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BETWEEN ROCKS AND HARD PLACES: UNPROVENANCED ANTIQUITIES AND THE NATIONAL STOLEN PROPERTY ACT

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I. INTRODUCTION

Amid intense media coverage,¹ early in the morning of January 23, 2008, federal agents served search warrants on four southern California museums: Los Angeles County Museum of Art, Pacific Asia Museum, Charles W. Bowers Museum, and Mingei International Museum.² Two warrants allege, *inter alia*, that the Bowers and Pacific Asia museums possess stolen antiquities from Thailand in violation of the National Stolen Property Act (NSPA).³ The NSPA criminalizes the possession of property valued at \$5,000 or more that crossed a federal or state border after the property was stolen if the possessor knows the property to be stolen.⁴

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1. See, e.g., Joelle Seligson, *California Raids Echo Through the Field*, MUSEUM, Mar./Apr. 2008, at 27; Stephanie Cash, *Four L.A. Museums Targeted for Loot*, ART IN AMERICA, Mar. 2008, at 200; Jori Finkel, *Thai Antiquities, Resting Uneasily*, N.Y. TIMES, Feb. 17, 2008, at AR29; Matthew L. Wald, *Tax Scheme Is Blamed for Damage to Artifacts*, N.Y. TIMES, Feb. 4, 2008, at E1; Jason Felch, *Intrigue But No Glamour for Smuggling Case Figure*, L.A. TIMES, Jan. 31, 2008, at A1; Edward Wyatt, *An Investigation Focuses on Antiquities Dealer*, N.Y. TIMES, Jan. 31, 2008, at A20; Edward Wyatt, *Papers Show Wider Focus in Inquiry of Artifacts*, N.Y. TIMES, Jan. 30, 2008, at A1; Jason Felch & Mike Boehm, *Federal Probe of Stolen Art Goes National*, L.A. TIMES, Jan. 29, 2008, at B1; Edward Wyatt, *Museum Workers Are Called Complicit*, N.Y. TIMES, Jan. 26, 2008, at B7; Mike Boehm, *Museum Didn't Need This Publicity*, L.A. TIMES, Jan. 26, 2008, at A1; Dana Parsons, *The Feds' Raid Is Already Ancient History at Bowers*, L.A. TIMES, Jan. 26, 2008, at B1; Jason Felch, *Raids Suggest a Deeper Network of Looted Art*, L.A. TIMES, Jan. 25, 2008, at A1; Paloma Esquivel, David Reyes & Robert J. Lopez, *Workers, Visitors See an Unusual Exhibit: Agents at the Door*, L.A. TIMES, Jan. 25, 2008, at A27; *Day to Day: FBI Raids L.A. Museums* (NPR radio broadcast Jan. 25, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=18415487> (last visited Jan. 18, 2010).

2. Search Warrant on Written Affidavit, *United States v. L.A. County Museum of Art*, No. 08-0100M (C.D. Cal. Jan. 19, 2008); Search Warrant on Written Affidavit, *United States v. Pac. Asia Museum*, No. 08-0118M (C.D. Cal. Jan. 22, 2008); Search Warrant on Written Affidavit, *United States v. Charles W. Bowers Museum Corp.*, No. 08-0093M (Jan. 19, 2008); Search Warrant, *In the Matter of the Search of Mingei Int'l, Inc.*, No. 08-MJ0205 (S.D. Cal. Jan. 31, 2008). Allegations in the warrants are devastating. Various of the museums are alleged to have participated in one or more of the following: tax fraud conspiracy to inflate the value of contributed works of art; possession of antiquities stolen from China; possession of antiquities stolen from Thailand; possession of antiquities illegally imported into the United States from Burma (sic); and possession of Native American archaeological resources removed from public or Indian lands without a permit. The warrants allege the museums violated, among others statutes, the National Stolen Property Act, Archaeological Resource Protection Act, and provisions of federal law criminalizing conspiracy to defraud the United States.

3. The NSPA is codified at 18 U.S.C. §§ 2311–2318 (2006). Discussion of the NSPA appears below in Part III.A.

4. 18 U.S.C. § 2315 states in pertinent part:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 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.

If this investigation leads to criminal prosecutions⁵ under the facts alleged, courts will be presented with a dilemma: either an acquittal or a conviction would have serious, unintended outcomes. An acquittal would effectively create a licit market for unprovenanced Thai antiquities within the court's jurisdiction.⁶ A conviction would set a precedent, transforming continued possession of vast portions of the antiquities collections of every museum within the court's jurisdiction into a federal crime. These potential outcomes develop from the confluence of three factors: first, the general inadequacy of the NSPA to answer the complex question of when an unprovenanced (i.e., an undocumented) antiquity is considered stolen for purposes of U.S. law;⁷ second, the unintended consequences created by Congress's 1986 amendments to the NSPA in cases involving unprovenanced antiquities; and third, the sharp differences between the Fifth and the Second Circuits' applications of the NSPA in the only two criminal prosecutions involving unprovenanced antiquities to have reached the federal appellate level. Although the first of these factors has been debated for many years,⁸ the second and third factors have largely gone without critical commentary, and the confluence of these factors has not yet been identified and discussed.

This article argues that continued application of the NSPA in cases involving unprovenanced antiquities risks outcomes that undermine one or both of two U.S. policy goals: (1) protecting the global archaeological record and (2) promoting museums' charitable and educational missions. Accordingly, this article suggests that the current uncertainty in how courts apply the NSPA in the unique circumstances of determining title to undocumented antiquities might best be resolved by pursuing alternatives to continued reliance on the NSPA in these circumstances.

Part II introduces necessary background information on the concept of provenance; the distinction between foreign nations' export and vesting statutes (referred to collectively as "patrimony statutes"); and the relationship between foreign patrimony statutes and the NSPA. Part III explores, in detail, the application of the NSPA in criminal cases involving unprovenanced antiquities, emphasizing the distinction between the Fifth and the Second Circuit Courts of Appeals' approaches. Part III also describes Congress's 1986 amendments to the NSPA, which (without apparent legislative intent to do so) have made application of the NSPA in cases involving unprovenanced antiquities especially problematic. Part IV addresses, in the context of existing U.S. policies, allegations in the search warrants that two California museums possess stolen Thai antiquities. Part V describes potential outcomes of any criminal prosecution under the facts alleged in the search warrants. Part VI concludes with simple sketches of three possible alternatives to the United States' existing framework for combating trafficking in unprovenanced antiquities.

5. Violations of the NSPA subject defendants to criminal penalties, and under other provisions of the United States Code (described in Part III.B below), allow prosecutors to institute civil seizure and forfeiture actions against the allegedly stolen objects.

6. See discussion *infra* Part V.A.

7. Congress originally enacted the predecessor statute to the NSPA to provide a federal cause of action for interstate transfers of stolen automobiles. For a discussion of the history of the NSPA, see *infra* Part III.A.

8. See *infra* Part III.B.

II. BACKGROUND

A. *The Concept of Provenance*

Provenance refers to the history of an object and includes such information as when and by whom the object was made, who owned it, and its record of publication, public exhibition, and restoration or conservation.⁹ A related term, provenience, refers to an antiquity's archaeological context or find spot; thus, an antiquity's provenience forms a part of its provenance. A complete provenance provides an unbroken history of an object from the time it was created (or discovered) to the present. Except for antiquities that were scientifically excavated, recorded, and published (i.e., for which provenience is known) and for major immovable monuments (such as the Pantheon in Rome), few ancient works possess a complete provenance. Those for which there is some documentation are said to have an incomplete or partial provenance. Most antiquities appearing on the market today have *no* provenance other than possession by the dealer or auction house offering the work for sale.¹⁰ Such works are referred to as unprovenanced: they lack provenance and, accordingly, provenience.

Although a great deal may be determined about an unprovenanced antiquity from stylistic and other analyses, the antiquity's archaeological context and, thus, a vital component of its history, is irretrievably lost.¹¹ As famously put by the American archaeologist Clemency Coggins, an unprovenanced antiquity may be forever beautiful, but forever dumb.¹² That inability to speak of its origins poses special problems in determining who has title to the work.¹³ Only if an antiquity is scientifi-

9. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 199 n.7 (2001).

10. In two highly influential articles—influential because they are data-based—David W.J. Gill and Christopher Chippindale determined that the vast majority of antiquities to reach the market in recent years lack provenance. See Christopher Chippindale & David W.J. Gill, *Material Consequences of Contemporary Classical Collecting*, 104 AM. J. ARCHAEOLOGY 463, 503–04 (2000) (concluding that often “the very slim record of provenance is itself a mixture of record and supposition”); David W.J. Gill & Christopher Chippindale, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 97 AM. J. ARCHAEOLOGY 601, 636–39 (1993) (showing that most Cycladic figures, originating from islands in the central Aegean, lack complete provenance).

11. And vice versa: without the object, the findspot lacks a vital component of its history. The term “time crime” has been used to define the destruction of the archaeological record through illicit excavation, looting, theft, and vandalism of antiquities and historic resources. The term appears to have been coined in 1995 by Robert D. Hicks when the “Time Crime Program” was established as part of the Virginia Department of Criminal Justice Services and the Virginia Department of Historic Resources. The program trained law enforcement officers and cultural property professionals about relevant state and national laws concerning the theft of and vandalism to cultural resources. Since then, Hicks has written on the topic of “time crimes” several times. See Robert D. Hicks, *Time Crime: Protecting the Past for Future Generations*, Law Enforcement Bulletin (1997), available at <http://www.fbi.gov/publications/leb/1997/july971.htm> (last visited Jan. 18, 2010); Robert D. Hicks, *Time Crime: Anti-Looting Efforts in Virginia*, 24 CULTURAL RESOURCE MGMT., 2, 3 (2001); David C. Lane, David G. Bromley, Robert D. Hicks & John S. Mahoney, *Time Crime: The Transnational Organization of Art and Antiquities Theft*, 24 J. CONTEMP. CRIM. JUST. 243 (2008). The term seems to have been expanded to define the area of criminal law relating to looting and damaging archeological sites and antiquities. See, e.g., Carolyn Shelbourn, “Time Crime”—Looting of Archaeological Resources and the Criminal Law in England and the United States, 3 CRIM. L. REV. 204 (2008).

12. See Clemency Coggins, *The Maya Scandal: How Thieves Strip Sites of Past Cultures*, SMITHSONIAN, Oct. 1970, at 8 (“An art object which has been excavated by *huaqueros* [looters] can rarely be traced to its place of origin even by experts. With no clear historical significance, therefore, the object can only be, forevermore, beautiful but dumb.”).

13. Ancient cultures are not defined by modern national boundaries: for example, the Roman empire extended from the British Isles to the Near East, and the Maya civilization extended across what is today five

ically excavated can its role in the archaeological record be established, and even if scientifically excavated, there is no assurance that the fragile and critical information regarding an object's context will be properly recorded and made available. As one observer recently noted, even digs undertaken with great respect to the excavated objects "often leave sites in ruin, without the documentation and detailed excavation records that are supposed to accompany legal excavations."¹⁴

By contrast, it is relatively easy to determine title to a provenanced antiquity. A work with provenance is stolen if its last documented owner has not authorized its sale, entrustment, or other disposition, and the work is discovered in the possession of someone other than the true owner without the true owner's permission.¹⁵ That was the situation, for example, in a case involving Byzantine mosaics removed in the late 1970s from the walls of a Greek Orthodox church in Turkish-occupied Cyprus and discovered in the possession of an Indiana art dealer in 1988.¹⁶ The mosaics had been the subject of a major scholarly publication that appeared in 1977 describing the mosaics in situ.¹⁷ The federal district court, sitting in diversity jurisdiction, applied Indiana substantive law¹⁸ to determine that the mosaics were stolen and ordered the defendant to return them to the civil plaintiff, the Autocephalous Greek Orthodox Church of Cyprus.¹⁹

Federal law incorporates a similar standard for determining whether provenanced antiquities are stolen. The Convention on Cultural Property Implementation Act of 1983 (CCPIA)²⁰ prohibits the importation into the United States of cultural property from another state party to the 1970 United Nations Educa-

separate Central American nations. See WILLIAM SHEPARD, HISTORICAL ATLAS 42–43 (Henry Holt and Co. eds., 1911) available at http://www.lib.utexas.edu/maps/historical/shepherd_1911/shepherd-c-042-043.jpg. Map of the Maya World, <http://www.pbs.org/wgbh/nova/maya/world.html> (last visited Mar. 8, 2010).

14. Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 702 (2008).

15. See, e.g., *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp. 1374, 1398 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

16. *Id.*

17. See *id.* at 1378 ("Between 1959 and 1967, the mosaic[s] were] cleaned and restored under the sponsorship of the Department of Antiquities of the Republic of Cyprus, the Church of Cyprus, and Harvard University's Dumbarton Oaks Center for Byzantine Studies. With the knowledge gained in its efforts to restore the mosaic[s], Dumbarton Oaks published an authoritative volume on the Kanakaria Church and its art: *The Church of the Panagia Kanakaria at Lythrankomi in Cyprus: Its Mosaics and Frescoes*, authored by A.H.S. Megaw and E.J.W. Hawkins (1977).").

18. For a recent discussion of the court's choice of law question, see Mary Ellen O'Connell, *Beyond Wealth: Stories of Art, War, and Greed*, 59 ALA. L. REV. 1075, 1075–88 (2008).

19. The Government of Cyprus was also a co-plaintiff in the case. The court accepted Cyprus' claim that it had standing due to "a recognized and legally cognizable interest in the four Kanakaria mosaics, and in protecting and preserving them as invaluable expressions of the cultural, religious and artistic heritage of Cyprus." *Autocephalous*, 717 F. Supp. at 1377 n.1. Both the Republic of Cyprus and the Autocephalous Greek Orthodox Church of Cyprus requested that the mosaics be returned to the Church of Cyprus. *Id.* The trial attracted unprecedented journalistic attention, particularly in the *New York Times*, and the case later became the focus of a book, DAN HOFSTADTER, *GOLDBERG'S ANGEL* (1994).

20. The CCPIA is codified at 19 U.S.C. §§ 2601–2613 (2006). The CCPIA gave force of law in the United States to portions of the world's first multilateral treaty addressing illicit trade in cultural property, the 1970 United Nations Educational, Scientific, and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention). The CCPIA was the only enacted component of a proposed set of federal laws that resolved the eleven-year long battle among competing interest groups to enact provisions of 1970 UNESCO Convention. See James F. Fitzpatrick, *A Wayward Course: The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. INT'L L. & POL. 857, 862–64 (1983).

tional, Scientific, and Cultural Organization Convention (1970 UNESCO Convention) that has been *both* “documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution” *and* stolen from that institution.²¹ The CCPIA, thus, adopts a conventional definition of “stolen,” limiting its meaning to a known object over which an owner exercised dominion and control. For unprovenanced antiquities, which by definition are undocumented, matters are more complex.

B. Export Regulations Versus Patrimony Statutes

The traditional rule of public international law is simple: mere illegal export does not provide a basis for a cause of action in the courts of another country; absent a specific treaty provision to the contrary, one nation generally does not enforce the penal or public laws of another nation.²² Under long-established U.S. law, the possession of an illegally exported work that has been *legally imported* into the United States cannot be subject to legal action merely because the work had been illegally exported.²³

To avoid the limitations of that rule, and lacking a federal statute specifically addressing the unique problems of determining title to unprovenanced antiquities, U.S. prosecutors have turned to a combination of the NSPA and foreign nations’ cultural heritage laws (often referred to as patrimony statutes) as a means of pursuing what the government determines to be stolen unprovenanced antiquities.

21. 19 U.S.C. § 2607 reads as follows:

Stolen cultural property

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.

Section 2609(a) provides that cultural property imported into the United States in violation of section 2607 shall be subject to seizure and forfeiture. The first such seizure and forfeiture did not occur until 1996 and involved a first century CE Roman marble torso of Artemis, which was ordered to be returned to Italy. *See* Anne C. Cockburn, *Stolen Torso Returned to Italy*, 17 IFAR REP., July-Aug. 1996, at 3, 3–4. No court order is published. *See* Docket, *United States v. A Roman Marble Torso*, No. 1:96-cv-02929 (S.D.N.Y. July 9, 1996).

22. For example, the House of Lords has held that illegal export of a Maori carving is insufficient to recognize New Zealand’s claim of ownership over the item sufficient to entitle New Zealand to a judgment for its return. *Attorney Gen. of N.Z. v. Ortiz*, [1984] 1 A.C. 1 (H.L. 1983). The court held that under the applicable statute New Zealand would have an ownership interest in the carving only when New Zealand’s customs or police seized an article, and that mere illegal export did not create a possessory interest. *Id.* at 19. In a recent case, the English Court of Appeals held that illegally exported artifacts were to be returned to Iran. *See* *Iran v. Barakat Galleries* [2007] EWCA Civ. 1374 (A.C.), ¶¶ 6, 165. The court acknowledged that claims to enforce public laws of a foreign country or provisions that were penal would not be upheld. *See id.* ¶ 96. Nonetheless, the court held that Iran enjoyed both title and an immediate right to possession of the antiquities under Iranian law, that the applicable provisions were not penal, and that the claim was patrimonial in nature rather than an enforcement of public law. *Id.* ¶¶ 86, 111, 149; *see also* discussion *infra* note 159.

23. Paul M. Bator stated the rule as follows:

The fundamental general rule is clear: *The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States; illegal export does not itself render the importer (or one who took from him) in any way actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country.*

Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 287 (1982); *see also* JOHN HENRY MERRYMAN, ALBERT E. ELSÉN & STEPHEN K. URICE, *LAW, ETHICS AND THE VISUAL ARTS* 163–69 (5th ed. 2007).

Federal prosecutors have repeatedly asserted that unprovenanced antiquities removed without a valid export license from a foreign nation in violation of that country's patrimony statutes are "stolen" within the meaning of the NSPA.²⁴

Patrimony statutes began to be enacted in the nineteenth century especially in nations that were subject to European imperialist expansion; many others were enacted after the middle of the twentieth century as new nation-states came into being. These enactments may be interpreted not merely as acts of independence but also as assertions of sovereignty in reaction to the prior colonial power structures.²⁵ In virtually all nations with such statutes, enforcement lagged enactment. Enforcement within many nations' own borders has been difficult due to limited resources²⁶ and corruption, which is common.²⁷ Thus, the effectiveness of patrimony statutes in reducing illicit trafficking in antiquities has been minimal.²⁸

Patrimony statutes typically address one or more of three distinct issues: regulation of archaeological activity, ownership of antiquities, and export of cultural property including antiquities.²⁹ The latter two are relevant here.³⁰

24. For examples of such prosecutions, see note 89, *infra*.

25. See *infra* note 29.

26. Many source nations are economically weak. Some—for example, Italy—are not: Italy has the world's seventh largest gross domestic product, see The World Bank, Gross Domestic Product 2008, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (last visited Jan. 22, 2010), but devotes just 0.28 percent of its budget to all of its cultural heritage expenditures, including cultural property protection. Elisabetta Povoledo, *Wanted: A Healthy Cash Infusion for Italy's Starved Cultural Institutions*, N.Y. TIMES, Sept. 4, 2008, at E1.

27. For example, in a case discussed later in this article, the court found that the defendant's partners in an illicit antiquities-trafficking scheme (Parry and Farag) had bribed Egyptian antiquities police officers:

In 1992, Parry and Farag learned that someone had reported them to the Egyptian authorities for dealing in antiquities. Due in part to the assistance of Farag's father, who was a powerful Egyptian government official, Parry and Farag were able to get their names removed from police records by paying a bribe to certain corrupt members of the Egyptian antiquities police. These same corrupt police officers then entered into a deal with Parry and Farag, offering them a variety of antiquities in police possession in exchange for Parry and Farag paying off some debts owed by the police officers. Parry chose three items from the "bran tub" full of items offered; he later sent those items to Schultz. Parry informed Schultz of how he had obtained the items. One of the items was marked with an Egyptian government registry number, which Parry succeeded in partially obliterating.

United States v. Schultz, 333 F.3d 393, 397 (2d Cir. 2003) (footnote omitted).

An earlier case, *United States v. Hollinshead*, appears to be the first application of the NSPA to a case involving an antiquity exported without an export license from a source nation that had enacted a vesting statute. There, the court noted that, at the time the antiquity was packed for shipment, not only was the convicted defendant present but "[a]lso present were some Guatemalan officers, who departed after receiving bribes." *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974).

28. As a leading archaeologist recently put it: "It is a melancholy observation that, although the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* was adopted as long ago as 1970, the destruction of archaeological sites through looting has increased rather than diminished in the thirty succeeding years." Colin Renfrew, *Foreword to TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE*, at xi (Neil Brodie et al. eds., 2001).

29. The first effort to provide a comprehensive compilation of international cultural heritage laws is BONNIE BURNHAM, *THE PROTECTION OF CULTURAL PROPERTY, HANDBOOK OF NATIONAL LEGISLATIONS* (1974). The next collection, prepared for and published by UNESCO, limited itself to export laws. LYNDEL V. PROTT & PATRICK J. O'KEEFE, *HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY* (1988). As with the Burnham compilation, Prott & O'Keefe's provides only summaries of law and not full text. Prott and O'Keefe's work was updated by the International Foundation for Art Research (IFAR) in 2000 and 2004 (copy of the 2000 update on file with author); for the 2004 update, see IFAR, *INTERNATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY*. UNESCO provides a forum for its member states to post cultural heritage laws. See United Nations Educational, Scientific, and

Ownership provisions vary substantially in reach and kind. These “vesting” statutes may apply to undiscovered antiquities solely,³¹ both discovered and undiscovered antiquities,³² or a mixture of antiquities and other cultural property, typically immovable monuments.³³ Under these laws, title usually vests at the time of enactment,³⁴ albeit that standard is not universal.³⁵ The purpose of vesting statutes is to make the nation the true owner of antiquities within the statute’s ambit without requiring the nation to reduce the antiquities to possession.³⁶

Export provisions, on the other hand, do not create property rights but, instead, impose a regulatory scheme providing the terms, conditions, and administrative processes for the legal removal of an antiquity (and other forms of cultural property) from a nation’s borders. These laws generally are of two types: a blanket prohibition on export (i.e., an embargo) or a licensing mechanism providing for export according to statutory provisions or administrative regulations.³⁷

Cultural Organization, UNESCO Database of National Cultural Heritage Laws, <http://www.unesco.org/culture/natlaws/index.php?&lng=en> (last visited Mar. 8, 2010). Most of these statutes are provided in the language in which they were written; English translations, when available, vary substantially in quality. IFAR has recently created on its web site a section entitled “International Cultural Property Ownership & Export Legislation” containing what is now the most accessible and comprehensive listing of these materials. See IFAR, International Cultural Property Ownership & Export Legislation, <http://ifar.org/icpoel.php> (last visited Mar. 8, 2010).

30. Some are omnibus statutes covering all three issues. For example, a recent Cambodian law states its purpose as follows: “The purpose of this law is to protect national cultural heritage and cultural property in general against illegal destruction, modification, alteration, excavation, alienation, exportation or importation.” Law on the Protection of Cultural Heritage, *available at* http://www.autoriteapsara.org/en/apsara/about_apsara/legal_texts/decreee4_text.html (last visited Mar. 8, 2010).

31. See, e.g., Peru Law No. 28296 of 2004 (General Law of the Cultural Patrimony of the Nation), *available at* [http://www.ifar.org/upload/PDFLink48976acc342e0WMK%20-%20Peru%20-%20Law%20No.%2028296%20of%202004.%20General%20Law%20of%20Cult.%20Pat.%20\(unofficial%20English\).pdf](http://www.ifar.org/upload/PDFLink48976acc342e0WMK%20-%20Peru%20-%20Law%20No.%2028296%20of%202004.%20General%20Law%20of%20Cult.%20Pat.%20(unofficial%20English).pdf) (last visited Mar. 8, 2010). The Peruvian law stipulates that undiscovered property shall be included in the “Cultural Patrimony of the Nation,” which is owned “exclusively by the state.” *Id.* at ch. II, art. 5. “Discovered or known” archaeological property that was owned privately before the enactment of the vesting statute may, however, remain private. *Id.*

32. See, e.g., Mexico General Law on National Assets of 2004, *available at* [http://www.ifar.org/upload/PDFLink48ab24588867aWMK-%20Mexico%20-%20General%20Law%20on%20National%20Assets%20of%202004%20\(unofficial%20English\).pdf](http://www.ifar.org/upload/PDFLink48ab24588867aWMK-%20Mexico%20-%20General%20Law%20on%20National%20Assets%20of%202004%20(unofficial%20English).pdf) (last visited Mar. 8, 2010); see also *United States v. McClain (McClain II)*, 593 F.2d. 658, 670 (5th Cir. 1979) (“Mexico has considered itself the owner of all pre-Columbian artifacts for almost 100 years.” (emphasis added)).

33. See, e.g., Protection of the Archaeological and Paleontological Heritage, Argentina Law No. 25743, June 25, 2003, *available at* <http://www.ifar.org/upload/PDFLink499aec830b234Act%20No.%2025743%20Protection%20of%20the%20Archaeological%20and%20Paleontological%20Heritage.pdf> (last visited Mar. 8, 2010). The act construes “archaeological heritage” to include any “movable [or] immovable [piece of] property or trace[] of any nature whether on or below the surface of the earth or under the Nation’s territorial waters which may provide information on the sociocultural groups that inhabited the country from pre-Columbian to recent historical times.” *Id.* § 2. Along with antiquities, then, the act vests monuments in the state. Specific provisions even call, e.g., for certain monuments of the Autonomous City of Buenos Aires to be vested in either the city, provincial, or national government. *Id.* § 30.

34. See, e.g., Egypt Law 117, art. 8, *available at* <http://ifar.org/upload/PDFLink4897669e0f11dWMK%20-%20Egypt%20-%20Law%20No.%20117.pdf> (last visited Mar. 8, 2010) (providing an exception for antiquities held privately prior to the statute’s enactment).

35. See, e.g., *United States v. An Antique Platter of Gold (Steinhardt)*, 991 F. Supp. 222, 227 n.25 (S.D.N.Y. 1997) (wherein an Italian law expert testified, and the court agreed, that Italy’s Law No. 1089—a vesting statute enacted in 1939—was meant to be retroactive to 1902, meaning the government possesses ownership rights in any antiquity for which no valid title predating 1902 exists).

36. It is this principle—that legislation alone can vest title in a government—that is at the heart of the *McClain* Doctrine. See note 40, *infra*.

37. See Bator, *supra* note 23, at 286 (“Most nations regulate the export of works of art . . . [this] regulation takes a variety of forms and is widely divergent in effectiveness. Some countries simply prohibit the

The distinction between the two is significant. If a foreign patrimony statute is interpreted merely as regulatory, as an export restriction, it falls within the general rule: a violation of such a statute would not create an actionable offense under U.S. law. If a foreign patrimony statute is interpreted as creating ownership interests in the foreign nation, a violation of export regulations could transform illegal export into theft, an actionable offense under U.S. law.³⁸

C. Foreign Vesting Statutes and the U.S. National Stolen Property Act

In 1977, U.S. prosecutors prevailed in characterizing as stolen, for purposes of a criminal prosecution under the NSPA, unprovenanced antiquities exported without a license from a foreign nation after that nation had enacted a vesting statute. In *United States v. McClain (McClain I)*, a case involving materials removed from Mexico, the court determined that “illegal exportation [following enactment of a vesting statute] constitutes a sufficient act of conversion to be deemed a theft.”³⁹ This “*McClain Doctrine*”⁴⁰ can be expressed as follows:

(ENACTMENT OF FOREIGN NATION VESTING STATUTE) + (ILLEGAL EXPORT) = STOLEN.

The *McClain Doctrine* led to substantial debate and criticism. Although the term “stolen” had previously been interpreted broadly for purposes of applying the NSPA,⁴¹ recognition of Mexico’s claim of ownership of antiquities that it never

export of all or some categories of art treasures. In addition, many countries require that a license be obtained before some or all works of art are exported. Such a licensing scheme can itself be administered as the equivalent of an embargo or can operate as a genuine screening device.”). For a succinct analysis of various export control models, see *id.* at 313–17.

38. See discussion *infra* Part III.B.2.

39. *United States v. McClain (McClain I)*, 545 F.2d 988, 1003 n.33 (5th Cir. 1977). For a critique of this position, see Bator, *supra* note 23, at 350–54. *McClain* is discussed in detail in Part III.B.1 below.

40. The first use of the term “*McClain Doctrine*” appears to be Frederic J. Truslow, *Peru’s Recovery of Cultural Patrimony*, 15 N.Y.U. J. INT’L L. & POL. 839, 854 n.79 (1983); however, the first discussion of the case appeared shortly after *McClain I*: S. David Schiller, *Recent Decision*, 17 VA. J. INT’L L. 793 (1977). The *McClain* cases have been the subject of substantial and often repetitive scholarly study: nearly 150 articles are cited in Lexis and Westlaw annotations.

41. For example, in *United States v. Turley*, the Supreme Court held that the term “stolen” included “all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft [would] constitute[] common-law larceny.” 352 U.S. 407, 417 (1957). The broad definition given to “stolen” in *Turley* became an issue in *United States v. Long Cove*, 582 F.2d 159 (2d Cir. 1978). See discussion *infra* Part III.B.3. In that case, the Second Circuit rejected the government’s assertion that claims taken in violation of a New York state environmental law were stolen for purposes of a prosecution pursuant to the NSPA, *Long Cove*, 582 F.2d at 165, despite the law’s clearly stated assertion that “The State of New York owns all . . . crustacea . . . in the state. . . .” *Id.* at 164. In applying *Turley*, the court in *Long Cove* reasoned that

In *Turley* the Court defined the word to include “all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny.” The Court, in a footnote, explained that the term “felonious” was “used in the sense of having criminal intent rather than with reference to any distinction between felonies and misdemeanors.” *Turley* had obtained possession of an automobile lawfully from its owner and had subsequently converted it to his own use. At common law, he would have been guilty not of larceny, but of embezzlement. Thus, the Court was making it clear that the definition of “stolen” was sufficiently broad to abolish the archaic distinctions between larceny by trespass, larceny by trick, embezzlement and obtaining property by false pretenses.

Id. at 163 (citations omitted).

possessed, nor knew to exist, and that it might never discover, seemed to some an unjustified expansion of the term.⁴² The next test of the *McClain* Doctrine in a criminal prosecution under the NSPA came twenty-six years later in *United States v. Schultz*.⁴³

After the decisions in *McClain I* and *II*, but before the prosecution in *Schultz*, Congress amended the first paragraph of 18 U.S.C. § 2315 in two significant ways. First, Congress added *possession* as a crime; the statute previously applied only to receipt, concealment, storing, bartering, selling, or disposing of stolen property. Second, Congress replaced the NSPA's interstate commerce requirement with a simpler, bright-line rule: the statute now applied to goods that "crossed a State or United States boundary after being stolen. . . ."⁴⁴ The impact of these amendments is discussed in Part III.B below.

In *Schultz*, a case involving Egyptian antiquities, the Second Circuit promulgated a two-prong test for determining whether an unprovenanced antiquity is stolen for purposes of the NSPA. The court held that U.S. law will treat as stolen property that which is taken "from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law."⁴⁵ The court found that Egypt had validly enacted a statute vesting title in the nation to its antiquities and asserted its rights as owner by actively enforcing the statute within its own borders against Egyptian citizens and foreign nationals by a large, well-organized, antiquities police force.⁴⁶ The "*Schultz* Doctrine" can be expressed as follows:

(ENACTMENT OF FOREIGN NATION VESTING STATUTE + FOREIGN NATION'S ASSERTION OF ACTUAL OWNERSHIP) + (ILLEGAL EXPORT) = STOLEN.

In Part III.B, this article explores the *McClain* and *Schultz* Doctrines in greater depth and explains how application of either doctrine in the context of prosecutions under the amended NSPA would inevitably undermine U.S. policy. Prior to that discussion, it is first necessary to provide background on the NSPA and Congress's 1985 amendments to the statute.

III. THE NATIONAL STOLEN PROPERTY ACT AND ANTIQUITIES

A. *The National Stolen Property Act*

The search warrants served on the Bowers and Pacific Asia museums in January, 2008, assert that those museums possess stolen Thai antiquities in violation of

42. For a thorough review of criticism of the *McClain* Doctrine, see Adam Goldberg, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1042–60 (2006).

43. 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003).

44. 18 U.S.C. § 2315 (2006).

45. *Schultz*, 333 F.3d at 416 (emphasis added).

46. *Id.* at 401–02; *cf.* Gov't of Peru v. Johnson, 720 F. Supp. 810, 814–15 (C.D. Cal. 1989), *aff'd sub nom.* Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991), available at No. 90-5521, 1991 WL 80599 (May 15, 1991) (finding, in a civil replevin action, that Peru was unable to establish ownership of the unprovenanced antiquities because it failed to demonstrate that the antiquities were excavated in modern day Peru; and failing to establish Peru was owner of the antiquities pursuant to its patrimony laws at time of exportation of the works).

18 U.S.C. § 2315,⁴⁷ which provides in pertinent part: “Whoever receives [or] possesses any goods . . . of the value of \$5,000 or more⁴⁸ . . . which have crossed a State or United States boundary after being stolen,⁴⁹ unlawfully converted, or taken, knowing⁵⁰ the same to have been stolen, unlawfully converted, or taken. . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.”⁵¹ The statute contains no requirement of unlawful or fraudulent intent.⁵² To prevail in a criminal prosecution for possession under 18 U.S.C. § 2315, the United States must prove its case beyond a reasonable doubt.⁵³ Importantly, a violation of the NSPA permits the United States to pursue civil seizure and forfeiture proceedings against the goods involved.⁵⁴

47. The NSPA is codified at 18 U.S.C. §§ 2311–2318 (2006). Section 2311 provides definitions for purposes of the Act. Two provisions of the Act—§§ 2314–2315—are related and often used together in cases involving antiquities. The first criminalizes transportation of stolen goods; the second, receipt and possession of them. The companion operative section of the NSPA that has been applied in other cases involving antiquities is § 2314 (Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting) and reads in pertinent part as follows:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . .

. . . .
Shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2314. The other provisions—§§ 2312–2313 and 2316–2318—are not relevant to this discussion.

48. The NSPA defines value to mean “the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.” 18 U.S.C. § 2311. The Supreme Court has held that the “value” of objects involved in a series of related illegal transactions charged under the NSPA, even if occurring at different times, can be aggregated. *See Schaffer v. United States*, 362 U.S. 511, 512–14 (1960). For an extensive discussion of “value” and aggregation under the NSPA, see Margaret Shulenberg, Annotation, *Determination of Value of Stolen Property Within Meaning of Provision of 18 U.S.C.A. § 2314 Proscribing Interstate or Foreign Transportation of Stolen Goods, Wares, Merchandise, Securities, or Money, of Value of \$5,000 or More*, 15 A.L.R. FED. 336, § 6 (1973).

49. The statutory terms at issue here, i.e., “stolen, converted or taken [by fraud],” traditionally have been given broad scope by the courts. For example, in *United States v. Turley*, the Supreme Court held that the term “stolen” included all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether the theft would constitute larceny at common law. *See* 352 U.S. 407, 417 (1957). The significance of this element in antiquities cases is discussed Part III.B, *infra*.

50. To succeed in a prosecution under 18 U.S.C. § 2315, the United States must establish that the defendant knew that the goods were stolen. *See, e.g., United States v. Tannuzzo*, 174 F.2d 177, 180 (2d Cir. 1949). For a discussion of this scienter requirement, see George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT’L L. & COM. 77, 99–101 (1978) and sources cited therein. Conscious avoidance of information that would permit the defendant to know that the goods are stolen constitutes actual knowledge for purposes of a prosecution under the NSPA. *See Schultz*, 333 F.2d at 412–13. The author has not located an extended scholarly discussion of the NSPA’s scienter requirement. However, the scienter requirement in an analogous federal criminal statute is carefully discussed by D. Randall Johnson, *The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957*, 34 WM. & MARY L. REV. 1291, 1310–20 (1993).

51. 18 U.S.C. § 2315 (emphasis added).

52. *See Gendron v. United States*, 295 F.2d 897, 901 (8th Cir. 1961) (holding that 18 U.S.C. § 2315 contains no specific requirement of unlawful or fraudulent intent, and that an inference is warranted that Congress did so deliberately given that Congress included such a requirement in 18 U.S.C. § 2314).

53. *See In re Winship*, 397 U.S. 358, 3664 (1970) (holding that “the Due Process Clause protects defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

54. 18 U.S.C. § 981(a) and (c) provide for civil forfeiture of personal property constituting or traceable to a violation of illicit activities described in 18 U.S.C. § 1956(c)(7). That statute includes any offense provided for in 18 U.S.C. § 1961(1), which includes violations of the NSPA. An advantage to bringing a civil forfeiture *in rem* action is the lower burden of proof: the United States must prove that a crime has occurred under the lower civil standard (preponderance of the evidence) rather than the more stringent criminal standard (be-

1. Origins of the NSPA: From Cars to Goods

The NSPA has a long and interesting history. In 1919, Congress enacted its predecessor, the National Motor Vehicle Theft Act, commonly known as the Dyer Act, after its sponsor, Representative L.C. Dyer of Missouri.⁵⁵ The legislation responded to a challenge presented by a technological innovation: “[The automobile] was a valuable, salable article which itself supplied the means for speedy escape [across a state border].”⁵⁶ Through the federal government’s jurisdiction over interstate commerce and the National Motor Vehicle Theft Act, Congress thought it met this new challenge.⁵⁷ In 1934, Congress enacted the NSPA, expanding the scope of the predecessor statute to include other forms of property, ranging from counterfeited securities to “goods.”⁵⁸ As the Supreme Court stated, “Congress. . . [came] to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful get away and thus make the state’s detecting and punitive processes impotent.”⁵⁹ A more colorful explanation is provided in the Congressional Record:

[A]mong the so-called “antigangster and antiracketeering bills” reported favorably from the Committee on the Judiciary is a bill to extend the provisions of the National Motor Vehicle Theft Act to other stolen property. I ask unanimous consent that the bill be now considered; the Senator who once objected has withdrawn his objection. Gangsters who now convey stolen property, except vehicles, across the State line, with that immemorial gesture of derision, thumb their nose at the officers. This bill extends the provisions of the National Motor Vehicle Theft Act to other stolen property described in the bill.⁶⁰

The new language in the NSPA did not include a definition of “goods.”⁶¹ Although no court has interpreted “goods” in a prosecution under 18 U.S.C. § 2315, courts have considered the appropriate definition in litigation under the other operative section of the NSPA, 18 U.S.C. § 2314. In a case holding that intangible property was not within the meaning of “goods” for purposes of 18 U.S.C. § 2314,

yond a reasonable doubt). See Stefan D. Cassella, *Using the Forfeiture Laws to Protect Archaeological Resources*, 41 IDAHO L. REV. 129, 132–33 (2004); see also Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT’L L. 1199, 1222–23 (2005). For examples of civil forfeiture actions involving unprovenanced antiquities, see *infra* note 89.

55. See *United States v. Turley*, 352 U.S. 407, 408, 413–17 (1957). A comprehensive account of the NSPA’s legislative history has yet to be written.

56. *Id.* at 413.

57. See *id.* at 414.

58. National Stolen Property Act, Pub. L. No. 73-246, 48 Stat. 794 (1934) (codified at 18 U.S.C. §§ 2314–2315 (2006)).

59. *United States v. Sheridan*, 329 U.S. 379, 384 (1946). For further observations on Congress’s intent in enacting the NSPA, see *United States v. Patten*, 345 F. Supp. 967, 968 (D.P.R. 1972) (reiterating and citing *Sheridan*) and *Cooper v. North Jersey Trust Co.*, 226 F. Supp. 972, 979 (S.D.N.Y. 1964) (“The legislative history of [18 U.S.C. § 2314] indicates that it was designed to implement federal-state cooperation in apprehending and punishing criminals.”). The legislative history of the NSPA is discussed in part in Nowell, *supra* note 50, at 89–91, and Graham Green, Recent Development, *Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases*, 44 HARV. J. ON LEGIS. 251 (2007).

60. 78 CONG. REC. 6981 (1934) (statement of Sen. Ashurst).

61. 18 U.S.C. § 2311.

the Fifth Circuit stated that “[t]he Third Circuit case of *United States v. Seagraves* . . . provides the most recognized definition of section 2314’s phrase ‘goods, wares, [or] merchandise.’”⁶² In *Seagraves*, a case involving geophysical maps, the court developed a two-part definition: “goods” must be (1) personal property or chattels that (2) are ordinarily a subject of commerce.⁶³ The *Seagraves* court observed: “Since the maps were shown without doubt to be subjects of commerce, albeit of a specialized nature, they are goods or wares or merchandise within the terms of the [NSPA].”⁶⁴

2. The 1986 Amendments: Possession and Interstate Commerce

In 1986 Congress amended the first paragraph of 18 U.S.C. § 2315, adding “possession” as a crime and substituting for the interstate commerce requirement the statute’s current language: “[goods] which have crossed a State or United States boundary after being stolen.”⁶⁵ The legislative history indicates that Congress’s primary purpose in making these changes was two-fold: to address a jurisdictional problem and to eliminate defenses predicated on stolen goods having left interstate commerce—either by “coming to rest” or as a result of the passage of time.⁶⁶

a. Possession

The first of these changes was the addition of possession to § 2315. Public Law 99-646 substituted the language “receives, possesses, conceals” for the statute’s former language “receives, conceals” in the first and second paragraphs of 18 U.S.C. § 2315. Congress’s stated purpose for adding “possession” was jurisdictional:

[The addition of] a possession offense [is intended] so that the section will reach persons who knowingly possess stolen property that has moved in interstate or foreign commerce as well as those who receive, conceal, or store such property. While obviously a person who possesses such property must have received it, a successful prosecution of a receipt-of-stolen-property case requires proof that the person received the property in the district of prosecution. The addition of a possession offense eliminates the requirement that the government prove that the defendant first received the stolen property in a particular district, an element which is sometimes difficult to prove and which has no bearing on the defendant’s criminal culpability.⁶⁷

No case directly defines “possession” for purposes of the NSPA.⁶⁸

62. *United States v. Smith*, 686 F.2d 234, 240-41 (5th Cir. 1982) (holding that copyright interests in works recorded on stolen videocassette tapes were not goods under § 2314).

63. *United States v. Seagraves*, 265 F.2d 876, 880 (3d Cir. 1959).

64. *Id.*

65. Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 76, 100 Stat 3592, 3618 (1986) (emphasis added).

66. For a detailed discussion of the legislative history, see *United States v. Trupin*, 117 F.3d 678, 683-84 (2d Cir. 1997).

67. 131 CONG. REC. 14,183 (1985) (internal citation omitted).

68. However, in a case involving unlawful possession of a firearm under 18 U.S.C. § 922, the Seventh Circuit defined the term as follows: “Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.” *United States v. Hernandez*, 39 F.

b. Bright-Line Test Replaces Interstate Commerce

By inserting a new, bright-line, test of goods having crossed a border or boundary, Congress intended to remove a defense that the stolen goods were no longer in interstate commerce.⁶⁹ Prior to 1986, the first paragraph of 18 U.S.C. § 2315 explicitly required a finding of interstate commerce: the paragraph applied only to goods that were “moving as, or which are a part of, or which constitute interstate or foreign commerce.” In 1986, Congress substituted for the interstate or foreign commerce requirement the current language: “[goods] which have crossed a State or United States boundary after being stolen. . . .”⁷⁰ Legislative history indicates that Congress’s primary purpose in making this change was to eliminate a defense predicated on the stolen goods having left interstate commerce—either by “coming to rest” or as a result of the passage of time.⁷¹ Congress explained its legislative purpose as follows:

The second change, which is related to the first [adding “possession” to the statute], eliminates the present requirement that the property still be considered as moving in interstate or foreign commerce at the time the defendant receives, conceals, or disposes of it. Although the courts have construed the “in commerce” requirement broadly, this requirement is also unnecessarily burdensome and is unrelated to the blameworthiness of the defendant’s conduct.⁷²

App’x 365, 370–71 (7th Cir. 2002) (quoting pattern jury instruction and noting its similarity to previously upheld definitions of possession). *Black’s Law Dictionary* defines possession as “the fact of having or holding property in one’s power; the exercise of dominion over property” and as “the right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object.” *BLACK’S LAW DICTIONARY* 1281 (9th ed. 2009).

69. Whether an object was or remained in interstate commerce sufficiently to satisfy this element of an alleged violation of the NSPA was a question of fact to be determined according to the circumstances. *United States v. Thies*, 569 F.2d 1268, 1273 (3d Cir. 1978). Courts could presume interstate commerce sufficient to convict when a defendant, in one state, was in possession of property recently stolen in another. *United States v. Kidding*, 560 F.2d 1303, 1309 (7th Cir. 1977) (citing *United States v. Pichany*, 490 F.2d 1073, 1078 (7th Cir. 1973)). Once having entered interstate commerce, however, goods could lose their “in commerce” status by passage of time or by a finding that the goods had come to rest at their final destination. Thus, in *Thies*, a nine-year period between the conversion of bonds and their reappearance in a sale, which formed the basis for a prosecution, was held too long a time for the bonds to be characterized as being in interstate commerce. *See* 569 F.2d at 1273. In *United States v. Tobin*, the court found that “a jury may conclude that an item once moving in interstate commerce has ‘come to rest’ and lost its interstate character so that subsequent attempts to receive, conceal, sell or dispose of it will not violate 18 U.S.C. § 2315.” 576 F.2d 687, 692 (5th Cir. 1978). However, it had been held that merely reaching another state did not mean that a work had come to rest; thus, a jury could find that goods remained in interstate commerce if their movement within the state to which they were transported was a continuation of the movement that began out of state. *See id.* The determination whether an object had reached its final destination (as opposed to its continuation in a broader scheme of interstate commerce) was a question of fact. *See Thies*, 569 F.2d at 1273. In *United States v. Licavoli*, the court held that “[i]n determining whether the interstate movement of a stolen article has come to an end, the jury may consider the nature of the article and the manner in which it must be disposed of.” 604 F.2d 613, 625 (9th Cir. 1979) (citing *Lee v. United States*, 363 F.2d 469, 475 (8th Cir. 1966)). The conclusion of the interstate trip did not necessarily terminate interstate commerce; whether interstate commerce had terminated was a question of fact requiring consideration of the circumstances surrounding the transport, including the transport’s relation to a greater scheme or fraud and the time period after theft or taking. *See Thies*, 569 F.2d at 1272.

70. Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 76, 100 Stat 3592, 3618 (1986) (emphasis added).

71. *See Trupin*, 117 F.3d at 683–84.

72. 131 CONG. REC. 14,183–84 (1985) (citation omitted).

Two years later, Congress reversed course for purposes of the *second* paragraph of the statute, reinserting the explicit requirement of “interstate or foreign commerce,” but did *not* do so in the first paragraph.⁷³

These changes in the statutory language lead to unforeseen consequences in prosecutions based on the *McClain* Doctrine. Those consequences develop fundamentally from the nature of possession as a continuing crime.⁷⁴ Before long, the courts had to face those consequences in *United States v. Trupin*,⁷⁵ a criminal prosecution of a defendant who possessed a stolen work of art prior to, and after, these amendments.

3. The Perils of Possession: *United States v. Trupin*

In approximately 1978, Barry Trupin purchased a Marc Chagall painting in New York City. The painting had been stolen in 1970 from a residence in Baltimore, Maryland.⁷⁶ Trupin kept the painting on his yacht and then at his home in Connecticut.⁷⁷ In 1980, he moved the painting to New York, where, in 1990, he attempted to sell it.⁷⁸ The prospective buyer learned that the painting had been stolen and contacted the Federal Bureau of Investigation, which conducted a sting operation leading to Trupin’s arrest.⁷⁹ At trial, the jury determined that Trupin knew that the Chagall was stolen.⁸⁰ On appeal from his conviction, Trupin asserted two arguments relevant here: first, that the amended language of the NSPA exceeded Congress’s authority under the Commerce Clause and, second, that the amendment functioned as an unconstitutional *ex post facto* law.⁸¹ The Second Circuit found no merit in either argument.⁸²

First, the court found that the amended statute did not violate the Commerce Clause of the Constitution and was well within the ambit of *Lopez*.⁸³ In its discussion, the court presciently recognized the significance of the change: that the replacement of the interstate commerce requirement with a requirement that the goods had crossed a U.S. or state border “might reach some conduct that was beyond the scope of the old law, e.g., stolen goods that have come to rest in their destination state.”⁸⁴ Second, the court rejected Trupin’s *ex post facto* argument, finding that Trupin had been convicted not for criminal activities that occurred prior to the statutory amendments but instead for “his continuing offense that oc-

73. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7048, 7057(b), 102 Stat. 4181, 4401-02 (1988); see also *Trupin*, 117 F.3d at 683.

74. For a discussion, see Annotation, *Possession of Stolen Property as Continuing Offense*, 24 A.L.R. 5th 132 (1994).

75. 117 F.3d 678 (2d Cir. 1997).

76. *See id.* at 680.

77. *See id.* at 681.

78. *See id.*

79. *See id.* The district court opinion contains a more detailed account of the facts. *See United States v. Trupin*, No. 95 Cr. 450, 1996 WL 50237, at *1 (S.D.N.Y. Feb. 8, 1996).

80. *See Trupin*, 117 F.3d at 681. From the facts it is clear that Trupin was in possession of the Chagall and that the painting had the requisite value for a prosecution pursuant to 18 U.S.C. § 2315 and had crossed state boundaries. *See id.*

81. *See id.* at 680.

82. *See id.*

83. *Id.* at 684.

84. *Id.*

curred after the date of the amendment of the statute.”⁸⁵ That is, Trupin was convicted for continuing to possess a work he knew to be stolen after Congress made possession a crime under the NSPA: “the relevant conduct in this case was not the receipt of the painting . . . but the continued possession of it after the 1986 amendment.”⁸⁶ As to what Trupin might have done to avoid criminal liability, the court commented:

Trupin could have avoided conviction for possession by ceasing his possession within a reasonable time after the 1986 amendment. He could have returned the painting to its owners anonymously or through his attorney, or delivered it to a legitimate custodian of lost and stolen art.⁸⁷ His failure to take any such remedial steps after the change in the federal law subjects him to conviction without implicating the *ex post facto* clause.⁸⁸

The impact of *Trupin* on cases involving unprovenanced antiquities is discussed in Part III.B below.

B. Application of the National Stolen Property Act in Antiquities Cases

Although cases seeking to recover antiquities from U.S. possessors have involved civil actions and criminal prosecutions in the context of both documented and unprovenanced antiquities,⁸⁹ this discussion is limited to U.S. criminal prosecu-

85. *Id.* at 686.

86. *Id.*

87. The court’s suggestions of what action Trupin might have taken may strike one as odd: the author is not aware of any “legitimate custodian of lost and stolen art.” However, the court has somewhat painted itself into a corner by relying on *Samuels v. McCurdy*, 267 U.S. 188 (1925): “In *Samuels v. McCurdy*, the Supreme Court held that the Georgia prohibition statutes making it illegal to ‘control or possess’ liquor could properly be applied to a defendant who had lawfully acquired the liquor before the effective date of the statute, and continued the possession for several years after the change in the law.” *Trupin*, 117 F.3d at 686 (citations omitted). The court fails to distinguish the ease of dispossessing oneself of liquor—pouring it down the drain—and the difficulty of dispossessing oneself of cultural property: the destruction of the latter would diminish society as a whole.

88. *Trupin*, 117 F.3d at 686–87 (citations and footnote omitted). The criminality of continued possession following a change in legislation has been found to be subject to a reasonable grace period to permit compliance. See *Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 72–74 (1915). However, the court found that “[b]ecause Trupin took no step to comply with the amended federal law, we need not decide what length of time would be reasonable as a grace period to permit compliance.” *Trupin*, 117 F.3d at 686 n.4. In *Godwin v. United States*, 687 F.2d 585, 588 (2d Cir. 1982), a case involving stolen art, the court noted: “We think there can be no doubt that the federal offense of receiving stolen property defined by § 2315 incorporates the common law exception for possession with the purpose of restoring stolen property to the owner,” which presumably is how the intermediaries that the *Trupin* court recommends would avoid liability while in possession of the stolen painting.

89. The following are examples of cases in each of these categories:

(1) *Civil actions, foreign nation plaintiffs, documented antiquities: Guatemala v. Hollinshead*, No. 6771 (Cal. Super. Ct. filed Dec. 29, 1972), was a Guatemalan action for possession or, in the alternative, fair market value, of a pre-Columbian stela; compensatory damages; exemplary damages; and attorneys’ fees. A brief description along with the complaint, answer, and cross complaint are reprinted in FRANKLIN FELDMAN & STEPHEN E. WEIL, *ART WORKS: LAW, POLICY, PRACTICE* 597–609 (1974). In 1974, the government of India brought suit to recover the possession of an ancient bronze image known as the Swapuram Natraja. The case is reported to have been settled. See LEONARD DUBOFF, *THE DESKBOOK OF ART LAW* 109–114 (1977) (discussing *India v. The Norton Simon Foundation*, No. CV 74-3581 RJK, (C.D. Cal. 1976)).

(2) *Civil actions, foreign nation plaintiffs, unprovenanced antiquities: Republic of Turkey v. Metro. Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990), involved an action by a foreign

nation to recover antiquities. The defendant museum's summary judgment motion was denied because material issues of fact existed as to whether the museum acted in bad faith in exporting artifacts in violation of Turkish law. In *Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566 (App. Div. 1990), the court upheld a preliminary injunction forbidding the auction of an unprovenanced group of ancient Roman silver vessels to which both Lebanon and Yugoslavia claimed ownership. *Peru v. Johnson* was a civil replevin action. Gov't of Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd sub nom.* Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991), available at No. 90-5521, 1991 WL 80599 (May 15, 1991). Peru was found to be unable to establish ownership of the unprovenanced antiquities for failing to demonstrate that the antiquities were excavated in modern day Peru and failing to establish that Peru owned the antiquities pursuant to its patrimony laws at the time the works were exported. Finally, in *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass. 1992), the defendants' motion to dismiss was denied in an action by Turkey that alleged that defendants knowingly purchased unprovenanced antiquities illegally exported in contravention of a Turkish vesting statute.

(3) *Civil actions, U.S. plaintiff, documented antiquities*: In *United States v. An Antique Platter of Gold*, the court held that a phiale was subject to forfeiture because (1) it was stolen in violation of the NSPA when exported from Italy in violation of Italy's patrimony law of 1939 and (2) material misstatements of fact were made on U.S. Customs declaration forms. *United States v. An Antique Platter of Gold (Steinhardt)*, 991 F. Supp. 222 (S.D.N.Y. 1997), *aff'd on latter grounds only*, 184 F.3d 131, 133 (2d Cir. 1999). *Steinhardt* fits into this category because, under the facts determined by the trial court, the phiale not only was known to be circulating in Italy as early as 1980, but also, and more significantly, the Italian citizen-possessor of the phiale showed it in 1991 to an employee of Italy's Monuments and Fine Arts Bureau in Palermo. *Id.* at 224. Accordingly, as early as 1991, the Italian government was on notice that the phiale existed and was in the private possession of a known art dealer and collector. Notwithstanding this information, Italy took no action to recover the phiale pursuant to its patrimony statute while the phiale was in Italy. *Steinhardt*, 991 F. Supp. at 224.

(4) *Civil actions, U.S. plaintiff, unprovenanced antiquities*: *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993), was an interpleader action in which the court held that a Guatemala patrimony law that vested ownership in Guatemala only at the moment of unlicensed export provided a basis for liability under the NSPA. Similarly, in *United States v. Two Gandharan Stone Sculptures*, No. 86 C 489, 1986 WL 8344 (N.D. Ill. July 18, 1986), another interpleader action, the court held that Pakistan had sufficiently alleged ownership of the unprovenanced antiquities at issue under Pakistani law without having to allege how it acquired title in order to survive a motion to dismiss. *See also* Unsigned Complaint at ¶ 13-14, *United States v. A South Arabian Alabaster Plaque*, No. 1:03-cv-06683-DC (S.D.N.Y. Aug. 28, 2003) (on file with author); Consent Judgment at 2-3, *United States v. One Red-Figure Calyx Krater Signed by Asteas*, No. CV04-2844 (C.D. Cal. Apr. 22, 2004).

(5) *Criminal actions, documented antiquities*: *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), was a conviction for conspiracy to transport a pre-Columbian stela documented as having been in Guatemala.

(6) *Criminal actions, unprovenanced antiquities*: This category includes the *McClain* and *Schultz* cases, discussed in Parts III.B.1 and III.B.2, *infra*. *United States v. McClain (McClain I)*, 545 F.2d 988 (5th Cir. 1977); *United States v. McClain (McClain II)*, 593 F.2d. 658 (5th Cir. 1979); *United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003).

tions pursuant to the NSPA involving unprovenanced antiquities.⁹⁰ *United States v. McClain*⁹¹ and *United States v. Schultz*.⁹²

1. The *McClain* Doctrine

In *United States v. McClain*, the Fifth Circuit acknowledged the landmark nature of its holding in the opening words of its opinion: “Museum directors, art dealers, and innumerable private collectors throughout this country must have been in a state of shock when they read the news—if they did—of the convictions of the five defendants in this case.”⁹³ *United States v. McClain* involved a group of itinerant dealers involved in selling, in the United States, financially unimportant pre-Columbian antiquities from Mexico.⁹⁴ The five defendants triggered their own arrest when, in 1973, they offered to sell pre-Columbian antiquities to Alberto Mejangos, unaware that Mejangos was director of a Mexican government entity, the Mexican Cultural Institute in San Antonio, Texas, and to a Cleveland collector, William Maloof, who became suspicious and contacted the FBI.⁹⁵ The defendants were arrested on March 6, 1974.⁹⁶ At trial, a jury convicted the five defendants of conspiracy to transport, receive, and sell stolen pre-Columbian antiquities (referred to in the opinion as “artifacts”) in interstate commerce, in violation of 18 U.S.C §§ 2314, 2315, and 371, and of receiving, concealing, bartering, and selling the antiquities in violation of 18 U.S.C § 2315.⁹⁷ As noted by the Fifth Circuit:

The legal theory under which the case was tried was that the artifacts were “stolen” only in the sense that Mexico generally has declared itself owner

90. In an earlier criminal prosecution, *United States v. Hollinshead*, involving a *documented* Mayan stela from Guatemala, not unprovenanced antiquities, the Ninth Circuit affirmed the convictions of two defendants on charges that they had conspired to transport stolen property in violation of the NSPA. 495 F.2d 1154 (9th Cir. 1974). At the time of the case, Guatemalan law appears to have permitted private ownership of archaeological materials. See Decreto No. 425 del 19 de Marzo de 1947 (modified by Decreto Ley No. 437, Mar. 24, 1966), available at http://www.ifar.org/icp_legislation.php?docid=1232462587 (last visited Mar. 8, 2010). However, Article 129 of the 1965 Constitution of Guatemala provides that all archaeological relics are property of the Guatemalan government. See Constitution of Guatemala of 1965, available at http://www.ifar.org/icp_legislation.php?docid=1232463274 (last visited Mar. 8, 2010). The Ninth Circuit’s opinion does not indicate the grounds for the district court’s having deemed the stela to be the property of the government of Guatemala. The author has not been able to locate a district court opinion. However, a copy of the United States’ appellate brief indicates that the United States’ expert witness testified and “explained that the legal title for all artifacts and stelae is with the Republic of Guatemala.” Brief of Appellee at 9, *United States v. Hollinshead*, No. 73-2526 (9th Cir. Dec. 20, 1973). The expert witness also testified that Guatemala actively enforced its antiquities laws and had pursued “10 to 20 prosecutions within a ten-year period. . . .” *Id.* at 97–98.

91. *McClain I*, 545 F.2d 988 (5th Cir. 1977); *McClain II*, 593 F.2d. 658 (5th Cir. 1979).

92. *United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff’d*, 333 F.3d 393 (2d Cir. 2003).

93. *McClain I*, 545 F.2d at 991. *McClain* is binding precedent not only in the Fifth, but also in the Eleventh Circuit: cases decided by the former Fifth Circuit prior to October 1, 1981, are binding precedent in the Eleventh Circuit. See *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209–11 (11th Cir. 1981) (en banc).

94. The defendants offered to sell a group of antiquities to an FBI undercover agent in San Antonio, Texas, for \$115,000; defendants were negotiating the sale, to the same agent, of another group of more significant objects in Los Angeles, California, for \$850,000, when they were arrested. See *McClain I*, 545 F.2d at 993. However, that group of objects was in the hands of another person, not one of these defendants. *Id.*

95. *Id.*

96. *McClain II*, 593 F.2d at 660–63. *McClain II* provides a significantly more detailed statement of the facts than *McClain I*.

97. See *id.* at 659.

of all pre-Columbian artifacts found within its borders. Thus, anyone who digs up or finds such an item and deals in it without governmental permission has unlawfully converted the item from its proper owner.⁹⁸

The defendants did not contest allegations that the antiquities had been exported from Mexico without export licenses.⁹⁹ Instead, their defense relied on two other arguments. They first argued that application of the NSPA to cases of mere illegal exportation constituted unwarranted federal enforcement of foreign law.¹⁰⁰ That argument was predicated on the defendants' assertion that the antiquities were not "stolen" because they had not been possessed by the Republic of Mexico (or anyone else).¹⁰¹ They then argued that the trial court erred by instructing the jury that Mexico had invested itself with ownership of all pre-Columbian artifacts since 1897.¹⁰²

The court reduced the first defense to a simple question: "[W]hether this country's own statute, the NSPA, covers property of a very special kind—purportedly government-owned, yet potentially capable of being privately possessed when acquired by purchase or discovery."¹⁰³ The court answered that question in the affirmative, holding that "a declaration of national ownership . . . combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the NSPA into play."¹⁰⁴ The court then analyzed a series of Mexican laws from 1897 until 1972.¹⁰⁵ It found that "[o]nly after the effective date of the 1972 law would the Republic of Mexico necessarily have ownership of the objects . . . involved in this case."¹⁰⁶ Having found that the United States failed to prove that the antiquities had been exported from Mexico after 1972, the court reversed and remanded.¹⁰⁷

At their second trial, four of the five defendants were convicted again.¹⁰⁸ On appeal from that conviction, the Fifth Circuit Court found that the defendants' direct attack on application of the NSPA under these facts was foreclosed by *Mc-*

98. *Id.* at 659.

99. *See McClain I*, 545 F.2d at 993.

100. *Id.* at 994.

101. *See id.*

102. *Id.*

103. *Id.* at 996.

104. *Id.* at 1000–01.

105. *Id.* at 997–1003.

106. *Id.* at 1000.

107. The court summarized its findings as follows:

In order to say whether any of the pre-Columbian movable artifacts were "stolen", it is necessary to know first when that artifact was exported from Mexico. If the exportation occurred after the effective date of the 1972 law, the artifact *may* have been stolen—but only if it were not legitimately in the seller's hands as a result of prior law. . . . If the exportation occurred before 1972, but after the effective date of the 1934 law, it would be necessary to show that the artifact was found on or in an immovable archaeological monument. If the exportation occurred before the effective date of the 1934 law, it could not have been owned by the Mexican government, and illegal exportation would not, therefore, subject the receiver of the article to the strictures of the National Stolen Property Act.

Id. at 1003 (emphasis added).

108. The fifth defendant had been found mentally incompetent to be retried. *United States v. McClain (McClain II)*, 593 F.2d 658, 660 n.2 (5th Cir. 1979).

Clain I.¹⁰⁹ The court reiterated a key determination in *McClain I* when it noted that the defendants had “provoked a square holding that, in addition to the rights of ownership as understood by the common law, the N.S.P.A. also protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government.”¹¹⁰ Nevertheless, the court again reversed the substantive count of a violation of the NSPA (but affirmed the conspiracy count) on grounds that Mexican law had not expressed that government’s ownership “with sufficient clarity to survive translation into terms understandable by and binding upon American citizens.”¹¹¹

McClain I produced a novel application of the NSPA. Relying on precedent giving an expansive scope to the definition of “stolen” for purposes of the statute,¹¹² the court determined that Congress had intended to bring foreign property owners within the NSPA’s protection¹¹³ and that the NSPA could apply to illegal exportation of artifacts declared by a foreign nation to be its property.¹¹⁴ Recognizing the difficulties its new interpretation might engender, *McClain I* emphasized that the NSPA scienter requirement would protect a defendant from both the lack of uniformity of foreign law and the possibility that a reference to foreign law would make the NSPA itself void for vagueness.¹¹⁵ In making these determinations, the court effectively gave birth to the definition of “stolen” described above as

109. *McClain II*, 593 F.2d at 664 (“We view appellants’ first argument [that Congress never intended the NSPA to reach items deemed ‘stolen’ only by reason of a country’s declaration of ownership] as foreclosed by our doctrine of law of the case. Under that doctrine it is our practice to apply a rule of law enunciated by the court to the same issues in subsequent proceedings and appeals in the same case. Unlike the rule of *res judicata*, the doctrine applies only to issues that were decided in the former proceeding but not to questions that might have been decided but were not.”).

110. *Id.* (citing *McClain I*, 545 F.2d at 994–97).

111. As the court put it:

It may well be, as testified so emphatically by most of the Mexican witnesses, that Mexico has considered itself the owner of all pre-Columbian artifacts for almost 100 years. If so, however, it has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens.

Id. at 670. For a discussion of the lack of a comprehensive collection of international cultural property laws, see *supra* note 29.

112. *McClain I*, 545 F.2d at 994–95.

113. *Id.* at 996. The court emphasized that it did not base its conclusion on mere illegal export. *Id.*

114. *Id.* The NSPA makes no reference to foreign law, while other federal statutes do. For example, the Lacey Act makes it unlawful to “import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold . . . in violation of any foreign law. . . .” 16 U.S.C. § 3372(a)(2)(A) (2006). A similar conservation statute criminalizes importing into the United States any marine mammal which was “taken in another country in violation of the law of that country.” *Id.* § 1372(c)(1)(B). In addition, a federal money laundering statute defines the required intent element of the crime as: “kn[owing] the property involved in the transaction represented proceeds from some form . . . of activity that constitutes a felony under State, Federal, or foreign law. . . .” 18 U.S.C. § 1956(c)(1) (2006). For an example of the difficulties of interpreting foreign law, see, for example, *United States v. McNab*, 331 F.3d 1228, 1239–47 (11th Cir. 2003) (holding that a foreign government’s post-conviction repudiation of its own law, which formed the basis of a defendant’s conviction in the United States under the Lacey Act, did not invalidate that conviction) and Doug M. Keller, Comment, *Interpreting Foreign Law Through an Erie Lens: A Critical Look at United States v. McNab*, 40 TEX. INT’L L.J. 157, 164–72 (2004).

Further, an open question remains whether, as a matter of U.S. policy, U.S. courts should give effect to foreign vesting statutes that, if enacted in the United States, could be found to create unconstitutional takings under the Fifth Amendment. For a discussion of the takings doctrine and its applicability to the development of U.S. domestic policies to protect cultural heritage, see Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After Lucas*, 13 Sr. THOMAS L. REV. 65 (2000).

115. *McClain I*, 545 F.2d at 1001 n.30.

follows: (Enactment of Foreign Nation Vesting Statute) + (Illegal Export) = Stolen.

The *McClain* cases left unanswered many important questions: How clear must a foreign nation's vesting statute be to avoid the reversal in *McClain II*? When is a vesting statute an export scheme in disguise, which would not—at least under U.S. law—vest ownership in a foreign nation? If a foreign nation need not reduce an antiquity to possession to demonstrate ownership, must it take any action other than legislative enactment? To what extent is a defendant in a U.S. court assumed to have knowledge of foreign law? Although the *McClain* Doctrine played a role in an important line of cases,¹¹⁶ not until *Schultz* did a circuit court again apply the NSPA to facts involving unprovenanced antiquities in a criminal prosecution.¹¹⁷

2. *United States v. Schultz*¹¹⁸

Whereas the defendants in *McClain* appear to have been a gang of inept criminals, Frederick Schultz was a sophisticated New York art dealer who had served as president of the National Association of Dealers in Ancient, Oriental, and Primitive Art.¹¹⁹ Schultz knew exactly what he was doing.

In the 1990s, Schultz and his partner in crime, Jonathan Tokeley Parry,¹²⁰ a British citizen, smuggled unprovenanced antiquities out of Egypt with the assistance of an Egyptian citizen, Ali Farag.¹²¹ Their modus operandi was to disguise ancient objects with a plaster and plastic coating making them appear to be modern souve-

116. See *supra* note 89 categories 2–4.

117. In an earlier case, the Second Circuit declined to address the question whether the antiquity was stolen for purposes of applying the NSPA. *United States v. An Antique Platter of Gold (Steinhardt)*, 184 F.3d 131, 133 (2d Cir. 1999). The district court had found that the Italian antiquity in question should be forfeited on two grounds: its possessor, Steinhardt, had made material misrepresentations on U.S. customs forms when object was imported into the United States, and the antiquity was owned by the Italian government pursuant to a patrimony law and was therefore stolen within the meaning of the NSPA. *Id.* at 134; see also *United States v. Schultz*, 333 F.3d 393, 406–07 (2d Cir. 2003). On appeal, the Second Circuit affirmed the prosecution's first theory—that the object was subject to forfeiture on account of the customs forms misstatements—and declined to rule on the question “whether the NSPA incorporates concepts of property such as those contained in the Italian patrimony laws.” *Steinhardt*, 184 F.3d at 134.

The amicus briefs filed in the *Steinhardt* appeal to the Second Circuit starkly illustrate the competing positions, on the one hand, of museums and other collectors, and on the other, of archaeologists. See Brief for American Association of Museums et al. as Amici Curiae Supporting Claimant Michael H. Steinhardt, *Steinhardt*, 184 F.3d 131 (2d Cir. 1999) (No. 97-6319); Brief for Archaeological Institute of America et al. as Amici Curiae Supporting Appellees United States of America and Republic of Italy, *Steinhardt*, 184 F.3d 131 (2d Cir. 1999) (No. 97-6319).

118. 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003).

119. See Alexi Shannon Baker, *Selling the Past: United States v. Frederick Schultz*, ARCHAEOLOGY, Apr. 22, 2002, <http://www.archaeology.org/online/features/schultz/> (last visited Dec. 2, 2009).

120. Parry's activities were discovered when his assistant brought a group of papyri to the British Museum to confirm their authenticity. The curator recognized the documents as those that had been stolen from an Egyptian government store room. See Alexi Shannon Baker, *Details on the Trial: Ten Years in the Making*, <http://www.archaeology.org/online/features/schultz/details.html> (last visited Dec. 2, 2009). A British court sentenced Parry to six years in prison for smuggling Egyptian antiquities into England. See Sarah Boseley, *Smuggler of the Falcon God Gets Six Years*, GUARDIAN, June 19, 1997, at 2, available at <http://www.arcl.ed.ac.uk/a1/stoppress/stop179.htm> (last visited Dec. 2, 2009). Subsequently, under the name he now uses, Jonathan Tokeley Parry published a book, JONATHAN TOKELEY, RESCUING THE PAST: THE CULTURAL HERITAGE CRUSADE (2006). Tokeley has his own web site where he describes himself as “Writer, Restorer and Antiquarian.” See Jonathan Tokeley, Home, <http://www.jonathantokeley.com/> (last visited Dec. 2, 2009).

121. *Schultz*, 333 F.3d at 396.

nirs.¹²² After the objects arrived in England, the plastic coating was removed.¹²³ Schultz and Parry invented the fictional “Thomas Alcock Collection” to create a fake provenance for the objects and, most heinously, Parry, who had training as an antiquities restorer, defaced some of the objects; by applying restoration methods known from the 1920s, Schultz and Parry deepened the deception and permanently disfigured the antiquities.¹²⁴

In 1994, Parry was arrested in Great Britain and Farag was arrested in Egypt.¹²⁵ Nevertheless, Schultz continued to communicate regularly with Parry; they were planning to continue their activities.¹²⁶ On July 16, 2001, Schultz was indicted in New York on one count of conspiring in violation of 18 U.S.C. § 371,¹²⁷ to receive stolen Egyptian antiquities that had crossed a state and U.S. boundary.¹²⁸ The underlying substantive offense was a violation of the NSPA, 18 U.S.C. § 2315.¹²⁹ Schultz moved to dismiss the indictment.¹³⁰ After an evidentiary hearing, the district court denied the motion to dismiss.¹³¹ Schultz was tried and on February 12, 2002, the jury returned a guilty verdict.¹³² On June 11, 2002, Schultz was sentenced to thirty-three months in prison and fined \$50,000.¹³³

On appeal to the Second Circuit, Schultz’s key argument was that the NSPA does not apply to cases in which an object was “stolen” only in the sense that it was possessed or disposed of by an individual in violation of a national patrimony law, as opposed to “stolen” in the commonly used senses of the word, for instance, where an object is taken from a museum or private collection.¹³⁴ In responding to this argument, the court undertook a two-part analysis, determining whether Egypt owned the antiquities and whether the antiquities had been stolen within the meaning of the NSPA.¹³⁵

Upon considering the first question, the court noted that Schultz had sought to dismiss his indictment by asserting that Egypt’s Law 117 did not vest true ownership rights in the Egyptian government but was instead a means of limiting the export of antiquities.¹³⁶ That is, Schultz had argued that Law 117 was regulatory, not proprietary. The district court had rejected Schultz’s argument.¹³⁷ On appeal, the circuit court reviewed the lower court’s determination of foreign law de

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 397–98.

126. *Id.* at 398.

127. Section 371 reads in pertinent part as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (2006).

128. *Schultz*, 333 F.3d at 395.

129. *Id.*

130. *Id.*

131. *United States v. Schultz*, 178 F. Supp. 2d 445, 447, 449 (S.D.N.Y. 2002).

132. *Docket, United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. Jul. 16, 2001) (No. 1:01-cr-00683).

133. *Id.*

134. *Schultz*, 333 F.3d at 398–99.

135. *See id.* at 399.

136. *Id.* at 396, 398–99.

137. *Schultz*, 178 F.Supp.2d at 447.

novo.¹³⁸ After analyzing the language of Law 117, the court concluded that the statute was “clear and unambiguous, and that the antiquities that were the subject of the conspiracy in this case were owned by the Egyptian government.”¹³⁹

The court then addressed Schultz’s assertion that the kind of “ownership” created by Law 117 should not be recognized for purposes of a prosecution under the NSPA. The core of Schultz’s argument was that the antiquities “were never truly owned by the Egyptian government.”¹⁴⁰ To respond to that assertion, the Second Circuit needed to determine whether it would adopt the Fifth Circuit’s reasoning in *McClain*.¹⁴¹ Schultz argued that *McClain* conflicted with existing Second Circuit precedent and with U.S. policy; that enactment of the 1983 Convention on Cultural Property Implementation Act confirmed that Congress never intended the NSPA to apply under these facts; and that the common law definition of “stolen” should not apply to the property at issue.¹⁴² The court handily dispensed with all of Schultz’s arguments except the first: that *McClain* conflicted with existing Second Circuit precedent.¹⁴³ On that issue, the court was forced to confront its prior decision in *United States v. Long Cove Seafood*,¹⁴⁴ which laid the foundation for the Schultz court’s modification of the *McClain* Doctrine.¹⁴⁵

3. *Long Cove* and the *Schultz* Doctrine

In *Long Cove*, the United States prosecuted thirty-three defendants for violating the NSPA by taking undersized clams from New York waters.¹⁴⁶ To determine whether the defendants violated the NSPA, the court was required to address the effect of a state environmental conservation law that vested ownership of the clams in the state.¹⁴⁷ The statute provided, in pertinent part:

The State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title

138. *Schultz*, 333 F.3d at 401.

139. *Id.* at 402.

140. *Id.* at 403.

141. *See id.* at 405 (“The Second Circuit has rarely addressed *McClain*, and has never decided whether the holding of *McClain* is the law in this Circuit.”). In its subsequent discussion, the court does not clearly adopt or reject *McClain*. *Id.* at 405–07.

142. *Id.* at 403. Schultz also argued: (1) that the district court erred by not allowing him to present a defense of mistake of U.S. law; (2) that the district court’s jury instruction regarding the doctrine of conscious avoidance was in error; and (3) that the admission of evidence regarding certain witnesses’ personal knowledge of Law 117 was in error. The court disagreed with Schultz on all three arguments. *Id.* at 410–16.

143. *See id.* at 403–10.

144. *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159 (2d Cir. 1978).

145. *See Schultz*, 333 F.3d at 405–06.

146. *Id.* at 161. The circuit court in *Schultz* incorrectly refers to these waters as “Long Island Sound.” *Schultz*, 333 F.3d at 405. *Long Cove* correctly identifies the waters as those of the Great South Bay. *Long Cove*, 582 F.2d at 162. For insight into the historic role of clams and clamming as part of the cultural heritage of those living along the Great South Bay, see Joseph Mitchell, *A Mess of Clams*, *NEW YORKER*, July 29, 1939, at 28, reprinted in *SECRET INGREDIENTS* 177 (David Remnick ed., 2007). Despite obvious differences, the similarities between illicit markets in clams and antiquities are several: they both involve irreplaceable resources (there is a finite number of archaeological sites; a clamming bed can be fished out or polluted) and generation-to-generation transmission of expertise, and both involve highly sought-after, rare products.

147. *Long Cove*, 582 F.2d at 164–65.

thereto shall remain in the state for the purpose of regulating and controlling their use and disposition.¹⁴⁸

The court formulated and then answered the question before it as follows: “The question [is] whether New York has asserted a true ownership interest in wildlife such as the Fifth Circuit [did], in [*McClain I*], h[olding] that Mexico had done [so] since 1972 with respect to pre-Columbian artifacts. We think not.”¹⁴⁹

Notwithstanding the clear language of the statute (“The State of New York owns all . . . shellfish. . .”), the court rejected the government’s claim that the clams were stolen for purposes of a prosecution under the NSPA.¹⁵⁰ In one sentence of statutory analysis, the court explained why the New York statute did not create an ownership interest sufficient to trigger liability under the NSPA: “While the second sentence of [the statute] provides that one who kills, takes or possesses wildlife ‘consents that title thereto shall remain in the state,’ this is solely ‘for the purpose of regulating and controlling their use and disposition.’”¹⁵¹ Thus, the court found that despite the statute’s unambiguous assertion of state ownership, the purpose of the statute was merely regulatory: it did not create a proprietary or possessory interest in the state such that a taking of the statutorily referenced property would constitute theft for purposes of the NSPA.¹⁵² As the court noted:

Even under the broad definition in *Turley*, stealing is still essentially an offense against another person’s proprietary or possessory interests in property. This does not mean that the victim must be shown to have had good title, but it does mean that the question whether a particular item is “stolen” cannot be decided in a vacuum, without considering whether there has been some sort of interference with a property interest.¹⁵³

Accordingly, the Second Circuit rejected the government’s position that clams taken in violation of the New York statute were “stolen” within the meaning of the NSPA.¹⁵⁴ In doing so, the Second Circuit sharply distinguished itself from the Fifth Circuit’s holding in *McClain I*, in which clear language of a vesting statute, alone, was deemed sufficient to trigger liability under the NSPA.¹⁵⁵ In *Long Cove*, the Second Circuit made it clear that something more than a mere statutory declaration of ownership is required to trigger liability under the NSPA.¹⁵⁶ When the Second Circuit applied *Long Cove* to the facts in *Schultz*, it reached a different result than the same court reached in *Long Cove* and a different result than the Fifth Circuit did in *McClain*.

148. *Id.* at 164 (quoting N.Y. ENVTL. CONSERVATION LAW § 11-0105 (McKinney 2005)).

149. *Id.* at 164–65 (citation omitted).

150. *Id.* at 165.

151. *Id.* (quoting N.Y. ENVTL. CONSERVATION LAW § 11-0105 (McKinney 2005)).

152. *See id.*

153. *Id.* at 163 (citations omitted). Further supporting the court’s conclusion that New York did not possess a true ownership interest was the fact “that whereas a possessor is normally subject to liability for harm done by wild animals, New York State is not liable for damage done by wild animals it professes to ‘own.’” *Id.* at 165 (citations omitted).

154. *See id.*

155. *See* United States v. McClain (*McClain I*), 545 F.2d 988, 1000–01 (5th Cir. 1977).

156. *See* 582 F.2d at 164–65.

In *Schultz*, the court emphasized that, contrary to New York in *Long Cove*, “Egypt *does* assert a possessory interest in antiquities pursuant to Law 117.”¹⁵⁷ In this respect, the court noted (though incorrectly) that unlike New York law, “[Egypt’s] Law 117 provides for *no exceptions* for private ownership of antiquities. . . .”¹⁵⁸ Further bolstering its decision was evidence introduced at trial that “the Egyptian government actively pursues any person found to have obtained an antiquity and takes immediate possession of all antiquities of which it becomes aware,” and that Egypt employs “[h]undreds of antiquities police . . . solely to effectuate this purpose.”¹⁵⁹ In brief, then, *Long Cove*’s emphasis on governmental enforcement of ownership, rather than a mere legislative declaration, contributed, indeed required, the Second Circuit to develop a different approach than that used in *McClain*.

The *Schultz* court cited *McClain* approvingly. It noted that *McClain* properly balanced the expansive meaning given to the term “stolen” for purposes of applying the NSPA and the important distinction between “mere unlawful export and actual theft.”¹⁶⁰ In this respect, the court observed that *Long Cove* “cited *McClain* more than once, in a positive light.”¹⁶¹ However, these references to *McClain* reflect only general agreement that foreign patrimony laws may, under certain circumstances, trigger the NSPA; they do nothing to soften *Schultz*’s fundamental break with *McClain* on what those circumstances must be.

Moreover, nowhere in its opinion did the Second Circuit explicitly adopt *McClain*. To the contrary, the court went to great lengths—repeating three times in its opinion—that Egypt’s Law 117 created an ownership interest sufficient for a successful prosecution under the NSPA *only* because Egypt actively asserted its statutorily created ownership interests.¹⁶² In its conclusion, in the court’s *fourth iteration* of that principle, the Second Circuit made its holding absolutely clear: “We conclude that the NSPA applies to property that is stolen from a foreign government,

157. *United States v. Schultz*, 333 F.3d 393, 405 (2d Cir. 2003).

158. *Id.* at 406. In a footnote, the court acknowledged that Law 117 does provide an exception for antiquities that were in private hands before the effective date of that law. *Id.* at 406 n.6.

159. *Id.* at 405. It is noteworthy that the court in *Barakat* cites *Schultz* for the proposition that “the patrimonial rights of the foreign state have been recognised in the context of criminal proceedings, even where the state never had possession.” *Iran v. Barakat Galleries* [2007] EWCA Civ. 1374 (A.C.), ¶ 150. It is true that the Egyptian government never had actual possession over the antiquities at issue in *Schultz*. Nonetheless, *Barakat*’s citation to *Schultz* is misleading because it omits any reference to *Schultz*’s heavy emphasis on the need for a state to enforce its declaration of ownership through assertions of ownership.

160. *Schultz*, 333 F.3d at 403.

161. *Id.* at 406.

162. *Id.* at 401 (“*Schultz* failed to present any evidence at the hearing or at trial that Law 117 is not what its plain language indicates it is, that is, an ownership law. Professor Abou El Fadl’s opinion that the law is ambiguous cannot 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.”); *id.* at 404 (“As discussed above, Egypt has made a clear declaration of national ownership through Law 117, and has enforced that law accordingly.”); *id.* at 410 (“We believe that, when necessary, our courts are capable of evaluating foreign patrimony laws to determine whether their language and enforcement indicate that they are intended to assert true ownership of certain property, or merely to restrict the export of that property.”); *id.* at 416 (“We conclude that the NSPA applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law.”).

where that government asserts actual ownership of the property pursuant to a valid patrimony law.”¹⁶³

The Second Circuit’s two-part test created a significantly different approach for determining liability under the NSPA in cases involving unprovenanced antiquities than the *McClain* Doctrine. Under *McClain*, a sufficiently clear foreign patrimony law vesting title in a foreign nation may suffice to trigger liability under the NSPA. *Schultz* requires something different—a foreign nation’s assertion of actual ownership pursuant to a validly enacted vesting statute: (Enactment of Foreign Nation Vesting Statute + Foreign Nation’s Assertion of Actual Ownership) + (Illegal Export) = Stolen.¹⁶⁴

163. *Id.* at 416 (emphasis added). The Second Circuit’s requirement that a vesting statute be enforced by a foreign nation for a U.S. court to recognize that nation’s ownership interest was presaged by a similar finding in *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff’d sub nom.* Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991), available at 1991 WL 80599. In that case, a civil suit brought by a foreign nation for the return of eighty-nine artifacts that had been seized from the American defendant by the U.S. government, the court held that Peru could not meet its burden of proof in establishing ownership of the works. *See id.* at 811–12. After expressing “considerable sympathy for Peru with respect to the problems that it confronts” in preventing the “looting of its patrimony,” the court held for the defendant. *Id.* In so doing, the court established a clear set of criteria for establishing a foreign nation’s ownership of unprovenanced antiquities. One of these criteria is a requirement that the foreign nation exercise its ownership rights domestically. As the court put it:

[T]he domestic effect of [a law proclaiming that artifacts are the property of the state] appears to be extremely limited. Possession of the artifacts is allowed to remain in private hands, and such objects may be transferred by gift or bequest or intestate succession. There is no indication in the record that Peru ever has sought to exercise its ownership rights in such property, so long as there is no removal from that country. The laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions, and, as was pointed out in [*McClain I*], export restrictions constitute an exercise of the police power of a state; “they do not create ‘ownership’ in the state.”

Id. at 814.

Schultz spawned the predictable avalanche of law review comments and articles. These publications reveal two basic interpretations of the case. In the first, *Schultz* is misleadingly reported to have adopted the *McClain* Doctrine, full stop. For example, “In *U.S. v. Schultz*, the 2nd Circuit recently upheld the *McClain* Doctrine holding that the NSPA applies to property ‘stolen’ from a foreign country, where the object’s ‘stolen’ status is based on the patrimony laws of the foreign country.” Karin E. Borke, *Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL-LCA J. ART & ENT. L. & POL’Y 381, 405 n.105 (2003). In the second, the *Schultz* court’s development of a second prong—“assertion of actual ownership”—is clearly identified and discussed. For example, “In *Schultz*, the court subjected Egypt’s Law 117, the national vesting law, to two tests: whether the statute on its face clearly vests newly-discovered archaeological artifacts in the nation, and whether the law was internally enforced within Egypt. The court held that this law passed both tests.” Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT’L L. 245, 326 n.352 (2006).

164. *See Schultz*, 333 F.3d at 410. *Schultz* leaves open the means by which a foreign nation could “assert actual ownership.” For example, for a nation unable to afford the kind of antiquities police force and active enforcement of its vesting statute that Egypt maintains, would a public information campaign regarding the law—aimed at both residents and visitors to the country—constitute a sufficient assertion of ownership?

In 1981, in a prescient observation, James R. McAlee raised the issue of foreign enforcement of a patrimony statute as a complicating factor in applying the NSPA in these cases:

Is a nation’s failure to enforce its antiquities law a defense in a prosecution based on the *McClain* theory? In *United States v. Weiner*, No. S-77-339, slip op. at 11 (E.D. Cal., filed June 7, 1979), the court rejected as a basis for dismissal the assertion that Costa Rica failed to enforce its law on pre-Columbian art, noting that the “only support for that bald statement is apparently that a few shopkeepers in Costa Rica told an investigator that the law was not enforced.” If a failure to enforce could be demonstrated, however, it might be argued that the foreign country had in effect tacitly abandoned its claim of ownership. This type of probing into the affairs of other countries may offend traditional notions of comity, but it may be necessary when foreign laws are made the basis for criminal actions in the United States.

IV. THE NATIONAL STOLEN PROPERTY ACT AND THE SEARCH WARRANTS

If the United States pursues actions¹⁶⁵ against the Bowers or Pacific Asia museums based on the facts alleged in the search warrants and premised on a violation of the NSPA, it will find itself in a lose-lose situation. Either an acquittal or a conviction would undermine one of two fundamental U.S. policy goals: protection of the global archaeological record and promotion of the educational mission of public museums. This Part describes why that is so.

A. *Allegations in the Search Warrants*

The search warrants served on the Bowers and Pacific Asia museums allege that these museums are in possession of stolen Thai antiquities in violation of 18 U.S.C. § 2315.¹⁶⁶ The salient facts alleged in the two search warrants are sufficiently similar so that a description primarily of just one, those in the Pacific Asia Museum warrant, suffices for purposes here.

The warrant alleges that one Bob Olson (referred to in the warrant as “the smuggler”), one Susan Lerer (referred to in the warrant as “the appraiser”), and one Jon Markell (referred to in the warrant as “the gallery owner”) were appraising and/or selling stolen Thai archaeological resources to an individual described as an undercover agent (UCA).¹⁶⁷ Markell arranged for the UCA to donate Thai antiquities to the Pacific Asia Museum (PAM).¹⁶⁸ Thereafter, the UCA participated in an undercover investigation of PAM. The UCA acquired Thai antiquities from “the smuggler” for prices exceeding \$5,000 and contributed them to PAM; PAM’s staff accepted possession of the contributed items at inflated appraisal values.¹⁶⁹ Accordingly, the UCA was able to claim fraudulent federal income tax charitable deductions.¹⁷⁰ Between November 2005 and January 2008, the museum staff and the UCA exchanged recorded telephone calls, e-mails, and letters regarding the sale, importation, and donation of what the search warrant alleges were stolen archaeological resources from Thailand. The Thai antiquities involved in these transactions derived from the Ban Chiang culture, which, from approximately 1,000 BCE to 200 CE, occupied what is today northeast Thailand.¹⁷¹ The original

James R. McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art into the United States*, 85 DICK. L. REV. 565, 596 n.133 (1981).

165. Although the discussion in Part IV assumes a criminal prosecution under the NSPA, the government may pursue the matter in the context of a civil forfeiture proceeding. See *supra* note 89, categories 1–4. The advantages of the latter are several: the lower civil standard of proof applies; it avoids potential political consequences of criminally indicting a museum trustee or professional; and if the government were to prevail, it could return the forfeited antiquities to Thailand. Nevertheless, the unanticipated outcomes of a criminal prosecution are present also in any civil action: in either situation the government would have to prove a violation of the NSPA and a court would have to determine whether it would adopt the *McClain* or *Schultz* Doctrine—or whether it would fashion a new interpretation of the law.

166. Search Warrant on Written Affidavit at 6, *United States v. Charles W. Bowers Museum Corporation*, Docket No. 08-0093M (Jan. 19, 2008); Search Warrant on Written Affidavit at 5, *United States v. Pacific Asia Museum*, Docket No. 08-0118M (C.D. Cal. Jan. 22, 2008).

167. Search Warrant on Written Affidavit at 8, *United States v. Pacific Asia Museum*, Docket No. 08-0118M (C.D. Cal. Jan. 22, 2008).

168. *Id.*

169. See *id.* at 11–13.

170. See *id.* at 16–17.

171. See *id.* at 9.

location where the Ban Chiang culture was discovered in the 1950s is now a designated World Heritage Site.¹⁷² “The smuggler” told the UCA that all of the Thai antiquities he had were imported into the United States within the past four years and had been exported without a permit from the Thai government. “The smuggler” also represented that the items he acquired were recently excavated, and that he knew it to be illegal to export antiquities out of Thailand, but not illegal to import them into the United States. In one case, a curator from one of the museums, with full knowledge of the facts, selected works the curator wanted the UCA to acquire from “the smuggler” and then contribute to the curator’s museum. In the other case, the UCA spoke first about a contribution of the antiquities to the museum’s deputy director of collections and to the museum’s registrar. The deputy director told the UCA she thought it was illegal to take the antiquities out of Thailand.

Both the Bowers and Pacific Asia museums eventually accepted contributions of Thai antiquities from the UCA having a value in excess of \$5,000.¹⁷³ The warrants assert that the museums’ personnel knew, or were in positions to suspect, that the Thai antiquities donated to the museums were recently exported from Thailand and had no export permits, and that Thai law asserted ownership of the antiquities prior to the antiquities’ recent export from Thailand.¹⁷⁴ Nowhere does the search warrant indicate that Thailand asserts actual ownership over antiquities within the ambit of its vesting statute.

B. Thailand’s Domestic Efforts to Protect Cultural Heritage

In 1961, Thailand enacted legislation (amended in 1992) providing that buried, concealed, or abandoned antiquities are state property and prohibiting export of such works without an export license issued by the government.¹⁷⁵ Although Thailand is a UNESCO member, it has never become a State Party to the 1970 UNESCO Convention.¹⁷⁶ Research indicates no evidence that Thailand enforces its cultural protection legislation domestically or otherwise asserts actual owner-

172. Designation of a World Heritage Site is pursuant to the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, <http://whc.unesco.org/en/conventiontext/> (last visited Sept. 15, 2008). At present there are 186 states that are parties to the Convention. See States Parties-UNESCO World Heritage Center, <http://whc.unesco.org/en/statesparties> (last visited Mar. 8, 2010). Pursuant to the Convention there are currently 890 World Heritage Sites. See World Heritage Centre-World Heritage List, <http://whc.unesco.org/en/list> (last visited Mar. 8, 2010). Thailand has five World Heritage Sites listed; the Ban Chiang Archaeological Site was listed in 1992. See *id.* For information on the Ban Chiang Archaeological Site, see University of Pennsylvania Museum of Archaeology and Anthropology, The Ban Chiang Project, <http://penn.museum/banchiang> (last visited Mar. 8, 2010).

173. See text accompanying *supra* note 169.

174. It is not clear whether the United States is relying on the 1961 or the 1992 Thai statute. See Search Warrant on Written Affidavit at 5, *United States v. Charles W. Bowers Museum Corporation*, Docket No. 08-0093M (Jan. 19, 2008).

175. Act on Ancient Monuments, Antiques, Objects of Art and National Museums, B.E. 2504 (1961), last amended by the Act on Ancient Monuments, Antiques, Objects of Art and National Museums (No. 2), B.E. 2535 (1992), [Thailand] GOVERNMENT GAZETTE Vol. 109, Part 38, dated 5th April B.E. 2535 (1992) (Thai Antiquities Act).

176. It has, however, posted an English language version of its cultural heritage legislation on UNESCO’s web site. See Act on Ancient Monuments, Antiques, Objects of Art and National Museums, http://www.unesco.org/culture/natlaws/media/pdf/thailande/thailande_act_1961_engl_orof.pdf (last visited Mar. 8, 2010).

ship over unprovenanced antiquities.¹⁷⁷ As one member of the Office of Archaeology and Museums in Thailand observed: “In Thailand, there are no special police forces or guards for this purpose [of enforcing cultural protection laws].”¹⁷⁸ As to Ban Chiang, the archaeological site where the Ban Chiang culture was first identified and excavated in Thailand, the same archaeologist reported:

Ban Chiang was entirely looted in the early 1970s. At that time, a lecturer at a famous university in Bangkok encouraged this looting. He asked villagers to dig and sell artefacts to him for his private collection. There were also dealers from Bangkok who came to Ban Chiang to buy looted items taken from private properties. . . . The government realized this serious problem and provided funds for the Fine Arts Department to build a museum at Ban Chiang in 1975. . . . Looting stopped for many years, but recently it has recommenced.¹⁷⁹

Bangkok maintains a thriving, open, and well-documented trade in antiquities without interference from the Thai government.¹⁸⁰ Although sections eighteen and twenty-two of the Thai Antiquities Act explicitly provide for a regulated market in antiquities,¹⁸¹ it is not clear whether the active trade today is licit or illicit. Indifference of the Thai government toward cultural heritage protection has had a profoundly negative effect on its neighboring states. For example, Thailand’s indifference is cited as one reason for the severity of the illegal export of Cambodia’s cultural heritage:

One of the problems Cambodia faces in protecting its cultural heritage is the failure of Thailand, in particular, to ratify the UNESCO Convention and give greater assistance to stopping the smuggling of Cambodian antiquities across their shared border. While Thailand’s inaction is an exacerbating factor in Cambodia’s difficulties, it is not directly relevant to the evaluation of the third determination. Thailand would be properly categorized as a transit, rather than a destination market, country because the Cambodian antiquities are sold from Thailand to ultimate destinations in other countries, such as the United States. Because the third determination is intended to address the incentive to loot that is provided from the ulti-

177. See *infra* notes 178, 179.

178. In informal discussion between the author and representatives of the Thai Department of Fine Arts in November 2008, the author gained the clear impression that despite the Department’s desire to do so, the Thai government is not committed to enforcing its cultural heritage statute domestically through police action, public education, or other means.

179. Rachanie Thosarat, *The Destruction of the Cultural Heritage of Thailand and Cambodia*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD’S ARCHAEOLOGICAL HERITAGE*, *supra* note 28, at 7, 9–10. It is important to note the time it took the Thai government to respond to a crisis situation (five years) and the form that official intervention eventually took—building a local museum, which is credited with having temporarily deterred the local population from continuing to loot its own site.

180. See sources cited *infra* note 181.

181. Whether all such sales comply with the law is, of course, impossible to determine. In a recent visit to Bangkok the author was repeatedly told by galleries selling antiquities that the galleries can obtain export licenses from the government, although the process can take a week or ten days. For a description of the market, see Tom Cockrem, *The Thrill Is in the Hunt*, *SYDNEY MORNING HERALD*, July 15, 2007, available at <http://www.smh.com.au/news/thailand/the-thrill-is-in-the-hunt/2007/07/12/1183833680612.html> (last visited Feb. 8, 2010) and Thomas Kean, *Asia Fights to Stem Loss of Cultural Treasures*, *MYANMAR TIMES*, Dec. 22–28, 2008, available at <http://www.mmtimes.com/no450/n011.htm> (last visited Feb. 8, 2010).

mate sales of undocumented antiquities, Thailand's role is not part of the analysis—and, unfortunately, is one over which Cambodia has little or no control.¹⁸²

Under this record, it is unlikely that Thailand would meet the second requirement of *Schultz*: an “assertion of actual ownership.” Nevertheless, the search warrants allege that two California museums possess “stolen” Thai antiquities, indicating that U.S. prosecutors would base a NSPA prosecution against these museums on the *McClain* rather than the *Schultz* Doctrine.

C. Relevant U.S. Policies

In any such prosecution, there are two reasonably foreseeable decisions if the United States proves its allegations. First, a court could follow *McClain*, ignore the enforcement prong of *Schultz*, and characterize the Thai antiquities as stolen simply because they were illegally exported after Thailand had enacted its vesting statute. Alternatively, a court could follow *Schultz* and determine that the antiquities are *not* stolen because Thailand fails to assert actual ownership of antiquities pursuant to its vesting statute. *Either result frustrates some aspect of existing U.S. policy.*

1. Protecting the Global Archaeological Record

The United States has been a leader among nations with active markets in cultural property in efforts to safeguard archaeological sites throughout the world. In 1970, the United States became the first major art-market nation to embark on a policy of mutual cooperation with an archaeologically rich nation when it signed a bilateral treaty with Mexico aimed at protecting archaeological materials of both countries.¹⁸³ U.S. policies aimed at protecting the global archaeological record are found elsewhere, for example in the nation's ratification of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;¹⁸⁴ the enactment of legislation implementing parts of that treaty, the Convention on Cultural Property Implemen-

182. Letter from Patty Gerstenblith, President, Lawyers' Committee for Cultural Heritage Preservation, to Cultural Property Advisory Committee, U.S. Department of State (Feb. 25, 2008), available at www.culturalheritagelaw.org/advocacy/Cambodia%20Renewal%20Letter.doc (last visited Feb. 8, 2010).

183. Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Mex., July 17, 1970, U.S.-Mex., 22 U.S.T. 494.

184. Nov. 14, 1970, 823 U.N.T.S. 231 (1972). At least according to official announcements of the executive branch, the Treaty came just as nations were entering a crossroads in combating cultural looting. President Nixon's Letter of Transmittal to the Senate urged consent to the treaty:

The illicit movement of national art treasures has become a matter of serious concern in the world community. Many countries have lost important cultural property through illegal exportation. The theft of art objects from museums, churches, and collections is increasing. Rising prices for antiquities stimulate looting of the archaeological sites, causing the destruction of irreplaceable resources for scientific and cultural studies. In addition, the appearance in the United States of important art treasures of suspicious origin gives rise to problems in our relations with other countries.

SENATE COMM. ON FOREIGN RELATIONS, CONVENTION ON OWNERSHIP OF CULTURAL PROPERTY, S. EXEC. REP. NO. 92-29, at 15 (2d Sess. 1972). The Senate unanimously provided its consent to the 1970 UNESCO Convention on August 11, 1972. 118 CONG. REC. 27,925 (1972).

tation Act of 1983 (CCPIA);¹⁸⁵ the promulgation of regulations relating to that legislation;¹⁸⁶ and the entering into emergency agreements and memoranda of understanding with other state parties to the Convention pursuant to the provisions of the CCPIA.¹⁸⁷ At present, the United States is a party to fourteen bilateral agreements with other state parties to the 1970 UNESCO Convention limiting the importation into the United States of specified archaeological materials from those nations.¹⁸⁸ U.S. policies supporting protection of the global archaeological record are expressed also in administrative agency action and especially in the efforts of the Department of Homeland Security's departments of U.S. Customs and Border Protection¹⁸⁹ and U.S. Immigration and Customs Enforcement (ICE),¹⁹⁰ which work to investigate and take action against the importation of stolen cultural property or cultural property subject to import restrictions pursuant to the CCPIA.

185. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2329 (codified as amended at 19 U.S.C. §§ 2601–2613 (2000)).

186. Interim Customs Regulations Amendments Concerning Convention on Cultural Property Implementation Act, 50 Fed. Reg. 26,193 (June 25, 1985); Customs Regulations Amendments Concerning Convention on Cultural Property Implementation Act, 51 Fed. Reg. 6905 (Feb. 27, 1986) (to be codified at 19 C.F.R. pts. 12, 178).

187. See U.S. Dept. of State, International Cultural Property Protection, <http://culturalheritage.state.gov/implement.html> (last visited Feb. 8, 2010). For updated information, access the links for each nation, found on the column to the right of the page.

188. See *id.*

189. See, e.g., Press Release, U.S. Immigration and Customs Enforcement, Hermitage Artworks Catalog, Stolen by Nazis, Returned to Russia (Oct. 22, 2008) [hereinafter *Hermitage Catalog Returned*], available at <http://www.ice.gov/pi/nr/0810/081022moscow.htm> (last visited Feb. 8, 2010). The ICE statement notes the border agency's role in enforcing cultural property provisions: "ICE . . . work[s] closely with . . . the State Department and U.S. Customs and Border Protection to identify antiquities that are smuggled into the United States." *Id.* (emphasis added); see also U.S. Customs and Border Protection, Prohibited and Restricted Items, http://www.cbp.gov/xp/cgov/travel/vacation/kbyg/prohibited_restricted.xml (last visited Feb. 9, 2010) (warning travelers: "Even if purchased from a business in the country of origin or in another country, legal ownership of such artifacts may be in question if brought into the United States. Therefore, although they do not necessarily confer ownership, you must have documents such as export permits and receipts when importing such items into the United States. While foreign laws may not be enforceable in the United States, they can cause certain U.S. laws to be invoked. For example, under the U.S. *National Stolen Property Act*, one cannot have legal title to art/artifacts/antiquities that were stolen—no matter how many times such items may have changed hands. Articles of stolen cultural property from museums or from religious or secular public monuments originating in any of the countries party to the 1970 *UNESCO Convention* specifically may not be imported into the United States. . . . Importation of items such as those listed above is permitted only when an export permit issued by the country of origin where such items were first found accompanies them." (emphasis added)).

190. See, e.g., *Hermitage Catalog Returned*, *supra* note 189 ("In one of the largest repatriations to date, on Sept. 15, 2008, ICE returned 1,044 cultural antiquities to the Government of Iraq that were seized in four separate investigations dating to 2001. The items, which included terra cotta cones inscribed in Cuneiform text, a praying goddess figurine that was once imbedded in a Sumerian temple and coins bearing the likenesses of ancient emperors, are an illustration of the long and varied history of the country now known as Iraq. Remnants of ancient Cuneiform tablets, which were seized by the Customs Service in 2001, were recovered from beneath the ruins of the World Trade Center in 2001 and will be restored in Iraq. The objects were turned over in a ceremony at the Embassy of Iraq, where Iraqi Ambassador Samir Shakir al-Sumaydi accepted on behalf of his government."); see also Press Release, U.S. Immigration and Customs Enforcement, ICE Seizes a Cultural Artifact Reported Stolen in Italy Almost 12 Years Ago (June 1, 2009), available at <http://www.ice.gov/pi/nr/0906/090601newyorkcity.htm> (last visited Mar. 2, 2010) ("U.S. Immigration and Customs Enforcement (ICE) today seized a Pompeii wall panel fresco from a Manhattan auction house that was reported stolen in Italy 12 years ago. The fresco panel, which was the subject of an international search by INTERPOL, was located by the Art Loss Register of New York and brought to the attention of ICE and Italian Authorities. Italian authorities provided ICE agents via the ICE attaché in Rome with information and documents identifying the fresco panel as stolen and part of the cultural property of Italy.").

2. Promoting Museums' Charitable and Educational Missions

U.S. policies aimed at promoting the educational mission of museums are expressed primarily, but not exclusively, in customs and taxation legislation. The duty-free importation of works of art began with the Payne Aldrich Tariff Act of 1909,¹⁹¹ which has been characterized as “primarily responsible for the growth of the Metropolitan Museum of Art in New York and the National Gallery of Art, in Washington, D.C., into world-class museums such as they are today.”¹⁹² The duty exemption was extended to nonrepresentational works of art in *C. Brancusi v. United States*.¹⁹³ Although they must be declared, most works of art and other cultural property enter the United States without imposition of duties.¹⁹⁴

U.S. tax policy has supported the contribution of money and cultural property, including antiquities, from individuals and private collections to public museums for nearly a century: “Contributions of property to qualified charitable organizations have been deductible under federal income tax law since the enactment of the Second Revenue Act of 1917.”¹⁹⁵ Additionally, most public museums qualify for favorable federal income tax treatment as organizations described within Internal Revenue Code § 501(c)(3).¹⁹⁶

Other expressions of Congress's support for the special role of museums include the Federal Arts and Artifacts Indemnity Act¹⁹⁷ and the Theft of Major Artwork statute.¹⁹⁸ The former provides the equivalent of insurance for works of art and artifacts loaned for temporary exhibition to U.S. public museums.¹⁹⁹ Without this federal program, the current richness of special museum loan exhibitions available to the U.S. public would be unimaginable: the costs of private insurance would make such exhibitions prohibitively expensive.²⁰⁰ The Theft of Major Artworks statute²⁰¹ makes it a federal offense to obtain by theft or fraud any object of cul-

191. Tariff of 1909, ch. 6, 36 Stat. 11, 81–82 (1909) (no longer in force).

192. Lawrence J. Persick, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 DICK. J. INT'L L. 89, 94 (1985).

193. T.D. 43063, 54 Treas. Dec. 428 (Cust. Ct. 1928) (holding that a sculpture not bearing resemblance to a living object but that was the original work of a professional sculptor is within the duty-free provisions for sculptures).

194. See Harmonized Tariff Schedule of the United States, HTSUS 9701-9706.00.00; 19 U.S.C. § 1202 (2006); 19 C.F.R. §§ 10.48–10.54 (2009); see also U.S. CUSTOMS AND BORDER PROTECTION, WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: WORKS OF ART, COLLECTOR'S PIECES, ANTIQUES, AND OTHER CULTURAL PROPERTY, http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/icp061.ctt/icp061.pdf (last visited Mar. 3, 2010).

195. John A. Wallace & Robert W. Fisher, *The Charitable Deduction Under Section 170 of the Internal Revenue Code*, in 4 RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2131, 2131 (U.S. Dep't of the Treasury 1977). Such contributions may qualify also for deductions for federal gift and estate tax under §§ 2522 and 2055, respectively, of the Internal Revenue Code.

196. For discussion of the legislative history of tax exemption for charitable organizations, see Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, *supra* note 195, app. at 2025–43.

197. Pub. L. No. 94-158, 89 Stat. 844 (1975) (codified as amended at 20 U.S.C. §§ 971–977 (2006)).

198. 18 U.S.C. § 668 (2006).

199. See 20 U.S.C. §§ 971–977 (2006).

200. For a description of the program, codified at 20 U.S.C. §§ 971–977, see *Insuring Art for Everyone: The Arts and Artifacts Indemnity Program*, NEA Arts, Vol. 4, 2008, at 8, available at http://arts.endow.gov/about/NEARTS/story.php?id=p08_insuring&issue=2008_v4 (last visited Feb. 10, 2010).

201. 18 U.S.C. § 668.

tural heritage (meaning an object that is either more than 100 years old and worth more than \$5,000, or any object worth more than \$100,000) from a museum.²⁰²

U.S. museums have developed sufficiently diverse collections—with examples of cultures from across the world and of all time periods—to serve the educational and aesthetic needs of a nation of global immigrants. That accomplishment, unparalleled in history, has placed museums in the forefront of educating and serving a pluralistic democracy.²⁰³

3. Policies Not in Conflict

Historically, these policy goals were mutually reinforcing. Modern archaeology²⁰⁴ and the great collecting traditions²⁰⁵ shared a common origin in antiquarianism.²⁰⁶ By the mid-nineteenth century, efforts to professionalize archaeology²⁰⁷ coincided, in the United States, with the founding of the first encyclopedic art museums such as the Metropolitan Museum of Art (established in 1870, with an antiquarian collector of Cypriote antiquities as its first director).²⁰⁸ Many such museums undertook archaeological expeditions, especially in the Classical world.²⁰⁹ By the 1960s, however, tensions developed between the archaeological

202. *Id.* § 668(a)(2).

203. For a discussion of the educational role of U.S. museums in the early twentieth century, see STEVEN CONN, *MUSEUMS AND AMERICAN INTELLECTUAL LIFE, 1876–1926* (1998) (demonstrating that U.S. museums of all kinds [history, natural history, art, commercial, etc.] served a critical role in providing educational opportunities to a general public, not merely an elite group of collectors).

204. “By most definitions, archaeology consists of an exploration of the past through material remains. The extraction of information from the ground is thus of crucial importance for the study of the past.” Alain Schnapp, *Between Antiquarians and Archaeologists—Continuities and Ruptures*, 76 *ANTIQUITY* 134, 135 (2002). Venerable, but still, perhaps, the most useful introduction to modern archaeological method and its history is MORTIMER WHEELER, *ARCHAEOLOGY FROM THE EARTH* (Clarendon Press 1954).

205. For a remarkable history of art collecting since antiquity, see JOSEPH ALSOP, *THE RARE ART TRADITIONS* (1982). While serving as director of the Metropolitan Museum of Art, New York, Francis Henry Taylor published *THE TASTE OF ANGELS: A HISTORY OF ART COLLECTING FROM RAMESES TO NAPOLEON* (1948).

206. For a concise treatment, see Schnapp, *supra* note 204, and “Antiquarianism” in *A DICTIONARY OF ARCHAEOLOGY* 65 (Ian Shaw & Robert Jameson eds., 1999).

207. Schnapp, *supra* note 204, at 135 (“[A]rchaeology as a fully fledged discipline made its appearance at a very precise period, the mid 19th century, in the context of the emergence of positivist sciences in Europe.”).

208. Three of the Metropolitan Museum of Art’s first four directors were archaeologists. See *Chart: The Changing of the Guard* accompanying Carol Vogel, *Curator at Met Named Director of the Museum*, *N.Y. TIMES*, Sept. 10, 2008, A18. On the founding of the Metropolitan Museum of Art and its first director, Luigi Palma di Cesnola, see STEPHEN L. DYSON, *IN PURSUIT OF ANCIENT PASTS* 150–51 (2006) and *The Cesnola Collection at the Metropolitan Museum of Art*, http://www.metmuseum.org/toah/hd/cesn/hd_cesn.htm (last visited Mar. 8, 2010). For a history of the museum, see CALVIN TOMKINS, *MERCHANTS AND MASTERPIECES* (Henry Holt & Co. 1989) (1970).

209. Indeed, U.S. museums have historically conducted archaeological expeditions. For example, in 1906, the Metropolitan Museum of Art in New York (Met) established an Egyptian Expedition to conduct archaeological excavations at several sites. The Egyptian government granted excavation permits and, under then-existing Egyptian law permitted the Met to retain one-half the finds; the other half remained in Egypt to help build the collection of the Egyptian Museum in Cairo. Until 1935, the Met conducted excavations at the royal cemeteries of Lisht, the Late Dynastic Period temple of Hibis at Kharga Oasis, the cemeteries and temples of Deir-el-Bahri in the Theban necropolis, and the Predynastic cemetery of Hierakonpolis. For a summary of the expeditions, see *The Metropolitan Museum of Art, Works of Art: Egyptian Art*, http://www.metmuseum.org/works_of_art/introduction.asp?dep=10 (last visited Jan. 22, 2010).

On occasion multiple museums cooperated in excavations such as those in and around Antioch in modern Syria. The Antioch expeditions (ca. 1932–39) were initially planned by the French Antiquities Service, which formed the “Committee for the Excavation of Antioch and Its Vicinity.” Princeton University archaeologist

and museum communities: the former perceiving continued collecting of antiquities as an incentive to the looting of archaeological sites throughout the world; the latter perceiving continued collecting as a means of bringing archaeological objects into the public domain for educational purposes and aesthetic enjoyment.²¹⁰ The divergence between the communities is starkly illustrated in competing amicus briefs filed in the appeal to the Second Circuit of the Southern District of New York's decision in *Steinhardt*.²¹¹ The major U.S. archaeological societies filed an amicus brief urging the Second Circuit to affirm the lower court's determination that the object in question had been stolen from Italy because it had been exported without a license after Italy had enacted a vesting statute.²¹² The major U.S. museum service organizations filed an amicus brief urging the Second Circuit to reverse that determination.²¹³ The court affirmed the decision on other grounds, entirely skirting this contentious question.²¹⁴ Nevertheless, the briefs illustrate the degree to which these communities had lost the ability to work cooperatively to fulfill what once were—and remain—mutually compatible policy goals.²¹⁵

Indications of a new spirit of cooperation between these communities are emerging. A prime example is the recent approbation of the Archaeological Institute of America of the 2008 promulgation of new standards for collecting antiquities by the Association of Art Museum Directors.²¹⁶ The policy goals of protecting the global archaeological record and of promoting museums' charitable and educational missions are thus not mutually exclusive; and, indeed, reinforce one another.

Charles Rufus Morey chaired the committee. Eventually a consortium of museums—including those of Princeton and Harvard University, the Louvre, the Baltimore Museum of Art, Dumbarton Oaks, and the Worcester Art Museum—participated in the excavations. See Princeton University Library, Antioch Excavation Financial Records, 1935–1938: Preliminary Finding Aid, <http://diglib.princeton.edu/ead/getEad?id=ark:/88435/v979v309c> (last visited Jan. 22, 2010).

From 1904 to 1947, the Museum of Fine Arts, Boston, teamed with Harvard University to conduct excavations in the area of the great pyramids of Giza. See Museum of Fine Arts, Boston, About the Giza Archives Project, <http://www.gizapyramids.org/code/emuseum.asp?newpage=about> (last visited Jan. 22, 2010).

210. See *supra* note 117.

211. See *supra* note 117.

212. Brief for Archaeological Institute of America et al. as Amici Curiae Supporting Appellee at 8, *United States v. An Antique Platter of Gold (Steinhardt)*, 184 F.3d 131 (2d. Cir. 1999) (No. 97-6319).

213. Brief for American Association of Museums et al. as Amici Curiae Supporting Appellant at 137–41, *Stienhardt*, 184 F.3d 131 (No. 97-6319).

214. *Steinhardt*, 184 F.3d at 137.

215. An example of an area where the museum and archaeological communities would undoubtedly find their positions united is expressed in a recent promulgation by the Archaeological Institute of America (AIA) urging congressional action to prevent the attachment of cultural objects in U.S. museums to compensate victims of terrorism. See Statement, Archaeological Institute of America, On the Attachment of Cultural Objects to Compensate Victims of Terrorism (Feb. 9, 2009), available at <http://www.archaeological.org/pdfs/AIAAttachment.pdf> (last visited Jan. 23, 2010). Apparently, the AIA had not considered reaching out to the major museum service organizations to work cooperatively despite what certainly would have been unanimity on the issue. Interview with Professor Brian Rose, President, Archaeological Institute of America, (Feb. 24, 2009). Worse, it appears the lack of cooperation cuts both ways: the author is unaware of any effort by any museum service organization to contact the AIA concerning the announcement of museums' policy initiatives.

216. See Press Release, Archaeological Institute of America, *Archaeological Institute of America Response to New AAMD Guidelines on the Acquisition of Archaeological Materials and Ancient Art* (undated), available at <http://www.archaeological.org/pdfs/AAMD2008.pdf> (last visited Jan. 23, 2010) and Press Release, Association of Art Museum Directors, *New Report on Acquisition of Archaeological Materials and Ancient Art Issued by Association of Art Museum Directors* (June 4, 2008), available at <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> (last visited Jan. 23, 2010).

Accordingly, the inevitability that a court judgment based on the allegations in the search warrants would lead to outcomes detrimental to one set of policies or the other indicates the inadequacy of the NSPA to promote established U.S. cultural policies. Use of the NSPA in this context has been uncomfortable since *McClain* and, since Congress's 1986 amendments to the statute, its use has now become significantly dangerous to U.S. policy. Thus, the development of specific legislation addressing the unique problems of determining title to unprovenanced antiquities should become a useful rallying point for finding commonalities between the museum and archaeological communities.

V. IMPLICATIONS OF PROSECUTING THE CALIFORNIA MUSEUMS UNDER THE NATIONAL STOLEN PROPERTY ACT

This Part briefly explores the implications of a prosecution under the NSPA of the California museums alleged to be in possession of stolen Thai antiquities under the facts alleged in the search warrants. It illustrates that either an acquittal or a conviction would bring unintended, negative outcomes to one or the other of two U.S. policy goals: protecting the global archaeological record and promoting museums' educational and charitable missions.

A. Implications of an Acquittal

If the Ninth Circuit applied the *Schultz*, rather than the *McClain*, Doctrine, it is reasonable to predict that the prosecution would fail. There simply is no evidence that Thailand enforces its vesting statute domestically or that Thailand in any way "asserts actual ownership" over the antiquities included within the scope of that statute.²¹⁷ An acquittal would, thus, effectively mean that unprovenanced antiquities from Thailand—and from other nations that had enacted vesting statutes but either cannot or choose not to enforce them domestically—would not be "stolen" for purposes of the NSPA. It is reasonable to foresee that such antiquities would then be bought and sold within the court's jurisdiction with impunity.

Repeatedly, scholars have asserted that a demand for antiquities is responsible for the looting of archaeological sites²¹⁸ and that looting inevitably leads to the destruction of the archaeological record and of antiquities that are of less than market quality. If that position is correct,²¹⁹ a holding applying the *Schultz* Doctrine, acquitting the museums of violations of the NSPA, would lead to increased

217. See discussion *supra* Part II.C (explaining the *Schultz* doctrine).

218. For example, see Gerstenblith, *supra* note 9, at 202 and NEIL BRODIE ET AL., STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL 25 (2000). In response to those who argue that there is no connection, see, most recently, Bauer, *supra* note 14, at 698 ("[T]he assertion that demand for antiquities has no effect on looting is ludicrous and patently false. While increased attention to a cultural product may help create a market for it, demand plays a pivotal role in driving the search for supply to satisfy [demand].").

219. The author is unaware of any independent, empirically-based, economic analysis of the antiquities market supporting or refuting the widely-held position, typically stated as fact, that market demand for antiquities is the primary impetus for looting archaeological sites. This lack of data is not new, and U.S. cultural property policy has been developed for more than twenty-five years in the absence of appropriate empirical study. As Senate Report No. 97-564 on Implementing Legislation for the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Cultural Property stated nearly thirty years ago: "No detailed data exist that provide reliable insights into either the precise nature or magnitude of trade in cultural property." S. REP. NO. 97-564, at 23 (1982), reprinted in 1982 U.S.C.C.A.N. 4078, 4100. That lack of "detailed data" has not been remedied.

looting of archaeological sites in Thailand and in other nations that do not assert actual ownership of antiquities pursuant to their vesting statutes. The ensuing damage to archaeological sites under this scenario is potentially enormous and would frustrate U.S. policies aimed at exactly the opposite result, protection of the global archaeological record.²²⁰

B. Implications of a Conviction

A conviction under these facts would require the court to disregard the “actual assertion of ownership” test of the *Schultz* Doctrine and follow *McClain*. For reasons described below, a holding applying *McClain*, finding that the museums violated the NSPA, would transform the continued possession of most antiquities (not just those from Thailand) in any museum within the court’s jurisdiction (not just the museums involved in the prosecution) into a violation of the NSPA.

Foreign nations began to enact vesting statutes in the nineteenth century.²²¹ U.S. museums were active collectors of antiquities from the middle of the nineteenth century until very recently.²²² It is reasonable to assume that many, if not most, of those antiquities lack documentation of legal export from their country of modern discovery.²²³ Following a conviction premised on the *McClain* Doctrine’s definition

One result of the lack of definitive empirical studies analyzing the role of supply, demand, taste, law enforcement, art criticism, and the many other factors that influence the antiquities market has been recent enthusiasm for creating legal markets in antiquities. See, e.g., Milken Institute, *Financial Innovations for Developing Archaeological Discovery and Conservation*, 7 Financial Innovations Lab Report 2008; Michael Kremer & Tom Wilkening, *Protecting Antiquities: A Role for Long-Term Leases?* (Weatherhead Center for International Affairs, Harvard University, Working Paper No. 2008-0084, 2007), available at http://www.wcfia.harvard.edu/sites/default/files/Kremer_Antiquities.pdf (last visited Jan. 23, 2010); Raymond Fisman & Shang-Jin Wei, *The Smuggling of Art, and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiquities* (National Bureau of Economic Research, Working Paper No. 13446, 2007); Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377 (1995). Such alternatives may well be appropriate policy alternatives. But until the antiquities market and especially the relationship between supply and demand are substantially better understood, it seems premature to consider these alternatives as solutions, which may well create unanticipated problems even more difficult to solve than the problems at hand.

220. For examples of these policies, see Part IV.C.1, *supra*.

221. For example, Egypt’s earliest vesting statute dates to 1883. See Adrienne L. Fricke, *A New Translation of Selected Egyptian Antiquities Laws (1881-1912)*, contained in Antoine Khater’s *Le Régime Juridique des Fouilles et des Antiquités en Égypte*, Appendix II to Stephen K. Urice, *The Beautiful One Has Come—To Stay in IMPERIALISM, ART AND RESTITUTION* 175–92 (John Henry Merryman ed., 2006).

222. Recent guidelines for acquiring antiquities promulgated by the American Association of Museums and the Association of Art Museum Directors can be interpreted as creating virtually insurmountable barriers to the continued acquisition of unprovenanced antiquities in the market. ASS’N OF ART MUSEUM DIRS., REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (2008), available at <http://www.aam-us.org/museumresources/ethics/upload/Standards%20Regarding%20Archaeological%20Material%20and%20Ancient%20Art.pdf> (last visited Apr. 12, 2010); AM. ASS’N OF MUSEUMS, STANDARDS REGARDING ARCHAEOLOGICAL MATERIAL AND ANCIENT ART (2008), available at <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> (last visited Apr. 12, 2010).

223. An important exception concerns antiquities acquired by museums that conducted archeological expeditions under a foreign nation’s laws that transferred title to a portion of expedition finds to the expedition sponsor.

The concern for provenance in the acquisition of antiquities is a relatively recent development in the history of collecting. For example, the first civil suit filed by a plaintiff foreign nation to reclaim allegedly stolen antiquities held by a U.S. possessor pursuant to a patrimony statute was decided (in favor of the U.S. possessor) only in 1989. See *Gov’t of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff’d sub nom. Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991), available at No. 90-5521, 1991 WL 80599 (May 15, 1991). The first scholarly article addressing due diligence standards in the acquisition of cultural property did not appear until 1990. See Linda Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT’L L. 1 (1990). A

of stolen, continued possession of such works would constitute a crime under the NSPA: post-acquisition knowledge satisfies the NSPA's scienter requirement.²²⁴ Accordingly, publication of the court's decision would provide every possessor of an unprovenanced antiquity exported without a license from a nation, after that nation had enacted a clearly articulated vesting statute, with knowledge that the antiquity is considered stolen for purposes of the NSPA. Continued possession of such an antiquity after gaining knowledge of the court's decision would complete all necessary elements for a criminal act under 18 U.S.C. § 2315.²²⁵

Museums would have no effective defense: Congress's 1986 amendments to the NSPA specifically sought to eliminate a defense predicated on an argument that stolen property was no longer in interstate commerce.²²⁶ Even in situations where the museum had taken possession of an antiquity decades ago, there would be no statute of limitations defense:²²⁷ as in *Trupin*, the museums' violation of the NSPA would not be the initial receipt, but rather the continued possession of, the antiquity.

Put another way, continued possession of virtually all unprovenanced antiquities in public museums within the court's jurisdiction would suddenly become actionable under the NSPA, and museums would be obligated to divest themselves of

symposium on provenance and due diligence standards was held only in 2000: The April 2000 Conference on Provenance and Due Diligence sponsored by the International Foundation for Art Research in collaboration with New York University. See IFAR, Provenance & Due Diligence, http://www.ifar.org/past_event.php?docid=1192514072 (last visited Mar. 8, 2010). Thus, nearly a century elapsed from the time foreign nations began to enact patrimony statutes until U.S. law and legal scholarship focused on how those statutes might affect title under U.S. law to antiquities from those nations. During that interval vast numbers of antiquities entered U.S. museum collections. When those works were acquired there simply was no reason to think that U.S. prosecutors—or anyone else—might characterize these works as “stolen” property.

224. See *United States v. Trupin*, 117 F.3d 678, 686–87 (2d Cir. 1997). For after-acquired knowledge under a similar scienter requirement in 18 U.S.C. § 1957, see Johnson, *supra* note 50, at 1313 (“After-acquired knowledge . . . can satisfy the statute’s scienter element with respect to further . . . transactions that are engaged in with the same tainted funds.”).

225. See *Trupin*, 117 F.3d at 686–87. *Trupin* differs in two ways from the hypothetical presented. First, the defendant in *Trupin* knew that the painting was stolen *prior* to Congress’s amendment of the NSPA. *Id.* at 681. In the hypothetical, prior to a judicial opinion adopting the *McClain* Doctrine, possessors of unprovenanced antiquities within the court’s jurisdiction have no knowledge that they possess stolen goods. Second, *Trupin* dealt with a legislative change in law, *id.* at 682; in the hypothetical, a judicial interpretation of an existing statute would trigger criminal liability. Thus, the *Trupin* court’s analysis under the Ex Post Facto Clause is, strictly speaking, inapposite: ex post facto concerns arise in the context of legislative acts; the retroactivity of judicial acts implicates due process analysis. See *Rogers v. Tennessee*, 532 U.S. 453, 456 (2001) (holding that the Tennessee Supreme Court’s retroactive application of its decision abolishing the “year and a day” rule in a prosecution for murder did not deny the defendant due process of law in violation of the Fourteenth Amendment, and providing extensive discussion of retroactive application of judicial constructions in criminal cases).

These differences, however, mask *Trupin*’s central holding: in a prosecution for possession under the NSPA, retroactivity is not in issue. See *Trupin*, 117 F.3d at 686. A prosecution under the hypothetical here would be premised not on defendants’ acts prior to a court’s upholding of the *McClain* Doctrine, but rather on defendants’ possession thereafter. Such a possessor presumably would be entitled to a reasonable period to take action to divest itself of possession or to take action to return the antiquities to their country of origin. See *id.* at 686–87.

226. See *supra* text accompanying note 71.

227. A five-year statute of limitations applies to criminal and civil forfeiture actions premised on a violation of the NSPA. See 18 U.S.C. § 3282 (2006). While this statutory provision has not been applied in a reported case, the general rule provides that the statute of limitations begins to run on the day following the day on which the event that gave rise to the cause of action occurred. *United States v. Guerro*, 694 F.2d 898, 901 (2d Cir. 1982). Presumably, then, the statute of limitations for an action predicated on possession of stolen goods would not begin to run until the day after a museum divested itself of possession.

those collections promptly.²²⁸ Failure to do so would expose the antiquities to civil seizure and forfeiture proceedings, and the museums' board and staff members to criminal liability. The loss of those collections would seriously impede the museums' ability to meet the educational needs of the communities they serve: without antiquities collections, the museums' educational programs would be crippled. That outcome is inconsistent with U.S. policies promoting public museums' charitable and educational activities.²²⁹

C. A Situation that Should Be Avoided

Given the assumption that a market in antiquities incentivizes the destruction of archaeological sites, a holding based on *Schultz* would, without immediate intervention in Thailand, have devastating impact on that nation's archaeological record. Given the 1986 amendments to the NSPA, a holding based on *McClain* would have devastating impact on existing museum collections. Neither result is acceptable. Acquittal carries too great a risk for efforts to protect the global archaeological record. Conviction carries too great a cost for the continued accomplishment of museums' charitable and educational missions. Yet, the facts alleged in the search warrants are opprobrious and, if true, deserve sanction. The next Part explores possible alternatives to the current dilemma.

VI. ALTERNATIVE APPROACHES AND CONCLUSION

The primary purpose of this article has been to illustrate how Congress's 1986 amendments to the NSPA create a situation in which continued application of the NSPA in cases involving unprovenanced antiquities leads to undesirable policy outcomes. Continued application of the *Schultz* Doctrine places at a disadvantage foreign nations that do not assert actual ownership of antiquities to which they claim title by operation of validly enacted vesting statutes. Continued application of the *McClain* Doctrine can transform licit possession of unprovenanced antiquities into a federal crime, regardless of how long the possessor has held them, and even if the NSPA's scienter requirement could not have been proven at the time of initial possession.

How then, as a matter of policy, should the United States accomplish the dual goals of protecting the global archeological record and promoting museums' charitable and educational missions? It is beyond the reach of this article to explore alternatives in depth, but three avenues for research, exploration, and discussion suggest themselves: first, codification of the *Schultz* Doctrine, possibly with new U.S. programs to assist foreign nations in enforcing their cultural heritage legislation; second, codification of the *McClain* Doctrine with a statutory provision granting repose for existing collections of antiquities in U.S. museum collections; and third, enactment of entirely new legislation specifically aimed at balancing existing policy goals and addressing the unique difficulties of determining title to undocumented antiquities.

228. And, of course, continued possession of unprovenanced antiquities in private hands would also become actionable.

229. See discussion *supra* Part IV.C.2.

One possibility would be to codify the *Schultz* Doctrine as the appropriate standard for characterizing unprovenanced antiquities as stolen for purposes of the NSPA. That is, for purposes of characterizing a work as stolen under the NSPA, a court would have to find that the foreign nation not only had validly enacted a vesting statute but also, that at the time the work was exported, the nation asserted actual ownership over works within the reach of that vesting statute. This codification of *Schultz* would accomplish several favorable goals. First, the *McClain* Doctrine and the difficulties it causes under the amended NSPA would be eliminated. Second, this codification would provide an incentive to foreign nations to follow Egypt's example: creation of effective antiquities police forces to enforce antiquities laws within the nation's borders. Third, it would assure that antiquities acquired by museums prior to recent shifts in normative approaches to antiquities collecting²³⁰ would be immune from NSPA liability: few, if any, foreign nations are likely to meet the "actual assertion of ownership" test prior to the recent past. Accordingly, any discussions of the return of antiquities from public collections to foreign nations would remain where they should be—matters for negotiation between museums and foreign nations²³¹—and not where they should not be—in the courts. Codification of the *Schultz* Doctrine would need to clarify that a foreign nation need not reduce to possession antiquities within the scope of its vesting statute—an impossible standard: a nation cannot possess what it does not know to exist. *Schultz* left open for interpretation a precise definition of "actual assertion of ownership," and given the vast differences in nations' capacities to take such action, an elastic standard leaving final determination in the hands of the courts would be appropriate. Additionally, such legislation would prove substantially more palatable to the international community if it were accompanied by the promise of foreign aid and technical assistance to assist nations that cannot afford to follow Egypt's example, which impressed the Second Circuit.

A second possible response would be to codify the *McClain* Doctrine as the appropriate standard for characterizing unprovenanced antiquities as stolen for purposes of the NSPA. Any such legislation would need to include a provision exempting existing museum collections from the reach of criminal prosecutions or civil actions premised on a violation of the NSPA. The latter provision would effectively restore to museums the defense that had been available before the 1986

230. These changes are most noticeable in the recently promulgated standards for the collecting of antiquities issued by the American Association of Museums and the Association of Art Museum Directors. See AM. ASS'N OF MUSEUMS, STANDARDS REGARDING ARCHAEOLOGICAL MATERIAL AND ANCIENT ART (JULY 2008), available at <http://www.aam-us.org/museumresources/ethics/upload/Standards%20Regarding%20Archaeological%20Material%20and%20Ancient%20Art.pdf> (last visited Mar. 8, 2010); ASS'N OF ART MUSEUM DIRS., REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (2008) available at <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> (last visited Mar. 8, 2010).

231. Italy has concluded negotiated settlements with several U.S. museums regarding its claim of ownership to unprovenanced antiquities in the museums' collections. For an example of such an agreement, see Agreement Between the Ministry for Cultural Heritage and Activities of the Italian Republic and the Metropolitan Museum of Art, New York (2006), reprinted in MERRYMAN ET AL., *supra* note 23, at 406–13.

amendments to the NSPA: works no longer in interstate commerce would not be within the ambit of the statute.²³²

A third possibility would be to examine entirely new legislation that would remove unprovenanced antiquities from the scope of the NSPA and place them under statutory provisions specifically crafted with the unique problems of establishing title to such objects as the provisions' primary consideration. Keeping those difficulties in mind while drafting legislation that harmonizes existing U.S. policies that protect the archeological record and museums' missions could, potentially, result in a new approach that eliminates the current uncertainty and the potential for negative outcomes described above.

Development of such legislation would not be easy: enactment of the CCPIA²³³ required more than a decade of legislative effort. Nevertheless, it is quite likely that the best interests of the archaeological and museum communities would be served by cooperation in drafting and effecting specific legislation to address what is now a situation where the risks of continued reliance on the NSPA are simply too great.

232. Matters, of course, become more problematic in the details. For example, how would the statute treat an antiquity given repose in a museum's hands if that antiquity were subsequently deaccessioned by the museum and offered for sale in the private marketplace?

233. See *supra* note 20.

