A Synopsis of the Laws Protecting Our Cultural Heritage

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I. INTRODUCTION

There has been widespread concern in recent years that the heritage of the various cultures may become obliterated. This concern has led to legislation in various countries to protect artistic, archaeological, and anthropological resources. The United States has been somewhat tardy in its efforts to preserve objects and monuments of artistic, historical, literary, and anthropological interest. As one court alleged, the United States has had a "short cultural memory."[1] Still, although initially dilatory in attempts to protect these treasures, in recent years Congress and state legislatures have recognized the importance of identifying and preserving our cultural heritage and have enacted legislation to initiate and promote such an endeavor. These statutes have resulted from the recognition that our cultural treasures are in jeopardy, that many have been destroyed without consideration of their values, and that not only do they "represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today."[2] As the Supreme Court acknowledged, the problem is "basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people."[3]

Following an apathetic posture toward the identification and preservation of cultural and historical objects, Congress finally, at the turn of the twentieth century, began to recognize the importance of certain historical structures and enacted the Antiquities Act[4] in 1906 to provide a means to protect such structures. Although limited in its application, the act marked the beginning of a collective venture to safeguard historical sites and monuments within the United States. This early and limited historical preservation movement gradually developed into a partnership with the states and the private sector.[5]

Because the Antiquities Act was limited in scope and because of a growing, intensified interest among the populace in protecting historical properties, Congress later adopted a series of supplementary statutes that gave impetus to the present historical preservation program. The first of these statutes which Congress enacted was the Historic Sites, Buildings

1. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 297 (7th Cir. 1990). *See infra* notes 257-64 and accompanying text.

2. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 108 (1978). *See infra* notes 94-101 and accompanying text.

3. *Penn Cent. Transp. Co.*, 438 U.S. at 108.

4. Ch. 3060, § 2, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-33m (1988)); *see infra* notes 25-39 and accompanying text.

5. *See* H.R. REP. No. 1457, 96th Cong., 2d Sess. 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6378, 6380.

and Antiquities Act[6] in 1935. Congress then established the National Trust for Historical Preservation[7] in 1949, and enacted the National Historic Preservation Act[8] in 1966, and the Archaeological Resources Protection Act[9] in 1979. Finally, Congress stipulated that historical and cultural resources are environmental concerns when it specified the objectives of the Reservoir Act[10] of 1960 and the National Environmental Policy Act[11] of 1969.

Congress has only recently granted protection to special works and artistic expressions. It recognized that architectural designs have national historical significance and provided for their protection with the enactment of the Architectural Works Copyright Protection Act[12] in 1990. It also adopted the Visual Artists Rights Act[13] in 1990 to grant special protection to certain visual artists. Congress concluded that motion pictures are an enduring part of the nation's cultural heritage and enacted the National Film Preservation Act[14] of 1988 and of 1992[15] to recognize certain designated films as significant American art forms deserving of protection. Congress decided that admiralty law principles were not well-suited for the preservation of historic shipwrecks and adopted the Abandoned Shipwreck Act[16] in 1987 for the protection of sunken treasures. It recently granted recognition and protection to the historical culture and heritage of the Native American by enacting the

6. Ch. 593, 49 Stat. 666 (1935) (codified as amended at 16 U.S.C. §§ 461-67 (1988 & Supp. I 1989)); *see infra* notes 40-47 and accompanying text.

7. Ch. 755, § 1, 63 Stat. 927 (1949) (codified as amended at 16 U.S.C. §§ 468-68d (1988)); *see infra* notes 48-52 and accompanying text.

8. Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470a to 470w-6 (1988 & Supp. III 1991)); *see infra* notes 57-69 and accompanying text.

9. Pub. L. No. 96-95, § 2, 93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa-70mm (1988)); *see infra* notes 87-90 and 170-71 and accompanying text.

10. Pub. L. No. 86-523, § 1, 74 Stat. 220 (1960) (codified as amended at 16 U.S.C. §§ 469 to 469c-1 (1988)); *see infra* notes 53-56 and accompanying text.

11. Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-70a (1988 & Supp. III 1991)); *see infra* notes 70-83 and accompanying text.

12. Pub. L. No. 101-650, § 701, 703, 104 Stat. 5128, 5133 (1990) (codified at 17 U.S.C. §§ 101(5), 102(a)(8) (Supp. II 1990)). The act was an amendment to the Copyright Act. *See infra* notes 102-06 and accompanying text.

13. Pub. L. No. 101-650, § 603(a), 104 Stat. 5128 (1990) (codified at 17 U.S.C. § 106A (Supp. II 1990)). This act was also an amendment to the Copyright Act. *See infra* notes 198-207 and accompanying text.

14. Pub. L. No. 100-446, § 1, 102 Stat. 1782 (1988) (codified at 2 U.S.C. §§ 178-78l (1988)) (*repealed by* Pub. L. No. 102-307, § 214, 106 Stat. 272 (Supp. IV 1992)).

15. Pub. L. No. 102-307, § 202, 106 Stat. 267 (1992) (codified at 2 U.S.C. §§ 179-79k (Supp. IV 1992)). The 1992 Act is an amendment to the Copyright Act and repeals the 1988 Act. *See infra* notes 208-12 and accompanying text.

16. Pub. L. No. 100-298, § 2, 102 Stat. 432 (1988) (codified at 43 U.S.C. §§ 2101-06 (1988)); *see infra* notes 140-53 and accompanying text.

Native American Graves Protection and Repatriation Act[17] in 1991. The United States has assumed a limited role in the protection of international treasures. It adopted the Pre-Columbian Art Act[18] in 1972 and implemented the Convention on Cultural Property[19] into domestic law in 1983.

Some courts have made significant contributions to protect cultural and historical properties and artifacts. For example, the United States Supreme Court gave vitality to the historical preservation movement when it ruled, in *Penn Central Transportation Co. v. City of New York*,[20] that preservation laws relate to the promotion of the general welfare.[21] The highest court in New York recently conceded[22] that international treasures are a part of our cultural heritage and must be protected when it acknowledged that New York should not become a haven for stolen art.[23]

This article reviews the statutes enacted to protect our cultural heritage and the court decisions interpreting such legislation. Its purpose is to assemble and summarize the laws currently in existence that serve to secure and preserve those special elements that comprise our cultural heritage.[24]

II. Protection of Historical Sites and Monuments

A. *The Antiquities Act of 1906*

The United States has been concerned principally with the protection of historical sites and monuments within the United States, rather than art works or international treasures, and, as to historical sites and monu-

17. Pub. L. No. 101-601, § 2, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-13 (Supp. III 1991)); *see infra* notes 173-78 and accompanying text.

18. Pub. L. No. 92-587, § 201, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091-95 (1988)); *see infra* notes 226-28 and accompanying text.

19. Pub. L. No. 97-446, § 302, 96 Stat. 2351 (1983) (codified as amended at 19 U.S.C. §§ 2601-13 (1988)); *see infra* notes 217-18, 223-25, 240-46 and accompanying text.

20. 438 U.S. 104 (1978). *See infra* notes 94-101 and accompanying text.

21. *Penn Cent. Transp. Co.*, 438 U.S. at 135-36. The Supreme Court decided that a state is not required to pay a property owner because a preservation law causes a diminution in the value of significant historical property by placing restrictions on the owner's use of such property. *Id.*

22. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991); *see infra* notes 275-85 and accompanying text.

23. *Solomon R. Guggenheim Found.*, 569 N.E.2d at 430-31. The New York Court of Appeals placed the burden of investigating the provenance of a work of art on the potential purchaser rather than on the original owner. *Id.*

24. I have taken information enumerated in this article from a treatise I authored as well as from a lecture on these statutes in a museum law class. Those portions of the article taken from the treatise are reprinted with permission from 2 Nonprofit Enterprises: Law and Taxation ch. 16 (1991), published by Clark Boardman Callaghan.

ments, only since the turn of the twentieth century. Although a small movement was started in the United States during the nineteenth century to save a few historic treasures, the Antiquities Act of 1906[25] was Congress's first attempt to protect historic ruins. The act was passed in response to vandalism at the Casa Grande ruins in Arizona, but it also represented an attempt to preserve Mount Vernon in Virginia.[26]

The Antiquities Act authorizes the President to set aside historic landmarks and structures as national monuments.[27] It provides penalties for destroying or damaging any historic ruins on public lands. The act further provides that any person who excavates, appropriates, injures, or destroys any historic or prehistoric ruin or monument, or any object of antiquity on lands owned or controlled by the federal government, without permission from the federal government department having jurisdiction over the lands, shall be fined and may be subject to imprisonment.[28]

The Antiquities Act is limited in its application because it subjects a person to penalties for the appropriation of any "ruin," "monument," or "object of antiquity."[29] The definition of these terms is not clear. In *United States v. Diaz*,[30] an individual was convicted in a federal district court under the Antiquities Act for appropriating objects of antiquity from government land. Upon appeal, the appellate court reversed the conviction stating that the act was too vague regarding the definition of "ruin," "monument," or "object of antiquity."[31] The defendant in *Diaz* had appropriated face masks found in a cave on the San Carlos Indian Reservation. These masks were identified by a San Carlos medicine man as having been made in 1969 or 1970 by another medicine man and were used by the Apache Indians in religious ceremonies.[32] After the religious ceremonies, the artifacts were traditionally deposited in remote places on the reservation for religious reasons and were never allowed to leave the reservation. According to a professor of anthropology who testified in the case, an "object of antiquity" could include something that was made "just yesterday" if it related to long standing religious or social tradition.[33] The appellate court disagreed, explaining that a person must be able to know with reasonable certainty those objects that may not be taken. The

25. Ch. 3060, § 2, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-33m (1988)).

26. *See* H.R. REP. No. 1457, 96th Cong., 2d Sess. 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6378, 6380.

27. 16 U.S.C. § 431 (1988).

28. *Id.* § 433. Under the Antiquities Act, permits are required to excavate upon federal property. These permits are granted by the Secretaries of the Interior, Agriculture, and Army, and are issued only to reputable institutions for scientific or historic preservation purposes. *Id.* § 432.

29. *Id.* § 433.

30. 499 F.2d 113 (9th Cir. 1974).

31. *Id.* at 114.

32. *Id.*

33. *Id.*

court noted that the word "antiquity" can refer not only to the age of an object but also to the use for which the object was made and to which it was put, subjects which the court thought were not likely to be of common knowledge.[34]

In *United States v. Smyer*,[35] the Tenth Circuit Court of Appeals distinguished *Diaz* and upheld a conviction for a violation of the Antiquities Act. The defendants in *Smyer* excavated a prehistoric Mimbres ruin at an archaeological site which was inhabited about A.D. 1000-1250.[36] The defendants alleged that the Antiquities Act was vague and, thus, unconstitutional, citing *Diaz* as authority.[37] The court, however, pointed out that *Diaz* involved newly created artifacts. The *Smyer* Court decided that a person of ordinary intelligence should know it is illegal to excavate a prehistoric Indian burial ground and appropriate artifacts that are 800-900 years old.[38] The court ruled that the Antiquities Act, as applied to the prosecution of defendants for taking artifacts from ancient sites, was not unconstitutionally vague.[39]

B. *The Historic Sites, Buildings and Antiquities Act of 1935*

The Antiquities Act became more effective when Congress passed the Historic Sites, Buildings and Antiquities Act (Historic Sites Act) in 1935.[40] The Historic Sites Act declared it 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."[41] The Secretary of the Interior was authorized to restore, reconstruct, and maintain historic sites and properties and to establish and maintain museums for these purposes.[42] The act authorized the Secretary to contract and enter into cooperative agreements with the states, municipal subdivisions, and private organizations and individuals, to protect, preserve, maintain, or

34. *Id.*
35. 596 F.2d 939 (10th Cir.), *cert. denied*, 444 U.S. 843 (1979).
36. *Id.* at 940.
37. *Id.* at 940-41.
38. *Id.* at 941.
39. *Id.* In United States v. Jones, 607 F.2d 269 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980), individuals who were observed digging on Indian lands and removing artifacts, consisting of clay pots, bone awls, stone metal, and human skeletal remains, were indicted under 18 U.S.C. §§ 641, 1361, the general theft and malicious mischief statutes. *Id.* at 270-71. These statutes provide greater penalties than does the Antiquities Act. The Ninth Circuit ruled that when certain conduct is proscribed by more than one statute, the government may elect to prosecute under either statute unless the congressional history indicates that Congress intended to disallow the more general statutes. *Id.* at 271. The court found no indication that Congress, in passing the Antiquities Act, intended to limit the applicability of the general theft statutes. *Id.* at 273.
40. Ch. 593, 49 Stat. 666 (1935) (codified as amended at 16 U.S.C. §§ 461-67 (1988 & Supp. I 1989)).
41. 16 U.S.C. § 461 (1988 & Supp. I 1989).
42. *Id.* § 462(f).

operate any historic or archaeologic building, site, object, or property connected with a public use.[43]

Pursuant to the Historic Sites Act, the Secretary of the Interior determined, in 1936, that certain land in the City of St. Louis, Missouri, possessed exceptional value as an historic site, and through the City of St. Louis, instituted condemnation proceedings to acquire the land.[44] This action was challenged in *Barnidge v. United States*,[45] based upon an allegation that the Historic Sites Act did not authorize the condemnation of property. The Eighth Circuit Court of Appeals decided that the federal government did have condemnation power to acquire real estate for public use.[46] Further, because the Historic Sites Act authorized the Secretary of the Interior to acquire property for purposes of the act, the court ruled that the federal government could acquire by eminent domain, or otherwise, sites of national historic significance to preserve them "to commemorate and illustrate the nation's history."[47]

C. *The National Trust for Historical Preservation in the United States*

The National Trust for Historical Preservation in the United States, (National Trust), was chartered in 1949 as a private, nonprofit organization.[48] The National Trust "receive[s] donations of sites, buildings, and objects significant in [United States] history and culture, [and] preserve[s] and administer[s] them for the public benefit."[49]

In *Landmarks Preservation Council of Illinois v. City of Chicago*,[50] the Supreme Court of Illinois ruled that the National Trust had standing to challenge the destruction of private buildings, which the National Trust viewed as having national historic significance, even though the buildings had not been officially declared to be "national landmarks."[51] The court reasoned that, in order for the National Trust to perform its congressio-

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43. *Id.* § 462(e).

44. *See* Barnidge v. United States, 101 F.2d 295, 296 (8th Cir. 1939).

45. 101 F.2d 295 (8th Cir. 1939).

46. *Id.* at 297; *see* 40 U.S.C. § 257 (1988). In United States v. 16.92 Acres of Land, 670 F.2d 1369 (7th Cir.), *cert. denied*, 459 U.S. 824 (1982), the Seventh Circuit ruled that 40 U.S.C. § 257 grants the federal government condemnation powers under other federal statutes. *Id.* at 1371. The court ruled that a federal statute need not specifically include condemnation as a permissible method of property acquisition. *Id.* Unless a statute excludes condemnation as a method of property acquisition, the federal government has such a right. *Id.*

47. *Barnidge*, 101 F.2d at 299.

48. Ch. 755, § 1, 63 Stat. 927 (1949) (codified as amended at 16 U.S.C. §§ 468-68d (1988)).

49. 16 U.S.C. § 468 (1988). The activities of the National Trust fall under the direction of a board of trustees composed of the Attorney General of the United States, the Secretary of the Interior, the director of the National Gallery of Art (Smithsonian Institution), and six United States citizens. *Id.* § 468b.

50. 531 N.E.2d 9 (Ill. 1988).

51. *Id.* at 14.

nally mandated functions, it was essential that the organization be permitted to maintain suits in state courts to prevent the unlawful destruction of buildings that have national historic significance.[52]

D. *Reservoir Act of 1960*

The Reservoir Act[53] was passed in 1960 to provide for the preservation of historical and archaeological data that might otherwise be lost or destroyed as a result of flooding or other alterations of the terrain caused by a federal construction project or a federally licensed activity or program.[54] "Whenever any Federal agency finds, or is notified in writing by an appropriate historical or archaeological authority, that its activities in connection with any Federal construction project or federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific [or] prehistorical . . . data," the agency must provide such information to the Secretary of the Interior.[55] The Secretary is required to investigate the areas affected.[56]

E. *The National Historic Preservation Act of 1966*

The National Historic Preservation Act[57] was passed in 1966[58] to provide for the maintenance and expansion of a National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, and culture, and to provide matching grants-in-aid to the National Trust for Historic Preservation in the United States for the purpose of preserving historical properties for the public benefit.[59] Pursuant to the National Historic Preservation Act, the head of

52. *Id.* The Supreme Court of Illinois concluded that Congress intended the National Trust to have standing to maintain such actions and that standing was necessary to enable the National Trust to fulfill the functions Congress intended it to have. *Id.*

53. Pub. L. No. 86-523, § 1, 74 Stat. 220 (1960) (codified at 16 U.S.C. §§ 469 to 469c-1 (1988)).

54. 16 U.S.C. § 469 (1988).

55. *Id.* § 469a-1.

56. *Id.*

57. Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470a to 470w-6 (1988 & Supp. III 1991)).

58. The small movement at the turn of the twentieth century to save a few historic treasures had grown immensely. Under the Historic Preservation Act, a partnership developed among the federal government, the several states, and the private sector to protect the nation's historic resources. *See* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 1980 U.S.C.C.A.N. (94 Stat.) 6380.

59. 16 U.S.C. §§ 470a-70d (1988). The National Historic Preservation Act was amended in 1980 to provide better guidance for the national historic preservation program at the federal, state, and local levels. The 1980 act provided for a loan insurance program to establish a national museum of the building arts, and for procedures for implementing the World Heritage Convention. *See id.* §§ 470a-1, 470d, 470w-5. The insured loan program was added to stimulate private investments in the preservation of properties included in the National Register. *Id.* § 470d. Historic properties are often viewed as a high-risk investment, and non-profit organizations interested in

any federal agency having direct or indirect jurisdiction over a proposed federal, or federally assisted, undertaking in any state must consider the effect of the undertaking on any district, site, building, structure, or object included, or eligible to be included, in the National Register, prior to approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license.[60]

The National Historic Preservation Act compels the Secretary of the Interior to direct and coordinate United States participation in the Convention Concerning the Protection of the World Cultural and Natural

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saving historic structures would often have difficulty qualifying for loans. Most of the loans that can be insured under this act would be for acquisition and development projects.

To obtain a listing in the National Register, nominations are made on National Register Nomination Form NPS 10-900 with accompanying continuation sheets. The form must be completed in accord with the requirements and guidance listed in the NPS publication, "How to Complete National Register Forms." *See* 36 C.F.R. § 60.3(i) (1992). Forms are obtained from the State Historic Preservation office. The criteria applied to evaluate property for the National Register are set out in 36 C.F.R. § 60.4 (1992). Qualifying property includes buildings, sites, and objects:

> that are associated with events that have made a significant contribution to the broad patterns of [United States] history; that are associated with the lives of persons significant in [that history]; or that embody the distinctive characteristics of a type, period, or method of construction . . . that represent the work of a master . . . that possess high artistic values, that represent a significant and distinguishable entity whose components may lack individual distinction, or that have yielded, or may be likely to yield, information important in prehistory or history.

Id.

60. 16 U.S.C. § 470f (1988). The Advisory Council on Historic Preservation has adopted procedures concerning an agency's commenting responsibility. If a federal agency complies with this procedure, it may adopt any course of action it believes to be appropriate. 36 C.F.R. § 60.2 (1992).

One court recently concluded that the National Historic Preservation Act is limited in scope. In Lee v. Thornburgh, 877 F.2d 1053 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia decided that the National Historic Preservation Act imposes obligations only on federal agencies and ruled that Congress and the District of Columbia are excluded from the act. *Id.* at 1056. The court explained that the act imposes no obligations on state governments and that the District of Columbia was included in the act's definition of a "state." *Id.*; *see also* 16 U.S.C. § 470w(2). The court asserted that the National Historic Preservation Act is "a narrow statute." *Lee*, 877 F.2d. at 1058. The court commented that "the main thrust [of the act] is to encourage preservation of historic sites and buildings rather than to mandate it." *Id.* It acknowledged that federal agencies are commanded to value preservation and are subject to requirements under the act, which are in relation to projects or programs the agencies either initiate or control through funding or approvals. *Id.* The court opined that the act imposes obligations only when a project is undertaken either by a federal agency or through the auspices of agency funding or approval. *Id.* "An agency having authority to license an undertaking may not issue such a license without fulfilling these obligations. Likewise, an agency with jurisdiction over a federal or federally-assisted project must comply with the act before approving funds for it." *Id.* at 1056. The court held that the act imposed obligations on federal agencies only in these limited circumstances. *Id.*

Heritage.[61] The Secretary of the Interior is directed to nominate periodically properties that are of international significance to the World Heritage Committee on behalf of the United States.[62]

In *Boyd v. Roland*,[63] the Fifth Circuit Court of Appeals recognized that the National Historic Preservation Act "require[s] federal agencies to take into account the effect of federally assisted undertakings on property 'included in, or eligible for inclusion in, the National Register.'"[64] Eligible property is that property that meets the National Register criteria.[65] The Fifth Circuit held "that eligible property is not restricted to property that had been officially determined to be eligible for inclusion in the National Register."[66]

Courts have ruled that a private right of action against a federal agency exists under the National Historic Preservation Act.[67] In *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*,[68] the Vieux Carre sought to arrest the construction of a riverfront park being erected in the historical district of New Orleans. The Fifth Circuit held that the Vieux Carre was within the zone of interests sought to be protected by the National Historic Preservation Act.[69]

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61. 16 U.S.C. §§ 470a-1(a) (1988). The Secretary of the Interior acts in cooperation with the Secretary of State, the Smithsonian Institution, and the Advisory Council on Historic Preservation. *Id.*

62. *Id.* § 470a-1(b). The Secretary of the Interior nominates properties of international significance to the World Heritage Committee for inclusion on the World Heritage List. Property cannot be nominated "unless it has previously been determined to be of national significance." *Id.*

63. 789 F.2d 347 (5th Cir. 1986).

64. *Id.* at 349 (emphasis omitted) (quoting 16 U.S.C.A. § 470(f) (West 1985)).

65. *See* 36 C.F.R. § 800.2(e) (1992).

66. *Boyd*, 789 F.2d at 349 (emphasis omitted).

67. 16 U.S.C. §§ 470 to 470ll (1988 & Supp. IV 1992). *See, e.g.*, Boarhead Corp. v. Erikson, 923 F.2d 1011, 1017 (3d Cir. 1991). In *Boarhead*, the owner of a farm whose title was traced from a grant to William Penn, and which had been used as the burial grounds of Native Americans, complained that the Environmental Protection Agency had decided to conduct cleaning activities on the farm without complying with National Historic Preservation Act. *Id.* at 1013-15.

The National Historic Preservation Act permits a court to award attorney's fees and other costs to a plaintiff if the plaintiff substantially prevails in the action. 16 U.S.C. § 470w-4.

68. 875 F.2d 453 (5th Cir. 1989), *cert denied*, 493 U.S. 1020 (1990).

69. *Id.* at 459. The Fifth Circuit cited Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970), which ruled that an interest in widely shared aesthetic and environmental concerns falls within the zone of interest to be protected by the National Environmental Protection Act. *Id.* Still, the *Vieux Carre* Court decided that the local project was only subject to a federal permit and, thus, a historical impact review under the National Historical Preservation Act was not required. *Vieux Carre*, 875 F.2d at 465. The court held that nationwide permits authorizing "truly inconsequential projects" were not "triggering 'licenses'" under 16 U.S.C. § 470f and, thus, such activities escaped the historical review requirements of the National Historic Preservation Act. *Id.* at 466.

F. *The National Environmental Policy Act of 1969*

The National Environmental Policy Act[70] added the requirement that environmental and cultural values be considered along with economic and technological values when proposed federal projects are assessed.[71] The act provides that the federal government must use all practicable means to improve and coordinate federal plans, functions, programs, and resources "to the end that the nation may preserve important historic, cultural, and natural aspects of the national heritage."[72] If proposed major federal action "significantly affect[s] the quality of the human environment," the appropriate governmental agency must prepare an environmental impact statement.[73]

The interrelationship between the National Environmental Protection Act and the National Historic Preservation Act on federally funded projects that impact upon historic structures can become an issue. In *Committee to Save the Fox Building v. Birmingham Branch of Federal Reserve Bank of Atlanta*,[74] the court considered the effect of the two acts on a challenged action of a federal agency. The court ruled that the demolition of a building listed in the National Register may be viewed as a "major" federal action.[75] Still, the court decided that "this consideration is interwoven with the requirement that the challenged action must significantly affect the quality of the human environment."[76] Because the court concluded that the impact on the physical environment of the demolition of an historic building is a social concern, it ruled that the Environmental Policy Act was not applicable.[77]

In *Preservation Coalition, Inc. v. Pierce*,[78] the Ninth Circuit Court of Appeals recognized that the National Environment Policy Act "requires Federal agencies to make detailed reports on major federal actions significantly affecting the quality of human environment,"[79] but decided

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In Landmarks Preservation Council of Illinois v. City of Chicago, 531 N.E.2d 9 (Ill. 1988), the Supreme Court of Illinois held that a local preservation organization did not have standing to challenge a city ordinance rescinding the landmark status of a building. *Id.* at 13. The court noted that the local organization's only interest was the ability of its members to view the property from a public street—none of the members were owners of the private property or of adjoining property and neither federal funds nor a federal agency were involved in the project. The court ruled that the National Trust had standing to maintain the suit. *Id.* at 14.

70. Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-70a (1988 & Supp. III 1991)).

71. 42 U.S.C. §§ 4331-32 (1988 & Supp. III 1991).

72. *Id.* § 4331(b)(4).

73. *Id.* § 4332(C).

74. 497 F. Supp. 504 (N.D. Ala. 1980).

75. *Id.* at 511.

76. *Id.*

77. *Id.*

78. 667 F.2d 851 (9th Cir. 1982).

79. *Id.* at 855.

that the federal action in the disputed transaction was not major.[80] Thus, the court ruled that there was no requirement that an environmental impact statement be created for the project.[81] The court noted that the National Environmental Policy Act "requires federal agencies to preserve important historic and cultural aspects of the nation's heritage."[82] It also decided that compliance with the National Historic Preservation Act does not assure compliance with the National Environmental Policy Act.[83] As the court explained, "each [act] mandates separate and distinct procedures, both of which must be complied with when historic buildings are affected."[84] The court pointed out that, while there are similarities between the demands and the goals of the two acts, each act must be taken on its own terms.[85] According to the court, both acts essentially create obligations that are chiefly procedural in nature and both have the goal of generating information about the impact of federal actions on the environment. As the court stated, both are designed to insure that the federal agency "stop, look, and listen" before moving ahead.[86]

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80. *Id.*

81. *Id.* at 859-60.

82. *Id.* at 858.

83. *Id.* at 859.

84. *Id.*

85. *Id.*

86. *Id.* In Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985), the court held that the Corps of Engineers violated both the National Historic Preservation Act and the Environmental Policy Act. According to the court, the Corps had issued a permit for the placement of riprap (large boulders to stabilize the shore banks from erosion) without taking required measures to protect the cultural and archaeological resources of the area. *Id.* at 1427. The court pointed out that the National Environmental Policy Act requires that a federal agency prepare an environmental impact statement if the proposed project will degrade some environmental factor. *Id.* at 1429-30 ("'If substantial questions are raised whether a project [will] have a significant effect on the human environment, a [statement] *must* be prepared.'") (quoting Foundation for N. Am. Wild Sheep v. Department of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982)). If an agency determines that the statement need not be prepared, a court may review the reasonableness of the agency's determination. *Id.* If the determination is found unreasonable, the court will order that an environmental impact statement be prepared. *Id.* The court noted that the defendant's contention that no major federal action occurred had been a threshold question for some courts in ascertaining the reasonableness of the agency's determination that an environmental impact statement need not be prepared. *Id.* at 1430-31. The court recognized that the courts are split on whether the action must be "major." *Id.* at 1431. For example, the court in *Colorado River Indian Tribes* looked at the reasonableness of the agency's determination without considering whether "major" federal action occurred. *Id.* The court ruled that federal agencies must examine the effects of their actions on property eligible to be included in the National Register. *Id.* at 1434. According to the court, eligible property is not limited to property that was formally determined to be eligible. *Id.* at 1435, 1437.

G. *Archaeological Resources Protection Act of 1979*

The Archaeological Resources Protection Act,[87] which enlarges upon the Antiquities Act of 1906, was passed in 1979 to protect archaeological resources and sites located on public and Indian lands.[88] The act prohibits the sale, purchase, transport, exchange, or receipt of any archaeological resources removed without permission from public or Indian land.[89] Thus, a museum could become liable under the act for receiving and/or purchasing historical objects taken from public or Indian lands.

The Archaeological Resources Protection Act is more explicit as to its coverage than is the Antiquities Act. For example, unlike the Antiquities Act, which does not define "ruin" or "object of antiquity," the Archaeological Resources Protection Act specifically defines an "archaeological resource" that is protected by the act. An "archaeological resource" is any material remains of past human life or activities that are of archaeological interest and which are at least 100 years of age.[90]

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87. Pub. L. No. 96-95, § 2, 93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa-70mm (1988)).

88. 16 U.S.C. § 470aa(b) (1988). The purpose of the Archaeological Resources Protection Act "is to secure for the present and future benefit of the American people, the protection of archaeological resources and sites located on public and Indian lands." *Id.* It also was intended "to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources . . . obtained before October 31, 1979." *Id.* In United States v. Austin, 902 F.2d 743 (9th Cir.), *cert. denied*, 498 U.S. 874 (1990), defendants indicted under the Archaeological Resources Protection Act for excavating a Native American archaeological site alleged that the act was unconstitutionally overbroad and vague. *Id.* at 743-44. The court ruled that the act was not unconstitutional. *Id.* at 745.

89. 16 U.S.C. § 470ee(a). The Archaeological Resources Protection Act also prohibits the excavation, removal, damage, or alteration of any archaeological resource. *Id.* § 470ee(b). The act provides for the issuance of permits to excavate upon public or Indian lands. *Id.* § 470cc. Persons receiving permits under the Archaeological Resources Protection Act need not also obtain permits under the Antiquities Act. *Id.* § 470cc(h). Native American tribes or their members need not obtain a permit under the Archaeological Resources Protection Act, or under the Antiquities Act, for the excavation or removal of any archaeological resource located on their lands if tribal law regulates the excavation and removal of archaeological resources. *Id.* § 470cc(g).

Under the Archaeological Resources Protection Act, "[t]he Secretary of the Interior may promulgate regulations providing for (1) the exchange between suitable universities, museums, or other scientific or educational institutions of archaeological resources removed from public lands and Indian lands, and (2) the ultimate disposition of resources removed pursuant to the [Antiquities Act]." *Id.* § 470dd. Any exchange of resources removed from Indian lands is subject to the consent of the Indian tribe which has jurisdiction over the land. *Id.*

90. 16 U.S.C. § 470bb(1). A violator is subject to a fine of $10,000 and/or imprisonment of not more than one year or, if the value of the object is more than $500, to a fine of $20,000 and/or imprisonment of not more than two years. *Id.* § 470ee(d). A second violation causes the penalty to be a fine of as much as $100,000 and/or imprisonment for as long as five years. *Id.* Penalties and prohibitions under the act are not

H. *State Preservation Laws*

Most historical preservation is accomplished through the states in cooperation with the federal government. Numerous state preservation programs were commenced in the past decade with each state now having established some form of state preservation agency.[91] Laws enacted by the states to encourage or require the preservation of buildings and areas with historic or aesthetic importance have been precipitated by two concerns. One was the "recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways."[92] The second concern was the "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all."[93]

An impediment to state historic preservation is the concern that once a structure is designated as having historic significance, it may not be altered or destroyed. In *Penn Central Transportation Co. v. City of New York*,[94] the Supreme Court likened the Landmarks Preservation Law of the City of New York to zoning laws that substantially relate to the promo-

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applicable to a person having lawful possession of an archaeological resource prior to October 31, 1979. *Id.* § 470ee(f).

91. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 41-861 to 41-866 (1991); CAL. PUB. RES. CODE §§ 5020-29 (West 1984 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 7-147a to 7-147y, §§ 10-321 to 10-321cc (West 1989 & Supp. 1993); FLA. STAT. ANN. §§ 266.0001-.0068 (West Supp. 1993); ILL. ANN. STAT. ch. 105, ¶ 533a, ch. 127, ¶ 133d (Smith-Hurd 1987); MASS. ANN. LAWS, ch. 9, §§ 26-28 (Law. Co-op. 1988 & Supp. 1993); ME. REV. STAT. ANN. tit. 27, §§ 501-09 (West 1988 & Supp. 1992); N.Y. PARKS, REC. & HIST. PRESERV. LAW §§ 3.01-.23 (McKinney 1984); PA. STAT. ANN. tit. 37, §§ 101-906 (1993).

92. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 108 (1978).

93. *Id.* The State of Florida has declared that the "rich and unique heritage of historic properties in [the] state, representing more than 10,000 years of human presence, is an important legacy to be valued and conserved for present and future generations." FLA. STAT. ANN. § 267.061(1)(a) (West 1991). This statute states that the "destruction of these nonrenewable historical resources will engender a significant loss of the state's quality of life, economy, and cultural environment." *Id.*

In Maine, the Maine Historic Preservation Commission was established to implement the policy of the state "to preserve the architectural, historic and environmental heritage of the people of the State and to develop and promote the cultural, educational, and economic benefits of these resources." ME. REV. STAT. ANN. tit. 27, § 501 (West 1988).

In Pennsylvania, the legislature made a finding that "[t]he irreplaceable historical, architectural, archaeological and cultural heritage of [the] Commonwealth should be preserved and protected for the benefit of all the people, including future generations." PA. STAT. ANN. tit. 37, § 102(3) (1993). The Pennsylvania statute provides that the preservation and protection of historic resources was deemed to promote the public health, prosperity, and general welfare. *Id.* § 102(4). It states that "[t]he rapid social and economic development of . . . contemporary society threatens to destroy the remaining vestiges of our historic heritage." *Id.* § 102(5).

94. 438 U.S. 104 (1978).

tion of the general welfare but require no payment to the property owner due to a diminution in property value brought about by the application of the law to the owner's property.[95] In *Mayes v. City of Dallas*,[96] the Fifth Circuit held that a property owner of a home within an historic preservation district could not change the property's exterior features without prior approval from city authorities.[97] The court held that a municipality had "the constitutional power to regulate the use of private property in the interest of historic preservation."[98] In *St. Bartholomew's Church v. City of New York*,[99] the Second Circuit ruled that a city's landmarks law did not violate a church's free exercise and takings claim.[100] The court decided

95. *Id.* at 135-36. Penn Central Transportation Company owned a building called the Terminal, which had been designated as one of New York City's most famous buildings. *Id.* at 115. Penn Central wanted to tear down a portion of the Terminal and construct an office building on its top. *Id.* at 115-16. The City of New York refused to grant permission and Penn Central brought suit, alleging that restrictions placed upon its property by the City of New York constituted a "taking" of its property without due process of law. *Id.* at 116-19. The United States Supreme Court decided that the New York law did not interfere in any manner with present uses of the Terminal. *Id.* at 136. According to the Court, the Terminal's designation as a landmark not only permitted the owner to continue to use the property but assumed that the owner would do so precisely as it had for the past 65 years—the building would remain a railroad terminal containing office space and concessions. *Id.* The Court ruled that Penn Central was not entitled to compensation for the law's restriction in its use of the Terminal. *Id.* at 136-37.

96. 747 F.2d 323 (5th Cir. 1984).

97. *Id.* at 326. The property owner was "denied permission to paint his brick home and to construct a walkway with pylons across his front lawn." *Id.* at 323. A city preservation regulation required prior approval for any exterior changes. *Id.* at 324.

98. *Id.* (citing *Penn Cent. Transp. Co.*, 438 U.S. at 132-34). The *Mayes* Court determined that the city ordinance satisfied due process criteria. *Id.*

In Board of Regents v. Walker County Historical Comm'n, 608 S.W.2d 252 (Tex. Ct. App. 1980), the board of regents of a university system commissioned architects to restore Sam Houston's Woodland home, a building under its control. *Id.* at 252. The county historical commission objected to the manner in which the restoration was to be performed. *Id.* The Texas Court of Appeals noted that section 191.131 of the Texas Antiquities Code required that a permit be obtained before any operations could be conducted on landmarks. *Id.* at 253. However, the court ruled that because the home had never been designated as a state landmark, the Antiquities Committee was neither authorized nor required to issue a permit. *Id.*

The Texas Antiquities Code was amended in 1981 to require a permit to alter, salvage, or excavate any property that is an historic site under section 191.092 of the Code or any sunken vessels or treasure imbedded in the earth as defined in section 191.091 of the Code. TEX. NAT. RES. CODE ANN. § 191.093 (West 1993).

99. 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

100. *Id.* at 351. The church contended that the city's denial of its application to erect a commercial office tower on its property impaired its ability to operate and expand its ministerial and charitable activities. *Id.* at 353. The appellate court agreed with the district court that the church had failed to prove that it could not continue its religious practices in its existing facilities. *Id.* at 357.

But see First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992), in which the Supreme Court of Washington ruled that a city's landmarks preservation

that although a landmarks law might "freeze" church property in its existing use and prevent a church from expanding or altering its activities, the Supreme Court's decision in *Penn Central* explicitly permitted such restrictions.[101]

I. *Architectural Works Copyright Protection Act of 1990*

The Architectural Works Copyright Protection Act[102] was instituted in 1990 as a "result of United States adherence to the Berne Convention for the Protection of Literary and Artistic Works."[103] In adopting the act, Congress determined that architecture is a form of artistic expression that "performs a significant societal purpose, domestically and internationally."[104] The act provides protection through the Copyright Act for "works of architecture," i.e., "the constructed design of buildings."[105] An architectural work that is now protected by the Copyright Act is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.[106]

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ordinance violated a church's right to free exercise of religion under the First Amendment. *Id.* at 177. It distinguished *St. Bartholomew's Church* because St. Bartholomew's Church sought an exception for an adjacent building, not for its house of worship, and because the court did not consider the constitutionality of a liturgy-based religious exemption. *Id.* at 181. The *First Covenant Church* Court noted that St. Bartholomew's Church had accepted designation as a landmark without objection, whereas the First Covenant Church had continuously objected to such designation. *Id.* Further, the First Covenant Church claimed that the landmark designation reduced the value of its principal asset by almost one-half. *Id.* at 183.

101. *St. Bartholomew's Church*, 914 F.2d at 356.

102. Pub. L. No. 101-650, §§ 701, 703, 104 Stat. 5128, 5133 (1990) (codified at 17 U.S.C. §§ 101(5), 102(a)(8) (Supp. II 1990)). The act was an amendment to the Copyright Act and provided copyright protection for works of architecture. *Id.*

103. H.R. Rep. No. 735, 101st Cong., 2d Sess. 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6941. See discussion of Berne Convention, *infra* notes 188-96 and accompanying text.

104. Pub. L. No. 101-650, 1990 U.S.C.C.A.N. (101 Stat.) 6936.

105. *Id.* at 6942.

106. 17 U.S.C. § 101(5) (Supp. II 1990). Section 120(a) of Title 17 permits the unauthorized "making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or is ordinarily visible from a public place." *Id.* The section thus provides a limitation on the copyright owner's right to prepare derivative works. *Cf.* 17 U.S.C. § 106(2). Section 120(b) permits the owner of a building embodying a protected architectural work to "make or authorize the making of alterations to [the] building" and to "destroy or authorize the destruction of [the] building" without the copyright owner's consent. *Id.* § 120(b). Section 301(b)(4) of Title 17 provides that "State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected" by 17 U.S.C. § 102(a)(8) are not preempted by the Copyright Act. *Id.*

J. *Commission for the Preservation of America's Heritage Abroad*

In 1985, Congress established the Commission for the Preservation of America's Heritage Abroad[107] in order to preserve and protect cemeteries, monuments, and historic buildings associated with the foreign heritage of United States citizens.[108] The Commission was charged with the duty of identifying and publishing a list of those cemeteries, monuments, and historic buildings located abroad that are associated with the foreign heritage of United States citizens from eastern and central Europe, and encouraging the preservation and protection of such structures.[109] In cooperation with the Department of State, the Commission is to obtain assurances from foreign governments that the cemeteries, monuments, and buildings it identified will be preserved and protected.[110]

K. *Limitations of Historical Preservation Laws*

Although legislation to protect historic sites and structures was slow in developing, the current preservation laws did initiate and advance a momentous national historical preservation movement. Still, the widespread protection such legislation has assigned to historical sites and monuments has not been conferred upon other cultural treasures. In addition, there have been other special problems not addressed by preservation laws. For example, because admiralty principles determine ownership of sunken vessels, the historical preservation laws have not protected sunken treasures. Further, historical preservation laws have not guaranteed Native Americans the preservation of their individual culture and heritage. In addition, historical preservation laws have not provided protection for the nation's artistic treasures or for international cultural and historical treasures. Congress has only recently enacted special legislation to address these issues.

III. Preservation of Sunken Treasures

The issue of title to sunken ships and to the artifacts found on these vessels has surfaced in recent years. There have been many excavations of sunken crafts since individuals and governments have acquired the means to locate and excavate these vessels. Technological advances have made access to shipwrecks in deep waters much less difficult. Currently, cameras can transmit a video presence of ship artifacts, and robotics devices can permit archaeologists to study and analyze sunken objects prior to excavation. The sea is able to preserve antiquities and provide society with considerable knowledge about ancient civilizations. Both the federal

107. Pub. L. No. 99-83, § 1303, 99 Stat. 280 (1985) (codified at 16 U.S.C. § 469j (1988 & Supp. IV 1992)).
108. 16 U.S.C. § 469j (1988 & Supp. IV 1992).
109. *Id.* § 469j(c).
110. *Id.*

government and the states have enacted legislation, in their roles as trustees of the public interest, to ensure protection of the historical and archaeological significance of these shipwrecks.[111]

There has been complex litigation involving the issue of ownership of shipwrecks. As the Supreme Judicial Court of Massachusetts noted, in *Commonwealth v. Maritime Underwater Surveys, Inc.*,[112] the public originally encouraged the "hardy and adventurous mariner" to engage in "laborious and sometimes dangerous enterprises" to locate and excavate these wrecks.[113] Ownership of such vessels was determined by the law of admiralty. Courts decided questions of title to sunken and abandoned shipwrecks by applying the law of finds and the law of salvage.[114] The law of finds, which "developed originally at common law and [was] then incorporated into admiralty, gives legal force to the venerable maxim 'finders-keepers.'"[115] The law of finds designates the finder, who takes possession of lost and abandoned property and who exercises dominion and control over the property, as the owner of such property. The application of admiralty law to a claim regarding derelict property "'would lead to an award either of outright ownership of the recovered goods (applying the law of finds) or of entitlement to an appropriate salvage award.'"[116]

The law of salvage is an ancient maritime doctrine, "meant to encourage the rescue of imperiled or derelict marine property by providing a liberal reward to those who recover property on or in navigable waters."[117] Admiralty courts do not view compensation as salvage merely as

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111. *See, e.g.*, 43 U.S.C. §§ 2101-06 (1988) (*see* discussion *infra* notes 140-53 and accompanying text); CAL. PUB. RES. CODE § 6309 (West 1988 & Supp. 1993); GA. CODE ANN. § 12-3-80 (1992); ILL. REV. ANN. STAT. ch. 127, ¶ 133c.02 (Smith-Hurd 1992); IND. CODE ANN. § 14-3-3.3.1 (West 1990); LA. REV. STAT. ANN. § 41:1604 (West 1990); MD. CODE ANN. NAT. RES. ACT § 2-309 (1988); MASS. GEN. L. ch. 6,.§§ 179, 180 (1990); MICH. COMP. LAWS § 299.54c (1993); MISS. CODE. ANN. § 39-7-9 (1992); S.C. CODE ANN. §§ 54-7-610 to 54-7-850 (Law. Co-op. 1992 & Supp. 1993) (*see* discussion *infra* at notes 155-59 and accompanying text); TEX. NAT. RES. CODE ANN. § 191.091 (West 1993).

112. 531 N.E.2d 549 (Mass. 1988). Maritime claimed title to the pirate ship WHYDAH, which capsized in 1717 during a storm off the Cape Cod coast. *Id.* at 549-50. The ship was "laden with plundered cargo." *Id.* at 549.

113. *Id.* at 551 (quoting The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869)).

114. *See, e.g., id.*; Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978).

115. Zych v. Unidentified, Wrecked & Abandoned Vessel, 941 F.2d 525, 527 (7th Cir. 1991).

116. *Maritime Underwater Surveys*, 531 N.E.2d at 551 (quoting Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186, 188 (S.D. Fla. 1981)).

117. *Id.* In Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985), the Eleventh Circuit explained that a salvor is entitled to a salvage award if three conditions are met: (1) a maritime peril existed from which the ship could not have been rescued without the salvor's assistance; (2) the salvor's act was voluntary; and (3) the act was successful in saving or helping to save at least part of the property at risk. *Id.* at 1515. In Martha's Vineyard Scuba Headquarters, Inc. v.

pay but as a reward given for perilous services and as an inducement to search for such wrecks.[118] The law of salvage "assumes that the property is owned and has not been abandoned."[119] The law of finds, on the other hand, determines title to abandoned property.[120]

American courts have applied the law of finds, rather than the law of salvage, in cases involving ancient shipwrecks where no owner is likely to come forward.[121] Title to recovered treasure vests either in the sovereign or in the finder. "The English common law approach to the law of finds is that title to abandoned property found on the seas is the prerogative of the crown."[122] The "American rule is that title to recovered property or treasure rests in the finder absent a legislative exercise of the sovereign prerogative."[123]

Unidentified, Wrecked & Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987), the First Circuit observed that, to maintain a salvor's franchise to the exclusion of the efforts of other salvors, the salvage operation must be "(1) undertaken with due diligence, (2) ongoing, and (3) clothed with some prospect of success." *Id.* at 1061.

In Columbus-America Discovery v. Atlantic Mut. Ins., 974 F.2d 450 (4th Cir. 1992), the Fourth Circuit noted six "main ingredients" admiralty courts use when fixing an award for salvage:

> (1) The labor expended by the sailors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.

Id. at 468.

118. *Maritime Underwater Surveys,* 531 N.E.2d at 551 (quoting The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869)).

119. *Id.*

120. *Id.*

121. *See, e.g., Maritime Underwater Surveys,* 531 N.E.2d 549; Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel, 569 F.2d 330 (5th Cir. 1978).

The Fourth Circuit in *Columbus-America Discovery* concluded that the "finds law is applied to previously owned sunken property *only* when that property has been abandoned by its previous owners." *Columbus American Discovery,* 974 F.2d at 461 (emphasis added). It decided that only a handful of cases have applied the law of finds, and that all of them fit into two categories. *Id.* First, it noted those cases "where owners expressly and publicly abandoned their property." *Id.* The second category of cases, according to the court, involves instances where items are recovered from ancient shipwrecks and no owner appears in court to claim them. *Id.* The court ruled that the evidence was insufficient to conclude that underwriters abandoned their interest in a sunken treasure and held that the trial court erred when it applied the law of finds. *Id.* at 468. On remand, it instructed the trial court to apply the law of salvage. *Id.* The dissent, however, disagreed with the majority's decision to apply the law of salvage. *Id.* at 476 (Widener, J., dissenting). The dissent concluded that, in the context of long lost wrecks, courts have almost without exception applied the law of finds. *Id.* (Widener, J., dissenting).

122. *Maritime Underwater Surveys,* 531 N.E.2d at 551.

123. *Id.*

Congress eventually decided that admiralty principles are "not well-suited to the preservation of historic and other shipwrecks" which may have considerable cultural value.[124] In addition, many states have recognized that historic shipwrecks are cultural resources needing greater protection and have enacted legislation to protect these resources for the public.[125]

A. *Antiquities Acts and the Law of Finds*

The federal government has used the Antiquities Act of 1906 and the Archaeological Protection Act of 1979, albeit with limited success, to assert title to ancient vessels that had sunk near the United States coast. For example, in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*,[126] the United States asserted title under the Antiquities Act to a Spanish galleon, the NUESTRA SENORA DE ATOCHA, that sunk off the coast of Florida in 1622.[127] The Fifth Circuit Court of Appeals, however, noted that by its terms the Antiquities Act applied only to lands owned or controlled by the federal government.[128] Because the wreck of the vessel rested on the continental shelf, it was outside the territorial waters of the United States.[129] The court applied the law of finds to award title to the

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124. H.R. Rep. No. 514(II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 377.

125. *Id.* at 366. See also *supra* note 111 for citations to selected state statutes.

126. 569 F.2d 330 (5th Cir. 1978).

127. *Id.* at 335. See discussion of the Antiquities Act, *supra* notes 25-39 and accompanying text.

128. *Id.* at 337.

129. *Id.* at 337-38.

> The continental shelf is . . . the seabed and subsoil of the marine areas adjacent to the coast . . . but outside the area of the territorial sea. . . . The territorial sea of the United States includes those waters lying not more than three miles . . . from the baseline (the artificial coastline). All parts of the sea not included in the territorial or internal waters of a nation constitute the high seas.

Id. at 338 n.14.

The Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1988), vests title in the United States to the lands and natural resources under the navigable waters extending three miles from a coastal state's respective coastline, but it also recognizes the coastal states' title to and ownership of the lands and navigable waters in the offshore seabed. The act transfers title and development rights in natural resources to the states without disturbing the sovereignty of the federal government over the marginal sea. *See* Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549 (Mass. 1988). In United States v. Maine, 420 U.S. 515 (1975), the Supreme Court held that the Submerged Lands Act grants the United States paramount rights to the seabed located beyond the three mile limit. *Id.* at 526.

The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56 (1988), demonstrates Congressional intent to extend the jurisdiction and control of the United States to the outer continental shelf. *Treasure Salvors*, 569 F.2d at 339 n.18. "Nations maintain limited jurisdiction over waters lying not more than twelve miles from the baseline, in order to prevent or punish infringement of customs, fiscal, immigration

vessel to Treasure Salvors.[130] In *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*,[131] the United States asserted title under the Antiquities Act and the Archaeological Protection Act to an eighteenth century English ship, the FOWEY, that was shipwrecked off the coast from a national park system known as Biscayne National Monument.[132] In *Klein*, the court

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or sanitary regulations within their territory or territorial sea. This belt of limited control is the contiguous zone." *Id.* at 338.

130. *Treasure Salvors*, 569 F.2d at 337. Treasure Salvors located the wreck site in 1971 near a shoal west of the Marquesas Keys. *Id.* at 333. Both the United States and the State of Florida claimed title to the vessel and to the artifacts found on the ship. *Id.* at 333; *see also* Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 676 (1982); Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560, 563 (5th Cir. 1981).

In Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), the State of Texas enjoined Platoro from removing some of the treasures from a Spanish galleon, ESPIRITU SANTO, that sank in 1555 in a storm and was resting in Texas's territorial gulf waters. *Id.* at 897. Platoro located the wreck in 1967 and removed some of its treasures. *Id.* The district court noted that, in Texas, the finder of lost property is the keeper. Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 518 F. Supp. 816, 819 n.1 (D.C. Tex. 1981). While some jurisdictions except from the law of finds property embedded in the soil, Texas does not. *Id.* On appeal, the Fifth Circuit noted that the Texas Antiquities Code, TEX. NAT. RES. CODE ANN. § 191.091, which designates as state archaeological landmarks sunken or abandoned pre-twentieth century ships and wrecks of vessels embedded in lands belonging to the State of Texas, was passed later, in 1969. *Platoro Ltd.*, 695 F.2d at 902 n.11. Thus, the district court held that the State of Texas could not claim ownership of the vessel. *Platoro Ltd., Inc.*, 518 F. Supp. at 823. Consequently, it ordered that the state either relinquish title to the ship to Platoro or pay it damages for its salvage efforts. *Id.* The appellate court vacated the district court's award of the res and remanded the case for a determination of the salvage award. *Platoro Ltd., Inc.*, 695 F.2d at 907. The court ruled that the salvage award should not exceed the value of the res. *Id.*

In Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel, 577 F. Supp. 597 (D.C. Md. 1983), a salvage company brought an action seeking title to three abandoned vessels believed to the be the SANTA ROSELEA, the ROYAL GEORGE, and the SAN LORENZO DE ESCORAL that sank in the Atlantic Ocean approximately 200 years ago. *Id.* at 600. The vessels had been seized by the United States Marshall for Maryland. *Id.* The district court found that the vessels were within Maryland's territorial jurisdiction. *Id.* at 608. Under Maryland's Natural Resources Act, MD. NAT. RES. CODE ANN. § 2-309, "[a]ny object or material of historical or archaeological value or interest found on an archaeological site or land owned or controlled by the State is the property of the State." *Id.* The court decided that the Antiquities Act of 1906 did not apply to state submerged lands; thus, the United States did not have an interest in the vessels. *Id.* at 610. The court ruled that the State of Maryland had a colorable claim of possession to the vessels and that the court lacked jurisdiction over the action against the state because of the Eleventh Amendment. *Id.* at 614.

131. 758 F.2d 1511 (11th Cir. 1985).

132. *Id.* at 1512. The remains of the FOWEY were within government territory. *Id.* at 1513. Klein discovered the vessel in 1978 while he was sport diving. *Id.* at 1512. After he removed several artifacts from the vessel, the government obtained an injunction to prevent any further salvage efforts on his part. *Id.* at 1512-13.

held that the United States had title to the ship.[133] The court explained that, while the law of finds applied, there were two exceptions to the rule that a finder acquires title over the owner of the land on which the property was found.[134] The court declared that the owner of the land is awarded title to abandoned property if the property is embedded in the soil, or if the owner of the land has constructive possession because the property is not considered to be lost.[135] The court decided that the United States had title under both exceptions.[136] The vessel was embedded in the soil, and it was not considered to be lost.[137] An assessment of Biscayne National Monument, prepared for the Park Service, had listed the eighteenth century wreck.[138] Because the shipwreck had already been inventoried, the court held that it was not lost.[139]

B. *Abandoned Shipwreck Act of 1987*

To eliminate the confusion over the ownership of, and the responsibility for, historic shipwrecks in state waters, Congress enacted the Abandoned Shipwreck Act[140] to protect underwater archaeological treasures in state waters.[141] Congress noted that when it adopted the Submerged Lands Act,[142] and thereby transferred ownership to the states of all natural resources and submerged lands out to a distance of three miles,[143] it had not specified whether the states also owned non-natural objects such as shipwrecks that rested on or within submerged lands.[144] Congress explained that notwithstanding this lack of clarity, numerous states had enacted legislation that pertained to the management of abandoned or historic shipwrecks in state waters.[145] Still, state courts had only limited

133. *Id.* at 1515.
134. *Id.* at 1514.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* The court did not grant Klein a salvage award because, according to the court, his "unauthorized disturbance of one of the oldest shipwrecks in the Park and his unscientific removal of the artifacts did more to create a marine peril than to prevent one." *Id.* at 1515.
139. *Id.*
140. Pub. L. No. 100-298, § 2, 102 Stat. 432 (1988) (codified at 43 U.S.C. §§ 2101-06 (1988)).
141. H.R. Rep No. 514 (II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 370, 371.
142. Ch. 65, § 2, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-15 (1988)).
143. 43 U.S.C. § 1311(a) (1988). This is the case except in Texas, Puerto Rico, and the west coast of Florida, where it is three marine leagues or nine statute miles. *Id.* § 1301(b).
144. H.R. Rep. No. 514 (II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 371.
145. *Id.* "It [was] estimated that the total number of shipwrecks in State waters [was] more than 50,000, of which some 5-10 percent might be of historical significance." *Id.*

success in enforcing these statutes, and some courts held that state regulation was preempted by admiralty principles.[146] These courts applied either the law of finds or the law of salvage to adjudicate the disputes before them.[147] The Abandoned Shipwreck Act was Congress's answer to the problem. To protect these archaeological resources, the act claims federal ownership of certain shipwrecks and simultaneously transfers title to these wrecks to the states for administration, management, and regulation.[148] It recognizes that "[h]istoric shipwrecks that contain both historic information and tangible artifacts are subject to salvage operations, with resultant loss of historical information and artifacts to the public."[149]

The Abandoned Shipwreck Act provides states with "the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands,"[150] including "abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights."[151] The act awards the United States title to any abandoned shipwreck that is embedded in a state's submerged lands, but the United States then transfers title to the state.[152] The act specifies that the law of salvage and the law of finds do not apply to those abandoned shipwrecks embedded in a state's submerged lands.[153]

Although the Abandoned Shipwreck Act represents a beginning, at least, of a needed program to protect underwater archaeological treasures, the act does not adequately resolve the conflicting interests of the government in seeking to preserve shipwrecks for the public, and of the salvors in their expenditure of time and resources in locating subter-

146. *See, e.g.*, Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981).

147. See Zych v. Unidentified, Wrecked & Abandoned Vessel, 941 F.2d 525, 529 (7th Cir. 1991), for a discussion of the law of finds.

148. *Id.* The Abandoned Shipwreck Act is an exercise of the federal government's "recognized sovereign prerogative to assert title to abandoned shipwrecks that lie within the waters of the United States" and "is also consistent with the recognized exception from the law of finds for shipwrecks embedded in submerged lands of a state." H.R. Rep. No. 514 (II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 375-76.

149. H.R. Rep. No. 514 (II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366.

150. 43 U.S.C. § 2101(a) (1988).

151. *Id.* § 2101(b).

152. *Id.* § 2105. However, the act provides that "[a]ny abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands." *Id.* § 2105(d).

153. *Id.* § 2106(a). The act specifically states that it does not change the law relating to shipwrecks other than to those embedded in submerged lands of a state or embedded in coralline formations protected by a state on submerged lands of a state. *Id.* § 2106(b).

ranean vessels.[154] Further, the act is limited in that it applies only to shipwrecks embedded in submerged state lands.

Some states have enacted recent legislation pursuant to the Abandoned Shipwreck Act to recognize their role in preserving sunken treasures. For example, South Carolina has attempted to resolve the conflict between encouraging and rewarding appropriate and beneficial endeavors of salvors with the state's concern that historic treasures from sunken ships may be lost as a result of some salvage operations. The South Carolina Underwater Antiquities Act[155] provides that the state has title to all submerged antiquities.[156] The South Carolina Institute of Archaeology and Anthropology is designated as the custodian of all archaeological materials.[157] A person requesting to conduct operations in the course of which submerged antiquities may be removed must apply to the Institute for a license.[158] However, the disposition of recovered submerged historic property includes a division with the licensee, i.e., the salvor.[159]

Although the Abandoned Shipwreck Act may be limited in scope, the act, as well as state legislation enacted to protect archaeological shipwrecks, represents the commencement of a governmental program to preserve underwater archaeological resources.

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154. Zych v. Unidentified, Wrecked & Abandoned Vessel, 941 F.2d 525 (7th Cir. 1991), detailed the act's limitations. In *Zych*, a salvor found the SEABIRD, which sank in Lake Michigan in 1868, and sought either title to the ship under the law of finds or an award under the law of salvage. *Id.* at 526-27. The State of Illinois claimed title to the ship under the Abandoned Shipwreck Act. *Id.* at 527. The Seventh Circuit commented that the Abandoned Shipwreck Act is limited in scope because it applies only to wrecks that are embedded in the land. *Id.* The court decided that an embedded wreck is one that is at least partially buried. *Id.* at 529. Consequently, the court remanded the case to the district court for a determination of whether the shipwreck was "embedded," noting that embeddedness is a factual question to be established by evidence. *Id.* at 534. The court noted that the Abandoned Shipwreck Act does not apply to any legal proceedings brought prior to its enactment. *Id.* at 531. It also expressed some concern as to the constitutionality of the act. *Id.* at 531-32. Article III, Section 2 of the Constitution extends judicial power to all cases of admiralty and maritime jurisdiction. U.S. CONST. art. III, § 2. As the court noted, Congress, in implementing the grant of jurisdiction, made it exclusive. *Zych*, 941 F.2d at 530. The district court had decided that while the Abandoned Shipwreck Act changed the substantive law, it did not alter jurisdiction. *Id.* at 531.

In Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989), Marx found two shipwrecks, believed to be the NUESTRA SENORA DEL BIEN VIAJE and the NUESTRA SENORA DEL PILAR, within three miles of the coast of Guam. *Id.* at 295. The Ninth Circuit noted that the Abandoned Shipwreck Act was inapplicable to the case. *Id.* at 300.

155. S.C. CODE ANN. §§ 54-7-610 to 54-7-850 (Law Co-op. 1992 & Supp. 1993).

156. *Id.* § 54-7-630.

157. *Id.* § 54-7-640.

158. *Id.* § 54-7-650.

159. *Id.* § 54-7-770(6). A licensed salvor "must receive at least fifty percent of the artifacts . . . in value or in-kind." *Id.*

IV. Conservation and Repatriation of Native American Artifacts

Native Americans view their culture as being separate and unique and insist that their special heritage should be identified and set apart from the historical heritage of the United States generally. Native Americans have asserted an ownership in, and have demanded repatriation of, Native American artifacts. Still, many proponents of the national historical preservation movement have not endorsed attempts to recognize a special Native American culture and, in that context, to repatriate Native American artifacts.

Native Americans have contended that various historical preservation laws and laws protecting the environment have interfered significantly with their culture and religion.[160] One problem has been the interference with their religious events. If votive offerings were newly made and left at religious shrines, they were often pilfered and sometimes taken out of the country without any interference from customs officials. Because the articles were newly made, the Antiquities Act of 1906 did not protect the Indian tribes from the public's removal of such objects.[161] Problems of this nature have served as the catalyst for the Native Americans' contention that their heritage should be identified and acknowledged as a separate and distinctive culture and that museums should repatriate Native American artifacts in their collections.[162] While this view may have merit, it has not been well received by supporters of the historical preservation movement.

A. *American Indian Religious Freedom Act of 1978*

Native Americans have cited the American Indian Religious Freedom Act,[163] passed by Congress in 1978, as authority for their right to retain their native cultural resources.[164] Native Americans have asserted that the act authorizes them to obtain a return of various Indian religious artifacts that are a part of museum collections.[165] The act, however, does not

160. *See* Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. Rev. Law & Soc. Change 437 (1986).

161. The court's decision in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974), is an example. In *Diaz*, the Ninth Circuit ruled that religious Native American artifacts of recent origin were not subject to protection under the Antiquities Act. *Id.* at 114. *See supra* notes 30-34 and accompanying text.

162. *See* Echo-Hawk, *supra* note 160, at 451.

163. Pub. L. No. 95-341, § 1, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1988)).

164. *See* Bowen Blair, *Indian Rights: Native Americans Versus American Museums—A Battle For Artifacts*, 7 Am. Indian L. Rev. 125 (1979).

165. *Id.* The Zuni had negotiated with the Smithsonian Institution to return certain of their artifacts which they alleged were stolen from their reservation at the turn of the century. Native Americans believed the Smithsonian had an obligation to return such artifacts because the Smithsonian is completely federally subsidized. They

include a provision that museums return religious artifacts belonging to Indian tribes. In addition, the act only has application to federal agencies.[166] Courts have ruled that the act is merely a statement of the federal government's policy that it will recognize the religious beliefs of Native Americans as well as of others.[167]

The American Indian Religious Freedom Act provides that the federal government will protect and preserve for Native Americans their inherent right of freedom to believe in and exercise their traditional religions.[168] Various federal departments, agencies, and other instrumentalities responsible for administering relevant laws, are to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices.[169]

B. *Archaeological Resources Protection Act of 1979*

The Archaeological Resources Protection Act of 1979[170] provides some protection to Native American tribes in their attempts to preserve their cultural treasures. The act requires that a permit to excavate on Indian lands can be secured only by the consent of the Native American tribe.[171] Although archaeological resources are artifacts that are at least 100 years of age, and thus, would not include religious objects of recent origin, the requirement of a permit from the Native American tribe to excavate upon Indian land has undoubtedly halted much of the taking of Native American artifacts and religious objects from Indian lands.[172]

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have contended those museums that are partially financed by the federal government and those that have tax-exempt status should also return Native American artifacts.

There is now established within the Smithsonian a National Museum of the American Indian which will "collect, preserve, and exhibit Native American objects of artistic, historical, literary, anthropological, and scientific interest [and will] provide for Native American research and study programs. . . ." 20 U.S.C. § 80q-1 (1988).

166. *See* American Indian Religious Freedom Act, Pub. L. No. 95-341, 1978 U.S.C.C.A.N. (95 Stat.) 1262, 1262-65.

167. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); 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); Crow v. Gullett, 541 F. Supp. 785 (D.C. S.D. 1982), *aff'd* 706 F.2d 856 (8th Cir. 1983).

168. 42 U.S.C. § 1996 (1988).

169. American Indian Religious Freedom Act, Pub. L. No. 95-341, 1978 U.S.C.C.A.N. (95 Stat.) 1262, 1265.

170. Pub. L. No. 96-95, § 2, 93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa-70mm (1988)); *see supra* Part II (G).

171. 16 U.S.C. § 470cc(c), (g) (1988). See *supra* notes 87-90 and accompanying text for a discussion of the act.

172. In addition, a person who willfully steals or converts for personal use or for the use of another, any property belonging to, or in the custody of, an Indian tribal organization is subject to criminal prosecution under 18 U.S.C. § 1163 (1988).

C. *Native American Graves Protection and Repatriation Act of 1991*

Native Americans recently obtained the legislation they have long judged necessary to secure their religious and funerary objects. The Native American Graves Protection and Repatriation Act[173] was passed in 1991 to require federal agencies and all museums that have possession or control over holdings or collections of Native American human remains and associated funerary objects to compile an inventory of such items and, to the extent possible, based on information possessed by such entities, to identify the geographical and cultural affiliation of such items.[174] The inventories must be completed in consultation with tribal governments and Native Hawaiian organization officials and traditional religious leaders within a five year period from the act's enactment.[175] Museums must supply documentation of existing records for the "purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding [the] acquisition and accession of Native American human remains and associated funerary objects."[176] Those museums that fail to comply with the act may be subject to civil penalties.[177] If a cultural affiliation of Native American human remains and associated funerary objects is established with a particular tribe, then, upon the request of a known lineal descendant of the Native American or the tribe, the federal agency or museum must expeditiously return such remains and associated funerary objects.[178]

Through its enactment of the Native American Graves and Protection Act, Congress has, in effect, recognized a distinct Native American culture. Congress has agreed with Native Americans that museums should repatriate Native American artifacts in their collections so that such artifacts will become a part of a special Native American heritage. Although there are significant misgivings about Congress's recent stance, a regard for the sensibilities of Native Americans should lead to a recognition of their separate heritage and an understanding of their need to preserve for themselves their unique and individual culture. Indeed, a recognition and preservation of a distinct Native American culture should

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173. Pub. L. No. 101-601, § 2, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-13 (Supp. III 1991)).

174. 25 U.S.C. § 3003(a) (Supp. III 1991).

175. *Id.* § 3003(b). The Native American Graves Protection and Repatriation Act provides that the intentional removal or excavation of Native American cultural items from federal or tribal lands for purposes of discovery, study, or removal, is permitted only if such items are excavated or removed pursuant to a permit under the Archaeological Resources Protection Act. *Id.* § 3002(e).

176. *Id.* § 3003(b).

177. *Id.* § 3007.

178. *Id.* § 3005(a)(1). The Native American Graves Protection and Repatriation Act provides that a museum will not be liable for claims from an aggrieved party for claims for breach of fiduciary duty or good faith if it repatriates in good faith. *Id.* § 3005(f).

broaden the public's understanding and appreciation of the historical heritage of the United States generally, a heritage that includes and encompasses a special and distinctive Native American history.

V. Support and Protection for the Arts

Congress was slow to provide protection for the arts. In 1965, Congress recognized what it termed as a "serious imbalance between federal support for natural or the pure sciences and for humanistic research and studies."[179] In establishing the National Foundation on the Arts and the Humanities,[180] Congress found and declared that the arts and the humanities belong to "all the people of the United States."[181] It recognized that:

> an advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.[182]

In creating the National Foundation on the Arts and the Humanities, Congress declared that "[d]emocracy demands wisdom and vision in its citizens."[183] It explained that "world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and the spirit."[184] Congress maintained that the federal government, "in order to fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people [must] make widely available the greatest achievements of art."[185] With that mission having been finally identified, Congress has recently enacted legislation that would provide additional support and protection for the nation's artists and artistic expressions.

The concept of literary and artistic rights involves two elements—one is a personal right, called a moral right; the other is a property right.[186] In the United States, the property right of an author and, very recently,

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179. *See* H.R. Rep. No. 618, 89th Cong., 1st Sess. 2 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3186, 3189.

180. Pub. L. No. 89-209, § 2, 79 Stat. 845 (1965) (codified as amended at 20 U.S.C. §§ 951-68 (1988 & Supp. IV 1992)).

181. 20 U.S.C. § 951(1) (1988 & Supp. IV 1992).

182. *Id.* § 951(3).

183. *Id.* § 951(4).

184. *Id.* § 951(8).

185. *Id.* § 951(11).

186. 2 Melville B. Nimmer & David Nimmer, Nimmer On Copyrights §§ 8.21-.22 (1992).

the moral right of some visual artists, are protected through the copyright law.[187]

A. *Berne Convention Implementation Act of 1988*

The Berne Convention, which symbolizes international protection for authors and artists, was formed about 100 years ago.[188] The Berne Convention attempts to reconcile the policies of the various nations regarding international copyright protection. Countries that adhere to the Berne Convention have long recognized a personal or moral right of an artist.[189] Article 6bis of the Berne Convention provides for two elements of a moral right—the right of paternity and the right of integrity of a work.[190]

The right of paternity is the artist's right to be known to the public as the creator of a work and the right to prevent others from usurping the work by naming another person as the creator.[191] It also prevents others from wrongfully attributing to the artist a work the artist did not create. The right gives the author the right to claim authorship after the transfer of any copyright in the work. The right of integrity in a work is the right of an artist to prevent distortions of the work.[192] It gives an artist the right to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, his or her work.[193]

When delegates from the United States met with copyright experts from several Berne Convention nations in Geneva in 1987 to discuss the United States joining the Berne Convention, the consensus was that adoption of a moral right in artists was not necessary for compliance with Berne standards.[194] The United States joined the Berne Convention in 1988, but it did not, at that time, amend the Copyright Act to include a moral right in artists.[195] The Berne Convention Implementation Act did not expand or reduce any right of an artist to claim authorship of his or her work or to object to any distortion, mutilation, or other modification

187. 17 U.S.C. § 106A (Supp. II 1990). Article I, Section 8 of the United States Constitution provides that Congress may promote the arts by providing an artist the exclusive right to his or her works. U.S. CONST. art. I, § 8. Copyright protection applies to "original works of authorship fixed in any tangible medium of expression. . . ." 17 U.S.C. § 102(a) (Supp. II 1990). Works of authorship include pictorial, graphic, or sculptural works and architectural plans. *Id.* § 102(a). Property rights of an artist are protected for the artist's life plus fifty years. *Id.* § 302(a). The moral right of a visual artist is protected for the artist's life. *Id.* § 106A(d).

188. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 1988 U.S.C.C.A.N. (102 Stat.) 3706, 3707.

189. *Id.* at 3714.

190. *Id.*; *see* 17 U.S.C. § 106A (Supp. II 1990).

191. 1988 U.S.C.C.A.N. (102 Stat.) 3706, 3714.

192. *Id.*

193. *Id.* at 3714-15.

194. *See id.* at 3715.

195. *See* 17 U.S.C. § 104(c) (Supp. I 1989).

of, or other derogatory action in relation to, the work that would prejudice the artist's honor or reputation.[196]

Artists continued to lobby Congress and, in 1990, secured an amendment to the Copyright Act to provide for a moral right for some visual artists.[197]

B. *Visual Artists Rights Act of 1990*

The Visual Artists Rights Act was passed in 1990[198] as an amendment to the Copyright Act to provide for a moral right for visual artists. The right provides visual artists with a paternity right and a right of integrity.[199] The right will endure for the life of the artist.[200]

In enacting the Visual Artists Rights Act, Congress declared that the act was of "the utmost importance to professional artists who build their future on the integrity and authenticity of . . . [art] in public and private collections and to the public in preserving its cultural legacy . . . ."[201] It noted that the act would prevent distortions of works that "cheat the public of an accurate account of the culture of our time."[202] Congress reflected that the act would mitigate against destruction of these creations and protect their historical legacy.[203]

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196. *Id.*

197. See 17 U.S.C. § 106A (Supp. II 1990), which was added to the Copyright Act as a result of the Visual Artists Rights Act of 1990.

198. Pub. L. No. 101-650, § 603(a), 104 Stat. 5128 (1990) (codified at 17 U.S.C. § 106A (Supp. II 1990)); *see also* 1990 U.S.C.C.A.N. (104 Stat.) 5128.

199. 1990 U.S.C.C.A.N. (104 Stat.) 6915. *See* 17 U.S.C. § 106A (Supp. II 1990).

When a work of visual art has been incorporated into or made a part of a building in a way that removing the work from the building would cause its destruction, distortion, or mutilation, the rights conferred by the Visual Artists Rights Act may apply unless the artist and the owner of the building have signed a written agreement to the contrary. 17 U.S.C. § 113(d)(1)(A)-(B). The owner of a building who wishes to remove a work of visual art that is part of the building must make a good faith attempt to notify the artist of the owner's intended action. *Id.* An owner has made a diligent, good faith attempt to locate the artist if the owner has sent notice by registered mail to the artist at the artist's most recent address that was recorded in the Register of Copyrights. *Id.* § 113(d)(2)(B). If the artist does not respond within ninety days to remove the work or to pay for its removal, the owner may remove the work.

With respect to architectural works now protected by the copyright laws, the owners of a building embodying an architectural work may, without the consent of the copyright owner of the architectural work, authorize the making of alterations to the building and may destroy the building. *Id.* § 120(b)

200. 17 U.S.C. § 106A(d) (Supp. II 1990). A work of visual art is a painting, drawing, print, or sculpture existing in a single copy or a limited edition of 200 copies that are signed and consecutively numbered by the artist. *Id.* § 101.

201. 1990 U.S.C.C.A.N. (104 Stat.) 6915, 6916.

202. *Id.*

203. *Id.*

The federal government has preempted the field in the recognition of a moral right for visual artists.[204] Thus, those state statutes that grant moral rights to visual artists are no longer valid.[205]

With its enactment of the Visual Arts Rights Act of 1990, Congress acknowledged that artists build their future on the integrity and authenticity of art in public and private collections and that the public has an interest in mitigating against destruction of artistic creations.[206] By enacting legislation to protect the historical legacy represented by artworks, Congress has established that the arts are an integral element of our civilization, are fundamental to our national character, and are among the greatest of our national treasures.[207] The Visual Artists Rights Act of 1990 represents a first step in Congress's creation of a built-in mechanism to protect and perpetuate the arts.

C. *National Film Preservation Act of 1988 and 1992*

Although Congress did not recognize a moral right for film producers in motion pictures, it recently acknowledged that motion pictures "are an indigenous American art form that has been emulated through the world . . . [that] certain motion pictures represent an enduring part of our Nation's historical and cultural heritage," and that certain films should be included as a part of the national cultural heritage.[208] It determined that it was appropriate and necessary for the government to recognize motion pictures as significant American art forms deserving of protection and, consequently, it sought to preserve certain designated films through its adoption of the National Film Preservation Act of 1988[209] and of 1992.[210]

The National Film Preservation Act establishes a National Film Registry for the purpose of maintaining and preserving films that are cultur-

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204. *See* 17 U.S.C. § 301 (Supp. II 1990). For preemption to occur under section 301, the rights must be fixed in a tangible medium of expression and fall within the subject of copyright. The federal law will not preempt state causes of action that are not covered by the Copyright Act. *See* 1990 U.S.C.C.A.N. (104 Stat.) 6915, 6931; *see also* 17 U.S.C. § 301(f) (Supp. II 1990).

205. 17 U.S.C. § 301(f). The preemption would extend for the life of the artist. *Id.* The state statutes include CAL. CIV. CODE § 987 (West 1982 & Supp. 1993); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1984 & Supp. 1993).

206. 1990 U.S.C.C.A.N. (104 Stat.) 6915, 6916.

207. *Id.*

208. 2 U.S.C. § 178 (1988 & Supp. IV 1992) (The 1988 Act was repealed in 1992 and reenacted as an amendment to the Copyright Act).

209. 2 U.S.C. § 178-178l (1988 & Supp. IV 1992). This section was repealed in 1992 by the National Film Preservation Act of 1992, Pub. L. No. 102-307, 102 Stat. 307 (1992).

210. Pub. L. No. 102-307, 102 Stat. 307 (1992). This act amended the Copyright Act and repealed the 1988 act.

ally, historically, or aesthetically significant.[211] The Librarian of Congress provides these films with a seal to indicate that they have been included in the National Film Registry.[212]

VI. Preservation of International Treasures

The cultural heritage of foreign nations has recently become a national concern. As the populace becomes aware and acknowledges that the cultural heritage of each country is bound with and includes the cultural treasures of other nations, a concern for the preservation of international treasures evolves. Cultural nationalism embraces the theory that all cultural property should remain in the country of its origin.[213] The theory maintains that a society learns of itself by studying its artistic treasures and that a nation's artistic treasures can be better investigated and understood in their original setting.[214] The principle demands the protection of international sites and artifacts.

Unfortunately, the United States has accorded only limited recognition to the concept that protection of a nation's cultural heritage includes appreciation and preservation of the cultural heritage of other nations. Congress has acceded to some international agreements, but has enacted only limited legislation curtailing the importation of cultural properties into the United States.[215]

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)[216] was the first significant international agreement to protect national cultural property. The 1954 Hague Convention protects cultural property during wartime; prohibits the destruction or seizure of cultural property during armed conflict, whether international or civil in nature, and during a period of belligerent occupation;[217] and applies to peacetime international trafficking in cultural property unlawfully seized during an armed conflict.[218] The second international agreement, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of

211. 2 U.S.C. § 203 (1988). The National Film Preservation Board reviews nominations of films submitted to it for inclusion in the National Film Registry. *Id.* § 205.

212. *Id.* § 203.

213. *See* John Merryman, *Thinking About the Elgin Marbles*, 83 Mich. L. Rev. 1881 (1985). Merryman maintains that cultural property is "important to the cultural definition and expression of a country, to shared identity and community. They tell people who they are and where they came from. In helping to preserve the identity of specific cultures, they help the world preserve texture and diversity." *Id.* at 1913. According to Merryman, a "people deprived of its artifacts is culturally impoverished." *Id.*

214. *Id.*

215. *See infra* text accompanying note 225.

216. May 14, 1954, 249 U.N.T.S. 215 (1956).

217. *See* Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Arts, Inc., 917 F.2d 278, 296 (7th Cir. 1990). *See infra* notes 257-64 and accompanying text.

218. *Autocephalous Greek-Orthodox Church*, 917 F.2d at 296.

Ownership of Cultural Property [the UNESCO (United Nations Educational, Scientific, and Cultural Organization) Convention],[219] focuses on private conduct, primarily during peacetime.[220] These acts reflect an international policy to protect the world's cultural properties and a general philosophy of the international community that "unique remnants" of earlier artistic periods "belong to their homeland."[221] As a justice once reflected, the "greed and callous disregard for the property, history, and culture of others cannot be countenanced by the world community" nor should it be sanctioned by the courts.[222]

The international community became concerned in the 1960s about the importation into various countries of artifacts unlawfully obtained from the country of origin. This concern led to the drafting in 1970 of an international agreement by the General Conference of UNESCO, wherein the parties to the convention agreed to oppose all illicit import, export, and transfer of ownership of cultural property with whatever means were at their disposal.[223] At the meeting of the General Conference in Paris in 1970, the several nations in attendance recognized that the illicit trade in cultural property of various nations had become a primary cause of the impoverishment of the cultural heritage of originating countries. It concluded that international cooperation constituted one of the most efficient means of protecting each country's cultural property against the dangers resulting from the illicit transfer of such properties.[224]

The United States did not implement the Convention on Cultural Property into domestic law until 1982.[225] Indeed, the United States currently has only two statutes, the Pre-Columbian Art Act and the Convention on Cultural Property Implementation Act, regulating or prohibiting the importation of artifacts.

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219. Nov. 14, 1970, 823 U.N.T.S. 231 (1972).

220. *See Autocephalous Greek-Orthodox Church*, 917 F.2d at 295-96.

221. *Id.* at 297.

222. *Id.* at 296 (Cudahy, J., concurring).

223. 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 (1972).

224. Tariff Schedule, Pub. L. No. 97-446, 1982 U.S.C.C.A.N. (96 Stat.) 4098, 4100, 4101, 4106. Art objects had been stolen in increasing quantities from churches, museums, and collections. *Id.* at 4099-100. The governments of the victimized nations became disturbed at the outflow of their artifacts to foreign lands and organized the convention to combat the increasing illegal international trade in national art treasures, which in some countries had led to wholesale pillaging. *Id.* at 4100. To this end, the parties to the convention undertook to protect their own cultural heritage and to establish an export certificate for cultural property designated by each country as being of importance. *Id.* The parties further agreed to take what measures they could, consistent with existing national legislation, to prevent museums and similar institutions within their territory from acquiring cultural property originating in another country that had been illegally exported. *Id.* at 4101.

225. *See infra* notes 240-46 and accompanying text.

A. *Pre-Columbian Art Act of 1972*

The Pre-Columbian Art Act[226] was adopted in 1972 to provide that no pre-Columbian monumental or architectural sculpture or mural could be imported into the United States unless the government of the country of origin of the sculpture or mural issued a certificate that the artifact's exportation from that country did not violate any of its domestic laws.[227] A pre-Columbian monumental or architectural sculpture or mural is any stone carving or wall art, or any fragment or part thereof, that is the product of the pre-Columbian Indian cultures of Mexico, Central America, South America, or the Caribbean Islands.[228]

The Pre-Columbian Art Act has not provided a meaningful deterrent to the pillage of pre-Columbian sites. Procedures available under the act can be extremely expensive and time consuming. In addition, the act covers objects imported from all Latin American countries. These countries may have acted differently to protect their cultural heritage, some by declaring national ownership and others merely by enacting stringent export restrictions.[229] Further, the act provides only for the civil penalty of forfeiture of the imported artifacts.

B. *National Stolen Properties Act*

Because the Pre-Columbian Art Act covers artifacts from a large number of countries and because penalties under the act only provide for forfeiture of the artifacts, some courts have interpreted the act as a recognition that additional deterrents were needed.[230] The National Stolen Property Act[231] can be employed to punish encroachments upon legiti-

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

227. 19 U.S.C. § 2092(a) (1988).

228. *Id.* § 2095(3). It is an immobile monument or architectural structure or part of such monument or structure, and is subject to export control by the country of origin. Any pre-Columbian monumental or architectural sculpture or mural imported into the United States in violation of the act is to be seized and is subject to forfeiture under the customs laws. *Id.* § 2093. A pre-Columbian monumental or architectural sculpture or mural will be permitted entry into the United States if, at the time of making entry, a certificate, issued by the government of the country of origin, certifying that such exportation is not in violation of the laws of that country, is filed with the district director of customs, or if satisfactory evidence is presented to the district director that the sculpture or mural was exported from the country of origin on or before June 1, 1973. 19 C.F.R. § 12.107 (1992). If such a certificate or similar evidence cannot be produced at the time of making entry, the district director will store the sculpture or mural and permit the importer ninety days to produce such a certificate or evidence. *Id.* § 12.108. Otherwise, any such sculpture or mural will be forfeited to the United States. *Id.* If the country of origin presents a request in writing, the sculpture or mural will be returned to that country. *Id.* § 12.109.

229. *See* United States v. McClain, 593 F.2d 658 (5th Cir. 1979).

230. *Id.*

231. 18 U.S.C. §§ 2314-15 (1988 & Supp. II 1990).

mate and clear ownership rights to imported artifacts. If a foreign country asserts legal title to artifacts located within its boundaries, the courts may apply the National Stolen Property Act to the illegal importation of such artifacts even though the artifacts may never have been physically possessed by agents of that nation. The National Stolen Property Act provides that it is a felony to knowingly sell or receive stolen goods in interstate or foreign commerce.[232]

In *United States v. McClain*,[233] the Fifth Circuit Court of Appeals upheld the conviction, under the National Stolen Property Act, of certain individuals who sold pre-Columbian artifacts in Texas.[234] Although there was evidence in the case that the artifacts had been illegally imported, there was no evidence as to the time or manner of importation.[235] Still, it was clear that the defendants knew their activity was illegal under Mexican law and that the government of Mexico might claim ownership of the artifacts.[236] The defendants were convicted in the trial court under the National Stolen Property Act. On appeal, the government successfully asserted that ownership of pre-Columbian antiquities had, by statute, been vested in the Mexican government.[237] Thus, the appellate court agreed with the government that the artifacts were stolen within the meaning of the National Stolen Property Act. The court rejected the defendants' contention that the Pre-Columbian Art Act had the effect of narrowing the National Stolen Property Act so as to make it inapplicable to artifacts declared to be property of another country.[238]

The *McClain* decision is important in that it advanced a method by which the courts may more adequately address the illicit importation of cultural treasures into the United States, i.e., via the National Stolen Property Act. For example, the Republic of Turkey recently claimed ownership to nearly two thousand ancient Greek and Lycian silver coins that were being sold to collectors in the United States; it contended that the sales violated the National Stolen Property Act.[239]

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232. *Id.* § 2315.

233. 545 F.2d 988 (5th Cir. 1977); *see also McClain*, 593 F.2d 658 (5th Cir. 1979).

234. *McClain*, 545 F.2d at 992.

235. *Id.* at 992-93.

236. *Id.* at 993.

237. *Id.* at 1000; *see also McClain*, 593 F.2d at 671-72.

238. *McClain*, 593 F.2d at 663-65. The Pre-Columbian Art Act only provided for seizure of the artifacts and a civil penalty; the National Stolen Property Act made the importation a felony offense carrying a fine of as much as $10,000 and imprisonment for up to ten years. *See* 18 U.S.C. § 2315 (1988 & Supp. II 1990).

239. Republic of Turkey v. OKS Partners, 797 F. Supp. 64 (D. Mass. 1992). The Republic of Turkey alleged that the coins were unearthed in Turkey in 1984 and that under Turkish law all such artifacts within Turkey's borders are Turkish property even before they are discovered. *Id.* at 65. The Republic of Turkey insisted that since as early as 1906 Turkish law had been unequivocal in claiming outright ownership of artifacts within its borders. *Id.* at 66. The Republic of Turkey sued possessors of the coins under the Racketeering Influenced and Corrupt Organizations Act (RICO), al-

C. *Convention on Cultural Property Implementation Act of 1983*

Congress implemented the Convention on Cultural Property Implementation Act[240] into domestic law in 1983. At that time, members of Congress noted that the demand for cultural artifacts had resulted in the irremediable destruction of archaeological sites and objects, and, thus, was depriving situs countries of their cultural patrimony and the world of important knowledge of the past.[241] Members of Congress finally recognized that the United States had become a principal market for articles of archaeological or ethnological interest and of art objects and that the discovery of stolen or illegally exported artifacts had in some cases severely strained the United States' relations with the countries of origin, some of which were close allies of the United States.[242]

The Convention on Cultural Property Implementation Act provides that when a participating nation makes a request to the United States for import restrictions on cultural property from that nation, because the requesting nation contends the cultural patrimony of the nation is in jeopardy from the pillage of its cultural properties, the President may enter into a bilateral agreement with that nation to apply import restrictions.[243] Such import restrictions would provide that no designated archaeological or ethnological material exported from the requesting nation could be imported into the United States unless the requesting nation issued a certificate that exportation was not in violation of that nation's laws.[244] The term "archaeological material" refers to an object of cultural significance that is at least 250 years old and has been normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water.[245] The term "object of ethnological interest" refers to an object that is the product of a tribal or nonindustrial society and is important to the cultural heritage

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leging as a "pattern of racketeering activity" the sale of such coins and that the sales could be in violation of the National Stolen Property Act. *Id.* at 67.

240. Pub. L. No. 97-446, § 302, 96 Stat. 2351 (1983) (codified at 19 U.S.C. §§ 2601-13 (1988)).

241. *See* 1982 U.S.C.C.A.N. (96 Stat.) 4098, 4100.

242. *Id. See generally* Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982) (noting that stolen and mutilated art from the jungles of Central America have been traced into some of the United States' most respectable museums. The author refers to the highly publicized scandals involving major museums, including Boston's Museum of Fine Arts and its Raphael and New York's Metropolitan Museum of Art and its Calyx or Krater).

243. 19 U.S.C. § 2602 (1988).

244. *Id.* § 2606. No article of cultural property documented as appertaining to the inventory of a museum, or a religious or secular public monument in any nation, that has been stolen from such nation or from an institution, can be imported into the United States. *Id.* § 2607. Any designated archaeological or ethnological material or article of cultural property that is imported into the United States is subject to seizure and forfeiture. *Id.* § 2609.

245. *Id.* § 2601.

of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origin, development, or history of that people.[246]

D. *Stolen Artifacts*

Requests for repatriation of cultural treasures illicitly brought into the United States continually surface. Such requests, and the subsequent litigation they create, present difficult and challenging problems. Resolution of these issues centers around the question of title to such artifacts. For example, the purchase of art treasures from a seller who has defective title will present title problems for the purchaser. Because artifacts are personalty, the Commercial Codes of the various states govern the sales and purchases of such objects. Still, the question of who has title to stolen artifacts is not specifically addressed by the Uniform Commercial Code.[247] Once property has been stolen, a subsequent purchaser generally cannot obtain good title to the property. This is because, under the common law, one who purchases title from a thief, no matter how innocently, acquires no title in the property; title remains with the owner.[248]

A New York court first applied the common law rule to a good faith purchase of a valuable painting that was stolen by members of Hitler's government in World War II.[249] In *Menzel v. List*,[250] the New York court

246. *Id.*

247. The Uniform Commercial Code provides that a purchaser of "goods" acquires all the title which the transferor had or had power to transfer. U.C.C. § 2-403 (1990). This provision does not permit a mere possessor to pass title, but does permit a person with voidable title to transfer good title to a good faith purchaser for value in certain circumstances. See 2 ANDERSON, UNIFORM COMMERCIAL CODE § 2-403:2 (3d ed. 1981).

248. *See* Menzel v. List, 246 N.E.2d 742 (N.Y. 1969).

249. Menzel v. List, 267 N.Y.S.2d 804 (1966). The court ruled that the taking of the property by the Germans was not subject to the Act of State Doctrine, which would have precluded any inquiry into the validity of the acts of the Germans. *Id.* at 813-20. The court noted that the Act of State Doctrine:

> rests upon a confluence of four factors: (a) the taking must be by a foreign sovereign government; (b) the taking must be within the territorial limitations of the government; (c) the foreign government must be extant and recognized by this country at the time of the suit; and (d) the taking must not be violative of a treaty obligation.

Id. at 813. The court found that the painting was not seized "by a foreign sovereign government but rather by the 'Center for National Socialist Ideological and Educational Research,' an organ of the Nazi party." *Id.* at 815. Further, the location of the property was not within the jurisdiction of the German government, and the Third Reich was not recognized by the United States at the time of the trial. *Id.* at 815-16. The court also ruled that the taking of the paintings was "pillage" or "plunder" so that the title of the original owner was not extinguished. *Id.* at 810-11. "Pillage, or plunder, is the taking of private property not necessary for the immediate prosecution of the war effort. . . . Taking under these circumstances is illegal, and the original owner's title is not extinguished." *Id.* at 811. "Booty" is "property necessary and indis-

stated that "the principle has been basic in the law that a thief conveys no title as against the true owner."[251]

In *O'Keefe v. Snyder*,[252] the New Jersey Supreme Court recognized that a thief "could not transfer good title to others regardless of their good faith and ignorance of the theft."[253] Still, the court was concerned with protecting an innocent purchaser when an owner "sleeps on his rights."[254] It held that the statute of limitations on a suit to recover stolen paintings would begin to run when the true owner knew "or reasonably should know of his cause of action and the identity of the possessor of the chattel."[255]

Most states have a discovery rule, as delineated in *O'Keefe*, causing the statute of limitation on replevin actions to begin running from the time the true owner discovered or should have discovered the whereabouts of a stolen work of art.[256] In *Autocephalous Greek-Orthodox Church v. Goldberg*

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pensable for the conduct of war, such as food, means of transportation, and means of communication; its taking is lawful." *Id.* at 810.

250. 267 N.Y.S.2d 804 (1966); *see also* Menzel v. List, 246 N.E.2d 742 (N.Y. 1969).

251. *Menzel*, 267 N.Y.S.2d at 819. The court commented that the law "stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors." *Id.* at 820.

252. 416 A.2d 862 (N.J. 1980).

253. *Id.* at 867.

254. *Id.* at 875.

255. *Id.* at 874. The New Jersey statute of limitations, N.J. STAT. ANN. § 2A:14-1, provided that a suit for replevin of goods or chattels must be commenced within six years after the cause of action accrues. According to the *O'Keefe* Court, this discovery rule avoids the harsh result of a mechanical application of the limitations statute. *Id.* at 869. "The discovery rule provides that . . . a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action." *Id.*

The United States Supreme Court, in Wood v. Carpenter, 101 U.S. 135 (1897), articulated the discovery rule with respect to an alleged fraudulent transfer of property. *Id.* at 141. The Court acknowledged that if a fraud was concealed, the statute of limitations would not begin until it was discovered. *Id.* The Court ruled that the fraud must be one that is secret, not one that is patent or known, and that concealment by mere silence is not sufficient. *Id.* There must be some trick or contrivance intended to exclude suspicion and to prevent inquiry. *Id.* at 143. According to the Court, "[w]hen a person has sufficient information to lead him to a fact, [the person] shall be deemed conversant of [that fact]." *Id.* at 141. If the party affected by any fraudulent transaction could, with ordinary care and attention, have reasonably detected the fact, the party acted with knowledge of it. *Id.* The party seeking to avoid a limitations bar because of fraud must aver and prove that diligence was used to detect the fraud. *Id.* "The circumstances of the discovery must be fully stated and proved, and the delay which occurred must be shown to be consistent with the requisite diligence." *Id.* at 143.

256. See DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), wherein the court noted that jurisdictions other than New York "have adopted limitation rules that encourage property owners to search for their missing goods." *Id.* at 109; *see* RESTATEMENT (SECOND) OF TORTS § 229 (1966); *see also supra* note 255.

& Feldman Fine Arts, Inc.,[257] the court applied Indiana law to determine the right of possession of four Byzantine mosaics created in the early sixth century, as between the Church of Cyprus, the Republic of Cyprus, and the purchaser of the mosaics.[258] Under Indiana law, a thief also obtains no title or right to possession of stolen items.[259] Thus, a thief cannot pass any right of ownership of stolen items to subsequent purchasers. The court determined that because the mosaics were stolen from the rightful owner (the Church of Cyprus), the purchaser of the mosaics never obtained title to, or right of possession of, the mosaics.[260] The court disagreed with the purchaser that the statute of limitations had run on the owners' claim. The court ruled that the owners' cause of action did not accrue until the owners, using due diligence, knew, or were on reasonable notice of, the identity of the possessor of the mosaics.[261] The court referred to *O'Keefe*, wherein the New Jersey Supreme Court held that, apart from the discovery rule, the statute of limitations in replevin actions ordinarily runs against the owner of lost or stolen property from the time of the wrongful taking.[262] However, the court noted that the court in *O'Keefe* explained that the rule applied "'absent fraud or concealment.'"[263] The court referred to the New Jersey Supreme Court's decla-

257. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

258. *Id.* at 1394.

259. *Id.* at 1398.

260. *Id.* at 1397. The four Kanakaria mosaics, consisting of small chips of colored glass, were originally affixed to the apse of the Church of the Panagia Kanakaria in the village of Lythrankomi, Cyprus, in A.D. 530. *Id.* at 1377. During and after a Turkish invasion in 1974, the Republic of Cyprus and the Church of Cyprus were denied access to occupied northern Cyprus. *Id.* at 1379. During the invasion, there was much looting of churches; many mosaics, frescoes, and icons in the churches and national monuments were stolen or destroyed. *Id.* The mosaics were removed from the apse of the church sometime between 1976 and 1979. *Id.* Neither the Church of Cyprus nor the Republic of Cyprus had ever authorized the removal or sale of the Kanakaria mosaics. *Id.* Immediately upon learning that the mosaics were missing, the Republic of Cyprus notified UNESCO, informing it of the significance of the lost art and seeking its assistance. *Id.* at 1380. The Republic of Cyprus notified the International Council of Museums, the organization that coordinates and develops measures and security for museums throughout the world. *Id.* It also notified the International Council of Museums and Sites, an organization that works with restorers and specialists in the preservation of ancient monuments. *Id.* Finally, the Republic of Cyprus sent the Europa Nostra a resolution which it believed would give wide publicity to the problem. *Id.* Cyprus's ambassador and permanent delegate to the United Nations assisted in contacting organizations and the Republic of Cyprus also contacted both European and American museums about the missing mosaics. *Id.* at 1380. The purchaser, who bought the mosaics in Switzerland for $1 million, attempted to sell them by contacting an art dealer and the Getty Museum in California. *Id.* at 1383-84. An official with the Getty Museum contacted the Republic of Cyprus. *Id.* at 1384.

261. *Id.* at 1386.

262. See *supra* notes 252-55 for a discussion of O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980).

263. *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1391 (quoting O'Keefe v. Snyder, 416 A.2d 862, 872 (N.J. 1980)).

ration in *O'Keefe* that where a chattel is fraudulently concealed, the general rule is that the statute is tolled. Thus, the court ruled that the statute of limitations was not a bar to the action and ordered the mosaics returned to the Church of Cyprus and the Republic of Cyprus.[264]

In New York, limitation on the time during which suit may be brought to recover stolen property does not begin until the rightful owner asserts a claim to the property and the possessor refuses to return the property.[265] In *Menzel v. List*,[266] the purchaser of a Chagall painting was forced to return the painting to its rightful owner.[267] In *Mucha v. King*,[268] the Seventh Circuit Court of Appeals ruled that the statute of limitations did not bar a suit by the original owner to recover a painting

264. *Id.* at 1391-92. The court also decided that the purchaser of the mosaics was not a bona fide purchaser. *Id.* at 1404. It noted that the purchaser had failed to take reasonable steps to resolve doubts concerning whether the seller had the capacity to sell the mosaics. *Id.*

In Republic of Turkey v. OKS Partners, 797 F. Supp. 64 (D. Mass. 1992), the court ruled that a claim by the Republic of Turkey to nearly two thousand ancient Greek and Lycian silver coins allegedly unearthed in Turkey in 1984 and imported illegally into the United States, was not barred by the statute of limitations. *Id.* The court found that, while the statute of limitations for replevin actions in Massachusetts was three years, such claims were subject to the "discovery rule" under which a cause of action based on "an inherently unknowable wrong" only accrues "'when the injured person knows, or in the exercise of reasonable diligence should know of the facts giving rise to the cause of action.'" *Id.* at 69 (quoting Dinsky v. Framingham, 438 N.E.2d 51, 52 (Mass. 1982)). The court held that Massachusetts law was in accord with the Seventh's Circuit's analysis in *Autocephalous Greek-Orthodox Church*. *Id.*

265. *See* Hoelzer v. City of Stamford, Conn., 933 F.2d 1131 (2d Cir. 1991); Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991). In Solomon R. Guggenheim Found. v. Lubell, 153 A.2d 143 (N.Y. App. Div. 1990), the New York Appellate Division recognized that, under New York law, the statute of limitations did not begin to run as against a good faith purchaser until demand for a return of the property was made and refused. *Id.* at 619. The court agreed that absent a demand for the property, there is no cause of action against a bona fide purchaser and absent a cause of action, the statute of limitation does not begin to run. *Id.* at 620. The court pointed out that the requirement that a demand be made upon a good faith purchaser is a substantive element of the cause of action, not a procedural condition precedent to suit. *Id.*

266. 246 N.E.2d 742 (N.Y. 1969).

267. *Id.* at 743. The painting was purchased for $4,000 from a New York art gallery; the gallery had purchased the painting from a Parisian art gallery. However, the painting had been purchased by the Menzels in 1932 at an auction in Belgium. *Id.* When the Germans invaded Belgium, the Menzels fled, leaving their possessions, including the Chagall painting, in their apartment. *Id.* When they returned six years later, the painting was gone; it had been removed by the German authorities and a receipt for it had been left. *Id.* The Menzels later learned that the painting was in List's possession from an art book which carried a reproduction of the painting and a statement that it was in List's possession. *Id.* The Menzels sued List for a return of the painting, and the court ordered its return to the Menzels. *Id.*

268. 792 F.2d 602 (7th Cir. 1986).

from a bona fide purchaser and awarded the painting to the original owner.[269]

In *DeWeerth v. Baldinger*,[270] the Second Circuit Court of Appeals, in applying New York law, ruled that when demand and refusal are necessary to start a limitations period, the demand may not be unreasonably delayed.[271] The court decided that New York law governing limitations

269. Jiri Mucha, son of Alphonse Mucha, brought suit to recover a painting, called the "Quo Vadis," that had been created by his father in 1904 and was believed to be lost. *Id.* at 603. King, who had possession of the painting, contended that the statute of limitations had run on the cause of action. *Id.* at 604. Alphonse Mucha had consigned the "Quo Vadis," along with 20 other paintings, to Newcomb-Macklin Gallery in 1920. *Id.* at 606. Mucha later returned to his home country Czechoslovakia. *Id.* In 1939, Czechoslovakia passed under Nazi yoke and Mucha was arrested and later died. *Id.* at 609-10. His son was unaware of the consignment of the paintings until he was commissioned in the 1960s to write a book about his father. *Id.* at 611. The Newcomb-Macklin Gallery was closed in 1979; an individual who purchased some articles at its final sale acquired some rolled-up paintings in the basement, without paying for them. *Id.* at 612. One of the paintings was the "Quo Vadis." The individual later sold the "Quo Vadis" for $150 to a Chicago art dealer, who in turn sold it to King for $35,000. *Id.* The court noted that the individual did not obtain Mucha's title to the painting and, thus, title could not be conveyed to either the Chicago dealer or King. *Id.*

The Seventh Circuit acknowledged that under the Uniform Commercial Code, § 2-403(2), entrusting the possession of goods to a merchant who deals in those goods gives the merchant power to transfer title to a buyer in the ordinary course of business. *Id.* (citing U.C.C. § 2-403(2)). The court in *Mucha* pointed out that a purchaser of the painting from the Newcomb-Macklin Gallery might have obtained good title to the painting. *Id.* On the other hand, the individual who picked up the painting from Newcomb-Macklin basement was not a buyer in the ordinary course of business from a bailee. *Id.*

In Porter v. Wertz, 421 N.E.2d 500 (N.Y. 1981), a Utrillo painting, entrusted by Porter, its owner, to Von Maker, an art merchant, was sold by Wertz, an acquaintance of Von Maker, to Feigen Gallery. Upon suit by the owner to regain possession of the painting, the court held that the purchaser had not acquired good title. *Id.* at 501. The court noted that section 2-403 of the Uniform Commercial Code was not applicable because the seller of the painting was not the merchant to whom the owner had entrusted the painting. *Id.* at 502.

270. 836 F.2d 103 (2d Cir. 1987), *cert denied*, 486 U.S. 1056 (1988).

271. *Id.* at 108. In *DeWeerth*, a West German citizen, who owned a Monet from 1922 until 1943 when the painting disappeared from Germany during World War II, brought suit against an American citizen who purchased the painting in New York in 1957. *Id.* at 104-05. The purchaser bought the painting in good faith and without knowledge of any adverse claim. *Id.* at 105. The Second Circuit noted that the New York statute of limitations governing actions for recovery of property required that suit be brought within three years of the time the action accrued. *Id.* at 106. Where the owner proceeds against one who innocently purchased the property in good faith, the limitations period begins to run only when the owner demands return of the property and the possessor refuses. *Id.* Although suit was brought within three years after the date the original owner made demand for return of the Monet and the purchaser refused to return it, the court ruled the statute of limitations barred the suit. *Id.* at 112. The court was concerned that a plaintiff could delay the action simply by postponing demand. *Id.* at 109. Thus, the court ruled that when demand and

of actions also weighed in favor of a duty to attempt to locate stolen property.[272] The court explained that a rule requiring reasonable diligence in attempting to locate stolen property was especially appropriate with respect to stolen art. Because the Second Circuit decided that valuable works of art tend to be easily remembered by those who have seen them, it concluded that the owner of stolen art has a better opportunity than most owners of stolen property in tracking down stolen works.[273] The court recognized that "[i]n virtually every state except New York, an action for conversion accrues when a good-faith purchaser acquires stolen property; demand and refusal are unnecessary."[274]

The New York courts disagreed with the Second Circuit's decision in *DeWeerth* concerning its interpretation of New York law. In *Solomon R. Guggenheim v. Lubell*,[275] a museum brought an action in replevin to recover a Chagall gouache that was stolen from the museum in the late 1960s.[276] The museum learned of the purchaser's possession of the painting in 1985; it made a demand in 1986 that the purchaser return the painting.[277] The possessor contended that the three year statute of limitations was a bar to the suit.[278] The New York Court of Appeals decided that the imposition of a reasonable diligence requirement on the museum would be an unwise extension of the case law.[279] The court declared that the Second Circuit, in *DeWeerth*, was incorrect in imposing a duty of reasonable diligence on owners of stolen art for purposes of the statute of limitations.[280]

The New York court, in *Guggenheim*, decided that the demand and refusal rule affords the most protection to true owners of stolen property. It stated that the rule is a "straight forward protection of true owners by

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refusal are necessary to start a limitations period, as in New York, the demand cannot be unreasonably delayed. *Id.* at 110.

272. *Id.*

273. *Id.* at 109.

274. *Id.* The *DeWeerth* Court referred to the *O'Keefe* decision, wherein the New Jersey Supreme Court imposed a duty of reasonable investigation. *See supra* text accompanying notes 252-55. The court in *DeWeerth* concluded that under New York law, an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property. *Id.* at 110. It decided that the plaintiff's efforts were minimal, noting that DeWeerth failed to take advantage of several mechanisms specifically created to locate art lost during World War II. *Id.* She also did not publicize her loss of the Monet in several available listings designed to keep museums, galleries, and collectors vigilant for stolen art. *Id.* at 111. Further, she did not conduct any search for 24 years, from 1957 until 1981. *Id.* at 112. The court stated that her failure to consult the Catalogue Raisonne was "particularly inexcusable." *Id.*

275. 569 N.E.2d 426 (N.Y. 1991).

276. *Id.* at 427.

277. *Id.* at 428.

278. *Id.*

279. *Id.* at 429-30.

280. *Id.*

creating a duty of reasonable diligence."[281] The New York court referred to the discovery rule in other states in which the statute of limitations on replevin actions begins to run from the time the true owner discovers or should have discovered the whereabouts of a stolen work of art.[282] It explained that New York rejected the discovery rule because New York courts had decided that the rule did not provide a reasonable opportunity for individuals of foreign governments to receive notice of a possessor's acquisition of artwork and sufficient time to take action to recover a work.[283] The court was concerned that New York would become a "haven for cultural property stolen abroad" because such works would be immune from recovery under limited time periods.[284] The court decided it was inappropriate to shift the burden onto the wronged owner. It concluded that "the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser."[285]

The Second Circuit later recognized that it erroneously applied New York law in *DeWeerth.* In *Hoelzer v. City of Stamford, Connecticut,*[286] the Second Circuit acknowledged that New York law does not have a requirement that a true owner of stolen property exercise due diligence in making a demand for the return of the stolen property.[287] In *Republic of Turkey v. Metropolitan Museum of Art,*[288] a district court held that the "un-

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 431. The *Guggenheim* Court did recognize that an owner's failure to exercise reasonable diligence would be considered in the context of a laches defense. *Id.*

In investigating the provenance of artwork, a potential purchaser should contact certain organizations such as the Federal Bureau of Investigation, which maintains a central archive of stolen art in the United States, the International Criminal Police Organization, which is a group of police agencies that computerize information on stolen art, the International Foundation for Art Research, which monitors trafficking in stolen art, and the Art Dealers' Association of America.

286. 933 F.2d 1131 (2d Cir. 1991).

287. *Id.* at 1138. In DeWeerth v. Baldinger, 804 F. Supp. 539 (S.D.N.Y. 1992), DeWeerth moved for relief from judgment after the Second Circuit's opinion in *Hoelzer. Id.* at 548. The district court granted DeWeerth's petition for relief. *Id.* After the decision of the New York Court of Appeals in *Solomon R. Guggenheim Found., supra* note 265, DeWeerth moved before the Second Circuit for a recall of its earlier mandate, "arguing that since the New York Court of Appeals had held the *DeWeerth* decision to have been incorrect, the Second Circuit was required to withdraw its mandate, vacate its judgment, and affirm the judgment" of the district court. The district court had rendered judgment for DeWeerth. *See* DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D.N.Y.), *rev'd,* 836 F.2d 103 (2d Cir. 1987), *cert. denied,* 486 U.S. 1056 (1987). The Second Circuit denied the motion without opinion. *See DeWeerth,* 804 F. Supp. at 544.

288. 762 F. Supp. 44 (S.D.N.Y. 1990).

reasonable delay" requirement set out in *DeWeerth* applies only to the equitable defense of laches and not to a statute of limitations defense.[289]

E. *Arts and Artifacts Indemnity Act of 1975*

The sharing of art through loans or travelling exhibits is a means of increasing knowledge and goodwill among the various countries involved as it provides the means to make international cultural treasures available to the world populace. The international loan of artistic treasures has been hindered in the past by the cost of insuring such exhibitions. To solve the problem of funds to acquire international exhibitions on loan, Congress passed the Arts and Artifacts Indemnity Act in 1975.[290] This act provides indemnification by the federal government for museum exhibitions of works of art, including tapestries, paintings, sculptures, folk art, graphics, and craft acts; manuscripts, rare documents and books; photographs, motion pictures, audio and video tapes; and other objects or artifacts that are of educational, cultural, or scientific value and that are certified by the Secretary of State as being in the national interest.[291]

An indemnity agreement under the act covers all eligible items while they are on exhibition in the United States when the display is part of an exchange of exhibitions.[292] Any person, nonprofit agency, institution, or government can apply for an indemnity agreement.[293] Since its enactment in 1975, the Arts and Artifacts Indemnity program has provided indemnity coverage for several hundred exhibits.[294] The program has

289. *Id.* at 46-47. The Republic of Turkey sought recovery of artifacts in possession of the Metropolitan Museum of Art. *Id.* at 45. The Republic of Turkey contended that "the artifacts were excavated from burial grounds in the Ushak region of Turkey and exported to the United States in contravention of Turkish law." *Id.* It also claimed that all artifacts found in Turkey belong to the Republic of Turkey. *Id.* The court held that the statute of limitations had not run against the Republic of Turkey. *Id.* at 46-47.

290. Pub. L. No. 94-158, § 2, 89 Stat. 844 (1975) (codified at 20 U.S.C. §§ 971-77 (1988 & Supp. IV 1992)).

291. 20 U.S.C. § 972(a) (1988 & Supp. IV 1992).

292. *Id.* § 972(b)(1). The Arts and Indemnity Act is administered by the Federal Council on the Arts and Humanities, and any applications for indemnity are submitted to this council. *Id.* § 971. Indemnification is limited to $300 million for a single exhibition. *Id.* § 974(c). No more than $3 billion of indemnity can be outstanding at any one time. *Id.* § 974 (b).

293. *Id.* § 973(a). The application must describe each item to be covered by the agreement, including an estimated value of the item, and set forth policies, procedures, techniques, and methods with respect to the preparation for, and conduct of, exhibition of the items. *Id.* If the Council approves, an agreement is made between the Council and the applicant pledging the full faith and credit of the United States to pay any amount for which the Council becomes liable under the agreement. *Id.* § 973(b)-(c).

294. *See* Arts, Humanities and Museums Amendments of 1985, Pub. L. No. 99-194, 1985 U.S.C.C.A.N. (1332 Stat.) 1055, 1074-75. The number of exhibits covered in 1985 was approximately 200. *Id.* The program is operated by the National Endowment for the Arts.

fostered international cooperation and goodwill through the sharing of cultural treasures.

Each country must strive to protect the cultural heritage of other nations. Most countries have realized that a sharing of each state's cultural treasures is feasible and represents a vital alternative to the tacit approval given in the past to powerful nations looting and pilfering the artifacts of smaller, weaker countries. The Arts and Artifacts Indemnity Act provides the means to accomplish the objective of permitting United States citizens to share in the cultural treasures of the world.

VII. Conclusion

Although the United States' concern about the protection and preservation of its cultural property was long overdue, the efforts of the federal government and the various states in recent years have demonstrated a shared recognition that the government is a trustee of the public interest and that, as such, it must give full value and support to the great branches of cultural activity to provide a model of excellence for its people. Legislation passed by both the states and the federal government, even though frequently limited in scope, has served as an affirmative directive for the initiation of programs to conserve artistic, archaeological, and anthropological treasures. Congress has recognized that as a democracy demands "wisdom and vision in its citizens,"[295] it acquires these values when its people "achieve a better understanding of the past, a better analysis of the present, and a better view of the future."[296] An understanding and appreciation of a nation's cultural origins and heritage and a study of a country's cultural resources are mandatory elements of the process because, in reality, the culturally impoverished nation is sterile.[297] Legislation to provide protection and preservation of cultural resources is imperative for the United States to realize its goal of fostering conditions under which modern society and prehistoric and historic resources "can exist in productive harmony and fulfill the social, economic and other requirements of past and future generations."[298]

A principal objective of legislation enacted to protect our cultural heritage often is to provide a stimulus and leadership for local and private sector activity. The private sector's role in assuring that the nations' cultural treasures are preserved and protected includes an awareness and understanding of the existing legislation and a perception of its effectiveness in conveying a "spirit of stewardship for the inspiration and benefit of present and future generations."[299] A compilation of the legislation and the court decisions interpreting such legislation is a starting point in

295. 20 U.S.C. § 951(4) (1988); *see supra* notes 180-85 and accompanying text.
296. 20 U.S.C § 952(3).
297. *See* Merryman, *supra* note 213, at 1913.
298. *See* 16 U.S.C. § 470-1(1).
299. *Id.* § 470-1(3).

the process. This paper summarizes the laws protecting our cultural heritage hopefully to provide for some that starting point.