

WHY U.S. FEDERAL CRIMINAL PENALTIES FOR DEALING IN  
 ILLICIT CULTURAL PROPERTY ARE INEFFECTIVE, AND A  
 PRAGMATIC ALTERNATIVE

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## I. INTRODUCTION

In recent years, the cultural property debate in the U.S. has focused on the extent to which the criminal law can impact the illicit trade. This has unfortunately shifted the discussion away from cultural property policy. Museum curators are forced to acquire objects, not based on their artistic or historical value, but rather on the criminal advice of their counsel. Connoisseurship has been displaced by other considerations. We should be looking at how best to safeguard archaeological sites, museums, and other historic sites to prevent theft and destruction. A criminal response, in isolation, can never hope to achieve success without overwhelming law enforcement resources or draconian legal measures. By triggering the extremely powerful federal prosecutorial machinery, the U.S. has unwittingly shut off debate about the proper place for art and antiquities, and alienated the art market itself.

The gap between what actually happens to cultural property and what many think should happen is widening. Some argue we should eliminate the trade in these objects, while others point out the benefits in allowing individuals and institutions to collect and care for cultural property.<sup>1</sup>

In a market in which provenance is not routinely given or made available, more work needs to be done if any meaningful decrease in the illicit trade can occur. By convincing both dealers and archaeologists that a pragmatic approach which encourages a licit trade in art and antiquities and ensures those objects are licitly excavated or exported, the U.S. can then exact some measure of control on the illicit market. This debate is best framed as an inarticulate certainty: effective regulation of the illicit market in a way which does not increase the black market is extremely difficult. Export restrictions and national ownership declarations seem to only fuel the demand for art and antiquities.

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<sup>1</sup> David Lowenthal, *Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 392, 394 (2005), arguing, "Despite, or perhaps because of, high-minded admonitions, the gulf between what happens to cultural property and what virtuous stewards feel should happen is not narrowing but broadening."

As a result, the best way to regulate this market would seem to be at the market end of the supply chain, in the U.S. and U.K. It is widely accepted that the art and antiquities markets are strongly centered in London and New York. Why does the U.S. regulate the illicit market; should we be concerned with ending the illicit trade outright; or should it instead merely punish egregious violations?

The U.S. criminal system is all or nothing. It focuses on the narrow debate between source and market nations over the extraterritorial recognition of export restrictions and national ownership declarations. Under this system prosecutors have a great deal of power, and it is not always exercised effectively or in a manner which actually would reduce the illicit trade. The United Kingdom generally endorses a pragmatic approach with respect to ownership of art and antiquities, and the restrictions on their export. The U.S. can learn a great deal from this kind of effective compromise. Without a well-ordered system which allows dealers and purchasers to deal in legitimate objects, the criminal penalties will never serve their stated goal, which is to substantially reduce the illicit trade and prevent the destruction of archaeological sites.

More art and antiquities transactions take place in the United States than any other nation. As the world's largest market for art and antiquities, the importance of U.S. regulation of cultural property looms large. The art and antiquities market comprises a variety of categories of objects and specialty markets. Any measurement of the size and nature of these open markets can provide an overview of the cultural property market generally, however accurately quantifying the market in illegal or illicit material will always prove inherently difficult.

The idea that the U.S. will recognize clearly-defined foreign national patrimony laws is now firmly entrenched in the second, fifth, and ninth Federal Circuits, all of which combine to account for the overwhelming majority of art and antiquities transactions in the United States. A unified and clear cultural policy may not be possible if we continue to allow individual cases, which may distort the law due to overly sympathetic facts, to define the scope of criminal regulation of illicit cultural property. In order to build the consensus necessary for a legislative solution, we need to better understand what fundamental values the current system promotes.

This article will outline the state of federal criminal regulation of cultural property in the US, and then attempt to unpack the values that this legal framework furthers. Then, by discussing the effective compromise which has taken place in

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England and Wales, we can see what reforms will need to take place to allow federal criminal regulation to have a real impact on the illicit trade in cultural property. Section II will provide an overview of the illicit trade by pointing out the lack of transparency, the ways judges have responded to criminal charges which have implicated cultural objects, the relevant values this regulation endorses, and why it is important to regulate the trade in cultural property. Section III will describe the nature and extent of federal criminal penalties for dealing in illicit cultural property in the U.S. including prosecution and civil forfeiture. Section IV will show how the pragmatic approach taken in England and Wales has proved extremely effective, and how a similar compromise allowing a licit regulated market involving detailed provenance would dramatically improve the criminal regulation of the market in the U.S. By unpacking the values at work in the federal criminal regulation and showing how a pragmatic approach has worked well in the U.K., cultural policy stakeholders can give real effect to criminal regulation and allow for a meaningful decrease in the illicit trade in cultural property.

## II. HOW TO ELIMINATE THE ILLICIT TRADE?

Most nations recognize the need to protect and preserve beautiful and historic objects. Approaches vary considerably, as does their efficacy. The international market in art and antiquities works against many of these restrictions. Though the market allows individuals and institutions to study, possess, display, and preserve beautiful objects, the trade often causes the theft, destruction and looting of cultural sites all over the world.

A helpful distinction has often been made between source and market nations. Source nations have an amount of domestic cultural property that exceeds the amount imported.<sup>2</sup> Some source nations include Mexico, Peru, Guatemala, Egypt, and Italy.<sup>3</sup> In contrast, market nations import more cultural property than they export. Much of this import and export is illegal. Some prominent market nations include the United States, France, Germany, United Kingdom and Japan.<sup>4</sup> Most source nations in the less developed world restrict the export of cultural property. Of course the distinction does have its limits, as every piece of

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<sup>2</sup> John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 832 (1986).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

cultural property has a source nation. The United States has large quantities of cultural objects from native American and other sources, but it also imports a great deal of objects as well.

Opponents of source regulation argue the restrictions deter individuals from declaring chance finds of antiquities. Information about these chance finds is lost, and any trade is driven underground into the black market, further increasing the criminal and corrupt elements of the trade.<sup>5</sup> By not allowing for a legitimate outlet for these inherently valuable objects, restrictions cause the illicit trade to flourish. Opponents of these strong source regulations argue that the law should protect only the most important objects, allowing the remainder to be bought and sold freely, thus reducing the demand for the most important objects.<sup>6</sup> This circulation would allow more people to come into contact with these objects, either as owners or visitors to museums.

Advocates of strong source regulation feel much differently. They argue archaeological sites are a limited resource which cannot be commercially exploited.<sup>7</sup> Also, the restraints on the alienability of these objects cuts against the ill-effects of the cultural property market through deterrence and the high-costs of avoidance.<sup>8</sup>

Nearly every nation, especially those rich in art antiquities, has some form of restriction on cultural property alienation. The restrictions take various forms, and include: export restrictions, total export restrictions of the most important objects, a preemptive government right to buy cultural property slated for export, or blanket retention of all cultural property.<sup>9</sup> Our inquiry should look at how, and why, and to what end the U.S. recognizes these foreign laws. To better understand the difficulty in regulating the trade, it helps to bear in mind that the trade is an extremely difficult one to police effectively.

#### A. *The Trade in Cultural Property Lacks Transparency*

The majority of cultural property transactions do not involve an exchange information on title history, or what is called provenance.<sup>10</sup> Very little information regarding the authenticity of

<sup>5</sup> Neil Brodie et al., *Stealing History: The Illicit Trade in Cultural Material* (McDonald Inst. for Archaeological Res., Cambridge, U.K.), 2000, at 10-11.

<sup>6</sup> *Id.*

<sup>7</sup> LYNDEL V. PROTT & PATRICK J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE: MOVEMENT* 464-70 (1989).

<sup>8</sup> *Id.* 64-70.

<sup>9</sup> JOHN HENRY MERRYMAN, *THE RETENTION OF CULTURAL PROPERTY*, IN *THINKING ABOUT ELGIN'S MARBLES, CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW* 123 (John Henry Merryman ed., 1988).

<sup>10</sup> For a discussion of how provenance affects transactions, see Leslie P. Singer & Gary

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title are given, nor are there guarantees that any of the provenance information that is given is accurate. Recent quantitative studies have done a tremendous job of moving from mere anecdotal evidence towards an empirical view of the art and antiquities market which indicates a substantial portion of antiquities which appear on the market may be illicit.

Professor Ricardo Elia conducted a recent study on South Italian vases from the Apulian region.<sup>11</sup> Elia analyzed Sotheby's auction catalogues between 1960 and 1998 and found that of the 1,550 vases auctioned; only 15% had provenance information.<sup>12</sup> Another study by Christopher Chippindale and David Gill looked at Cycladic figurines.<sup>13</sup> That study concluded that of the 1,600 known Greek Cycladic figurines, only 143 were recovered by archaeologists.<sup>14</sup> Another study examined the antiquities collections of seven prominent collectors, including Shelby White and Leon Levy who loaned their collection to an exhibition at the Metropolitan Museum of Art in New York in 1990 and 1991.<sup>15</sup> Of the 1,396 objects in these seven collections, only 10% of the objects had stated provenance.<sup>16</sup> Yet another study looked at five auction sales in 1991 and found that only 18% of the objects in the catalogues had a stated provenance.<sup>17</sup>

Though the situation with regards to works of art is marginally better, provenance is often lacking when individuals buy and sell paintings or sculpture as well. Director Stephen Spielberg, a prominent collector of Norman Rockwell, recently discovered a Rockwell painting he had innocently purchased at an auction in 1989 had been stolen decades earlier.<sup>18</sup> Though it would be too easy to claim that all objects sold without a provenance must be stolen or looted, clearly we can see that the market does not routinely give provenance and lacks transparency. No systemic safeguards ensure that individuals are buying and selling licit objects. In dealing with this lack of transparency, judges often have had great difficulty in fitting general legal

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A. Lynch, *Are Multiple Art Markets Rational?*, 21 J. CULTURAL ECON. 197 (1997).

<sup>11</sup> RICARDO ELIA, ANALYSIS OF THE LOOTING, SELLING AND COLLECTING OF APULIAN RED-FIGURE VASES: A QUANTITATIVE APPROACH, IN *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* 146 (Neil Brodie et al. eds., 2001).

<sup>12</sup> *Id.* at 150-51.

<sup>13</sup> Christopher Chippindale & David Gill, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 3 AM. J. OF ARCHAEOLOGY 602 (1993).

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

<sup>15</sup> Christopher Chippindale and David Gill, *Material Consequences of Contemporary Classical Collecting*, 104 AM. J. OF ARCHAEOLOGY 463 (2000).

<sup>16</sup> *Id.* at 481.

<sup>17</sup> *Id.* at 481-82.

<sup>18</sup> *Spielberg Collection is Found to Contain Stolen Rockwell Art*, N.Y. TIMES, Mar. 4, 2007, [http://www.nytimes.com/2007/03/04/us/04rockwell.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/03/04/us/04rockwell.html?_r=1&oref=slogin).

principles into cultural property disputes.

B. *The Choice between Common Law Judicial Interpretation or Legislative Action*

The common law system of adjudication is not well-suited to cultural property disputes.<sup>19</sup> Much of the discussion relating to cultural property regulation in recent years has centered on the *McClain* doctrine, which recognizes foreign national patrimony laws.<sup>20</sup> This development was created by judges interpreting federal law. That may not be an ideal state of affairs. Judicial cultural policy-making presents three potential problems: (1) the common law does not always satisfactorily resolve disputes which occur infrequently without legislative guidance; (2) results can be unpredictable; (3) this unpredictability leads to contention among the various groups which form the "cultural property world".<sup>21</sup>

Many of the underlying weaknesses in the state of cultural property law can be directly tied to the nature of the common law system.<sup>22</sup> Common law adjudication relies on facts. An approach which allows for compromise among the cultural policy stakeholders through political processes and legislation to dictate policy may be better suited to combating the illicit trade. Such an overarching legislative approach has not successfully taken place in the US; however the U.K. has managed to forge successful compromise in this context.<sup>23</sup>

The common law can sometimes operate effectively in cultural property disputes. Facts matter in cultural property disputes, and the common law spends a great deal of time and resources in developing facts. These disputes frequently involve difficult questions of a scientific nature.<sup>24</sup> Take the description of the evidence required in the English case, *Bumper Development*

<sup>19</sup> JEREMY EPSTEIN, *THE HAZARDS OF COMMON LAW ADJUDICATION, IN WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 123 (Kate Fitz Gibbon ed., 2005).

<sup>20</sup> See *infra* section III.

<sup>21</sup> John Henry Merryman describes this as "a social subsystem we can call 'the cultural property world,' which is populated by artists, collectors, dealers and auction houses, museums and their professionals, art historians, archaeologists and ethnographers, and source nation cultural officials, among others." John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11, 12 (2005).

<sup>22</sup> EPSTEIN, *supra* note 19, at 123.

<sup>23</sup> See *infra* sections III, IV. See also 131 Cong. Rec. S2598-03 (Mar. 6, 1985). Senator Patrick Moynihan twice introduced legislation that would have prevented federal criminal law from enforcing foreign patrimony laws. Neither bill was passed.

<sup>24</sup> EPSTEIN, *supra* note 19, at 123.

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*Corp. Ltd. v. Commissioner of Police of the Metropolis and others*:<sup>25</sup> "Experts in stylistic comparison, metallurgy, statistical analysis, soil analysis—even an expert on termite workings—were all involved in this complicated and difficult inquiry, some of them spending considerable time "in the field" in Tamil Nadu in order to pursue inquiries. . ."<sup>26</sup>

Consider also the testimony which a New York State court heard in awarding the Trustee of the Marquess of Northampton the Sevso hoard which had been purchased from Sotheby's for \$70 million:<sup>27</sup>

This summer, the parties . . . agreed to a physical inspection of the treasure. The examination yielded slivers of wood, traces of soil, and tiny organic particles. Each of these samples was divided four ways among the parties and sent to forensic laboratories for analysis. A lab in California identified the slivers as oak, and not the cedar wood more common to Lebanon. Part of the soil samples were irradiated in Missouri, and part in London on behalf of Lord Northampton. Dr. Louis Sorkin at the American Museum of Natural History in New York identified the organic particles as caterpillar remains of a moth species that probably nested in the cloth in which the silver was wrapped.<sup>28</sup>

Facts are central in determining who should control these objects. A deliberate accounting of this kind of scientific analysis encourages careful resolution. Common law adjudication would in theory allow the parties to present their view of the case, which should help the truth emerge. Why then does the common law system often lead to unpredictable results in the context of cultural property?

Judicial law-making works best when presented with a large sample of cases with which to base any given decision. With a body of relevant precedent, Judges can make their decision from an informed position, allowing them to see how different results in

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<sup>25</sup> *Bumper Development Corp. Ltd. v. Commissioner of Police of the Metropolis and others*, 4 All E.R. 638, C.A. (1991).

<sup>26</sup> NORMAN PALMER, STATUTORY, FORENSIC AND ETHICAL INITIATIVES, IN *THE RECOVERY OF STOLEN ART 18* (Norman Palmer ed., 1998) (citing an unpublished paper delivered by David Calcutt Q.C., counsel for Bumper, to members of the art trade: October 1990, at 10).

<sup>27</sup> *Republic of Croatia v. Trustee of the Marquess of Northampton*, 203 A.2d 167 (N.Y. App. Div. 1<sup>st</sup> Dep't 1994). For a troubling account of the lengths to which nations have gone to recover cultural treasures, see HARVEY KURZWEIL, LEO V. GAGION AND LUDOVIC DE WALDEN, *THE TRIAL OF THE SEVSO TREASURE: WHAT A NATION WILL DO IN THE NAME OF ITS HERITAGE*, IN *WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* (Kate Fitz Gibbon ed., 2005). The Sevso treasure was recently exhibited by Bonham's auction house in anticipation of a potential sale, see <http://illicit-cultural-property.blogspot.com/2006/10/sevso-treasure-on-private-display.html> (last visited Oct. 25, 2006).

<sup>28</sup> PALMER, *supra* note 26, at 18 (citing Text of an IFAR Report, October 1993, page 5).



the courtroom produce a reaction in the outside world. Unfortunately, the relative dearth of cases involving cultural property allows particularly egregious facts to skew the law.

An extreme set of facts can shift the law in unwanted directions. Consider the prosecutions of Frederick Schultz, and his English counterpart Jonathan Tokeley-Parry.<sup>29</sup> Regardless of whether one agrees with criminalizing the removal of nationalized cultural property from source nations, clearly prosecutors in both cases had ideal sets of facts with which to prosecute both defendants. The conduct of both defendants led to the conclusion that something untoward and underhanded was taking place. Such a factual bias may skew the law too far in one direction, leading to its potentially unfair applications on other defendants. Though it may produce satisfactory results in the present case, the ways in which the precedent will be used may not be as desirable. When judges make decisions based on a set of skewed or overly-sympathetic facts, that precedent runs the risk of being applied to situations in which the facts are less deserving of special consideration in the future.<sup>30</sup>

Perhaps the best practical solution to this problem is an increase in the globalization of legal discourse. Precedent and legal scholarship should be shared across jurisdictions, so that a comprehensive body of thought and precedent may lead to workable legal strategies aimed at stemming the illicit trade in cultural property.

### C. *The Values Inherent in Cultural Property Policy*

What is the ultimate purpose of using the criminal law as one of the major foundations for cultural property policy? Are we concerned merely with punishing the particularly egregious cases, or should it encourage better overall protection of archaeological context. In 1982, in a seminal work on the subject Paul Bator articulated a values-based approach comprising five basic categories: (1) preservation of the object, (2) preservation of the archaeological context, (3) preserving the national patrimony, (4) international movement, and (5) access.<sup>31</sup> These values provide

<sup>29</sup> See *infra* section III.A.

<sup>30</sup> EPSTEIN, *supra* note 19, at 126.

<sup>31</sup> Paul Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 276 (1982). The article was later published as a monograph, Paul Bator, *The International Trade in Art* (1983). This article references the initial essay. This approach has been used recently in evaluating Egypt's claims to *The Bust of Nefertiti* currently on display in Berlin. See STEPHEN K. URICE, *THE BEAUTIFUL ONE HAS COME - TO STAY, IN IMPERIALISM, ART AND RESTITUTION* 135 (John Henry Merryman ed., 2006).

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the foundation for evaluating the strengths and weakness of cultural property regulation generally.

Another important figure in the scholarly debate, John Henry Merryman, consolidated many of Bator's ideas and argued that there are two ways of thinking about cultural property, "as components of a common human culture" or "as part of a national cultural heritage."<sup>32</sup> The impact which Merryman's analysis has had on the debate is a testament to his concise and thoughtful formulation. However, just because we can think of cultural property in national or international terms does not mean that those are the only or even best ways to approach the debate.

By framing the debate as a dichotomy, Merryman may have unwittingly contributed to the gulf dividing the extreme claims of both nationalists and internationalists, and prevented a discourse which would lead to compromise. A reductionist approach, which looks at cultural property regulation as the sum of fundamental cultural policy values will provide a better view of the state of the federal criminal law in this area. The nationalist/internationalist dichotomy, though useful as a theoretical tool, neglects to incorporate the full complexity of the problem. It often promotes a dualistic fallacy, which assumes that either the national or international position is the only correct approach to a dispute.

### 1. Preserving the Object

Preservation of art and antiquities is "the fundamental value".<sup>33</sup> Above all, cultural policy should insure future generations continue to be able to view, possess or study art and antiquities. At a fundamental level, the beauty and value of objects encourages people to care for them.<sup>34</sup>

The relationship between commerce and aesthetics can often cause problems though. As Bator argued, "[i]t is the most distasteful aspect of the current art trade that on this question aesthetics and economics sometimes part company, and that the physical mutilation of certain types of art is rendered profitable because a respectable and lucrative market can be found for fragments no matter how brutally obtained."<sup>35</sup> To say we should

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<sup>32</sup> Merryman, *supra* note 2, at 831.

<sup>33</sup> Bator, *supra* note 31, at 295.

<sup>34</sup> *Id.* at 295-96.

<sup>35</sup> *Id.* at 296. A number of examples of the mutilation of monuments to provide marketable fragments exists. For the situation with respect to Mayan architecture, see Clemency Coggins, *United States Cultural Property Legislation: Observation of a Combatant*, 7 INT'L J. CULTURAL PROP. 52 (1998); see also *Iran v Berend* [2007] EWHC 132 (QB) (in which the High Court of Justice in London refused to apply the doctrine of *renvoi* in evaluating Iran's claims to a limestone fragment taken from the ancient city of

preserve objects does not mean that in all cases objects should remain in their source nation. Sometimes, preservation may be better accomplished elsewhere. Though some objects may be best preserved in their original location, sometimes collectors or better-funded institutions abroad may do a better job.<sup>36</sup>

## 2. Preserving Archaeological Context

Another very important value is the preservation of archaeological context surrounding antiquities. A great deal of information can be learned from a careful excavation by skilled archaeologists. However the unskilled excavation of antiquities destroys this information. As a result, preserving this information depends upon the laws in place in source nations, and the enforcement resources which implement them.<sup>37</sup> As Bator argued, “an antiquity without a provenance—even if perfectly preserved—is of limited historical significance; if we do not know where it came from, it can provide only limited scientific knowledge of the past.”<sup>38</sup> One of the reasons for such intense disagreement among the shapers of cultural property policy is the correlation between the illicit trade and the market in antiquities.<sup>39</sup> Wherever possible then, the preservation of archaeological information mandates that unearthing antiquities should be done by “a special class of experts”.<sup>40</sup> Some successful measures have attempted to forge a compromise between commerce and archaeological context. We will examine the pragmatic measures taken in England and Wales under the Portable Antiquities Scheme. Rather than declare all undiscovered antiquities the property of the state, individuals are encouraged to report discoveries.<sup>41</sup> That kind of compromise remains a minority view though.<sup>42</sup>

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Persepolis).

<sup>36</sup> Bator, *supra* note 31, at 296. With increased movement, the risk of loss or damage increases though, so it would be a mistake to always assume an object should be better preserved in a wealthy nation. A Goya painting entitled *Children with a Cart* was stolen en route from the Toledo Museum of Art on to the Solomon R. Guggenheim Museum in New York before being recovered by the FBI. *Lost, Found and Lent Goya*, N.Y. TIMES, Feb. 5, 2007, [http://www.nytimes.com/2007/02/06/arts/06arts.html?\\_r=1&ref=arts&oref=slogin](http://www.nytimes.com/2007/02/06/arts/06arts.html?_r=1&ref=arts&oref=slogin).

<sup>37</sup> Bator, *supra* note 31, at 302.

<sup>38</sup> *Id.* at 301.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 302.

<sup>41</sup> The Treasure Act 1996 acts as the foundation for the scheme. It requires finders of certain objects to report any find to a designated coroner within 14 days. If the object is deemed treasure, then the finder is entitled to a reward based on the market price of the object. Treasure Act 1996, § 1.

<sup>42</sup> See Portable Antiquities Scheme, <http://www.finds.org.uk/> (last visited Jan. 21, 2007).

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To summarize, preserving archaeological context is another of Bator's major values.<sup>43</sup> It unites aesthetically beautiful antiquities with the past, and gives us a glimpse of past civilizations. However the contextual value does not dictate an antiquity should remain in its source nation indefinitely or that nations should retain all of their artistic or cultural creations.<sup>44</sup>

### 3. Preserving the National Patrimony

Certain objects belong in a given location, and cannot be fully appreciated in other locations. Deciding this difficult question remains perhaps the most vexing problem facing cultural policy makers. Cultural property often becomes closely linked with a specific nation. A nation possessing an exceptionally beautiful or historical object receives a number of rewards. The important question with respect to national patrimony is whether the proper nation is receiving these benefits. Bator conceptualized national patrimony in terms of national wealth and cultural inheritance.<sup>45</sup> The question of national wealth is by far the simpler. If a nation has been unfairly deprived of the value of some of its national wealth, a simple economic resolution can be reached. However, the analysis of a nation's cultural inheritance presents a more difficult question. As Bator said, "the art of a society is both a manifestation and a mirror of its culture . . . [It is] closely linked to the processes of education: The study of a nation's art is part of the process through which citizens learn who they are."<sup>46</sup> This more difficult question seeks to determine where an object's proper place should be. Laying out which objects belong in a given national patrimony remains difficult and highly subjective.

### 4. International Movement

Nations which export their art derive a number of advantages. As Bator stated, "[a]rt is a good ambassador. It stimulates interest in, understanding of, and sympathy and admiration for that country."<sup>47</sup> Art and cultural objects can enhance respect for other cultures and break down

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<sup>43</sup> Bator, *supra* note 31, at 301.

<sup>44</sup> As Bator noted, "Once an object is scientifically excavated, its provenance studied and recorded, its relationship to other finds fully explored, removing it no longer threatens [the contextual value]." *Id.*

<sup>45</sup> Bator, *supra* note 31, at 303-04.

<sup>46</sup> *Id.* at 304.

<sup>47</sup> *Id.* at 306.

“parochialism.”<sup>48</sup> A number of others have endorsed this value as well.<sup>49</sup> By sharing art and antiquities with other nations, a source nation can increase its own standing among other nations. It can serve to eliminate ignorance as well.<sup>50</sup>

### 5. Accessibility

To a certain extent, cultural property should be placed where it can find the greatest interested audience. Art and antiquities should be made available to the public and scholars so that it can “exercise its power over us” and increase knowledge generally.<sup>51</sup> In resolving cultural property disputes, we should be mindful of how available a work of art might be to the general public.

Visibility and accessibility should not outweigh other values though. Accessibility may be postponed.<sup>52</sup> Consider an object from a developing source nation which cannot be displayed to the public immediately because that nation does not have enough resources to build a museum; it might be purchased and made available to the public in a wealthier industrialized nation immediately; however, it could still be put on display in its source nation in a generation or two.<sup>53</sup> As Bator argued, “we should resist the vulgar assumption that art always ‘serves’ best when it is most visible and accessible.”<sup>54</sup> Accessibility does not just favor public institutions either. Private collections often become public, and are created in a “comparatively irresponsible,” “adventurous” and “iconoclastic” way.<sup>55</sup> Consider for example Sir John Soane’s Museum in London, which is packed with architectural drawings, paintings, antiquities and models to create a unique collection which would almost certainly never have existed had it been guided by museum curators.<sup>56</sup> The question of access remains an important factor, however the debate often does not involve the level of access, but rather who should have access to an object.

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<sup>48</sup> *Id.* at 306-08.

<sup>49</sup> See Merryman, *supra* note 21; see also Kwame Anthony Appiah, *Cosmopolitanism* 124 (2006) (arguing “The Problem for Mali is not that it doesn’t have enough Malian art. The problem is that it doesn’t have enough money... If UNESCO had spent as much effort to make it possible for great art to get into Mali as it has done to stop great art from getting out, it would have been serving better the interests that Malians, like all people, have in a cosmopolitan aesthetic experience.”)

<sup>50</sup> Bator, *supra* note 31, at 308.

<sup>51</sup> *Id.* at 299.

<sup>52</sup> *Id.* at 299-300.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 300.

<sup>55</sup> *Id.*

<sup>56</sup> Wikipedia, *Sir John Soane’s Museum*

[http://en.wikipedia.org/wiki/Sir\\_John\\_Soane's\\_Museum](http://en.wikipedia.org/wiki/Sir_John_Soane's_Museum) (last visited Feb. 11, 2007).

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Should it be the residents of wealthier nations, the source nation or should there be a balance between the developed and developing world? The complex nature of that question renders access merely a secondary value; it should of course be considered, but should not dominate the discussion.

After establishing that preservation of the object and preservation of archaeological context are the two primary values inherent in cultural property policy, we should now consider why nations regulate the illicit trade in cultural property.

#### D. *Why Do We Regulate the Illicit Market?*

The illicit trade in cultural property presents a pressing international problem. Nations are becoming increasingly interconnected. The current escalating value of art and antiquities strains the current regulatory framework and fuels the black market. Estimates place the illicit trade in cultural property at close to \$6 billion annually, putting it close behind the underground markets in illegal drugs and firearms.<sup>57</sup> A great deal of what may pass as licit cultural property may actually be illicitly excavated, illicitly exported, or even stolen.<sup>58</sup> The illicit trade often destroys archaeological context and sometimes even the actual objects, which are often chopped up or disguised to hide their value.<sup>59</sup> The illicit trade has the potential to remove large parts of a nation's cultural heritage. In 2002, Italy reported over 18,000 objects stolen from its museums, churches, historic sites, and archaeological sites.<sup>60</sup> These objects are valuable for their artistic, cultural and historical importance. When they are stolen or destroyed we lose the ability to study and learn about our past.

Efforts to combat the illicit trade in cultural property present unique ethical and legal questions. There exist very different opinions about what can and should be done with cultural property. This divergence of opinion often prevents meaningful

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<sup>57</sup> Federal Bureau of Investigation, *Art Theft Program*, <http://www.fbi.gov/hq/cid/arttheft/arttheft.htm> (last visited Mar. 10, 2007).

<sup>58</sup> Richard McGill Murphy, *A Corrupt Culture*, *NEW LEADER*, Feb. 23, 1998, at 15 (arguing that "30 to 40 percent of the world's available antiquities pass through the sale rooms [of dealers] in New York and London. Roughly 90 percent of these pieces are of unknown provenance, meaning they were almost certainly stolen, smuggled or both.")

<sup>59</sup> A great deal of scholarship focuses on the damage done to archaeological sites as a result of the illicit trade. For two of the most persuasive articles, see Coggins, *supra* note 35, at 52, and Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 *CONN. J. INT'L L.* 197 (2001) [hereinafter Gerstenblith].

<sup>60</sup> INTERPOL, *Cultural Property Theft Statistics* <http://www.interpol.int/Public/WorkOfArt/statistics/StatPlace2003.asp> (last visited Mar. 10, 2007).

and effective regulation. We must attempt to reconcile these differences. A pragmatic approach would create a system which better accomplishes the goals of all of the stakeholders in the cultural property world. First, we will look at the federal criminal regulation of cultural property, and then look at how a pragmatic approach in the United Kingdom has proved successful.

### III. FEDERAL CRIMINAL REGULATION

The evolution of federal<sup>61</sup> criminal penalties for dealing in nationalized art and antiquities has gradually evolved. There exists a very real risk that if we are not clear about what values this criminal regulation furthers we could end up with a patchwork system that does not end up promoting any of the core cultural policy values. As the following discussion makes clear, successful prosecutions are rare. Prosecutors have had to assert conspiracy charges and have even resorted to comparatively draconian seizure measures in an attempt to regulate a market which lacks transparency. These strategies are effective at punishing the individual defendants, but do not effectively regulate the market. The current state of affairs will always produce limited results, unless the market can effectively distinguish between licit and illicit objects. Without transparency, this will prove difficult. Federal criminal prosecutions and seizures work well for clear and egregious cases, but do not satisfactorily regulate the market at a systemic level.

#### A. NSPA Prosecutions under the McClain doctrine

The National Stolen Property Act ("NSPA") imposes jail time or high fines for transporting stolen goods across state lines.<sup>61</sup> Originally enacted to enable prosecutors to bring criminal charges against car thieves who drove stolen cars across state lines, the NSPA has been adapted to respond to the illicit trade in antiquities.<sup>62</sup> It establishes a felony offense for those who knowingly sell, transport, receive, or conceal goods whose value exceeds \$5,000 in interstate or foreign commerce.<sup>63</sup> A defendant must have acted knowingly to violate the NSPA; this element can

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<sup>61</sup> 18 U.S.C. § 2314-15 (2006).

<sup>62</sup> 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, 89-91 (1978).

<sup>63</sup> 18 U.S.C. § 2314 (2006).

be extremely difficult to establish in the context of cultural property because of the shroud of secrecy surrounding art and antiquities transactions. The NSPA has always been a viable tool in limiting the trade in cultural property in cases of traditional theft.<sup>64</sup> A series of decisions in the last thirty years has increasingly brought its provisions to bear on nationalized antiquities as well.

### 1. United States v. Hollinshead<sup>65</sup>

The first attempt to apply the NSPA to nationalized antiquities came in 1974 in *United States v. Hollinshead*. In many respects the prosecution was a "fluke" which made the often-difficult issue of proving criminal conduct on the part of the defendant far simpler for the prosecution; an important factor which commentators often fail to properly discuss.<sup>66</sup> In 1961, archaeologist Ian Graham discovered Mayan ruins in a site he called "Machaquila."<sup>67</sup> He photographed a stela in 1962, and returned to the site in 1968 to find the stela in the same condition. Then, in 1971, Graham was asked about a pre-Columbian stela which was being sold by Clive Hollinshead. He recognized the fragment as the same one he had photographed in both 1962 and 1968.<sup>68</sup>

Following Graham's identification of the fragment, a civil action was brought by the Guatemalan government, however that suit was dropped when criminal charges were brought. During the criminal trial, Clive Hollinshead and John Fell were convicted of conspiracy to transport stolen goods in interstate commerce.<sup>69</sup> Hollinshead travelled to Guatemala, cut the Mayan stela, which

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<sup>64</sup> See *United States v. Aleskerova*, 300 F.3d 286 (2002) (upholding convictions for possessing stolen artworks from a museum in Azerbaijan, and conspiring to sell them in the US). That trend continues. An attorney was recently arrested and indicted on charges of attempting to sell works of art that had been entrusted to him by the thief. One of the works was a \$30 million dollar still life by Cezanne. *Boston Herald, Retired lawyer indicted in case of stolen art*, <http://news.bostonherald.com/localRegional/view.bg?articleid=187441> (last updated Mar. 9, 2007).

<sup>65</sup> *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

<sup>66</sup> Bator, *supra* note 31, at 346 (citing Record, *United States v. Hollinshead*, No. 10970-CD-MML (C.D. Cal.)).

<sup>67</sup> *Id.* at 345.

<sup>68</sup> *Id.*

<sup>69</sup> *United States v. Hollinshead*, 495 F.2d 1155 (9th Cir. 1974). All of the NSPA convictions for dealing in stolen cultural property were for conspiracy. Federal law states that if two or more individuals conspire to commit any federal offense, and one or more of the co-conspirators perform any act in furtherance of the conspiracy, each co-conspirator is subject to fines and/or imprisonment of not more than five years. 18 U.S.C. § 371 (2006).



Graham had already documented twice, into pieces.<sup>70</sup> He then shipped the objects to himself in California in a box marked personal effects.<sup>71</sup> The Ninth Circuit was not presented with the direct issue of whether the NSPA could apply to national patrimony laws; but it did pave the way for subsequent prosecutions, as it applied a generous definition of "stolen" to art and antiquities.<sup>72</sup> It opened the door for prosecutions in situations where objects have been removed from a nation which has nationalized cultural material.<sup>73</sup> Though the government was forced to show the stela was stolen, it did not have to prove the defendants knew exactly where the object was stolen. Rather, the court held the defendants' conduct in bribing officials, cutting the stela into easily disguised pieces and using false information on the packaging showed beyond a reasonable doubt that they knew they were transporting stolen property into the United States.

## 2. The *McClain* Cases

The next test of the applicability of the NSPA to cultural property came with the two appellate decisions stemming from *United States v. McClain*.<sup>74</sup> At least two of the five *McClain* defendants had ties to Clive Hollinshead.<sup>75</sup> The defendants were convicted under the NSPA for stealing pre-Columbian artifacts from Mexico, and selling them in the United States.<sup>76</sup> This group of art dealers and appraisers created a network in Mexico where artifacts were taken from excavations to the Mexican Archaeological Institute; they were then given false papers and backdated before 1972 in an attempt to give them clean provenance.<sup>77</sup> The objects were then taken across the border to

<sup>70</sup> *Hollinshead*, 495 F.2d at 1155.

<sup>71</sup> *Id.*

<sup>72</sup> The court defined stolen as "acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership." *Hollinshead*, 495 F.2d at 1156.

<sup>73</sup> See Gerstenblith, *supra* note 59, at 214-15.

<sup>74</sup> *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (hereinafter "*McClain I*"); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) (hereinafter "*McClain II*"). The decisions have been analyzed a great deal. See Richard Upton, *Art Theft: National Stolen Property Act Applied to Nationalized Mexican Pre-Columbian Artifacts*, 10 N.Y.U. J. INT'L L. & POL. 569 (1978); Bator, *supra* note 31, at 346-50; Gerstenblith, *supra* note 59, at 214-41; Adam Goldberg, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1039-42 (2006).

<sup>75</sup> In *McClain II*, the court stated: "At least appellants Simpson and Bradshaw knew Hollinshead and were aware of his conviction and probation. Hollinshead was to have supplied several of the artifacts that appellants were selling when they were arrested." 593 F.2d at 659.

<sup>76</sup> *McClain I*, 545 F.2d 988.

<sup>77</sup> *McClain II*, 593 F.2d at 661.

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Calexico, California where they were sold.<sup>78</sup> These actions ultimately raised the suspicions of the director of the Mexican Cultural Institute, which informed the FBI, resulting in an undercover investigation.<sup>79</sup>

A Mexican law passed in 1972 nationalized ownership of undiscovered pre-Columbian artifacts.<sup>80</sup> As a result, the provenance and date of discovery of the objects was an important potential issue. However, in the first conviction, the government presented no evidence as to how and when the objects were discovered or exported. *McClain I* dealt with the vesting of ownership of antiquities with Mexico, with the court considering the definition of "stolen" under the NSPA.<sup>81</sup> It determined that the term should be given a broad meaning and remanded to the district court the issue of when precisely the objects were exported from Mexico.<sup>82</sup>

Although the prosecution argued that an 1897 law accomplished state ownership, the court held title did not completely vest with Mexico until enactment of the 1972 law, because only then did Mexico declare ownership of all pre-Columbian artifacts.<sup>83</sup> The jury had not been instructed to determine when any of the pre-Columbian objects at issue had been exported from Mexico, or how to apply the relevant Mexican law to the export.<sup>84</sup> Because of the improper jury instruction, the court remanded the controversy back to the Federal District Court. Although a temporary victory for the defendants, *McClain I* firmly established the applicability of the NSPA to pieces of cultural property emanating from nations which had vested title to these objects in the state, even where the objects have never been within the physical possession of the foreign government.<sup>85</sup>

On remand, the defendants were once again convicted of

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *McClain I*, 545 F.2d at 992; see Ley federal sobre monumentos y zona Published in the Diario Oficial de la Federación on 6 May 1972.

<sup>81</sup> *McClain I*, 545 F.2d at 994-997. The court highlighted the scope of the Supreme Court's definition of "stolen" under the Motor Vehicle Theft Act: "stolen" does not refer exclusively to larcenously taken automobiles." *Id.* at 995 (citing *United States v. Turley*, 352 U.S. 407, 411 (1957)). Other earlier cases had held Congress intended the NSPA to reach all ways by which an owner is wrongfully deprived of the use or benefit of the use of his property ... "'stealing' is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership." *Id.* at 995 n. 6 (citing *Lyda v. United States*, 279 F.2d 461 (5th Cir. 1960)); *Crabb v. Zerbst*, 99 F.2d 562, 565 (5th Cir. 1939).

<sup>82</sup> *McClain I*, 545 F.2d at 993, 997-1004.

<sup>83</sup> *Id.* at 997-98, 1000-01.

<sup>84</sup> *Id.* at 1004.

<sup>85</sup> *McClain II*, 593 F.2d 658, 664 (5th Cir. 1979).

violating the NSPA, and of conspiracy to violate the act.<sup>86</sup> At the retrial, the prosecution was required to establish beyond a reasonable doubt that the defendants knew they were selling stolen objects. In *McClain II*, the court upheld the conspiracy conviction due to overwhelming evidence that the defendants intended to smuggle Mexican artifacts, clearly violating the 1972 Mexican Act, and by implication the NSPA.<sup>87</sup> However, the conviction under the NSPA itself was overturned because of due process concerns.<sup>88</sup> The District Court Judge and not the jury must determine questions of foreign law.<sup>89</sup> As the 5th Circuit Court of Appeals reasoned, the most likely interpretation of the evidence by the jury led to the conclusion that Mexico deemed itself the owner of its pre-Columbian objects as early as 1897. However, that act was too vague to impose criminal liability upon a defendant under the "jurisprudential standards" of the United States.<sup>90</sup>

The conviction of the *McClain* defendants for conspiracy to violate the NSPA firmly establishes that individuals may be convicted under the NSPA for dealing in objects that foreign states have nationalized. This ownership interest will be enforced by U.S. courts, despite the absence of any actual possession of the object by the foreign state. If a misappropriation occurs, such as removing that object from the foreign territory, then the action will be deemed a theft, and will trigger the panoply of prosecutorial enforcement mechanisms available in the United States. There are limits on the enforcement of these foreign patrimony declarations. For one, the objects at issue must have been found within the modern territory of the nation declaring an ownership interest.<sup>91</sup> Second, the vesting legislation must be sufficiently clear so as to give notice of its effects. Finally, the criminal misappropriation must have occurred after the effective date of the vesting legislation. As a result, the *McClain* doctrine allows further prosecutions under the NSPA in the cultural property context; however, their widespread efficacy remains in doubt as the scienter requirement under the NSPA presents a substantial hurdle for prosecutors.<sup>92</sup>

<sup>86</sup> *Id.* at 665-66.

<sup>87</sup> *Id.* at 671-72.

<sup>88</sup> *Id.* at 670.

<sup>89</sup> *Id.* at 669-70, citing *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954), *cert. denied* 348 U.S. 927 (1955); *Liechti v. Roche*, 198 F.2d 174 (5th Cir. 1952).

<sup>90</sup> *McClain II*, 593 F.2d at 670.

<sup>91</sup> For example, if a Roman statue was found in Spain, Spain might have an interest under the NSPA, but not Italy.

<sup>92</sup> See Claudia Fox, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects*:

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The *Hollinshead* and *McClain* convictions were condemned by many commentators, on the grounds that United States courts should not give added weight to the retention schemes of other nations. By strengthening the efficacy of retention schemes, the black market would step in to fill the demand for cultural material.<sup>93</sup> Much of this criticism now seems unwarranted, especially if you give weight to the work of Mackenzie and others arguing for increased penalties for the purchasers and dealers of illicit cultural property.<sup>94</sup> However, the *McClain* doctrine, despite the fears it raised in many sectors of the cultural property market, has not had a profound effect on the illicit trade.

Both Mexico<sup>95</sup> and Guatemala<sup>96</sup> continue to suffer enormous losses of cultural property, and no convincing data has emerged to link the *Hollinshead* or *McClain* convictions to any decrease in looting of archaeological sites or illegal exports. Though it could be argued that without the deterrent effect of the NSPA there might have been far more looting, the current state of deterrence is hardly limiting theft and destruction of archaeological sites to a satisfactory level. Despite its limited impact, the *McClain* doctrine has been repeatedly upheld, and seems firmly entrenched in United States cultural property policy.<sup>97</sup>

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*An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U.J. INT'L L. & POL'Y 225, 232-36 (1993) (arguing the problems in establishing scienter in stolen art, and by extension antiquities, cases can be quite difficult because of destruction of evidence, the secrecy in the market, and the high volume of transactions).

<sup>93</sup> See Jennifer Anglim Kreder, *The Choice between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1211-12 (2005).

<sup>94</sup> See Simon Mackenzie, *Law, Regulation and the Illicit Antiquities Market*, 45 BRIT. J. CRIMINOL. 249 (2004) (stressing that penalties should be increased at the market end of the antiquities supply chain); see also Simon Mackenzie, *Illicit Antiquities, Criminological Theory, and the Deterrent Power of Criminal Sanctions for Targeted Populations*, 7 J. OF ART ANTIQUITY & L. 125 (2002).

<sup>95</sup> Mexico covers remnants of a number of pre-Columbian civilizations, including the Maya, Aztecs, Olmecs, Zapotecs, Mixtecs, Totonacw, Toltecs, Teotihuacanos, and Tarascans. See RICHARD E.W. ADAMS, *ANCIENT CIVILIZATIONS OF THE NEW WORLD* 25-89 (1997); see also MICHAEL D. COE, *MEXICO: FROM THE OLMECS TO THE AZTECS* (1994). Mexico's National Institute of Anthropology and History estimates that over 1,000 pieces have been stolen from Mexico's churches since 1999. Elisabeth Malkin, *Nothing is Sacred, as Looters Rob Mexican Churches of Colonial Treasures*, N.Y. TIMES, Oct. 4, 2006.

<sup>96</sup> Guatemala has 5,000 recognized archaeological sites, containing the remains of the Maya and Xinka civilizations, but only 45 are under permanent surveillance. JUAN ANTONIO VALDES, *Management and Conservation of Guatemala's Cultural Heritage: A Challenge to Keep History Alive*, in ART AND CULTURAL HERITAGE 95 (Barbara T. Hoffman ed., 2005). See Report of the Cultural Property Advisory Committee to the President Regarding the Request of the Government of Guatemala for Emergency Import Restrictions under the Cultural Property Implementation Act, 10 (Cultural Property Advisory Committee, United States Information Service, February 1990); Coggins, *supra* note 35, at 61.

<sup>97</sup> See *Turkey v. OKS Partners*, 797 F. Supp. 64, 66 (D. Mass. 1992) (holding that Turkey's patrimony law gave it standing to bring an action for the recovery of allegedly looted ancient coins). See also *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), *aff'd*, 184 F.3d 131 (2d Cir. 1999) (involving the forfeiture of a gold phiale stemming from customs violation and the NSPA). On appeal, the Second Circuit Court of Appeals affirmed the forfeiture under the customs forfeiture and did not reach

3. Dealing in Nationalized Egyptian Antiquities: *United States v. Schultz*,<sup>98</sup> and *R. v. Tokeley-Parry*<sup>99</sup>

Two recent convictions of antiquities dealers in the United States and United Kingdom reveal the strengths and weaknesses of the United States' approach to criminal enforcement of foreign national patrimony laws. As the two prosecutions below reveal, United States courts have erected important safeguards with the NSPA which are not discussed in the United Kingdom prosecution. Both cases see courts attempting to punish the circumstantial criminal conduct of both defendants. However, the nature of the illicit trade in antiquities, with its lack of provenance and overall shroud of secrecy, render problems of proving criminal conduct difficult.

United States v. Schultz<sup>100</sup>

The Frederick Schultz trial garnered a great deal of notoriety due to his high standing among antiquities dealers. Schultz, a prominent Manhattan art dealer, once served as president of the National Association of Dealers in Ancient, Oriental, and Primitive art.<sup>101</sup> In spite of this reputation, Schultz was convicted of conspiring to receive stolen property under the NSPA and sentenced to 33 months of incarceration.<sup>102</sup>

Schultz met Jonathan Tokeley-Parry ("Parry"), and they developed a close working relationship to acquire and sell newly-discovered Egyptian antiquities.<sup>103</sup> Parry had been convicted under English law for dealing in Egyptian antiquities, and testified for the prosecution in the Schultz trial.<sup>104</sup> The two developed a number of techniques to disguise antiquities or make it appear as if they were a part of collections which predated Egypt's national patrimony legislation.<sup>105</sup> In one case, they disguised ancient Egyptian statues as cheap souvenirs.<sup>106</sup> Parry then "restored" the

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the NSPA issue. *United States v. An Antique Platter of Gold*, 184 F.3d 131, 135 (2d. Cir. 1999). See *infra* section III.C.

<sup>98</sup> *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

<sup>99</sup> *R. v. Tokeley-Parry*, [1999] Crim. L. R. 578.

<sup>100</sup> *Schultz*, 333 F.3d 393.

<sup>101</sup> *Id.* at 395, 412.

<sup>102</sup> *Id.* at 395, 398.

<sup>103</sup> *Id.* at 396-97.

<sup>104</sup> *Id.* at 396.

<sup>105</sup> *Id.* at 396, 412.

<sup>106</sup> *Id.* at 396.

antiquities using techniques from the 1920's and claimed they were part of the bogus Thomas Alcock Collection.<sup>107</sup> Parry was arrested by New Scotland Yard in 1994 for smuggling Egyptian objects and served a three year prison term; however, he continued dealing in Egyptian artifacts with Schultz.<sup>108</sup>

Schultz raised three arguments in support of his appeal: (1) the *McClain* doctrine conflicts with United States policy; (2) the enactment of the Cultural Property Implementation Act of 1983 preempts the prosecution under the NSPA; and (3) the common law definition of "stolen" would not cover the antiquities at issue in his conviction.<sup>109</sup>

Though the Second Circuit Court of Appeals found the arguments unpersuasive, they did note general concerns with the application of the *McClain* doctrine. In response to the argument regarding the conflict in United States policy, the court argued that such an interpretation, even if true, was irrelevant; the Egyptian Law 117 at issue is a true ownership law, and not merely an export restriction.<sup>110</sup>

The argument that the adoption of the CPIA preempts prosecution under the *McClain* doctrine proved unpersuasive as well. Though Senator Patrick Moynihan had stated publicly that

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<sup>107</sup> *Id.* One technique involved applying Victorian pharmaceutical labels stained with tea, to the restored objects. Tokeley-Parry imitated older restoration styles by painting an Amenhotep III head with brown varnish, and using modeling material to create a false nose, beard, and a cobra on the forehead. He then took pictures of the "old" restorations, before removing his handiwork. In a fake restoration report, he then claimed he had restored the object using modern techniques. Schultz then offered these and other similarly smuggled items for sale in his Madison Avenue art gallery. Brief for the United States of America at 9, *United States v. Schultz*, No. 02-1357 (2d Cir. Dec. 3, 2002).

<sup>108</sup> *R. v. Tokeley-Parry*, [1999] Crim. L. R. 578. See also Brief for the United States of America at 8, *United States v. Schultz*, No. 02-1357 (2d Cir. Dec. 3, 2002). Schultz and Parry encountered problems because their dealings were too successful: many of the collections contained only extremely valuable items, and it was unlikely that a collection would consist exclusively of high value items. At trial, a number of letters between Tokeley-Parry and Schultz were admitted into evidence. One letter revealed one object was [L]ost to us because, simply, we didn't have any money there to put down a deposit and secure it (that is, physically take it away from the farmer.) I'm immensely depressed about this, as the piece would have solved all our problems . . . We managed, however, with considerable skill, to keep our customer who, it seems, is sitting on a temple. We have told him that we need another important piece, and he has agreed to actively dig for one. *Id.* at 18. The record contains many such communications between Schultz and Tokeley-Parry, all of which firmly established the two knew their behavior was illegal. One communication, in a creative take on Peter Graves' exploits in "Mission Impossible," even urged Schultz to eat the message after he read it. Closer to the time of their arrest, the two even started writing to each other in Italian, in code, to prevent hotel staff from reading their communications. *Id.* at 19, 23.

<sup>109</sup> *Schultz*, 333 F.3d at 403.

<sup>110</sup> *Id.* at 407-08. Schultz argued that the United States policy does not enforce foreign export restrictions. However, he was unable to provide any evidence to that effect, and the Second Circuit pointed to testimony at trial by two Egyptian officials who described the penalties for illegal export and domestic theft or concealment were quite different. *Id.*

the adoption of the CPIA was contingent on an agreement that Congress would prohibit prosecutions under the *McClain* doctrine, no such bill has ever been passed.<sup>111</sup> The CPIA does not preempt prosecution under the *McClain* doctrine for two reasons. First, the legislative history of the CPIA indicates the opposite.<sup>112</sup> Second, the same activity can trigger both the CPIA and the NSPA.<sup>113</sup> Finally, Schultz argued the common law definition of "stolen" does not encompass the antiquities at issue in the prosecution.<sup>114</sup> The court dispatched that argument as well. The Supreme Court has clearly recognized the absence of a clear common-law definition of "stolen."<sup>115</sup>

The *Schultz* holding reinforced and expanded the *Hollinshead* and *McClain* decisions. Now, the Second, Fifth and Ninth Circuits have all taken the position that the NSPA can be used to enforce foreign national patrimony legislation.

One fascinating upshot of the *Schultz* conviction has been its impact on antiquities dealers. In his recent book on the subject, Simon Mackenzie interviewed a number of antiquities dealers all over the world, and included their anonymous comments. The book reveals an entertaining, and sometimes troubling picture. One New York dealer said of Parry, "He's a pathological liar and I met him on several occasions when Fred [Schultz] was dealing with him and I mean he was just a nutter."<sup>116</sup> Mackenzie's work indicates most dealers believed Schultz was careless in dealing with Parry:

The fact that Fred Schultz might have done some stupid things in not getting good information from the guy who was offering him things on consignment for sale and the fact that the guy who was offering things on consignment for sale was a clear crook and a nutcase, you know that. . . if you're buying a used car our you're buying art, then you have to protect yourself in that situation.<sup>117</sup>

For prosecutions under the NSPA to have an effect on the black market, dealers must be aware of potential sanctions if they continue to trade in objects which may be suspicious. They must

<sup>111</sup> Two such bills were introduced by Senator Moynihan, though neither passed. *Schultz*, 333 F.3d at 408-09, n. 9, citing 131 CONG. REC. S2598-03 (Mar. 6, 1985).

<sup>112</sup> *Schultz*, 333 F.3d at 408, quoting the Senate Report on the CPIA, "the CPIA 'neither pre-empts state law in any way, nor modifies any Federal or State remedies that may pertain to articles to which [the CPIA's] provisions . . . apply.'" *Id.* at 408, citing S. REP. NO. 97-564, at 22 (1982).

<sup>113</sup> *Schultz*, 333 F.3d at 409.

<sup>114</sup> *Id.* at 409-10.

<sup>115</sup> *Id.* at 409, (citing *United States v. Turley*, 352 U.S. 407 (1957), in which the Supreme court recognized the term stolen "has no accepted common-law meaning.").

<sup>116</sup> Mackenzie, *supra* note 94, at 79.

<sup>117</sup> *Id.* at 78-9.

also be able to differentiate between licit and illicit objects.

R. v. Tokeley-Parry<sup>118</sup>

Another earlier prosecution saw English courts grappling with similar criminal conduct. In 1999, the conviction of Jonathan Tokeley-Parry under the Theft Act 1968 was upheld.<sup>119</sup> The Court of Appeal for the Criminal Division upheld Parry's conviction and six-year prison sentence for two counts of handling stolen Egyptian antiquities.<sup>120</sup>

One threshold difference between the U.S. and U.K. prosecutions is the differing view of Egypt's national Patrimony Law. In *Schultz*, the Second Circuit applied the Egyptian patrimony law, referred to as Law 117, which declared all antiquities found in Egypt after 1983 to be the property of Egypt.<sup>121</sup> However in Parry's earlier conviction, the English court said "Since 1951 all antiquities in Egypt are the property of the state and if held by an individual without a license or removed from Egypt, are stolen."<sup>122</sup> If there is an unclear or unenforced law on the books, defendants may be in an unfair position under the English precedent.<sup>123</sup>

Two issues were presented by Parry on appeal. The first questioned whether the jury heard sufficient evidence to support a conviction.<sup>124</sup> The primary witness for the Crown at the trial was Mark Perry, a man whom Parry had approached about smuggling antiquities from Egypt in exchange for £500.<sup>125</sup> The indictment detailed the smuggling of two Egyptian antiquities: pieces of a false door from the Tomb of Hetepka, and a figure of Horus.<sup>126</sup> The Court of Appeal for the Criminal Division found "ample evidence" in support of the conviction, citing in particular the fact that Mark Perry's evidence was corroborated by another man whom Parry had approached to engage in similar smuggling

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<sup>118</sup> *Tokeley-Parry* [1999] Crim LR 578.

<sup>119</sup> *Id.* Tokeley-Parry testified for the prosecution in the trial of Frederick Schultz, who conversely refused to testify on Tokeley-Parry's behalf during his prosecution. For an interesting account of some of Parry's exploits see Peter Watson, *The Investigation of Frederick Schultz*, CULTURE WITHOUT CONTEXT, ISSUE 10 (2002), <http://www.mcdonald.cam.ac.uk/IARC/cwoc/issue10/investigation.htm> (last visited Aug. 25, 2007).

<sup>120</sup> *Tokeley-Parry* [1999] Crim LR 578.

<sup>121</sup> *Schultz* 333 F.3d at 395.

<sup>122</sup> *Tokeley-Parry* [1999] Crim LR 578.

<sup>123</sup> See *Gov't of Peru v. Johnson*, 720 F.Supp. 810 (C.D. Cal. 1989) (holding that in Peru's replevin action seeking the return of antiquities, the nationalization was not sufficiently clear so as to require restitution).

<sup>124</sup> *Tokeley-Parry* [1999] Crim LR 578.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*



operations.<sup>127</sup>

The second issue involved an interpretation of s.22 (1) of the Theft Act, which requires that a defendant assists another person in the removal of stolen goods. Parry argued that s.22 (1) could not encompass Mark Perry as "another person." However, as Parry engaged Perry, the "other" person, to travel to Egypt and collect stolen antiquities, Parry was guilty of handling stolen goods even though Perry may have been an innocent agent and unaware of the stolen nature of the antiquities. The court found this argument unpersuasive as well, as it was precisely the kind of criminal conduct which section 22(1) of the Theft Act was meant to punish.<sup>128</sup>

In comparing the *Parry* and *Schultz* convictions, we see two very different formulations of the important issues. Both courts were presented with a situation in which the defendants were dealing in antiquities, and creating false provenances and collections to attempt to disguise their conduct. U.S. courts have responded by sharply limiting the application of the NSPA to foreign patrimony laws, and requiring that they are clearly worded. The English jurisprudence on this issue is not as developed. The *Parry* conviction seems to be at the same point as the *Hollinshead* conviction in the US. The court was confronted with patently obvious criminal conduct, but was unsure of how precisely to fit the conduct into the Theft Act. Thus, this set of facts could lead to unsatisfactory results in the future. By sharing the lessons of the American courts, future English courts could diminish some of the possible negative outcomes and could begin to build a body of global precedent which could work in concert to de-incentivize the illicit trade in cultural property.

### B. *Federal Criminal Forfeitures*

Criminal forfeitures are powerful tools for federal prosecutors. They strongly favor the government and original owners. They may be necessary under the current system which lacks transparency. However, they have not always been used effectively and they certainly do not seem to have an effect on the market generally.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* ("[I]t would be difficult to imagine a clearer case for the operation of that part of s.22 which provides that an accused person shall be guilty of an offence if he assists the removal by another person of stolen goods;" (citing the 8<sup>th</sup> Report of the Criminal Law Revision Committee on Theft and Related Offences (1966), Command Paper 2977.))

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In 1970, Congress reintroduced forfeitures following a 180 year period in which they had been seldom used outside the admiralty context.<sup>129</sup> Forfeiture proceedings are a curious hybrid of the civil and criminal law. They were seen as new tools to respond to organized crime and drug dealing by removing the incentive for illegal conduct by returning wrongfully appropriated property to its original owner. Increasingly, prosecutors have taken what they have learned in those arenas, and applied them to cultural objects.<sup>130</sup>

No general law of forfeiture exists. Instead, each federal crime has its own forfeiture provision.<sup>131</sup> They are initiated by the government in an *in rem* action which names the specific piece of property as the defendant.<sup>132</sup> Often, a federal agency, such as the Treasury Department or the FBI, seizes the property, and then the U.S. Attorney's Office initiates a proceeding.<sup>133</sup> The trial then takes place in much the same manner as any civil action, save the fact that anyone with a legal interest in the object may contest the forfeiture.

Forfeitures are a very powerful tool for both prosecutors and original owners or possessors of cultural property. From the Government's perspective, forfeiture proceedings offer a number of advantages over prosecutions.<sup>134</sup> Perhaps most importantly, the

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<sup>129</sup> See S. REP. No. 98-225, at 82 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3265 (stating that, "[f]rom that time [1790] until 1970 there was no criminal forfeiture provision in the United States Code.").

<sup>130</sup> Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America*, in DRUGS, CRIME AND SOCIAL POLICY 109 (Thomas Mieczkowski ed., 1992).

<sup>131</sup> Stefan D. Cassella, *Using the Forfeiture Laws to Protect Archaeological Resources*, 41 IDAHO L. REV. 129, 130-31 (2004), citing some examples, including: 18 U.S.C. § 2254(a)(1) (2000), where the government can seize items constituting the crime itself as is the case with drugs, counterfeit money, or some pornography; 18 U.S.C. § 924(d)(1) (2000), where prosecutors may seize the instrumentality of the crime, as when a handgun is used in a robbery; 8 U.S.C. § 1324(b)(1) (2000), where some categories of property used to transport illegal aliens may be seized, such as vessels or aircraft; 31 U.S.C. § 5332(c)(3) (2001), which targets the "article, container, or conveyance" used to illegally transport currency across borders.

<sup>132</sup> See *U.S. v. Portrait of Wally, A Painting By Egon Schiele*, 2002 WL 553532 (S.D.N.Y. 2002).

<sup>133</sup> See *U.S. v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), *aff'd*, 184 F.3d 131 (2d Cir. 1999). See also Gerstenblith, *supra* note 59, at 224-25.

<sup>134</sup> However, these advantages are not to the degree they once were. Congress amended the rules for civil forfeitures in 2000 with the Civil Asset Forfeiture Reform Act, 18 U.S.C. § 983 (2000), ("CAFRA"). Section 983(c)(1) amends the government's burden of proof from a probable cause standard to a preponderance of the evidence standard. Also, § 983(d)(1)(A)(i) creates a new innocent-owner defense if the dispossessed claimant "did not know of the conduct giving rise to the forfeiture." The innocent owner must have been "(i) a bona fide purchaser or seller for value; and (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture." *Id.* at § 983(d)(3)A(i)-(ii). See Kreder, *supra* note 93, at 1252; see also Ashton Hawkins, David Korzenik & David Rudenstine, *Roundtable Discussion: Who is Entitled to Own the Past?* 19 CARDOZO ARTS & ENT. L.J. 243, 271 (2001).

burden of proof is lower. A mere preponderance of the evidence standard applies in forfeitures, rather than the "beyond a reasonable doubt" standard.<sup>135</sup> Also, the government must prove a crime occurred, but does not actually put the offender on trial; this makes evidentiary problems easier to overcome. For claimants, forfeitures are backed by the considerable resources of the government against current possessors.<sup>136</sup> This often has the effect of inducing a quick settlement.

Forfeitures also allow the government to circumnavigate statutes of limitations. A new crime occurs every time an object deemed "stolen" under the NSPA crosses a state or national boundary. This profoundly limits the period of repose on which the current art market is based. Passage-of-time defenses can often favor present possessors, particularly where defendants have possessed an object for an extended period.<sup>137</sup> However forfeiture proceedings are not triggered until the criminal activity occurs, effectively forestalling statute of limitations or laches defenses, both of which are usually available in civil litigation.<sup>138</sup>

In many instances, plaintiffs will not usually have the financial resources to bring a civil claim, save for extremely valuable items. For example, in Nazi-looted art disputes, one particular lawyer counsels plaintiffs not to bring a claim unless the item's value exceeds three million dollars.<sup>139</sup> The government, in turn, has all of the financial and investigative resources which law enforcement can bring to bear. Prosecutors may also decide to file criminal charges in conjunction with a civil forfeiture, which can certainly increase the pressure upon a present possessor. Though the government will be the named party, it often works on behalf of

<sup>135</sup> 18 U.S.C. § 983(c)(1) (2007).

<sup>136</sup> In this discussion, the reader may be confused between the terms claimant and plaintiff. As the plaintiff in these kinds of civil forfeitures must be the U.S. government, the claimant refers to the original owner of the piece of cultural property.

<sup>137</sup> In the U.S., the two prevailing rules governing the triggering of limitation periods are the demand and refusal rule, and the discovery rule. The demand and refusal rule starts the running of a limitations period when an original owner makes a return for a stolen work from a good faith purchaser. See *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311 (1991). The discovery rule does not start the running of a limitations period until the claimant discovers, or should have discovered with reasonable diligence the basis of a cause of action. *Erisoty v. Rizik*, 1995 WL 91406 (E.D. Pa.); *O'Keefe v. Snyder*, 83 N.J. 478 (1980) (in which Georgia O'Keefe's replevin action began to accrue when she reasonably should have known her paintings were missing). For a good discussion of limitations periods generally, see David L. Carey Miller, David W. Meyers & Anne L. Cowe, *Restitution of Art and Cultural Objects: A Re-Assessment of the Role of Limitation*, 6 ART, ANT. & L. 1 (2001).

<sup>138</sup> CAFRA provides "no action pursuant to this section to forfeit property not traceable directly to the offense . . . may be commenced more than 1 year from the date of the offense." 18 U.S.C. § 984(b) (2007).

<sup>139</sup> See HOWARD J. TRIENENS & SCOTT J. STONE, *LANDSCAPE WITH SMOKESTACKS: THE CASE OF THE ALLEGEDLY PLUNDERED DEGAS*, Northwestern Univ. Press (2000) (discussing the defense attorney who first coined the "rule of thumb").

the claimant, and may even be joined by the claimants.<sup>140</sup> Finally, the government can seize the object far more easily than a civil plaintiff. They must only show probable cause that the assets are subject to forfeiture.<sup>141</sup> In contrast, a claimant must establish both irreparable harm, and a likelihood of success on the merits to obtain a temporary federal injunction.<sup>142</sup> Cutting against these considerable advantages somewhat, a current possessor may claim attorney's fees and post-judgment interest in forfeiture proceedings.<sup>143</sup>

The first example of a seizure of cultural property under the NSPA came in *United States v. Pre-Columbian Artifacts*.<sup>144</sup> In that case, the U.S. government filed an interpleader action to determine ownership of a number of pre-Columbian artifacts.<sup>145</sup> It was noteworthy at the time as it was unclear what kind of impact *McClain* would have. The court applied a Guatemalan law which provides that, upon illegal export, objects become the property of Guatemala.<sup>146</sup> The court made clear that merely violating an export restriction would not violate the NSPA.<sup>147</sup> Under Guatemalan law, however, title to the artifacts vested in the Republic of Guatemala upon their illegal export. This might have triggered an NSPA violation. The question remains open though. The case was settled before trial, precluding an ultimate determination on the merits. It would have presented an interesting issue regarding the enforcement of export restrictions. If the District Court's initial holding had been upheld, a source nation need only declare itself the owner of cultural property upon an illegal export to trigger the criminal enforcement measures of the Federal Government.

### 1. The Litigation Surrounding Egon Schiele's *Portrait of Wally*<sup>148</sup>

Nearly nine years on, the *Portrait of Wally* litigation has still not managed to reach the substantive issues of the case, and the work remains in storage in the New York Museum of Modern Art

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<sup>140</sup> See *Portrait of Wally*, 2002 WL 553532.

<sup>141</sup> 18 U.S.C. § 983(c)(1) (2007).

<sup>142</sup> FED. R. CIV. P. 65(b).

<sup>143</sup> Kreder, *supra* note 93, at 1234-35.

<sup>144</sup> See *U.S. v. Pre-Columbian Artifacts*, 845 F.Supp. 544 (N.D. Ill. 1993).

<sup>145</sup> *Id.* at 545.

<sup>146</sup> *Id.* at 547.

<sup>147</sup> *Id.*

<sup>148</sup> *U.S. v. Portrait of Wally, A Painting By Egon Schiele (Portrait of Wally I)*, 105 F.Supp.2d 288 (S.D.N.Y. 2000); *U.S. v. Portrait of Wally, A Painting By Egon Schiele (Portrait of Wally II)*, 2002 WL 553532 (S.D.N.Y. 2002).

in a tragic echo of the fictional Jarnydyce v. Jarndyce in Charles Dickens' *Bleak House*. At present, a new trial will likely ensue to determine if the painting was stolen under the relevant Austrian law. A discussion of the factual history of the painting, as alleged by the government in the third amended complaint, should give a good background for the ensuing litigation.<sup>149</sup>

Some time before 1938, Egon Schiele's *Portrait of Wally* was housed in the apartment of a Jewish gallery owner, Lea Bondi Jaray (Bondi).<sup>150</sup> In April 1938, Friedrich Welz acquired the gallery belonging to Bondi in a process called "aryanization", in which Jews were forced to sell their property at extremely low prices.<sup>151</sup> Welz was later interned by the U.S. military on suspicion of war crimes, at which point it confiscated his possessions, including the *Portrait of Wally*.<sup>152</sup> Then, as per its post-war military policy, the military returned the property to the government of Austria, not the individuals to whom the property may have belonged prior to its seizure.<sup>153</sup>

The work then was then mistakenly included in a shipment to another dispossessed family.<sup>154</sup> Bondi, who had since fled to London, then allegedly enlisted Dr. Rudolph Leopold to recover the work from the Belvedere Gallery, the purchaser of the work.<sup>155</sup> Later, Leopold acquired *Portrait of Wally* for himself from the Belvedere, without Bondi's knowledge.<sup>156</sup> After later learning of Leopold's possession of the work, Bondi hired an Austrian attorney, but she was unable to recover the work before her death in 1969.<sup>157</sup> Leopold then sold the work to the Leopold Museum-Privatstiftung (Leopold), the museum in which he served as the Director for life.<sup>158</sup> Bondi's heirs, and the government claim that Leopold was hired as an agent for Bondi to attempt to regain the work.

The dispute resurfaced in 1997, when the Leopold presented the work to the New York Museum of Modern Art (MoMA) for a temporary exhibition.<sup>159</sup> After the exhibition, only days before the work was set to return to Austria, the Manhattan District

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<sup>149</sup> *Portrait of Wally II*, 2002 WL 553532.

<sup>150</sup> *Id.* at \*1. The facts are taken from *Portrait of Wally II*, Third Amended Verified Complaint, 2001 WL 34727703 (S.D.N.Y. 2001).

<sup>151</sup> *Portrait of Wally II*, 2002 WL 553532, at \*1.

<sup>152</sup> *Id.* at \*2.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at \*3.

<sup>157</sup> Bondi allegedly learned of Welz's ownership of the work in 1957 when she saw his name listed in an exhibition catalogue with the work. *Id.* at \*3-4.

<sup>158</sup> *Id.* at \*4.

<sup>159</sup> *Id.* at \*1, \*4.

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Attorney's Office subpoenaed the painting.<sup>160</sup> That subpoena was quashed initially by the New York Court of Appeals because it violated New York's anti-seizure statute.<sup>161</sup> That same day, a Federal Magistrate Judge issued a seizure warrant for the work based on probable cause that Dr. Leopold had violated the NSPA.<sup>162</sup> The painting has been in storage since the beginning of the dispute in 1998, while the value of the "Portrait of Wally" has soared to between \$5 and \$10 million.

Many argue this dispute has had a chilling effect on international art loans. As art adviser Ashton Hawkins says,

I think that people who would have previously considered lending now simply don't consider it. . . . I know from my colleagues who arrange these exhibitions in New York and in other cities that lending to the United States and particularly to New York has been more of a problem than it used to be.<sup>163</sup>

Glenn Lowry, the director of the MoMA had a similar view testifying before the House Committee on Banking and Financial Services in 2000, "[*Portrait of Wally*] had been exhibited around the world for decades and. . . had been reproduced frequently in books."<sup>164</sup>

The use of criminal process in this case seem unwarranted and detrimental both to the claimants and to the museum-going public. Neither side has gained anything by the protracted dispute; the public at large has lost the ability to view and enjoy the work. The *Wally* litigation is a cautionary tale of how the forfeiture process does not work well. Federal prosecutors should be very aware of the history of a work, and the strength of the anticipated issues at trial before initiating a forfeiture. Other forfeiture proceedings have produced more satisfactory results however.

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<sup>160</sup> *Id.* at \*4.

<sup>161</sup> *In re* Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art, 93 N.Y.2d 729 (App. Div. 1999).

<sup>162</sup> *Portrait of Wally*, 2002 Westlaw 553532, at \*4.

<sup>163</sup> David D'Arcy, MoMA in Battle over Painting Seized by Nazis, NPR All Things Considered (2004), <http://www.npr.org/templates/story/story.php?storyId=4246589>.

<sup>164</sup> Holocaust Assets: Hearing Before the H. Comm. on Banking and Financial Services, 106th Cong. 95 at 96 (2000) (statement of Glenn D. Lowry, Director of Museum of Modern Art, New York).

## 2. One Oil Painting Entitled "Femme En Blanc" by Pablo Picasso<sup>165</sup>

A much different result occurred in 2004 when the U.S. Attorney's Office in Los Angeles instituted a civil forfeiture proceeding to assist Thomas Bennigson, the sole heir of Carlota Landsberg, a Holocaust survivor.<sup>166</sup> At issue was *Femme en Blanc*, a 1922 Pablo Picasso portrait of model and Paris socialite Sara Murphy worth an estimated \$10 million.<sup>167</sup>

The work's provenance is similar to countless other pieces owned by victims of the Nazi persecution in the 1930's. Landsberg and her husband first purchased the work in 1926 or 1927.<sup>168</sup> Somewhere around 1939, Landsberg sent the painting to Paris gallery owner Justin Thannhauser for "safekeeping."<sup>169</sup> However, Thannhauser later wrote to Landsberg in 1958 that "[u]pon the occupation of Paris in 1940, when we were no longer in Paris and the house was closed, the entire contents of the four-story building—and with it your painting—were stolen."<sup>170</sup>

The work remained missing for the next 30 years. Efforts were made to recover it, including its publication in the "Repertoire," a list of property removed from France between 1939 and 1945.<sup>171</sup> In 1975, a French art dealer, Maurice Covo, sold the work to Stephen Hahn; and Hahn went on to sell the work to Marilyn and James Alsdorff for \$350,000.<sup>172</sup> Coincidentally, the French statute of repose is thirty years.<sup>173</sup> It seems very likely that the possessor of the painting after the war waited until the French limitations period had expired before selling the work. After the 1975 sale, it remained in the Alsdorffs' home until 2001 when the Alsdorffs sent the painting to Los Angeles for exhibition at the David Tunkl Fine Art Gallery.<sup>174</sup>

<sup>165</sup> U.S. v. One Oil Painting Entitled "Femme En Blanc" by Pablo Picasso, 362 F.Supp.2d 1175 (C.D. Cal. 2005).

<sup>166</sup> The work was seized by FBI agents in Chicago in October 2004. See Federal Bureau of Investigation, Press Release, Los Angeles Field Office, *\$10 Million Picasso Painting Stolen by Nazis During World War II Seized by U. S.* (Oct. 26, 2004), <http://www.bslaw.net/news/041026.html>.

<sup>167</sup> Regina Chen, *From Nazi Germany to Berkeley: The Lady in White*, DAILY CALIFORNIAN, June 24, 2003, <http://www.dailycal.org/sharticle.php?id=12022>.

<sup>168</sup> *Femme en Blanc*, 362 F.Supp.2d at 1178 (citing Complaint for Forfeiture at ¶ 4).

<sup>169</sup> *Id.* (citing Complaint for Forfeiture at ¶ 9).

<sup>170</sup> *Id.* (citing Complaint for Forfeiture at ¶ 12).

<sup>171</sup> *Id.* (citing Complaint for Forfeiture at ¶ ¶ 15,16).

<sup>172</sup> *Id.* (citing Complaint for Forfeiture at ¶ ¶ 17-19).

<sup>173</sup> Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., 1999 WL 673347, at 6 (S.D.N.Y. 1999) (noting the French Civil Code bars actions for real and personal property after thirty years of prescriptive possession); see also Kreder, *supra* note 93, at 1244.

<sup>174</sup> *Femme en Blanc*, 362 F.Supp.2d at 1178 (citing Complaint for Forfeiture at ¶ 20).

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Tunkl offered to sell the work for the Alsdorf's and in 2001 the work was shipped to Geneva Switzerland for inspection.<sup>175</sup> In 2001, Didier Imbert, a representative for a potential buyer, asked the Art Loss Register to check into the painting's provenance as a part of his due diligence inquiry.<sup>176</sup> Because the painting was named in the Repertoire, it generated concern.<sup>177</sup> In all probability, the choice of Switzerland for the viewing was more than a mere coincidence. Despite some recent reforms, Switzerland earned a reputation as a forum which facilitates art transactions due to liberal statutes of limitation which favor purchasers who negotiate and conclude their business there. In June 2002, the Art Loss Register contacted Thomas Bennigson, Landsberg's sole living heir.<sup>178</sup> Bennigson was unaware of the existence of the painting, and initiated a civil proceeding against Marilyn Alsdorf in California Superior Court.<sup>179</sup>

A jurisdictional chess match followed.<sup>180</sup> In June 2003, the Superior Court found that it lacked personal jurisdiction over Alsdorf, and it granted her Motion to Quash the Summons.<sup>181</sup> The California Court of Appeal affirmed the Superior Court's Order.<sup>182</sup> Alsdorf waived service of process, but raised an issue of personal jurisdiction, arguing she did not have the constitutionally-mandated minimum contacts requirement with California. However, after the jurisdictional issue was scheduled for oral argument with the California Supreme Court, the parties agreed to a \$6.5 million settlement of all claims.<sup>183</sup> This caused the government to drop its forfeiture suit as well.

Forfeiture is a very powerful potential tool in the government's arsenal. Potential claimants would be wise to enlist the powerful potential ally of the District Attorney's office. In some cases the forfeitures work out satisfactorily. However, the extreme advantages held by the government when the forfeitures are undertaken dictate that this mechanism should be used

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<sup>175</sup> *Id.* (citing Complaint for Forfeiture at ¶ 20).

<sup>176</sup> *Id.* (citing Complaint for Forfeiture at ¶ 22). The ALR is perhaps the best known of the stolen art databases.

<sup>177</sup> *Femme en Blanc*, 362 F.Supp.2d at 1179 (citing Complaint for Forfeiture at ¶ 25).

<sup>178</sup> *Id.* (citing Complaint for Forfeiture at ¶ 34).

<sup>179</sup> *Id.* (citing Complaint for Forfeiture at ¶ 48).

<sup>180</sup> As Jennifer Anglim Kreder points out, "Alsdorf engaged in 'jurisdictional hopscotch,' moving the painting from one location to another, seemingly to make it more difficult for Bennigson to file a traditional suit against her. The painting was moved from Los Angeles . . . to Chicago . . ." Kreder, *supra* note 93, at 1244.

<sup>181</sup> *Femme en Blanc*, 362 F.Supp.2d at 1179.

<sup>182</sup> *Bennigson v. Alsdorf*, 2004 WL 803616 (Cal. Ct. App. 2004).

<sup>183</sup> Ben Egelko, *Suit over a Picasso settled: Heir gets millions for work Nazis stole*, Aug. 10, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/08/10/BAGVPE5DEV1.DTL&hw=picasso+painting&sn=003&sc=835> (last visited Aug. 25, 2007).



sparingly. When not used judiciously, protracted litigation may often result. One of the biggest implications of the *McClain* doctrine may be its potential use in forfeitures. Prosecutors may successfully avoid the difficulty of proving knowledge under the NSPA by utilizing the more relaxed evidentiary standards in a forfeiture proceeding. The following case details just such a proceeding.

### C. Customs Powers

In many instances, the United States Customs Service ("Customs") stands as one of the last and best checks on the market in art and antiquities. It wields a great deal of power in individual cases. Customs is charged with prohibiting smuggling, entry of goods by false statements, fraud and false statements, failure to declare, loading or unloading of merchandise or baggage without permit, and false descriptions on ocean bills of lading.<sup>184</sup> Both criminal prosecutions and civil forfeitures can result from misconduct. However, despite their regulatory power, customs officials seem to have had a limited practical effect on the illicit market in cultural objects as a whole. Certainly there have been some important seizures where objects have been returned to their source nation; but the enormous volume of objects which enter the U.S. puts limits on what we can and should expect them to accomplish.<sup>185</sup>

In *United States v. An Antique Platter of Gold*, federal prosecutors seized a gold phiale from the home of a New York collector.<sup>186</sup> The phiale originated in Sicily, in the 4<sup>th</sup> century B.C.<sup>187</sup> Forfeiture was ordered on two grounds. First, the District Court held forfeiture was proper under the NSPA because the phiale was Italian state property.<sup>188</sup> Second, the District Court stated that importation was illegal because of false statements on the customs entry forms.<sup>189</sup> The Second Circuit Court of Appeals did not reach the more controversial question of whether the

<sup>184</sup> See 18 U.S.C. §§ 545, 1001, 1497, 1453, 815 (2007).

<sup>185</sup> In 2007, 400 valuable and illicit Peruvian artifacts were seized by Customs agents being sold from a van by an Italian man. Peter Whoriskey, *U.S. Returns More Than 400 Pre-Columbian Relics to Peru*, WASH. POST, June 14, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/13/AR2007061301993.html>.

<sup>186</sup> *An Antique Platter of Gold*, 184 F. 3d 131. For an excellent discussion of the issues and surrounding controversy raised by the dispute, see Carla J. Shapreau, *Case Notes: Second Circuit Holds that False Statements Contained in Customs Forms Warrant Forfeiture of Ancient Gold Phiale—Hotly Contested Foreign Patrimony Issue Not Reached by the Court*, 49 INT'L J. CULTURAL PROP. 137 (2000).

<sup>187</sup> *An Antique Platter of Gold* 184 F. 3d at 133.

<sup>188</sup> *Id.* at 132.

<sup>189</sup> *Id.*

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collector had the requisite knowledge under the NSPA, as the forfeiture was proper based on the misstatements on the customs import form.<sup>190</sup>

The collector incorrectly identified Switzerland as the origin of the object.<sup>191</sup> This has been a common practice. Often times, importers will mark Switzerland as the nation of origin to prevent suspicion from customs agents.<sup>192</sup> In this case, the buyer's agent went to great lengths to import the phiale from Switzerland and not Italy. Also, the purchase price was listed at \$250,000 rather than the actual price of \$1.2 million.<sup>193</sup> The fictitious forms succeeded initially. It was not customs officials who discovered the violation. The collector displayed the object for three years before Italian officials learned where the phiale was and notified the State Department that it was stolen.<sup>194</sup>

In his recently published work looking at regulation of the illicit antiquities market, Simon Mackenzie interviewed one dealer from New York who described the very low import restrictions from Hong Kong into the United States:

There's a great deal of buying in Hong Kong; they have to get some kind of little stamp duty kind of okay from the Government: "yes you may send this out." They record who it was bought from, what it is and what was paid for it, who bought it, and say "fine, off you go." Then it comes to U.S. customs with the same list, same invoice, and basically their question is "is it over 100 years old?" We've got a documented invoice of who sold it and who bought it, so is it over 100 years old? And then it comes through clear of customs. That's the exercise. It's not very complicated.<sup>195</sup>

This very simple, matter-of-fact procedure would allow objects from dozens of nations near Hong Kong to be plausibly sold in the United States, even if they had been recently excavated. Though Customs potentially holds tremendous power to seize and prevent goods from entering the country, the volume of material entering America's borders greatly diminish Customs' ability to have much of an impact on the illicit trade. Its most likely impact, much as with the NSPA, comes when a nation discovers a well-known or very valuable object has gone missing.

Though Customs' systemic impact under the status quo seems quite limited, training Customs to spot or ask questions about

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<sup>190</sup> *Id.* at 134.

<sup>191</sup> *Id.* at 133.

<sup>192</sup> See D'Arcy, *supra* note 163.

<sup>193</sup> *An Antique Platter of Gold*, 184 F. 3d at 133-34.

<sup>194</sup> *Id.* at 134.

<sup>195</sup> Mackenzie, *supra* note 94, at 69.

antiquities, though difficult, is feasible.<sup>196</sup> However, in the US, a concerted effort to police objects coming into the country seems unlikely. At this point, American policy-shapers and lawmakers have instructed Customs to concern itself with objects imported in violation of a bilateral or other agreement pursuant to the CPIA.

Enforcement measures such as prosecutions under the NSPA and forfeiture should be responsibly utilized. These very powerful tools do have a number of limitations though. NSPA prosecutions require the government to prove a scienter component. This continues to be a difficult element to establish. Using these federal enforcement measures may also have some unanticipated drawbacks. A broad application of the NSPA may hinder the negotiating power of the U.S. State Department to impact international agreements on the protection of cultural objects, because of its ability to establish details of protection.<sup>197</sup> However, it should be noted that this State Department authority has not resulted in a great deal of progress outside of the bilateral agreements which the U.S. has with a number of nations, and NSPA prosecutions do not seem to have hindered those efforts. In addition, NSPA antiquities prosecutions such as in the *Hollinshead*, *McClain*, or *Schultz* cases require a nation to have clearly vested itself of title in its own antiquities, and many source nations have not done this. An accurate accounting of how many nations have clearly vested title to their antiquities to satisfy the due process concerns and thus invoke the protections of the NSPA remains quite difficult. Often, a determination cannot be made until the law has been interpreted by an American court. Also, the vesting statute, though clear, may not be enforced to a sufficient degree. For example, in *Peru v. Johnson*, a number of antiquities dealers were active in Peru despite Peru's vesting legislation.<sup>198</sup> No Peruvian cases had interpreted the statute, and the public register called for by the statute did not exist. In that case, the court held Peru's declaration of ownership, without being accompanied by any action, amounted to mere export control. Though this rigorous examination of source nation ownership appears to be unique, it further muddies the waters. All indications seem to point to each illicit import and transport as a unique situation, and predicting outcomes remains difficult given the paucity of precedent.

More generally, the federal criminal penalties in this context

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<sup>196</sup> Patrick O'Keefe, *The Use of Criminal Offences in UNESCO Countries: Australia, Canada, and the USA*, 6 ART, ANT. & L. 19, 34 (2001).

<sup>197</sup> Kreder, *supra* note 93, at 1234.

<sup>198</sup> 720 F.Supp. 810 (C.D. Cal. 1989).

may not be producing satisfactory results. Aggressive use of forfeitures may make lending of valuable works more difficult. Pursuing stolen cultural property too vehemently may just drive the property further into the black market, making an ultimate recovery more difficult. More aggressive federal action might also make it more difficult to encourage the art and antiquities community to make more open and comprehensive provenance searches.<sup>199</sup> Liberal use of the NSPA might risk "unnecessarily alienating. . .dealers, scholars, and museum staff members, upon whose expert knowledge, services, and cooperation successful" return of stolen objects relies.<sup>200</sup>

By definition, each piece of cultural heritage must be considered unique. Their provenances are often complex and confusing as well. As such, each item should be treated singularly by federal prosecutors. Civil forfeitures are a powerful tool, even after the reforms of CAFRA in 2000. Though the cultural property market seems to be doing well under the current scheme, U.S. prosecutors should restrict prosecutions and forfeiture proceedings to those situations in which an item appears to be stolen recently, or there appears to be a pattern of abuses. Otherwise, the rights of claimants are placed higher than those of innocent purchasers.

The current state of regulation seems to do a reasonably good job preserving the actual object. However, we do not need criminal penalties to encourage individuals to preserve art and antiquities. An object's inherent aesthetic and monetary value would seem to do that just as well. It is safe to say that a valuable object will be preserved, regardless of the criminal penalties in place. Would *Portrait of Wally* be preserved in any different way if it were hanging in the Leopold today, rather than in storage? I think not. Federal criminal penalties seem to slightly advance the preservation of objects. It might though serve to preserve the less-valuable objects which are often destroyed or ignored when individuals conduct illegal excavations. In many ways, the preservation of these lesser objects connects with the preservation of archaeological context.

Application of the similar value, preservation of archaeological context, proves a bit more difficult to unravel. This value of course applies almost exclusively to antiquities. The real question is, "Did the prosecutions of the defendants in the

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<sup>199</sup> Kreder, *supra* note 93, at 1250.

<sup>200</sup> G. W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. AND COM. 77, 102-07 (1978).

*Hollinshead, McClain, and Schultz* protect undiscovered antiquities and archaeological context?" Unfortunately, a thorough analysis of this value would have us weigh a number of facts which are, in fact, unknowable. There is no certain way to gauge how well the prosecutions deterred other antiquities dealers from making questionable purchases of illicit antiquities. Similarly, the scale of looting worldwide is difficult to ascertain. Simon Mackenzie has argued that an increase in criminal penalties at the top of the pyramid for antiquities dealers and purchasers would go a long way towards limiting the illicit trade in antiquities generally, as it would wipe out the economic incentive for dealing in the objects.<sup>201</sup>

Certainly, criminal penalties must be a component of the regulatory scheme, and the current state of regulation attempts to endorse preservation of archaeological context wholeheartedly. Actors in the cultural property world decry the loss of archaeological evidence, and rightly so. However, the federal criminal penalties do not do a very good job of protecting archaeological context. If there are very real and very substantial penalties imposed on dealers or purchasers of nationalized antiquities, it should follow that individuals would be less likely to attempt to steal or illegally excavate the objects. The impact would seem to trickle down, from purchasers and dealers to individuals in source nations. Despite some anecdotal evidence that the current state of criminal sanctions have diminished the U.S. market for illicit antiquities, we have no way of knowing for sure. Making an example of egregious violations periodically does not adequately regulate the trade. Incredibly, many antiquities dealers seem to believe Schultz was just stupid or had unfortunate luck to come before an overly-harsh judge.<sup>202</sup>

If we wanted to preserve archaeological context, a more effective strategy would allow regulation to differentiate between an antiquity which was excavated properly, and one which had been illegally excavated. That strategy would seem to necessitate a more rigorous provenance check on routine antiquities purchases. After all, nothing on its face differentiates a looted from a licit antiquity. Perhaps the market will begin to take this position, and

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<sup>201</sup> Mackenzie, *supra* note 94, at 252.

<sup>202</sup> Mackenzie was able to gauge the response of antiquities dealers to Schultz's recent conviction. Many seemed shocked at the result, but had hardly indicated they were going to shift the way they operate. Most dealers were able to make excuses for the criminal conduct. As one New York dealer stated "[T]here is an obligation, dealers do have an obligation to educate themselves on the laws of countries from which the material comes from that they handle... but that's a far cry from accusing him of being guilty of stealing something." Mackenzie, *supra* note 94, at 78-79.

require more detailed information on purchases. It seems increasingly likely though that this change will not take place without new legislation or government action. A number of commentators have persuasively argued for an open and honorable art and antiquities market.<sup>203</sup> However the reluctance of the art and antiquities trade to adequately regulate itself has caused the increase in forfeitures and prosecutions under the NSPA. Above all else, the prosecutions and seizures discussed here should serve as a cautionary tale to the market: if the market is unable or unwilling to police itself, the government will start to increasingly adopt stricter measures.

The federal criminal penalties use a broad definition of "stolen" property to prevent the looting of archaeological sites and the trade in unprovenanced antiquities. Criminal prosecutions are certainly warranted in egregious cases, and the defendants' conduct in the three prosecutions discussed would all seem to fall within that category. However, if our true goal is to preserve archaeological context, we should develop measures to tackle that problem specifically, and not attempt to overburden the concept of "stolen" property merely because policing archaeological sites is difficult, and the market may be loathe to enact its own reform. Forfeitures and the *McClain* doctrine should be reserved for clear and egregious violations where prosecutions are warranted. Attempts to unduly broaden their scope would produce unsatisfactory results and might end up increasing the illicit trade.

The third preservation value, preservation of the national patrimony, is a mixed value. The prosecutions and seizures involving antiquities all resulted in the objects' return to their source nation. These objects are returned so they can be viewed and appreciated in their nation of origin. However, the *Portrait of Wally* and *Femme en Blanc* seizures actually resulted in the works being taken away from the German and Austrian museums where they were displayed and created. We could perhaps argue that these nations forfeited their patrimonial claim to these objects because of the ways in which they were acquired. However, it does not seem to be the case that the criminal regulatory framework laid out here will preserve a national patrimony in every case.

Above all, the criminal regulation is limiting the international movement of objects. On one level, we may consider this a good thing. The jurisdictional hopscotch employed by the possessors in the *Platter of Gold* and the *Femme en Blanc* forfeitures were an attempt to circumnavigate the law. The law responded swiftly to

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<sup>203</sup> John Henry Merryman, *Illicit International Trade in Cultural Objects*, 4 INT'L J. CULTURAL PROP. 13 (1995).

those attempts. However, the seizures may also prevent the international movement of other works. As in the *Portrait of Wally* dispute, concerns about other forfeitures and the possibility of seizures may have hampered travelling exhibitions. This prevents the benefit of art and antiquities acting as a good ambassador and breaking down parochialism.

Perhaps one reason the current state of regulation has proved so controversial, is the fact that it seems to be adopting values which have very little to do with the relevant values of cultural policy Bator articulated. Namely, much of the criminal regulation seems aimed squarely at righting historical wrongs. We can justifiably ask whether the criminal law regarding art and antiquities should be attempting to remedy the problems of colonialism and the holocaust.

What is the ultimate purpose of using the criminal law as one of the major foundations for cultural property policy? Are we concerned merely with punishing the particularly egregious cases, or should it encourage better overall protection of archaeological context? We do not have a clear answer to these questions. The state of criminal measures discussed here does not seem to clearly further any of these policies, save for restricting the international movement of works of art. A far better system would look at the market as a whole, and attempt to make it more profitable to deal in a responsible manner. Unfortunately it seems like it will take more government action to produce that result. Dealers and the market would be wise to begin to police their own dealings to avoid this result. If they do not, they run the risk of a further expansion of federal recognition of foreign patrimony laws or even export restrictions.

#### IV. A PRAGMATIC MODEL

The previous section laid out the strengths and weaknesses of U.S. federal criminal regulation of cultural property. The criminal response is a very powerful and direct reaction to undesirable activity. However, without a more comprehensive system which allows parties to ensure they are dealing in licit cultural property, this criminal regulation will surely prove ineffectual. It will continue to punish outrageous and egregious conduct by dealers, while allowing the more subtle violations to continue unabated. These widespread violations continue to cause the theft of art and the looting of archaeological sites. A better approach would be to adopt a more pragmatic approach to

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regulation. By tempering the goals of both cultural nationalists and internationalists it may be possible to create a workable system which actually has an impact on the illicit market. Such a pragmatic system has evolved in the U.K. That nation has used some creative and useful compromises between archaeologists and dealers in art and antiquities.

### A. *The U.K. Approach*

#### 1. Export Restrictions

The U.K. maintains a limited set of export restrictions. It allows the export of objects generally, but if an object qualifies, export may be delayed to give domestic institutions an opportunity to purchase the object. It promotes a compromise between owners and those who want to retain important objects within the country. The government has broad discretion to promulgate regulations which contain the authority for regulation.

Until 1939, the U.K. had no controls on the export of cultural property.<sup>204</sup> The Second World War forced Parliament into preserving national resources for the war effort. As part of this emergency restriction, the Import, Export and Customs Powers (Defence) Act 1939 ("the 1939 Act") was enacted. It still serves as the authority for the U.K. government to control exports.<sup>205</sup> In 1949, a number of works of art were refused export because they were national treasures.<sup>206</sup> The debate surrounding these developments led to the appointment of a committee, chaired by Lord Waverley, to advise the government on the best way to control the export of art and antiquities.

The committee suggested that the existing export licensing framework should be used to prevent the loss of national treasures. It rejected other means of control such as a tax on art

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<sup>204</sup> Michael Polonsky & Jean-Francois Canat, *The British and French Systems of Control of the Export of Works of Art*, 45 INT'L & COMP. L. Q. 557, 561 (1996).

<sup>205</sup> Section 9(3) of the 1939 Act provides that the Act "shall continue in force until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end." No order has ever been made, and in 1990, Parliament passed the Import and Export Control Act 1990 which repealed the subsection, thereby making the 1939 Act permanent. See *R. v. Blackledge and Others* (Court of Appeal, 22, May 1995, unrep.) in which Lord Taylor of Gosforth rejected the argument that orders made pursuant to the 1939 Act were invalid because the emergency situation of WWII had expired because in the absence of any Order in Council under s. 9(3), the Act remained in force. Contrast this with Sir Richard Scott, who concluded that from 1950 until 1990, "there was, in my opinion, a reprehensible abuse of executive power by successive administrations" in failing to bring forth and Order in Council, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, H.C.P.115 ¶ C1 57 (1996), (the "Scott Report").

<sup>206</sup> *Report on the Committee on the Export of Works of Art, etc.* ¶ 22 (1952) ("the Waverley Report").



exports, or the provision of public funds to enable these objects to be purchased.<sup>207</sup> One of the main concerns was ensuring that any system would not punish owners by reducing prices. Thus, the committee recommended that, "in every case in which export is prevented, the owner must be assured of an offer to purchase at a fair price."<sup>208</sup> The committee then laid out three questions, which are now referred to as "the Waverley criteria,"

Is the Object so closely associated with our history and national life that its departure would be a misfortune?

Is the Object of Outstanding aesthetic importance?

Is the Object of outstanding significance for the study of some particular branch of art, learning or history?<sup>209</sup>

These recommendations form the foundation for the current system. Currently, the export of antiques is governed by the Export of Goods (Control) Order 1992, which prohibits the export without a license of any goods produced more than 50 years before the export.<sup>210</sup> When an owner wishes to export an object, and the amount does not exceed the relevant U.K. monetary threshold, the Department of National Heritage does not consider the work to be a potential national treasure. Other applications are referred to an "expert advisor" who decides whether an export license can be granted without referring the matter to the Reviewing Committee on the Export of Works of Art (the "Reviewing Committee").

If the application is referred to the Reviewing Committee, the applicant and advisor set out the reasons that they believe an export license should or should not be granted. The Reviewing Committee then decides whether to recommend to the Minister that an export license should be granted, or whether to defer the application to allow for an offer to purchase the item at or above the fair market value recommended by the Reviewing Committee. The usual deferral period is between two and six months; however, a period for up to twelve months may be used for exceptional items.<sup>211</sup>

During the deferral period, if no offer is made to purchase

<sup>207</sup> Waverley Report, ¶¶ 121-24, 110-13, 114-17, 118-20.

<sup>208</sup> Waverley Report, ¶ 125.

<sup>209</sup> Waverley Report, ¶ 187. The Canadian Cultural Property Export and Import Act 1974-76 § 11(1) has similar tests: "(a) whether the object is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences; and (b) whether the object is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage."

<sup>210</sup> S.I. 1992/3092, ¶ 2, Sch. 1 Group 2. The export of non-antiques is controlled by S.I. 1994/1191.

<sup>211</sup> Department of National Heritage Press Notice DNH 27/94, 16 Feb. 1994.

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the object at or above the fair market price, an export license is normally granted. If an offer is made and accepted by the owner, the license application will lapse. If an owner does not accept an offer at or above the market price, an export license will normally be refused.

In most cases, the limited export restriction works well. It rests upon the possibility that sufficient funding can be arranged. It allows the owners of works to freely attempt to sell them abroad, without fear that they will lose income if the work is denied export. This effectively precludes the motivation to sell many works on the black market. However when the art market encounters a period of growth, as occurred in the late 1980s, and as is currently the case, it becomes increasingly difficult to raise the requisite funds.

Such was the case with Antonio Canova's beautiful neo-classical marble statue, *The Three Graces*, commissioned in 1814. In March 1989, the Getty Museum in California had entered into a contract to purchase the statue for £7.6 million provided that an export license was granted.<sup>212</sup> A decision on the export license was repeatedly deferred until May 1990, at which time the Secretary of State for Trade and Industry Nicholas Ridley announced purchases by private individuals could be considered and there was a private offer by private individuals to purchase the statue.<sup>213</sup> However, the seller refused to accept the offer. In September 1993, the Getty offered £7.6 million yet again. When the seller applied for another export license, the Reviewing Committee recommended that a decision on the export license should be deferred for an unprecedented 18 months to allow for funds from the National Lottery via the National Heritage Memorial Fund.

During this extended period, a number of donors came forward and allowed the Victoria and Albert Museum and the National Museum of Scotland to purchase the sculpture jointly. The Getty, intent on acquiring the work, brought suit challenging the export delay. However, the decision of the National Heritage Secretary was upheld.<sup>214</sup> Perhaps the most important consequence

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<sup>212</sup> Polonsky, *supra* note 204, at 569.

<sup>213</sup> 171. PARL. DEB., H.C., (6th ser.) (1990) 691-92 (stating "By encouraging the continuing injection of private money into the acquisition of heritage items, we will be creating a greater funding base for them. I am confident that this will enable a larger number of these outstanding heritage items to remain in this country.")

<sup>214</sup> *R. v. Secretary of State for National Heritage and Another, ex parte the J. Paul Getty Trust* (unrep., 27 Oct. 1994). See also N.Y. TIMES, *Getty Loses British Battle for Statue*, Oct. 28, 1994, available at <http://query.nytimes.com/gst/fullpage.html?res=9400E0D7133FF93BA15753C1A962958260&n=Top%2fReference%2fTimes%20Topics%2fOrganizations%2fG%2fGetty%2c%20%20Paul%2c%20Museum>. See Sara Bush, *The Protection of British Heritage: Woburn Abbey and 'the Three Graces'*, 5 Int'l J. of Cultural Prop. 269 (1996); see also Richard Crewdson,

of the *Three Graces* estoppel period is the revision of the guidelines which allow a private offer to be considered, if accompanied by a public institution which would guarantee reasonable public access, conservation provision, and an agreement not to sell the object for a period of time.

Though the vast majority of the applications will either result in the grant of a license, or a successful fund-raising initiative, the whole system relies on the ability of U.K. institutions or individuals to raise funds. As the chair of the Reviewing Committee, Lord Inglewood said recently, "Sixty per cent of the objects, by value, that come before U.S. end up being exported because the money cannot be raised."<sup>215</sup> An owner of a Waverley quality work may choose not to sell the work to the public institution even after months of fundraising.<sup>216</sup> Though there may be limits on where the object can be taken, it is an individual's private property. A better system would prevent a painting from being withdrawn from the whole process.

The U.K. export restrictions draw an effective compromise between retaining exceptionally beautiful or historic objects and cultural commerce. By taking a sensible approach to export restrictions, the U.K. has effectively limited the desire for individuals to smuggle works out of the country, and allowed British cultural institutions an opportunity to keep important works in the country. These are precisely the kind of export restrictions that the U.S. criminal system should be enforcing, as they reduce the motivation for selling cultural property on the black market.

## 2. Portable Antiquities Scheme

A similar approach has been developed in England and Wales for undiscovered antiquities. In the 1970's and 1980's, the biggest threat to undiscovered cultural objects in the U.K. was the growing popularity of metal detectors.<sup>217</sup> This led to a large increase in the number of objects being found, but not all of them were reported. Before the recent reform, the only widespread legal protection

*Waverley Adrift* 6 INT'L J. OF CULTURAL PROP. 353 (1997).

<sup>215</sup> Charlotte Higgins, *Tate leads fight to reform law after masterpieces slip through the net*, GUARDIAN, Dec. 9, 2006, available at <http://216.239.59.104/search?q=cache:fZK0hOrjmToJ:politics.guardian.co.uk/arts/story/0,,1968261,00.html+blue+rigi+waverley&hl=en&gl=uk&ct=clnk&cd=5&client=firefox-a>.

<sup>216</sup> As the Art Fund's David Barrie said of the successful but futile fundraising effort for Joshua Reynolds's "Omai", which was later withdrawn from sale, "It was a massive tease, the whole system was made a mockery of." *Id.*

<sup>217</sup> Roger Bland, *Rescuing Our Neglected Heritage: The Evolution of the Government's Policy on Portable Antiquities in England and Wales*, 14 CULTURAL TRENDS 257 (2005).

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granted to antiquities found in England and Wales not found near protected monuments was the common law of treasure trove.<sup>218</sup> Only objects of gold or silver, deliberately hidden with the intention of recovery, qualified as treasure trove and became the property of the Crown. The common law definition was often criticized because it allowed far too many valuable finds to escape regulation because they fell short of the common law definition.<sup>219</sup>

These concerns led to enactment of the Treasure Act 1996.<sup>220</sup> It requires finders of certain objects to report any qualifying find to a designated coroner within fourteen days. If the object is deemed a treasure, then the finder is entitled to a reward based on the market price of the object.<sup>221</sup> Under section 8(3) of the Treasure Act, if an individual fails to report a find, she may be imprisoned for up to three months, fined, or both. The Act retains the requirement that a portion of any treasure trove must be gold or silver. This is regrettable, and marks a continued shortcoming in the legal regulation of undiscovered antiquities in most of the U.K.<sup>222</sup>

However, perhaps more important than the legal framework are the efforts of the Portable Antiquities Scheme, which encourages voluntary reporting of finds for those objects which

<sup>218</sup> See *Attorney-General of the Duchy of Lancaster v. G.E. Overton (Farms) Ltd.*, 3 All E.R. 503 (1980), (holding 8,000 ancient coins were not "treasure" because tests indicated the silver content ranged from .2% to 6%, and as such were base metals excluded from the common law definition of treasure trove despite their historical value).

<sup>219</sup> See e.g., Norman Palmer, *Treasure Trove and the Protection of Antiquities*, 44 MODERN L. REV. 178 (1981).

<sup>220</sup> Treasure Act 1996 (c.24).

<sup>221</sup> Under Section 1, "treasure" is considered:

- (a) any object at least 300 years old when found which-
  - (i) is not a coin but has metallic content of which at least 10 per cent by weight is precious metal;
  - (ii) when found, is one of at least two coins in the same find which are at least 300 years old at that time and have that percentage of precious metal; or
  - (iii) when found, is one of at least ten coins in the same find which are at least 300 years old at that time;
- (b) any object at least 200 years old when found which belongs to a class designated under section 2(1);
- (c) any object which would have been treasure trove if found before the commencement of section 4;
- (d) any object which, when found, is part of the same find as-
  - (i) an object within paragraph (a), (b) or (c) found at the same time or earlier; or
  - (ii) an object found earlier which would be within paragraph (a) or (b) if it had been found at the same time.

In addition, the Secretary of State has designated "any group of two or more metallic objects of any composition of prehistoric date" treasure as well if found after Jan. 1, 2003.

<sup>222</sup> The Treasure Act covers England, Wales, and Northern Ireland. Scotland has its own legal system and has its own common law definition of treasure which does not require valuable metals. See *Lord Advocate v. Aberdeen University and Another*, (1963) 1963 S.C. 533. For an excellent discussion of the Scots law position, see David L. Carey Miller & Alison Sheridan, *Treasure Trove in Scots Law*, 1 ART, ANT. & L. 393 (1996).

fall outside the scope of the Treasure Act. The scheme has created a massive community archaeology project. As Neil MacGregor, Director of the British Museum has said recently, “[t]he huge increase in finds is testimony to the success of the Treasure Act and the Portable Antiquities Scheme and makes a crucial contribution to our understanding of our past.”<sup>223</sup> The Portable Antiquities Scheme also maintains a website which instructs the public on what to do when they discover a potential piece of treasure.<sup>224</sup>

The scheme recognizes the inherent difficulty in constantly policing archaeological sites, and effectively recruits the public into policing and reporting finds. The system has certainly encouraged treasure hunters to report their finds.<sup>225</sup> The nation’s museums have also benefited because if a find is valuable enough, the find may be purchased. Archaeologists are both excited and wary of the system. As a result, a lot more finds are being reported, and an impressive database is being created.<sup>226</sup> However, archaeologists continue to argue that cultural heritage and its physical manifestations should not be privately owned. The scheme starts with the premise that it is not currently feasible to prevent the private ownership of all antiquities.

The voluntary scheme has produced some impressive and unexpected benefits. It has not just increased the voluntary reporting of objects which fall below the treasure trove threshold, it has also dramatically increased the reporting of objects which must be reported. Before the reporting scheme, few finds were reported. Between 1988 and 1996, there was an average of a little over 23 treasure finds reported annually.<sup>227</sup> With the Treasure Act and the Portable Antiquities Scheme those numbers have increased dramatically. In 1998, the first full year of the program, 201 treasure finds were reported. By 2005, 595 treasure finds were reported.<sup>228</sup> Finders are educated about good practice, which in turn creates opportunities for them to learn about archaeology. This indicates that a simple prohibition or state ownership declaration will do very little. A comprehensive approach is

<sup>223</sup> Press Release, Portable Antiquities Scheme, 45% Increase in Number of Archaeological Finds Reported (Jan. 17, 2007).

<sup>224</sup> See Portable Antiquities Scheme, <http://www.finds.org.uk/> (last visited Jan. 21, 2007).

<sup>225</sup> See Maev Kennedy, ‘*Unsung Heroes of Heritage*’ Extolled For Unearthing Hoard of Treasure, *GUARDIAN*, Jan. 18, 2007, available at <http://arts.guardian.co.uk/news/story/0,,1992993,00.html>.

<sup>226</sup> As of 2005, the database had 120,000 objects listed, along with 42,000 publicly available images. See Roger Bland, *A Pragmatic Approach to the Problem of Portable Antiquities: The Experience of England and Wales*, 79 *ANTIQUITY* 440 (2005).

<sup>227</sup> Department of Culture, Media and Sport, *Portable Antiquities Scheme Annual Report 2005/6*, <http://www.finds.org.uk/documents/report06.pdf>.

<sup>228</sup> *Id.*

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needed which builds on the regulatory framework and educates the public at large about compliance but also erects a good system which allows for the quick reporting of discoveries. This adds to the body of knowledge and precludes a market in unprovenanced objects. The Scheme produces a better, more responsible attitude among the general public. Though archaeologists may have doubts about the scheme, the reporting of treasure and other historic finds has helped them and their research. The importance of the Portable Antiquities Scheme lies in its ability to use the public as a tool for archaeologists and researchers. Though comprehensive protection and excavation of important sites remains the goal of archaeologists, the scheme works as a pragmatic and valuable compromise.

### 3. Dealing in Cultural Objects (Offences) Act 2003

On December 30, 2003, the Dealing in Cultural Objects (Offences) Act entered into force in England and Wales. This is the counterpart in England and Wales to the *McClain* doctrine. The new measure was meant to clearly criminalize certain actions. Unfortunately, as with prosecutions under the NSPA, the lack of provenance in the majority of art and antiquities transactions renders it effective for egregious violations only. The Department for Culture, Media and Sport issued the following statement after the introduction of the new offence:

The new offence is intended specifically to combat traffic in unlawfully removed cultural objects and will assist in maintaining the integrity of buildings, structures and monuments (including wrecks) world-wide by reducing the commercial incentive to those involved in the looting of such sites. It will send a strong signal that the Government is determined to put a stop to such practices.<sup>229</sup>

The question of whether this commercial incentive has in fact been reduced remains very much in doubt. The new offence has four principal elements.

First, the criminal act must involve a cultural object. A cultural object is defined as those objects which are of a historical, architectural, or archaeological interest.<sup>230</sup> This generous

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<sup>229</sup> Department for Culture, Media and Sport: Cultural Property Unit, Dealing in Tainted Cultural Objects – Guidance on the Dealing in Cultural Objects (Offences) Act 2003, available at <http://www.culture.gov.uk/NR/rdonlyres/F89F9981-05FD-4A9A-B9DF-0C82F3B3C50E/0/Dealincultural.pdf>, (last visited Aug. 25, 2007).

<sup>230</sup> Section 2(1) Dealing in Cultural Objects (Offences) Act 2003.

definition seems all-encompassing, and casts its net over countless objects of any real monetary value. Second, the defendant must have known or believed the cultural object was tainted. An object may be tainted for the purposes of the offence in three circumstances: (1) if it was excavated and such excavation violated local law; (2) if the object at any time formed part of a building or structure of historical, architectural, or archaeological interest and it was illegally removed from that building; or (3) if it is illegally removed from a monument.<sup>231</sup> Third, a defendant must have dealt with the object. Dealing includes a number of activities including lending, borrowing, giving, accepting, exporting and importing, or making an agreement with another to do one of these activities.<sup>232</sup> Fourth, the defendant must have dealt with the object dishonestly.<sup>233</sup> The best way to illustrate the dishonesty requirement involves a simple hypothetical.<sup>234</sup> Imagine an antiquities dealer innocently takes a consignment of an Egyptian bust for a third party. If the dealer later learns the property is tainted and reports knowledge to the police, the dealer may have dealt with the object, but has avoided criminal liability.

The Dealing in Cultural Objects Act firmly attaches criminal liability in situations when a dealer sells newly unearthed antiquities from a nation that has nationalized them in some way. However, the knowledge requirement poses a tremendous potential obstacle for the Crown. A prosecutor must establish both that a defendant bought a tainted object, and also that the defendant knew it was tainted. Establishing this knowledge component seems particularly onerous. So much so that prosecutions for the offence seem highly unlikely.<sup>235</sup> Prosecutions under the Act will likely be few and far between. This seems troubling, as the pragmatic compromise forged in crafting the U.K.'s export restrictions, and in responding to the discovery of antiquities in England and Wales were not successfully implemented in the new criminal offense.

The primary applicability of the offense may be analogous to the way the NSPA has been used in the *McClain* and *Schultz*

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<sup>231</sup> *Id.* at § 2 (2-5).

<sup>232</sup> *Id.* at § 3.

<sup>233</sup> *Id.* at § 1. For the current test for dishonesty see *R. v. Ghosh* [1982] Q.B. 1053, CA, Lord Lane C.J., at 1064D-F.

<sup>234</sup> See Anthony Browne & Pierre Valentin, *The Art Market in the United Kingdom and Recent Developments in British Cultural Policy*, in *WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 100 (Kate Fitz Gibbon ed., 2005).

<sup>235</sup> Mackenzie, *supra* note 94, at 82 (arguing "in a market where there is no routine exchange of provenance information on purchase, it would seem very easy for a dealer to exchange his tainted purchase with a simple denial of knowledge or belief that it was anything out of the ordinary").

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prosecutions in the U.S. It will likely be quite effective in egregious cases where defendants have been careless. Unfortunately though, it seems ill suited to tackle problems with the market generally. This hardly seems a satisfactory result.

B. *How a Pragmatic Approach to the Cultural Property Trade Would Benefit Everyone*

A system which allows buyers and sellers to check that their purchases are legitimate would allow a healthy and robust trade. Dealers in cultural property would be able to freely operate, without suspicion.<sup>236</sup> Also, archaeologists and advocates for source nations could shift their efforts from criticism of the market and dealers and instead work protecting and preserving archaeological sites.

The evidentiary standards for any prosecution are high. A prosecutor must prove beyond a reasonable doubt the elements of the offense. This evidentiary hurdle becomes almost impossible to overcome when dealers, buyers, and regulators cannot routinely check the provenance of a given piece of cultural property. Until there is a comprehensive way to check the provenance of an object, the criminal regulation will continue to prove ineffective. We can see a tension between the estimates of the size of the illicit trade and the relative paucity of prosecutions in market nations. As the prosecutions under the NSPA all show, prosecutors are only able to secure conspiracy convictions, because the workings of the market are shrouded in such mystery. Without a more comprehensive regulatory system which insures that individuals deal in licit objects, these prosecutions will continue to be ineffective.

How this reform might take place is of course open to a great deal of speculation. Perhaps the market will begin to police itself, but the market has shown a hesitancy to do this in the past. If the market does not begin this kind of self-regulation it seems likely that governments will increasingly step in. As we saw with the forfeitures of cultural property, this intervention is not always welcome or productive. A pragmatic balancing of the values at stake in the cultural property trade is needed to bring all the disparate interest groups to the table and create a system which prevents theft, destruction of archaeological sites, and allows a robust and healthy trade. What precise form this compromise will

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<sup>236</sup> John Merryman has argued persuasively for an honorable trade in cultural property as well. See Merryman, *supra* note 202, at 13.



take exceeds the scope of this article. However, by showing the various stakeholders that compromise is in their best interest, perhaps we can begin to build the consensus necessary for real reform.

### V. CONCLUSION

Under the current system, the best effective protection for art and antiquities is for nations to adopt clearly defined archaeological patrimony laws, and rely on the American criminal laws to enforce them. This hardly seems a desirable result. A better solution would allow the market itself to act as a safeguard for art and antiquities by requiring a detailed and accurate provenance. The current state of federal criminal regulation is neither advancing the cause of preservation of archaeological context, nor of the operation of a licit market. A far more agreeable compromise would foster a market in antiquities and art which promotes the preservation of archaeological context and prevents theft.

As the largest single art and antiquities market in the world, the U.S. must continue to work to harmonize and reform these laws as they relate to cultural property if there will be any real reduction in the illicit cultural property market. Much of the criminal regulation can be quite effective, especially at the federal level with the NSPA, but only in high profile and egregious cases.

At a systemic level, there appears to be a great deal of work to be done. The current state of criminal regulation is, above all, limiting the international movement of art and antiquities and preserving the national patrimony. It does not seem to work very well in preserving archaeological evidence. The gap seems to be growing between what we think should happen to art and antiquities, and what is actually happening. A much better system would encourage an open and licit market in antiquities. Such a system would involve a compromise between cultural nationalists and internationalists. As the experience in England and Wales has shown, where compromise can be brokered, the net result is an effective and pragmatic regulatory framework.

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