Republic of Turkey v. Christie's, Inc.: An Idolized Take on Modern Cultural Property Law

I. OVERVIEW

After thirty-seven years spent in a glass box, attended by the company of constantly-rotating strangers and stagnant, priceless works of art, the Anatolian Marble Female Idol of Kiliya-type stepped into the air and onto the block—the auction block.[1] The Idol's paper trail starts in 1961, when two American collectors acquired the antiquity from Turkey's J.J. Klejman Gallery.[2] The Idol was then loaned to the Metropolitan Museum of Art (Met) for approximately twenty-seven years before it was received by an American gallery and sold to Judy and Michael Steinhardt in 1993.[3] Four years later, the Idol resumed its quiet and comfortable life as an occupant of the Met's Near Eastern Ancient Art galleries until being reclaimed by the Steinhardts in 2007.[4] After another decade out of public view, the Idol resurfaced in Christie's catalogs anticipating an April 28, 2017 auction for exceptional pieces of antiquity—and here, the government of Turkey intervened.[5]

1. Republic of Turkey v. Christie's, Inc., 425 F. Supp. 3d 204, 209 (S.D.N.Y. 2019).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

The Anatolian Idol was created around 2200 B.C.E., perhaps earlier, and hails from one workshop located in modern-day Turkey: Kulaksizlar, the only-known maker of Kiliya-type figures.[6] When Turkey learned about the existence and upcoming sale of the Idol in March 2017, the then-Consul General sent Christie's a letter informing the auction house of the Idol's likely origin and requesting its return.[7] Turkey's claim of ownership stems from a 1906 Ottoman Decree that plainly states that "all monuments and . . . antiquities . . . are the property of the Government of the Ottoman Empire."[8]

The auction house failed to return the Idol, so Turkey instituted a diversity action with claims of conversion and replevin against Christie's and Steinhardt at the end of April 2017 seeking a temporary restraining order against the upcoming sale.[9] The court denied the Republic a restraining order, allowing the auction to take place as scheduled.[10] On the day of the auction, the *New York Times* published an "Open Letter from the Ministry of Culture and Tourism of the Republic of Turkey" containing general thanks for prior repatriation of Turkish cultural property over the years, with no direct reference to Christie's.[11] Over the next year and a half, a complex mess of litigation ensued: a twice amended complaint, counterclaims by Christie's and Steinhardt, further amendments, and motions to dismiss culminated on December 7, 2019, when both parties moved for summary judgment.[12] The U.S. District Court for the Southern District of New York held that the statute of limitations for Turkey's claims began when it "had made demand for return of artifact;" and that a finding of summary judgment for Christie's and Steinhardt on Turkey's claims was blocked by the Republic's ample demonstration of ownership. *Republic of Turkey v. Christie's, Inc.*, 425 F. Supp. 3d 204 (S.D.N.Y. 2019).

6. *Id.*
7. *Id.*
8. *Id.* at 214.
9. *Id.* at 209.
10. *Id.*
11. *Id.* at 210.
12. *Id.*

II. BACKGROUND

A. What Is Cultural Property Law?

The instant case represents one small facet of the ever-growing, ever-evolving field of cultural property law.[13] Though dealing with objects thousands of years old, cultural property is a relatively new term, introduced for the first time during the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[14] to describe those archaeological, artistic, ethnographical artifacts of human history, both movable and immovable, that "embody the culture" of man.[15] The term was borne of international concern for the safety of monuments and other cultural objects during times of war.[16] The phrase and the field have advanced in the seven decades since, growing to encompass a wide range of objects—from intangible cultural heritage,[17] such as a Maori dance, to underwater cultural heritage,[18] like historic shipwrecks that must be protected from looting—and drawing protection from countless legal fields.[19] At the intersection of "tort, contract, property, criminal, art, Indian, museum, constitutional, environmental, and international law," cultural property law occupies a space that cannot be adjudicated under one set of statutes or one constitution.[20] Instead, controversy must be solved through dialogue among differing perspectives: six discrete theories and methods, each stemming from a set of assumptions about how best to apply law.[21]

Two diametrically opposed theories form the backdrop of all cultural property repatriation disputes: internationalist and nationalist.[22] The internationalist theorist believes that "cultural resources are the property of mankind."[23] Therefore, the party (be it public country or private entity)

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13. *See* Sherry Hutt, *Cultural Property Law Theory: A Comparative Assessment of Contemporary Thought*, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES 17 (Jennifer R. Richman & Marion P. Forsyth, eds., 2004).

14. UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

15. John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 341 (1989).

16. 1954 Hague Convention, *supra* note 14.

17. UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3 [hereinafter 2003 ICH Convention].

18. UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40 [hereinafter 2001 UCH Convention].

19. Hutt, *supra* note 13, at 17.

20. *Id.*

21. *Id.*

22. *Id.* at 22-23.

23. *Id.* at 21.

best able to care for the property has the duty to advance its protection and preservation, independent of where the artifact originally hails from.[24] In strict opposition, nationalist theorists "[hold] that cultural patrimony is inalienable;" cultural property must be returned to its source nation.[25] Critics of nationalist theory note its fixation on patrimony at the cost of conservation and preservation.[26] Between these poles lies the tension between patriarchal vestiges of Western colonization and modern notions of patriotic autonomy.

Underneath the umbrellas of internationalist and nationalist theory gather four methods that each prioritize a narrower perspective.[27] Moralist theory would place control of cultural property in the hands of the *right* people for *right*eous reasons.[28] Property law theory is grounded in the rights of ownership espoused by common or civil law—a determination contingent on the country in control of the property.[29] Scientific theorists believe that scientific inquiry holds preeminent interest in cultural property; as such, cultural property should first and foremost be given to those scientists.[30] Market theory prioritizes "free trade and an open flow of items and knowledge in the marketplace."[31]

B. A Nation Contending with International Issues

In the United States, courts have grappled with the application of internationalist and nationalist theories through the lenses of multiparty conventions and domestic case law.[32] The United States is a party to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,[33] which explains that:

> the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of [origin countries] and that international co-operation constitutes one of the most

24. *Id.*
25. *Id.* at 22.
26. *Id.* at 23.
27. *Id.* at 17.
28. *Id.* at 19-20.
29. *Id.* at 23-24.
30. *Id.* at 27.
31. *Id.* at 29.
32. *See* United States v. McClain, 593 F.2d 658, 660 (5th Cir. 1979); *see also* United States v. Schultz, 333 F.3d 393, 395 (2d Cir. 2003).
33. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

> efficient means of protecting each country's cultural property against all the dangers resulting therefrom.[34]

Unfortunately, because the convention could not create an international body to police and prosecute violators, the agreement depended on the good faith cooperation of all party states.[35] In addition, the definition of cultural property and the means by which each state must regulate it are very broad, allowing discretion on the part of the states.[36] Domestically, the U.S. has often prosecuted traffickers of cultural property under the National Stolen Property Act (N.S.P.A.), a federal theft statute designed to charge criminals operating in interstate commerce.[37]

In response to growing awareness of the reality of illicit cultural property moving from source nations to market nations, U.S. circuit courts have developed case law for interpreting foreign ownership statutes as they relate to the N.S.P.A.[38] In *United States v. McClain*, the Fifth Circuit held that foreign ownership laws must be sufficiently clear in their declaration of ownership such that they may be understood by Americans.[39] After years trafficking in pre-Columbian movable artifacts within the U.S., the defendants were found in violation of the N.S.P.A.: a 1972 Mexican statute was "clear and unequivocal" in asserting ownership over all pre-Columbian artifacts.[40]

Thirty years later, the Second Circuit decided *United States v. Schultz*, holding that an Egyptian cultural object is "stolen" within the meaning of the N.S.P.A. if it is an antiquity that was found in violation of Egypt's patrimony law.[41] In determining whether Egypt's ownership law was binding, the court required the defendant to "overcome the combination of (1) the plain text of the statute, and (2) the testimony of two Egyptian government officials to the effect that the statute is a true ownership law and is enforced as such."[42] Although neither the Fifth Circuit nor the Second Circuit phrased its decision in the language of a specific cultural property theory, the thrust of both opinions is nationalist.[43] Synthesis of the *McClain*/*Schultz* doctrine shows that foreign patrimony laws must be

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34. *Id.* at art. 2.
35. *Id.* at art. 5.
36. *Id.* at arts. 1, 4, 5.
37. National Stolen Property Act, 18 U.S.C.A. § 2314 (2013).
38. *See McClain*, 593 F.2d at 660; *see Schultz*, 333 F.3d at 395.
39. *McClain*, 593 F.2d at 670.
40. *Id.*
41. *Schultz*, 333 F.3d at 393.
42. *Id.* at 401.
43. *See McClain*, 593 F.2d at 660; *see Schultz*, 333 F.3d at 400-03.

sufficiently clear and understandable in their plain language, as well as recognized and enforced by their country of origin.[44]

III. COURT'S DECISION

In the noted case, the United States District Court for the Southern District of New York followed the nationalist leanings of *McClain* and *Schultz* when denying Christie's motions for summary judgment.[45] As a threshold issue, the court held that the three-year statute of limitations governing Turkey's claims started when the country demanded the Idol's return.[46] More substantively, Christie's' motion for summary judgment on Turkey's conversion and replevin claims failed to recognize genuine issues of material fact, leaving the matter of Turkey's ownership interest for the anticipated bench-trial.[47] Further, Turkey did not tortiously interfere with the contract between Christie's and the highest bidder, nor did the country act with the "sole purpose of inflicting intentional harm" on the auction house due to Turkey's "clear interest" in repatriating cultural property.[48]

A. Threshold Issues and Choice of Law

The court first had to decide choice of law questions prompted by an international country's diversity action against a United States national.[49] The parties agreed that New York law would apply to both Turkey's substantive claims for conversion and replevin, and affirmative defenses.[50] However, a preliminary question—whether Turkey had an ownership interest sufficient to bring its claims—must be decided under Turkish law: the 1906 Ottoman Decree reserving and assuring all cultural property of the Ottoman Empire (later to become modern-day Turkey) to the Ottoman Empire.[51]

The auction house initially argued that the statute of limitations for Turkey's conversion and replevin claims had already ran, thus barring its suit.[52] However, the three-year statute of limitations applicable to the

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44. *E.g. McClain*, 593 F.2d at 670; *e.g. Schultz*, 333 F.3d at 401.
45. Republic of Turkey v. Christie's, Inc., 425 F. Supp. 3d 204, 209 (S.D.N.Y. 2019); *see also McClain*, 593 F.2d at 670; *see also Schultz*, 333 F.3d at 401.
46. *Christie's, Inc.*, 425 F. Supp. 3d at 209.
47. *Id.*
48. *Id.*
49. *Id.* at 210.
50. *Id.*
51. *Id.* at 210-11.
52. *Id.* at 211.

instant case begins to run upon accrual.[53] For good-faith purchasers, accrual starts once the true owner reaches out and requests their property back.[54] New York law recognizes that the good-faith purchaser is not aware of the property's stolen past and absolves her of liability until she is put on notice.[55] "It is her refusal of such a demand that transforms her previous lawful possession into an unlawful one."[56] The court determined that Steinhardt, predecessor-in-interest to Christie's, was a good faith purchaser.[57] As such, accrual began in 2017; the statute of limitations had not run.[58] Had the court determined that the Steinhardts were bad faith purchasers, the statute of limitations would have began to run at the moment they took possession in 1993 and therefore prevented Turkey from bringing suit decades later.[59]

B. Turkey Has Demonstrable Interest in Owning the Idol

After unsuccessfully arguing that Turkey had not brought its suit in a timely fashion, Christie's and Steinhardt turned to whether the country had proved sufficient ownership.[60] The court determined that the question hinged on its interpretation of the 1906 Decree.[61] Under *Schultz*, courts must first look "to the plain language of the relevant law" when adjudicating international antiquity ownership.[62] In relevant part, the 1906 Decree states that:

> [a]ll monuments and immovable antiquities situated in or on land and real estate belonging to the Government . . . are the property of the Government of the Ottoman Empire . . . the right to discover, preserve, collect and donate to museums the aforementioned belongs to the Government.[63]

The court concluded that the plain language of the Decree vested ownership of all antiquities, movable and immovable, in or on sovereign land, in the "Government" of the Ottoman Empire (thus, in modern-day Turkey).[64]

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53. *Id.* N.Y. C.P.L.R. 214 (McKinney 1996).
54. *Id.* at 212; *e.g.* Menzel v. List, 49 Misc.2d 300, 301 (Sup. Ct. N.Y. Cty. 1996).
55. *Christie's Inc.*, 425 F. Supp. 3d at 212.
56. *Id.*; *see* Leveraged Leasing Admin. Corp. v. PacifiCorp Capital, Inc., 87 F.3d 44, 49 (2d Cir. 1996).
57. *Christie's Inc.*, 425 F. Supp. 3d at 212.
58. *Id.*
59. *Id.*
60. *Id.* at 214.
61. *Id.*
62. *Id.*; *e.g.* United States v. Schultz, 333 F.3d 393, 395 (2d Cir. 2003).
63. *Christie's Inc.*, 425 F. Supp. 3d at 214.
64. *Id.* at 215.

Following *Schultz*, Christie's and Steinhardt would have to overcome a combination of "(1) the plain text of the [Decree], and (2) the [evidence] to the effect that the [Decree] is a true ownership law" to strike down the Decree as proof of interest.[65] In response, Turkey's experts offered evidence of conspicuous effort on the part of the Republic to repatriate Turkish antiquities found in extranational museums and galleries.[66] Additionally, the Republic of Turkey, as "successor" to the Ottoman Empire, must enforce Ottoman laws including the 1906 Decree.[67] The auction house finally pointed to *McClain*, arguing that the Decree was not sufficiently understandable [to the American public], but the court found that requiring every foreign ownership statute to be translated into English to satisfy *McClain* would be an absurd and unintended mandate.[68]

As a result of the court's above findings, summary judgment for Christie's and Steinhardt on whether the 1906 Decree is an ownership law vesting property rights in Turkey was denied.[69] However, the Turkish Republic must show that there was evidence sufficient for a reasonable juror to find that the Idol came from Turkey to properly establish ownership under the Decree.[70] Here, the country cited the unique provenance of Kiliya-type figurines.[71] Kulaksizlar, an ancient workshop located in modern-day Turkey, remains the only known manufacturer of Kiliya-type models.[72] Though the Idol could have traveled around the Mediterranean and inevitably been unearthed elsewhere, as Christie's and Steinhardt argued, Turkey did not have to establish a specific findspot.[73] The Republic did offer evidence showing that antiquities looted from Turkish land appeared in museums or collections within a few years of unearthing; and that J.J. Klejman (of the titular gallery that originally sold the Idol to the Steinhardts' predecessors-in-title) was a "well known 'dealer-smuggler'" of the sixties.[74] From the evidence presented, the court determined that Turkey proved the existence of genuine issues of material fact.[75]

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65. *Id.*; *Schultz*, 333 F.3d at 401.
66. *Id.*
67. *Id.* at 216.
68. *Id.*; *see* United States v. McClain, 593 F.2d 658, 660 (5th Cir. 1979).
69. *Christie's Inc.*, 425 F. Supp. 3d at 216.
70. *Id.*
71. *Id.* at 217.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 217-18.

C. Turkey Was Hardly Tortious in Its Quest for Repatriation

The court then turned to the matter of Turkey's motions for summary judgment on Christie's and Steinhardt's tortious interference with contract and tortious interference with prospective economic advantage claims.[76] Here, the contract in question was that between Christie's and its highest bidder.[77] The crux of Christie's argument, and indeed the point on which it fails, is the requirement that the Turkish Republic "[intentionally procured] the third-party's breach of the contract without justification."[78] The court quickly disposed of the allegations Christie's and Steinhardt proffered, finding that even the most compelling reason relied on "unsubstantiated speculation" with no "specific evidence" to corroborate it, and granted Turkey's motion for summary judgment.[79]

Christie's and Steinhardt were similarly unsuccessful in their tortious interference with prospective economic advantage claim.[80] Under New York law, they were required to show that the Turkish Republic either committed a crime, committed an independent tort, or acted with the sole motivation of intentionally harming the auction house and its cosignatories.[81] Christie's and Steinhardt did not allege any of the above; instead, they claimed that genuine issues of material fact existed as to whether Turkey used "wrongful means" to interfere in their business with the highest bidder. [82] The court determined that the only available "wrongful means" avenue in the instant case would lie in "meritless litigation."[83] However, for the reasons outlined in its denial of Christie's and Steinhardt's motion for summary judgment, the court found the auction house's "meritless litigation" argument, in a word, meritless.[84]

Finally, the court considered closing issues.[85] Following *Daubert*, the court permitted the expert evidence in question to be admitted at trial, at which point the reliability and relevance of the evidence would be interrogated.[86] Furthermore, the court did not grant the parties' requests to

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76. *Id.*
77. *Id.*
78. *Id.*; Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 424 (N.Y. 1996).
79. *Christie's Inc.*, 425 F.Supp.3d at 219.
80. *Id.*
81. *Id.; e.g. 16* Casa Duse, LLC v. Merkin, 791 F.3d 247, 262 (2d Cir. 2015); Carvel Corp. v. Noonan, 3 N.Y.3d 182, 190 (N.Y. 2004).
82. *Christie's Inc.*, 425 F. Supp. 3d at 220.
83. *Id.*
84. *Id.*
85. *Id.* at 220-22.
86. *Id.*

file documents with heavy redactions or under seal.[87] The court held that documents submitted in a summary judgment motion are "as a matter of law—judicial documents to which a strong presumption of access attached," stemming from both common law and the First Amendment, and therefore denied the parties' requests.[88]

IV. ANALYSIS

Although the court rightfully struck down Christie's and Steinhardt's motions for summary judgment—signaling validation of Turkey's interest in the Idol and waning patience for an art market contingent on illicit cultural property—it had grounds to award summary judgment in Turkey's favor.[89] Viewed in the light most reasonable to the nonmoving party, there were no issues of material fact such that a reasonable juror could not conclude that the Turkish Republic's interest was valid and binding, thus necessitating return of the Idol to Turkey.[90] Instead, the court took a half-measure in dismissing Christie's and Steinhardt's claims for tortious interference (showing an inclination to agree with the foreign government) while punting the question of ownership to trial.[91]

Turkey, however, proffered a wealth of evidence on the ownership question that Christie's and Steinhardt failed to undermine.[92] Following *McClain* and *Schultz*, the language of the 1906 Ottoman Decree was plain, unambiguous, and contemporarily used for enforcement.[93] The court thereby determined that the Decree was an ownership law sufficient for Turkey to claim ownership.[94] The Republic then entered evidence into the record showing that private ownership of Turkish antiquities within Turkey was prohibited and domestically enforced.[95] In addition, Turkey has had long success with its international repatriation claims under the Decree: multiple "high-profile attempts" to recover Turkish cultural property in 1970;[96] a 1993 suit against the Metropolitan Museum of Art

87. *Id.*
88. *Id.;* Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 121 (2d Cir. 2006).
89. *Christie's Inc.*, 425 F. Supp. 3d at 204.
90. *Id.* at 216-17.
91. *Id.* at 204.
92. *Id.* at 214-17.
93. *Id.; e.g. McClain*, 593 F.2d at 670-71; *e.g. Schultz*, 333 F.3d at 401.
94. *Christie's Inc.*, 425 F. Supp. 3d at 215.
95. *Id.*
96. *Id.*

that ended in settlement and the return of the "Lydian Hoard;"[97] and the successful recovery of a statue from the Cleveland Museum.[98]

Christie's and Steinhardt then argued that Turkey's conversion and replevin claims could not prevail because the country had not established an official findspot for the Idol.[99] Though the court ultimately dismisses this argument as unnecessary, it is notable that the auction house did not proffer a specific findspot of its own to corroborate the Steinhardts' claim of ownership.[100] Had the auction house been held to the same standard it accused Turkey of failing to meet, its argument would collapse under the Idol's shady modern provenance.[101] Instead, the court acknowledges that the only known maker of Kiliya-type idols was the workshop Kulaksizlar.[102] Finally, Turkey offered evidence tending to show the timeline from which artifacts were looted and then sold, as well as J.J. Klejman's known business of dealing smuggled artworks.[103] Under the weight of Turkey's persuasive and corroborated argument, the court could have found summary judgment for the Turkish Republic on its claims.

A potential reason for the court's more tentative step is the lack of binding (or clear) precedent in a civil setting.[104] *McClain* and *Schultz* both unambiguously recognized the validity of each foreign patrimony law, using its legitimacy to return the illicitly trafficked cultural property to its country of origin.[105] Strict application would mandate return of the Idol to Turkey upon determination that the Decree is, indeed, an ownership law.[106] However, the aforementioned cases both entailed federal prosecutions against individuals who had violated a specific federal law of the United States.[107] In contrast, the instant case concerns a civil suit between a foreign government and domestic private entities.[108] Although the case law provides compelling language with which to evaluate the legitimacy of the 1906 Ottoman Decree, the court in *Turkey* lacks the police power to

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97. Jo Ann Lewis, *Met Returns Treasures to Turkey*, THE WASHINGTON POST (Sept. 23, 1993), https://www.washingtonpost.com/archive/lifestyle/1993/09/23/met-returns-treasures-to-turkey/d37bdc6f-913f-4dea-a7f4-c3e4b2079575/.

98. *Christie's Inc.*, 425 F. Supp. 3d at 215.

99. *Id.* at 217.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See McClain*, 593 F.2d at 660; *see also Schultz*, 333 F.3d at 393.

105. *McClain*, 593 F.2d at 660; *Schultz*, 333 F.3d at 401.

106. *See McClain*, 593 F.2d at 660; *see Schultz*, 333 F.3d at 401.

107. *McClain*, 593 F.2d at 660; *Schultz*, 333 F.3d at 393.

108. *Christie's Inc.*, 425 F. Supp. 3d at 204.

confiscate the Idol and return it to the Turkish Republic.[109] However, the court regularly dismisses Christie's and Steinhardt's claims as "unsubstantiated allegations or assertions," "unsubstantiated speculation," and argument without "specific evidence."[110] Such abnormally hostile language toward the auction house indicates a potentially turning tide in the realm of foreign repatriation at the expense of private entities.

V. CONCLUSION

In reifying the validity of the 1906 Ottoman Decree and recognizing Turkey's ownership interest in the Idol, the United States District Court for the Southern District of New York contributed to an expanding yet scattered body of case law that attempts to strike a balance between international interests and domestic protection.[111] Here, the court built on the methodology outlined by *McClain* and *Schultz*, expanding the potential for recognition to international ownership laws that are more than a hundred years old.[112] The court favored a nationalist approach, potentially signaling a future of greater American participation in the repatriation of foreign cultural property. Seemingly mindful of the purpose behind the 1970 UNESCO Convention, the court sought not to impoverish the global stores of cultural heritage, but rather take a step towards protecting them from the dangers of looting, theft, forgery, and traffic.[113]

Jeremy Laine Schrady*

109. *See McClain*, 593 F.2d at 660; *see also Schultz*, 333 F.3d at 393.

110. *Christie's Inc.*, 425 F. Supp. 3d at 219.

111. *See McClain*, 593 F.2d at 660; *see Schultz*, 333 F.3d at 393.

112. *See McClain*, 593 F.2d at 660; *see also Schultz*, 333 F.3d at 393; *Christie's Inc.*, 425 F. Supp. 3d at 204.

113. 1970 UNESCO Convention, *supra* note 33, at art. 2.

* © 2021 Jeremy Laine Schrady. J.D. candidate 2022, Tulane University School of Law; B.A. 2019, University of California at Berkeley. The author would like to thank her family and friends for their unwavering support, as well as the members of *Tulane Journal of International and Comparative Law* for their efforts to prepare and publish this piece.