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Jessica Eve Morrow

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# THE NATIONAL STOLEN PROPERTY ACT AND THE RETURN OF STOLEN CULTURAL PROPERTY TO ITS RIGHTFUL FOREIGN OWNERS

JESSICA EVE MORROW\*

**Abstract:** Artifact-rich countries have recently begun to campaign more vigorously for the return of their cultural property that has found its way illegally into the United States. Whether blatantly stolen or taken in violation of a country's export law, the National Stolen Property Act is the vehicle through which these countries can hope to retrieve their property. Its requirements, however, have often proven too difficult for countries to overcome. The United States, on behalf of the source country, must meet the *mens rea* requirement of the National Stolen Property Act, an often insurmountable goal because of the confusion surrounding the circumstances under which the property was taken. By relaxing the *mens rea* requirement, the National Stolen Property Act will become more effective and its goals of punishment and deterrence will be furthered.

## INTRODUCTION

The issue of protecting cultural property has emerged in recent years as one of critical importance to countries that are mostly developing but are rich in artifacts that attract the eye of collectors and museum-goers the world over.<sup>1</sup> The illegal importation of cultural property into the United States from such countries is a billion-dollar industry that puts a strain on the relationship between the United States and source countries.<sup>2</sup> In response to this issue, the United States has developed a series of progressive cultural property laws, such as the National Stolen Property Act of 1961 (NSPA), that allow source coun-

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\* Jessica Morrow is an Executive Editor of the *Boston College International & Comparative Law Review*.

<sup>1</sup> Kevin F. Jowers, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 *TEX. INT'L L. J.* 145, 146 (2003).

<sup>2</sup> James E. Sherry, *U.S. Legal Mechanisms for the Repatriation of Cultural Property: Evaluating Strategies for the Successful Recovery of Claimed National Patrimony*, 37 *GEO. WASH. INT'L L. REV.* 511, 511 (2005).

tries to retrieve stolen cultural property from the United States.<sup>3</sup> This Note argues that by relaxing the NSPA requirement that the defendant knows that he or she is importing an artifact which has been stolen from the source country, these laws will be more effective in fighting the illegal importation of stolen cultural property.<sup>4</sup> Relaxation of the *mens rea* requirement would not result in a loss of legally imported artifacts because the United States, on behalf of the source country, would still be required to establish a *prima facie* case against the defendant before it could benefit from the lessened evidentiary burden.<sup>5</sup>

This Note's Background section discusses the importance of protecting cultural property. The Discussion section examines the legal safeguards that the United States has developed, such as the NSPA and the Convention on Cultural Property Implementation Act (CPIA).<sup>6</sup> These laws were enacted to stem the flow of stolen cultural property into this country, and to provide a forum for foreign countries to retrieve that property once it has entered into the United States.<sup>7</sup>

The Analysis section proposes modifications to the NSPA that would make it easier for foreign countries to recover artifacts that have been stolen from within their borders and brought to the United States. This solution balances the source country's right to recovery of stolen cultural property on the one hand, with the rights of private owners to retain lawfully acquired and imported artifacts, on the other.

## I. BACKGROUND

The term "cultural property" refers to objects that have "artistic, archaeological, ethnological or historical interest" and value.<sup>8</sup> Cultural property is often found in "source" nations, such as many Central and South American countries, Egypt, Greece, and Cambodia, that are usually developing and rich in artifacts, but without the resources or infrastructure to protect those artifacts from looters or to properly care for them in national museums.<sup>9</sup> "Market" nations, on the other hand, are

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<sup>3</sup> National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2001).

<sup>4</sup> See Laura M. Siegle, *United States v. Schultz: Putting Cultural Property in its Place*, 18 TEMP. INT'L & COMP. L.J. 453, 456 (2004).

<sup>5</sup> See *id.* at 463.

<sup>6</sup> Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (2005); 18 U.S.C. §§ 2314–2315.

<sup>7</sup> See Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (2005); 18 U.S.C. §§ 2314–2315.

<sup>8</sup> John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 831 (1986).

<sup>9</sup> See Jowers, *supra* note 1, at 147; Siegle, *supra* note 4, at 455.

Western, developed states, such as the United States and Great Britain, where a great many objects of cultural property are brought, and eventually wind up in museums, private collections, or packed away in crates.<sup>10</sup>

### A. *Why Protecting Cultural Property Is Important*

Protecting cultural property at the original site from looting is vital for anthropologists, historians, and others who care about preserving cultural heritage.<sup>11</sup> Looting results in the disappearance of an artifact into the miasma of the world of illegally exported and imported artifacts, and destroys any record of the context, history, and cultural affiliation of the object.<sup>12</sup>

Not only is protecting cultural property important for archeological and scientific communities, but it is also vital to a nation's collective cultural identity.<sup>13</sup> The theory of cultural nationalism suggests that cultural property should be protected because it links present inhabitants to their national heritage through identification with the location where the cultural property was found.<sup>14</sup> This theory gives nations a singular interest in the specific object found, suggests the attribution of a national character to that artifact, and advocates that the item is thus best appreciated within the context of its place of origin.<sup>15</sup> Another theory, cultural internationalism, suggests that cultural property is a part of a common human culture, whatever its place of origin.<sup>16</sup> According to this theory, an artifact is best appreciated by being exhibited in a place easily accessible to the public, such as a museum in a large international city which is likely to be more accessible to the wider public than the place of the artifact's origin.<sup>17</sup> These two theories underlie the proliferation of laws aimed at curbing the illegal export and import of cultural property.<sup>18</sup> Market nations have recognized that, in order to foster good international relations and protect stolen cultural property

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<sup>10</sup> See Jowers, *supra* note 1, at 147.

<sup>11</sup> See Kavita Sharma, *From the Mayan Machaquila Stele to Egyptian Pharaoh Amenhotep's Head: United States Courts' Enforcement of Foreign National Patrimony Laws After United States v. Schultz*, 56 HASTINGS L.J. 749, 750 (2005).

<sup>12</sup> See *id.*

<sup>13</sup> Andrea Cunning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes*, 26 Hous. J. INT'L L. 449, 454 (2004).

<sup>14</sup> *Id.*

<sup>15</sup> Merryman, *supra* note 8, at 832.

<sup>16</sup> *Id.* at 831.

<sup>17</sup> See Siegle, *supra* note 4, at 454.

<sup>18</sup> See *id.* at 455.

from being lost in the black market, they must enact laws that allow foreign countries to seek the return of their cultural property.<sup>19</sup> Cultural nationalism informs this Note's argument that in order to effectuate the proper goals of the NSPA—punishment and repatriation—the burdens of proof for source nations must be relaxed.<sup>20</sup>

### B. National Patrimony Laws

The difference between a stolen object of cultural property, and one that is illicitly exported is that for an object to be considered stolen, it must have an owner, while an illegally exported object is merely one that has been taken out of the source country in violation of that nation's export laws.<sup>21</sup>

Most source countries have national patrimony laws that vest ownership of all cultural property, whether known or unknown or above or below ground, in the state.<sup>22</sup> Thus, after the enactment of a national patrimony law, private owners cannot acquire title to such property; if any such property is found after the passage of the law it automatically becomes property of the state and must be turned over to the government.<sup>23</sup> This makes the source country the owner of all cultural property within its borders.<sup>24</sup> Source countries can also enact national export laws that restrict the export of cultural objects except under limited circumstances.<sup>25</sup> Thus, an illicit export occurs when an object is taken out of the source country without a permit, if one is required.<sup>26</sup>

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<sup>19</sup> *See id.*

<sup>20</sup> *See* Sherry, *supra* note 2, at 532-33.

<sup>21</sup> U.S. State Dep't, Bureau of Educ. and Dep't Affairs, Int'l Cultural Property Protection, <http://exchanges.state.gov/culprop/faqs.html> (last visited Jan. 25, 2007) [hereinafter U.S. State Dep't].

<sup>22</sup> John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL'Y J. 1, 51-52 (2004).

<sup>23</sup> *See id.* at 67.

<sup>24</sup> U.S. State Dep't, *supra* note 21.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

## II. DISCUSSION

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

The 1970 United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership on Cultural Property (UNESCO Convention) is a multi-national agreement that attempts to unify international cultural property law.<sup>27</sup> The long-term purpose of the convention is to protect the knowledge that can be gathered from excavated archaeological material and “to preserve ethnographic material that remains in its societal context” in the source country.<sup>28</sup> UNESCO Convention defines “cultural property” broadly and places restrictions on imports, exports, and transfer of title of cultural property.<sup>29</sup> In particular, Article 9 states:

The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.<sup>30</sup>

Thus, parties to the UNESCO Convention agree to:

- (1) prevent the transfer of ownership and illicit movement of cultural property;
- (2) insure the earliest possible restitution of property to rightful owners;
- (3) admit actions for recovery of cultural property brought by or on behalf of aggrieved parties;
- and (4) recognize the indefeasible right of each state to de-

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<sup>27</sup> United Nations Educational, Scientific and Cultural Organization, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter Convention]; Joshua E. Kastenberg, *Assessing the Evolution and Available Actions for Recovery in Cultural Property Cases*, 6 DEPAUL-LCAJ. ART & ENT. L., 39, 48–49 (1995).

<sup>28</sup> U.S. State Dep’t, *supra* note 21, <http://exchanges.state.gov/culprop/backgrnd1.html> (last visited Jan. 25, 2007).

<sup>29</sup> Cohan, *supra* note 22, at 43.

<sup>30</sup> Convention, *supra* note 27, at art. 9.

clare certain cultural property inalienable and not susceptible to exportation.<sup>31</sup>

### B. *The Cultural Property Implementation Act*

The United States became a signatory to the UNESCO Convention in 1982, when Congress ratified the convention through the Cultural Property Implementation Act (CPIA).<sup>32</sup> This Act codified UNESCO Convention into United States law and allowed the government to implement Article 9 and provide foreign plaintiffs with a cause of action in the United States.<sup>33</sup> The Act allows the United States to recognize demands from countries for the United States to place import restrictions on archaeological artifacts that have been looted from within their boundaries.<sup>34</sup> The recognition of these requests promotes licit and documented trade and reduces the incentive for pillage, thus protecting valuable archaeological and cultural material that resides *in situ*.<sup>35</sup> Under Section 308 of the CPIA, no article of stolen cultural property from a party to the UNESCO Convention may be imported into the United States after the date the convention entered into force with respect to that party, or the effective date of the CPIA (April 12, 1983), whichever is later.<sup>36</sup> Violations of the CPIA result in seizure, forfeiture, and return of the cultural property to the rightful country owner.<sup>37</sup> Under the CPIA, the United States has signed numerous bilateral agreements with foreign countries aimed at reducing the number of illegally exported works that enter the United States by enforcing the source country's cultural property laws.<sup>38</sup>

### C. *The National Stolen Property Act*

The UNESCO Convention is also enforceable in the United States under the NSPA.<sup>39</sup> While the CPIA provides for civil remedies, the

<sup>31</sup> Cohan, *supra* note 22, at 43–44.

<sup>32</sup> Kastenberg, *supra* note 27, at 49.

<sup>33</sup> *Id.*

<sup>34</sup> Cohan, *supra* note 22, at 46.

<sup>35</sup> U.S. State Dep't, *supra* note 21, <http://exchanges.state.gov/culprop/backgrnd.html> (last visited Jan. 25, 2007).

<sup>36</sup> U.S. State Department, *supra* note 21, <http://exchanges.state.gov/culprop/backgrnd2.html> (last visited Jan. 25, 2007).

<sup>37</sup> Cumming, *supra* note 13, at 472.

<sup>38</sup> Daniel W. Eck & Patty Gerstenblith, *International Cultural Property*, 37 INT'L L. 565, 566 (2003).

<sup>39</sup> Kastenberg, *supra* note 27, at 50.

NSPA creates an enforcement arm of the CPIA by taking source countries' patrimony laws into consideration and making criminal sanctions available.<sup>40</sup> The NSPA, which was enacted in 1948, states that "[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods . . . of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both."<sup>41</sup> Additionally, "[w]hoever receives, possesses, conceals, stores, barter[s], sells, or disposes of any goods . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken" is subject to fine or imprisonment.<sup>42</sup> United States courts have read the NSPA to provide for the enforcement of all international cultural property controls, including the UNESCO Convention, and to allow the United States to represent the interests of foreign countries by suing individuals for recovery of cultural property that has been stolen or illegally imported into the United States.<sup>43</sup>

Under the NSPA, United States courts evaluate whether a source country's national patrimony law sufficiently vests ownership in the artifact, such that it could be considered "stolen," and therefore form the basis of a cognizable claim within the courts' jurisdiction.<sup>44</sup> The NSPA has been interpreted to apply to cases involving a defendant who sells or receives property that he or she knows has been illegally excavated in violation of a foreign country's export laws.<sup>45</sup> Thus, proving that the defendant had knowledge of the source country's national patrimony law is a requirement for successful prosecution under the NSPA.<sup>46</sup> Because of the often ambiguous circumstances surrounding the excavation and provenance of an object, this evidentiary burden of the NSPA often proves to be a barrier to source countries seeking the return of their property.<sup>47</sup>

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<sup>40</sup> *Id.*; Sharma, *supra* note 11, at 756.

<sup>41</sup> National Stolen Property Act, 18 U.S.C. § 2314 (2001).

<sup>42</sup> 18 U.S.C. § 2315 (2001).

<sup>43</sup> Kastenbergs, *supra* note 27, at 50.

<sup>44</sup> Sharma, *supra* note 11, at 756.

<sup>45</sup> Cohan, *supra* note 22, at 65.

<sup>46</sup> *See id.*

<sup>47</sup> *See* Sherry, *supra* note 2, at 532–33 (explaining concept through a hypothetical).

## D. *The Development of the Knowledge Requirement of the NSPA*

### 1. The First Consideration of National Patrimony Laws:

#### *United States v. Hollinshead*

The first case in which United States courts considered national patrimony laws under the NSPA was *United States v. Hollinshead* in 1974.<sup>48</sup> The defendants, including a dealer in pre-Columbian artifacts, organized the removal and transport into the United States of a rare pre-Columbian stele that was found in a Mayan ruin in the Guatemalan jungle.<sup>49</sup> The defendants were convicted under the NSPA for conspiracy to transport stolen property in interstate commerce.<sup>50</sup> In upholding the conviction, the Ninth Circuit credited expert testimony that the stele and other such artifacts were property of the state under Guatemalan law, and therefore could not be removed without governmental permission.<sup>51</sup> The court also found that there was “overwhelming evidence” that the defendants knew it was a violation of Guatemalan law to remove the stele and that they knew it was stolen.<sup>52</sup> This case, however, presented a rare situation in which the stolen artifact was extensively documented by the source country, and therefore easily proven to be that country’s property without the need for the United States court to analyze the applicable national patrimony law.<sup>53</sup>

### 2. Elements Necessary for a Conviction under the NSPA:

#### *United States v. McClain*

In 1977, in *United States v. McClain*, the Fifth Circuit held that in order for the defendants to be convicted under the NSPA for stealing pre-Columbian artifacts from Mexico and selling them in the United States, the prosecution had to show that the defendants either knew that the items were stolen or that possessing or removing the objects violated Mexican law, and that the artifacts were owned by the Mexican government at the time they were removed.<sup>54</sup> At trial, evidence,

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<sup>48</sup> 495 F.2d 1154, 1155 (9th Cir. 1974); Sharma, *supra* note 11, at 757.

<sup>49</sup> *Hollinshead*, 495 F.2d at 1155.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1155–56.

<sup>52</sup> *Id.* at 1155.

<sup>53</sup> Sharma, *supra* note 11, at 757–58.

<sup>54</sup> *United States v. McClain*, 593 F.2d 658, 660–63 (5th Cir. 1979) [hereinafter *McClain III*]; Sharma, *supra* note 11, at 759.

such as forged documents regarding the artifacts history, was introduced to show that the defendants knew their actions were illegal.<sup>55</sup> On appeal, the Fifth Circuit upheld Mexico's national patrimony law by finding that the NSPA applied to ownership by foreign legislative declarations even if the objects in question had never been physically possessed by that government.<sup>56</sup>

When the case was appealed a second time, the Fifth Circuit addressed the issue of whether Mexico's patrimony laws were adequately clear in giving title to the Mexican government.<sup>57</sup> While the court agreed with the defendants that the various Mexican patrimony laws were "vague and inaccessible except to a handful of experts who work for the Mexican government," the court found that the most recent patrimony law was "clear and unequivocal in claiming ownership of all artifacts."<sup>58</sup> The Court thus upheld the conspiracy conviction under the NSPA because the evidence showed that the defendants knew the artifacts were stolen.<sup>59</sup> The defendants knew about the most recent patrimony law, attempted to conceal their actions and falsified the origin of the artifacts.<sup>60</sup> *McClain II* thus exhibits the readiness of United States courts to uphold convictions under the NSPA for transporting stolen artifacts into the United States, but only if the applicable national patrimony law is clear and unambiguous and the defendants knew that the artifact was stolen.<sup>61</sup>

### 3. The Future of NSPA Litigation: *United States v. Schultz*

In *United States v. Schultz*, the Second Circuit stated that the NSPA should be broadly construed to justify the federal courts' application of the statute whenever they determine that the property was stolen in another country.<sup>62</sup> Schultz, a prominent New York art dealer, was convicted under the NSPA of smuggling Egyptian artifacts out of Egypt and selling them in the United States in violation of Egypt's cultural patrimony law.<sup>63</sup> The defendant and his co-conspirator produced false

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<sup>55</sup> *McClain II*, 593 F.2d at 660–63.

<sup>56</sup> *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977) [hereinafter *McClain I*].

<sup>57</sup> Sharma, *supra* note 11, at 759.

<sup>58</sup> *McClain II*, 593 F.2d at 664, 670–71.

<sup>59</sup> *Id.* at 671.

<sup>60</sup> *Id.* at 660–63.

<sup>61</sup> Sharma, *supra* note 11, at 759–60.

<sup>62</sup> 333 F.3d 393, 402 (2d Cir. 2003).

<sup>63</sup> *Id.* at 395–98.

labels regarding the provenance of the objects, and created a fake art collection through which to sell the objects in the United States.<sup>64</sup>

The Second Circuit held that an object is “stolen” under the NSPA if it has been taken from a country in violation of that country’s patrimony law.<sup>65</sup> The Court then stated that the Egyptian national patrimony law was sufficiently clear in establishing Egyptian ownership of all artifacts found after 1983, the year that the national patrimony law was enacted.<sup>66</sup>

The conviction in *Schultz* signals the United States’ commitment to enforce the cultural patrimony laws of foreign countries, and to represent the interests of those countries in criminal actions in United States courts.<sup>67</sup> Because of the difficulties that source countries face in proving that the defendant knew that the artifact was stolen and that their actions violated the source country’s national patrimony laws, however, the NSPA still does not provide foreign countries with complete relief in their quest to halt the disappearance of their cultural heritage.<sup>68</sup>

### III. ANALYSIS

In order to be convicted under the NSPA, a defendant must have stolen or imported the object *knowing* that he was doing so in violation of a country’s patrimony laws.<sup>69</sup> The heavy evidentiary burden that source countries face begs the question of whether the goal of the NSPA is to return stolen cultural property, or merely to punish offenders.<sup>70</sup> Were the knowledge burden relaxed, the NSPA would better effectuate both goals—offenders would be more easily convicted and the stolen object would be more likely to be returned.<sup>71</sup>

A relaxation of the *mens rea* requirement of the NSPA would not result in the United States’ losing artifacts that have been imported into the country legally.<sup>72</sup> Because the foreign country would first be required to establish a *prima facie* case against the defendant before

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<sup>64</sup> *Id.* at 396.

<sup>65</sup> *Id.* at 399, 404; Siegle, *supra* note 4, at 461.

<sup>66</sup> *Schultz*, 333 F.3d at 399, 402.

<sup>67</sup> See Siegle, *supra* note 4, at 455.

<sup>68</sup> See *id.* at 464.

<sup>69</sup> See Mark J. Petr, *Trading Places: Illicit Antiquities, Foreign Cultural Patrimony Laws, and the U.S. National Stolen Property Act after United States v. Schultz*, 28 HASTINGS INT’L & COMP. L. REV. 503, 506 (2005); Siegle, *supra* note 4, at 463.

<sup>70</sup> See Siegle, *supra* note 4, at 464.

<sup>71</sup> See Sherry, *supra* note 2, at 534.

<sup>72</sup> See Siegle, *supra* note 4, at 463.

it can benefit from the presumption attendant to a national patrimony law crafted with regard to the guidelines of the NSPA, the existence of a well-crafted patrimony law alone does not mean that the artifact will be returned to the claiming country.<sup>73</sup>

While a court will impute knowledge to the defendant based on the circumstances, it remains extremely difficult to prove that the defendant had sufficient knowledge of a foreign country's patrimony laws.<sup>74</sup> A country must also prove that the artifact was *stolen*, meaning that the artifact must have been documented by the source country prior to its theft.<sup>75</sup> This is often impossible, however, because many artifacts remain buried below ground, unknown to the government until they are dug up by a looter and shipped out of the country.<sup>76</sup> Because the problem of documenting every artifact presents many of its own concerns that are better suited to discussion in a more in-depth forum, this Note focuses only on the NSPA's knowledge requirement.<sup>77</sup>

While in *Schultz* the elaborate deceptions the defendants engaged in, such as creating a fake collection and forging certificates, made it obvious that they knew they were violating Egyptian cultural patrimony law, in many cases a defendant would have bought something that he or she does not know has been illegally exported, or will take an artifact without knowing that the source country has declared ownership through a national patrimony law.<sup>78</sup>

In situations such as these, a source country seeking the return of its stolen cultural property faces the difficult task of proving that the defendant both knew of and understood that country's cultural patrimony law, and knew that his actions would result in the theft of the artifact under that law.<sup>79</sup> National cultural patrimony laws, however, are often inaccessible to any but the most informed, and might be written in a way that only experts can understand.<sup>80</sup> In fact, United States courts have sometimes found that the governing national cul-

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<sup>73</sup> See Sharma, *supra* note 11, at 766–67.

<sup>74</sup> See Ildiko Pogany DeAngelis, *How Much Provenance is Enough? Post-Schultz Guidelines for Art Museum Acquisition of Archaeological Materials and Ancient Art*, in LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 241, 248 (ALI-ABA COURSE OF STUDY) (Mar. 30–Apr. 1, 2005); Petr, *supra* note 69, at 506.

<sup>75</sup> See Jowers, *supra* note 1, at 168.

<sup>76</sup> See DeAngelis, *supra* note 74, at 249.

<sup>77</sup> See Sharma, *supra* note 11, at 762.

<sup>78</sup> See Cohan *supra* note 22, at 67; DeAngelis, *supra* note 74, at 247.

<sup>79</sup> See *Schultz*, 333 F.3d at 402.

<sup>80</sup> See *McClain II*, 593 F.2d at 670.

tural patrimony statutes of a foreign country were too vague to be a basis for criminal liability in the United States.<sup>81</sup>

In order to pave the way toward a potentially more successful recovery action under the NSPA, countries rich in artifacts should ensure that their national cultural patrimony laws are clear and comprehensive and as easily accessible as other laws.<sup>82</sup> Having an accessible, clear and unambiguous patrimony law makes it much easier to prove that the defendant had knowledge of, and understood, such a law.<sup>83</sup>

The NSPA should be amended to include guidelines for what it considers to be clear and comprehensive patrimony laws, to assist source countries in retrieving their stolen cultural property.<sup>84</sup> These guidelines would offer source countries a model to follow in crafting their patrimony laws, and by following the NSPA's suggestions, would evidence their desire to retrieve their stolen heritage.<sup>85</sup> Foreign countries should not be penalized for not drafting their national patrimony laws in compliance with United States' guidelines, so a source country's failure to do so would not mean that a United States court would refuse to recognize the national patrimony law in question.<sup>86</sup> The source country would still have the opportunity to prove the clarity and accessibility of its law through the use of experts and standard trial techniques.<sup>87</sup> Thus, the guidelines would only act as a facilitator, rather than a bar to entry.<sup>88</sup>

Once a country has crafted its patrimony law in consideration of the NSPA's suggested guidelines, the presumption should then be that the defendant had knowledge of, and understood, the law.<sup>89</sup> Thus, after the source country establishes a *prima facie* case that the defendant stole the object from within the country's borders in violation of the country's existing and enforced national patrimony law, the defendant would then have the burden of proving that he was unaware of the patrimony law and did not know that he was violating it by taking the artifact.<sup>90</sup> This shift in the burden of proof from the source country to the defendant would likely result in an increased

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<sup>81</sup> *Id.* at 670; Cohan, *supra* note 22, at 66.

<sup>82</sup> *See* Sharma, *supra* note 11, at 767.

<sup>83</sup> *See McClain II*, 593 F.2d at 670

<sup>84</sup> *See* Sharma, *supra* note 11, at 756.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 767.

<sup>87</sup> *See* Petr, *supra* note 69, at 508–10.

<sup>88</sup> *See* Sharma, *supra* note 11, at 756.

<sup>89</sup> *But see* Cumming, *supra* note 13, at 483.

<sup>90</sup> *But see id.*

number of suits by the United States on behalf of source countries and a greater percentage of stolen cultural property being returned to their rightful owners.<sup>91</sup>

#### CONCLUSION

The National Stolen Property Act and its enforcement in *Schultz* signals that the United States is committed to assisting source nations retrieve their stolen cultural property, and to stemming the flow of illegal cultural property looting in general. Nevertheless, the requirement of a heightened level of proof under the NSPA frustrates enforcement of the law, and concomitantly, the attainment of the law's goals of deterrence, punishment, and return. Relaxing the knowledge requirement of the NSPA would further the twin goals of penalty and return, and the United States would be seen as leading the international effort in the fight against disappearing culture.

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<sup>91</sup> See DeAngelis, *supra* note 74, at 248–49.