RECENT DEVELOPMENTS

United States of America v. Frederick Schultz: The National Stolen Property Act Revives the Curse of the Pharaohs

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I. OVERVIEW

Frederick Schultz, a New York antiquities dealer, arranged with Jonathan Tokeley-Parry to bring Egyptian antiquities from a private collection assembled in the 1920s by Thomas Alcock, an English relative of Tokeley-Parry, to the United States for resale.[1] Schultz sold one item from the collection, a sculpture of the head of Pharaoh Amenhotep III, for $1.2 million to a private collector.[2] Unfortunately, the Thomas Alcock Collection never actually existed before 1991, the year in which Schultz and Tokeley-Parry created it to help them evade the laws of the United States, the United Kingdom, and the Arab Republic of Egypt.[3] In reality, Tokeley-Parry had smuggled the treasures attributed to this fictitious

1. *See* United States v. Schultz, 333 F.3d 393, 395 (2d Cir. 2003), *cert. denied*, 72 U.S.L.W. 3292 (2004).
2. *Id.* at 396.
3. *Id.*

Egyptologist directly out of Egypt.[4] Assisted by Ali Farag in Egypt, Tokeley-Parry would acquire an object and have it disguised as a cheap tourist souvenir by covering it in plaster, paint, and/or plastic to get it out of Egypt and into England.[5] After its arrival in England, he would restore it using techniques common in the 1920s and affix an authentic-looking "Thomas Alcock Collection" label.[6] Schultz and Tokeley-Parry devised this plan specifically to create a marketable provenance for the objects that they obtained.[7] The arrests of Tokeley-Parry and Farag in June 1994, two years after Schultz sold the statue of Amenhotep III, by authorities from their respective countries on charges of dealing in stolen antiquities, complicated the arrangement, yet did not deter Schultz.[8] Schultz sent money in December 1994 to purchase three stelae through Tokeley-Parry, who was still in the custody of the Crown.[9] Tokeley-Parry then tried to arrange for the stelae's shipment to Switzerland, where he would pick them up later in 1996.[10] Bad luck had arrived to stay, however, and this last effort proved wholly unsuccessful.[11] On July 16, 2001, federal authorities indicted Schultz under Title 18 of the United States Code, section 371, for one count of conspiring to receive stolen antiquities through interstate and foreign commerce in violation of the National Stolen Property Act (NSPA).[12]

Schultz moved to dismiss the indictment claiming that the items he obtained from Tokeley-Parry could not be considered "stolen" as required by the NSPA.[13] Schultz asserted that because the items were allegedly either newly discovered or unlisted in any catalogue, by definition they could not be "stolen" because they had no owner(s).[14]

4. *Id.* Some of the alleged antiquities that they brought into New York from the fake collection were actually fake antiquities. *Id.* at 396-97.

5. *Id.*

6. *Id.* at 396.

7. *Id.*

8. *See id.* at 397-98. After restoring a sculpture called "The Offeror" that he smuggled out of Egypt in 1992, Tokeley-Parry discovered that it was a fake. He said nothing about either the restoration or inauthenticity and sent it to Schultz anyway, who independently learned that it was a fake and returned it. Schultz later attempted to claim "The Offeror" from the British authorities, who had seized it following the arrest of Tokeley-Parry. Although Schultz provided them with a forged invoice in hopes of convincing them that he had purchased "The Offeror" from a New York dealer and that he had sent it to Tokeley-Parry only for restoration, his claim failed. *Id.* at 397.

9. *Id.* at 398 (defining "stelae" as inscribed limestone slabs, found in this instance by builders in Egypt and offered for sale).

10. *Id.*

11. *Id.*

12. *Id.* at 395.

13. *Id.* at 395-96.

14. *Id.* at 396.

The United States District Court for the Southern District of New York denied his motion to dismiss after conducting an evidentiary hearing.[15] It found that the objects belonged to the Egyptian government as declared by Law 117, an Egyptian patrimony law that established the ownership of the government over all antiquities found in Egypt after 1983.[16] A jury convicted Schultz in early 2002.[17] He immediately appealed the conviction on the grounds that the use of the term "stolen" under the NSPA does not apply to an object taken only in violation of a national patrimony law of a foreign country rather than in the common-law sense of the word.[18] He also contended that such laws properly fall into the category of export law rather than property law, and U.S. policy denies the enforcement of another country's export law.[19] Finally, Schultz argued that even if Egypt's patrimony law does establish government ownership of all antiquities found in Egypt after 1983, the Cultural Property Implementation Act (CPIA) should have preempted his prosecution under the NSPA.[20] The United States Court of Appeals for the Second Circuit *held* that the government of Egypt was the owner of the antiquities that Schultz had conspired to steal, affirming his conviction under the NSPA by the trial court. *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *cert. denied*, 72 U.S.L.W. 3292 (2004).

II. BACKGROUND

A. National Stolen Property Act[21]

The government designed the NSPA to deter the original theft and to punish those who traffic in stolen articles.[22] Its creation closed a loophole through which a person could avoid prosecution under state law simply by moving across state or national borders.[23] The NSPA criminalizes the receipt, transport, or sale of goods valued at $5000 or more that have been imported into the country, "knowing the same to

15. *Id.*
16. *Id.* at 401.
17. *Id.* at 395-96.
18. *Id.* at 398-99.
19. *Id.* at 407.
20. *See id.* at 408.
21. National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (2003).
22. United States v. Moore, 571 F.2d 154, 156 (3d Cir. 1978); *see also* Jodi Patt, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 NW. U. L. REV. 1207, 1211 (2002) (citing Peter J.G. Toren, *The Prosecution of Trade Secrets Under Federal Law*, 22 PEPP. L. REV. 59, 67-68 (1994)).
23. McElroy v. United States, 455 U.S. 642, 654 (1982) (citing United States v. Sheridan, 329 U.S. 379, 384 (1946)); *see also* Patt, *supra* note 22, at 1211.

have been stolen, unlawfully converted, or taken."[24] The key elements that the State must prove beyond a reasonable doubt under the NSPA are (1) value of $5000 or more,[25] (2) interstate or foreign transport,[26] (3) "stolen,"[27] and (4) knowledge that the object of transport had been stolen before it entered commerce.[28] Although the owner of the stolen property is neither compensated nor guaranteed restitution, the United States prosecutes the alleged violation rather than the owner of the property, and the United States bears the cost of the prosecution.[29]

B. *Application of the National Stolen Property Act to Antiquities Claimed by a State*

Once the authorities determine an imported antiquity to be "stolen," it may be subject to forfeiture to U.S. Customs because it has entered the country in violation of the NSPA.[30] If the United States secures a

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24. 18 U.S.C. § 2315 (2003). The full text of the statute states:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value or $500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken.
>
> . . . .
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

Id.

25. *See* United States v. Neary, 552 F.2d 1184, 1189 (7th Cir. 1977), *cert. denied*, 343 U.S. 864 (1978) (describing the rationale for a $5000 minimum, which was "not really to absolve those who deal culpably with . . . lesser value, but to impose a limit which would avoid overtaxing the federal justice system" (citing United States v. Gardner, 516 F.2d 334, 349 (7th Cir. 1979))).

26. *See McElroy*, 455 U.S. at 649-50 (stating that "[t]he origin of the 'interstate commerce' element of § 2314 was the National Motor Vehicle Theft Act (Dyer Act)" (internal citations omitted)).

27. *See* United States v. Greco, 298 F.2d 247, 251 (2d Cir. 1962) (upholding a conviction for receiving and transporting bonds that had been stolen in a foreign country); *see also* United States v. Turley, 352 U.S. 407, 411, 412 (1957) ("'[S]tolen' . . . has no accepted common-law meaning. . . . Nor in law is 'steal' or 'stolen' a word of art." (quoting Boone v. United States, 235 F.2d 939, 940 (4th Cir. 1956))).

28. *See* United States v. Rosa, 17 F.3d 1531 (2d Cir. 1994) (requiring the government to prove the *mens rea* as to the stolen status of the goods).

29. *See* Patt, *supra* note 22, at 1212 (citing Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 472 n.33 (1987)).

30. *See* Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 448-49 n.165 (2003):

> 18 U.S.C. § 981(a)(1)(C) (civil forfeiture) and 18 U.S.C. § 982(a)(1) (criminal forfeiture) allow the government to seize and forfeit stolen property, but civil forfeiture actions are subject to an innocent owner defense. The current possessor of the stolen property bears the burden of proving both elements of this defense.

conviction for a violation of the NSPA, then the forfeiture proceeding disposes of the object.[31] Generally, the United States negotiates the return of an artifact to the country that claims ownership.[32] Even if the United States fails to prove that an artifact is "stolen," it is possible for the country of origin to obtain the forfeited artifact under the NSPA by proving that it was "unlawfully converted" by virtue of its improper importation into the United States.[33]

1. *United States v. Hollinshead*[34]

United States v. Hollinshead marked the first time that a U.S. court recognized the ownership by a foreign nation, as proclaimed by a patrimony law, over an artifact taken from its soil and transported into the United States.[35] The United States Court of Appeals for the Ninth Circuit ruled on an appeal from Clive Hollinshead from a conviction of conspiracy to violate the NSPA by taking pieces of a Mayan stele out from the jungle of Guatemala and clandestinely shipping the pieces to the United States, where the convicted parties attempted to sell them.[36] Clive Hollinshead, a pre-Columbian artifacts dealer, contended that the judge improperly instructed the jury that convicted him and his co-conspirator to presume that he knew that the Guatemalan law characterized the Mayan artifact as stolen property.[37] The court held that it would be "astonishing" for the jury to find that Hollinshead did not know that the Mayan stele, for which he bribed Guatemalan officials, was not stolen, and the trial court's jury instruction based upon the definition of "stolen" given by 18 U.S.C. § 2314 was not prejudicial to Hollinshead.[38] And while the court found that Hollinshead's knowledge of Guatemalan law was relevant in determining whether he possessed the requisite knowledge that the objects were "stolen" as required for conviction under the NSPA, the judge's failure to clarify the issue did not amount to prejudice.[39]

Id. (quoting 18 U.S.C. § 983(d)).

31. Moore, *supra* note 29, at 472 n.33.

32. *Id.*

33. *See* 18 U.S.C. § 2315.

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

35. Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 168 (2003) (citing *Hollinshead*, 495 F.2d at 1154).

36. *Hollinshead*, 495 F.2d at 1155.

37. *See id.*

38. *Id.* at 1155-56.

39. *See id.* at 1156.

The serendipitous facts of the case easily distinguish the precedent set by *Hollinshead* whereby Hollinshead and his co-conspirators stole a clearly documented stele before its removal by an archaeologist whom a prospective purchaser eventually showed a photograph of the same stele.[40] Even more remarkable in light of later cases, the court did not dispute Guatemala's claim of ownership.[41]

2. The *McClain* Doctrine[42]

In *United States v. McClain* (*McClain I*), the United States Court of Appeals for the Fifth Circuit allowed the prosecution of American citizens under the NSPA with the definition for "stolen" supplied by a national ownership law of Mexico.[43] The court qualified its ruling on appeal in *McClain II*, however, by reversing the substantive conviction under the NSPA in *McClain I* because the trial judge allowed the jury to determine when the Mexican patrimony law became effective.[44] Nevertheless, the court upheld the convictions of conspiracy to violate the NSPA despite the error in the jury instruction.[45] The strength of the evidence demonstrated the appellant-defendants knew that their conduct was illegal and that they had plans to continue illegally transporting pre-Columbian antiquities in violation of a law that clearly existed at the time of their arrest.[46]

McClain I and *II* implicated the appellant-defendants in a conduit operation similar to that in *Hollinshead*, but on a larger scale.[47] Like *Hollinshead*, the defendants knew their endeavors were illegal, and they took precautions to avoid future prosecution.[48] They planned to pass the objects into Europe where they would obtain bills of sale from European art dealers in order to create a more attractive provenance for potential buyers of the pieces.[49] In the end, bad luck fell on the group when one of

40. Moore, *supra* note 29, at 475.

41. Jowers, *supra* note 35, at 168.

42. United States v. McClain, 545 F.2d 988 (5th Cir. 1977) (*McClain I*); *rehearing denied by* 593 F.2d 658 (5th Cir. 1979) (*McClain II*).

43. *See McClain I*, 545 F.2d at 1000-01.

44. *McClain II*, 593 F.2d at 671.

45. *Id.*

46. *Id.*

47. *Id.* at 660. With the exception of one defendant who the court found to be mentally incompetent, both cases featured the same parties. *Id.* at 660 n.2.

48. *See id.* at 660-61.

49. *Id.* at 661; *see* Gerstenblith, *supra* note 30, at 446 n.156 ("The term 'provenience' is . . . the history of an archaeological object back to its archaeological find spot . . . . 'Provenance' has been used to indicate the modern history of the ownership of an object."); *see also* Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 199 n.7 (2001).

the defendants contacted an undercover FBI agent and, while attempting to arrange a sale of some of the objects, relayed enough information for his own arrest as well as the arrests of his fellow smugglers.[50]

In the "*McClain* Doctrine," as it has become known, the court established three prerequisites for the enforcement of a foreign nation's patrimony laws in a U.S. court under the NSPA.[51] First, the law must clearly notify Americans what conduct it permits.[52] Second, a law that vests ownership in the foreign state retroactively will not be applied to antiquities that people discovered before the promulgation of the law.[53] Third, the antiquities claimed must have originated from within the nation's current borders.[54] The *McClain II* court thus distinguished between ownership laws that meet the NSPA requirements and the export laws of a foreign sovereign, which the *McClain I* court emphatically declared unenforceable in U.S. courts.[55]

3. *United States v. Pre-Columbian Artifacts*[56]

Nearly a decade after *Hollinshead*, the object at the heart of that controversy returned to Guatemala following a forfeiture proceeding.[57] Because of the procedure dictated by the interpleader-defendants' motion to dismiss, the court accepted Guatemala's assertion of ownership as true on the pleadings.[58] The court granted summary judgment to the United States and returned the stele to Guatemala according to an exchange agreement between the Guatemalan government and the Los Angeles County Museum.[59] The interpleader-defendants in *Pre-Columbian Artifacts* tried to gain possession of the stele by pointing out that the

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50. *See McClain II*, 593 F.2d at 661-62. Clive Hollinshead, who was on probation at the time, supplied some of the artifacts that the defendants tried to sell. *Id.* at 659 n.1.

51. *See* Patty Gerstenblith, United States v. Schultz, *in* CULTURE WITHOUT CONTEXT: THE NEWSLETTER OF THE ILLICIT ANTIQUITIES RESEARCH GUIDE (Spring 2002), *available at* http://www.mcdonald.cam.ac.uk/IARC/cwoc/issue10/USvSchultz.htm.

52. *Id.*; *see also McClain II*, 593 F.2d at 671 (construing the status of the Mexican patrimony law before the 1972 enactment, the court stated that the NSPA "cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature").

53. Gerstenblith, *supra* note 51; *McClain II*, 593 F.2d at 670 (refusing to recognize Mexico's claim of ownership of all artifacts found since 1897).

54. Gerstenblith, *supra* note 51; United States v. McClain, 545 F.2d 988, 1003 (5th Cir. 1997) (*McClain I*).

55. *See McClain I*, 545 F.2d at 1002 ("[T]he state's power to regulate is not ownership. Nor does the fact that a state has regulated an object in and of itself constitute ownership.").

56. United States v. Pre-Columbian Artifacts, 845 F. Supp. 544 (N.D. Ill. 1993).

57. *See id.*

58. *Id.* at 546; *see* Moore, *supra* note 29, at 474-75 n.43.

59. Moore, *supra* note 29, at 474-75 n.43.

Guatemalan law was an export law rather than an ownership law.[60] The Guatemalan law provided that pre-Columbian artifacts would become the property of the Republic of Guatemala upon illegal export from the country.[61] Thus, as soon as the stele exited Guatemala, the receipt, possession, or transportation of the "stolen" item in the United States became theoretically actionable under the NSPA.[62]

4. *United States v. An Antique Platter of Gold*[63]

The difficulties in determining which foreign patrimony laws were export laws and which could meet the criteria for acknowledged ownership were anticipated in the *McClain* cases,[64] then seized upon by the defendants in *Pre-Columbian Artifacts*,[65] and then dodged by the United States Court of Appeals for the Second Circuit in *United States v. An Antique Platter of Gold*.[66] Sitting in the center of the art market in the United States, the court affirmed the summary judgment of the trial court that denied the claimant, Michael Steinhardt, possession of a large, gold, fourth century B.C. Sicilian phiale that the court deemed the claimant imported illegally.[67] The court declined to rule on Steinhardt's assertion that the patrimony laws of Italy could not render property imported into the United States "stolen."[68] Instead, the court relied on the indisputable evidence that the statements on the customs forms with which the phiale entered the United States contained materially false statements.[69] According to the facts shown by the court, Steinhardt sought to obtain the phiale through an agent, Haber, who traveled to the Swiss-Italian border to take possession of the platter after Steinhardt agreed to pay approximately $1.2 million for it.[70] Knowing that it came from Italy and had only passed through Switzerland in transit, Haber still allowed his customs agent to denote Switzerland as the country of origin on the customs form.[71] This sleight of hand was sufficient to cause the customs label to fail the "natural tendency test" employed by the court to determine whether the false claim of Swiss origin would naturally

60. *Pre-Columbian Artifacts*, 845 F. Supp. at 546-47.
61. *Id.* at 547.
62. *Id.* (denying the defendants' motion to dismiss).
63. United States v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999).
64. *See* United States v. McClain, 593 F.2d 658, 670-71 (5th Cir. 1979) (*McClain II*).
65. *See Pre-Columbian Artifacts*, 845 F. Supp. at 546-47.
66. *An Antique Platter of Gold*, 184 F.3d at 134.
67. *Id.* at 132-33 (describing a "phiale" as a large bowl).
68. *See id.* at 133.
69. *Id.* at 134-35.
70. *Id.* at 133.
71. *Id.*

influence customs officials to assume that the package was not subject to any nation's patrimony laws.[72] Although Italy received the antiquity as a result of the later forfeiture proceedings, the doctrinal division of *McClain I* and *II* in the Second Circuit was only indirectly implicated.[73]

C. *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*[74]

Aware of the escalating destruction of cultural property caused by an ever-growing market, the United States ratified the United Nations Education, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter UNESCO Convention).[75] The UNESCO Convention was partially the result of the United States' concern about the methods used by individuals to illegally acquire objects from money-poor, yet culturally wealthy, source nations for sale in wealthy market nations, generally at very large profits.[76]

The UNESCO Convention was not self-executing, and in 1983 the United States passed the Cultural Property Implementation Act (CPIA) to implement the convention in part.[77] The purpose of the UNESCO Convention is to encourage member countries to enact national and multilateral measures to limit the illicit trade in antiquities, and it is the primary means for the protection of artistic and cultural objects in times other than war.[78] To that end, the CPIA utilizes two means to protect antiquities from illegal passage into other nations.[79] First, a country can make a bilateral agreement with the United States under Article 9 of the UNESCO Convention to limit the importation of designated archaeological or ethnological material into the United States provided that there is a demonstrated risk of pillage or destruction should the United States and other markets remain open to the type of objects

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72. *See id.* at 136-37.
73. *See id.* at 134.
74. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 U.N.T.S. 231 (1970) [hereinafter UNESCO Convention].
75. Jowers, *supra* note 35, at 155 n.92.
76. Predita Rostomian, Note, *Looted Art in the U.S. Market*, 55 RUTGERS L. REV. 271, 279-80 (2002).
77. Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (2000); *see also* Jowers, *supra* note 35, at 155.
78. *See* Rostomian, *supra* note 76, at 279-80.
79. Jowers, *supra* note 35, at 155.

identified.[80] The source nation must also demonstrate that it has implemented complementary controls to protect its patrimony.[81] Alternatively, the President, upon request from a State Party, may implement emergency import restrictions without a bilateral agreement in the event of an "emergency condition."[82] Both options have a five-year duration, and the State Party must submit a request for a renewal by Presidential extension of the agreement before the United States grants a renewal.[83] The United States has returned stolen property to Greece, Italy, Guatemala, and Turkey under the agreements established by the authority of the CPIA.[84] Since *McClain*, defendants prosecuted under the NSPA have protested that the passage of the CPIA preempted the NSPA, and there remains a passionate disagreement among commentators and members of the art and antiquities community on the accuracy of this assertion.[85] Following the CPIA's implementation in 1986, it has served to protect narrow categories of cultural property, and it is further limited to apply only to action at the point of entry into the United States.[86]

III. THE COURT'S DECISION

In the noted case, the United States Court of Appeals for the Second Circuit adhered to the *McClain* Doctrine established by the Fifth Circuit, where the application of the term "stolen" as defined by a foreign patrimony law was applied to a prosecution for conspiracy to violate the NSPA by illegally transporting, receiving, and possessing antiquities "stolen" according to a foreign ownership law.[87] The court found that the term "stolen" applied to objects taken in violation of an Egyptian patrimony law because "stolen" is subject to an expansive meaning under the NSPA.[88] The court's refusal to directly address the holding of *McClain I* or *II* in *United States v. An Antique of Gold Platter* was not the equivalent of a rejection of the *McClain* Doctrine.[89] Most importantly, it

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80. *See* 19 U.S.C. § 2602; *see also* Jowers, *supra* note 35, at 155.

81. 19 U.S.C. § 2602(a)(1)(B).

82. *See generally id.* § 2603 (explaining emergency implementation of impact restrictions); *see also id.* § 2603(a)(1)-(3) (defining the term "emergency condition").

83. *Id.* § 2602(e)-(f); *id.* § 2603(c)(3) (stating renewal is available for three years for emergency import restrictions).

84. Jowers, *supra* note 35, at 157.

85. *See generally* Celestine Bohlen, *Illicit Antiquities and a Test Case Fit for Solomon: The Trial of a Dealer Divides the Art World*, N.Y. TIMES, Jan. 30, 2002, at E1.

86. Rostomian, *supra* note 76, at 283.

87. United States v. Schultz, 333 F.3d 393, 410 (2d Cir. 2003), *cert. denied*, 72 U.S.L.W. 3292 (2004).

88. *See id.* at 409-10.

89. *Id.*; United States v. An Antique Platter of Gold, 184 F.3d 131, 134 (2d Cir. 1999).

held that the plain language of the Egyptian patrimony law clearly established it as an ownership law rather than merely a foreign sovereign's export law.[90] Although the United States honors certain export laws of nations that have bilateral and emergency agreements with the United States in accordance with the CPIA,[91] the court stated that the statutory history of the CPIA does not indicate a legislative intent to exclude cultural property from the NSPA and limit cultural property protection to only those measures enumerated in the CPIA.[92]

The court first explored the meaning and purpose of the Egyptian patrimony Law 117 ("The Law on the Protection of Antiquities") by reviewing the expert testimonies presented for Schultz and the prosecution at the district court in an evidentiary hearing.[93] The court found that the applicable articles of Law 117 show that the law clearly defines the term "antiquity," that the law vests ownership of antiquities in the "public," and that the law forbids possession of antiquities from 1983 onward, with an exception for those who possessed them before the enactment of the prohibition.[94] Testimony on Law 117 came from three sources: Dr. Gaballa ali Gaballa, the Secretary General of Egypt's Supreme Council of Antiquities (SCA); General Ali El Sobky, the Director of Criminal Investigations for the Egyptian Antiquities Police; and Professor Khaled Abou El Fadl, a professor of Islamic and Middle Eastern Law at the University of California—Los Angeles (UCLA) Law School.[95] The Egyptian government provided the first two witnesses to help the prosecution establish the nature of Law 117.[96] Accordingly, Dr. Gaballa said that even those who continue to possess the antiquities that they owned before the 1983 law must secure the permission of the Egyptian government before they may "transfer, dispose of, or relocate" the antiquities.[97] Dr. Gaballa also testified that domestic legal actions use Law 117 concerning antiquities within Egypt as well as in the noted case.[98] General El Sobky supported Dr. Gaballa's statements by saying that most of the investigations conducted by his department here for internal Egyptian traffickers and that such prosecutions would, at a

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90. *Schultz*, 333 F.3d at 408.
91. *See* Jowers, *supra* note 35, at 157.
92. *Schultz*, 333 F.3d at 410.
93. *Id.* at 398-403. "Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence." *Id.* at 400 n.2 (citing FED. R. CRIM. P. 26.1 (2003)).
94. *Id.* at 399-400.
95. *Id.* at 400-01.
96. *Id.*
97. *Id.* at 400.
98. *Id.* at 401.

minimum, yield the return of the antiquity through government seizure.[99] Professor El Fadl, the expert provided by Schultz to describe the law as "confusing" and "ambiguous," admitted that he never had practiced in Egypt and that he never had read Law 117 before preparing for the noted case.[100] Based on the testimony from the evidentiary hearing, the court concluded "that Law 117 [was] clear and unambiguous and that the antiquities that were the subject of the conspiracy . . . were owned by the Egyptian government."[101]

After establishing the identity of the owners of the objects, the court examined whether the ownership vested in the Egyptian government was the same ownership interest that the U.S. government intended to protect when it drafted the NSPA.[102] Schultz contended that the "stolen" objects never truly belonged to the government.[103] The court disagreed and described the expansive meaning that the NSPA attributes to the term "stolen."[104] Moreover, the court explicitly stated that its refusal to directly address the holding of *McClain* in *United States v. An Antique Platter of Gold* did not signal a rejection of the *McClain* Doctrine's application of a foreign patrimony law to determine if an object was "stolen" as defined by the NSPA.[105] Following a discourse justifying its "failure to address a question that is not necessary to the outcome of a case," the court snubbed the idea that it might "pass gratuitously" on an issue not essential to the resolution of *United States v. An Antique Platter of Gold*.[106]

Schultz' assertion that recognition of Law 117 contradicts U.S. policy was swept aside by the court on the basis that it had already determined that the law was a "true ownership law."[107] Finally, the court pointed out the codification of the two laws, showing that the CPIA is an import law within Title 19 (Customs Duties) while the NSPA is a criminal law, codified within Title 18 (Crimes and Criminal

99. *See id.*
100. *Id.*
101. *Id.* at 402.
102. *Id.*
103. *See id.*
104. *Id.* at 403 (citing United States v. Handler, 142 F.2d 351, 353 (2d Cir. 1944) (holding NSPA considers embezzled property "stolen"); United States v. Bottone, 365 F.2d 389, 393-94 (2d Cir. 1966) (holding photocopies of owner's original document considered "stolen" under the NSPA)).
105. *Id.*; United States v. An Antique Platter of Gold, 184 F.3d 131, 134 (2d Cir. 1999).
106. *Schultz*, 333 F.3d at 407 (citing United States v. United States Gypsum Co., 333 U.S. 364, 402 (1948) (Frankfurter, J., concurring in part)).
107. *Id.* at 408.

Procedure).[108] It explained that the same conduct can properly be subjected to both civil and criminal consequences simultaneously.[109]

The court completed the noted opinion by distinguishing the various cases that Schultz presented in seeking procedural relief for defense of mistake of U.S. law, as well as his challenge on the admission of the testimony of some witnesses on their knowledge of Law 117.[110]

IV. ANALYSIS

One of the most remarkable aspects of the noted case is the egregious nature of the offense committed by Schultz when viewed in relation to the position that he occupied in the antiquities market. Just before the indictment, Schultz was the president of the National Association of Dealers in Ancient, Oriental, and Primitive Art (NADAOPA).[111] The NADAOPA, founded in 1975 in New York City, is considered to be the most respected U.S. trade association for antiquities dealers.[112] Since its creation, the NADAOPA has actively opposed the United States' implementation of the UNESCO Convention, and it also has lobbied to reduce the scope of the *McClain* Doctrine.[113] Schultz also had served as president of the International Association of Dealers in Ancient Art (IADAA), an invitation-only association that, according to Schultz in 1996, formed initially to oppose trade restrictions on cultural property in the European Community.[114] The Rules adopted by the IADAA, however, describe its mission as one to "actively encourage the protection and preservation of ancient sites," and its Code of Ethics and Practice obliges its members to purchase antiquities in good faith, to the

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108. *Id.* at 409.

109. *Id.* (citing Hudson v. United States, 522 U.S. 93, 98-99 (1997)) (holding that a person may be subjected to civil and criminal penalties for the same conduct without violating the Double Jeopardy Clause).

110. *Id.* at 413-15. The district court instructed the jury on conscious avoidance. Because Schultz failed to object to the instruction when it was made, he had to show that the use of the instruction resulted in "plain error." *Id.* at 413. Additionally, the evidence that Schultz had actual knowledge of Law 117 made it difficult for Schultz to prove that a different instruction would have affected the outcome of his trial. *Id.* at 414 n.13. The district court allowed five witnesses to testify about their personal knowledge of Law 117 despite a relevance objection raised at trial by Schultz, concluding that the testimony tended to indicate that "even an ignoramus in this field would know at least about patrimony laws." *Id.* at 415. The court in the noted case found that the district court did not abuse its discretion in allowing the testimony of these witnesses. *Id.*

111. Gerstenblith, *supra* note 51.

112. William G. Pearlstein, *Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market*, 28 LAW & POL'Y INT'L BUS. 123, 143 n.74 (1996).

113. Gerstenblith, *supra* note 51.

114. Pearlstein, *supra* note 112, at 140-41 n.68.

best of their ability.[115] The evidence presented by the government in seeking an affirmation of the conviction of Shultz demonstrated that one of the most respected antiquities dealers in the nation had acted on the level of an "ordinary thief."[116]

Schultz was not the first member of the antiquities community to tempt fate.[117] In a secretive, billion-dollar market with a limited number of buyers in relation to the great number of archaeological sites, dealers in antiquities have little incentive to police their own activities with regard to illicitly obtained objects.[118] Auction catalogs at the major international auction houses often contain seventy to ninety percent of antiquities for sale without provenience or verifiable provenance.[119] However, the United States, as a signatory member of UNESCO, has established a policy to regulate the antiquities market in a way that reduces the presence of such illicit antiquities.[120] Recent events in the Baghdad Museum and the continuing drain of antiquities from Iraq over the last decade have also galvanized dealers, archaeologists, and legislators to implement market controls restricting the flow of illicit antiquities from Iraq into and within the United States.[121] The Enhanced Protection of Our Cultural Property Act of 2003 increased the government's effectiveness in prosecuting those who traffic in illicit antiquities through federal sentencing guidelines.[122] Additionally, the United States resumed an active role in UNESCO in October 2003, affirming its commitment to the organization.[123]

In this context, the decision of the court in the noted case reflects judicial support of the policy of greater control of the antiquities market. The evident degree of culpability which Schultz failed to refute provided the jury with clear support for a conviction, which the Court of Appeals for the Second Circuit correctly upheld.[124] In affirming Schultz's

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115. *Id.* at 140-41 (quoting Rules of the International Association of Dealers on Ancient Art, art. 2.3).

116. Ricardo J. Elia, *Digging up Dirt: Antiquities Case Unearths Corruption*, WALL. ST. J., June 19, 2002, at D7.

117. *See generally* Gerstenblith, *supra* note 30.

118. *See* Moore, *supra* note 29, at 479.

119. Elia, *supra* note 116, at D7.

120. *See generally* 19 U.S.C. §§ 2601-2613 (2000).

121. Alan Riding, *Art Experts Mobilize Team to Recover Stolen Treasure and Salvage Iraqi Museums*, N.Y. TIMES, Apr. 18, 2003, at B2.

122. *See generally* UNITED STATES SENTENCING GUIDELINES MANUAL, 18 U.S.C. § 2B1.5 (2000).

123. Remarks by First Lady Laura Bush to UNESCO Plenary Session, Sept. 29, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/09/print/20030929-6.html.

124. United States v. Schultz, 333 F.3d 393 (2d Cir. 2003), *cert. denied*, 72 U.S.L.W. 3292 (2004).

conviction, the Court added a particularly strong precedent in support of the federal regulation of an increasingly scrutinized field of activity.[125] The *McClain* Doctrine created by the Fifth Circuit did not bind the court in the noted case.[126] However, the court retraced the steps followed by the Fifth Circuit when it established the *McClain* Doctrine, and it claimed the Doctrine for itself.[127]

V. CONCLUSION

The plight of Schultz and the Egyptian antiquities handled by him has revitalized the *McClain* doctrine. The effects of the conviction on the U.S. antiquities market and beyond were anticipated even before the court handed down the decision in the noted case. The fact that a Manhattan dealer with over twenty-five years in the business will spend thirty-three months in prison for taking antiquities out of Egypt in violation of its patrimony laws underpins the significance of the Second Circuit's affirmation of the legal approach contained within the *McClain* doctrine.[128] This conviction should encourage other archaeologically-rich nations to reexamine their national patrimony laws now that a second U.S. federal court has endorsed the rights of those nations to enforce public ownership of their respective cultural property and heritage.

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125. *See generally id.* at 403-07.
126. *See id.* at 403-04; *see also* United States v. McClain, 545 F.2d 988 (5th Cir. 1977) (*McClain I*); *reh'g denied* 593 F.2d 658 (5th Cir. 1979) (*McClain II*).
127. *Schultz*, 333 F.3d at 416.
128. Bohlen, *supra* note 85, at E1.
* J.D. candidate 2005. This Note is dedicated to the memory of J. Marvin Ericson and Estelle Manshack. Special thanks to Natalia Alexiou.