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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3. Id. at 310.
4. Id. at 312.

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ums and elite collectors to Italy; and 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; 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. 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 Etruscan 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.


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

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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 Calif. W. Int'l L.J. 227, 229 (1992) (discussing legal framework applicable to pre-Columbian artifacts found throughout Central and South America).

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 archeological 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.\textsuperscript{12} To smuggle artifacts out of source nations,\textsuperscript{13} smugglers often “cut [artifacts] into pieces or deliberately deface[]” them to conceal their value from customs officers.\textsuperscript{14} Collectors have purchased an astronomical number of antiquities over the years for billions of dollars,\textsuperscript{15} often without knowing an object’s provenience—history tracing its path from find-spot to present.\textsuperscript{16} Their motivations are varied, often including a desire to act as a steward of history.\textsuperscript{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.\textsuperscript{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.
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.\(^1\) Finally, as Coggins put it in 2001: “Without an historical context, owning such objects simply becomes part of an expensive hobby.”\(^2\)

Museums in the United States acquire objects through purchase or donation and accept objects on short or long-term loan.\(^3\) 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.”\(^4\) 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.\(^5\) According to Professor of Archaeology, Ricardo J. Elia: “People think that there is an illicit market and a legitimate market . . . [i]n fact, it is the same.”\(^6\) Ever since Profes-

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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.”


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 Euphronioi Transcript, Scoop INDEPENDENT NEWS, Jan. 11, 2006, http://www.scoop.co.nz/stories/HL0601/S00076.htm.


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


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 2003 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 pullback 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 griffin 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.


   [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 WLN 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 Halberman, 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 ARCHAEOLOGY, 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. As demonstrated below, acquisitions practices and philosophy have changed dramatically since the year 1970.

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"). The purpose of the UNESCO Convention is to curb widespread pillaging of archeological sites. 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. 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. 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.
32. Id. at introduction; Merryman, Two Ways, supra note 13, at 843.
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 archaeologists 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. & COMM. 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 Schultz40 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 Coggin.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 Coggin 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).
40. United States v. Schulz, 333 F.3d 393, 398 (9th Cir. 2003).
41. See Hollinshead, 495 F.2d at 1155; McClain, 545 F.2d at 992; Schultz, 333 F.3d at 410.
43. Podesta, supra note 34, at 475 (noting that 110 nations have adopted the Convention).
44. E.g., David Sasso, 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.
46. See, e.g., Ewing, supra note 35, at 181.
47. Coggin, 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 nation\(^{50}\) (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 ownership\(^{52}\)—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

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50. McClain, 545 F.2d at 1003.
51. Id. at 1001.
52. Id. at 995, 1002.
54. Id. at 1222–45.
55. Id. at 1223.
57. Chauncey D. Steele IV, Note, The Morgantina Treasure: Italy’s Quest for Repatriation of Looted Artifacts, 23 SUPFK 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 WLN 20306086 (stating that many illicit objects find their way onto the market as a result of armed conflicts, such as in Iraq and Afghanistan); Patrick Radden Keeble, 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
clinging 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. 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. 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. 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].”

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. 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. 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 Oster, *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 Bahcali, *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).

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.
Convention in 1979\textsuperscript{64} and later signed a Memorandum of Understanding (MOU) with the United States in 2001.\textsuperscript{65} Pursuant to the MOU, which was renewed in 2006, the United States agreed to protect pre-Classical, Classical, and Imperial Roman architectural material,\textsuperscript{66} thus committing U.S. customs and enforcement agents to the goal of recovering artifacts.\textsuperscript{67} Just this year that MOU has led to over 1,000 artifacts being returned to Italy.\textsuperscript{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.\textsuperscript{69} It has long been known that artifacts illegally excavated in Italy are often transported through Switzerland before reaching the international market.\textsuperscript{70} Accordingly, Italian police sought assistance from Swiss police in 1995 to conduct raids on the Geneva warehouses of Italian art dealer Giacomo Medici.\textsuperscript{71} As relayed in The Medici Conspiracy, the raid uncovered a

\textsuperscript{64} Watson & Todeschini, supra note 18, at 29; UNESCO, supra note 31.


\textsuperscript{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=AsqTqgVQLIP8&refer=culture; Eakin, supra note 66.


\textsuperscript{70} E.g., Michele Kanitz, 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.").

\textsuperscript{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.\textsuperscript{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.\textsuperscript{73} The Italian government viewed the organigram in conjunction with other evidence, particularly photographs found at the Medici warehouses,\textsuperscript{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.\textsuperscript{75}

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

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

\begin{footnotesize}
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\item \textsuperscript{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/np/0906/090601newyork.htm.
\item 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.
\item 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 1068988.
\item 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.
\item 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.
\item Hoving, supra note 2, at 307--40.
\item Watson & Todeschini, supra note 18, at ix--x.
\end{itemize}
\end{footnotesize}
cies during her tenure as curator there, was the first U.S. museum employee ever to be indicted for allegedly trading in illegal antiquities. 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. In 2006, after True's indictment and in the midst of the below-described negotiations, the Getty again tightened its acquisitions policy.

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. On October 25, 2007, the Getty formally agreed to return forty of the fifty-one artifacts demanded, including the prized Cult Goddess limestone and marble statue (a/k/a Aphrodite). 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. Pursuant to the agreement, Italy has loaned other artifacts and will continue to engage in "cultural cooperation," including research projects and joint exhibitions.

82. This policy has since been tightened further, as discussed in Part III below.
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. artnet.com/culturegrtl2006/11/getty_and_rutelli_trade_panche.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. Looting Antiquities Return to Italy from Getty, Other US Collections, AGENCIE FRANCE PRESS, Dec. 17, 2007, http://afp.google.com/article/ALeqM5gDmDJuzysWFl54l4dIab46BD5ig RA.
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.artsjournal.com/culturegrtl2008/11/more_on_cleveland_museums_retl.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. It is likely that the Italian
statute of limitations, which continues to run until the conclusion of a
prosecution and appeal, will expire before the end of True’s trial, and
possibly also Hecht’s, which would preclude their conviction.

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. The museum continues to dispute
Italy’s claim that the silver’s find-spot is located in Morgantina.
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). On October 30, 2007, the Princeton University Art
Museum agreed to return four objects immediately and four more in four
years. In January 2008, the University of Virginia agreed to return two
ancient Greek sculptures, and, on November 19, 2008, Italy and the

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,
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

90. HEINZ DUTHEIL, GUILTY AS CHARGED! A CASE FOR THE INTERNATIONAL CRIMINAL COURT

91. Kate Fitz Gibbon, Museums Into the Fray: The Marion True Trial, THE MAGAZINE
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?, SCOOPE INDEPENDENT
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),

95. Rudy Larini, Princeton Agrees to Return Art to Italy, STAR-LEDGER (Newark), Nov. 19,

96. News Release, UVA Today, University of Virginia Returns Rare Archaic Sculptures to
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 Carabintieri, 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


102. Id.


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 year—\textsuperscript{106} and police raids have uncovered additional dealer's archives containing "some 10,000[sic] further Polaroids . . . waiting to be processed."\textsuperscript{107} Also, "there [were] the Polaroids seized in Greece which have yet to be exploited to the same degree as Italy."\textsuperscript{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."\textsuperscript{109} That report stated:

\begin{quote}
[\text{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.\textsuperscript{110}]
\end{quote}

Since the Position Paper came out in 2001, the museum community has been steadfast in supporting the cultural internationalist position,\textsuperscript{111} which maintains that liberal exchange of cultural objects is preferable.\textsuperscript{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."\textsuperscript{113} Finally, the Position Paper noted

\begin{footnotesize}
\textsuperscript{108} Id.
\textsuperscript{110} Id. at 1–2.
\textsuperscript{113} AAMD Position Paper, \textit{supra} note 109, at 2.
\end{footnotesize}
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," 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.\footnote{Id.}

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.\footnote{Id.}

\section*{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.\footnote{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].} It reaffirmed within the Report’s Statement of Principles that "in the absence of any breach of law or of the Principles"\footnote{Id. at Part I(D).} incomplete documentation of ownership history should be excused, at least in some cases because of an object’s "rarity, importance, and aesthetic merit."\footnote{Id.} Such objects may be "acquired and made accessible not only to the public and to scholars but to potential claimants as well."\footnote{Id.} 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."\footnote{Id. at Part II(A)(1).} The 2004 Report, like the 2001 Position Paper, provided a list of factors for a museum to
consider before acquiring a work. 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.”

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. Legal claims and litigation are costly for museums to evaluate and defend against.

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.” 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.”

Additionally, Guideline C is entitled “Legal Considerations.” 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.” 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.

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

122. Id.
123. Id.
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

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132. Id.
133. AAMD Position Paper, supra note 109, at 2.
134. Id.
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 Dir’s, 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:

Whether 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 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.
Loans of Archeological Material and Ancient Art issued a report largely extending the 2004 Principles and Guidelines to loans, particularly to "long-term loans" like those arranged between various U.S. museums and Italy. 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." 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. 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.

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. 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." 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. It announced the creation of a new AAMD web-

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147. Id.
148. Id. at Part II(C).
149. Id.
150. Id.
152. Id.
site "where museums will publish images and information" about new acquisitions. 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. It "recognize[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. 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."

Nonetheless, Principle F still retains flexibility to exercise judgment when complete ownership history is unavailable. 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

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.

Id.
judgment to acquire the work, consistent with the Statement of Principles above.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{162} The standards "recommend[]"\textsuperscript{163} that "museums require documentation that the object was"\textsuperscript{164} (1) "out of its probable country of modern discovery" by 1970; or (2) "legally exported [out of] its country of modern discovery."\textsuperscript{165} The AAM policy also contains a loophole "when there is substantial but not full documentation" of provenance,\textsuperscript{166} and states that if a museum utilizes the loophole, "it should be transparent about why

\textsuperscript{159} 2008 New Report, supra note 111, at Part II(F).
\textsuperscript{160} Id. (emphasis added).
\textsuperscript{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.

\textsuperscript{163} Id. at sec. 2, para. 4.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at sec. 2, para. 5.
\textsuperscript{166} Id. at sec. 2, para. 6.
this is an appropriate decision in alignment with the institution’s collections policy and applicable ethics codes.”

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.

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.

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.

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. The task of full provenance research as to all archaeological and ancient art objects obtained after 1970 would be

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167. Id.
170. AAM Standards, supra note 162, at sec. 3.
enormous.

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

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." 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." 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."

E. Nazi-Confiscated Art Precedents

On June 4, 1998, the AAM 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." The Washington Principles drew heavily from the AAM guidelines and called for nations to reach "just and fair solution[s]" to Nazi-looted art claims. The AAM November 1999 Guidelines, amended April 2001, echo the AAM standard. Although conciliatory in nature, the guidelines and principles are vague and lack instruction as to what is

172. Id.
173. Id.
175. AAM Standards, supra note 162, at sec. 4, para. 1.
176. Id.
“equitable”\textsuperscript{181} or “appropriate”\textsuperscript{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.\textsuperscript{183} Museums are throwing down the litigation gauntlet against fragile, arguably weak, claims.\textsuperscript{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.”\textsuperscript{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?\textsuperscript{186}

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

\textsuperscript{181} Id.

\textsuperscript{182} Id.


\textsuperscript{184} See id.


\textsuperscript{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. 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.

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). 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." 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. 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. At the Brooklyn Museum alone, approximately one third of its formerly prized collection of Coptic sculptures are believed to be fakes. 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.

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

191. See Archaeological Inst. of Am., supra note 189; Am. Sch. of Oriental Research, supra note 189, at 1, 3.
193. See id.
194. See id.
pieces of the thangka are repaired and replaced over time thus making their authenticity harder to verify.\textsuperscript{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.\textsuperscript{197} This dynamic, obviously, creates a “complex challenge in the spectrum of fakes, forgeries and fabrications” in the thangka marketplace.\textsuperscript{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.\textsuperscript{199} The scope of forged works is wide including burial remains alleged to be that of Jesus’s brother James,\textsuperscript{200} a burial box with references to Jesus,\textsuperscript{201} and a stone tablet with biblical passages.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{204}

Other markets and places being affected by the recent forgery surge include auctions and sales both online on sites like Ebay,\textsuperscript{205} and offline in places like auction houses, museums, and art galleries.\textsuperscript{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.
200. See Laidlaw, supra note 199, at L1.
201. See Lejkovits, supra note 199, at 4.
202. See id.
203. See Kalman, supra note 199, at 4.
204. Id.


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.\textsuperscript{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.\textsuperscript{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”\textsuperscript{209} to an FBI investigation at the Weisman Museum at the University of Minnesota.\textsuperscript{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.\textsuperscript{211} The custom of the collecting market has never previously required such a high level of proof of ownership—even if it should have.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{214} Although they noted their uniform condemnation of looting,\textsuperscript{215} as has the AAMD\textsuperscript{216} and the AAM,\textsuperscript{217}

\begin{enumerate}
\item[209.] Larry Neumeister, NY, Fla. Art Dealer Accused of Selling Forgeries, ASSOCIATED PRESS, Nov. 21, 2008.
\item[212.] See id.
\item[213.] JAMES CUNO, WHOSE CULTURE?: THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTQIUITIES 65 (Princeton University Press 2009).
\item[215.] See id. at para. 1.
\item[216.] See Task Force, supra note 178.
\item[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 tables 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

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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. 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. The fear seems to be that, by the end of the "war," the museums will be left with "bare walls." 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," 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. Conforti and others in the pro-collecting "camp" call for the promotion of licit markets, much like Professor Merryman did starting in the 1980s. 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-

228. See Bizot Group, supra note 225, at para. 4.
229. See supra note 25 and accompanying text.
230. See Stotlas, supra note 211; Merryman, supra note 37, at 269.
nues for dealers and collectors to acquire antiquities. 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. 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 over-valuing of antiquities donated to California museums so that donors could take overly generous tax deductions. 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. Hopefully, those in the anti-collecting camp can find some comfort in the new AAM and AAM guidelines and the increased transparency as a result of the AAM database. 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.

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

231. See Stolts, supra note 211; Merryman, supra note 37, at 270.
233. See Wyatt, Four Museums, supra note 6, at A14.
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 Popebin, 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 elimin-
nated. 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' Attorney
s 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 prac-
tices 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 subse-
quent de-accessioning at great cost to the public.

238. See Clemency Chase Coggin, United States Cultural Property Legislation: Observations of a Combatant, 7 INT'NL 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").