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Difficulties with the Interordinal Laws of Cultural Property as Applied in the United States, and Proposed Solutions

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"This situation creates an apparent complexity in the management of interterritorial relationships, a complexity that also affects, in a significant manner, legal security."[1]

Luis Gordillo, *describing the complexities of EU constitutional law.*

I. Introduction: The Current System of Interordinal Cultural Property Laws Is Inoperable.

One of the most notable elements of the laws surrounding movable cultural property is the number of them that exist, both in the United States, and internationally. Despite a multitude of treaty regimes, national statutes to operationalize those treaties, national laws, and common law doctrine, by all indications, the international market for stolen or illegally exported culturally property continues to thrive. The U.S. Department of Justice has ranked art crime behind only drugs and arms in terms of the highest-grossing criminal trades.[2]

In addition to the network of international and federal law, some notable international repatriation actions have been achieved by means of state replevin statutes.[3] How can we begin to make sense of the web of law that is meant to apply to the international movement of cultural artifacts that come to rest in the United States? Indeed, many scholars have created nuanced maps of individualized successes or failures of the areas of the current regime.[4] Others have written about the theoretical justifications for more enhanced protections[5], and conversely, some have written of the possibility of an open market for cultural property rather than a regime of thicker protection.[6]

This paper seeks to sketch the contours of the interordinal web of the current laws, and delineate problem areas where the law fails to reach as well as the areas where law exists, yet remains misapplied. In doing so, I am hoping to continue the dialectic begun by Alexander Bauer in his 2008 piece, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*[7] as well as borrow some inspiration from the interordinal analysis applied by Gordillo in his groundbreaking recent work, INTERLOCKING CONSTITUTIONS.[8]

This is a top-down perspective, with less attention to each individual law than to the interordinal architecture created by the current regime as a whole. By looking at the overall structure of the laws as applied in the United States, it is possible to propose holistic solutions to patch up where the obvious gaps exist. My research indicates that this perspective is lacking in the current scholarship, and my hope is that by looking at the interordinal nature of the law today, the overall structure may be improved, rather than proposing solutions to one singular law or enforcement mechanism with disregard to the totality of the web. Because of the complexity of the trade itself, featuring overlapping laws of foreign nation states and the interwoven rules of United States import and criminal law, it is no surprise that the laws embody the "instability of interordinal relationships."[9]

Standing represents one key difficulty that repeatedly emerges in the interordinal analysis. To bring a claim on cultural property that has come to reside in the United States, only wealthy, internationally powerful nation states have the opportunity to pursue the type of litigation or repatriation campaigns that may or may not have a

reasonable probability of success. And the murkiness of the current regime makes it difficult to track and locate expropriated objects. Even if one locates the lost cultural property, it is increasingly evident that it is nearly impossible to predict the efficacy of a claim.

This unpredictability does lead one to wish for a simple answer, such as a free market solution via a deregulation of the international cultural property trade. However, we will explore why the argument for a deregulated international trade would exacerbate many of the current problems, and elides the fundamental concerns that are unique to cultural property – such as how to incorporate source nation's desire for repatriation and cultural groups' moral claims.

In examining the landscape with a critical eye, I hope to expose the assumptions underlying the laws and scholarship, with the hope of offering a few avenues of development that could enhance the standing of key constituents and improve the predictability of potential claims. Without new solutions, the overall structure of the laws governing international cultural property residing in the United States, the system will remain inoperable and unpredictable. Although it is difficult to estimate the costs of a non-functioning cultural property regime, one can be certain that the murkiness of the law hides treasured and potentially sacrosanct art and artifacts in the shadows of the failed interordinal scheme.

In exploring the international cultural property regime from the perspective of the United States market, I will work through the following analysis. In Part II, I will examine critical legal instruments and their application to determine the gaps in the

interordinal scheme. Then, in Part III, I will explore the alluring, yet flawed, potential laissez-faire solution to the current system's inadequacies. Finally, in Part IV, I will offer potential solutions to issues raised in Part II, including possibilities for improved provenance, alternative dispute resolution, repatriation procedures, as well as the promise of state law.

II. What are the most important legal instruments and landmark cases in the current system, and what inadequacies do they reveal?

A. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970

While the Convention clearly signaled a concerted international effort to respond to the problem of trafficking in cultural property, the enforcement of the instrument has proven difficult. In fact, leading critics have noted that looting and destruction of archaeological sites "has increased rather than diminished in the thirty succeeding years" since the Convention was ratified.[10]

Since the Convention was not self-executing, and each member may select which Articles of the Convention they will subscribe to, it is notable that the United States took twelve years in order to give effect to only limited parts of the convention.[11] Since the UNESCO convention was drafted, there has been controversy about the extent to which the Convention would require the immediate return of all stolen cultural property

objects.[12] As a result the United States did not give effect to Article 3 of the Convention, the most unequivocal statement that stolen cultural objects must be returned.[13] Of course, this skeptical enactment of the Convention nevertheless functions as a binding law, in the form of the Cultural Property Implementation Act (CPIA).[14]

The CPIA offers three main remedies for enforcement of the UNESCO Convention. But what is most notable is the restricted standing offered by the Act as operationalized by the Convention.

The CPIA:

> "(1) makes it unlawful to import any designated archaeological or ethnological material that is exported from a state party, that is, a country that has joined the 1970 UNESCO Convention; (2) bars the importation of an article of cultural property stolen from a museum or religious or secular public monument or similar institution in any state party; and (3) provides for the forfeiture of any designated archaeological or ethnological material or article of cultural property that has been imported in violation of the CPIA." [15]

The Act, and the Convention which it construes, limits actions to state parties. This is a significant error that has been addressed in subsequent international law, but the oversight suggests the underlying cultural biases and the persistence of a hegemonic structure that enforces, rather than recognizes, subaltern positions in the pursuit of protections of cultural property. As many critics noted, the problem with the UNESCO Convention was the "definition's preoccupation with the relationship of nation-states to cultural property. Not only do states designate what items are cultural property…they are the only entities competent to do so."[16] Additionally, some critics have noted that

"…provisions with regard to the protection of third party acquirer in good faith might undermine the Convention."[17]

Given the difficultly in getting the 1970 Convention operationalized, it is perhaps no wonder that the problem might be magnified where an international law instrument utilizes heightened enforcement language. This is but one issue facing the UNIDROIT Convention.

B. The UNIDROIT Convention.

The UNIDROIT Convention has been heralded as the successor in interest to the UNESCO treaty, and many believe it has the potential to solve the problem of non-state standing, as well as operationalize a broader obligation to return stolen property. Regardless of the efficacy of the instrument itself, a glance at the list of signatories reveals the Convention's lack of traction on the international stage.[18] The United States, for example, has not joined the convention. This may in part be due to the fact that the convention allows no reservations – ie. a country must implement all or none of the provisions.[19] Given that the UNIDROIT Convention is much more explicit about obligations on nations to return stolen materials, it may be perceived as too broad by countries with large markets in stolen goods. However, one important element in the UNIDROIT convention may be found in its grant of standing only to States, but also to former "owners", and the language may even be read more broadly than that. Article

2(1) of the UNIDROIT Convention unequivocally states, "The possessor of a cultural object which has been stolen shall return it."[20]

The UNIDROIT situation is emblematic of the difficulties in regulating international traffic in stolen cultural property. Here, the better the law has become, the less likely it is to be enforceable, due to member states' discomfiture with potentially limitless claims. Many academics and supporters of cultural property have called for further enforcement of the UNIDROIT Convention as a corrective to the problems with the UNESCO Convention. However, the most persuasive argument might be from famous cultural property attorney Lawrence M. Kaye, when he suggested,

> Although to date only a handful of nations have ratified the UNIDROIT Convention, the institution of a permanent court of arbitration just might be the catalyst that the international community needs to realize that the UNIDROIT Convention is, at the moment, the best way to curb the illicit market in art and antiquities.[21]

The instrument itself contemplates such a solution, as the Convention provides that an owner or requesting State may bring a claim before a court *or other competent body* for the return of the cultural object.[22] The establishment of cultural property tribunals may offer a significant benefit for non-state parties with less resources to be able to access the remedies available under the act. Moreover, this would diminish the burden on states ratifying the UNIDROIT Convention, if the preferred method of adjudication were to be a non-state commission for arbitration. The possibility of a group whose mission were to adjudicate these type of disputes, much like the American

Arbitration Association, but with a limited scope for property disputes, might actually produce profits as well as assist in elevating the transparency of cultural property disputes.[23]

C. National Stolen Property Act (NSPA)[24]

The U.S. jurisprudence interpreting the NSPA has filled another hole in the stolen international property web – this federal law has been applied to property that was not actually stolen, but rather, illegally exported if the artifacts were excavated in contravention of state patrimony laws.[25] Interestingly, this law was not particularly enacted to combat cultural property issues, but rather acts as a broader statute regarding property theft in general. Yet it has also been used as a compliment to the CPIA as the enforcement mechanism for criminal penalties resulting from violations of the UNESCO Convention.[26] That it has been the most effective in repatriation cases brought in the United States so far, is not reassuring. Why? The statute has a *mens rea* requirement that mandates knowledge of the source nation's patrimony laws in order to establish guilt for a trafficker.[27] Moreover, the NSPA, like the CPIA, requires the wronged entity to be a State, rather than a people or cultural group. So, even potential solutions to the *mens rea* problem[28], do not give rise to a solution to the issue of standing for subaltern groups.

Moreover, the precedent surrounding the NSPA remains non-determinative on the issue of interpretation of foreign state patrimony laws and their relationship to the

export of the cultural property in question. Federal prosecutors have asserted that unprovenanced antiquities without a valid export license from a foreign nation are "stolen' within the meaning of the NSPA.[29] However, the case law may not be so easily reduced. The Fifth and Second circuits offer competing paradigms for determinations of whether an object is "stolen".

i. *U.S. v. McClain*[30]

The defendants in this case exported pre-Columbian artifacts from Mexico and were convicted under the NSPA by the District Court for the Western District of Texas. However their conviction was reversed upon appeal, because the court found that Mexico was required to have established national ownership before an illegal exportation of an article can be considered theft for the purposes of the NSPA.[31] This holding has been cleverly reduced to the following calculus by Stephen Urice: "(Enactment of Foreign Nation Vesting Statute) + (Illegal Export) = Stolen."[32] This was a highly unclear outcome, as the difference between a foreign nation vesting statute, and a merely regulatory export law became a difficult standard to interpret. This standard was not revisited until nearly thirty years later in *US v. Shultz*.

ii. *US v. Shultz*[33]

The *Shultz* case portended to clarify the standard for violations of foreign export laws, but in reality, leaves the question just as provocatively open-ended. The sophisticated art dealer defendant was charged with the theft of Egyptian antiquities, and prosecuted under the NSPA via Egyptian law providing that all Egyptian antiquities

are national property. The court found this was more than a regulatory export law, but rather an affirmative grant of patrimonial provenance for antiquities born of Egypt.[34] Again, Urice has reduced the holding to a simplified equation: "(Enactment of Foreign Nation Vesting Statute + Foreign Nation's Assertion of Actual Ownership) + (Illegal Export) = Stolen".[35]

However, even applying the "simplified" equations for the holdings of each case, the inconsistency between the two circuits is apparent. In fact, rather than clarifying the potential distinction of regulatory versus patrimonial vesting statutes, the *Shultz* opinion simply adds an additional and equally mercurial requirement of "Foreign Nation's Assertion of Actual Ownership".[36] *Shultz* represented a relatively easy case where a sophisticated dealer knowingly stole antiquities in the face of a relatively explicit Egyptian law, where "Law 117 ma[de] it clear that the Egyptian government claims ownership of all antiquities found in Egypt after 1983."[37] One can easily imagine the challenge where a foreign nation's statute contains ambiguity as to whether an export regulation vests patrimonial title in the nation-state, or whether it is merely a regulatory, non-ownership export statute.

McClain and *Schultz*, the leading cases under the NSPA, resort to strange distinctions of foreign law and offer two competing and unresolved visions of the proper role of provenance laws in adjudicating stolen property disputes in the United States. Barring emergence of a coherent precedent or further development of the NSPA, the criminal prosecutions under the act will be unpredictable and unlikely to offer predictive

guidance for nations wishing to ensure their cultural property will be protected should it enter the U.S market.

III. The laissez-faire solution?

A. Why an open-market solution is tempting

It is difficult to view the scandals of ownership in relation to museum artifacts as a positive development in the international regulation of the movement of cultural property. Perhaps the quintessential example of a case where the current system of law has led to bad result is the prosecution of Marion True, former curator for the Getty Museum. Her prosecution in Italy has been deemed a "warning…to the entire Western museum establishment."[38] However, after years of highly publicized prosecution and the very public disgrace of the formerly esteemed curator, the case against Ms. True ended with the Italian court dismissing the charges against her due to the statute of limitations running out (partially because the Italian system of justice moves at such a glacial pace).[39]

Given the lacunas in interordinal cultural property law governing the international cultural property in the United States, and the glaring examples of the inefficacy of foreign prosecutions such as Mr. True's, one might be tempted to entertain an open-market solution to the problem. Indeed, as my exploration reveals, many of the laws overlap, few can be clearly applied, and the strongest attempts at international response have not been adopted. It is in the light of the Getty scandal, and other similar museum scandals, and the established inefficacy of the international legal regime,

Professor Posner has stepped in as a high-profile proponent of the possibilities for an open market in cultural property.

However, his analysis reveals that the argument for an open market depends upon unacceptable assumptions about cultural property and emphasizes that giving up on regulation is unlikely to lead to positive results. After exploring the argument, I will put forward some potential hybrid solutions to the problems of the current regime.

B. Normative concerns with the open market solution.

In the tradition of the law and economics school, it is unsurprising that Professor Posner's article on *The International Protection of Cultural Property* would advocate a Coasian solution to the inadequacies in the international regime for the regulation of movable cultural property. But his argument relies on unacceptable assumptions. If we take the argument that cultural property claims are inherently absurd and that it is hardly worth considering the source of cultural property, then perhaps his logic makes sense. But that logic is cold and calculating, and throughout the piece, Posner reveals the depth of his internationalist bias, and his disregard for any concept of an indigenous culture having a claim to their own property. Many of Professor Posner's decontextualized assumptions, widely resonant in the wider academic discourse, continue to undermine the development of a coherant international culture property regime.

Take for instance Professor Posner's analysis of the current harms in the illegal trade of antiquities:

> "The illegal trade in antiquities thus produces a number of harms. First, the antiquities are frequently damaged. Second, scholarly information is lost because archeological norms are violated. Third, the origin country loses the antiquities to foreign countries, which many people find objectionable for reasons that I will discuss below. Fourth, purchased antiquities usually disappear into private collections and cannot be studied by scholars or appreciated by people who care about cultural property."[40]

Here we can see that the normative assumptions behind his law and economics argument for an open market in cultural property include an implicit valuation of the internationalist argument, as well as a lack of understanding of the harm to subaltern cultural groups within foreign countries who might make claim to their stolen goods. The harms simply go further than whether a very wealthy collector will deny a very wealthy university the opportunity to admire the cultural property in question.

So when Professor Posner advocates for a free market solution, he elaborates, on the classic tropes of internationalism without examining his own assumptions:

> "One of the benefits of a free market in cultural property is that much cultural property would leave poor, insecure states that suffer from war, corruption, and inefficient law enforcement, and be stored in wealthy, secure states."[41]

Although the merits of the internationalist argument certainly may exist, to adopt the internationalist position both in terms of identifying the harms of the current system, and in reference to the free market solution is inappropriate. Why? Professor Posner purports to evaluate the illegal international trade in cultural property, and what should be done to stop it. Yet, Professor Posner posits that nothing should be done to stop it because ultimately the *stolen* property will end up in the best, wealthiest hands in the Western source nations. This does not resolve the problem of the outflow of cultural property from source states, let alone the potential claims of subaltern groups within those states whose voices are not heard in regard to property that has perhaps originated on their land, or has emanated from their ancestors.

Professor Posner's dismissal of the nuances of cultural property are made shockingly evident when he offers the modern art market as a paragon of the possibilities of the free market system for the market in cultural property. [42] Just like in modern art, he states, the "the people who value it most will buy it."[43] This statement demonstrates a lack of knowledge of both the modern art world, as well as cultural property disputes. In the modern art world, provenance is of critical importance. When a great painting becomes available, it is a significant impediment to a sale if there is any degree of provenance that is unclear. As a result, provenance records become the most important element in a transaction, and most of that information is readily available as artists are (mostly) still alive, and dealers are at most a few steps removed from the original conception of the work.

The implicit problem with the trade in cultural property is that the source object's provenance is the center of the issue, and cannot simply be gleaned from a gallery's ledger or the artist's studio records. When objects come from an ancestry or historical peoples who have overlapping histories, or complex geographical roots, the very question of its origins may require serious effort. By simply opening the flood gates, with no inter-border enforcement or tracking mechanisms, the free market will inherently toss to the side the complex questions of heritage, because the costs of ascertaining it are too high. That is why the modern art example is far too convenient for Professor Posner – it assumes the world of crisp provenance can be applied to cultural property disputes. Any trope that ignores this fundamental characteristic of the international cultural property market has little hope of presenting an accurate analogy for it, let alone offering an effective proscriptive solution.

It is equally shocking that Professor Posner goes so far in his description of the Modern Art market to state that, "No one believes that a painting finished yesterday by an American artist should stay in America, and be imprisoned in an American museum, on the grounds that American cultural property should stay on American soil."[44] Well, then what about NAGPRA? The entire purpose of the domestic law is to be sure that certain indigenous property remain on, not only American soil, but the actual soil from which it originated.[45]

If Professor Posner cannot accurately state the interests at play in the *domestic* art market, how can his highly reductive strategy for the international market be reliable?

It would be a different argument if Professor Posner took the position that a free market would adequately protect cultural property interests, because the market somehow recognizes the unique features of cultural property and benefits from consumer awareness protections. However, he does not say that. He argues instead, cultural property is just not special, and his normative position devalues the proposed solution. He writes that "… the moral basis of a modern people's claim to cultural property is questionable"[46] and further, "If the people have a strong enough psychological need for the artwork, they can always purchase it through a government or museum. They do not have any moral right to possession."[47] In making these assumptions, he denigrates the standing of any group that would threaten to undermine his free market position- namely the groups with arguably the strongest claims to cultural property- those groups who have sacred, spiritual, or heritage relationships with the cultural property. By writing their claim as "questionable", he conveniently assumes away the argument that is most likely to threaten his proposed solution.

In summarizing his argument, Professor Posner concludes that the current regime's "flaws result from its fundamental assumptions rather than from technical problems that could be corrected through marginal reform."[48] Nevertheless, given the inadequacy of the free market argument, I shall proceed to offer some ideas for marginal reform.

IV. Ideas for better legal coverage, and support of cultural groups left without voice in the current regime.

A. An art loss register style mechanism for cultural property[49]

The idea of a database for stolen art is not a new one. In fact, many databases exist regarding items looted during times of war, especially for lost or stolen items from the World War II period.[50] Despite academics and restitution officials calling for a total database, the best existing version at this time seems to be the Central Registry of Information of Looted Cultural Property 1933-1945 available at http://www.lootedart.com/ . However as critics have noted the information on the site " is devoid of essential links and documents" and is often merely an aggregated version of state officials comments at international conferences.[51]

A more promising version of an international database for stolen art comes from the private sector's "The Art Loss Register" located at www.artloss.com. It is highly detailed with catalogue images for almost 80,000 stolen items.[52] However, this subscription-only site records only thefts reported by "subscribing insurance companies, their loss adjusters, law enforcement agencies, private individuals, museums, and galleries."[53] The site relies on subscriptions, and "the insurance industry is…the largest financial contributor[] to the register."[54] Although this type of registry clearly offers an effective tool for subscribing insurance companies, and in turn the private trade and high profile museum world, it regulates mostly those objects already recognized at auction or in museum or private collections, and does not begin to address any sort of source country priorities for cultural property.

Why is a broader database necessary? The founder of the Holocaust Art Restitution Project ("HARP") idea described the "database as a beginning point, not as an endpoint" when discussing HARP's efforts to combat stolen World War II art. The magnitude of the trade in cultural property with foreign provenance that ends up on the United States market is difficult to gauge. That many groups with claims to cultural property have no centralized forum to demarcate their claims to lost, stolen, or illegal excavated objects makes provenance impossible, and increases the difficulty in prosecuting claims when an object does surface.

For example, in *Peru v. Johnson,* the government of Peru failed to recover a group of pre-Columbian artifacts in a claim against an art dealer and collector. The court sought evidence of an inventory or itemization of the Peruvian objects to ensure title in the country, rather than the good faith purchaser, and so their claim failed.[55] An open source registry would alert potential purchasers to title disputes, and offer a definitive catalogue for country's or groups to affirmatively create provenance records for objects of great cultural significance. In addition, implementing record keeping requirements for export/import transactions involving archaeological or "found-in-the-ground" objects via an open-source register would allow for easy identification of when purported cultural property was crossing borders. In order to implement the system effectively, international funding would have to be made available in order to overcome the insurance market centricity of the Art Loss Register. This could be accomplished by adding to international treaty instruments, or via taxation on foreign cultural property imported into the U.S. Without such a system for tracking provenance precisely where

provenance is most at issue, how can the legal regime have a hope of becoming enforceable?

B. How can NAGPRA inform the international cultural property landscape?

One of the key difficult outlined in the legal analysis section of this paper is the lack of standing for cultural groups to bring claims under enforceable law for the repatriation of stolen or illegally excavated cultural property. This is especially true under the UNESCO – CPIA regime. In addition to the difficulty for cultural groups neglected by the inaccessibility of the legal regime, this same lack of accessibility perpetuates their exclusion by disallowing this class of claimants as potential catalysts for reform. Cultural groups, not necessarily the Nation-State, may present the strongest moral or cultural argument for the retention and preservation of their property. Without their voices in dialogue, any attempt to solve the problem of the international trade in cultural property lacks the most essential claimants.

As noted above, the state and federal law governing repatriation of cultural property from foreign sources are at best, unpredictable and difficult to apply. Adding the interordinal complexity of treaty law, with Nation-State standing requirements, certainly does not make it easier for a cultural group to seek return of an item of cultural property. Perhaps this is one reason that some United States museums have proactively turned to NAGPRA "as a model for foreign repatriation requests."[56]

Both scholars and museums have begun to visualize NAGPRA as a potential model for foreign repatriation claims. For example, the National Museum of the

American Indian (NMAI) has essentially duplicated the NAGPRA "national programme for international repatriations to indigenous communities in Canada, Cuba, and Peru."[57] Given the scarcity of binding law to govern such circumstances, the voluntary application of NAGPRA-like provisions to repatriation requests may offer a significant improvement for museums or cultural institutions presented with international cultural group claims.

> "[The NMAI]...through the U.S. State Department, [] establishes government-to-government relations before it officially contacts the relevant indigenous group. This procedure ensures negotiations are conducted with authorized representatives if there are competing, indigenous claimants. Significantly, the NMAI supports repatriation directly to the 'descendant indigenous community'."[58]

Moreover, NAGPRA's dispute resolution mechanisms have similarly been offered as a model for resolving disputes between cultural group claimants and museum or private holders.[59] As Mastalir notes, "Section Eight of the Act establishes a seven-member review committee composed of equal numbers of representatives from Native American organizations and the museum community…" with a tie-breaker chosen from among a list of nominees agreed upon by both groups.[60]

Given the lack of workable models, NAGRA may offer a unique fit for cultural groups seeking repatriation of cultural property, without having to resort to the unpredictability of either the international treaty sphere, or the difficulties of U.S. national or state law. In addition, U.S. museums or private collections proactively offering a NAGPRA-like mechanism as a device for foreign claimants may be able to

avoid issue such as the Italian attack on Marion True or a high profile cultural property controversy. Rather than potential tarnish of museum reputation, as in the case of Marion True and the Getty, extending the olive branch in the form of relatively accessible repatriation procedure can help museums to ensure that their collections retain legitimacy. Of course, museums resist this type of inquiry into foreign cultural group claims, but merely ignoring the issue can result in potentially larger liability if a controversy reaches a federal court.

C. Forum for Arbitration/Mediation and Dispute Resolution

As noted above, NAGPRA's guidelines for dispute resolution regarding cultural property claims may offer some guidance for informal adjudications. But without binding law to enforce similar standing for cultural groups, or the adoption of international legal instruments which offer extra-territorial solutions, the current legal paradigm is sorely lacking for a relatively stable alternative dispute resolution forum. The UNESCO Convention, the most widely adopted international instrument for cultural property adjudication, "specifically addresses the problem of dispute resolution at only one point."[61] The UNESCO Convention, in Subsection 5 of Article 17, offers its own offices to reach a settlement where there is a dispute over the implementation of the Convention.[62] However, this standing is limited to State Party signatories to the convention, and leaves out the possibility of an arbitration or negotiation between a state party and a non-state party.

As mentioned above, the promise of the UNIDROIT convention, despite its lack of adopting states, comes from its emphasis on possibly extra-territorial arbitration for disputes. Given the breadth of the UNIDROIT Convention[63], the establishment of a permanent forum for arbitration has particular promise for cultural groups left out by the nation-state standing requirements of the UNESCO Convention. The UNIDROIT Convention expressly provides for the possibility.[64]

Scholars in the field have noted that cultural property disputes may actually be better suited to alternative dispute resolution than other property. Professor Alan Scott Rau has suggested that where a variety of interests are at play, the more likely it is that the two parties can trade off for mutual gain.[65] Particularly in art-related disputes, Professor Rau suggests that the trade-offs between the tangible and intangible , and short and long term interests may offer a unique opportunity for compromise.[66]

In order to effectuate a meaningful opportunity for an arbitral solution, the United States could simply adopt the UNIDROIT Convention, and many of the aforementioned issues would be solved. However, because of the breadth of the Convention, and the instrument's no reservations requirement, the United States will not be likely to adopt it in the near future. Barring the adoption of UNIDROIT, the aforementioned proactive policy by museums and collectors becomes much more important. Establishing an arbitral forum for foreign claims does not mean that title will be lost for all American possessors of cultural property. Bad claims will not be likely to prevail, and good claims will be resolved earlier in a dispute, preventing inordinate costs.

Barring this admittedly idealistic solution, what else can cultural groups do to protect their stolen property?

D. The promise of state law applied in the federal courts: *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg*[67]

Given the treacherous legal landscape resulting from the interplay of U.S. federal law and the international treaty regime, a cultural group may have difficulty selecting a forum and a legal plan of attack having discovered an object of their cultural property in other hands in the United States. At this stage in the regime's development, the larger multinational treaties would not be the most effective choice of law. Nor would the NSPA or CPIA (the CPIA after all merely operationalizes the UNESCO Convention, including its standing limitations). Ironically, the best device for bringing the claim may be under the state replevin laws where the object or objects currently reside.

Autocephalous Greek Orthodox Church of Cyprus v. Goldberg may offer a solid working model for international cultural groups wishing to make claims on their stolen cultural property in the federal courts applying state laws. Although the opinion may seem like an outlier, beginning as it does with an extended quotation from a poem by Lord Byron, it is one of the most widely cited and influential decisions on stolen cultural property. In the case, the Turkish government had allowed the export of mosaics belonging to the Greek Orthodox Church in Cyprus.[68] The Church sued in Indiana, where Peg Goldberg, art dealer and gallery operator, had possession of them. The Church stated that the Turkish exporting authority had no right to allow the mosaics out of the

country.[69] Interestingly, it was Marion True who alerted the Church of Cyprus to the location of the mosaics, when Peg Goldberg approach True in an attempt to sell the objects to the Getty Museum.[70]

The fascinating element of the *Autocephalous* case is that a federal district court sitting in diversity applied Indiana replevin laws to determine ownership of the mosaics. Here, in the face of all the potential complexities of federal and international law, the Judge found that mosaics belonged to the Church of Cyprus, under Indiana replevin law, 25 I.L.E Replevin §1, which is quite simple: "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."[71] Despite the fact that the Turkish government had allowed their export, the court found that "the Church ha[d] a valid, superior and enforceable claim to these Byzantine treasures, which therefore must be returned to it."[72]

A cultural property group that does not match a nation-state in terms of treaty standing or resources may benefit from the simplicity of this form of claim. Assuming a group can trace their property to a resting place in a state with replevin protection, it seems that a simple replevin action vastly exceeds the difficulties of either the CPIA or the NSPA in terms of both the burden of proof on the state group and in terms of standing. Note that under the CPIA, a cultural group such as a church would not have standing because it is not a nation-state.[73] Under the NSPA, the claim would be infinitely more complex based on the requirements regarding the foreign state's export statutes and a court's choice to characterize the source country law as a vesting statutes or

merely regulatory statutes.[74] The NSPA claim would also be made more difficult by a permissive export, such as consensual export of the mosaics by the quasi-official Turkish authority in *Autocephalous*.[75]

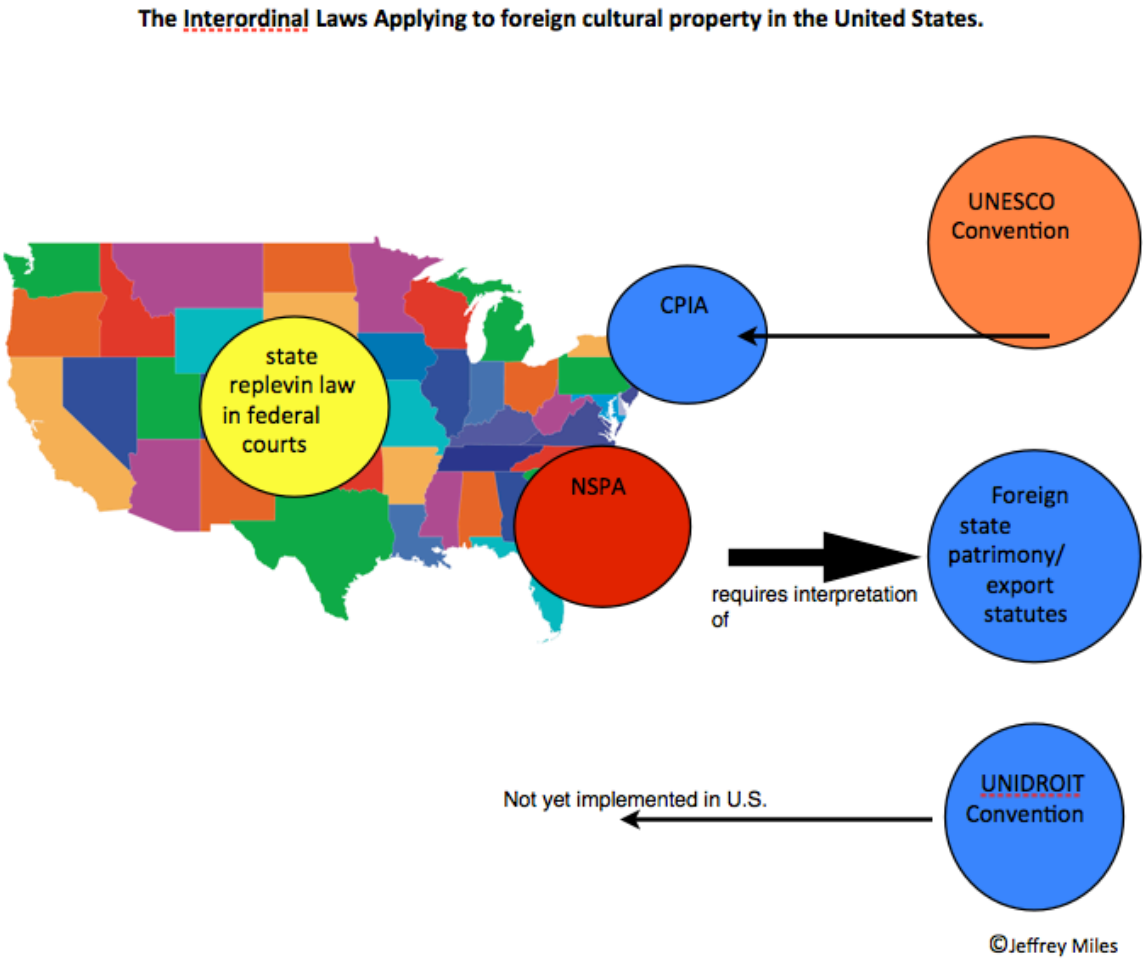
Ironically, the promise of state standing under the simplest replevin laws may offer more predictability and precision than the complexities of interordinal regimes of federal and international law, especially for cultural groups occupying a subaltern position in their home country. This fact should offer hope as well as a blueprint for foreign subaltern groups or peoples who wish to bring claims for their cultural property which has come to reside in the United States against their will. In addition, the realistic threat of such claims should create concrete motivation for United States museums, dealers and collectors to pursue the aforementioned policy and procedure changes in order to avoid being hailed into the federal courts. Without the ambiguity of international law and the inertia of federal law to hide behind, bad actors cannot avoid the blunt instrument of state theft statutes as applied by conscientious federal judges. Therefore, proactive change is not only morally correct, but it is a legalistic imperative.

V. Conclusion: What does this mean for the future of international cultural property in the United States?

In the few years since the prosecution of Marion True in Italy, the international cultural property legal regime as applied to the United States has not changed. One can scarcely believe that the curator of one of the leading museums of the world faced criminal charges for over a decade in Italian courts, and yet, mysteriously, the debate

over the regime is far from fervent. Although many scholars have written about the nuances of various aspects of the trade in cultural property, this paper takes a holistic view with the hope that the macro perspective sheds some light on the areas of the current regime most in need of attention, as though to point out holes in an architectural structure, and then to offer a few bricks and mortar. Rather than raze the regime, as Professor Posner advocates, a few structural improvements may offer significant benefits to difficult cultural property disputes and build predictability moving forward. It is my hope that this paper continues to grow the dialectic around thicker and more resonant protection for cultural property illicitly present in the United States.

VI. Addendum: Diagram of the Applicable Law



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[1] LUIS I. GORDILLO, INTERLOCKING CONSTITUTIONS: TOWARDS AN INTERORDINAL THEORY OF NATIONAL, EUROPEAN, AND UN LAW 3 (2012), *describing* overlapping constitutional law in the EU, and its relation to UN law.

[2] Noah Charney, et al., *Protecting Cultural Heritage from Art Theft*, *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march-2012/protecting-cultural-heritage-from-art-theft (Accessed November 24, 2012).

[3] *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg,* 917 F.2d 278 (1990).

[4] Stephen K. Urice, "*Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*", 40 N.M. L. REV 123 (2010); Marilyn E. Phelan, *Cultural Property: Who owns it and What Laws Protect It*?, 74 Tex. B.J. 202 (2011) .

[5] Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033 (1992-1993).

[6] Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J.INT'L L. 213 (2007).
[7] Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 691 (2008)
[8] *See* Gordillo, *supra* note 1.
[9] *Id.* at 6.
[10] Bauer, *supra* note 7, at 694-695 *citing,* A. COLIN RENFREW, *Foreword to* TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE xi (Neil Brodie, et al. eds., 2001).
[11] Marilyn E. Phelan, *Cultural Property: Who owns it and What Laws Protect It?,* 74 TEX. B.J. 202, 205 (2011).
[12] Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects* 208 in THE RECOVERY OF STOLEN ART : A COLLECTION OF ESSAYS (Norman Palmer, ed., 1998).
[13] *Id.* at 208, *citing* Paul Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV 275, 377 (1982), *stating*, "…the United States has given no effect to Article 3 which one commentator regarded as 'mysterious.'"
[14] The Cultural Property Implementation Act (CPIA), U.S.C.A. §§ 2601*, et seq* (West 2012).
[15]Daniel A. Klein, *Construction and Application of the Convention on Cultural Property Implementation Act,* 54 A.L.R. Fed. 2d 91 (2011).
[16] Mastalir, *supra* note *5*, at 1042.
[17] ART & LAW, p. 472 (Demarsin, et al., eds., 2008).
[18] *See Signatories at* **http://www.unidroit.org/english/implement/i-95.pdf.**
[19] Alexandra Love Levine, *The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention*, 36 BROOK. J. INT'L L. 751, 753 (2011).
[20] Prott, *supra* note 12, at 208.
[21] Lawrence M. Kaye, *Disputes Relating to the Ownership and Status of Cultural Property* 53 *in* RESOLUTION METHODS FOR ART-RELATED DISPUTES (Quentin Byrne-Sutton and Fabienne Geisenger-Mariethoz, eds., 1999)
[22] Prott, *supra* note 12, at 214.
[23] The question here is who would support it, and would money players accidentally influence the outcomes of arbitration in doing so, if it were a profit enterprise?
[24] *See,* National Stolen Property Act (NSPA), 18 U.S.C. §§ 2314 & 2315 (West 2012).
[25] Phelan, *supra* note 11 at 204; *U.S. v. McClain*, 545 F.2d 988 (1977); *U.S. v. Schultz*, 333 F.3d 393 (2003).
[26] Jessica Eve Morrow, *The National Stolen Property Act and the Return of Stolen Cultural Property to its Rightful Foreign Owners*, 30 B.C. INT'L & COMP. L. REV. 249, 255 (2007).
[27] *Id.*
[28] *See generally, id.*
[29] Urice, *supra* note 4, at 128.

[30] *U.S. v. McClain*, 545 F.2d 988 (1977)
[31] *Id.*
[32] Urice, *supra* note 4, at 142, *interpreting U.S. v. McClain*.
[33] *U.S. v. Schultz*, 333 F.3d 393 (2003).
[34] *See id.*
[35] Urice, *supra* note 4, at 147, *interpreting U.S. v. Shultz*.
[36] *Id.*
[37] *U.S. v. Shultz,* 333 F.3d at 396.
[38] SHARON WAXMAN, LOOT : THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD 302 (2008).
[39] Jason Felch, "Charges dismissed against ex-Getty curator Marion True by Italian judge", Los Angeles Times, October 13, 2010, *available at*: http://latimesblogs.latimes.com/culturemonster/2010/10/charges-dismissed-against-getty-curator-marion-true-by-italian-judge.html.
[40] Posner, *supra* note 6, at 218.
[41] *Id.* at 230.
[42] *Id.* at 222-224.
[43] *Id.* at 222.
[44] *Id.* at 223.
[45] *See* NAGPRA, 25 U.S.C. § 3001, et seq (2006); *See also* Kristen E. Carpenter, Sonia K. Katyal, and Angela R. Riley, *In Defense of Property*, 118 YALE L. J. 1022, 1089-1097 (2009).
[46] Posner, *supra* note 6, at 223.
[47] *Id.* at 224.
[48] *Id.* at 231.
[49] *See* Julian Radcliffe, *The Work of the International Art and Antiques Loss Register* 189 in THE RECOVERY OF STOLEN ART : A COLLECTION OF ESSAYS (Norman Palmer, ed., 1998).
[50] Konstantin Akinsha, *The Temptation of the Total Database,* p.159, 163 (2004), *in* RESOLUTION OF CULTURAL PROPERTY DISPUTES (The International Bureau of the Permanent Court of Arbitration, ed., 2004).
[51] *Id.*
[52] Radcliffe, *supra* note 49.
[53] *Id.* at 191.
[54] *Id.* at 193.
[55] Kaye, *supra* note 21, at 37 *describing*, *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd sub nom*., *Government of Peru v. Wendt, 933* F.2d 1013 (9th Cir. 1991).
[56] ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS 281 (2006).
[57] *Id.*
[58] *Id.*
[59] Mastalir*, supra* note 5, at 1067-1068.
[60] *Id.*

[61] *Id.* at 1055, *citing*, Ann P. Prunty, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing Its Marbles*, 72 GEO.L.J. 1155, 1159-60 (1984).
[62] *Id.*
[63] *See, generally*, Levine, *supra* note 19.
[64] *See* Prott, *supra* note 12, at 214.
[65] Alan Scott Rau, *Mediation in Art-Related Disputes* 160 in RESOLUTION METHODS FOR ART-RELATED DISPUTES (Quentin Byrne-Sutton and Marc-André Renold, eds., 1999).
[66] *Id.*
[67] *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg,* 917 F.2d 278 (1990).
[68] *Id.*
[69] *Id.*
[70] *Id.* at 283.
[71] *Id.* at 290.
[72] *Id.* at 294.
[73] *See* Klein, *supra* note 15.
[74] *See U.S. v. McClain*, 545 F.2d 988 (1977); *see also U.S. v. Schultz*, 333 F.3d 393 (2003).
[75] *See* discussion of Cypriot political dynamic, *Autocephalous Greek Orthodox Church of Cyprus,* 917 F.2d at 280.