

The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities

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*"When I saw the vase . . . I knew I had found what I had been searching for all my life."*¹

*"I thought I knew where it must have come from. An intact red-figured Greek vase of the early sixth century B.C. could only have been found in Etruscan territory in Italy, by illegal excavators."*²

*"We would consciously avoid knowledge of the history of the vase."*³

*"I was already thinking how to get the money to get this treasure. At the split second I first looked at it, I had vowed to myself to get it. . . . This was the single most perfect work of art I had ever encountered."*⁴

Former Metropolitan Museum of Art Director Tom Hoving speaking about the now-infamous *Euphronios krater* since restituted to Italy after the below described scandals that rocked the art and antiquities world.

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In 2008 we witnessed the dramatic culmination of various scandals in the museum and cultural heritage community. To name just a few of the high-profile events: (1) restitutions of spectacular Etruscan and Greek objects from some of the United States' most prestigious muse-

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1. Reported in JOHN L. HESS, *THE GRAND ACQUISITORS* 143 (1974).
2. THOMAS HOVING, *MAKING THE MUMMIES DANCE* 309 (1993).
3. *Id.* at 310.
4. *Id.* at 312.

ums and elite collectors to Italy;⁵ (2) FBI raids on four California museums whose employees allegedly engaged in antiquities trafficking and the exchange of inflated appraisals for donations to perpetuate tax fraud;⁶ and (3) the death of renowned archeologist and Director of the Southeast Asian Ceramics Museum in Bangkok, Roxanna Brown, while she was in FBI custody.⁷ These scandals did not arise in a vacuum. The law and ethics of the cultural property market is changing—dramatically. This Article will analyze the law and ethics revolution pertaining to museums' acquisitions of antiquities along with the revolution's impact on the market and knowledge of our collective history.

Those interested in the law and ethics pertaining to the acquisition of antiquities will appreciate the value of some history to understand the current environment and thus, Part I lays out some basic history of the modern era of acquisition law and ethics. Part II highlights the most high-profile scandal to shake the museum and cultural property community—restitutions of exquisite Etruscan⁸ and Greek objects from some of the United States' most prestigious museums and collectors. Part III analyzes ethics guidelines adopted by the Association of Art Museum Directors ("AAMD") and American Association of Museums ("AAM"). Part IV concludes that we are in a new era in terms of both law and ethics pertaining to the acquisition of antiquities, which may have a profound impact on the education of the American museum-going public concerning ancient cultures.

5. See discussion *infra* Part II.

6. See Edward Wyatt, *Four Museums are Raided in Looted Antiquities Case*, N.Y. TIMES, Jan. 25, 2008, at A14. See also Jason Felch & Doug Smith, *You Say that Art is Worth how Much?*, L.A. TIMES, Mar. 2, 2008, at A1; Jeff McDonald & Jeanette Steele, *Balancing Art, Ethics*, SAN DIEGO UNION-TRIB., Feb. 17, 2008, at B1; Matthew L. Wald, *Tax Scheme Is Blamed for Damage to Artifacts*, N.Y. TIMES, Feb. 4, 2008, at E1; Laura Bleiberg, *More Questions About Bowers*, ORANGE COUNTY REG., Jan. 31, 2008, at B1; Jason Felch & Mike Boehm, *Federal Probe of Stolen Art Goes National*, L.A. TIMES, Jan. 29, 2008, at B1; Edward Wyatt, *Museum Workers Are Called Complicit*, N.Y. TIMES, Jan. 26, 2008, at B7; Associated Press, *Raids by Federal Agents Newest Black Eye to American Museums*, KOMONews, Jan. 25, 2008.

7. See Jason Felch, *A Life in Shards: A Passion for Art, a Perilous Pursuit*, L.A. TIMES, Sept. 11, 2008, at A1. (providing details about the antiquities smuggling scandal that led to the indictment and arrest after five-year investigation); Lawrence Van Gelder, *Museum Director Is Found Dead*, N.Y. TIMES, May 16, 2008, at E4 (discussing death in custody). See also Robert Faturechi, *Lawsuit Filed in Death of Roxana Brown, Held at Detention Center*, SEATTLE TIMES, July 15, 2008, at B2; John Berthelsen, *A Museum Director's Death in an American Jail*, ASIA SENTINEL, June 8, 2008, http://www.asiasentinel.com/index.php?option=com_content&task=view&id=1244&Itemid=367; Mike Boehm, *Museum Didn't Need This Publicity*, L.A. TIMES, Jan. 26, 2008, at A1. See generally Randy Dottinga, *Art Museums Struggle with Provenance Issues*, CHRISTIAN SCI. MONITOR, Apr. 2, 2008, at 13.

8. Etruscan objects derive from Etruria, an "ancient country of west-central Italy in present-day Tuscany and parts of Umbria." AM. HERITAGE DICTIONARY, 612-13 (4th ed. 2000).

I. THE DAWN AND DEBATE OF THE MODERN ERA OF ACQUISITION ETHICS

In 1969, Archeologist Clemency Coggins laid bare the unauthorized destruction of pre-Columbian archeological sites causing the irreversible loss of historical and archeological data in order to obtain objects to sell on the international market.⁹ Coggins's famous article begins:

In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market. Not since the sixteenth century has Latin America been so ruthlessly plundered.¹⁰

Well-known archeologist and cultural property law expert Patty Gerstenblith succinctly explained the damage to sites resulting from looting when she stated, "Only carefully preserved, original contexts can furnish the data upon which the reconstruction of our past depends. Once this context is lost, the inherent value, that is the historic, cultural and scientific information that informs us about the object, is irreparably injured."¹¹

9. Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94 (1969).

10. *Id.* at 94. See also, e.g., Jamison K. Shedwill, Comment, *Is the "Lost Civilization" of the Maya Lost Forever?: The U.S. and Illicit Trade in Pre-Columbian Artifacts*, 23 CAL. W. INT'L L.J. 227, 229 (1992) (discussing legal framework applicable to pre-Columbian artifacts found throughout Central and South America).

11. Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 198-99 (2001). See also Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377 (1995)

Once a site has been worked over by looters in order to remove a few salable objects, the fragile fabric of its history is largely destroyed. Changes in soil color, the traces of ancient floors and fires, the imprint of vanished textiles and foodstuffs, the relation between one object and another, and the position of a skeleton—all of these sources of fugitive information are ignored and obliterated by archeological looters.

Moreover, antiquities traffickers often deliberately deface artifacts to render them less recognizable and easier to smuggle. Treasure hunters have been known to destroy human remains, break up artifacts, behead statues, melt down ancient coins, and chisel reliefs from tombs.

The historical damage extends beyond the defacement of physical evidence to the corruption of the archaeological record. The finders of artifacts often conceal the sites, either to protect a needed source of income or to shield their illegal activities from law enforcement agents. Fear of inviting looters has even intimidated some legitimate archeologists from publishing their findings. More disturbingly, professional smugglers routinely forge export papers and falsify the provenance, or origin, of the artifacts they sell. As one commentator noted, such falsifications amount to a "quite horrifying distortion of history.

Id. at 382-83 (internal footnotes and citations omitted). Accord Lyndel V. Prott, *National and International Laws on the Protection of the Cultural Heritage*, in ANTIQUITIES TRADE OR BETRAYED: LEGAL, ETHICAL & CONSERVATION ISSUES 57 (Kathryn W. Tubb, ed. 1995):

The damage is particularly acute when integrated architectural sculptures and reliefs are hacked away from monuments to be sold as moveable chattels.¹² To smuggle artifacts out of source nations,¹³ smugglers often “cut [artifacts] into pieces or deliberately deface[]” them to conceal their value from customs officers.¹⁴ Collectors have purchased an astronomical number of antiquities over the years for billions of dollars,¹⁵ often without knowing an object’s provenience—history tracing its path from find-spot to present.¹⁶ Their motivations are varied, often including a desire to act as a steward of history.¹⁷ Perhaps more often, however, collectors are mesmerized by the object’s beauty and mystique, as exemplified by the quotations of former Director of the Met, Tom Hoving, which opened this Article.¹⁸ Profit potential also is a com-

[Illicit excavation] destroys the scientific value of the site by damaging the site’s stratigraphy, and of the object, by wrenching it out of its context. Information for comparative dating, style assessment or relation to other objects in the site is thus lost. The site is destroyed by inexpert excavation . . . Part of the cultural record is also lost to expert reassessment by the disappearance of these objects into private collections which are not accessible to the public or to researchers and by the find itself being not professionally recorded, curated and published.

See generally ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE (Neil Brodie et al. eds., 2006).

12. See Coggins, *Illicit Traffic*, *supra* note 9, at 96.

13. See generally John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 832 (1986) (coining phrases “source nation[]” and “market nation[]” in the antiquities context).

14. See Jane Warring, Comment, *Underground Debates: The Fundamental Differences of Opinion That Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT’L L. REV. 227, 242 (2005).

15. E.g., Clemency Coggins, *Cultural Property and Ownership: Antiquities*, 16 CONN. J. INT’L L. 183, 186 (2001) (discussing wealth spent to collect antiquities); see also, e.g., Alia Szopa, Comment, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIAMI BUS. L. REV. 55, 75–76 (2004); Borodkin, *supra* note 11, at 377–78. (discussing multi-billion dollar illicit art market).

16. See Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 178 n.38 (2007) (defining provenience).

17. E.g., Warring, *supra* note 14, at 237.

18. HOVING, *supra* note 2, at 309. See also Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 316–21 (1999) (discussing the “intrinsic value” of antiquities); James Cuno, *Museums and the Acquisition of Antiquities*, 19 CARDOZO ARTS & ENT. L.J. 83, 88 (2001) (discussing acquisition of collection of Greek vase fragments: “On seeing them, my first thought was how beautiful they were and how important they could be for teaching.”).

Oscar White Muscarella is a Near East expert who was fired (three times) from the Metropolitan Museum of Art after publicly opposing the purchase of the *Euphronios krater* discussed below, of which then-Director Tom Hoving approved. Muscarella’s saga and multiple reinstatements at the Met are reported in many sources, including PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY’S TOMB RAIDERS TO THE WORLD’S GREATEST MUSEUM* (2006). In a December 2005 interview with Suzan Mazur (SM), an independent journalist who published scathing reports about the *Euphronios* affair discussed in Section II below, Muscarella (OWM) described collectors’ motives in collecting antiquities as follows:

mon motivator within the antiquities market.¹⁹ Finally, as Coggins put it in 2001: "Without an historical context, owning such objects simply becomes part of an expensive hobby."²⁰

Museums in the United States acquire objects through purchase or donation and accept objects on short or long-term loan.²¹ Coggins "traced a substantial portion of this stolen and mutilated art from the jungles of Central America into some of America's most respectable museums."²² Coggins's work led to demands by source nations for the return of some of the most treasured items in museum collections along with the adoption of the Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act.²³ According to Professor of Archeology, Ricardo J. Elia: "People think that there is an illicit market and a legitimate market . . . [i]n fact, it is the same."²⁴ Ever since Profes-

OWM: With all the euphemisms of [those involved in the trade], it's rape. All these people are justifying their destruction, their power to have these objects in their apartment. Bring their guests in and say "Golly gee look what I have!" [sic] Power and perversion of the wealthy. These are the people who are encouraging it. Who are authorizing it. Who are the recipients of it. Plunder does not exist without the existence of these people. . . .

SM: And is it intentional? Do they want to erase the history?

OWM: They don't care. I've talked to the dealers and collectors. One dealer stated he "wanted it [a plundered object] madly."

Suzan Mazur, *Antiquities Whistleblower Oscar White Muscarella: The Whistleblower & the Politics of the Met's Euphronios Purchase: A Talk with Oscar White Muscarella*, SCOOP INDEPENDENT NEWS, Dec. 25, 2005, <http://www.scoop.co.nz/stories/print.html?path=HL0512/S00252.htm>. For more information about Hoving and the *Euphronios krater*, see Hess, *supra* note 1.

19. E.g., Borodkin, *supra* note 11, at 377-78. Independent journalist Suzan Mazur offered this anecdote about the profit motive in regard to a kylix, a prize amphora that was awarded at the Panathenaic Games in Athens, which she viewed and discussed with a Sotheby's antiquities expert: "The piece went at auction to New York dealer Ed Merrin for \$190,000. Merrin once told me for an Economist magazine story that he does it all 'for love.' Corporate raider Asher Edelman (inspiration for Michael Douglas' character Gordon Gekko in the film Wall Street) had \$10 million invested in Merrin Gallery . . ." Suzan Mazur, *Mazur: Sotheby's Pre-Auction Euphronios Transcript*, SCOOP INDEPENDENT NEWS, Jan. 11, 2006, <http://www.scoop.co.nz/stories/HL0601/S00076.htm>.

20. Coggins, *Cultural Property*, *supra* note 15, at 186.

21. See generally Cuno, *Museums and the Acquisition*, *supra* note 18, at 83. See also James Cuno, *U.S. Art Museums and Cultural Property*, 16 CONN. J. INT'L L. 189, 189 (2001); Linda F. Pinkerton, *Museums Can Do Better: Acquisitions Policies Concerning Stolen and Illegally Exported Art*, 5 VILL. SPORTS & ENT. L.J. 59, 62 (1998); John W. O'Hagan, *Art Museums: Collections, Deaccessioning and Donations*, 22 J. CULTURAL ECON. 197, 198 (1998).

22. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 279, 306 (1982) (seminal article in cultural property law field describing "art as a good ambassador").

23. 19 U.S.C. §§ 2091-95 (1982); see also Leo J. Harris, *From the Collector's Perspective: The Legality of Importing Pre-Columbian Art and Artifacts*, in THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 155, 155-68 (Phyllis Mauch Messenger, ed., 1989) (discussing all laws implicated by export and import of pre-Columbian art and artifacts).

24. Barry Meier & Martin Gottlieb, *An Illicit Journey Out of Egypt, Only a Few Questions*

sor Elia's comment, there has been a raw, polarizing philosophical and ethical debate raging between the archeologists' "camp,"²⁵ and the collector/dealer/museum "camp,"²⁶ as to the extent of the antiquity market's trickle down impact upon archeological sites worldwide.²⁷ Despite the relatively small number of purchase acquisitions made directly by museums, they still receive many financial and in-kind donations from collectors who do acquire items on the market and, therefore, should act as leaders to exemplify best practices to combat the illicit trade in cultural property.²⁸ Museums have responded by adopting increasingly

Asked, N.Y. TIMES, Feb. 23, 2004, at A1 (quoting Associate Professor of Archeology at Boston University).

25. Oscar White Muscarella (OWM) is one of the most vocal and critical of museum acquisition practices, as exemplified in the below exchange during his December 2005 interview with Suzan Mazur (SM):

SM: You contend that what percentage of the artifacts in the museum are looted?
 OWM: In my department [Ancient Near East] it's mixed and there's been a pull-back on buying antiquities. If you go to the Greek and Roman room—I call it "The Temple of Plunder"—the great majority are plundered over the years. There's even one object stolen from another museum. They [the museum administrators] know it's stolen from a museum. They refuse to return it. It's a griffen head.

In the Department of Arts of Africa, etc., every pre-Columbian object—every one—is plundered and the tomb sites totally destroyed. . . .

But other departments that play a major role in plunder are the Asian Art department:

Hundreds and hundreds from temples and tombs all over Cambodia, Thailand, China, just to decorate vitrines in the Metropolitan Museum of Art.

Mazur, *Antiquities Whistleblower*, *supra* note 18, at 10.

26. Perhaps the two most vocal advocates of the cultural internationalism position are Professor John H. Merryman of Stanford Law School and James Cuno of the Art Institute of Chicago. Their scholarship is discussed extensively herein.

27. *E.g.*, John H. Merryman, *Legal Issues in Museum Administration*, SL077 ALI-ABA, at *3, *10-*11 (2006) (Am. Law. Inst.) (stating that there has been a "revolution in acquisition ethics" initiated by "the extremely effective archaeologists' Crusade against the international trade in antiquities"); *accord*, Paul M. Bator, *The International Trade in Art*, 254 PLIPAT 659, 664 (1988) (available in Westlaw):

[I]t is my impression that over the past 20 years there has been an important change in consciousness. Art-importing societies such as the United States have become increasingly aware that the preservation and conservation of humanity's artistic and archaeological heritage constitutes a general human obligation, to be shared by all the world's societies and not arbitrarily restricted to those countries that happen to be rich in archaeological materials.

See also Colin Renfrew, *A Scandal That Rocked the Art World*, EVENING STANDARD (LONDON, UK), June 26, 2006, at 34, *available at* 2006 WLNR 11071727 (Lord Renfrew is an esteemed archeologist who on January 9, 2009, was presented with an award from the SAFE (Saving Antiquities for Everyone) archeological preservation organization); Phyllis Halterman, *SAFE Beacon Award Lecture & Reception honoring Professor Colin Renfrew*, SAFE, (Jan. 10, 2009), <http://www.savingantiquities.org/event.php?eventID=156>.

28. *E.g.*, Pinkerton, *Museums Can Do Better*, *supra* note 21, at 59; *see also* Colin Renfrew, *Museum Acquisitions: Responsibilities for the Illicit Traffic in Antiquities*, in *ARCHEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE* 245 (Neil Brodie et al. eds., 2006):

stringent acquisitions guidelines, the most stringent of which were adopted in late 2008.²⁹ As demonstrated below, acquisitions practices and philosophy have changed dramatically since the year 1970.³⁰

Coggins's work was also an impetus for the drafting of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 ("UNESCO Convention").³¹ The purpose of the UNESCO Convention is to curb widespread pillaging of archeological sites.³² Initially the UNESCO Convention did little to directly change the legal landscape in the United States with the exception of a few categories of objects to which the United States agreed to prohibit importation pursuant to various statutes and bilateral agreements.³³ The Convention adopted what has been referred to critically as the "blank check" approach, which requires art importing signatories to block importation of any object exported in violation of any source nation's export regulations.³⁴ As explained by Professor John H. Merryman of Stanford Law School, a renowned scholar in the cultural property field:

The disaster that befell the Iraqi National Museum immediately after the coalition occupation of Baghdad in 2003 reminds us again of the widespread practice of looting, both adventitious and organized, both of existing museum collections and of still unexcavated areas of archeological sites. The looters are financed, whether before or more often after the event, by collectors. But I argue that the climate of opinion is to a large extent set by museum curators. For it is the content of public exhibitions that establishes the conventions in this matter, and it is the acquisitions of museums, as often by gift or bequest as by purchase, that sets the tone. I argue, moreover, that what is shown in a major museum on temporary loan is as relevant as the permanent acquisition. Very few museums exercise the same degree of due diligence in this area as they do for permanent acquisitions. And some museums consider it one of the criteria for acquisition that an unprovenanced piece has already been publicly exhibited and published in a major museum exhibition. I argue that "reputation laundering by public exhibition" is the up-market version of money laundering in the traffic of drugs.

Id. at 245.

29. See discussion *infra* Part III.C.

30. See Prott, *supra* note 11, at 59–61; Patrick J. Boylan, *Illicit Trafficking in Antiquities and Museum Ethics*, in ANTIQUITIES TRADE OR BETRAYED, *supra* note 11, at 94–104; James Ede, *The Antiquities Trade: Towards a More Balanced View*, in ANTIQUITIES TRADE OR BETRAYED, *supra* note 11, at 211–14; Jerome M. Eisenberg, *Ethics and the Antiquity Trade*, in ANTIQUITIES TRADE OR BETRAYED, *supra* note 11, at 216–21.

31. See generally UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *opened for signature* Nov. 14, 1970, 823 U.N.T.S. 231.

32. *Id.* at introduction; Merryman, *Two Ways*, *supra* note 13, at 843.

33. Edward M. Cottrell, Comment, *Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property*, 9 CHI. J. INT'L. L. 627, 643 (2009).

34. Merryman, *Two Ways*, *supra* note 13, at 844; see Janene Marie Podesta, *Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Undermines its Goals by Unduly Targeting Market Nations*, 16 CARDOZO J. INT'L & COMP. L. 457, 461–65 (2008).

Article 3 [of UNESCO] defines as "illicit" any trade in cultural property that "is effected contrary to the provisions adopted under this Convention by the States Parties thereto." Thus, if Guatemala were to adopt legislation and administrative practices that, in effect, prohibited the export of all pre-Columbian artifacts, as it has done, then the export of any pre-Columbian object from Guatemala would be "illicit" under UNESCO 1970. Several source nations that are parties to UNESCO 1970 have such laws. This feature of UNESCO 1970 has been called a "blank check" by interests in market nations; the nation of origin is given the power to define "illicit" as it pleases. Dealers, collectors and museums in market nations have no opportunity to participate in that decision. That is why legislation implementing United States adherence to UNESCO 1970 took 10 years to enact. Dealer, collector and museum interests sought, with some success, to limit the effect on the trade in cultural property that would follow if the United States automatically acquiesced in the retentive policies of some source nations.³⁵

In another essay lamenting the wide divide between archeologists, specialists,³⁶ and source nations, versus collectors and art dealers, Clemency Coggins responded to another of Professor Merryman's essays in a way that encapsulates the breadth of the current divide:

In outlining the archaeological point of view Professor John Merryman suggests, disbelievingly, in his essay that archeologists would eliminate all commercial demand for such objects, if possible, that archaeology is at war with the market, and that some archaeologists

35. Merryman, *Two Ways*, *supra* note 13, at 844-45 (internal footnotes with citations omitted). The United States ratified UNESCO in 1983 although the U.S. Congress via the Cultural Property Implementation Act has implemented only Paragraphs 7(b) and 9. See generally Leonard D. Duboff et al., *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 SYRACUSE J. INT'L L. & COM. 97, 114 (1976) (stating that the United States was "not prepared to give the rest of the world a blank check in that [the United States] would not automatically enforce, through import controls, whatever export controls were established by the other country" except as narrowly limited by Article 9 which calls for controls during a time of crisis). See generally Ann Guthrie Hingston, *U.S. Implementation of the UNESCO Cultural Property Convention*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY*, *supra* note 23, at 129, 129-46 (providing a general discussion of the Cultural Property Implementation Act); Maria Papageorge Kouroupas, *United States Efforts to Protect Cultural Property: Implementation of the 1970 UNESCO Convention*, in *ANTIQUITIES TRADE OR BETRAYED*, *supra* note 11, at 83-89. For an opinion that the Cultural Property Implementation Act, adopted by Congress in 1983 to implement UNESCO, did not comport with promises made to the museum and dealer community in exchange for their support, see Douglas C. Ewing, *What Is "Stolen"? The McClain Case Revisited*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY*, *supra* note 23, at 177, 177-83.

36. Specialists are defined in this context as including "archeologists, art historians, curators, conservators—all those professionally dedicated to the preservation of ancient art." Clemency Chase Coggins, *A Licit International Traffic in Ancient Art: Let There Be Light!*, 4 INT'L J. CULT. PROP. 61, 76 n.2 (1995).

are delighted when fakes appear on the market. But this is all absolutely true. Furthermore, archaeologists do, indeed, assume that an ancient object was illicitly acquired unless there is convincing proof to the contrary. Guilty until proven innocent.³⁷

Litigation has also shaped the debate. The *Hollinshead*,³⁸ *McClain*,³⁹ and *Schultz*⁴⁰ cases have established that one may be prosecuted under the National Stolen Property Act for removing an object from a source nation in violation of a clear national ownership law.⁴¹ This has become known as the “*McClain* doctrine.”⁴² The widespread adoption of the Convention⁴³ and the entrenchment of the *McClain* doctrine have strengthened the position of archeologists in the ongoing debate about the antiquities market and museum acquisition practices, but the debate continues on many fronts as looted antiquities continue to flow throughout the world.⁴⁴ The most common framework for the debate has been that of “cultural nationalism” versus “cultural internationalism,” as was first articulated by Professor Merryman.⁴⁵

Of course, all actors in the antiquities trade are bound to follow applicable law. However, the debate continues as to whether one in the United States should acquire an object without detailed documentation showing it was exported from a source nation in compliance with that nation’s export laws when no U.S. law has been broken.⁴⁶ In other words, should objects be “guilty until proven innocent,” as stated by Professor Coggins.⁴⁷ Regardless of the philosophical debate, if the source nation lacks a clear national ownership law applying to objects excavated after its enactment, then the risk of criminal prosecution and civil liability in the United States is minimal under the *McClain* doc-

37. *Id.* at 62. (internal footnotes omitted). Professor Coggins was responding to John H. Merryman, *A Licit International Trade in Cultural Objects*, in *WHO OWNS THE PAST: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 269, 269–289 (Kate Fitz Gibbon, ed. 2005).

38. *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974).

39. *United States v. McClain*, 545 F.2d 988, 992 (5th Cir. 1977), conviction on retrial upheld by 593 F.2d 658 (1979).

40. *United States v. Schultz*, 333 F.3d 393, 398 (2d Cir. 2003).

41. See *Hollinshead*, 495 F.2d at 1155; *McClain*, 545 F.2d at 992; *Schultz*, 333 F.3d at 410.

42. E.g., Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 *VAND. J. TRANSNAT’L. L.* 1199, 1246 n.335, n.339 (2005).

43. Podesta, *supra* note 34, at 475 (noting that 110 nations have adopted the Convention).

44. E.g., David Sassoon, *Considering the Perspective of the Victim: The Antiquities of Nepal*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY*, *supra* note 23, at 61, 62 (“We saw the passage of the Cultural Property Act of 1983 which has done close to nothing to stem the tide of illicit trade.”). See note 35, *supra*, and accompanying text.

45. John Henry Merryman, *Thinking About the Elgin Marbles*, 83 *MICH. L. REV.* 1881, 1911–21 (1985).

46. See, e.g., Ewing, *supra* note 35, at 181.

47. Coggins, *A Licit International Traffic*, *supra* note 36, at 62.

trine.⁴⁸ Basically, the ability to win a civil or criminal law suit concerning an allegedly looted antiquity with possible find-spots in multiple nations (some with in-the-ground statutes and others without), turns primarily on which party bears the burden of proof.⁴⁹

Assuming compliance with both U.S. customs regulations and the source nation's clear ownership law, the next step in the inquiry, under the *McClain* doctrine, is to evaluate civil litigation risk in the United States as an evidentiary matter concerning whether the claimant can show (1) that the object was removed from a find-spot within the modern source nation⁵⁰ (2) after enactment of the ownership law.⁵¹ A criminal prosecution would also require a showing (3) that the acquirer possessed the requisite level of intent to deprive the owner of the benefit of ownership⁵²—and (4) a prosecutor willing to bring the case.⁵³ A case might be brought by the U.S. government in the form of a civil forfeiture action,⁵⁴ which would shift the burden of establishing right of possession onto the purchaser claiming title.⁵⁵

A number of prominent U.S. museums have been caught in the center of it all, often without clear documentation demonstrating proper title.⁵⁶ Perhaps the most important impetus for the dramatic change in law and ethics pertaining to the antiquities market is the recent revelation as to the extent of criminal activity providing a steady stream of illicit objects to the high-end antiquities market.⁵⁷ Although some still

48. Kreder, *The Choice*, *supra* note 42, at 1211.

49. Cf. Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 69 (2009).

50. *McClain*, 545 F.2d at 1003.

51. *Id.* at 1001.

52. *Id.* at 995, 1002.

53. E.g., Kreder, *The Choice*, *supra* note 42, at 1220–22.

54. *Id.* at 1222–45.

55. *Id.* at 1223.

56. E.g., JAMES CUNO, WHO OWNS ANTIQUITY? 1–20 (2008).

57. Chauncey D. Steele IV, Note, *The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts*, 23 SUFFOLK TRANSNAT'L L. REV. 667, 667–68 (2000). See also *US to Return 1,000 Smuggled Iraqi Artefacts*, AGENCE FRANCE PRESSE, Sept. 22, 2008, available at 9/22/08 AGFRP 10:21:00; Jennifer Modenessi, *Given Up as Lost, Afghan Treasures Make a Triumphant Return in New Exhibit*, ALAMEDA TIMES-STAR, Oct. 26, 2008, available at 2008 WLNR 20306086 (stating that many illicit objects find their way onto the market as a result of armed conflict, such as in Iraq and Afghanistan); Patrick Radden Keefe, *The Idol Thief: Inside One of the Biggest Antiquities-Smuggling Rings in History*, THE NEW YORKER, May 7, 2007, at 58, 60 (explaining that in 2003, police arrested Vaman Ghiya who ran an antiquities smuggling ring under the noses of Indian law enforcement for thirty years); Jori Frinkel, *Thai Antiquities, Resting Uneasily*, N.Y. TIMES, Feb. 17, 2008, at 29; Edward Wyatt, *An Investigation Focuses on Antiquities Dealer*, N.Y. TIMES, Jan 31, 2008, at A20 (explaining that four California museums were raided as part of a federal investigation into the smuggling of antiquities from Thailand. The investigation revealed a tax fraud scheme in which antiquities dealers donated Thai antiques to museums at inflated

cling to the due process notion of “innocent until proven guilty,” the recent scandals, in addition to the work of Professor Coggins and others dating back to 1969, seem to demonstrate that most antiquities being offered on the market for the first time were recently looted.⁵⁸ In particular, developments originating in Italy have shown that the market in Etruscan artifacts has been infected with illicit excavation and organized international crime for quite some time.⁵⁹ Illicit objects were laundered for years by sophisticated dealers into the international market eventually making their way into respected collections and esteemed museums in the United States.⁶⁰ Due to this activity we have seen the prosecution of previously esteemed collectors, a museum curator, and *tombaroli*, which is an Italian word meaning “tomb robber[s].”⁶¹

II. ITALIAN CRIMINAL INVESTIGATIONS AND PROSECUTIONS

Popular press has attributed Italy’s recent success reclaiming its cultural patrimony to the book *The Medici Conspiracy* by Peter Watson and Cecilia Todeschini.⁶² Although the book is interesting, Italy’s recent successes are better attributed to events dating back to 1902 when the first “in-the-ground” statute passed, thereby vesting ownership of unearthed ancient artifacts in the state.⁶³ Italy ratified the UNESCO

values); Tania Branigan, *Chinese Fury at Sale of Plundered Treasures*, THE GUARDIAN, Nov. 3, 2008, <http://www.guardian.co.uk/world/2008/nov/03/china-fashion-yves-saint-laurent> (stating that the auction of the art collection of fashion designer Yves Saint Laurent included two bronze sculptures originally from an imperial summer palace destroyed by the British in 1860. China alleges that the objects are war plunder, while the auction house “Christie’s says there is . . . clear legal title for each” sculpture); Marjorie Olster, *Egypt Faces Obstacles in Recovering Antiquities*, ASSOCIATED PRESS, Nov. 23, 2008, available at 11/23/08 AP DataStream 16:44:16 (reporting that the Egyptian Government and the St. Louis Art Museum dispute the ownership of an ancient mummy mask discovered in Egypt in 1952 that resurfaced in 1998 and was purchased by the St. Louis Art Museum); Simon Bahceli, *Nine Arrested Over 2,000 Year-Old Syrian Bible*, CYPRUS MAIL, Feb. 4, 2009, available at 2009 WLNR 2119747; *More Antiquities Arrests in the North*, CYPRUS MAIL, Feb. 8, 2009, available at 2009 WLNR 2466721 (both explaining that a raid on an antiquities dealer’s apartment revealed smuggled church relics believed to be of Cypriot origin).

58. Coggins, *Illicit Traffic*, *supra* note 9, at 94.

59. See discussion *infra* Part II.

60. *Id.* This is not to imply by any means that this was the first scandal involving museum antiquities purchases. Many other scandals, such as that involving the Lydian Hoard, predated this one, but, as discussed below, this one has triggered restitution of more objects than any other. For a discussion of the Lydian Hoard case by those who litigated it, see Lawrence M. Kaye & Carla T. Main, *The Saga of the Lydian Hoard: From Uşak to New York and Back Again*, in ANTIQUITIES TRADE OR BETRAYED, *supra* note 11, at 150–60.

61. Steele, *supra* note 57, at 667.

62. WATSON & TODESCHINI, *supra* note 18.

63. Michael Kimmelman, *Stolen Objects? Shady Dealers? Time for a Change*, NEWS & OBSERVER, Mar. 27, 2006, www.newsobserver.com/105/v-print/story/379302.html (last visited Mar. 1, 2009).

Convention in 1979⁶⁴ and later signed a Memorandum of Understanding (MOU) with the United States in 2001.⁶⁵ Pursuant to the MOU, which was renewed in 2006, the United States agreed to protect pre-Classical, Classical, and Imperial Roman architectural material,⁶⁶ thus committing U.S. customs and enforcement agents to the goal of recovering artifacts.⁶⁷ Just this year that MOU has led to over 1,000 artifacts being returned to Italy.⁶⁸ However, Italy has been proactive in its recovery efforts, declining to wait for the United States to do the "heavy lifting."

In the mid-1990s, Italy began to press U.S. museums to return objects Italy believed had been illegally exported.⁶⁹ It has long been known that artifacts illegally excavated in Italy are often transported through Switzerland before reaching the international market.⁷⁰ Accordingly, Italian police sought assistance from Swiss police in 1995 to conduct raids on the Geneva warehouses of Italian art dealer Giacomo Medici.⁷¹ As relayed in *The Medici Conspiracy*, the raid uncovered a

64. WATSON & TODESCHINI, *supra* note 18, at 29; UNESCO, *supra* note 31.

65. Agreement Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy, U.S.-Italy, Jan. 19, 2001, <http://exchanges.state.gov/heritage/culprop/itfact/pdfs/it2001mou.odf> (2001). For some hindsight into this agreement see Looting Matters: CPAC, *Italy and Hindsight*, <http://lootingmatters.blogspot.com/2009/01/cpac-italy-and-hindsight.html> (Jan. 9, 2009, 15:47 EST).

66. Extension and Amendment to the Agreement Between the Government of the United States of America and The Government of The Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, U.S.-Italy, Jan. 13-19, 2006, available at <http://exchanges.state.gov/heritage/culprop/itfact/pdfs/it2006mouext.pdf> [hereinafter Extension of U.S.-Italy Agreement]. See also Hugh Eakin, *Italy Goes on the Offensive with Antiquities*, N.Y. TIMES, Dec. 26, 2005, at E5.

67. Cf. Charles S. Koczka, *The Need for Enforcing Regulations on the International Art Trade*, in THE ETHICS OF COLLECTING CULTURAL PROPERTY *supra* note 23, at 185, 195 (discussing March 5, 1986, letter to the editor of the New York Times from Douglas Ewing, President of the American Association of Dealers in Ancient, Oriental, and Primitive Art, entitled "Customs Service Is Overzealous on Art Seizures"). Koczka's perspective was that "[w]hen law enforcers are criticized for being overzealous in their work, they must be doing something right to receive such a backhanded compliment."). *Id.* Vernon Silver, *Met's Antiquities Case Shows Donor, Trustee Ties to Looted Art*, BLOOMBERG.COM, Feb. 23 2006, <http://www.bloomberg.com/apps/news?pid=10000088&sid=ASqTpqVQLIP8&refer=culture>; Eakin, *supra* note 66.

68. See Daniel Flynn, *FBI help return over 1,000 artifacts to Italy*, REUTERS INDIA, Sept. 24, 2009, <http://in.reuters.com/article/lifestyleMolt/idINTRE58N2DD20090924>. See also David Perlmutter, *ICE Finds Stolen Italian Bust in Charlotte*, THE CHARLOTTE OBSERVER, Mar. 19, 2009, <http://www.charlotteobserver.com/breaking/story/608204.html>.

69. Steve Scherer & Adam L. Freeman, *Italy Cracks Down on Stolen Art, Doubling Recoveries*, BLOOMBERG.COM, Jan. 13, 2009, <http://www.bloomberg.com/apps/news?pid=20601088&sid=atqxYAbRWf58&refer=muse>.

70. E.g., Michele Kunitz, Comment, *Switzerland & the International Trade in Art & Antiquities*, 21 Nw. J. INT'L L. & BUS. 519, 520 (2001) ("After theft from their source countries, stolen artifacts are cleaned and laundered through various countries, most notably Switzerland.").

71. WATSON & TODESCHINI, *supra* note 18, at 20. See also PETER WATSON, *SOTHEBY'S: THE*

vast treasure trove of smuggled antiquities—many fresh from the ground and others in various stages of preparation for market.⁷² A parallel investigation in Italy uncovered a paper referred to as “the organigram,” which hints at a vast smuggling ring implicating key players in the international antiquities market.⁷³ The Italian government viewed the organigram in conjunction with other evidence, particularly photographs found at the Medici warehouses,⁷⁴ and brought criminal charges against key and lesser players including prominent art dealer Robert Hecht and former Getty Museum curator Marion True. A raid of Hecht’s residence uncovered his personal journal seeming to detail his activities (although he claims it is a draft novel), which has been pivotal in his prosecution.⁷⁵

Hecht was (in)famous for having sold the *Euphronios krater* to the Met for a controversial \$1 million in 1972, the first million-dollar sale of an antiquity.⁷⁶ Additionally, as articulated in Hoving’s book, *Making the Mummies Dance*,⁷⁷ and numerous other sources including *The Medici Conspiracy*,⁷⁸ there was much speculation at the time of the sale that the krater was overpriced. The sale was a landmark in rendering art theft more profitable than ever.⁷⁹

True, who had tightened the Getty’s questionable acquisition poli-

INSIDE STORY (Random House 1997) (providing additional background for the culmination of the raids on Medici’s warehouses).

72. WATSON & TODESCHINI, *supra* note 18, at 21; *Stolen Italian Artifact Smuggled into the United States Found at Auction House*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, June 1, 2009, <http://www.ice.gov/pi/nr/0906/090601newyork.htm>.

73. WATSON & TODESCHINI, *supra* note 18, at 16–18. Unfortunately for Italian investigators, the author of the organigram was dead by the time it was found, and the organigram alone does not indicate if the key players knew they were trading in looted antiquities. *Id.*

74. *Id.* at 13. See also Elisabetta Povoledo, *U.S. Antiquities Dealer at Center of Inquiry Italy Contends it Lost Art to Looting*, INT’L HERALD TRIB., June 21, 2006, at 2, available at 2006 WLNR 10688988.

75. WATSON & TODESCHINI, *supra* note 18, at 16–18. For more information on the pending trials see Dan Bischoff, *Deal Life: This Old Art*, DAILY DEAL, Sept. 25, 2006, available at 2006 WLNR 16510029 (explaining that research has revealed no reported change in status of Medici’s appeal); Peter Watson & Cecilia Todeschini, *Raiders of the Lost Art*, L.A. TIMES, May 8, 2006. A raid of Hecht’s residence uncovered his personal journal seeming to detail his activities (although he claims it is a draft novel), which has been pivotal in his prosecution. See Jason Felch & Ralph Frammolino, *The Nation; Several Museums May Possess Looted Art*, L.A. TIMES, Nov. 8, 2005, at A16; Steve Scherer, *Rome Court Upholds Conviction of Antiquities Dealer*, BLOOMBERG.COM, July 15, 2009, <http://www.bloomberg.com/apps/news?pid=20601088&sid=asneBHwVx9wU>.

76. WATSON & TODESCHINI, *supra* at note 18, at ix. See also Randy Kennedy & Hugh Eakin, *The Met, Ending 30-year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, at A1.

77. HOVING, *supra* note 2, at 307–40.

78. WATSON & TODESCHINI, *supra* note 18, at ix–x.

79. See, e.g., Thomas K. Grose, *Stealing History: Cultural Treasures Are Being Looted—and Museums and Collectors Are Turning a Blind Eye*, U.S. NEWS & WORLD REP., June 19, 2006, at 40, available at 2006 WLNR 23825148.

cies during her tenure as curator there,⁸⁰ was the first U.S. museum employee ever to be indicted for allegedly trading in illegal antiquities.⁸¹ Under True's stewardship, the Getty implemented a policy requiring objects to be acquired from "established, well-documented collections" and to have been published before 1995.⁸² In 2006, after True's indictment and in the midst of the below-described negotiations, the Getty again tightened its acquisitions policy.⁸³

Negotiations between the Italians and the Getty were difficult—it took several years before they could agree on which antiquities the Getty would return to Italy.⁸⁴ On October 25, 2007, the Getty formally agreed to return forty of the fifty-one artifacts demanded,⁸⁵ including the prized *Cult Goddess* limestone and marble statue (*a/k/a Aphrodite*).⁸⁶ In the agreement, the Italian Culture Ministry agreed the *Cult Goddess* could remain on display at the Getty until 2010, but the other artifacts were to be returned immediately.⁸⁷ Pursuant to the agreement, Italy has loaned other artifacts and will continue to engage in "cultural cooperation," including research projects and joint exhibitions.⁸⁸

80. Monica M. Jackson, *Archaeology, Looting and the Luxury Arts in the XXI Century*, 13 ART & ANTIQUITY LAW 59, 70 (2008). See generally Linda F. Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT'L L. 1, 25 n.140 (1990).

81. Felch & Frammolino, *The Nation*, *supra* note 75, at A16.

82. This policy has since been tightened further, as discussed in Part III below.

83. Posting of Mike Boehm to Culture Monster, <http://latimesblogs.latimes.com/culturemonster/2009/01/gettys-antiquit.html> (Jan. 1, 2009, 6:00 PST) (discussing then upcoming Renfrew presentation entitled "Combating the Illicit Antiquities Trade: The 1970 Rule As a Turning Point (or How the Metropolitan Museum Lags Behind the Getty)"). The last revision to the Met's Collection Management Policy was November 2008. Press Release, Metropolitan Museum of Art, Metropolitan Museum's Collection Management Policy (Revised November 2008) (Jan. 6, 2009).

84. Jason Felch & Livia Borghese, *Italy, Getty End Rift*, L.A. TIMES, Sept. 26, 2007, at E1. Negotiations concerning *Victorious Youth* are ongoing, with the Getty claiming it had been found in international waters and thus is not subject to restitution. CultureGrrl, http://www.artjournal.com/culturegrrl/2006/11/getty_and_rutelli_trade_punche.html (Nov. 23, 2006, 11:40 EST); Nicole Winfield, *Italy Court Orders Getty's Bronze Confiscated*, ASSOCIATED PRESS, Feb. 11, 2010, available at 2/11/10 APWIRES 19:55:34 (The Getty maintains that it will "appeal the [Pesaro court's decision to confiscate] to Italy's highest court and . . . 'vigorously defend' its right to keep the bronze 'Victorious Youth.'").

85. *Looted Antiquities Return to Italy from Getty, Other US Collections*, AGENCE FRANCE PRESS, Dec. 17, 2007, <http://afp.google.com/article/ALeqM5gDmDJuzySwFI614dIah46BD5igRA>.

86. Diane Rozas, *Past is Present*, ART & ANTIQUES, Oct. 1, 2007, <http://www.artandantiquesmag.com/Past-is-Present>.

87. Elisabetta Povoledo, *Italy Lends the Getty a Bounty of Berninis*, N.Y. TIMES, Feb. 2, 2008, at B7; Felch & Borghese, *supra* note 84. See also Elisabetta Povoledo, *Italy Makes Its Choice of Antiquities to Lend Met*, N.Y. TIMES, Mar. 15, 2006, at E2.

88. See Povoledo, *Italy Makes Its Choice*, *supra* note 87, at E2 (On February 1, 2008, Italy lent the Getty "a bounty of Berninis"); CultureGrrl, http://www.artjournal.com/culturegrrl/2008/11/more_on_cleveland_museums_retu.html (Nov. 20, 2008 11:26 EST) (Pursuant to the agreement, such loans will be of a four-year duration, which many criticize as too short to

In the midst of the negotiations in August 2007, Italy dropped the civil charges against True and reduced the criminal charges, but the criminal trial of True and Hecht continues.⁸⁹ It is likely that the Italian statute of limitations, which continues to run until the conclusion of a prosecution and appeal,⁹⁰ will expire before the end of True's trial, and possibly also Hecht's, which would preclude their conviction.⁹¹

Meanwhile, on February 21, 2006, the Italian government finalized negotiations with the Met for the return of the prized *Euphronios krater*, other vases, and Hellenistic silver.⁹² The museum continues to dispute Italy's claim that the silver's find-spot is located in Morgantina.⁹³ Elsewhere, in September 2006, the Museum of Fine Arts, Boston agreed to return thirteen objects, including a statue of Sabina (wife of the Roman emperor, Hadrian).⁹⁴ On October 30, 2007, the Princeton University Art Museum agreed to return four objects immediately and four more in four years.⁹⁵ In January 2008, the University of Virginia agreed to return two ancient Greek sculptures,⁹⁶ and, on November 19, 2008, Italy and the

accommodate serious academic study); *Getty Launches Antiquities Partnership With Sicily*, ARTINFO.COM, Feb. 18, 2010, <http://www.artinfo.com/news/story/33938/getty-launches-antiquities-partnership-with-sicily/> (describing the Getty's new "proposal" by which "the museum would team with Sicilian archaeologists and museum officials to conserve objects, consult on earthquake protection, and jointly develop exhibitions").

89. Felch & Borghese, *supra* note 84. It was reported in the press that the Getty tried to condition the return upon the dropping of charges against True and that the Italians refused this request. Jason Felch & Ralph Frammolino, *The Return of Antiquities a Blow to Getty*, L.A. TIMES, Aug. 2, 2007, at A1. One report seems to contradict this characterization of events. The *L.A. Times* quoted Getty spokesman Ron Hartwig as having stated: "Marion's situation is tragic . . . [w]e have, however, tried throughout this process to keep the two issues separate and focus on resolving the claims for the objects with Italy with the great hope that it would have a positive impact on Marion's situation." Ralph Frammolino & Jason Felch, *Getty Agrees to Return Antiquities to Italy*, L.A. TIMES, Aug. 1, 2007.

90. HEINZ DUTHEL, GUILTY AS CHARGED! A CASE FOR THE INTERNATIONAL CRIMINAL COURT 333 (2008).

91. Kate Fitz Gibbon, *Museums Into the Fray: The Marion True Trial*, THE MAGAZINE ANTIQUES, Mar. 26, 2009, <http://www.themagazineantiques.com/news-opinion/current-and-coming/2009-03-26/museums-into-the-fray-the-marion-true-saga/> (describing how True's trial has been ongoing for the past four years).

92. Suzan Mazur, Opinion, *The Italy-Met Euphronios Accord?*, SCOOP INDEPENDENT NEWS, Feb. 22, 2006, <http://www.scoop.co.nz/stories/HL0602/S00265.htm>. For a discussion of the silver, see Steele, *supra* note 57, at 670; *Getty Launches Antiquities Partnership With Sicily*, *supra* note 88.

93. Steele, *supra* note 57, at 670.

94. Press Release, Museum of Fine Arts, Boston, Museum of Fine Arts, Boston and Italian Ministry of Culture Sign Agreement Marking New Era of Cultural Exchange (Sept. 28, 2006), <http://www.mfa.org/press/sub.asp?key=82&subkey=3444>.

95. Rudy Larini, *Princeton Agrees to Return Art to Italy*, STAR-LEDGER (Newark), Nov. 19, 2007, at 13. See David Gill & Christopher Chippindale, *From Malibu to Rome: Further Developments on the Return of Antiquities*, 14 INT'L J. CULTURAL PROP. 205, 224-25 (2007).

96. News Release, UVA Today, University of Virginia Returns Rare Archaic Sculptures to Italy (Jan. 3, 2008), <http://www.virginia.edu/uvatoday/newsRelease.php?id=3577>.

Cleveland Museum of Art issued a joint press release announcing the return of fourteen items.⁹⁷

The Italians also turned their sights to dealers and collectors implicated in the photo chain linking *tombaroli* looting to the market.⁹⁸ New York art dealer Jerome Eisenberg of Royal Athena Galleries agreed to return eight Etruscan and Roman artifacts on November 6, 2007.⁹⁹ Collector Shelby White returned nine objects in January 2008 and will return another currently on loan with the Museum of Modern Art in New York in 2010.¹⁰⁰

Finally, in January 2008 the Italian government broke up an international ring of antiquities smugglers,¹⁰¹ which led to the largest criminal case against antiquities smugglers to date.¹⁰² On January 17, 2008, General Giovanni Nistri, head of the art squad within the Italian *Carabinieri*, reported statistics that in his opinion show that international trafficking is "surely declining."¹⁰³ If General Nistri is correct, Italy's active pursuit of restitutions from high-profile entities and individuals and its criminal prosecutions are significant factors in the decline. Another likely factor is the 2006 bilateral agreement signed by Italy and Switzerland requiring Swiss customs agents to verify proof of origin and legal export of antiquities arriving in Switzerland from Italy.¹⁰⁴ This is a dramatic legal change to the Geneva Freeport procedures described in *The Medici Conspiracy*.¹⁰⁵ The Rome trial of True and Hecht continues

97. Press Release, Cleveland Museum of Art & Ministero per I Beni e Attività Culturali, *The Cleveland Museum of Art and Italy Agree to Exchange of Antiquities and Scholarship* (Nov. 19, 2008), http://www.cma.org/ASSETS/D834A1A72FB24F55804CBD8B6B46C574/Rome_Joint_Release_November_2008FINAL%20TO%20RELEASE%20ENGLISH.pdf. Initially, there were conflicting reports in the media concerning whether an agreement had been reached with the Cleveland Museum of Art, but Sandro Bondi, the current Italian Minister of Culture, issued a statement September 10, 2008, that, contrary to earlier statements by prior Italian Minister of Culture Francesco Rutelli, no agreement had been reached. Steven Litt, *The Cleveland Museum of Art Still Has No Deal with Italy on Returning Allegedly Looted Antiquities*, *PLAIN DEALER*, Sept. 10, 2008, http://www.cleveland.com/entertainment/index.ssf/2008/09/contrary_to_a_recent_public.html.

98. Posting of Philip Willan to Museum Security Network, <http://www.museum-security.org/?p=1563> (Feb. 28, 2009, 13:27 EST).

99. *Dealer Repatriates Art*, *N.Y. TIMES*, Nov. 7, 2007, at E2.

100. Elisabetta Povoledo, *Collector Returns Art Italy Says Was Looted*, *N.Y. TIMES*, Jan. 18, 2008, at B1.

101. Posting to Museum Security Network, <http://www.museum-security.org/?p=160> (Jan. 29, 2008, 10:44 EST).

102. *Id.*

103. Marta Falconi, *Italy's Art Squad Says Archeological Looting Declining*, *ASSOCIATED PRESS WORLDSTREAM*, Jan. 17, 2008, available at <http://www.encyclopedia.com/doc/1A1-D8U7P3283.html>.

104. Frank Jordans, *Swiss to Return Stolen Antiquities to Italy*, *USA TODAY*, Nov. 6, 2008.

105. WATSON & TODESCHINI, *supra* note 18, at 53-65.

in its fourth year¹⁰⁶—and police raids have uncovered additional dealer's archives containing "some 10,000[sic] further Polaroids . . . waiting to be processed."¹⁰⁷ Also, "there [were] the Polaroids seized in Greece which have yet to be exploited to the same degree as Italy."¹⁰⁸ These restitution efforts are far from over.

III. THE U.S. MUSEUM COMMUNITY'S REACTIONS

Naturally, the American museum community reacted to these scandals. Some historical background is necessary to understand the significance of these recent events.

A. 2001 AAMD Position Paper

In October 2001, the AAMD issued a Position Paper that underscored that "acquiring works . . . is a vital part of a museum's mission."¹⁰⁹ That report stated:

[W]hile it is highly desirable to know the archaeological context in which an artifact was discovered because this can reveal information about the origin of the work and the culture that produced it, this is not always possible. Nevertheless, much information may be gleaned from works of art even when the circumstances of their discovery are unknown. Indeed, most of what we know about early civilizations has been learned from artifacts whose archeological context has been lost.¹¹⁰

Since the Position Paper came out in 2001, the museum community has been steadfast in supporting the cultural internationalist position,¹¹¹ which maintains that liberal exchange of cultural objects is preferable.¹¹² The Position Paper described the nature of museums' due diligence concerning title and legal importation of an object noting "[c]onclusive proof is not always possible, because documentation and physical evidence may be inaccessible or lost."¹¹³ Finally, the Position Paper noted

106. Posting of Elisabetta Povoledo to Arts Beat, <http://artsbeat.blogs.nytimes.com/2009/01/23/ex-getty-curators-four-year-trial-resumes-in-rome/> (Jan. 23, 2009, 13:34 EST).

107. Posting of David Gill to Looting Matters, <http://lootingmatters.blogspot.com/2008/11/cleveland-museum-of-art-why-history-of.html> (Nov. 24, 2008, 06:50 EST).

108. *Id.*

109. Ass'n of Art Museum Dirs., Art Museums and the International Exchange of Cultural Artifacts 1 (Oct. 2001), http://www.aamd.org/papers/documents/CulturalProperty_000.pdf [hereinafter AAMD Position Paper].

110. *Id.* at 1–2.

111. Ass'n of Art Museum Dirs., New Report on Acquisition of Archaeological Materials and Ancient Art, (Jun. 4, 2008), <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> [hereinafter 2008 New Report].

112. See, e.g., Merryman, *International Trade*, *supra* note 37, at 269–89; CUNO, *supra* note 56, at 26–43, 160–62.

113. AAMD Position Paper, *supra* note 109, at 2.

that in an effort “[t]o deter illicit trade and to ensure that the importation of art and artifacts from other countries is conducted in a lawful and responsible manner,”¹¹⁴ museum directors should consider elements such as the jeopardy to the country’s cultural patrimony from pillaging, international community interests, compliance with domestic and international laws, and the provenance of the piece.¹¹⁵

The Position Paper did not give any firm direction to art museum directors as to how the individual questions should be weighed or balanced in the evaluation process. Particularly significant is the last question regarding legal exportation. During the debates concerning the drafting and U.S. implementation of the UNESCO Convention, U.S. collectors and the U.S. museum community adamantly opposed the “blank check” approach, which would have required the United States to give effect to all foreign nations’ export restrictions. Thus, it is quite significant that in 2001 the AAMD decided to include the legality of the exportation of an object among the factors directors should consider.¹¹⁶

B. 2004–2007 AAMD Reports

In 2004, the AAMD revisited the issue of acquisition of archeological materials and ancient art in its June 4, 2004, Task Force Report.¹¹⁷ It reaffirmed within the Report’s Statement of Principles that “in the absence of any breach of law or of the Principles”¹¹⁸ incomplete documentation of ownership history should be excused, at least in some cases because of an object’s “rarity, importance, and aesthetic merit.”¹¹⁹ Such objects may be “acquired and made accessible not only to the public and to scholars but to potential claimants as well.”¹²⁰ Thus, the Report takes the position that in some cases acquisition of an incompletely documented object might benefit a true owner whose chances of finding the object may be increased.

The 2004 Report also noted that it is important that the museum “rigorously research the provenance of a work.”¹²¹ The 2004 Report, like the 2001 Position Paper, provided a list of factors for a museum to

114. *Id.*

115. *Id.*

116. *Id.*

117. Ass’n of Art Museum Dirs., Report of the AAMD Task Force on the Acquisition of Archeological Materials and Ancient Art (June 4, 2004), http://www.aamd.org/papers/documents/TaskForceReportwithCoverPage_Final.pdf [hereinafter 2004 Report on Acquisition].

118. *Id.* at Part I(D).

119. *Id.*

120. *Id.* Other AAMD Reports, Position Papers and Guidelines are the subject of evaluating claims and de-accessioning objects.

121. *Id.* at Part II(A)(1).

consider before acquiring a work.¹²² These factors, which are relevant to affirmative defenses to defeat a civil legal claim, include the ownership, exhibition, and publication history, the countries in which the work of art has been located and when, whether a claim of ownership of the work of art has been made, “whether the [art] work appears in . . . databases of stolen works[,] and the circumstances under which the . . . art is being offered.”¹²³

These 2004 factors are directly relevant to affirmative defenses that may be raised to defeat a civil legal claim to the work of art, such as statute of limitations, laches, and waiver.¹²⁴ Legal claims and litigation are costly for museums to evaluate and defend against.¹²⁵

Additionally, Guideline A(2) instructs that museums should “make a concerted effort to obtain accurate written documentation with respect to the history of the work of art, including import and export documents.”¹²⁶ And Guideline A(3) states that museums “should require sellers, donors, and their representatives to provide all available information and documentation, as well as appropriate warranties regarding the origins and provenance of a work of art offered for acquisition.”¹²⁷

Additionally, Guideline C is entitled “Legal Considerations.”¹²⁸ It requires that museums “comply with all applicable local, state, and federal U.S. laws, most notably those governing ownership and title, import, and other issues critical to acquisition decisions.”¹²⁹ It continues to note the problematic complexity of the law applicable to antiquities cases:

The law relevant to the acquisition of archaeological materials and ancient art has become increasingly complex and continues to evolve. Since the status of a work of art under foreign law may bear on its legal status under U.S. law [pursuant to the *McClain* doctrine], member museums must be familiar with relevant U.S. and foreign laws before making an acquisition.¹³⁰

Moreover, Guideline D deals exclusively with the UNESCO Convention.¹³¹ It provides that member museums should not acquire objects

122. *Id.*

123. *Id.*

124. See Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 638–39 (2000).

125. See Daniel Range, Comment, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 TEX. INT'L L.J. 655, 666–67 (2004).

126. 2004 Report on Acquisition, *supra* note 117, at Part II(A)(2).

127. *Id.* at Part II(A)(3).

128. *Id.* at Part II(C).

129. *Id.* at Part II(C)(1).

130. *Id.*

131. *Id.* at Part II(D).

falling into any of the below three categories:

[(1)] any archaeological material or work of ancient art known to have been 'stolen from a museum, or a religious, or secular public monument or similar institution'

[(2) objects] known to have been part of an official archaeological excavation and removed in contravention of the laws of the country of origin [; or]

[(3)] any such works of art that were removed after November 1970 regardless of any applicable statutes of limitation and notwithstanding the fact that the U.S. did not accede to the Convention until 1983.¹³²

In comparison to the 2001 factors, the 2004 factors focus with precision on key legal standards. Although the 2001 factors mention "applicable law,"¹³³ which presumably meant criminal law and U.S. import regulations, and one factor implicates foreign export law, the 2001 factors' core theme reflects concern about the impact of museum acquisitions upon unauthorized excavation in foreign lands and destruction of the archeological record.¹³⁴ In contrast, the 2004 factors take on a more legalistic—and defensive—approach that primarily reflects fear of costly law suits.¹³⁵ They inherently implicate legal evaluation of the ability to defeat claims that may be brought.

This is not to say that the Guidelines foreclosed acquiring an object with knowledge that there was a distinct chance it might later be restituted, but as a general rule museum deaccessioning is strongly disfavored.¹³⁶ Guideline F in the 2004 Report states that if a member receives a claim to an object, it should seek an "equitable resolution"¹³⁷ "even though this claim may not be enforceable under U.S. law."¹³⁸ "Possible options that should be considered include: transfer or sale of the work of art to the claimant; payment to the claimant; loan or exchange of the work of art; or retention of the work of art."¹³⁹

Additionally, archeological ethics remained a concern for the

132. *Id.*

133. AAMD Position Paper, *supra* note 109, at 2.

134. *Id.*

135. 2004 Report on Acquisition, *supra* note 117, at Part II(C)(1).

136. *Id.* at Part II(E).

137. *Id.* at Part II(F).

138. *Id.*

139. *Id.* It should be noted here that the AAMD in a November 2007 Position Paper stated that one consideration when determining whether to deaccession an object is whether "evidence [has] come to light that the work was stolen from another institution or that it was illegally exported or imported in violation of the laws of the jurisdiction in which the museum is located." Ass'n of Art Museum Dirs., Art Museums and the Practice of Deaccessioning (Nov. 2007), <http://www.aamd.org/papers/documents/FINALPositionPaperDeaccessioning.doc>. Note that the concept of the violation of a foreign nation's export regulation is not to be considered.

AAMD. Guideline E of the 2004 Report entitled "Incomplete Provenance" provides that in cases where rigorous research could not provide "sufficient information on the recent history of a proposed acquisition," that "museums must use their professional judgment . . . in accordance with the Statement of Principles," to determine whether to nonetheless acquire an object.¹⁴⁰ The exercise of judgment should "recogniz[e] that the work of art, the culture it represents, scholarship, and the public may be served best through the acquisition of the work of art by a public institution dedicated to the conservation, exhibition, study, and interpretation of works of art."¹⁴¹ Examples are provided:

[(1) if] the work of art is in danger of destruction or deterioration; or [(2)] the acquisition would make the work of art publicly accessible, providing a singular and material contribution to knowledge, as well as facilitating the reconstruction of its provenance thereby allowing possible claimants to come forward.¹⁴²

Another notable factor museums were instructed to take into account was:

[W]hether the work of art has been outside its probable country or countries of origin for a sufficiently long time that its acquisition would not provide a direct, material incentive to looting or illegal excavation; while each member museum should determine its own policy as to length of time and appropriate documentation, a period of 10 years is recommended.¹⁴³

In this very important respect, the 2004 Guidelines injected a factual assessment of the acquisition's likely impact upon looting. In 2004, the AAMD's view was that a ten-year separation between the likely date an object was improperly excavated and its acquisition date meant that the acquisition likely had no "direct, material incentive to looting or illegal excavation."¹⁴⁴ Most archeologists would dispute this assessment.¹⁴⁵

Regardless of who was right factually, by 2004, the AAMD approach to weighing the pros and cons of a possible acquisition became primarily, but not exclusively, a legalistic one. Although the AAMD recognized that acquisitions—even those that would not violate any applicable law—should not encourage destruction of the archeological record, risk to the museum's budget became the primary guiding light.

On February 27, 2006, the AAMD Subcommittee on Incoming

140. 2004 Report on Acquisition, *supra* note 117, at Part II(E).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See, e.g., Neil Brodie & Colin Renfrew, *Looting and the World's Archaeological Heritage: The Inadequate Response*, 34 ANN. REV. ANTHROPOLOGY 343, 352–53 (2005).

Loans of Archeological Material and Ancient Art issued a report largely extending the 2004 Principles and Guidelines to loans,¹⁴⁶ particularly to “long-term loans” like those arranged between various U.S. museums and Italy.¹⁴⁷ However, there are a few important distinctions in the 2006 Report. For example, in regard to determining ownership history, in addition to asking lenders for information and appropriate warranties, the Guidelines provide that “[i]n some cases, the museum may decide that it is responsible and prudent to make further inquiries from other possible sources of information and/or databases.”¹⁴⁸ As to loans for visiting exhibitions, the Guidelines state the principal responsibility for researching ownership history falls upon the AAMD member museum primarily responsible for organizing it.¹⁴⁹ The Guidelines also caution that while the borrowing institution will generally accept the lending institution’s assessment of the ownership history, legal issues may arise for the borrowing institution.¹⁵⁰

The AAMD’s January 2007 Position Paper, *Art Museums, Private Collectors, and the Public Benefit*, contains a “laundry list” of factors to evaluate a potential loan or donation.¹⁵¹ Additionally, because the Position Paper applies to all art acquisitions and loans, the de-emphasis of issues related to archeological ethics does not signify a departure from the Principles and Guidelines previously expressed. It is also significant that whereas the prior Reports, Guidelines, and Position Papers did not address how to weigh or balance the factors, the 2007 Position Paper states that “[e]ach of the 176 institutions . . . answers these questions according to the unique mandate of its mission and the interests of its community.”¹⁵² Thus, AAMD member museums have now been given the directive to individually determine how the factors should be weighed or balanced.

C. AAMD 2008 New Report

On June 4, 2008, the AAMD issued its *New Report on Acquisition of Archaeological Materials and Ancient Art*, which signifies a shift in AAMD philosophy.¹⁵³ It announced the creation of a new AAMD web-

146. Ass’n of Art Museum Dirs., Report of the AAMD Subcommittee on Incoming Loans of Archaeological Material and Ancient Art (Feb. 27, 2006), http://www.aamd.org/papers/documents/Loans_and_PressRelease.pdf.

147. *Id.*

148. *Id.* at Part II(C).

149. *Id.*

150. *Id.*

151. Ass’n of Art Museum Dirs., *Art Museums, Private Collectors, and the Public Benefit* (Jan. 2007), <http://www.aamd.org/papers/documents/PrivateCollectors3.pdf>.

152. *Id.*

153. 2008 New Report, *supra* note 111.

site “where museums will publish images and information” about new acquisitions.¹⁵⁴ Instead of leaving it to individual museums to assess the potential legal risks and the object’s possible link to clandestine excavation within the last ten years on a case-by-case basis, it, in part, adopts the “blank check” approach, previously rejected in the United States, in relation to UNESCO.¹⁵⁵ It “[r]ecognize[s] the 1970 UNESCO Convention as providing the most pertinent threshold date for the application of more rigorous standards to the acquisition of archeological material and ancient art” as well as for the development of “a unified set of expectations for museums, sellers, and donors.”¹⁵⁶ Guideline E states, in relevant part, that AAMD member museums “should not acquire a work unless its provenance research [(1)] substantiates that the work was outside its country of probable modern discovery before 1970 or [(2)] was legally exported from its probable country of modern discovery after 1970.”¹⁵⁷

Nonetheless, Principle F still retains flexibility to exercise judgment when complete ownership history is unavailable.¹⁵⁸ Guideline F expands upon this flexibility, which fairly can be described as an intentional loophole in providing that museums use an informed judgment when assessing the provenance of a piece:

The AAMD recognizes that even after the most extensive research, many works will lack a complete documented ownership history. In some instances, an informed judgment can indicate that the work was outside its probable country of modern discovery before 1970 or legally exported from its probable country of modern discovery after 1970, and therefore can be acquired. In other instances, the cumulative facts and circumstances resulting from provenance research, including, but not limited to, the independent exhibition and publication of the work, the length of time it has been on public display and its recent ownership history, allow a museum to make an informed

154. Press Release, Association of Art Museum Directors, New Report on Acquisition of Archaeological Materials and Ancient Art Issued by Ass’n of Art Museum Dir., <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> (Jun. 4, 2008) [hereinafter 2008 Press Release]. 2008 New Report, *supra* note 111. Nothing is yet posted on the site.

155. See 2008 New Report, *supra* note 111, at Part I(F) (explaining “blank check” approach).

156. 2008 Press Release, *supra* note 154.

157. 2008 New Report, *supra* note 111, at Part II(E).

158. *Id.* at Part I(F).

Recognizing that a complete recent ownership history may not be obtainable for all archaeological material and every work of ancient art, the AAMD believes that its member museums should have the right to exercise their institutional responsibility to make informed and defensible judgments about the appropriateness of acquiring such an object if, in their opinion, doing so would satisfy the requirements set forth in the Guidelines below and meet the highest standards of due diligence and transparency as articulated in this Statement of Principles.

judgment to acquire the work, consistent with the Statement of Principles above.¹⁵⁹

The overarching “guiding light” to operating within the loophole and deciding whether to acquire an object with incomplete ownership history back to 1970 is stated in Guideline F (second paragraph): “In both instances, the museum must carefully balance the possible *financial and reputational harm* of taking such a step against the benefit of collecting, presenting, and preserving the work in trust for the educational benefit of present and future generations.”¹⁶⁰ In sum, this emphasis is less legalistic than that of the 2004 Report. And, the guiding light is not that of preserving archeological context, but that of the bottom line of the museum.¹⁶¹

D. AAM Standards and Guidelines

The American Association of Museums also weighed in on the debate in 2008 in its Standards Regarding Archaeological Material and Ancient Art. According to the new standards, even if an acquisition would be legal, museums “should not acquire any object that, to the knowledge of the museum, has been illegally exported from its country of modern discovery or the country where it was last legally owned.”¹⁶² The standards “recommend[]”¹⁶³ that “museums require documentation that the object was”¹⁶⁴ (1) “out of its probable country of modern discovery” by 1970; or (2) “legally exported [out of] its country of modern discovery.”¹⁶⁵ The AAM policy also contains a loophole “when there is substantial but not full documentation” of provenance,¹⁶⁶ and states that if a museum utilizes the loophole, “it should be transparent about why

159. 2008 New Report, *supra* note 111, at Part II(F).

160. *Id.* (emphasis added).

161. The 2008 Report largely repeats the due diligence standards of the 2004 Report, but a few differences should be noted. Guideline A seems to strengthen the due diligence standard by suggesting that “museums should *thoroughly* research the ownership history . . . prior to their acquisition, including making a *rigorous* effort to obtain accurate written documentation with respect to their history. . . .” *Id.* at Part II(A) (emphasis added). Moreover, Guideline C states that “[m]ember museums should require sellers, donors, and their representatives to provide all information of which they have knowledge, and documentation that they possess, related to the work being offered” *Id.* at Part II(C). Thus, the AAMD is recognizing that the old days—when almost unquestioned faith in representations by esteemed donors about an object’s ownership history was the norm—are over.

162. Am. Ass’n of Museums, Standards Regarding Archaeological Material and Ancient Art sec. 2, para. 3 (July 2008), <http://www.aam-us.org/museumresources/ethics/upload/Standards%20Regarding%20Archaeological%20Material%20and%20Ancient%20Art.pdf> [hereinafter AAM Standards].

163. *Id.* at sec. 2, para. 4.

164. *Id.*

165. *Id.* at sec. 2, para. 5.

166. *Id.* at sec. 2, para. 6.

this is an appropriate decision in alignment with the institution's collections policy and applicable ethics codes."¹⁶⁷

Dr. Kwame Opoku, a frequent contributor to the debate concerning repatriation of African objects from Western museums, who wrote an essay in 2008 that attracted a rejoinder on Afrikanet.info from de Montebello, critiqued the AAM loophole:

The solution of the AAM is what one often finds where there is division of opinion and both sides are almost equally strong: a bold general principle with an exception which almost negates totally the general principle. Both sides win. One step forward and one back.¹⁶⁸

But surely the expression of the U.S. museum community's new attitude toward the "blank check" approach represents a significant development. Also significant is the fact that the Getty and the Indianapolis Museum of Art had already adopted the 1970 "blank check" approach for new acquisitions—without a loophole—in 2006 and 2007, respectively.¹⁶⁹

These AAM standards apply to new acquisitions, but the standards take a revolutionary position in regard to existing collections. They state in relevant part:

In order to advance further research, public trust, and accountability museums should make available the known ownership history of archaeological material and ancient art in their collections, and make serious efforts to allocate time and funding to conduct research on objects where provenance is incomplete or uncertain. Museums may continue to respect requests for anonymity by donors.¹⁷⁰

This standard is revolutionary because there is no limit to the number of objects within a museum's collection to which the standard applies, and some of the most prestigious institutions' collections contain hundreds of thousands of objects.¹⁷¹ The task of full provenance research as to all archaeological and ancient art objects obtained after 1970 would be

167. *Id.*

168. Kwame Opoku, *New AAM Standards for the Acquisition of Archaeological Material and Ancient Art: A Minor "American Revolution"?*, MODERN GHANA, Sept. 6, 2008, <http://www.modernghana.com/news/181668/50/new-aam-standards-for-the-acquisition-of-archaeolo.html>.

169. Policy Statement on Acquisitions by the J. Paul Getty Museum (Oct. 23, 2006), http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf; Illicit Cultural Property, <http://illicit-cultural-property.blogspot.com/2007/05/yesterday-artnewspaper-published.html> (May 1, 2007, 06:12 EST). The Indianapolis Museum of Art policy was a stop-gap pending the adoption of new standards by the AAMD. According to a statement issued by its Director, Maxwell Anderson, and published in *The Art Newspaper* on April 30, 2007, the IMA acknowledged 1970 as a bright line in March 2004. *See id.*

170. AAM Standards, *supra* note 162, at sec. 3.

171. CultureGrrl, http://www.artsjournal.com/culturegrrl/2008/08/aams_new_antiquities_acquisiti.html (Aug. 12, 2008, 11:20 EST).

enormous.¹⁷² As stated by Lee Rosenbaum, who pens the influential CultureGrrl blog: “Did they realize what they were saying?”¹⁷³ It should be noted, however, that the new standards are aspirational in nature, not requirements.¹⁷⁴

The language of the new AAM Standard 4 seems to reveal a more reconciliatory approach toward handling claims by suggesting museums “respectfully and diligently address ownership claims to antiquities and archaeological material.”¹⁷⁵ It also suggests that “[w]hen appropriate and reasonably practical, museums should seek to resolve claims through voluntary discussions directly with a claimant or facilitated by a third party.”¹⁷⁶ This new standard heavily reflects the cooperative approach to claims to Nazi-looted art previously advanced by the AAMD and the AAM, as well as the “Washington Principles.”¹⁷⁷

E. *Nazi-Confiscated Art Precedents*

On June 4, 1998, the AAMD issued guidelines that called on member museums to resolve legitimate Nazi-era claims to art in their collections “in an equitable, appropriate, and mutually agreeable manner.”¹⁷⁸ The Washington Principles drew heavily from the AAMD guidelines and called for nations to reach “just and fair solution[s]” to Nazi-looted art claims.¹⁷⁹ The AAM November 1999 Guidelines, amended April 2001, echo the AAMD standard.¹⁸⁰ Although conciliatory in nature, the guidelines and principles are vague and lack instruction as to what is

172. *Id.*

173. *Id.*

174. Am. Ass’n of Museums, AAM Standards and Best Practices for U.S. Museums, <http://www.aam-us.org/aboutmuseums/standards/index.cfm> (last visited Mar. 13, 2010).

175. AAM Standards, *supra* note 162, at sec. 4, para. 1.

176. *Id.*

177. On December 3, 1998, forty-four governments acceded to principles at a conference held in Washington, D.C. Nations met again in 2000 to build upon the Washington Principles in Vilnius, Lithuania, under the auspices of the Parliamentary Assembly of the Council of Europe. COMMISSION FOR LOOTED ART IN EUROPE, WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART (Dec. 3, 1998), <http://www.lootedartcommission.com/Washington-principles>. The Vilnius Forum generated a declaration expressing continued support of the Washington Principles without significantly refining them or expanding upon them. COMMISSION FOR LOOTED ART IN EUROPE, VILNIUS FORUM DECLARATION (Oct. 5, 2000), <http://www.lootedartcommission.com/vilnius-forum>.

178. Ass’n of Art Museum Dirs., Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933–1945) (June 4, 1998), <http://www.aamd.org/papers/guideln.php> [hereinafter Task Force].

179. U.S. State Dep’t Bureau of European and Eurasian Affairs, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.htm>.

180. Am. Ass’n of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era (Nov. 1999) (Amended Apr. 2001), http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm.

“equitable”¹⁸¹ or “appropriate”¹⁸² in difficult cases. Moreover, things have changed since this conciliatory tone was struck in 1998.

A little over a decade since publication of the pivotal AAMD Report and The Washington Principles in 1998, we have moved into an era in which museums have begun to file declaratory judgment actions against claimants.¹⁸³ Museums are throwing down the litigation gauntlet against fragile, arguably weak, claims.¹⁸⁴ It is telling that in May 2007, the AAMD issued a Position Paper stating that despite the large amount of Nazi-era provenance research that had been conducted in museums between 1998 and July 2006 (which one should note had not been uniformly progressive in all institutions), only “twenty-two works in American museum collections have been identified as having been stolen by the Nazis and not properly restituted after the war.”¹⁸⁵ The filing of declaratory judgment actions certainly seems a dramatic turn away from the spirit of 1998. Is the same in store for antiquities? Will we transition out of this new phase of purported openness to a period of preemptive litigation strike to defeat claims?

IV. CONCLUSION

The questions presented boil down to these: Should one presume, without more empirical research, that objects lacking impeccable documentation are looted—and, assuming so, should they nonetheless be purchased under any circumstances? If we ban such objects from museums and scholarly study, what consequences will the market experience? What information will we lose in the overarching fight to preserve archeological context?¹⁸⁶

Many archeologists, consistent with policies of the American Institute of Archeology (“AIA”) and American Schools of Oriental Research

181. *Id.*

182. *Id.*

183. See Kreder, *The New Battleground*, *supra* note 49, at 60–61 (citing Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 803 (N.D. Ohio 2006); Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. March 31, 2007)).

184. *See id.*

185. Ass’n of Art Museum Dirs., *Art Museums and the Identification and Restitution of Works Stolen by the Nazis 1* (May 2007), www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf.

186. See generally Manlio Frigo, *Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property*, 16 INT’L J. CULTURAL PROP. 49 (2009) (answering questions on the ever-changing ethical rules and codes of conduct in the field of art law while focusing on the main codes of conduct drafted by international, national, public, and private institutions, federations, and associations and those code’s influence on art market regulation).

("ASOR"), believe undocumented antiquities should be shunned.¹⁸⁷ As recently stated by archeologist Elizabeth Stone:

The place we ought to be is where we are when it comes to buying Brazilian parrots, buying fur coats and things like that. It's no longer a thing you do. It's no longer fashionable. And what you need to do is make clear to the wealthy—that it's no longer fashionable to collect antiquities because of the ethical problems. When you've done that, it's going to stop. It's really going to stop.¹⁸⁸

To try to stop archeologists from inadvertently enhancing the value of looted artifacts, the AIA and ASOR prohibit initial publication in their journals of unprovenanced objects (with the exception of an article highlighting the looting problem).¹⁸⁹ Scholars "who lend their expertise to the trade are now considered unethical, and are seen as collaborators in the mutilation and corruption of the past."¹⁹⁰

These policies reflect concern about the destruction of the archeological record discussed above, as well as other weaknesses that a market filled with unprovenanced objects poses for science.¹⁹¹ For example, the market demand for undocumented Coptic sculptures allowed fakes to infiltrate museum and private collections for more than forty years, thus distorting our understanding of ancient Egypt and the importance of Christian iconography there.¹⁹² At the Brooklyn Museum alone, approximately one third of its formerly prized collection of Coptic sculptures are believed to be fakes.¹⁹³ At this point, it will be hard even for experts to tease out all of the fakes from collections throughout the United States and the world.¹⁹⁴

The Coptic market is not unique in being infiltrated with fakes. Another market includes a Himalayan Buddhist art form known as thangkas.¹⁹⁵ Thangkas are composite objects, meaning the various

187. See John Henry Merryman, *Museum Ethics*, 2006 A.L.I.-A.B.A. COURSE OF STUDY: LEGAL ISSUES IN MUSEUM ADMIN. 3, 9 (2006).

188. Suzan Mazur, *New York Times & Met Museum Sing to Collectors*, SCOOP INDEPENDENT NEWS, Mar. 17, 2006, <http://www.scoop.co.nz/stories/HL0603/S00246.htm>.

189. Archaeological Inst. of Am., Annual Meeting: Ethical Standards Requirement (2009), <http://www.archaeological.org/webinfo.php?page=10288>; Am. Sch. of Oriental Research Bd. of Trs., Statement of ASOR Policy on Preservation and Protection of Archaeological Resources 2 (Nov. 18, 1995) (modified Nov. 22, 2003), <http://www.asor.org/excavations/policy.pdf>.

190. Coggins, *A Licit International Traffic*, *supra* note 36, at 62.

191. See Archaeological Inst. of Am., *supra* note 189; Am. Sch. of Oriental Research, *supra* note 189, at 1, 3.

192. See Martin Bailey, *Revealed: One third of Brooklyn Museum's Coptic Collection is Fake*, THE ART NEWSPAPER, July 1, 2008, <http://www.theartnewspaper.com/articles/Revealed-one-third-of-Brooklyn-Museum-s-Coptic-collection-is-fake/8620>. The fakes themselves seem to date back to the 20th century.

193. See *id.*

194. See *id.*

195. Ann Shaftel, *Spiritual but Fake?*, 1 J. ART CRIME 16, 17 (2009).

pieces of the thangka are repaired and replaced over time thus making their authenticity harder to verify.¹⁹⁶ In some cases the thangkas have been made as “intentional fakes” with the intent to defraud while in other cases these unconventional thangkas are used in the traditional manner by the people who create them.¹⁹⁷ This dynamic, obviously, creates a “complex challenge in the spectrum of fakes, forgeries and fabrications” in the thangka marketplace.¹⁹⁸

The Buddhist religion is not the only religion with fakes on the market. Pieces of art associated with Christian iconography have created a firestorm of newsworthy fodder over the past couple of years.¹⁹⁹ The scope of forged works is wide including burial remains alleged to be that of Jesus’s brother James,²⁰⁰ a burial box with references to Jesus,²⁰¹ and a stone tablet with biblical passages.²⁰² The case involving the alleged remains of Jesus’s brother has even raised suspicion that several world renowned top scholars have ties to the forgery group primarily responsible for many of these religious fakes.²⁰³ However, their ties and ultimate guilt are questionable. This was, perhaps, stated best by the judge in the case when he wondered aloud how he could accurately “determine the authenticity of the items[when] the professors could not [even] agree among[st] themselves.”²⁰⁴

Other markets and places being affected by the recent forgery surge include auctions and sales both online on sites like Ebay,²⁰⁵ and offline in places like auction houses, museums, and art galleries.²⁰⁶ In Canada a new art-fraud task force recently charged a man with seventy-five counts

196. See *id.* at 17.

197. *Id.* at 17–18.

198. *Id.* at 21.

199. See, e.g., Stuart Laidlaw, *Forgery of Antiquities is Big Business*, TORONTO STAR, Nov. 4, 2008, at L1 (discussing a case involving the alleged burial remains of Jesus’s brother); Etgar Lefkovits, *Justice Ministry Weighs how to Proceed in ‘Jesus Ossuary’ Fraud Trial*, JERUSALEM POST, Nov. 3, 2008, at 4; Jonathan Lopez, *Books: ‘Unholy Business’ Spins a Good Yarn About Faith, Fraud, and Forgery*, ASSOCIATED PRESS, Nov. 17, 2008; Nina Burleigh, *Faith and Fraud*, L.A. TIMES, Nov. 29, 2008, at A21; Matthew Kalman, *Antiquities Authority Chief: Top Scholars Were Suspected of Ties to Forgery Group*, JERUSALEM POST, Sept. 9, 2009, at 4.

200. See Laidlaw, *supra* note 199, at L1.

201. See Lefkovits, *supra* note 199, at 4.

202. See *id.*

203. See Kalman, *supra* note 199, at 4.

204. *Id.*

205. Mike Boehm, *Relic sellers are Faking it on EBAY*, L.A. TIMES, May 29, 2009, at D1. But see *Online Sales of Illicit Cultural Goods Halted*, SWISSINFO.CH, Nov. 4, 2008, http://www.swissinfo.ch/eng/news_digest/online_sales_of_illicit_cultural_goods_halted.html?cid=7019154.

206. See ARTINVESTMENT.RU, *Outline Makovsky Led Antiques in the Colony*, ARTINVESTMENT.RU, July 8 2008, http://artinvestment.ru/en/news/artnews/20080807_spouses_preobrazhenskie_convicted.html; see also Dareh Gregorian, *Forgery a Work of Art*, NEW YORK POST, Nov. 15, 2008, at 007.

of fraud, forgery, and possession of goods after officers found upwards of eighty reproductions of works by Riopelle, Paul Émile Borduas, and Marcelle Ferron in his home.²⁰⁷ In France, renowned artist S. H. Raza “unwittingly inaugurated a show of . . . fakes” of his own works put together by his own nephew; Raza later sued his nephew for his actions regarding the auction.²⁰⁸ Meanwhile, in America there are plenty of instances of forgery as well ranging from a “prominent New York and Miami art dealer . . . arrested on charges of selling forged paintings”²⁰⁹ to an FBI investigation at the Weisman Museum at the University of Minnesota.²¹⁰

Despite the thriving market in forgeries, collectors and many within the museum community believe we should rescue unprovenanced antiquities and not “pretend they didn’t exist,” as recently stated by Michael Conforti, President of the AAMD.²¹¹ The custom of the collecting market has never previously required such a high level of proof of ownership—even if it should have.²¹² Additionally, chance finds are possible—floods and earthquakes happen, people find objects on private property to which national ownership laws may not apply, and old collections do exist.²¹³

Some scholars of antiquity are caught in the middle. In August 2007, the Biblical Archaeology Society issued a Statement of Concern in relation to the “movement that has received much publicity lately that condemns the use of unprovenanced antiquities from consideration in the reconstruction of ancient history.”²¹⁴ Although they noted their uniform condemnation of looting,²¹⁵ as has the AAMD²¹⁶ and the AAM,²¹⁷

207. CBC News, *Canadian Police Unveil New Art-Fraud Task Force*, CBC.CA, Jan. 27, 2009, <http://www.cbc.ca/canada/montreal/story/2009/01/27/mtl-art-theft-task-force-0127.html>.

208. See Neha S. Bajpai, *Forgers’ Canvas*, THE WEEK, Feb. 7, 2009, available at Posting of Deepak I. Shahdarpuri to Indian Art News, <http://indianartnews01.blogspot.com/2009/02/forgers-canvas-by-neha-s-bajpai.html> (Feb. 7, 2009, 14:56 GMT).

209. Larry Neumeister, *NY, Fla. Art Dealer Accused of Selling Forgeries*, ASSOCIATED PRESS, Nov. 21, 2008.

210. See Bea Chang, *FBI Painting Forgery Probe Leads Investigators to Twin Cities*, KARE11.COM, http://www.kare11.com/news/news_article.aspx?storyid=538694.

211. See Helen Stoilas, *New Guidelines for U.S. Museums Acquiring Antiquities*, THE ART NEWSPAPER, Jul. 24, 2008, <http://www.theartnewspaper.com/articles/New-guidelines-for-US-museums-acquiring-antiquities%20/8635>.

212. See *id.*

213. JAMES CUNO, *WHOSE CULTURE?: THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES* 65 (Princeton University Press 2009).

214. Biblical Archaeology Society, *Publication of Unprovenanced Antiquities: Statement of Concern* (Aug. 2007), <http://web.archive.org/web/20070810124535/http://www.bib-arch.org/bswbOOunprovenancedstatement.html>.

215. See *id.* at para. 1.

216. See Task Force, *supra* note 178.

217. See Press Release, American Association of Museums, *AAM Establishes New Standards*

they stated that a history of the ancient Near East and the Mediterranean basin "cannot be written without the evidence from unprovenanced antiquities."²¹⁸ The Statement identifies many important unprovenanced and looted antiquities including "the Dead Sea Scrolls, the Nag Hammadi Codices, the recently reported Gospel of Judas, the Wadi Daliyeh papyri," coins, stone seals, and hundreds of thousands of cuneiform tablets that are the basis of our understanding of Mesopotamian history.²¹⁹ The Statement in particular criticizes the AIA and ASOR publication policies, claiming that it is "almost universally recognized" that the policies have "had little or no effect on looting."²²⁰ In the words of the Biblical Archaeology Society's Statement itself, "Scholars cannot close their eyes to important information."²²¹ It continued:

7. We do not encourage private collection of antiquities. But important artifacts and inscriptions must be rescued and made available to scholars even though unprovenanced. When such objects have been looted, the antiquities market is often the means by which they are rescued, either by a private party or a museum. To vilify such activity results only in the loss of important scholarly information.

8. We would encourage private collectors of important artifacts and inscriptions to make them available to scholars for study and publication. Too often collectors who do make their objects available to scholars are subject to public obloquy. As a result, collectors are disinclined to allow scholars to study their collections, and the public is the poorer.²²²

In summary, as a result of the various antiquities markets' infection with fraudulent and looted goods and various policies adopted in response thereto, there has been a dramatic shift in significant segments of *both* the archeologist and museum/collector/dealer camps concerning the best approach for all those with an interest in antiquities—including the museum-going public. The initial cultural nationalism versus cultural internationalism framework was useful to start discussion, but eventually seemed too polarized to lead to useful solutions. Regardless of one's view of cultural nationalism, the existence of an antiquities market, or politics,²²³ present acquisitions invite a whole host of more complex

on Collecting of Archaeological Material and Ancient Art (Aug. 13, 2008), <http://www.aam-us.org/pressreleases.cfm?mode=list&id=147>.

218. Biblical Archaeology Society, *supra* note 214.

219. *Id.* at para. 4. See also Lefkovits, *supra* note 199, at 4.

220. Biblical Archaeology Society, *supra* note 214, at para. 6. At an October 2008 conference in Chicago at DePaul University College of Law attended by the author, some in the museum community were saying the same is true of museum acquisitions.

221. *Id.* at para. 5.

222. *Id.* at para. 7–8.

223. See generally CUNO, WHO OWNS ANTIQUITY?, *supra* note 56, at 119–25 (railing against "nationalist retentionist cultural property laws").

issues to consider. Although hard empirical data would be useful to understand the full ramifications of acquisition and publication policies, such data necessarily will be very difficult or impossible to obtain because of the clandestine, and often criminal, nature of activities at an object's source and path to the seemingly licit market.²²⁴ Logic and hard evidence about the extent of looting of antiquities throughout the world have demonstrated that "guilty until proven innocent" is the right presumption going forward, but it can be overcome! Thus, we cannot allow the lack of firm data concerning the extent of the illicit market to become an excuse to close down open communication.

Museums are on the defensive, as is plainly seen in the evolution of AAMD and AAM policies discussed above and the Universal Museum Statement issued in response to the restitution movement wherein some of the world's largest museums in possession of antiquities are essentially justifying their existence.²²⁵ The fear seems to be that, by the end of the "war,"²²⁶ the museums will be left with "bare walls."²²⁷ The Statement does not instruct museums to refuse all repatriation requests by any means; it calls for a case-by-case determination in light of the benefit to humanity of "universal museums,"²²⁸ much as the new AAMD and AAM Reports and Guidelines call for a balancing of the benefits and harms of de-accessioning an item.

Thus, despite the call by many in the anti-collecting camp for eliminating the market, it would be naïve to believe that many museums will support elimination of the market at any time in the near future. They will continue to acquire objects and confront the archeological "camp," and collectors and donors will continue to buy spectacular objects even if the price for documented ones rises.²²⁹ Conforti and others in the pro-collecting "camp" call for the promotion of licit markets, much like Professor Merryman did starting in the 1980s.²³⁰ They maintain that so long as a market exists outside of institutional buying, which, in their opinion, should remain the norm, source nations should provide legal ave-

224. See Ricardo J. Elia, *Looting, Collecting, and the Destruction of Archaeological Resources*, 6 *NONRENEWABLE RESOURCES* 85, 88 (1997).

225. See Bizot Group of Museum Directions, *Declaration on the Importance and Value of Universal Museums* (Dec. 2002), <http://www.clemusart.com/ASSETS/37CD35CFA0F6454EAFE2C5EAA2714919/UniversalMuseums.pdf>.

226. See Coggins, *A Licit International Traffic*, *supra* note 36, at 62.

227. See Jennifer Anglim Kreder, *The Holocaust, Museum Ethics and Legalism*, 18 *S. CAL. REV. L. & SOC. JUST.* 1, 30 (2008) (describing the concerns that the Holocaust restitution movement would lead to "bare walls"); see also George Abungu, *The Declaration: A Contested Issue*, *ICOM NEWS* (Int'l Council of Museums, France), 2004, at 5, http://icom.museum/pdf/E_news2004/p4_2004-1.pdf.

228. See Bizot Group, *supra* note 225, at para. 4.

229. See *supra* note 25 and accompanying text.

230. See Stoilas, *supra* note 211; Merryman, *supra* note 37, at 269.

nues for dealers and collectors to acquire antiquities.²³¹ If source nations do not support a licit market and the price for spectacular documented antiquities rises even further, we will see even more incentive for looting and more sophisticated forgery of objects.

On the one hand, there is hope that we have entered a new era that will lead to a détente between the pro-collecting and anti-collecting camps, which both share the common mission of education about ancient cultures. There is value in acquiring and preserving objects and there is value in acquiring and preserving archaeological data. Museums can—and are—taking the lead and slowing down acquisitions. They are looking for documentation. Perhaps they could slow down even further and display some of the less visually spectacular objects from storage and create exhibits that emphasize their historical significance more than their physical aspects.²³² These practices would have significant market impacts and would even increase knowledge about objects in museum collections.

We will likely see fewer outright purchases by museums; in the past outright purchases were limited—the Getty was the exception not the rule. Donations will continue, although the IRS may monitor them more closely as a result of the criminal indictments following the overvaluing of antiquities donated to California museums so that donors could take overly generous tax deductions.²³³ Additionally, we will also likely see many more loans, like those from Italy to the museums that have recently restituted objects. Also likely are more touring exhibitions.²³⁴ Hopefully, those in the anti-collecting camp can find some comfort in the new AAMD and AAM guidelines and the increased transparency as a result of the AAMD database.²³⁵ It would also be ideal if some museums followed the examples of museums like the Indianapolis Museum of Art and published information discovered via their own thorough provenance research on their own web sites.²³⁶

On the other hand, we may be on a collision course. Many in the

231. See Stoilas, *supra* note 211; Merryman, *supra* note 37, at 270.

232. See Brooklyn Museum, Provenance Research Project, http://www.brooklynmuseum.org/collections/provenance_research_project.php (last visited Mar. 12, 2010.)

233. See Wyatt, *Four Museums*, *supra* note 6, at A14.

234. See CultureGrrl, http://www.artsjournal.com/culturegrrl/2009/01/mario_rescas_whirlwind_tour_of.html (Jan. 14, 2009, 14:00 EST).

235. Additionally, dealers associations have adopted ethics codes—some as early as 1984. See Coggins, *A Licit International Traffic*, *supra* note 36, at 66.

236. See Indianapolis Museum of Art, Provenance Research, <http://www.imamuseum.org/art/research/provenance> (last visited Mar. 12, 2009); see also Robin Pogrebin, *At Public Board Meeting, Smithsonian Practices New Openness*, N.Y. TIMES, Nov. 18, 2008, at A13 (describing the Smithsonian's "new commitment to openness" in regard to such issues as diminishment of endowment fund as a result of lavish expense-account spending and the market).

anti-collecting "camp" will not be satisfied until the market is eliminated. Museums will conclude that their concessions are not enhancing their reputations, but have added fuel to the repatriation movement if increased transparency translates into the receipt of more claims that they do not view as being meritorious.²³⁷ The risk to the anti-collecting camp is that the museums could withdraw from the dialogue and slow-down or halt publication—and in some cases even exhibition—of objects lacking full documentation.²³⁸ The risk to the museum/collector/dealer camp is reputational as well as legal. If the burden of proof in civil litigation remains on the claimant in the future, then perhaps we will see an increase in prosecutions by U.S. Attorneys and States' Attorneys General in the United States. Perhaps we will see more curators and dealers prosecuted abroad. Or, perhaps U.S. Attorneys will utilize the civil forfeiture procedure to seize objects and shift the burden onto the museum (and other claimants).

In conclusion, members of the cultural heritage community must continue to let informed logic and ethics guide their policies and practices as they act as stewards of objects for the public trust. The biblical scholars have demonstrated that we cannot "turn a blind eye" to all undocumented antiquities. Nor, however, can we continue to accept the lack of documentation with no questions asked as the norm. In light of the overwhelming evidence of the extent of the infection of the market with illicit and fraudulent objects, a presumption of "guilty until proven innocent" is appropriate for most objects. The idea that we must "save" all undocumented antiquities from destruction or disappearance into the oblivion of private collections is naïve. It is remotely possible that some may be destroyed if they cannot find a buyer, but proper ethics dictates that museums and their esteemed patrons, the collectors of the finest (and hence most profitable) objects, not play that role. Failure to change would result in looters continuing to dig *en masse* for spectacular objects, destroying archaeological context and countless other objects in the process—and hence our historical record. Finally, acquisition of the object, even with the best of intentions, risks prosecution under anti-trafficking laws, including the National Stolen Property Act, and subsequent de-accessioning at great cost to the public.

237. See Kreder, *The New Battleground*, *supra* note 49, at 60–61.

238. See Clemency Chase Coggins, *United States Cultural Property Legislation: Observations of a Combatant*, 7 INT'L J. CULTURAL PROP. 52, 53 (1998) (explaining that in the next few years after UNESCO some museums "went underground and stopped publishing, or even exhibiting, their questionable new acquisitions from the New World and the Old").