in the phenomenon during the 1960s and 1970s. Today, that law is as contested as it is vital. However, the law alone is insufficient to curb the trade in illicit antiquities. Customs enforcement, museum and collector self-policing, and law enforcement presence at archaeological sites in Mexico is necessary to make the system work. Persistent opaqueness of the antiquities market makes enforcement difficult, and increasing market transparency—especially in museum acquisitions and art auctions—would be a step in the right direction. Changes in museum acquisition policies, especially with regard to provenance, are welcome, but research is required to determine whether museums actually adhere to those policies. Because the scope of the problem is international, the international legal framework and country participation should be bolstered rather than dismantled as market liberalizers suggest. On that score, the work of ICOM in facilitating partnerships and information sharing is important.[337] Likewise, the U.S. State Department's database of illicit antiquities also aids in enforcement and can assist museums and private collectors in insuring whether their acquisitions are above board.[338]

At root, many of these changes in practices are driven by culture, and the hope is that over time the scale of antiquities looting and trafficking will change the purchasing behavior of collectors. Instability in Mexico—due in large part to the more pressing priority of drugs, corruption, and violence—make the likelihood of controlling supply and securing archaeological sites rather dim.[339] The possibility of bilateral law enforcement efforts relating to archaeological sites would be an interesting development, but souring relations between the United States and Mexico may limit the

337. *See, e.g., Emergency Red List of Cultural Risk – Yemen,* INTERNATIONAL COUNCIL OF MUSEUMS, http://icom.museum/resources/red-lists-database/red-list/yemen/ (last visited Mar. 7, 2018) (notifying the public that ICOM has published its list of endangered antiquities from Yemen).

338. *Photo Guides for Import Restrictions, supra* note 44.

339. *See* BEITTEL, *supra* note 262, at 1.

possibility.[340] Curbing demand is thus a more realistic way to combat the trade. Nevertheless, we can continue to hope for a resurgence in interest in protecting antiquities in a time where Iraq and Syria's archaeological heritage continues to suffer pillage, and perhaps a time where Mexico again rallies other countries to the cause and where market countries, like the United States, are willing to lend a hand.

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340. *See* Justin Chapman, *The Future of U.S.-Mexico Relations is Unpredictable*, PAC. COUNCIL ON INT'L POL. (Feb. 10, 2017), https://www.pacificcouncil.org/newsroom/future-us-mexico-relations-unpredictable (discussing the impacts of souring U.S.-Mexico relations).