

EVALUATING THE APPLICATION OF THE NATIONAL STOLEN PROPERTY ACT TO ART TRAFFICKING CASES

In 1934 Congress legislated the National Stolen Property Act (“NSPA”)¹ to coordinate federal and state prosecution of the illegal interstate movement of fraudulent securities, counterfeit money, and stolen goods.² In recent years, however, federal attorneys have used the NSPA to prosecute the illegal importation of cultural property³ into the United States. After summarizing the problems presented by the illicit art trade in Part I, and outlining the goals of a legitimate art trade in Part II, in Parts III and IV this Recent Development analyzes the effectiveness of applying the NSPA to cases involving cultural property. The analysis proceeds in Part V by considering whether the use of the NSPA to prosecute art trafficking conflicts with the Convention on Cultural Property Implementation Act (“CPIA”),⁴ which implemented U.S. treaty obligations under the 1970 United Nations Educational, Scientific and Cultural Organization Convention (“UNESCO 1970”).⁵ This Recent Development concludes that such an application of the NSPA potentially violates Congress’s more recent statement of U.S. policy regarding cultural property in the CPIA. Following this assessment are recommendations for how to enhance the effec-

¹ The National Stolen Property Act extended the National Motor Vehicle Theft Act to other property. See Pub. L. No. 73-246, 48 Stat. 794 (codified at 18 U.S.C. §§ 2314–2315 (2006)).

² 18 U.S.C. § 2314; see also *United States v. Sheridan*, 329 U.S. 379, 384 (1946); *United States v. McClain*, 545 F.2d 988, 994 (5th Cir. 1977) (“The apparent purpose of Congress in enacting stolen property statutes was to discourage both the receiving of stolen goods and the initial taking . . .”) (citing *United States v. Gardner*, 516 F.2d 334, 349 (7th Cir. 1975)); *United States v. Bolin*, 423 F.2d 834, 838 (9th Cir. 1970); *United States v. Patten*, 345 F. Supp. 967, 968 (D.P.R. 1972)); George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYR. J. INT’L L. & COM. 77, 88–91 (1978) (describing Congress’s intent in legislating the NSPA and the disjuncture between this legislative intent and its subsequent application to cultural property cases).

³ A community’s designation of an object as “cultural property” links that piece to a collective identity. “‘Cultural property’ refers to those objects that are the product of a particular group or community and embody some expression of that group’s identity, regardless of whether the object has achieved some universal recognition of its value beyond that group.” Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569–70 (1995).

⁴ 19 U.S.C. § 2601 (1983).

⁵ See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO 1970]. After World War II, UNESCO emerged as the preeminent international organization charged with protecting cultural property. The post-war cooperation among nations led to the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict. Years later, as international focus shifted towards regulating the peacetime art trade, UNESCO’s efforts led to the creation of the 1970 Convention. See Teresa McGuire, *African Antiquities Removed During Colonialism; Restoring a Stolen Cultural Legacy*, 1990 DET. C.L. REV. 31, 39, 46 (1990) (describing the role of UNESCO after World War II); see also John Merryman, *Free International Movement of Cultural Property*, 31 N.Y.U. J. INT’L L. & POL. 1, 3–4 (1998) (describing the UNESCO’s role in forging the “modern period” of cultural property protection).

tiveness of the NSPA in prosecuting art trafficking cases by bringing the NSPA's application into greater accord with the CPIA and with cultural internationalist interests. Such a shift in the use of the NSPA would also have the effect of promoting a limited, licit art trade.

I. THE PROBLEM OF ILLICIT TRAFFICKING IN CULTURAL PROPERTY

The adverse consequences of the illicit art trade underscore the need for greater regulation. In a landmark 1969 article,⁶ archaeologist Clemency Coggins demonstrated that a principal danger posed by the illicit art trade was the loss of vital historical and archaeological data that occurs when a cultural artifact is hastily removed from its original location.⁷

Art trafficking and the loss of cultural property can also threaten modern national identity because "the art of a society is both a manifestation and a mirror of its culture" and consequently, the loss of cultural property may disrupt the processes through which citizens shape their national identities.⁸ Other scholars have gone beyond this nationalist understanding of cultural property to emphasize the loss to all people that follows from the destruction of any culture's objects.⁹

Economic consequences also follow from the illicit art trade: UNESCO estimates the annual value of the illegal art trade at \$6 billion, second in value only to the illegal narcotics trade.¹⁰ An unquantifiable consequence of the illicit art trade is the tension trafficking establishes between source and market nations.¹¹ The trade operates as a global exchange between financially poor, artifact-rich source nations and wealthy but artifact-poor market nations. The stress between source and market nations is exaggerated by the historical and colonial experiences of the two groups of countries.¹² The transnational effects of the illicit art trade present a unique set

⁶ See Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969) (providing a case study of the decontextualization of Pre-Columbian artifacts).

⁷ *Id.*

⁸ Paul Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 304 (1981).

⁹ See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 831-32 (1986).

¹⁰ See *Trafficking in Art Objects Next Only to Narcotics Trade: UNESCO*, NAVHIND TIMES, Sept. 7, 2005, available at <http://cpprot.te.verweg.com/2005-September/001638.html> (last visited Oct. 31, 2006). But see Kate Fitz Gibbon, *The Illicit Trade—Fact or Fiction?*, in WHO OWNS THE PAST? 179, 179-180 (Kate Fitz Gibbon ed., 2005) (disputing the current valuation of the illicit art market and further criticizing comparisons of the art market to the illicit narcotics and armaments trades).

¹¹ Merryman defines "source nations" as those that are rich in cultural artifacts, such as Egypt or Mexico. By contrast, demand exceeds supply in market nations like Japan or the United States. Thus, "[d]emand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property." Merryman, *supra* note 9, at 832.

¹² See Kwame Anthony Appiah, *Whose Culture Is It?*, N.Y. REV. OF BOOKS 2, 38-41 (Feb. 9, 2006); see also McGuire, *supra* note 5, at 32-34.

of challenges to any attempt to regulate the art trade. The application of the NSPA to cases involving art trafficking, evaluated in Part IV of this Recent Development, must be assessed in light of these pressures.

II. THE GOALS OF A LEGITIMATE ART TRADE

Any measure of the effectiveness of the NSPA in combating the problems described above must also consider the goals of a legitimate art trade. Paul Bator has described a limited set of principles that should inform any legal regime regulating the art trade.¹³ These core values include: (1) the preservation of site-specific monuments and other endangered works;¹⁴ (2) the national retention of a limited selection of cultural property; and (3) trade that does not threaten any nation's cultural heritage.¹⁵ The principles summarized by Bator reflect both nationalist and internationalist interests in cultural property.¹⁶ Cultural nationalists stress a close link between an object and the culture that created it, usually embodied in a nation-state.¹⁷ Nationalist scholars therefore favor a strong regime of national retention of cultural patrimony.¹⁸ By contrast, cultural internationalists emphasize a looser, more universal relationship between

¹³ Bator, *supra* note 8. Bator's description of the goals of a legitimate art trade provides an apt framework for evaluating legal regulation of the international art market because it attempts to balance both cultural nationalist and internationalist arguments. His work has also been cited in the precedent cases. See *McClain*, 545 F.2d at 996 n.13; see also *United States v. Schultz*, 178 F. Supp. 2d 445, 449 (S.D.N.Y. 2002).

¹⁴ On this point Coggins has advocated that "[t]he ideal scenario is to leave antiquities underground (unless threatened by construction or public works), where they have rested safely for centuries, having established a stable physical equilibrium that will be destroyed on exposure to the modern environment. Such hands-off stewardship of the past is a conservation initiative. Cultural heritage is a non-renewable resource that must be depleted very cautiously, very conservatively, and above all, very *consciously*." Clemency Coggins, *Cultural Property and Ownership: Antiquities*, 16 CONN. J. INT'L L. 183, 186 (2001).

¹⁵ Bator, *supra* note 8, at 309–10. To distinguish between works for retention and works for the market, the scholarship of James Cuno is useful. Cuno distinguishes between "cultural patrimony," which should be nationalized, and other "cultural property," which should be free to travel. "For example, all old bells are cultural *property* but the Liberty Bell is cultural *patrimony*. Cultural *patrimony*, in other words, suggests a level of importance greater than that of cultural *property*. It is not something owned by a people, but something *of* them, a part of their defining identity." James Cuno, *Museums and the Acquisition of Antiquities*, 19 CARDOZO ARTS & ENT. L. J. 83, 84–85 (2001) (emphasis in the original). See also David Rudenstine, *The Rightness and Utility of Voluntary Repatriation*, 19 CARDOZO ARTS & ENT. L.J. 69, 76 (2001). (distinguishing cultural patrimony from cultural property, noting that "[i]t must be emphasized that cultural patrimony is a much smaller and narrower group of antiquities than the broad term cultural property").

¹⁶ See Bator, *supra* note 8, at 294–95, 308–09 (suggesting preferable goals for those "who are willing to set aside the narrowest nationalistic perspectives").

¹⁷ See Merryman, *supra* note 9, at 832 ("Another way of thinking about cultural property is as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the 'repatriation' of cultural property.").

¹⁸ See Merryman, *supra* note 9, at 831–32.

an art object and the “common human culture.”¹⁹ Consequently, internationalists stress the need for cultural property to move relatively freely.²⁰ The competing values advocated by cultural nationalists and internationalists are reflected in the judicial opinions examined in Part III that apply the NSPA to art trafficking. Having described the unique challenges posed in regulating the art trade in Part I, as well as outlining some key goals of a lawful trade, this Recent Development next considers the effectiveness of applying the NSPA in prosecuting art trafficking cases and promoting the goals of a limited, licit, international art trade.

III. THE APPLICATION OF THE NATIONAL STOLEN PROPERTY ACT TO ART TRAFFICKING CASES

The NSPA criminalizes the importation or interstate transport of goods worth \$5,000 or more when the defendant acts “knowing the same to have been stolen, converted or taken by fraud.”²¹ In the three leading cases, *United States v. McClain*,²² *Peru v. Johnson*,²³ and *United States v. Schultz*,²⁴ U.S. courts have considered whether to recognize foreign nationalizing legislation, also known as omnibus statutes,²⁵ as sufficient to fulfill the definition of “stolen” goods under the NSPA.

In *McClain*, decided in 1977, the Fifth Circuit considered the application of the NSPA to the export of cultural property from Mexico.²⁶ While there was clear evidence that Mexico’s nationalizing statute applied to the Pre-Columbian artifacts in the case, there was no evidence proving when the pieces had entered the United States.²⁷ Since prosecutors could not establish the timing of the importation with greater precision, a conviction under the NSPA appeared difficult.²⁸ U.S. prosecutors overcame this legal obstacle by showing that the artifacts were “stolen” because Mexico had

¹⁹ Merryman, *supra* note 9, at 831 (“One way of thinking about cultural property . . . is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”).

²⁰ See Merryman, *supra* note 9, at 831–32.

²¹ 18 U.S.C. § 2314 (2000).

²² 545 F.2d 988 (5th Cir. 1977).

²³ 720 F. Supp. 810 (C.D. Cal. 1989).

²⁴ 178 F. Supp. 2d 445 (S.D.N.Y. 2002).

²⁵ Nationalizing statutes can range from less-intrusive screening mechanisms to total embargoes of the export of cultural property. In the cases discussed here, the nationalizing statutes aimed to prevent the export of any cultural property from the foreign state and also established constructive ownership of the artifacts. This state ownership applied to both discovered and undiscovered works. See Bator, *supra* note 8, at 314 (describing the history and content of different omnibus statutes).

²⁶ See *McClain*, 545 F.2d at 991–92.

²⁷ See *id.* at 992 (“The government presented no evidence as to how and when the artifacts were acquired in Mexico, nor as to when the pieces were exported.”).

²⁸ Bator, *supra* note 8, at 347–48 (describing the challenge to prosecutors in demonstrating that the defendant fulfilled the general knowledge requirement of NSPA liability).

nationalized all Pre-Columbian artifacts in 1972.²⁹ Since the government of Mexico had owned the artifacts, the defendants must necessarily have stolen the property by illegally removing it from Mexican territory.³⁰ This finding depended on the court's acceptance of the Mexican nationalizing statute and the propriety of applying Mexican law in U.S. courts. *McClain* was significant for its deference to a foreign statute in defining "stolen" property under the NSPA. However, this deference was qualified with "the proviso that a clear national ownership law has to have been enacted before an object was taken for the object to be considered stolen."³¹

The *McClain* decision raised considerable concern in the U.S. art community about the legitimacy of all Mexican objects imported into the country since 1972.³² In 1989, however, one court retreated from *McClain*'s broad deference to foreign omnibus statutes. In *Peru v. Johnson*, the Government of Peru brought a civil action to recover native objects from an American collection.³³ The Government of Peru alleged that the objects at issue were stolen under the NSPA because in 1822 Peru had nationalized its entire cultural patrimony, both discovered and unexcavated.³⁴ Peru's argument was consistent with the reasoning of the *McClain* court. However, in contrast to the holding in *McClain*, the *Johnson* court found that Peru had not actively enforced its own omnibus statutes.³⁵ Consequently, the court reasoned, Peru had enacted only export controls and had not gone so far as to establish ownership over the disputed cultural property.³⁶ Since the goods were never the property of Peru, the artifacts were not stolen for NSPA purposes.³⁷ The *Johnson* court held that U.S.

²⁹ The lower court accepted the prosecutors' suggestion that Mexico nationalized its artifacts in 1897; however, the Fifth Circuit found that nationalization occurred in 1972. See *McClain*, 545 F.2d at 1000. Since Mexico established constructive ownership of the artifacts when it implemented nationalizing legislation in 1972, the removal of the works from Mexican territory after this time constituted theft for NSPA purposes. See Bator, *supra* note 8, at 348.

³⁰ See *McClain*, 545 F.2d at 1000–01 ("We hold that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen,' within the meaning of the [NSPA]. Such a declaration combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the NSPA into play.')

³¹ Alexi Shannon Baker, *Selling the Past: United States v. Frederick Schultz*, ARCHAEOLOGY, Apr. 22, 2002, available at <http://www.archaeology.org/online/features/schultz/criminal.html>. This qualification precluded foreign nations from passing nationalizing statutes and then seeking restitution from American collections in U.S. courts under the NSPA. See *id.*

³² See *McClain*, 545 F.2d at 991 ("Museum directors, art dealers, and innumerable private collectors throughout this country must have been in a state of shock when they read the news if they did of the conviction of the five defendants in this case.')

³³ See *Johnson*, 720 F. Supp. 811 (C.D. Cal. 1989).

³⁴ See *id.* at 811–13.

³⁵ See *id.* at 814.

³⁶ See *id.* ("There is no indication in the record that Peru has ever sought to exercise its ownership rights in such property, so long as there is no removal from that country. The laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions')

³⁷ See *Johnson*, 720 F. Supp. at 815.

courts would recognize foreign omnibus statutes only when the foreign nation had actively enforced its own nationalizing laws.³⁸ The holding in *Johnson* may also be attributable, in part, to the fact that the objects in question were duplicates—works for which many similar examples exist.³⁹ There is a stronger cultural internationalist argument in favor of allowing duplicate forms of cultural property to travel. This allows for a more universal disbursement of the works, and also better provides for their preservation, which source nations often cannot afford.⁴⁰

*United States v. Schultz*⁴¹ built upon *McClain* and *Johnson* and confirmed the *McClain* doctrine that a foreign omnibus statute could be used as the basis for domestic NSPA prosecution.⁴² At trial the government proved Frederick Schultz's heavy involvement in the illegal excavation of numerous Egyptian cultural objects, including a relief which was mutilated for export.⁴³ After demonstrating the defendant's involvement, the key issue for the government in *Schultz* was establishing that the goods were "stolen" under the NSPA. To make this argument, the government relied on the precedent in *McClain* to show that Egypt had nationalized the objects in 1983.⁴⁴ The dispositive issue in *Schultz* was whether the Egyptian statute was more like the vague Peruvian export controls in *Johnson* or the more precise nationalizing statute of Mexico recognized in *McClain*. After considering expert testimony from Egyptian officials, the District Court for the Southern District of New York ruled that the Egyptian statute, while not precise, had established Egypt's rightful ownership of the artifacts.⁴⁵ As in *McClain*, the *Schultz* court held that a foreign nationalizing statute was an appropriate source for defining whether goods were stolen under the NSPA.⁴⁶

³⁸ See *id.* at 814–15.

³⁹ See *id.* at 812 ("The 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 archeological monuments in Bolivia and Ecuador.").

⁴⁰ See Gordon Gaskill, *The Smuggle History*, ILLUSTRATED LONDON NEWS, June 14, 1969, at 28. Paul Bator also notes that in the view of the art community, "the practice of exporting antiquities has materially aided the preservation of the artistic patrimony of mankind. . . [e]xport may thus put a work of art into hands far more eager and able to conserve it than any available at home." Bator, *supra* note 8, at 297.

⁴¹ 178 F. Supp. 2d 445 (S.D.N.Y. 2002).

⁴² See *id.* at 448–49.

⁴³ Alexi Shannon Baker, *Selling the Past: United States v. Frederick Schultz*, ARCHAEOLOGY, Apr. 22, 2002, available at <http://www.archaeology.org/online/features/schultz/trial.html>.

⁴⁴ See *Schultz*, 178 F. Supp. 2d at 446.

⁴⁵ See *id.* at 448–49.

⁴⁶ See *id.*

IV. EVALUATING THE EFFECTIVENESS OF THE NATIONAL STOLEN PROPERTY ACT

McClain, *Johnson*, and *Schultz* remain the most prominent art trafficking cases. The use of the NSPA in these cases raises questions about how well it advances the ideals of a legitimate international art market described in Part II of this Recent Development. The NSPA, although not originally enacted to ensure the preservation of cultural property, successfully provides for preservation interests in multiple ways. By supporting nations' efforts to retain archaeological works, the NSPA promotes the preservation of artifacts, especially monumental and site-specific works such as the looted relief in *Schultz*. The national restitution of monumental works, as witnessed in *Schultz*, aligns well with Coggins's argument about the need to avoid the decontextualization of this form of cultural property. The *Johnson* court's hint in dicta that duplicates should travel also encourages the preservation of these artifacts, which source countries often lack the resources to care for adequately.⁴⁷ That U.S. courts will only enforce omnibus statutes where the foreign government has taken active steps to enforce its laws, according to the *Johnson* court, also encourages these states to preserve their own cultural property. The reservation of U.S. courts as a forum to settle cultural property disputes for cases in which the foreign government has actively protected its cultural property provides an incentive for foreign states to actively preserve their heritage.

Despite its potential benefits, the NSPA also fails to account for other goals of a legitimate art trade by granting broad judicial deference towards the incorporation of foreign omnibus statutes. The NSPA will enforce foreign statutes even when they are over-inclusive, as in *McClain*,⁴⁸ so long as these statutes are sufficiently specific about government ownership, as was the Egyptian statute in *Schultz*.⁴⁹ This aspect of the NSPA defers too heavily to cultural nationalism. By wholly incorporating foreign nationalizing legislation, the current application of the NSPA potentially encourages arbitrage and the development of a black market by driving the art trade underground.⁵⁰ In spite of the use of nationalizing stat-

⁴⁷ See *Johnson*, 720 F. Supp. at 812. See also Karen S. Jore, *The Illicit Movement of Art and Artifact: How Long will the Art Market Continue to Benefit from Ineffective Laws Governing Cultural Property?*, 13 BROOK. J. INT'L L. 55, 70–71 (1987) (citing Turkey as a case study of strong nationalizing laws coupled with weak enforcement and heavy looting).

⁴⁸ See 545 F.2d at 997–1000 (examining legislation vesting constructive ownership of all Pre-Columbian artifacts in its territory, both discovered and undiscovered, with the Mexican government).

⁴⁹ See 178 F. Supp. 2d at 445–48 (holding that Egyptian Law 117 was sufficiently specific to establish Egyptian ownership of the artifacts thereby creating a cause of action under the NSPA).

⁵⁰ See Bator, *supra* note 8, at 310–11 (describing the challenges of preventing art theft through standard criminal law techniques in light of market forces which encourage looting). But see Adam Goldberg, *Comment: Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L.REV. 1031, 1039–

utes that aim to stem the supply of cultural property by criminalizing its export from source nations, international demand for the endangered cultural property often remains high in market nations.⁵¹ This international demand creates internal pressure within the source country for illegal excavation for sale abroad.⁵²

Cultural internationalists argue that because nationalizing legislation ignores international demand for cultural property by attempting to statutorily limit the supply of works, these statutes spur black markets in cultural property.⁵³ Alternatively, cultural internationalists propose that each nation should reserve a limited number of especially important works for national retention while allowing less significant works to travel to satisfy international demand.⁵⁴ For example, Bator and other cultural internationalists have praised the British selective export system for its legislative restraint in retaining a limited number of works of vital cultural significance to Britain while allowing the export of the vast majority of less important works.⁵⁵

By aligning the new application of the NSPA in cultural property cases with cultural internationalist interests in a limited, legitimate art market, the NSPA could better provide for the preservation of cultural property while also deterring a black market. However, in addition to the overreliance of the NSPA upon the foreign omnibus statutes favored by cultural nationalists, the current use of the NSPA to prosecute art trafficking also conflicts with the more current and comprehensive statement of U.S. policy regarding cultural property in the CPIA. This Recent Development now explores this inter-branch conflict between Congress's legislation of U.S. policy regarding cultural property in the CPIA and the judiciary's innovative use of the NSPA to address art trafficking.

V. THE CONVENTION OF CULTURAL PROPERTY IMPLEMENTATION ACT

The United States implemented UNESCO 1970⁵⁶ through the CPIA in 1983.⁵⁷ Articles 7 and 9 of UNESCO 1970 are the convention's two substantive provisions.⁵⁸ CPIA § 308 implements article 7 of UNESCO 1970

46 (2006) (challenging criticisms of the *McClain* doctrine and presenting policy arguments in favor of a broad application of *McClain* and the nationalizing statutes at issue in the case).

⁵¹ See Bator, *supra* note 8, at 310–311.

⁵² See *id.*

⁵³ See *id.* at 317–19 (arguing that flawed export control systems and misaligned economic incentives encourage illegal trade).

⁵⁴ See Bator, *supra* note 8, at 317–19.

⁵⁵ See *id.* at 319–25 (providing a general discussion of the benefits and potential limits of the British and Japanese selective export systems).

⁵⁶ See UNESCO 1970, *supra* note 5.

⁵⁷ Pub. L. No. 97-446, Title III, §§ 302–324, 96 Stat. 2329, (1983) (codified at 19 U.S.C. §§ 2601–2613 (2006)); see also UNESCO 1970, *supra* note 5.

⁵⁸ See *Convention on Cultural Property Implementation Act: Hearing on H.R. 5643 and S. 2261 Before the Subcomm. on Int'l. Trade of the Senate Comm. on Fin.*, 95th Cong. 18, 2d. Sess. (1978) [hereinafter *Hearings*] (statement of Mark B. Feldman, Deputy Legal

by criminalizing the importation into the United States “of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party (signatory to the convention).”⁵⁹ Section 308 manifests the nationalist interest of article 7 in preventing the movement of nationalized or otherwise reserved works.

In contrast to the cultural nationalist goals promoted by section 308 of the CPIA, section 303, which implements article 9 of UNESCO 1970, balances nationalist and internationalist concerns. Article 9 requires signatory nations to erect import and export barriers to prevent the movement of cultural property upon the request of any signatory nation whose cultural patrimony is endangered.⁶⁰ Under section 303, Congress requires the executive branch to determine the following to institute import restrictions on foreign cultural property:

- (A) that the cultural patrimony of the State Party [to the Convention] is in jeopardy from pillage of archaeological or ethnological materials of the State Party;
- (B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;
- (C) that (i) the application of the import restrictions . . . would be of substantial benefit in deterring a serious situation of pillage, and (ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and
- (D) that the application of the import restrictions . . . in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.⁶¹

Advisor for the Department of State) (“[The CPIA] contains two principal obligations that require implementing legislation. The first is the obligation under article 7(b) of the convention The other obligation, Mr. Chairman, implemented by this legislation is that set forth in article 9 of the convention”).

⁵⁹ CPIA § 308, 19 U.S.C. § 2607.

⁶⁰ See UNESCO 1970, *supra* note 5, at Art. 9.

⁶¹ CPIA § 308, 19 U.S.C. § 2602. In a 1975 House hearing regarding this section of the CPIA, the State Department explained the purpose of the factor analysis: “The requirement that the President make these findings prior to entering into an agreement is meant to ensure that a factual situation does indeed exist where such measures as import controls are appropriate, that less dramatic measures are not available, and that import controls by the United States would have the intended effect in remedying the situation.” H.R. REP. NO. 94-14171, at 15 (1976) (Conf. Rep.). The State Department’s testimony underscores the conservative approach of the United States in implementing the UNESCO 1970 convention. However, there was some concern at the time of implementation that section 303 of the CPIA conferred too much power on the executive to make a discretionary finding and impose import restrictions. Given the restrained application of the section 303 analysis since 1983—there are currently only twelve import restrictions in place—these concerns have not been borne out. See H.R. REP. NO. 94-14171, at 21 (1976) (Conf. Rep.). See also *Hear-*

While article 9 of UNESCO 1970 called for an automatic system of matching import and export barriers between source and market nations, the U.S. has more narrowly interpreted its treaty obligations in the CPIA to mandate only a system of discretionary import barriers.⁶² The section 303 factor analysis is consistent with the policy goals for a legitimate art trade described by Bator and other cultural internationalists in contrast to the more nationalist leanings of articles 7 and 9 of UNESCO 1970.⁶³ Building on the prohibition of trafficking in stolen works in section 308, section 303 stresses the preservation of endangered works. Congress noted both nationalist and internationalist interests in cultural property when it passed the CPIA and attempted to balance these concerns through the CPIA's four factor approach. In legislating the CPIA to implement UNESCO 1970, the House of Representatives acknowledged that "[i]ts purpose is to combat the illegal international trade of national art treasures,"⁶⁴ and the Senate similarly affirmed that the purpose of the bill was to "[preserve] the cultural treasures that not only are of importance to the nations whence they originate, but also to a greater international understanding of our common heritage."⁶⁵

Under section 303(B) of the CPIA, the United States will only honor export controls that the petitioning foreign government has already attempted to enforce. However, under the current application of the NSPA as seen in *McClain*⁶⁶ and *Schultz*,⁶⁷ U.S. courts will enforce broader foreign omnibus statutes than those authorized by Congress in the CPIA. The divergence of criminal liability under the NSPA from the statement of U.S. policy in the CPIA is problematic because both pieces of legislation affect the form the art trade will take and seem to work at cross-purposes. Different definitions of what constitutes "stolen" property in each act highlights this problem.⁶⁸ One scholar has noted that whereas only a documented object may be considered stolen under the CPIA, "cultural property is deemed stolen if it is subject to a national declaration of ownership re-

ings before the Subcomm. on Trade of the H. Comm. on Ways and Means: Hearing on H.R. 5643, 95th Cong. 35 (1977). But see James F. Fitzpatrick, Stealth Unidroit: Is USIA the Villain?, 31 INT'L L. & POL. 47, 53 (1998) (criticizing the executive's enforcement of the CPIA).

⁶² One possible explanation for this narrow interpretation of UNESCO 1970 is that "U.S. history has always favored the free trade approach toward movement of cultural properties into and out of the United States." Fitzpatrick, *supra* note 61, at 47, 48.

⁶³ See Part III, *supra* (describing the goals of a limited, licit art trade and briefly summarizing the debate between cultural nationalism and cultural internationalism).

⁶⁴ H.R. REP. NO. 94-14171 at 1 (1976) (Conf. Rep.).

⁶⁵ See S. REP. NO. 97-564 at 21 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 4098, 4100.

⁶⁶ See 545 F.2d at 999-1001.

⁶⁷ See 178 F. Supp. 2d at 448-49.

⁶⁸ See CPIA § 308, 19 U.S.C. § 2607 (defining the scope of the CPIA as applying only to "cultural property documented as appertaining to the inventory of a museum or religious or secular monument. . ."). The NSPA only uses the term "stolen," allowing the judiciary to define what constitutes stolen property under the Act. See 18 U.S.C. § 2314 (2006).

ardless of whether the plaintiff can document that any owner actually lost possession” under the current application of the NSPA.⁶⁹ These varying definitions of “stolen” property create diverging incentives for foreign states when designing their legal regimes governing cultural property. While the application of the CPIA favors the specification by each nation of what pieces constitute its national patrimony,⁷⁰ the application of the NSPA instead favors all-encompassing omnibus statutes that nationalize all works.⁷¹

The current application of the NSPA in art trafficking cases muddles Congress’s express statement of U.S. policy regarding cultural property in the CPIA. Although Congress was warned of such a potential conflict when it legislated the CPIA, it failed to address the issue by revising the CPIA to take account of the *McClain* decision. Douglas Dillon, president of the Metropolitan Museum of Art, testified before a subcommittee of the House Ways and Means Committee that the *McClain* decision had the potential to create a broader incorporation of foreign omnibus statutes than allowable under the prospective legislation of the CPIA.⁷² Dillon was concerned about divergence of the *McClain* holding from the proposed CPIA, and testified that the *McClain* decision “could significantly undermine the intention and scope of the UNESCO convention.”⁷³

Through Dillon, the Metropolitan Museum proposed revisions to the draft version of the CPIA to “prevent the application of the National Stolen Property Act where the alleged act of stealing or conversion is based solely on a broad national patrimony statute.”⁷⁴ However, the proposed amendments were never adopted.⁷⁵ Similarly, Douglas Ewing, president of the American Association of Dealers in Ancient, Oriental and Primitive Art, testified before the subcommittee that the draft version of the CPIA failed to “deal with the recent decision by the Court of Appeals for the Fifth Circuit in *United States v. McClain*”⁷⁶ and that “[t]his decision

⁶⁹ William G. Pearlstein, *Cultural Property, Congress, The Courts, and Customs: The Decline and Fall of the Antiquities Market?*, in WHO OWNS THE PAST? 9, 16 (Kate Fitz Gibbon ed., 2006). However, in dicta, the court in *Schultz* distinguished between the customs focus of the CPIA and the criminal law content of the NSPA. Recognizing the potential for overlapping or alternative liability for defendants under the CPIA and NSPA, the *Schultz* court indicated that one can distinguish between a customs violation under the CPIA and criminal liability under the NSPA. See *Schultz*, 178 F. Supp. 2d at 448–49.

⁷⁰ See 19 U.S.C. §§ 2604-06 (2006).

⁷¹ See *McClain*, 545 F.2d at 1000–01 (holding that a declaration of national ownership combined with export restrictions can implicate the NSPA).

⁷² See *Hearings*, *supra* note 58, at 2 (statement of Douglas Dillon) (noting that the broad definitions of national patrimony could potentially subject people to criminal prosecution and civil actions. In contrast, the CPIA “is prospective in operation and limits the material or property which may be claimed to that which is subject to a particular embargo under section 3”).

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 3.

⁷⁵ See *id.* at 15–17.

⁷⁶ See *Hearings*, *supra* note 58, at 31. Ewing also raised some questions about the over-

announced an interpretation of the [NSPA] which would vitiate the regulatory system to control art imports provided by H.R. 5643 [CPIA].”⁷⁷ To reconcile the judicial and legislative actions, Ewing also proposed an amendment to the CPIA to specifically address *McClain*.⁷⁸ Congress’s failure to consider adequately the policy implications of *McClain* created the conditions for the present-day conflict between the judiciary’s interpretation of the NSPA and Congress’s legislation of U.S. policy regarding cultural property in the CPIA.

The judiciary’s broad deference to foreign omnibus statutes under the NSPA creates a judicial forum to address cultural property cases that Congress foreclosed by delegating this authority to the executive in the CPIA. Sections 303(a)(2) and 306 of the CPIA shifted the administration of questions involving cultural property to the President and the Executive Branch’s Cultural Property Advisory Committee and provided a four factor analysis in section 303 for use in resolving issues involving cultural property.⁷⁹ Although the current use of the NSPA mostly promotes a legitimate international art market, the NSPA would be improved by recognizing only more specific foreign omnibus statutes that protect a narrowly tailored definition of the cultural patrimony in accordance with the CPIA. This shift in the application of the NSPA would resolve the conflicting policies presently promoted by the NSPA and the CPIA.

The conflict between the NSPA and the CPIA will be tested in future art trafficking cases where liability is based on the NSPA. One such group of cases involves art looted by the Nazis. In *United States v. One Oil Painting Entitled “Femme En Blanc” by Pablo Picasso*,⁸⁰ federal prosecutors for the first time premised NSPA liability on the interstate transportation of Nazi-looted art.⁸¹ In the case, the U.S. Attorney’s Office intervened in an ongoing dispute between two claimants to the rightful title to Picasso’s “Femme en Blanc” and charged Marilyn Alsdorf under the NSPA. The government’s prosecution was premised on Alsdorf’s knowledge that the painting was stolen from its former owners by the Nazis and her transport of the work between states.⁸² Alsdorf’s motion to dis-

lapping functions of the NSPA and CPIA, musing that “[i]f a foreign nation can by its own actions render it illegal to bring art into the United States, why enact H.R. 5643 [CPIA] at all?” *Id.* at 35.

⁷⁷ See *Hearings*, *supra* note 58, at 31 (citation omitted).

⁷⁸ *Id.* at 35.

⁷⁹ See CPIA §§ 303(a)(2), 306, 19 U.S.C. §§ 2602, 2604 (2002). See also President Reagan’s delegation of CPIA duties within the executive branch in Exec. Order No. 12,555, 51 Fed. Reg. 3475–76 (Mar. 10, 1986) (delegating authority primarily to the Department of State, but also to the United States Information Agency, Department of the Treasury, and Secretary of the Interior).

⁸⁰ 362 F. Supp. 2d 1175 (C.D. Cal. 2005).

⁸¹ See Sue Choi, *The Legal Landscape of the International Art Market after Republic of Austria v. Altmann*, 26 Nw. J. INT’L L. & BUS. 167, 187 (2005) (exploring the limits and potential of applying the NSPA to Nazi-looted art cases).

⁸² See *Femme en Blanc*, 362 F. Supp. 2d at 1179–80.

miss was denied by the District Court.⁸³ Soon thereafter, in August 2005 the parties settled and the government consented to drop the NSPA charges, satisfied that the matter had been resolved.⁸⁴ Although there is potential for a great number of Nazi-looted art cases involving works in the United States, the number of such cases that will involve NSPA liability is much lower. The application of the NSPA in these cases will likely be limited by the knowledge and intent requirements of the NSPA to cases in which the defendant acquired the cultural property knowing it to have been stolen by the Nazis.⁸⁵

Another group of cases in which the tension between the NSPA and the CPIA will be further tested involves foreign claims against works in U.S. collections. In Rome, J. Paul Getty Museum antiquities curator Marion True currently stands trial for conspiring to traffic in looted antiquities and receiving stolen property for display at the Getty.⁸⁶ Although Italian prosecutors desired to try True in an Italian forum, it was a major challenge for the prosecutors to bring True to trial given the defendant's U.S. residency.⁸⁷ However, because the charges in True's case align well with the elements of the NSPA liability, the current application of the NSPA potentially creates a parallel U.S. forum for criminal liability in such cases.

In the future, cases similar to True's might be more easily tried in the United States. The abundance of current foreign claims against imported cultural property in U.S. collections indicates the potential for numerous future domestic trials involving NSPA liability. An increased volume of NSPA cases may result in greater expertise by domestic courts in dealing with cultural property issues and increased consistency in these decisions. In these cases, courts will have to consider the conflict between broad NSPA liability and the more limited scope of U.S. policy concerning cultural property in the CPIA. One way courts could resolve this conflict is by lessening their deference to cultural nationalism and overly broad definitions of cultural patrimony in foreign omnibus statutes. By bringing the application of the NSPA into line with cultural internationalist interests and Congress's statement of policy in the CPIA, the courts could best provide for the preservation of works while fostering a legitimate trade in cultural property.

—Graham Green*

⁸³ See *id.* at 1178.

⁸⁴ See Press Release, Burris & Schoenberg, LLP, Litigation Over Picasso Painting Settled Out of Court (Aug. 9, 2005), available at <http://www.bslaw.net/news/050809.html> (last visited on Nov. 10, 2006) (announcing the \$6.5 million settlement).

⁸⁵ See Jennifer Anglim Kreder, *The Choice between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1222 (2005).

⁸⁶ Andrew L. Slayman, *The Trial in Rome*, ARCHAEOLOGY, (Feb. 6, 2006), <http://www.archaeology.org/online/features/italytrial> (last visited on Oct. 18, 2006).

⁸⁷ See *id.*

* B.A., Cornell University, 2002; J.D. Candidate, Harvard Law School, Class of 2007. The author would like to thank Professor Terry Martin for his assistance during the research and writing of this Recent Development.

