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Trading Places: Illicit Antiquities, Foreign Cultural Patrimony Laws, and the U.S. National Stolen Property Act after *United States v. Schultz*

By MARK J. PETR*

Introduction

Even before the recent and widely-publicized looting of Iraqi cultural institutions in the aftermath of war, the active trade in art and antiquities of dubious provenance has been an important concern of the U.S. Attorney's Office for the Southern District of New York because, just as New York City is one of the world's important financial centers, it is also one of the most important centers of the world's art market.[1] The U.S. Attorney's Office there has persistently advocated the position that the national ownership laws of foreign nations allow prosecutors to consider property, such as ancient artifacts, to be "stolen" for the purpose of prosecution under the U.S. National Stolen Property Act (NSPA).[2] In the instance of antiquities, the U.S. Attorney's Office only recently succeeded, however, with a precedent-setting prosecution using the NSPA in the case of *United States v. Schultz*.[3] In 2003, the Second Circuit Court of Appeals agreed and upheld the conviction of Schultz, a New York antiquities dealer who sold ancient artifacts claimed by the government of Egypt under its cultural patrimony law.[4] Dealers, collectors, and

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1. Martha Lufkin, *Schultz prison sentence upheld: "The same as material stolen from a private home,"* THE ART NEWSPAPER.COM, at <http://www.theartnewspaper.com/news/article.asp?idart=11275> (Sept. 18, 2003).

2. Lufkin, *supra* note 1.

3. United States v. Schultz, 178 F.Supp. 2d 445, (S.D.N.Y. 2002) ("Schultz I"), *aff'd* 333 F.3d 393 (2d Cir. 2003) ("Schultz II"), *cert. denied* 124 S. Ct. 1051 (2004).

4. Schultz II, 124 S. Ct. at 416.

associations representing their interests strenuously disagreed and had filed friend-of-the-court briefs arguing that such treatment would harm the legitimate trade in antiquities.[5] Art dealer and collector trade associations are concerned that in the aftermath of *Schultz* the antiquities trade will be irreparably damaged.[6] Critics of the trade in antiquities make no secret that destruction of the trade is their goal, finding little difference in effect between the trade in legally and illegally acquired artifacts.[7] One critic of the antiquities trade, Ricardo J. Elia, associate professor of archaeology at Boston University has said, "People think that there is an illicit and a legitimate market. In fact, it is the same."[8] However, even under the new *Schultz* regime there are strong reasons why legitimate traders in antiquities could and should flourish and that increased enforcement can work to the advantage and benefit of those who obey the law.

If the successful *Schultz* prosecution actually creates a reduction in the number of illegally obtained antiquities on the market, the law of supply and demand will put a price premium on legally obtained and documented artifacts, resulting in higher per sale profits and commissions for dealers. Likely, many of these items may be legally obtained (or, because of the date of their acquisition, at least "grandfathered" into the legal market) duplicates from museum collections that would have remained in storage. Their sale will generate funds to further legitimate institutional goals for the public benefit. There also could be a greater likelihood that a higher percentage of offerings of illegally obtained antiquities will be recognized. With a lower volume of sales but a higher per sale profit, legitimate antiquities dealers will have greater resources and more time, as well as a bigger incentive, to properly research items offered to them and by them. The result should be more identifications and repatriations of illegally obtained antiquities.

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5. *Id.* at 398.

6. American Society of Appraisers, *Use of U.S. and Foreign Laws in Antiquities Case Serves as Warning to Appraisers: American Society of Appraisers Joins Amicus Brief to U.S. v. Frederick Schultz*, at <http://www.appraisers.org/news/announcedetail.cfm?announcementID=268> (visited Mar. 8, 2004).

7. Patty Gerstenblith, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 201-11 (2002).

8. Barry Meier and Martin Gottlieb, *Loot, Along the Antique Trail: An Illicit Journey Out of Egypt, Only a Few Questions Asked*, THE NEW YORK TIMES, at <http://nytimes.com/2004/02/23/international/23ANTI.html> (Feb. 23, 2004).

The National Stolen Property Act (NSPA) and pre-*Schultz* Caselaw

The NSPA

The NSPA of 1934 is a federal law that allows for prosecution of those involved in the importing, exporting, buying or selling of cultural artifacts that have been illegally obtained.[9] It functions through the recognition of foreign countries' cultural patrimony legislation, allowing these foreign patrimony laws to be effectively enforced inside the territory of the United States by U.S. courts.[10] Typically, such patrimony laws equate with theft the unauthorized excavation or removal of artifacts from their archaeological context within their country of origin. Importantly, such laws must not be merely export prohibitions. In order to be effectuated in the United States through the NSPA, the foreign country's patrimony law must vest ownership of the antiquities in the government of their country of origin.[11]

There are two provisions of the NSPA that are most applicable to trade in illicit antiquities.[12] The first is 18 U.S.C. § 2314, which makes the transportation of stolen goods across borders in interstate or foreign commerce illegal. The second provision is 18 U.S.C. § 2315, which makes receipt or sale of such stolen goods illegal. There are, however, noted difficulties in pursuing criminal prosecutions under the NSPA. Only three successful prosecutions for stolen antiquities have been made using the NSPA since its inception.

There are three major elements to the text of section 2314 crucial to prosecutions.[13] "Whoever transports in interstate or foreign commerce any goods, wares, [or] merchandise of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud.... Shall be fined under this title or imprisoned not more than ten years, or both."[14] First, the language clearly covers those

9. National Stolen Property Act, 18 U.S.C.S. §§ 2314, 2315 (2001) [hereinafter "NSPA"].

10. Schultz II, 124 S. Ct. at 410.

11. *Id.*

12. Robert S. Schwartz, Note, *In Schultz We Trust: The Future of Criminal Prosecution For Importers of Illicit Cultural Property Under the National Stolen Property Act*, 11 CARDOZO J. INT'L & COMP. L. 211, 218 (Spring, 2003).

13. Schwartz, *supra* note 12, at 219.

14. 18 U.S.C.S. § 2314 (2001).

individuals who transport stolen goods (inclusive of antiquities) in foreign commerce. Second, section 2314 grants the ability to prosecute the actors who bring stolen cultural property into, or transport it within, the United States, allowing for fines, imprisonment, or both. Importantly, however, an element of scienter is required for the offense to be criminal. This element of knowledge that such antiquities were stolen is what has made prosecutions under the NSPA difficult.[15] With antiquities long since removed from their context, it is difficult to prove knowledge that the artifacts were stolen.[16]

Section 2315 makes sale or possession of such cultural property illegal:

> Whoever receives, possesses, sells, or disposes of any goods, wares, [or] merchandise of the value of $5,000 or more which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken shall be fined under this title or imprisoned not more than ten years, or both.[17]

Besides making simple possession of stolen property criminal under the NSPA, section 2315 also poses some of the most difficult issues surrounding the NSPA.[18]

First, is an art dealer a criminal simply for obtaining cultural property from a country that has nationalized the ownership of its cultural patrimony? Section 2315 requires an element of scienter to protect any careless but innocent dealers. The language of scienter in the statute suggests that a successful prosecution must prove that a dealer has knowledge that an artifact in his possession is stolen in light of the laws of its country of origin.[19] In the three prosecutions that have resulted in convictions, however, courts have, as in other areas of criminal law, allowed such knowledge to be inferred from the defendant's actions under the circumstances.[20]

Taken together, these two sections of the NSPA are meant to

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15. *Id.*

16. Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 395 (1995).

17. 18 U.S.C.S. § 2315 (2001).

18. Schwartz, *supra* note 12, at 219.

19. 18 U.S.C.S. § 2315 (2001).

20. Schultz II at 412; United States v. McClain, 593 F.2d 658, 668 n. 15 (5th Cir. 1979); United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974).

attack the demand side of the entire antiquities trade.[21] It is hoped by NSPA prosecution proponents that imprisoning dealers in the United States who trade in illegally imported artifacts will eventually undercut the networks that supply such objects to the trade.[22] There are, however, at least three further complicating circumstances inherent to the art, and especially the antiquities, trade that complicate NSPA prosecutions and threaten the trade of legitimate antiquities dealers. First, the vast amount of cultural objects that have been excavated over the centuries and transported to other countries make it nearly impossible for legitimate dealers in antiquities to be sure, without extensive research, of the provenance of the items that are offered for sale.[23] Even with research, the general lack of specificity and care in record-keeping within many legitimate private collections allow for relatively easy fabrication of believable, yet false, provenance.[24] A second complicating factor in this situation is the art world tradition of trust and dealing on a handshake amongst peers.[25] Third, combining these lax formalities with the fact that most dealers or galleries are very small business entities consisting of two, three, or perhaps a handful of employees, trust in dealing is as much a potential occupational hazard as it is a necessity, for it is often felt that there are not enough hands, time, or money to thoroughly research every piece offered for sale.[26] Given these difficulties for NSPA prosecutions, it is no wonder that the three successful prosecutions that have occurred are separated by decades and have proven to have very atypical and clear-cut sets of facts.[27]

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21. Schwartz, *supra* note 12, at 219.

22. *Id.*

23. *Id.*

24. Borodkin, *supra* note 16, at 386-87.

25. *Id.* at 387.

26. *Id.*

27. Schultz had extensive and well-documented dealings with his co-conspirator who handled the illegal exportation of the stolen antiquities. Schultz II at 412. The conspirators in *McClain* suffered the misfortune of ignorantly offering their stolen booty to a Mexican cultural center in San Antonio, Texas that happened to be run by the illegally obtained artifacts' country of origin. United States v. McClain, 593 F. 2d 658, 660 (5th Cir. 1919). In *Hollinshead*, the lead defendant directly supervised each step of the stolen artifact's journey to and within the United States from excavation to transportation to presentation for sale. United States v. Hollinshead, 495 F. 2d 1154, 1155 (9th Cir. 1974).

Earlier NSPA Prosecutions

United States v. Hollinshead

The *United States v. Hollinshead* is the first case that resulted in the successful prosecution of art smugglers under the NSPA.[28] The prosecution successfully applied the NSPA to convict the defendants of conspiracy to transport stolen goods in interstate commerce through Guatemala's national ownership law.[29] The named defendant, Hollinshead, acquired a Mayan stele in the Guatemalan jungle, cut it in pieces and shipped it to California via Belize.[30] The defendants transported the stele within the United States attempting to sell it to museums and collectors. Eventually, their efforts raised suspicions and authorities were tipped off, leading to their arrest, trial, and conviction.[31] Hollinshead appealed on the grounds that the prosecution did not show that the defendants had knowledge of the foreign law.[32] Guatemalan law states that all artifacts are the property of the government and may not be removed without permission.[33] The Ninth Circuit rejected Hollinshead's argument, adopting a broad definition for the term "stolen" in the NSPA: "Stolen means 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."[34] Under this definition, prosecutors only need to show that the defendants knew an item was stolen and not the laws of the country of origin.[35] The court held that the defendants actions in cutting the stele into smaller, more easily concealed, pieces for smuggling and the roundabout method used to bring it to the United States made evident the defendants actual knowledge that their actions were illegal in Guatemala.[36] Their conviction under the broad definition of "stolen" which included artifacts removed in violation of

28. 495 F. 2d at 1156.
29. *Id.* at 1155.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1156.
35. Schwartz, *supra* note 12, at 220.
36. 495 F. 2d at 1156.

a foreign country's cultural patrimony laws provides the basis for future prosecutions under the NSPA.[37] This definition allowed the later prosecutions in *United States v. McClain*, and then *Schultz*, as courts followed the concept that property removed from a country with patrimony laws nationalizing its antiquities was in fact stolen.

United States v. McClain

The series of *United States v. McClain* cases borrowed the definition of "stolen" from *Hollinshead* and used it to provide an outline for the prosecutions of antiquities dealers under the NSPA.[38] The defendants in *McClain* were convicted of substantive violations of both sections 2314 and 2315 of the NSPA as well as conspiring to violate these laws.[39] They had imported antiquities from Mexico and tried to sell them to various institutions in the United States.[40] Unfortunately for the smugglers, one of the institutions was actually a branch of the Mexican national government.[41]

The *McClain* prosecution was complicated by the legislative history of Mexican laws regarding protection of its antiquities.[42] Mexico implemented its cultural patrimony laws in phases.[43] The first phase was in 1897 and only covered its large monuments.[44] Movable artifacts, such as the antiquities in question, were not actually covered by the laws until 1972.[45] The substantive convictions obtained at the initial trial were overturned and remanded as it was not established at trial exactly when the artifacts had been brought into the United States.[46] Importantly, however, the Fifth Circuit did follow *Hollinshead* in recognizing that ownership of artifacts by a government as a basis for theft under the NSPA.[47]

After another round of convictions, the Fifth Circuit eventually

37. Gerstenblith, *supra* note 7, at 214-15.

38. United States v. McClain, 545 F. 2d 988 (5th Cir. 1977)("McClain I"), *reh'g denied*, 551 F.2d 52, *aff'd after new trial*, 593 F. 2d 658 (5th Cir. 1979)("McClain II"), *cert. denied* 444 U.S. 918 (1979).

39. 593 F. 2d at 659.

40. *Id.* at 659-60.

41. *Id.* at 660.

42. *Id.* at 666-67.

43. *Id.* at 666.

44. *Id.*

45. *Id.*

46. *Id.* at 667.

47. McClain I, 545 F. 2d at 994-97; McClain II, 593 F. 2d at 664.

overturned the substantive convictions a second time because of the vagueness of the Mexican laws.[48] The court was concerned with Due Process problems arising through the use of the Mexican laws.[49] Evidence in the record, however, did show that the defendants intended to trade further in illicit Mexican antiquities after the sale of the collection for which they were arrested.[50] This intent proved a clear violation of the 1972 Mexican patrimony legislation and demonstrated a further conspiracy to violate the NSPA.[51] The conspiracy convictions became the only ones the Fifth Circuit upheld.[52] The *McClain* cases, however, reaffirmed the broad definition of "stolen" under the NSPA and laid further groundwork for how to handle questions surrounding the implementation of foreign cultural patrimony laws through the NSPA and obtain sound, substantive convictions.[53] This groundwork was not tested for another 25 years, until the case of *United States v. Schultz*.

United States v. Schultz

The Violation

Frederick Schultz, along with a British national, used corrupt connections within the Egyptian police force to acquire a variety of antiquities in order to present them for sale in the United States over a number of years.[54] Among the antiquities were a sculptural head of the pharaoh Amenhotep III that Schultz, the proprietor of a prominent New York art gallery and former president of the National Association of Dealers of Ancient, Oriental, and Primitive Art, sold for $1.2 million in 1994.[55] The smuggled artifacts were coated in plastic and plaster and paint in order to appear to be cheap tourist souvenirs and escape the interest of Egyptian customs authorities.[56] The British national also concocted fake provenance showing the antiquities to have come from a non-existent British collection that

48. McClain II, 593 F. 2d at 670-71.
49. *Id.* at 671.
50. *Id.* at 671-72.
51. *Id.*
52. *Id.*
53. Gerstenblith, *supra* note 7, at 216-17.
54. Schultz II, 124 S. Ct. at 395-96.
55. *Id.* at 396.
56. *Id.*

had supposedly acquired them in the 1920s.[57] Once Schultz imported the artifacts, he used this false provenance to offer the works in his gallery in New York City and to prominent collectors and museums throughout the United States.[58] Schultz was eventually convicted of conspiracy to violate the NSPA, fined $50,000, and received a 33-month sentence in a federal penitentiary.[59]

The Defense

When first indicted in July 2001, Schultz moved to dismiss the indictment on the ground that the antiquities were not stolen within the NSPA's definition.[60] Schultz claimed that the Egyptian law did not truly vest the ownership of the antiquities in the Egyptian government.[61] His theory was that, without vesting, they therefore were not owned by anyone, so they could not have been stolen.[62] The prosecution countered with the Egyptian cultural patrimony law, known as Law 117, which stated that all antiquities found in Egypt after 1983 were the property of the Egyptian government.[63] The court denied Schultz's motion after a short hearing.[64] At trial, a jury convicted Schultz in February 2002.[65]

On appeal, Schultz offered several arguments to overturn his conviction. First, Schultz appealed the outcome of the pre-trial motion that found that Law 117 vested ownership of antiquities in the Egyptian government and that even if Law 117 did vest ownership, it was not a type of ownership the United States should recognize.[66] Schultz's most compelling argument, though, was his third: the NSPA is superseded by the Convention on Cultural Property Implementation Act.[67] Schultz also tried out the arguments that the common law definition of "stolen" should determine whether antiquities were covered by the NSPA and that the district erred by not allowing him to present a defense based on mistake of United

57. *Id.*
58. *Id.* at 395-98.
59. *Id.* at 398.
60. Schultz I at 446-48.
61. *Id.* at 447.
62. *Id.*
63. *Id.* at 446.
64. *Id.* at 449.
65. Schultz II at 395.
66. *Id.* at 398-99.
67. *Id.* at 409.

States law.[68]

The Second Circuit relied on the plain language of Law 117 as enough to satisfy the requirement that ownership of the antiquities be vested in the Egyptian government; Article 6 of the law clearly states that "[a]ll antiquities are considered to be public property."[69] As well, the court agreed with the prosecution-provided expert testimony that Law 117 had also been used to prosecute violations that had taken place entirely within Egyptian borders, showing that it was no mere export prohibition.[70] The Second Circuit further cited a body of Supreme Court precedent urging that the NSPA "should be broadly construed."[71] The court also cited the *McClain* precedent in disallowing Schultz's contention that the United States should not apply Law 117 and its ownership provision.[72]

Schultz's more novel third argument required further consideration. The CPIA, enacted in 1983, is the United States implementation of the customs regulations contained in the 1970 UNESCO Convention of which it is a signatory.[73] The CPIA is a network of international agreements to protect cultural patrimony which functions at the request of a foreign sovereign.[74] First, a request is made to the President of the United States that he act to protect artifacts that have reached the U.S. market.[75] Unlike the NSPA, a country need not have enacted cultural patrimony legislation; it merely needs to be part of the UNESCO Convention to have access to CPIA.[76] The CPIA creates the right to repatriation as well as monetary penalties.[77] To fall under CPIA prosecution, an antiquities dealer would have to falsify customs documents, creating criminal liability under United States' law.[78] This liability is independent of NSPA, and the potential penalties under the CPIA

68. *Id.* at 409-12.

69. *Id.* at 399.

70. *Id.* at 400-01.

71. *Id.* at 402 (citing McElroy v. United States, 445 U.S. 642, 655 (1982) and United States v. Wallach, 935 F.2d 445, 469 (2d Cir. 1991)(citing Moskal v. United States, 498 U.S. 103, 113 (1990))).

72. Schultz II, 124 S. Ct. at 403.

73. *Id.* at 408.

74. S. Rep. No. 97-564, at 21 (1982).

75. Schultz II, 124 S. Ct. at 408.

76. Gerstenblith, *supra* note 7, at 222.

77. Schwartz, *supra* note 12, at 231

78. *Id.* at 232.

are much less severe than NSPA.[79]

Schultz seized on this possibility to argue that the CPIA has supplanted the NSPA, shifting his liability to charges with milder penalties.[80] He claimed the CPIA was intended to be the only mechanism by which the U.S. government deals with the illegal importation of cultural property.[81] Moreover, Schultz also tried an argument that would have relieved him of all liability whatsoever.[82] He claimed that the CPIA only bars the importation of items that have been stolen from a museum or other cultural institution and is not intended to cover artifacts excavated in violation of patrimony laws.[83]

In answer to this argument, the Second Circuit stated that "[t]he CPIA does not state that importing objects stolen from somewhere other than a museum is legal."[84] The court noted that the CPIA is only meant to fill in the gaps left by the NSPA and that nothing in the language of the CPIA suggests that it replaces the NSPA.[85] In fact, the legislative history of the CPIA shows that it ". . .neither pre-empts state law in any way, nor modifies any Federal or State remedies that may pertain to articles to which [the CPIA] provisions. . .apply."[86] The court ruled that the CPIA, therefore does not supplant liability under the NSPA, rather, it creates new causes of action.[87] It is possible to violate both the NSPA and the CPIA when importing objects into the United States.[88] Many antiquities dealers and collectors fear that this potential for both criminal and civil charges will have a deleterious effect on the trade, endangering their livelihoods as well as the artifacts that are not only a source of income but also beauty, pleasure, and knowledge.

The Possible Chilling Effect of *Schultz* on the Antiquities Trade

"The importance of the *Schultz* quake and its aftershocks on the

79. Schultz II, 124 S. Ct. at 408-09.
80. *Id.* at 408.
81. *Id.*
82. *Id.* at 408-09.
83. *Id.* at 408.
84. *Id.* at 408-09.
85. *Id.* at 408.
86. Senate Rep. No. 97-564 at 22 (1982).
87. *Id.* at 409.
88. *Id.* at 408-09.

antiquities market cannot be underestimated."[89] "The question of cultural patrimony, or who has the right to own and exhibit the artefacts[sic] of other nations, is already one of the most highly vexed issues in the art world."[90] The amicus brief filed with the Second Circuit on behalf of Schultz states that the district court's decision "threatens the viability of the segment of the art market and museum community that collects, exhibits and deals in antiquities and cultural objects imported into the United States."[91]

Legitimate dealers in antiquities fear criminal prosecution with stiff penalties for making mistakes in scholarship. The *Antiquities Trade Gazette* notes:

> [A]nyone wishing to deal in Egyptian antiquities in the US will have to be able to show cast-iron provenances going back to before 1983 for any piece, regardless of its cultural or economic value. As the nature of antiquities – often dug up after thousands of years – means that firm provenances are rarely possible, the ruling is likely to blight a huge number of transactions."[92]

"The legitimate trade and ownership of cultural properties are at risk," impacting professional appraisers, private collectors, antiquities dealers and museum curators, notes Edwin W. Baker, ASA executive vice president.[93] "The pendulum has swung too far against antiquities dealers and collectors," says William Pearlstein, an attorney at Golenbock Eisman, who represents dealers and collectors. "It is harder and harder for collectors to know what is safe to collect."[94]

One publication directed towards dealers and collectors of ancient art presented Schultz's situation in histrionic terms:

> Imagine this scenario: government prosecutors accuse you of

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89. Trace Media Resources, *The Frederick Schultz Affair*, CASE STUDIES, at <http://www.trace.co.uk/resources/media/casestudies/police/FrederickSchultz> (visited Mar. 6, 2004).

90. Steven Vincent, *Commentary: The Stake in the Schultz Trial*, ORIENTATIONS INTERNET EDITION, at <http://www.kaleden.com/articles/3322.html> (visited Mar. 6, 2004).

91. American Society of Appraisers, *supra* note 6.

92. *Ruling a Major Blow to U.S. Antiquities Trade*, ANTIQUITIESTRADEGAZETTE.COM, at <http://www.antiquestradegazette.com/news/news_article_main.asp?id=1809&pt=nb> (Jan. 21, 2002).

93. American Society of Appraisers, *supra* note 6.

94. Nathan Vardi, *The Return of the Mummy*, FORBES.COM, at <http://www.forbes.com/forbes/s003/1222/156.html> (Dec. 22, 2003).

> attempting to sell several objects which they contend your business partner stole from a foreign country - even though that country never made a claim for the objects, and its law defining ownership is written in a language incomprehensible to you, while your own nation's statutes on this point are unclear. Moreover, in building their case against you, prosecutors rely mainly on the testimony of your business partner - a convicted criminal and con artist who, out of motives of profit and revenge, repeatedly lied, misled you and manipulated you. Worse, because of the nature of the charges, your government does not have to prove you actually 'stole' these objects - just that you believed that even 'one' object was stolen when you tried to sell it. As if that weren't enough, even if you did not realize what you were doing was wrong, but the jury thinks that you 'consciously avoided' discovering the truth, you are guilty. This, in essence, is the legal situation that Frederick Schultz, a well-respected New York antiquities dealer, has faced. . . .[95]

Such fears do appear to have some basis in reality. For much of history, the world-wide trade in artifacts was largely unregulated and often the formalities of importation and exportation were lax.[96] Theoretically, antiquities that were legally exported, but not completely documented, before a source-country's patrimony law took effect will, post-*Schultz*, lose value in the marketplace as collectors and museums would risk litigation by their acquisition.[97] Some scholars welcome such an outcome: "Our belief is that if people find it difficult to sell these objects on the art market, if they fear the objects might be seized and they might end in court, it might be a deterrent," says Nancy Wilkie, president of the Archaeological Institute of America.[98]

Proponents of the trade in antiquities also fear the damage that could be done to the collecting programs of American museums and a decimation of the cultural knowledge and understanding that such collections promote. Jonathan Bloom, a lawyer in the firm of Weil, Gotshal & Manges, which represents four dealers' groups, has commented that "[h]ad this legal regime been in place in say 1875, then we wouldn't have the kind of art collections that we have today

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95. Steven Vincent, *Commentary: Schultz Convicted*, ORIENTATIONS:INTERNET EDITION, at <http://www.kaleden.com/articles/3344.html> (visited Mar. 8, 2004).

96. *Id.*

97. *Id.*

98. Celestine Bohlen, *The Trial of a Dealer Divides the Art World*, THISDAYONLINE.COM, at <http://www.thisdayonline.com/archive/2002/02/03/20020203art03.html> (July 31, 2003).

in American museums."[99] William Pearlstein, a lawyer for the National Association of Dealers in Ancient, Oriental and Primitive Art (an organization of which Schultz was once President) cited the public interest in positioning the NADAOPA's support of Schultz: "What the United States is doing is quite radical and quite to the contrary of the interest of museums, the public, the dealers and the auction houses. I think the government is out to squelch the antiquities trade, and no one is taking into account the interest of the public it serves."[100]

An eminent antiquities dealer, writing for *The Wall Street Journal*, defends the trade's commodification of cultural property for its effective conservation of artifacts:

> Contrary to what some believe, trade in ancient objects is not the enemy of preservation. The great contribution the art market makes to this cause is to endow works of art with value. When objects have no value they are inevitably at grave risk of destruction because preserving them is a costly enterprise. Storing, safeguarding, heating and air conditioning, and conserving art can only be done for a relatively few things. In practice, there is a constant triage which saves a few treasured objects while consigning the remainder to destruction through benign neglect.[101]

This dealer further touts the international trade in antiquities as having the effect of dispersing important cultural treasures throughout the world and protecting them from local disasters, citing the recent looting of antiquities from the Iraqi museums as evidence of the dangers putting "all your eggs in one basket" by leaving source countries in control of their own heritage.[102]

Whether the *Schultz* decision will have the profound effects the proponents of such policy arguments purvey remains to be seen. There are, however, some likely reasons why the consequences of *Schultz* will not be as dire as predicted.

The Potential Benefits of *Schultz* to the Antiquities Trade

The antiquities trade is a market that has become gradually more

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99. *Id.*

100. *Id.*

101. Andre Emmerich, *Let the Market Preserve Art: What were all those antiquities doing in Iraq anyway?*, WSJ.COM OPINION JOURNAL, at <http://www.opinionjournal.com/la/?id=110003399> (Apr. 23, 2003).

102. *Id.*

regulated over the past 100 years. The *Schultz* decision is only the implementation of a regulation that drives market forces. The law of supply and demand in the antiquities has been astutely described as follows:

> [T]he world divides itself into source nations and market nations. In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece, and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland, and the United States are examples. Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.[103]

If the *Schultz* regime creates a reduction in the number of illegally obtained antiquities on the market originating from source countries, the law of supply and demand will by logic put a price-premium on legally obtained and documented artifacts. The result will be higher per sale prices for documented antiquities, providing higher commissions for dealers. Following this train of logic to its conclusion points to a situation with a lower volume of sales but a higher per sale profit, in other words, legitimate antiquities dealers will have greater resources and more time, as well as a bigger incentive, to properly research items offered to them and by them. Again, by this logic, the result could be more identifications and repatriations of illegally obtained antiquities. If proper documentation becomes less of a burden, it will become accepted as routine. Hamilton, a partner in the Washington-based Trans-Art International Gallery, notes, "People are required to do a title search when they buy a house or a car. It's mystifying why this hasn't become standard practice in the art world."[104] Since the *Schultz* decision has been affirmed, prominent dealers have become increasingly vigilant:

> I think fifteen years ago, people took a more relaxed view of things, says James Ede, a London-based dealer and head of the

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103. J.H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. OF INT'L L. 831, 832 (1986).

104. Gail Russel Chaddock, *Art World Wary of New Rules*, THE CHRISTIAN SCIENCE MONITOR, at <http://search.csmonitor.com/durable/1998/02/10/feat/arts.1.html> (Feb. 10, 1998).

> International Association of Dealers in Ancient Art, "The feeling was that these were stupid laws, they were laws in other countries, they didn't apply to us. Today, that feeling has completely changed.[105]

Another oft-noted potential benefit resulting from an increased price for legally obtained antiquities (and the increased competition to acquire them) is that museums will be able to benefit through the sale of duplicate items within their collections.[106] These funds can go to further the educational goals of the institution. A similar incentive could work to allow poorer source countries to benefit from the sale of antiquities excavated and properly documented under their cultural patrimony laws.[107] While beyond the scope of this writing, a number of potentially workable proposals have been made to develop a legal, managed market in antiquities for the benefit of museums and source countries.[108]

Conclusion

The *Schultz* decision undeniably provides for prosecution as a powerful regulating device over the formerly free-wheeling international trade in antiquities. The prison sentence given to this prominent member of the trade will cause other dealers to have second thoughts about the source of their wares. The proof of the effectiveness of implementing the NSPA in the antiquities trade should be judged by the effects on the market for antiquities and whether benefits accrue for education and preservation within the source countries for artifacts and in the world-at-large.

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105. Meier and Gottlieb, *supra* note 8.

106. Emmerich, *supra* note 101.

107. *Id.*

108. See William G. Pearlstein, *Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market*, 28 LAW & POL'Y INT'L BUS. 123 (1996). See also, Dalia N. Osman, Note, *Occupiers' Title to Cultural Property: Nineteenth-Century Removal of Egyptian Artifacts*, 37 COLUM. J. TRANSNAT'L L. 969 (1999).