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# ASSESSING THE EVOLUTION AND AVAILABLE ACTIONS FOR RECOVERY IN CULTURAL PROPERTY CASES

Joshua E. Kastenberg\*

## INTRODUCTION

"It Belongs in a Museum" — Indiana Jones.<sup>1</sup>

Hopefully, recognition when cultural property claims are made, institutions like the Metropolitan Museum of Art have to, at some point, give up the battle . . . and recognize that these objects should be returned to their rightful countries of origin.<sup>2</sup>

For collectors of antiquities, artifacts, and other cultural property, there is an increasing concern that a bona fide purchase claim may not be a viable defense against an action for recovery of ownership from another party such as ethnic groups, foreign nations or Native American associations or tribes. This concern is not unfounded. Unlike the purchase of other property, cultural property is a unique category, requiring different consideration from normal recovery laws. For individuals or parties seeking the return of cultural property, there are a variety of useful legal actions for recovery of cultural property. This article neutrally examines the federal and state actions and analyzes the viability of each potential law.

In recent years there has been growing legal debate over objects of cultural importance. A well known example is the argument between Greece and England over the ownership of the Elgin Marbles, a Greek treasure which England acquired almost two centuries ago.<sup>3</sup> Although the laws regarding cultural property<sup>4</sup>

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1. Indiana Jones and the Last Crusade (Paramount Pictures 1989).

2. Lawrence Kaye, transcript, *Morning Edition*, National Public Radio, Sept. 24, 1993. Lawrence Kaye represented Turkey through the law firm of Herrick, Feinstein, and Herrick in *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990).

3. See Christopher G. Jernigan, *Protecting National Treasures in a Single-Market EC*, 17 B.C. INT'L. & COMP. L. REV. 153 (1994).

4. Cultural property includes, but is not limited to, objects of historic importance such as art, archaeological artifacts and historic documents.

There has even been the suggestion that the definition of cultural property might expand to paleontological finds on Indian reservations. See *Black Hills Inst. of Geologic Research v. United States Dept. of Justice*, 812 F. Supp. 1015 (S.D. 1993). See generally Patrick K. Duffy & Lois A

differ between the United States and other art-importing nations, the saga of the Elgin Marbles places the cultural property debate into a current legal perspective.

Many issues surround the validity of Greek claims over the Marbles. There are literally hundreds of legal questions involved in the debate over rightful ownership. For example, officers of the British Museum have suggested that the Ottoman authorities who handed over the rights to the Marbles were the lawfully recognized government of Greece;<sup>5</sup> therefore, Lord Elgin acquired the Marbles legally.<sup>6</sup> These same museum officials have also argued that the Greek claim fails the statute of limitations requirement.<sup>7</sup> In the United States, however, these same defenses are considered irrelevant. This fact uniquely sets the United States apart from other art-importing countries.

United States laws regarding antiquities are not settled, but an historic legal overview provides some guidance to the direction of cultural property claims. These laws gain importance with the realization that art is second only to narcotics in worldwide illegally trafficked items.<sup>8</sup> Furthermore, there is an abundance of disputed cultural property within legitimate interests, such as museums and personal collections. Thus, before taking an overview of current legal protections, it may be helpful to briefly examine two current controversies.

The two most recent controversies involve the Metropolitan Museum of Art, The Museum of Fine Arts in Boston, and The Republic of Turkey.<sup>9</sup> In Septem-

Lofgren, *Jurassic Farce: A Critical Analysis of the Government's Seizure of "Sue," A Sixty-Five-Million-Year-Old Tyrannosaurus Rex Fossil*, 39 S.D. L. REV. 478 (1994). Although the Department of Justice eventually abandoned this claim, they originally argued that the Antiquities Act of 1906 applied. Also, paleontological resources as cultural property is mentioned in the UNESCO Convention on the Prevention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.

Finally, there is a suggestion that information such as photo copies and photographs of national treasures are in the protected class of cultural property. See *Biblical Archaeology Soc. v. Qimron*, 1993 WL 39572 (E.D. Pa. Feb. 10, 1993).

5. See, e.g., Michael Binyon, *Greece Opens Its Arms To Venus*, TIMES (London), Jul. 4, 1994, at 1. "Britain has always insisted that the frieze, now housed in the British Museum, was legally purchased."

6. *Id.*

7. John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1986). Merryman argues that:

Greece has accordingly been in a position to sue for the Marbles since 1828 and has never done so. Nor has Greece aggressively pursued its diplomatic remedies, since the 1983 request for the return of the Marbles is the first such diplomatic demand. Unless some unusual exception were made, it seems clear that the Greeks have lost any right of action they might have had for the recovery of the Marbles before an English court, where the applicable statute of limitations is six years.

*Id.* at 1882.

8. In 1986, the International Foundation for Art Research (IFAR), a New York-based non-profit organization founded to curtail trafficking stolen art and assisting in art authentication, reported 524 foreign thefts of art, now estimated at \$1 billion a year. See generally John Shinn, *New World Order for Cultural Property: Addressing The Failure of International and Domestic Regulation of the International Art Market*, 35 SANTA CLARA L. REV. 978 (1994).

The international marketplace for art, artifacts, and antiquities is a billion dollar market. See Heidi Berry, WASH. POST, Sept. 20, 1990, at 20.

9. See Mark Rose & özgen Acar, *Turkey's War On The Illicit Antiquities Trade*, ARCHAEOLOGY,

ber, 1993, the Metropolitan returned a "priceless trove" known as the Lydian hoard to Turkey after a six year legal battle.<sup>10</sup> Metropolitan officials agreed to settle the claim only after the New York District Court barred a statute of limitations defense in *Republic of Turkey v. Metropolitan Museum of Art*.<sup>11</sup> Currently, there is a Turkish claim for the upper half of a statue of Herakles owned by the Museum of Fine Arts in Boston.<sup>12</sup> Initially, museum officials argued that these statues were numerous and could be found in hundreds of Roman villas from England to Syria.<sup>13</sup> However, Turkish officials were able to produce the lower half of the statue in question, which fit evenly at the break.<sup>14</sup> Despite this fact, the museum has kept the upper half.<sup>15</sup> Litigation will undoubtedly result, costing both Turkey and the museum sums of money and lost time before a settlement occurs. However, the situation for Turkey is not as bleak as it would certainly be in Northern Europe. If the same facts were applied to a United Kingdom museum, for example, one can hardly begin to imagine the various defenses raised. A British museum would undoubtedly argue both the statute of limitations defense and that Lydia became an extinct civilization over a millennium before the Turks even populated Asia Minor.<sup>16</sup> While in Britain, these arguments alone would preclude a Turkish claim, the same defenses would be barred in the United States. The reasons for such a bar come to light when the past century of laws and legal remedies surrounding cultural property are examined.

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March/April 1995, at 44.

10. Daniel Hays, *Returning the Booty: Turkey Gets Back Hundreds of Priceless Artifacts*, REUTERS NEWS SERVICE, Sept. 22, 1993, at 12 (quoting Philip de Montebello, the museum director who issued a statement that the decision to settle the lawsuit came immediately after Turkey presented evidence that much of the collection was stolen "only months before the museum acquired it").

11. *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990). In *Republic of Turkey*, the court based its conclusion on the earlier decision of *Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618 (App. Div. 1990), where the court held that the "unreasonable delay" requirement in a statute of limitations defense applied only to the equitable defense of laches. Cultural property, in both *Republic of Turkey* and *Guggenheim*, does not fall under a laches aegis because the discovery laws do not begin to toll until the plaintiff recognizes where the materials are located. Thus, the court held that the delay was not unreasonable.

12. Rose & Acar, *supra* note 9, at 48.

13. *Id.*

14. *Id.* Turkish officials unearthed the lower half of the statue in 1974.

15. *Id.* The Museum's director, Robert P. Mitchell, argued:

The museum does not acknowledge Turkey's claim to ownership. There has never been any evidence that the statue was stolen, and allegations to that effect were entirely unsupported . . . . Indeed the break between the top and bottom halves appears to be an ancient one, such that the top half could have been removed long ago from the territory that is now known as Turkey.

16. See generally H.W.F. SAGGS, *THE MIGHT THAT WAS ASSYRIA* (1984) (discussing a general overview of ancient civilizations in Asia Minor); see also H.W.F. SAGGS, *THE GREATNESS THAT WAS BABYLON* (1988).

The British might argue that a direct historic relationship is necessary to prove cultural property. Since Asia Minor has been occupied by the Assyrian, Bronze Age Greek, Roman, Byzantine, and Turkish civilizations since the fall of Lydia, an argument that no direct relationship exists may have merit. Nonetheless, as will be seen in the following section, such a defense would not be valid in a United States court.

In Section I, the overview of federal laws provides guidance to sovereign entities seeking a legal claim over cultural property. In addition, Section I examines the evolution of United States federal law in the cultural property context. This will provide a plaintiff with a clearer picture of recovery actions under U.S. federal law. Furthermore, Section II presents an argument for why standard state replevin laws are less costly and more efficient than the U.S. federal statutes.

## I. A SURVEY OF UNITED STATES LAWS

### A. *American Antiquities Act of 1906*

In 1906, Congress realized the importance of safeguarding potential national treasures on federal lands by passing the American Antiquities Act.<sup>17</sup> The Act provided a blanket set of protections and penalties which were intended to be a stiff deterrent to pilfering and smuggling artifacts.<sup>18</sup> However, the Antiquities Act did not extend beyond federal lands. In fact, it was not even enforced until the 1970s because of complaints of pilfering from Indian lands.<sup>19</sup> In the 1974 decision *United States v. Diaz*,<sup>20</sup> the Ninth Circuit held that the Antiquities Act was unconstitutionally vague for failing to define terms such as "ruin" and "monument."<sup>21</sup>

The *Diaz* decision is open to criticism on two grounds. First, there had already existed legal definitions for "ruin," "antiquity," "relic," "artifact" and "monument." The court needed only to look to the few Internal Revenue cases<sup>22</sup> for this terminology. Second, five years after *Diaz*, in *United States v. Smyer*,<sup>23</sup> the Tenth Circuit rejected the "fatally vague" argument. After reviewing *Webster's New International Dictionary*,<sup>24</sup> the court held that "[a] ruin is the remains of something which has been destroyed," and antiquity refers to "times long since past."<sup>25</sup> Thus, either the courts or Congress had the task of clarifying the Antiquities Act or superseding it with another.

17. Pub. L. No. 103-325 (1906) (codified at 16 U.S.C. § 433 (1910)).

18. *Id.* The Antiquity Act holds that any person appropriating, excavating, injuring, or destroying any historic or prehistoric ruin or monument, or any object of antiquity, situated on federal lands, without permission, was to be fined no more than \$500 or imprisoned for ninety days, or both.

19. *See, e.g.*, *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

20. *Id.*

21. *Id.* at 114-15. ("The statute does not limit itself to Indian Reservations or to Indian Relics. Hobbyists who explore the desert and its ghost towns for arrowheads and antique bottles could arguably find themselves within the Act's proscriptions.")

22. *See, e.g.*, *In Re Chester Tripp*, 22 T.C.M. (CCH) ¶1225, (1963) (defining "antiquity" and "ruin" as "artifacts valued by their significance and age").

23. *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979).

24. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1173 (3d ed. 1972).

25. *Smyer*, 596 F.2d at 941. The defendants had visited the sites on several occasions and consulted with an archaeologist. Therefore, the defendants' claim of the law not providing a clear definition of "antiquity" was dubious. Judge Breitenstein distinguished *Smyer* from *Diaz*, because *Diaz* involved newly created cultural property. In *Diaz*, expert anthropologists argued that an "artifact" could have a wide range of ages, from yesterday to the beginnings of time. *Diaz*, 499 F.2d at 114.

### B. Historic Sites Act of 1935

In 1935, Congress passed the Historic Sites Act (HSA)<sup>26</sup> to identify and evaluate properties of national historic significance. Under the HSA, Congress declared that "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."<sup>27</sup> The HSA gave the 1906 Antiquities Act greater breadth by allowing the Secretary of the Interior to designate properties for protection and preservation, fulfilling one of the purposes listed in the 1906 Act.<sup>28</sup> This designation of properties was to be accomplished through cooperation with state governments, municipal subdivisions, private organizations, and qualified individuals interested in the preservation of historic buildings, sites, and property connected with a public use.<sup>29</sup>

In addition, the HSA introduced the concept of a National Register, where the historic properties would be listed for the benefit of the public, particularly purchasers and historians.<sup>30</sup> Moreover, in 1936, at the time the HSA was enacted, the Act worked well into President Franklin Delano Roosevelt's New Deal. Since U.S. economic expansion had slowed, and the HSA would need more employees in order to identify and evaluate properties of national historic significance, the Act would increase employment opportunities, which was the goal of FDR's New Deal.<sup>31</sup> However, the HSA has been criticized for failing to protect and repatriate Native American graves, sites and other objects.<sup>32</sup>

Soon after the passage of the HSA, in *Barnridge v. United States*,<sup>33</sup> the Eighth Circuit had to determine the scope of the Act's authority. In *Barnridge*, the Secretary of the Interior determined that a privately owned site in St. Louis,

26. Pub. L. No. 89-249, 79 Stat. 971 (1935) (codified at 16 U.S.C. §§ 462-67 (1937)).

27. 16 U.S.C. § 461 (1988).

28. ROBERT B. MCKINSTRY, JR., ET AL., SPECIAL PLACES, SPECIAL RULES: THE PLACE OF NEPA, SEPAS, AND ENVIRONMENTALLY SENSITIVE FEATURES IN REGULATION OF MUNICIPAL SOLID WASTE, C355 ALI-ABA 79, at 147-48 (1988).

29. 16 U.S.C. § 462(e) (1994).

30. Protection of Historic and Cultural Properties, 36 C.F.R. § 800.4(a)(1)(i) (1992). Factors considered for inclusion of a property into the National Register are as follows:

The quality of significance in American History, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and objects, that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded or may be likely to yield, information important in pre-history or history.

31. See REXFORD G. TUGWELL, F.D.R.: ARCHITECT OF AN ERA (1967).

32. June Camille Bush Raines, *One is Missing, Native American Graves Protection and Repatriation Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639, 649 (1992).

33. *Barnridge v. United States*, 101 F.2d 295 (8th Cir. 1939).

Missouri, had value as a historic site, and therefore, he instituted proceedings to condemn the property. This action by the Secretary of the Interior was challenged by the owners of the property when they contended that the HSA did not give the Secretary of the Interior the power to condemn private properties.<sup>34</sup> The Eighth Circuit, however, decided that the federal government did indeed possess condemnation power for the purposes of acquiring real estate under the HSA's auspices.<sup>35</sup>

Although the HSA covered properties in existence, the Act did not provide an enforcement mechanism to stop the future rapid growth of suburbs in the post World War II era. In fact, in the post-war era, suburbs and industry grew exponentially.<sup>36</sup> As a result, federal agencies were substantially unable to stop the degradation of historic sites with historic preservation laws. Therefore, in order to remedy this gap in the legislation, the Lyndon Johnson administration addressed anew the problems of historic preservation and protection of objects of historical significance.

### C. National Historic Protection Act

The National Historic Protection Act (NHPA)<sup>37</sup> was passed by Congress in 1966. While the NHPA does not directly affect the nation's cultural property laws, it provides some guidance behind congressional intent to salvage the nation's history by protecting sites of historic significance. At the height of the Cold War, President Lyndon Johnson sought to create a balance between the need to preserve history and the demands to further industrial progress.<sup>38</sup> However, the courts have seen this balance as a purely environmental concern, rather than an issue of cultural property ownership.<sup>39</sup> For example, in *Pennsylvania Central v. New York City*,<sup>40</sup> the Court gave vitality to the historic preservation movement when it held that preservation laws related to the promotion of the

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34. *Id.*

35. *Id.* at 297. Furthermore, because the HSA gave authorization for the Secretary of the Interior to acquire property for the purposes of the Act, the court held that the federal government could acquire by eminent domain, or otherwise, sites of national historic importance to preserve them "to commemorate and illustrate the nations history." *Id.* at 299. See generally Mary Phelan, *Synopsis of Laws Regarding Cultural Property*, 28 NEW ENG. L. REV. 66 (1993).

36. Congress argued that "the HSA failed to stop the accelerated loss of the historic built environment, especially in areas of urban renewal and road construction which dominated the post World War II landscape in the 1950's." H.R. REP. NO. 1457, 96th Cong., 2d Sess. 18-19 (1980) (*reprinted* in 1980 U.S.C.A.A.N. 6378, 6380-81).

37. Pub. L. No. 94-422, Stat. 1313, 1319-23 (codified at 16 U.S.C. §§ 470 (a)-(w)(6) (1967)).

38. See generally ROBERT DIVINE, *THE JOHNSON YEARS* (1987); see also FRANK CORMIER, *LBJ: THE WAY HE WAS* (1977).

39. In *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Court noted that "the problem of [historic preservation] is basically an environmental one, of enhancing - or perhaps developing for the first time - the quality of life for people." *Id.* at 108. (citing Gilbert, *Introduction, Precedents For The Future*, 36 LAW & CONTEMP. PROB. 311, 312 (1971). (quoting address by Robert Stipe, 1971 Conference on Preservation Law, Washington, D.C., May 1, 1971 (unpublished text at 6-7))).

40. 438 U.S. 104 (1978).

general environmental welfare.<sup>41</sup> Moreover, no specific case law regarding cultural property collections evolved from the NHPA, nor has the NHPA provided any specific protections for artifacts or antiquities. The NHPA is geared more toward the preservation of landmarks and properties relating to the nation's history. However, even in the cultural property context, the NHPA might provide protection for parties interested in preserving a cultural property, but there are several bureaucratic problems that the interested party would face.

First, the NHPA is encumbered by lengthy agency enactment procedures found in its section 106 enforcement and compliance provision.<sup>42</sup> Under this section, all federal agency projects or private development projects requiring federal agency approval must take into consideration potential harm to historic sites and objects.<sup>43</sup> Second, section 106 administrative procedures are unsettled because the issues of both agency timeliness and comprehensive study have never been addressed. For example, in *Wilson v. Block*,<sup>44</sup> the D.C. Circuit Court held, over the objections of a property owner, that an agency did not need to survey one hundred percent of a site slated for development. In fact, the court accepted a Forest Service survey of forty percent as acceptable to meet the section 106 requirement of comprehensive site assessment.<sup>45</sup> Third, section 106 contains a provision that agency determinations can be conducted in a flexible manner.<sup>46</sup> Congress gave the Advisory Council a "reasonable time to comment" on an agency's or private developer's undertakings.<sup>47</sup> The Advisory Council, in turn, interpreted congressional intent in the most flexible manner possible.<sup>48</sup>

As a result, with the exception of Native American groups, parties interested

41. Phelan, *supra* note 35, at 68.

42. 36 C.F.R. § 800.4 (1992).

43. *Id.*

44. *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

45. *Id.* at 753-754. This particular case dealt with an archaeological review where the Forest Service had excavated roughly 40% of property to determine any historic or archaeological significance. The court held that "partial surveys are sufficient. The regulations do not expressly require agencies in all cases to fully survey the grounds of all impact areas, and in fact recognize that the need for surveys will vary from case to case." See 36 C.F.R. § 800.4(a)(1)-(2) (1992).

46. H.R. REP. NO. 1916, 89th Cong., 2d Sess. 6 (1966) (reprinted in 1966 U.S.C.A.A.N. 3307-3309). See also Malissa MacGill, *Old Stuff is Good Stuff: Federal Agency Responsibilities Under Section 106 of the National Historic Preservation Act*, 7 ADMIN. L.J. AM. U. 697 (1994).

47. MacGill, *supra* note 46, at 699-700.

48. The Code of Federal Regulations provides for a flexible rather than rigid process of agency determination. 36 C.F.R. § 800.3(c) provides:

Timing: Section 106 process requires the Agency Official to complete the section 106 process prior to the expenditure of any Federal funds on the undertaking or prior to the issuance of any license or permit.

*The Council does not interpret this language to bar an Agency Official from expending funds on or authorizing nondestructive planning activities preparatory to an undertaking before complying with section 106, or to prohibit phased compliance at different stages in the planning . . .*

The Agency Official should establish a schedule for completing the section 106 process that is consistent with the planning and approval schedule of the undertaking (*emphasis added*).



in the collection and preservation of antiquities have shied away from using the NHPA. The NHPA has been used by environmental groups as a defense regarding mining concerns as well as property development. Thus, the NHPA provides guidance in a cultural property context only to the extent that it embodies some legislative desire to maintain the nation's history.

#### *D. American Indian Religious Freedom Act of 1978*

Native Americans have cited the American Indian Religious Freedom Act of 1978 (AIRFA)<sup>49</sup> as authority for their right to retain their native cultural property.<sup>50</sup> Native Americans have asserted that the AIRFA authorizes them to obtain a return of Indian religious artifacts that are located in a museum collection.<sup>51</sup> However, the AIRFA does not contain a provision that museums return religious artifacts, and the lack of such a provision has proved problematic. For example, the Zuni Tribe recently requested from the Smithsonian Institution the return of certain burial artifacts.<sup>52</sup> The Zuni representatives believed that the Smithsonian, as a museum funded mostly by federal funds, had an obligation to return their artifacts.<sup>53</sup> However, the Zuni's claim was settled out of court and never litigated. As a result, there is no precedent regarding federally subsidized museums. Moreover, in light of several circuit court decisions, as well as the Supreme Court decision *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>54</sup> the courts have ruled that AIRFA is merely a statement of the federal government's policy that it will recognize the religious beliefs of Native Americans as well as other groups, but it will not necessarily insist on the return of religious artifacts.<sup>55</sup> Furthermore, the courts have not even interpreted the AIRFA as establishing any new rights.<sup>56</sup> Therefore, the AIRFA provides little help to Native American groups seeking to reacquire artifacts via a religious guarantee theory.

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49. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1980)).

50. Phelan, *supra* note 35, at 71.

51. *Id.*

52. Bowen Blair, *Indian Rights: Native Americans Versus American Museums - A Battle For Artifacts*, 7 AM. INDIAN. L. REV. 125 (1980). See also Adele Merenstein, *The Zuni Quest For Repatriation of the War Gods*, 17 AM. INDIAN. L. REV. 589 (1992).

53. Blair, *supra* note 52, at 126.

54. 485 U.S. 439 (1988).

55. See generally *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); *United States v. Top Sky*, 547 F.2d 483 (9th Cir. 1976).

56. James A.R. Nofziger, *The Underlying Constitutionalism of the Law Governing Archaeological and Other Heritage*, 30 WILLAMETTE L. REV. 581 (1994). Nofziger writes that the AIRFA is largely precatory and thus has had little effect on cultural property laws.

See also Barbara S. Falcone, *Legal Protections (Or the Lack Thereof) Of American Indian Sacred Religious Sites*, 41 FED. B. NEWS & J. 568 (1994). Falcone argues that "[a]lthough the passage of the AIRFA was definitely a step in the right direction, its very nature as a policy statement with no cause of action and no enforcement provisions created a hollow promise of religious liberty for Native Americans." *Id.* at 572.

*E. Archaeologic Resources Protection Act*

The Archaeologic Resources Protection Act of 1979 (ARPA)<sup>57</sup> refined, and to a large extent, superseded the 1906 Antiquities Act. The ARPA reasserted federal control over archaeological resources on federal land and provided stiff penalties to violators. In response to *Diaz*,<sup>58</sup> Congress provided a definition of "cultural property" as "any material remains of past human life or activities which are of archaeological interest and are at least one-hundred years old."<sup>59</sup> To date, the ARPA provides the most extensive protection for Native American cultural property. In fact, the courts have given the ARPA wide latitude rather than a strict interpretation. For example, in *United States v. Gerber*,<sup>60</sup> the Seventh Circuit determined that ARPA extended beyond federal lands and Indian reservations.<sup>61</sup>

The *Gerber* decision is insightful because it demonstrates an application of the ARPA in a wider context, specifically, that it is not merely relegated to federal lands in its use. In *Gerber*, a well known collector of Indian artifacts and a promoter of annual Indian relic shows purchased unearthened artifacts from a construction employee at a General Electric facility in Indiana.<sup>62</sup> These artifacts were uncovered in a large earth mound and eventually constituted the fourth largest North American artifact find to date.<sup>63</sup> Because Gerber's relic shows and sales activities placed him in a high profile setting, he was eventually arrested and charged with violating ARPA.<sup>64</sup> Gerber admitted transporting stolen artifacts in interstate commerce and pleaded guilty to misdemeanor violations of ARPA.<sup>65</sup>

Gerber then claimed that despite ARPA's references to state and local law, ARPA was inapplicable to archaeological objects removed from lands not owned by either the federal government or Indian tribes.<sup>66</sup> Judge Posner reasoned that based on legislative intent, this defense was without merit:

[I]t is almost inconceivable that Congress would have wanted to encourage amateur archaeologists to violate state laws in order to amass valuable collections of Indian artifacts, especially as many of these amateurs do not appreciate the importance to scholarship of leaving an archaeological site intact and undis-

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57. Pub. L. No. 96-95, § 2, 93 Stat. 721 (codified at 16 U.S.C. §§ 470 (aa)-(LL) (1979)).

58. 499 F.2d 113.

59. Pub. L. No. 96-95, § 470(aa).

60. *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993).

61. *Id.* at 1113. The section of the ARPA that provided the basis of Gerber's conviction was that "no person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law." 16 U.S.C. § 470ee(c). (Congress clearly wanted to avoid the possible ambiguities of the Antiquities Act.)

62. *Gerber*, 999 F.2d at 1113.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

turbed until the location of each object in it has been carefully mapped to enable inferences concerning the design, layout, size, and age of the site, and the practices and culture of the inhabitants, to be drawn.<sup>67</sup>

Thus, as a result of the *Gerber* decision, ARPA is not only under rigid enforcement, but it also provides the widest protection for Native American cultural property finds to date.

#### F. The Pre-Columbian Art Act of 1972

Within the last thirty years, ancient pre-Columbian antiquities have become a major source of investment.<sup>68</sup> The Pre-Columbian Art Act (PCAA)<sup>69</sup> was the first peacetime anti-importation law regarding cultural property. The PCAA was directed at smugglers from South American countries in an attempt to stem the growing market of Mayan, Incan, and Toltec artifacts.<sup>70</sup> Furthermore, the PCAA requires a certificate from the antiquity's country of origin declaring that the purchase in that country did not violate any of that country's artifact laws.

However, the PCAA's shortcomings are numerous. First, the PCAA only provides civil penalties.<sup>71</sup> Second, procedures under the PCAA can be very expensive and time consuming.<sup>72</sup> Finally, the lack of a criminal penalty undoubtedly gives the PCAA minimal deterrence value.<sup>73</sup>

#### G. The UNESCO Convention

In 1982, the United States became a full signatory to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (UNESCO).<sup>74</sup> UNESCO took the unique step of defining cultural property.<sup>75</sup> Moreover, this multi-national agree-

67. *Id.* at 1116. Judge Posner added:

It is also unlikely that a Congress sufficiently interested in archaeology to impose substantial criminal penalties for the violation of archaeological regulations [the maximum penalty under the ARPA is five years plus a \$100,000 fine, § 470ee(d)] would be so parochial as to confine its interests to archaeological sites and artifacts on federal Indian lands merely because that is where most of them are.

*Id.*

68. H.R. REP. NO. 3403, 96th Cong., 1st Sess. 34 (1979). See generally Jameson K. Shedwell, *Is the Lost Civilization of the Maya Lost Forever - The United States and Illicit Trade in Pre-Columbian Artifacts*, 24 CAL. W. INT'L L.J. 227 (1992).

69. Pub. L. No. 92-587, § 201, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091-95 (1988)).

70. *Id.* See also Norman Hammond, *Teotihuacan: Art From the City of the Gods*, TIMES (London), Aug. 5, 1993, at 1.

71. 19 U.S.C. § 2093 (1994).

72. Phelan, *supra* note 35, at 96.

73. *Id.*

74. UNESCO Convention, Nov. 14, 1970, 823 U.N.T.S. 231, [hereinafter *UNESCO*].

The United States became a full signatory with the passing of the Cultural Property Implementation Act of 1982, Pub. L. No. 97-446, Title III, § 302, Jan. 12, 1963, 96 Stat. 2351 (codified at 19 U.S.C. § 2601 (1995)).

75. UNESCO covers a wide range of items falling under the definition of "cultural property."

ment was an attempt to unify international cultural property law. UNESCO was only the second international agreement enacted during peacetime to protect national treasures. Unlike the first peacetime agreement (the Pre-Columbian Art Act of 1972), UNESCO is almost fully international in its coverage.<sup>76</sup> However, there are two noticeable drawbacks to UNESCO in the international sense. First, some of the wealthier art-importing countries of the world are not signatories. To date, the United States is one of only three major art-importing countries that is actually a signatory to the UNESCO convention.<sup>77</sup> Second, UNESCO is without accompanying enforcement provisions in most countries; therefore, it suffers from a lack of enforcement power in most of the signing nations. As a result, UNESCO is weakened from a lack of commitment in the international community for resolving cultural property issues.<sup>78</sup> However, in the United States, UNESCO has a greater enforcement power because the United States' commitment to the agreement is paramount. This commitment to UNESCO is reflected in *Metropolitan Museum of Art v. Republic of Turkey*,<sup>79</sup> in which the court expressed a desire to see the agreement enforced more often.

Unlike many other signatories to UNESCO, the United States does not claim an absolute right to its own cultural property. Instead, in 1972, the federal government prohibited only the export of objects illegally removed from federal and Indian lands. In 1982, Congress ratified UNESCO through the Cultural Property Implementation Act.<sup>80</sup> This Act, which codified UNESCO into United States law, provided foreign plaintiffs with a basis for suit. However, even after its ratification, the United States plaintiffs only claimed property removed from

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Among the major provisions, Article 1 provides, in part:

I. [T]he term "cultural property" means property which on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art, science, and which belongs to the following categories:

a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;

b) property relating to history, including the history of science and technology, and military and social history, to the life of national leaders, thinkers, and artists, and to events of national importance;

c) products of archaeological excavation (including repair and clandestine) or of archaeological discoveries;

d) elements of artistic or historic monuments or archaeological sites which have been dismembered;

e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals . . . .

823 U.N.T.S. 231.

76. Among the signatories are the United States, Canada, Australia, New Zealand, most of the Central and South American countries, Egypt, Kenya, and South Africa. See 823 U.N.T.S. 231.

77. The United Kingdom, Germany, Italy, and Japan are not signatories. And in reality, the United States is the only major art-importing country. Canada and Australia are not large art markets. These nations do, however, import more than export. See UNESCO Treaty § I; see also Phelan, *supra* note 35, at 96.

78. Shinn, *supra* note 8, at 1005.

79. 762 F. Supp. 44, 45 (S.D.N.Y. 1990).

80. 19 U.S.C. § 2602 (1994).

former Indian lands and federal properties. Thus, the United States is more concerned with illegal import than export of cultural property.

Nonetheless, there are numerous benefits to United States participation in UNESCO. The United States' enforcement of UNESCO provides the plaintiff with a more streamlined approach to getting the case to court than the PCAA. More importantly, United States enforcement of UNESCO can be coupled with criminal sanctions through its enforcement arm, the National Stolen Properties Act. Finally, United States involvement in UNESCO shows a commitment to the international community.

#### H. National Stolen Properties Act

All international controls, such as UNESCO, are enforceable under the National Stolen Properties Act of 1961 (NSPA).<sup>81</sup> Though the validity of the NSPA came under scrutiny between 1974 and 1979 in *United States v. Hollinshead*,<sup>82</sup> *United States v. McClain (I)*,<sup>83</sup> and *United States v. McClain (II)*,<sup>84</sup> the power to enforce any international antiquities protection agreement remains unchallenged as a result of the Court's decision in *United States v. Curtiss-Wright Export Corp.*<sup>85</sup> In *Curtiss-Wright*, the Court held that the federal government under the executive branch possesses inherent powers over foreign relations.<sup>86</sup> Thus, UNESCO, as is the case with all treaties to which the United States is a party, is the supreme law of the land. With this legitimacy, the United States can represent foreign interests and sue for recovery of artifacts by utilizing the NSPA to enforce the UNESCO agreement.

The NSPA has withstood the "unconstitutionally vague" attack which plagued the Antiquities Act of 1906.<sup>87</sup> In *Hollinshead*, the defense raised the objection that "there should be no presumption that an American would understand a foreign nation's law."<sup>88</sup> However, this defense was discounted due to a number of factors, the most important factor being that the defendants' actions showed a knowledge of Guatemalan antiquity law by their clandestine efforts to conceal the purchase and shipment out of that country.<sup>89</sup> In *McClain (I)*, the Fifth Circuit held that an unambiguous claim of national ownership by the Mexican government was sufficient grounds to prosecute under the NSPA.<sup>90</sup> However, in

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81. Pub. L. No. 87-371, § 2, 75 Stat. 802 (codified at 18 U.S.C. § 2314 (1988)).

82. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

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

84. *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) [hereinafter *McClain (II)*].

85. 299 U.S. 304 (1936).

86. *Id.*

87. See text accompanying *supra* notes 17-25.

88. *Hollinshead*, 495 F.2d at 1155. This was a dubious claim because the weight of evidence proved that the defendants knowingly violated Guatemalan law, including the bribing of Guatemalan customs agents, and the false labeling of the transported stele. Furthermore, Judge Duniway reasoned that the law under which the defendants were prosecuted was United States law. Guatemalan law served only to bring the defendants under the NSPA.

89. *Id.* These factors involved the bribing of customs officials.

90. *McClain (I)*, 545 F.2d at 992.

*McClain (II)*, the Fifth Circuit, sitting en banc, reversed its earlier decision, rejecting the proposition that unlawful exportation alone renders an artifact stolen under the NSPA.<sup>91</sup> Under the *McClain (II)* standard, the artifact must be stolen by the precise definition of the plaintiff nation's laws in order to be protected under the NSPA.

### *I. Native American Graves Protection and Repatriation Act*

Native Americans constitute the oldest civilization in the United States. However, Congress has only recently recognized the importance of Native American ownership over cultural property by passing the Native Americans Graves Protection and Repatriation Act (NAGPRA) in 1991.<sup>92</sup> There are several ideologies conflicting over the extent of Indian ownership.<sup>93</sup> Therefore, it is impossible to understand the concept of actual ownership without examining the relationship between Indian law and autonomy, and the United States government.

Although there is an argument that Indian tribes have a special status in the United States cultural property laws, there is an equally strong argument that much of the legal power vested in the Indian tribes has eroded over the past two decades.<sup>94</sup> To some extent, during the past two decades, the Court has strayed from the concept of Indian tribes as "nations within a nation."<sup>95</sup> The Court has even allowed state incursions on reservations, making tribal status as "nations within a nation" a disappearing basis of law.<sup>96</sup> Moreover, traditional protection for Native Americans has eroded in some fundamental aspects, such as religious protection under the First Amendment.<sup>97</sup> Recently, in *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>98</sup> the Court allowed the Department of the Interior to construct logging roads through Indian Sacred Sites. The Court dismissed arguments that: (1) the land itself was a cultural property; and (2) the Department of the Interior's action constituted an infringement on religious freedom as guaranteed both by the First Amendment<sup>99</sup> and the American Indian Religious Freedom Act of 1978.<sup>100</sup> Therefore, the federal laws protecting Indian cultural property claims may have reached a high watermark with no future

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91. Shedwill, *supra* note 68, at 248.

92. Pub. L. No. 101-61, 104 Stat. 3048 (codified at 25 U.S.C. § 3001 (1990)).

93. See generally Blair, *supra* note 52, at 125; and Falcone, *supra* note 56, at 568.

94. Michael C. Blumm & Michael Cadigan, *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction Over Indian Cases*, 46 ARK. L. REV. 203 (1993).

95. *Id.* Since *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court has characterized Indian tribes as independent nations. However, the federal government divested the tribes of their external sovereignty to conduct foreign diplomacy, to prosecute criminal cases, and under the Indian Commerce Clause of the Constitution, to regulate commerce with the Indian Tribes. See *Montana v. United States*, 450 U.S. 544, 564-66 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978); and U.S. CONST. art. I, § 8, cl. 3, *respectively*.

96. Blumm & Cadigan, *supra* note 94, at 204.

97. *Id.*

98. 485 U.S. 439 (1988).

99. U.S. CONST. amend. I, cl. 3.

100. 42 U.S.C. § 1966 (1984).

additions. The Court, in light of the *Lyng* decision, may even permit regression from the older protections as well.

However, in the event that Indian tribes lose even more traditional protections, Indian tribes, foreign entities and ethnic groups have a viable alternative to pursuing cultural property claims under federal action. The most obvious alternative rests in the variety of state tort and remedy laws which are more flexible and easily accessible than their federal counterparts. Moreover, should any party seeking repossession of a cultural property find any of the above federal laws an unlikely or difficult action, there remains a clearer cause of action for return in the form of replevin actions.

Cultural property ownership claims under replevin actions in the state courts under the individual state replevin laws may be found to be both more efficient and less expensive than pursuing claims through federal laws. The following section analyzes three recent ground-breaking cases to prove this point.

## II. STATE LAWS: THE VIABLE ALTERNATIVE

### A. *Autocephalous II*

In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*,<sup>101</sup> the Seventh Circuit Court of Appeals held in part that an individual state's replevin laws can be utilized by a plaintiff to recover cultural property.<sup>102</sup> It is important to examine the facts of *Autocephalous II* because of the number of potential defenses that were rendered inapplicable by the court. First, the choice of legal forum was challenged; second, the defendant asserted a limitation of actions defense; third, the defendant objected to the choice of a replevin theory; finally, aspects of international law, such as a second plaintiff seeking recognition, were asserted.<sup>103</sup> *Autocephalous II* leaves the rightful impression that state laws of replevin are a viable alternative to federal laws in certain permissible cases. Ultimately, compared to federal laws, it is more efficient and less costly for a foreign entity to pursue a cultural property claim under state replevin laws. The facts of *Autocephalous II* provide a brief background to the legal issues presented.

In the early sixth century, a large mosaic depicting Jesus Christ as a young boy on the lap of his mother, the Virgin Mary, was affixed to the apse of the Church of Panagia Kanakaria ("Kanakaria") in the village of Lythrankomi, Cyprus.<sup>104</sup> Cyprus, an island that had been under foreign occupation from the Ottoman Turkish conquest up to independence from Britain in 1960,<sup>105</sup> has a colorful and complicated history. The two dominant ethnic groups are Cypriot Greeks, composing three-fourths of the population, and Cypriot Turks, compos-

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

102. *Id.* at 286-87.

103. *Id.* at 278.

104. *Id.* at 279.

105. *Id.* at 280. This period of intermittent occupation is a span of over five hundred years.

ing the other one-fourth of the population.<sup>106</sup> In 1974, as a result of complex internal and international conditions, the Turkish government invaded Cyprus. To this day, the island is divided, with the southern portion of the island Greek and the northern portion Turkish.<sup>107</sup> In 1975, the northern portion of the island where Lythrankomi is located, formed what became known as the Turkish Federated State of Cyprus (TFSC).<sup>108</sup> In 1983, the name was changed to the Turkish Republic of Northern Cyprus (TRNC).<sup>109</sup> Of the world's nations, only Turkey has recognized either of these two governments.<sup>110</sup>

Sometime after the Turkish invasion, there were reports that the ancient Greek Orthodox churches were being looted and systematically destroyed.<sup>111</sup> This destruction was carried out under the permission of a decree from the TFSC's occupying government.<sup>112</sup> In 1979, the recognized government in Southern Cyprus received word that the Kanakaria had been vandalized.<sup>113</sup>

In 1988, Peg Goldberg, an art gallery owner from Indiana, went to Europe to shop for her gallery and came into contact with Michel Van Rijn, a Dutch art dealer.<sup>114</sup> Their meetings resulted in the sale and transfer of the Kanakaria mosaic in Switzerland.<sup>115</sup> Goldberg, in later testimony, claimed to have called UNESCO's office in Geneva, as well as the International Foundation for Art Research, to "inquire whether there was a claim of record for the mosaics."<sup>116</sup> There was no information to either prove or disprove her claim to have made these attempts. Moreover, the lower court pointed out that Goldberg did not contact either the Republic of Cyprus, the TNRC, INTERPOL, or the Church of Cyprus.<sup>117</sup> Upon returning home with the mosaics, she advertised their sale in brochures and by contacting dealers.<sup>118</sup> Through an American curator, Republic of Cyprus officials discovered the mosaic's location and requested its return.<sup>119</sup> Goldberg refused their request, and the Republic of Cyprus, as well as the Autocephalous Church of Cyprus, brought suit in the Southern District of Indi-

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106. *Id.*

107. *Id.* The Turkish invasion led to the forced exodus of over one hundred thousand Greek Cypriots who lived in northern Cyprus.

108. *Id.*

109. *Id.*

110. *Id.* The United States, despite its alliance with the Republic of Turkey, has never recognized either the TFSC or the TRNC governments.

111. *Id.* at 280-81.

112. *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1379 (S.D. Ind. 1989) [hereinafter *Autocephalous I*] (Government edicts mandated distinction of religious artifacts . . . ).

113. *Autocephalous II*, 917 F.2d at 281.

114. *Id.* at 281. Van Rijn had a checkered history. He had been convicted in France for forging Marc Chagall's name on prints, and he claimed to be a descendent of both Rembrandt and Rubens. Furthermore, Goldberg admitted to knowing these facts about Van Rijn.

115. *Id.* at 282.

116. *Id.* at 283.

117. *Id.*

118. *Id.*

119. *Id.*



ana.<sup>120</sup>

Initially, Goldberg argued that a Swiss legal forum had jurisdiction.<sup>121</sup> However, the lower court held that Switzerland was an improper choice because "the Geneva airport, where Goldberg assumed possession of the mosaics - bears little connection to Cyprus' cause of action."<sup>122</sup> The lower court noted the following facts, to which the Seventh Circuit agreed:

[t]he defendants, those who financed and effected the transfer of the mosaics, and those who now hold the principal monetary interests in the mosaics are all Indiana citizens; the money used to purchase the mosaics came from an Indiana bank; the agreement among Goldberg, Fitzgerald, Van Rijn and Faulk stipulates that Indiana law will apply, indicating Goldberg's reliance on the law of her own state; and, the mosaics are presently being held in Indiana, where they have been stored since they entered the United States in July, 1988.<sup>123</sup>

Thus, the following factors are used to determine where jurisdiction is proper: (a) where the defendants reside; (b) where the purchasing money originates; (c) where the defendant stipulates a law which will govern the transaction; and (d) where the cultural property is located.

Goldberg also asserted that Cyprus failed to sue before the running of the statute of limitations.<sup>124</sup> She relied on two principles of law: (1) that Judge Noland of the district court "announced a new discovery rule in Indiana;"<sup>125</sup> and (2) the Republic of Cyprus failed to exercise due diligence in the pursuit of its lost treasures.<sup>126</sup> In 1983, a newspaper article had discussed the looting of Cyprus churches on the Turkish part of the island.<sup>127</sup> Goldberg asserted that Cyprus failed, at that time, to take effective action to stop this activity.<sup>128</sup> However, the district court concluded that an Indiana court would find that Cyprus' action was filed in a timely manner because under Indiana's discovery rules, Cyprus's cause of action did not accrue until Cyprus learned that the mosaics were in Goldberg's possession.<sup>129</sup> The lower court based its decision on *Kunstsammlungen Zu Weimar v. Elicofon (KZW)*<sup>130</sup> where a German art gallery, KZW, sued an American art collector for the return of German paintings that had disappeared after the Second World War. In *KZW*, the Second Circuit held that a cause of action for return of stolen paintings under the control of a bona fide

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120. *Id.*

121. *Id.* See also Steven F. Grover, *The Need For Civil-Law Nations To Adopt Discovery Rules In Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431 (1992). Switzerland is not a signatory to UNESCO and has very liberal art transfer laws.

122. *Autocephalous I*, 717 F. Supp. at 1393-94 (following the *lex locus situs* rule); See generally Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17 (1993).

123. *Autocephalous II*, 917 F.2d at 287.

124. *Id.*

125. *Id.* at 289.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Autocephalous I*, 717 F. Supp. at 1388-93.

130. *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982) [hereinafter *KZW*].

purchaser did not accrue until the purchaser refused to comply with the demand for the return of the paintings.<sup>131</sup> Thus, a statute of limitations defense can succeed only where (as in the case of the Elgin Marbles) the plaintiff has full knowledge of the location of the cultural property.

On the issue of a viable remedy theory, the district court held that Cyprus's request for the return of the mosaic was within the acceptable scope of Indiana replevin law.<sup>132</sup> Under Indiana replevin law, the plaintiff must establish three elements: (1) that the plaintiff holds title or right to possession; (2) that the property is unlawfully detained; and (3) that the defendant wrongfully holds possession.<sup>133</sup> When analyzing these elements, it was clear to the court that the Kanakaria Church had right of possession, thereby satisfying the first element. The request by the Kanakaria Church for Goldberg to return the mosaic, in addition to Goldberg's refusal, satisfied the second element, the element regarding the unlawful detention of the property. Furthermore, regarding the third element, Goldberg continued to wrongfully hold the mosaics in her possession.<sup>134</sup> Goldberg was unable to assert a bona fide purchaser defense because under Indiana law, a purchaser from a thief has no valid claim of title or right to possession. Indiana follows the common law doctrine of *Nemo dat quod non habet*.<sup>135</sup> Thus, no one who traces title through a thief may defeat the ownership claims of the rightful owner in an action for replevin. Following this reasoning, the Seventh Circuit again upheld the lower court's finding that Ms. Goldberg never actually owned the mosaic.<sup>136</sup>

Finally, on appeal, Goldberg argued that the district court should have viewed the TFSC's confiscatory decrees, adopted one year after the Turkish invasion, and adopted by its successor the TRNC, as *de facto* laws.<sup>137</sup> The Seventh Circuit upheld the district court's decision not to recognize these laws because the TFSC and the TRNC were not recognized nations by the United States.<sup>138</sup> There was ample guidance over the recognition issue. For example, in *Federal Republic of Germany v. Elicofon*,<sup>139</sup> the court held that an agency of the East German government could not assert a cultural property art claim in an American court because East Germany was not recognized at the time.<sup>140</sup>

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131. *Id.* at 1161. See also *Menzel v. List*, 267 N.Y.2d 804 (1966).

132. *Autocephalous II*, 917 F.2d at 290. Under Indiana law, replevin is an action at law "whereby the owner or person claiming the possession of personal goods may recover such personal goods where they have been wrongfully taken or unlawfully detained." 25 IND. L. ENCL. *Replevin* § 1.

133. 25 IND. L. ENCL. *Replevin* § 42; 917 F.2d at 290.

134. *Autocephalous II*, 917 F.2d at 291.

135. Collin, *supra* note 122, at 21. Literally translated, this phrase means that title to property cannot be transferred through a thief to a third party. *Id.*

136. *Autocephalous II*, 917 F.2d at 291.

137. *Id.*

138. *Id.* at 293.

139. *Federal Republic of Germany v. Elicofon*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

140. *Id.* at 232. Interestingly, on September 4, 1974, the United States formally recognized the East German government, and the judge vacated his earlier order and allowed the then East Germany

Therefore, the necessary elements to establish a claim under state replevin law are: (1) that the plaintiff has a rightful claim on the cultural property; (2) that the plaintiff has satisfied the liberal discovery rules against any limitations; (3) that the party in possession refuses return the property; (4) that the legal forum is appropriate, which is typically determined by the state in which the cultural property is located or where the party in possession conducts business; and (5) that the party in possession has acquired the cultural property in violation of some jurisdiction's property law. These factors which are endemic to a cultural property claim present a far less complicated action than pursuit through a federal law, which is continually enmeshed in changing statutory interpretations. Whether the above mentioned property law is foreign, state, or other, the cause of action still is considered meritorious.

### B. *The Legacy of Autocephalous II*

*Autocephalous II* opened the doors, not only to replevin actions under state law, but it also defined the statute of limitations context in art and antiquity ownership and theft cases. Furthermore, it established standing to diverse and foreign entities in federal courts to pursue claims under state law.

Two more recent cases highlight the standards of discovery set forth in *Autocephalous II*. In each of the following cases, the district courts determined that the discovery period could possibly accrue for periods of time extending beyond what the *Autocephalous II* decision originally contemplated.

#### 1. *Republic of Turkey v. OKS Partners*

In *Republic of Turkey v. OKS Partners*,<sup>141</sup> the Turkish government brought suit against possessors of an ancient coin collection which was allegedly smuggled out of Turkey. Turkey sought an action under both the Racketeering Influenced Corrupt Organizations Act (RICO)<sup>142</sup> and the Massachusetts Consumer Protection Act (MCPA)<sup>143</sup> to obtain the return of the disputed artifacts.<sup>144</sup> While RICO is the fundamental conspiracy law in the United States encompassing both criminal and civil actions, the MCPA is an act to prevent fraud in consumer transactions. Furthermore, the MCPA provides a replevin remedy for the successful plaintiff. OKS asserted both the inapplicability of the RICO action and

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to intervene as a plaintiff.

141. *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (S.D.N.Y. 1990).

142. 18 U.S.C. § 1961 et seq. (1994).

To establish a RICO claim, the plaintiff must allege at least to statutorily define predicate acts, and he must show that the acts "are related, and that they amount to, or pose a threat of continued activity." 797 F. Supp. at 67. (quoting *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)).

Also it was not "necessary to decide whether the acts complained of 'amounted to' a continued criminal activity, because the 'pose a threat of continued criminal activity' prong was satisfied." 797 F. Supp. at 67.

143. MASS. GEN. LAWS ANN. ch. 93A, § 1(a) (West 1994).

144. See *supra* note 142.

a timeliness defense against the MCPA action.

The district court of Massachusetts held that the plaintiff's allegations under a RICO claim were enough to defeat a defense based on *McClain (II)*.<sup>145</sup> *McClain (II)* held that unlawful exportation alone does not render an artifact as stolen for two reasons. First, Turkey possessed a legal claim on all artifacts in Asia Minor as early as 1906.<sup>146</sup> This satisfied the requirement that the artifact must be stolen within the meaning of the plaintiff nation's laws. In Turkey, the government has right of possession over all artifacts.<sup>147</sup> Second, Turkey's claims did not rely on the National Stolen Properties Act, but on a RICO claim. There, the requirements of a clear violation of the plaintiff's laws are not the applicable standard to begin a RICO action.<sup>148</sup> The district court thus held that Turkey's claim of injury due to the loss of the coins was sufficient to sustain the RICO action.<sup>149</sup> Whether the Republic of Turkey will be successful in pursuing the RICO claim remains to be seen as the issue has not yet been decided in any court. However, a RICO action has been determined viable.

OKS then asserted a statute of limitations timeliness defense against the plaintiff's claim under the MCPA.<sup>150</sup> Turkey counterargued that their case was analogous to *Autocephalous II*, where the limitation discover rule was held to begin once the plaintiff "discovered" his cause of action.<sup>151</sup> The district court held that the plaintiff's *Autocephalous II* analogy was acceptable.<sup>152</sup> Finally, OKS asserted that the application of the MCPA to this case was unconstitutional under the Commerce Clause because it would likely lead to non-uniform treatment of foreign commerce.<sup>153</sup> The district court found this argument irrelevant

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145. *McClain II*, 593 F.2d at 658.

146. This was a law inherited from the Sultanate during the later Ottoman Empire. For a review of Ottoman and Turkish law, see generally Dr. Christian Rumpf, *The Importance of Legislative History Materials in the Interpretation of Statutes in Turkey*, 19 N.C.J. INT'L L. & COM. REG. 267, 270 (1994).

147. *Id.*

148. *OKS*, 797 F. Supp. at 66.

149. *Id.* at 67. The court relied on *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1358-59 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989). The complainant's allegation of injury to the sovereign were adequate where it sought the return of "money, funds and property belonging to Philippines and its people" which the defendant had improperly removed from the country. *Id.*

150. *Id.* at 69.

151. *Id.* at 69. "Discovered" connotes that the plaintiff learns enough facts to form a basis, which must include the facts that (1) the works are being held by another; and (2) who, or at least where, that other is. *Id.*

152. *Id.* The court held:

I agree with the Seventh Circuit's analysis [in *Autocephalous II*] and hold that Massachusetts law is in accord on this point. These allegations of the defendants' calculated, successful effort to hide the existence, or at least the provenance, of the coins, if true, could be enough for a jury to find that the facts were *inherently unknowable* to Turkey for purposes of tolling the statute of limitations under either the unadorned discovery rule or the doctrine of fraudulent concealment. Consequently, Turkey's common law claims cannot be dismissed on statute of limitations grounds at this time.

*Id.* (emphasis added)

153. *Id.*; U.S. CONST. art I, § 8, cl. 3.

because there was only a minimal impact on foreign commerce.<sup>154</sup> Thus, *Autocephalous II*'s impact in the cultural property forum was felt directly in the dismissal of the standard limitations defense, and indirectly by reinterpreting a Massachusetts law against consumer fraud which has replevin as a possible remedy.

## 2. *Erisoty v. Rizik*

The District Court for the Eastern District of Pennsylvania held in *Erisoty v. Rizik*<sup>155</sup> that a thirty year lapse of time will not, in and of itself, constitute a statute of limitations bar to a claim. The facts of this case differ from both *Autocephalous II* and *OKS* in that the inheritors of a private collector, rather than a sovereign entity, were seeking the return of a potential cultural property. However, both the *Autocephalous II* and *OKS* courts held for the original owners' position.

The facts of *Erisoty* are interesting. In 1940, Ayoub Rizik, an art collector, and his wife, acquired four Corrado Giaquinto paintings titled "Winter, Spring, Summer, and Autumn."<sup>156</sup> In 1960, these paintings were stolen from the Rizik's home in Washington, D.C. The theft was reported to both the Federal Bureau of Investigation (FBI) and INTERPOL, the international police agency. The Riziks had also notified the Art Dealers Association of America and the International Foundation for Art Research (IFAR). Shortly after the theft, the Riziks died, leaving their two children, Philip and Jacqueline Rizik, the stolen paintings, should they ever be recovered. Furthermore, the children had been reimbursed by their parent's insurance company. Some efforts at recovery were made, but as time went on, the chances of recovery became less likely.

In 1988, a removal service discovered one of the paintings, titled "Winter," behind the drywall in an apartment slated for destruction.<sup>157</sup> After a series of verifications, the painting was auctioned to Steven Erisoty who, through diligent efforts, restored it. Eventually, the FBI was informed of Erisoty's possession. The FBI then seized the painting and returned it to Rizik. Erisoty then commenced a suit for the return of the painting.

Of the many issues that arose, the most salient was whether the Rizik's efforts to locate the painting were sufficiently reasonable to "toll the statute of limitations."<sup>158</sup> That the Riziks were neither art collectors nor part of the art community was held irrelevant.<sup>159</sup> It was further held that Erisoty could not claim that the Riziks had transferred title to their insurance company after it reimbursed them for the loss in 1960.<sup>160</sup> The district court held that the statute of limita-

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154. *OKS*, 797 F. Supp. at 68.

155. *Erisoty v. Rizik*, No. 63-6215, 1995 WL 91406 (E.D. Pa. Feb. 23, 1995).

156. Giaquinto (1703-1763) was an Italian "pre-impressionist school" artist who specialized in painting seasonal landscapes.

157. *Erisoty*, 1995 WL 91406 at \*3. The painting titled "Winter" was in extremely poor shape as it was cut into several pieces.

158. *Id.* at \*8.

159. *Id.* at \*9.

160. *Id.* (stating "... the Riziks had a continuing interest in the painting sufficient to warrant

tions may be tolled for the Rizik's claim of ownership.<sup>161</sup> The court applied a weight-effort test to determine if the original owner had met the burden necessary to "toll" the statute: "[w]ith respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to art work of greater value, it may be more reasonable to expect the owner to do more."<sup>162</sup>

The court held that the discovery rule under these conditions "is highly fact sensitive."<sup>163</sup> Thus, the court will examine recovery efforts on a case-by-case basis. In the case of *Erisoty*, the court held that the Riziks exercised enough due diligence to toll the statute of limitations in their favor. The district court noted that a case-by-case scheme "permits the court to consider the relative qualities of the rival claimants to the art work."<sup>164</sup> However, despite the court's consideration of the "relative qualities" of the rival claims, it remains clear that the balance in any such consideration tips in favor of the original owner. Furthermore, it remains clear that the unreasonable length defense is easily overcome by proving that the delay by the plaintiff was not intentional, but rather circumstantial.

### CONCLUSION

*Autocephalous II* not only provides guidance to a plaintiff seeking recovery of cultural property, but also illuminates three fundamental aspects of cultural property law. First, statute of limitations defenses in cultural property cases are unusable under most circumstances. It would take an intentional delay by the party seeking recovery to provide the possessor (whether the possessor is a museum or individual) with a defense of unreasonable delay. Second, it remains clear that the balance in any cultural property consideration tips in favor of the original owner. This favoritism exists because it is presumed that the original owner was also once the rightful owner. This remains true even if the original owner was without actual possession for a considerable period of time. Finally,

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consideration of their efforts under the due diligence criteria of the discovery rule.").

161. *Id.* at \*10. (holding that the toll may occur, "... if strict enforcement would work an injustice on victims of a tort or crime, such as where an original owner is unable to locate stolen art work for many years despite reasonable search efforts.").

162. *Id.* at \*12. (quoting *O'Keefe*, 416 A.2d 862, 873 (1980)). The court in *Erisoty* then quoted the *Autocephalous II* holding, "that any laziness this rule might at first blush invite on the part of the plaintiff is heavily tempered by the requirement that, all the while, the plaintiff must exercise due diligence to investigate the theft and recover the works." *Id.* (quoting *Autocephalous II*, 917 F.2d 278, 289 (7th Cir. (1990)).

163. *Id.* John G. Petrovich, cited by the court, suggests a five part balancing test to apply the discovery rule:

All relevant factors should be considered including, but not limited to, the following: (1) the nature of the injury; (2) the availability and quality of the witnesses and physical evidence; (3) the lapse of time since the initial wrongful act; (4) whether the circumstances permit the inference that the delay has been intentional or deliberate; and (5) whether the delay has unusually prejudiced the defendant.

John G. Petrovich, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 U.C.L.A. L. REV. 1122, 1152 (1980).

164. *Erisoty*, 1995 WL 91406 at \*12.

*Autocephalous II* proves that replevin is a more viable option than the cumbersome federal statutes examined in Section II of this article. Under the replevin doctrines of most states, it may be the case that sovereign entities whether foreign nations, Indian Tribes or recognized ethnic groups residing in the United States have greater redress using state statutes than federal protections. Replevin actions by their very nature can be accomplished more efficiently and cheaper than suits brought under the many available federal laws listed in Section II. Furthermore, replevin laws, as seen in *Autocephalous II*, tend to favor the party of original ownership, while the federal laws are on the brink of devolution against the party of original ownership.

Though the drawback to replevin is that an absolute constitutional right has not been established, such as in a suit brought under AIRFA or NAGPRA for example, the return of ownership and a legal right, however, have been established. Moreover, as the examination of the AIRFA, NAGPRA, and ARPA has illuminated, the courts are sometimes unwilling to find asserted constitutional rights for the plaintiff. Unless the plaintiff party desires to reassert a constitutional or federal right, then replevin is the more viable option.