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Collecting Antiquities in the International Market

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The trial of former Getty antiquities curator, Marion True, and the dealer Robert Hecht in Italy has focused public attention on the illegal trade in looted ancient art and archaeological artifacts to an extent rarely seen in the past.[1] The looting of the Iraq Museum in Baghdad in April 2003 and the even more disastrous large-scale looting of archaeological sites in southern Iraq since the beginning of the Second Gulf War have also brought the devastating effects of the international market into even starker relief.[2] The agreement between Italy and the Metropolitan Museum of Art in February 2006 by which the Metropolitan recognized Italy's title to numerous artifacts, including the Euphronios krater purchased in 1972,[3] may illustrate a significant shift in the paradigm of acquisition of undocumented artifacts by the major collecting museums of the United States. This article will address, first, the background of how the world of the antiquities market came to this crucial turning point. It will then address the current legal status of such antiquities and the market response to recent legal developments, focusing in large measure on the role of the major acquiring art museums and their philosophical understanding of their role as collectors. Finally, this article will consider the legal and ethical approaches that museums and private collectors need to follow in order to ensure that the current situation is not perpetuated.

Background

Humans have long been interested in the material remains of past cultures and civilizations, and they have often collected artifacts, whether as symbols of military conquest and domination or as a means of enjoying past artistic accomplishments. On the other hand, archaeology developed as a science only in the middle of the nineteenth century and achieved many of its most significant advances in the second half of the twentieth century. Borrowing in large measure from the emerging fields of Darwinian evolutionary biology and paleontology, which rely on the stratigraphic placement of fossils to reconstruct the evolution of life forms, stratigraphic excavation gained significance with the late nineteenth and early twentieth century excavations of Heinrich Schliemann at Troy and Sir Flinders Petrie in Egypt and the Negev Desert. In the mid-twentieth century, Sir Mortimer Wheeler and Dame Kathleen Kenyon, working respectively in India and the Levant, further demonstrated the importance of scientific, controlled excavation and the recovery of contemporary material cultural remains in association with each other. Archaeology finally became a truly interdisciplinary field with the use of scientific techniques in conjunction with linguistic, philological, art historical, and anthropological analyses. Objects, whether considered artistic or utilitarian, faunal and floral remains, architectural features, and human remains and their original contextual relationship to each other are all equally essential in achieving an optimal reconstruction and understanding of the past.

The advent of these interdisciplinary methodologies coincided with the growth of the international art market in the years following World War II. The intrinsic conflict between the controlled excavation of archaeological sites, which is an inherently slow and painstaking process, and the desire of public and private collectors to have maximum numbers of objects available on the market and to acquire objects with a minimum of legal regulation soon became apparent. As the proliferation of interdisciplinary methodologies relegated art historical analyses and connoisseurship to the role of but one among many relevant disciplines that are used to understand the past, this tension has increased concomitantly. Unlike other commodities, new antiquities cannot be manufactured to satisfy market demand (unless they are fakes). Therefore, as the wealth of Western nations increased and the art market grew to keep pace with the demand from collectors, the looting of archaeological sites to satisfy this demand became a significant detriment to the study of the past.

Although earlier international conventions had set out criteria for the protection of cultural sites, monuments and public repositories of objects of artistic, historic, cultural, and scientific interest during time of war,[4] the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention")[5] was the first attempt to control the market in cultural objects with one of its goals the preservation of their original contexts. For nearly three decades, few of the market countries ratified this Convention, with the notable exception of the United States, which ratified it in 1972 and enacted implementing legislation in 1983.[6] While France ratified in 1997,[7] it was only in response to the damage to the cultural heritage of Iraq during the Second Gulf War that Switzerland and the United Kingdom finally ratified the Convention and enacted implementing legislation.[8]

In his seminal article published in 1986, Professor John Henry Merryman posited that there are two ways of looking at cultural property. He dubbed these two perspectives "cultural nationalism" and "cultural internationalism."[9] Cultural nationalism, according to Merryman, is a negative force, based in excessively retentionist policies of source nations, defined as those nations with an excess of cultural goods over internal market demand.[10] These nations engage in this retention for a number of reasons, including romantic Byronism and the usefulness of cultural property as political symbols.[11] Cultural internationalism, on the other hand, he views as a positive force—encompassing all those who wish to see art works and cultural objects circulate freely in the world, primarily through market mechanisms. As Merryman describes it, cultural internationalism is the most beneficial mechanism for producing cross-cultural understanding and artistic appreciation, with few negative side effects.[12]

Merryman's views have evolved to a limited extent. In a later article, he points out three essential values that are central to the development of a cultural property policy: truth, access, and preservation.[13] However, he posits that cultural internationalism is the means of achieving universal access and only in exceptional cases does the goal of preservation dictate against free market movement of cultural objects.[14] Finally, in one of his most recent articles, Merryman comes to identify the field of cultural property or cultural heritage law as "cultural property trade law."[15] This demonstrates his focus on cultural property law as defined by concerns of trade and the market and allows us to view his "cultural internationalism" for what it really is—the market perspective. Merryman consistently turns to the market as the sole means of providing access to cultural

objects and often the best means of achieving preservation; the type of access attained through the market seems to be, to him, the paramount value that the law should encourage with respect to cultural objects, even if that leads to the sacrifice of other values.

Merryman's work seems premised on some significant flaws in understanding the values that archaeological artifacts and sites can impart. Merryman's criticism of trade restrictions is misplaced when applied to attempts by nations with rich archaeological resources to protect their archaeological sites from looting through national ownership laws, export controls, and other means. Equally flawed is his assertion that the viewpoint represented by countries of origin and by archaeologists and other scholars who study and reconstruct ancient life is counter to an internationalist understanding.

Use of the term "cultural internationalism" in Merryman's sense[16] is a serious semantic misrepresentation; his perspective should more properly be termed simply the "free market" perspective. This conclusion is well-explained by Morag Kersel, who wrote:

> [T]he term "cultural internationalist" as employed by Merryman and those who support his position, is a misnomer. Instead, the term free-market [should] be used, which in reality is what their position supports. The idea of the free-market, where goods may circulate without national restrictions and prohibitions, is based on free competition. Organizations like UNESCO, ICOM and the [Illicit Antiquities Research Centre] are those who are truly internationalist in stance, attempting to balance the rights of indigenous populations to determine the disposition of their cultural heritage, with the protection of cultural heritage for the betterment of mankind. The term internationalist conjures up positive connotations, providing access to all. Rather than being internationalist in approach the free-market position, in this context, advocates for the unfettered movement of cultural material in the marketplace—those who can afford to purchase the artifacts are allowed access.[17]

If the underlying purpose of "cultural internationalism" is to achieve greater cross-cultural understanding, then the market is neither the exclusive nor even the best way of achieving this. Market proponents, in fact, rely on a one-way flow of cultural materials to Western nations based on economic superiority. They justify this uni-directional movement through reliance on the "rescue narrative"—that is, that wealthier institutions, individuals, and countries are doing the world a service by appropriating cultural objects, with or without the consent of the current owner, because they are thereby saving the object for the benefit of all mankind. But, as Kersel points out, this type of movement is not the same as cultural interchange:

> The free-market definition of international cultural exchange is not what most stakeholders think of when considering this concept. . . . [A]n exchange is "the action, or an act, of reciprocal giving and receiving." In the free-market position international cultural exchange is primarily a one-way movement of material from archaeologically-rich nations to those in possession of the financial resources to purchase the material (either nationally or internationally). This is not what UNESCO or other organizations or individuals have in mind when they proffer the international exchange of cultural material, which usually engenders both short-term loans and long-term loans between nations where both benefit equally from the movement of the archaeological artifacts. The international exchange of free-market proponents is primarily a flow of objects from less-developed nations to collectors usually with a much higher per capita income. And the exchange is usually financial, not intellectual. In response to this one-way movement many countries enact legislation in the attempt to protect their cultural heritage.[18]

The way to achieve this type of understanding and to bring people from different nations together is through demonstrating respect for each other's cultures and laws and by working cooperatively with other nations to achieve knowledge of both their cultural past and present. In contrast, a free and unregulated market in ancient art is associated with theft of property, smuggling, looting, and destruction of both knowledge and objects. The collecting of ancient art by private individuals and museums, which has long had an aura of exclusivity, altruism, and philanthropy, has now taken on an aura of criminality and questionable ethics. The revelations that have been made public during the True/Hecht trial and the other tribulations of major museums[19] show the seamy underbelly of the international art market. How did we come to this point and, more importantly, how do we change the operation of the international market in antiquities so that it is both legal and ethical and it becomes a force for the acquisition of knowledge and understanding that can be shared throughout the world?

Legal Control of the Market

The law and the consequences imposed on those who violate it are means of affecting human conduct. The law in market countries operates to reduce demand for looted artifacts. It is a basic economic precept that if demand for a commodity is reduced, then the supply will also be reduced. If collectors (both private and public) in the market nations refuse to buy undocumented artifacts, then incentives for looting the artifacts will diminish.[20] Both national and international legal regimes provide a variety of disincentives to

the handling, selling, and buying of looted antiquities. In the nineteenth and twentieth centuries, many nations rich in archaeological heritage enacted laws that vest ownership of undiscovered artifacts in the nation. While a market proponent views these laws only as inhibitions on a free market, others who are concerned with understanding the past see these laws as a means of discouraging looting of sites by denying the finder and subsequent purchasers title to the artifacts.

The law in the United States, which is generally regarded as the single largest market for antiquities in the world, may be examined as an example of a market nation's attempt to control the market in antiquities.[21] In 1977 the U.S. Court of Appeals for the Fifth Circuit decided *U.S. v. McClain*,[22] holding that several dealers had violated the National Stolen Property Act,[23] by conspiring to deal in pre-Columbian artifacts owned by the nation of Mexico. The Fifth Circuit held that Mexico's law vested ownership of not-yet-discovered artifacts in the nation and that any artifacts removed from Mexico without permission constituted stolen property.[24]

Market participants failed to accept the meaning of the *McClain* decisions, largely because they refused to understand the true nature of national ownership laws.[25] To market proponents, national ownership laws are no different from export controls—which, in the absence of a specific agreement, are not enforced by other nations.[26] Nonetheless, national ownership laws were used as the basis for several recoveries of looted and stolen artifacts in civil suits in the years following the *McClain* decision.[27] *McClain* was reaffirmed in the criminal context with the conviction of Frederick Schultz,[28] a prominent New York antiquities dealer and former president of the National Association of Dealers in Ancient, Oriental and Primitive Art.[29] With facts eerily reminiscent of the *McClain* case, the Second Circuit Court of Appeals held that Schultz had violated the NSPA by conspiring to deal in antiquities removed from Egypt in violation of its 1983 national ownership law. The status of foreign national ownership laws is now clearly established in those circuits with the most robust art market. This legal principle can provide a strong disincentive to trading in undocumented artifacts and a method by which foreign nations may recover their stolen property and intentional wrongdoers be punished.

The international market in antiquities is regulated in the United States in other ways as well. As part of its ratification of the 1970 UNESCO Convention, the United States enacted the Convention on Cultural Property Implementation Act (CPIA).[30] The CPIA implements two sections of the 1970

UNESCO Convention.[31] The first prohibits the import into the United States of stolen cultural property that had been documented in the inventory of a public or secular institution in another State Party.[32] The second grants the President the authority to impose import restrictions on designated categories of archaeological and ethnological materials that are subject to pillage in another State Party.[33] Violations of the CPIA result only in civil forfeiture of the cultural materials at stake; there are no criminal penalties involved,[34] unless some other law was also violated. Other legal restraints include the requirement of proper declaration of value and country of origin for archaeological artifacts, as with all imported commercial goods.[35] Finally, the trafficking provisions of the Archaeological Resources Protection Act can also be utilized to prosecute individuals involved in the interstate or international transport of stolen archaeological resources.[36]

Impediments to More Effective Law Enforcement

A recent study of the operation of the international market in antiquities points out many of the reasons why existing legal restraints are less effective in this area than in other criminal markets.[37] White-collar criminals are heavily influenced by the risk of detection and the likelihood and severity of punishment. The legal regime that addresses this market in the United States is hobbled by the very effective lobbying of major collectors, dealers, and some museums. In contrast, the legal regime that addresses the trade in endangered species is more stringent and therefore also more effective.[38] Mackenzie's study, based on extensive interviews with market participants (dealers and collectors and their lawyers), demonstrates that market participants indulge in a significant amount of denial about what they do. Many recognize that there are looted and stolen artifacts and unethical dealers, but they all profess that they themselves do not engage in any shady practices and conduct their business in an ethical manner. Some buyers delude themselves into thinking that they are legally protected by dealing only with those they know and trust and by engaging in transparently ridiculous ruses.[39] So long as a significant number of antiquities on the international market do not have documented provenience[40] history, the potential dealer or buyer can delude him or herself into believing that the particular artifact being traded is not stolen or looted.[41]

Buyers' attitudes about lack of provenience fall into three groups: one group says they will buy only documented artifacts; one group engages in the fiction

that undocumented antiquities are chance finds and this makes their acquisition legitimate; a third group does not seem to care about provenience.[42] In particular, market participants often indulge in the fiction that many of the antiquities on the market are the result of chance finds and the accompanying rationalization that this excuses sales that may be illegal.[43] Market participants also voice the desire to protect the seller by not asking too many questions, the desire to maintain a competitive edge against other dealers, and the notion that lack of complete provenience information does not necessarily mean that an artifact is looted.[44]

While the potential for punishment may serve as a disincentive, the construct of the legal regime restrains the role of the law as a fully effective disincentive to trading in looted antiquities. The most important is that the burden of proof is on the government or on the claimant to establish the required elements. By definition, looted antiquities are undocumented before they appear on the international market; it is therefore only in the unusual circumstance that the time and place of discovery of a looted antiquity can be determined to the legally required standard.[45] In a criminal prosecution, the government must establish that the artifact is stolen and that the current possessor knew or consciously avoided learning that the artifact was stolen.[46] The fact that so many of the artifacts on the market are undocumented poses an additional challenge for a prosecutor to establish that the possessor knew that this particular artifact was looted.

A second difficulty is that the primary methods of enforcement of the relevant laws are through civil forfeiture and private replevin claims. Possessors of looted artifacts generally face only the possibility of losing the artifacts' monetary value and will likely not be deterred because the amount of money at stake is relatively small.[47] A few examples of the prices paid for antiquities at the source compared to their value on the international market illustrate this point. While it is difficult to obtain first-hand information as to the price of looted antiquities at the source, the journalist Joanne Farchakh reported in May 2004 that at the source at sites in southern Iraq, a cuneiform tablet would sell for $4, a decorated vase would sell for $20 to $50, and a sculpture would sell for about $100.[48] In Baghdad, the journalist Joseph Braude paid $200 for each of three cylinder seals looted from the Iraq Museum.[49] In comparison, the average that is often used for the value of a cylinder seal sold on the market in London or New York is estimated at $1,000.[50] A recent cursory survey of comparable objects being offered on eBay showed that cylinder seals were priced at $350 to $2,000; cuneiform tablets were offered at a range of $350 up to

£550.[51] A recent Christie's catalogue gave low and high estimates of $1,200 and $1,800 for a cuneiform envelope and tablet that sold for $10,800.[52] The markups for antiquities from source at a looted archaeological site, to the transit points, to the ultimate market in locations such as New York and London can be many hundredfold. If a collector or dealer in London or New York must relinquish an artifact, he or she loses relatively little out-of-pocket.

As Mackenzie points out, so long as the risks of detection and meaningful punishment remain low, the conduct of those market participants who violate the law will not be deterred. It is difficult, however, to craft a legal system in which these impediments to meaningful punishment are eliminated. One possibility is to reverse the burden of proof—that is, place the burden on the current possessor to affirmatively establish the legitimate provenience of artifacts; any artifacts for which this background cannot be established would be presumed looted and stolen. The United Kingdom did this to a limited degree in its statutory instrument implementing United Nations Security Council Resolution 1483, which requires member states to prohibit trade in illegally removed Iraqi cultural materials.[53] There is some indication that these provisions are inhibiting the open trade in Iraqi cultural materials, but it is less certain whether it is inhibiting the underground trade. However, it is unlikely the law will or can evolve in this direction beyond the particularly dire circumstances of the destruction of Iraq's cultural heritage since the beginning of the war in March 2003.[54]

Another change in the law might be a shift from viewing interdiction at the border at the time of importation as the primary method of law enforcement. Based on his study of the illicit markets in drugs and endangered species, Mackenzie concluded that "laws that empower an informed and dedicated local police force to search out illicit commodities within their jurisdiction" and to prosecute the possessors are more effective than laws that focus on interdiction at the border.[55] The recent creation of the F.B.I. Art Crime Team may be viewed as a positive step in this direction in the United States.[56]

The structure of the legal regimes in the major market nations allows market participants to externalize the detrimental effects of their conduct. While the market participants continue to enjoy relative immunity from the law and, in the case of auction houses and dealers, to reap large financial profits, the negative effects of their conduct are imposed both on the countries of origin, which are deprived of their heritage while their laws are flouted, and on the rest of society, which loses the ability to understand and reconstruct

the past. As Mackenzie points out, there is relatively little incentive in the market nations to curb the trade because policy makers and legislators in the market nations perceive the harm as being done in the archaeologically rich nations.[57] In addition, the auction houses, dealers, large collecting museums, and wealthy collectors have political access that cannot be matched by the preservationist organizations.[58] Finally, the public does not yet have a sufficient understanding or sense of urgency to be moved to make this a political priority for elected representatives, although public awareness has grown considerably since the looting of the Iraq Museum in April 2003. However, such gaps in the law may be filled through a variety of mechanisms, the most relevant of which are codes of ethics, public pressure, and indirect regulation. In particular, the public museums of the United States have a special role and responsibility to play in diminishing the detrimental effects of the art market on the world's archaeological heritage.

Museums and the Market: Museums Make the Market

The current proffered justification for the continued acquisition of undocumented antiquities is summed up in the phrase "universal museum,"[59] a concept that owes much to Merryman's notion of "cultural internationalism" but one that, unlike Merryman, emphasizes the role of the public museum over that of the private collector. In December 2002, eighteen of the world's leading museums issued the "Declaration of the Universal Museum"[60] at the behest of the British Museum, which had come under increasing pressure to return, as either a gift or loan, the Parthenon Sculptures to Athens in time for the 2004 Olympics. This Declaration states that objects that have been in a particular museum collection for a long time have become part of the cultural heritage of their new nation. They should therefore remain in those museums, where they can be of the greatest benefit to the museum's visitors.

While claiming intellectual descent from the Enlightenment notion of the encyclopedic museum, the mantra of the "universal museum" actually relates as much or more to collecting practices typical of and enabled by imperialism and colonialism.[61] The aspirations of museums such as the Metropolitan Museum of Art and the Art Institute of Chicago to be universal museums are now fulfilled through economic, rather than political or military, empire. In tracing the origin of the so-called universal museum to an Enlightenment pedigree, museum professionals who acquire undocumented antiquities are,

in fact, acting in an anti-Enlightenment, anti-scientific, and anti-rational manner. Many justifications are offered for the acquisition of undocumented antiquities, but among them is now current the notion that at a time when it is necessary to understand other peoples, the mere exposure to such objects will increase cross-cultural understanding. This sounds like a worthy goal, but the assumptions underlying the means of achieving this goal are erroneous.

When undocumented artifacts are acquired, little is known about their find-spot, their date, their original context, and even their authenticity. Entire categories of ancient artifacts, such as Cycladic figurines, are known almost exclusively from the market.[62] It is therefore impossible to determine which figurines are authentic,[63] what they were used for, whether they were primarily grave goods, what their date is, and from which of the islands in the Aegean they originate.[64] One can still appreciate their aesthetic qualities and their resemblance to modern sculptures, but there is little else that one can do with them—we do not even know whether they were intended to be displayed vertically or horizontally and so their placement in a museum case may tell us more about *our* aesthetic concepts than about those of the ancient peoples of the Aegean. Yet, as some museum professionals would tell us, it is possible to establish a close, personal relationship with the object through direct encounter with the original and to appreciate works without need for study,[65] or, as Philippe de Montebello was quoted in an interview as stating:

> "It continues to be my view—and not my view alone—that the information that is lost [when an object is looted] is a fraction of the information that an object can provide. Ninety-eight percent of everything we know about antiquity we know from objects that were not out of digs," Mr. de Montebello said, and he cited the Euphronios krater—painted by one of the most important Greek vase painters of antiquity—as an example. "How much more would you learn from knowing which particular hole in—supposedly Cerveteri—it came out of?" he asked. "Everything is on the vase."[66]

These statements indicate a purely subjective and emotional interaction with the ancient object. There is no rational, scientific, or intellectual encounter with the artifact, and therefore the observer learns little about the ancient culture that will increase cross-cultural understanding or help the observer understand individuals with a different cultural, religious, or historical background. All the observer can do is bring the knowledge and emotional resources he or she has already internalized to the viewing of the artwork. As Chippindale and Gill explained,

> [T]he central *intellectual* consequence of the contemporary classical collections . . . [is] an unwitting and unthinking conservatism. The new objects and the way they are treated contribute to our consolidated knowledge insofar as they confirm, reinforce, and strengthen the existing patterns of knowledge. Surfacing without secure information beyond what is immanent in themselves, the objects are unable to broaden our basis of knowledge. Interpreted and restored in light of prior expectations, they are reconciled with what we presently know, but they cannot amend and improve our present knowledge much, if at all. Where they do in themselves offer an anomaly or contradiction to established understanding, the ever-present dangers of orverrestoration and falsity kick in; the truly unusual items that surface remain incomprehensible until their oddity is matched by a find for which there is a real security of knowledge. At that point, they can take up their accustomed role of confirming the correctness of that knowledge.[67]

The concept of the universal museum, at least in its current incarnation, owes little to the rationality and scientific inquiries of the Enlightenment era and more to an emotionally based desire to continue to collect with as few restrictions as possible and to compete with the older European museums, which were founded in the context of empire.

Another argument in support of the collecting of undocumented antiquities focuses on delegitimizing the national ownership claims of nations to the antiquities found buried in their soil. Market participants assert that modern nations cannot claim ownership of artifacts that predate the creation of the modern nation. The amicus curiae brief submitted to the Second Circuit by the American Association of Museums and other museum organizations in support of the collector's position in *United States v. An Antique Platter of Gold* posited that Italy could not claim ownership of the phiale because the modern Italians are not the same "people" as the ancient inhabitants of Italy who produced the phiale.[68] The concept of national ownership of antiquities has significant legal and cultural ramifications. National ownership, like the nation-state itself, is a legal construct and recognizes that each nation has the inherent right as an attribute of sovereignty to determine, within its own borders, the nature of property ownership and where to draw the line between public and private property.[69] While the legal argument is itself sufficient to legitimize the concept of national ownership, the denigration of a connection to the past that transcends modern political states also raises questions of understanding of ethnicity, religion, language, and culture.[70]

The concept of the universal museum is also justified by the notion of "rescue." According to the "rescue narrative," cultural objects need to be rescued,

preserved, and cared for by those nations, institutions, and individuals that are perceived as wealthier, better educated, more appreciative of the relics of the past, and therefore better able to preserve these relics for the benefit of all peoples.[71] The best distributive mechanism is through the international art market, which determines the monetary value of these objects, and it is because of this value that the object is preserved.[72]

Museum professionals now view themselves as rescuing the individual object that is offered for sale from the market. In a speech at the National Press Club, de Montebello likened the artifact that is offered for sale to an orphan who has been left on the street, hungry and cold.[73] He views the museum as having an obligation to rescue the "orphan" by acquiring it. Aside from the anthropomorphizing of an inanimate object underlying this comparison, this viewpoint displays a fetishistic preoccupation with individual objects. It ignores the fact that the market can be as destructive of individual objects as it is of archaeological sites. Objects that are not desired by the market are destroyed or left in a discarded heap.[74] Even those objects the market wishes to preserve are often severely damaged, disfigured, or destroyed.[75] The chaos of the market also permits a large number of forged objects to enter museums and the scholarly record.[76] It seems difficult for these museum professionals to visualize anything beyond the individual object that is present before their eyes and view the destruction that lies behind the particular object[77]—and also the destruction that this purchase will engender in the future.

What this rescue narrative fails to acknowledge is the connection between the acquisition of unprovenanced antiquities and the destruction of archaeological sites. While paying lip service to the issue of site looting, the rescue narrative denies the connection between the market and this looting and thereby denies the basic economic law of supply and demand. Market proponents deny this connection,[78] although it is difficult to understand how they can imagine that looting would go on at the current pace if there were no market for undocumented antiquities. The primary motivation for looting is to attain the monetary value of the artifacts; if the monetary value were depressed, this incentive would diminish. A common way to deny this cause and effect relationship is to claim that undocumented artifacts are the result of accidental finds, construction projects, and agricultural activity. While some artifacts are found accidentally in these ways, true chance finds, those found near the surface through routine construction and agricultural activity, will not be in sufficiently good condition to be marketable.[79]

On the ground experience in many countries demonstrates that looters loot for the money they earn. Looting activities respond to market demand for particular types of artifacts and looting has moved from an occasional, opportunistic activity to a well-funded, well-organized business, including the placing of looters on retainer so that they work full-time for particular middlemen. The contemporary nature of site looting is now documented in such disparate countries as Iraq, Italy, Israel and the West Bank, Peru, Turkey, and Thailand.[80] The use of the law to impose detrimental consequences on middlemen and purchasers is therefore clearly instrumental in reducing the incentive to loot archaeological sites. However, when direct legal enforcement proves inadequate, museum policies, codes of ethics and acquisition guidelines, and indirect regulation need to fill the gaps. In that way museums can assure that they are fulfilling their obligations to the public, which are owed in exchange for their favored status.

The Way Forward: Will the Future Be Different from the Past?

Most museums in the United States are incorporated as charitable organizations and receive their favored tax-exempt status under section 501(c)(3) of the Internal Revenue Code on the basis that they serve an educational or scientific purpose. They therefore have a legal obligation to make this scientific or educational purpose paramount in their practices and functions.[81] Some museum directors denigrate the role of museums as educators of the public by focusing on a narrow definition of their role as preservers of physical objects while ignoring the full historical, cultural, and educational context of the objects in their collections.

In June 2004, the Association of Art Museum Directors (AAMD) released its Guidelines on the Acquisition of Archaeological Materials and Ancient Art[82] "to assist members in revising their acquisition policies" in light of "the increasingly complex legal and ethical issues that arise in the acquisition process. . . ." Yet the Guidelines fail to focus on the incentive to loot archaeological sites fostered by the acquisition of undocumented antiquities that are likely to have been looted but whose status as stolen property may not be demonstrable to legal standards. For example, the Guidelines refer specifically only to objects looted from official excavations, but the sites that are most likely to be subject to looting are those that are not part of an ongoing,

official excavation. To minimize site looting, it is necessary to prohibit acquisition of objects that are looted from any archaeological site. The Guidelines also do not place sufficient emphasis on transparency of museum policies and acquisitions. Museums should make the full history of an archaeological artifact public. Failure to disclose information often aids in the obfuscation of the background of recently looted archaeological materials.

The AAMD Guidelines require compliance with all U.S. law[83] but say nothing about compliance with the law of the country of origin or other countries through which the object passed. In contrast, the ICOM Code of Ethics emphasizes not merely basic compliance with U.S. law but also compliance with the laws of the country of origin and intermediary countries.[84] Such compliance would contribute greatly to the avoidance of acquiring undocumented artifacts while also assisting museums in avoiding legal complications in the United States.

Probably the most troubling aspect of these Guidelines is the provision that addresses circumstances in which a proposed acquisition can proceed, even when there is not sufficient information for a museum to determine whether the acquisition would comply with the Guidelines or with applicable law. An acquisition can proceed when "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."[85] This exception would apply to virtually any object an art museum will choose to acquire, and it also ignores the underlying purpose of restitution. While restitution vindicates the rights of the true owner, it also represents a failure in that it means that a site has been looted and the object's original context is lost. Restitution has a dual purpose: reuniting the object with its proper owner *and* serving as a disincentive to future looting. The AAMD Guidelines fail to recognize this second purpose. The other exception is almost equally vague and troubling in that it allows acquisition "if the work of art is in danger of destruction or deterioration."[86] Without any sense of urgency or immediacy to the deterioration, this standard could again apply to virtually all ancient works of art and artifacts.

These exceptions are qualified by the recommendation that museums should only acquire antiquities that have been out of their country of origin for ten years. Yet ten years is too short a time to protect a museum from claims for recovery of stolen artifacts by the rightful owner. The fact that this time limitation is a "moving target"—that is, it fails to establish a specific cutoff

date—means that the incentive to loot sites will not be diminished. A middleman knows that looted material need only be held in storage for ten years and then, under the AAMD Guidelines, it becomes eligible for acquisition.

Museums and private collectors need to recognize the fundamental difference between collecting archaeological artifacts and other types of art works and cultural objects. The indiscriminate collecting of archaeological artifacts, which puts money into the market and provides the incentive for further looting, imposes negative externalities on all segments of society that occur only rarely in other forms of collecting. Only the collecting of undocumented artifacts, which leads to site looting, creates direct and immeasurable harm through destruction of the historical record and the loss of the non-renewable cultural heritage. American museums, as educational institutions, must give priority to the preservation of the cultural and historical record and must adopt stringent policies that are tailored to deterring, rather than fostering, the demand for undocumented ancient artifacts and works of art.

There are other voices within the museum community. Focus on the AAMD Guidelines could lead one to ignore the many other museums in the United States that take a different approach.[87] This dichotomy in types of museums also reflects different approaches to how we try to understand the past. The large collecting art museums, represented by the AAMD, tend to focus on the beauty and aesthetic qualities of ancient artifacts that were often once utilitarian but have been transformed into "art" through imposing our modern canons of art historical analysis onto ancient civilizations.[88] Other museums concentrate more on understanding the full context of the past, in which the art object and its aesthetic qualities play a role, but not the exclusive role.

It is in this context that the Getty Museum's recent announcement of its new policy for the acquisition of ancient art takes on remarkable significance. The Getty will now apply a marker date of November 1970, the date of the adoption of the 1970 UNESCO Convention, by which potential acquisitions will be judged. The Getty will require affirmative documentation that the artifact was out of its country of origin or in the United States before November 1970 or that it was legally exported from the country of origin after 1970.[89] As one of the art museums in the United States with the financial capacity to make major acquisitions on the international art market, the Getty should have an influence on market practices, and its policy is a rejection of the approach adopted by the AAMD, of which the Getty is a member.

Conclusion

The question now to be posed is whether the other art-collecting museums in the United States and the other wealthy nations of the world will change their practices and adopt greater transparency by which their practices can be judged. Museums in the United States are, in many senses, the collector of last resort due to both their highly visible leadership role among museums throughout the world and due to the United States tax structure which allows American private buyers to pay a premium, which will be returned when they contribute an art work to a museum and receive a charitable deduction in exchange.[90]

What will be the collecting practices of these museums in the future? Have they changed or will newspaper headlines in 30 years recount the restitution of artifacts looted and bought today? U.S. museums often claim that they have changed. However, if the AAMD Guidelines are an indication, that change is not sufficient. Many museums claim that they follow more stringent acquisition practices than those in the AAMD Guidelines, but they often do not make their policies or new acquisitions public. It is therefore not possible to determine what their policies are or whether their practices match these policies. Until museums adopt greater transparency, the public will be left to wonder. However, both greater transparency and greater accountability should be required in exchange for the significant public direct and indirect subsidies that museums in the United States receive.

The agreement between the Republic of Italy and the Metropolitan Museum of Art and that with the Boston Museum of Fine Arts can serve as a model for future cooperation between archaeologically rich nations and the museums of the United States and other regions of the world. The agreement with the Metropolitan allows the Met to retain the Euphronios krater for two years and the Hellenistic silver set for four years. Italy has already loaned new objects to both the Metropolitan and the Boston MFA.[91] The agreements also encourage the museums to conduct excavations in Italy and to bring excavation finds to the United States for study and display. This type of agreement based on mutual respect and cooperation is the future both for museums and for those nations rich in archaeological resources that wish to protect their sites from looting while, at the same time, sharing their heritage with other nations. However, the collecting museums should follow the Getty's example by demonstrating respect for the laws of the nations rich in archaeological heritage and concern for the nexus between collecting practices and the ongoing looting of sites.

The question that will determine the future is not whether museums in the United States will have archaeological artifacts and ancient art works to display. Rather, the question is how will these artifacts come to U.S. museums. Will museums continue in an antagonistic standoff with other nations while providing the incentive for looting and destruction of sites and monuments, or will they turn to cooperative means of obtaining artifacts, which have their full story to tell, to display to, educate, and please the American public?

Notes

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1. See, e.g., Tracy Wilkinson, *Ex-Getty Antiquities Curator Appears at Italian Court Session*, LOS ANGELES TIMES, Nov. 17, 2005, at A9; Jason Felch & Ralph Frammolino, *Several Museums May Possess Looted Art*, LOS ANGELES TIMES, Nov. 8, 2005, at A16 (noting that Marion True is believed to "be the first American museum official targeted for prosecution by a foreign government").
2. See, e.g., Neela Banerjee & Micah Garen, *Saving Iraq's Archaeological Past from Thieves Remains an Uphill Battle*, NEW YORK TIMES, Apr. 4, 2004, at A16; Joanne Farchakh, *Le massacre du Patrimoine irakienne*, ARCHAEOLOGIA, July–Aug. 2003, at 14, 25–29 (2003); Micah Garen, *The War within the War*, ARCHAEOLOGY, July–Aug. 2004, at 28, 31.
3. Agreement between the Ministry for Cultural Heritage and Activities of the Italian Republic and the Metropolitan Museum of Art (Feb. 21, 2006) (copy on file with author). The Boston Museum of Fine Arts and Italy have recently entered into a similar agreement; for the text of the agreement and a list of the objects returned, see http://www.mfa.org/collections/index.asp?key=2656
4. The first international instrument to address exclusively the protection of cultural property was the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, available at http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html. For more discussion, see Patty Gerstenblith, *From Bamiyan to Baghdad: The Protection of Cultural Heritage during Time of Conflict at the Beginning of the 21st Century*, 13 GEO. J. INT'L L. 245 (2006).
5. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].
6. Convention on Cultural Property Implementation Act , 19 U.S.C. §§ 2601–13 (2000) (CPIA). This legislation implemented only Articles 7(b)(ii) and 9 of the 1970 UNESCO Convention.

7. State Parties to the 1970 UNESCO Convention, available at http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha (last visited Aug. 25, 2006).
8. See *id.* The Swiss implementing legislation is the Swiss Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act), available at http://www.kultur-schweiz.admin.ch/arkgt/files/kgtg2_e.pdf. The U.K. ratified the Convention earlier but enacted its implementing legislation in 2003, the Dealing in Cultural Objects (Offences) Act 2003, 2003 Ch. 27, available at http://www.opsi.gov.uk/acts/acts2003/20030027.htm. Japan ratified the Convention in 2002, and other market nations such as Germany and Belgium are considering taking this step as well.
9. John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831 (1986).
10. *Id.* at 832. On the other hand, market nations are defined as those where "demand exceeds the supply, [which] encourages export from source nations." *Id.*
11. John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 363 (1989).
12. Merryman, *Two Ways, supra* note 9, at 846.
13. Merryman, *The Public Interest in Cultural Property*, *supra* note 11, at 355–361.
14. *Id.* at 361–363.
15. John Henry Merryman, *Cultural Property, International Trade and Human Rights*, 19 CARDOZO ARTS & ENT. L.J. 51 (2001), where Merryman refers to the field of cultural property law as "cultural property trade law."
16. The philosopher Kwame Anthony Appiah associates his advocacy of free circulation of contemporary art works and crafts from African nations as well as the ability of African nations to acquire art works from other parts of the world, which he terms cosmopolitanism, with Merryman's notion of "cultural internationalism." Yet this association is misplaced when applied to the archaeological heritage. Appiah recognizes the need for and legitimacy of national ownership of archaeological artifacts when he writes, "So when I lament the modern thefts from Nigerian museums or Malian archaeological sites or the imperial ones from Asante, it's because the property rights that were trampled upon in these cases flow from laws that I think are reasonable." Anthony Appiah, *Whose Culture Is It Anyway?* 53:2 THE NEW YORK REVIEW OF BOOKS 11 (Feb. 9, 2006).
17. Morag K. Kersel, *License to Sell: The Legal Trade of Antiquities in Israel* 5 n. 13, Ph.D. Dissertation, University of Cambridge (2006) (citations omitted) (copy on file with author).
18. *Id.* at 10–11 (citations omitted).
19. See, e.g., *supra* note 1; Peter Watson & Cecilia Todeschini, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES (2006). In a recent example,

the Getty Museum agreed to return two of four objects claimed by Greece. One is a votive relief purchased by J. Paul Getty in 1955 but which had been stolen from the storerooms of the French archaeological mission on the island of Thasos. The second is a grave stele that the museum purchased from Safani Gallery in 1993. It had been previously unknown before its purchase. Hugh Eakin, *Getty Museum Agrees to Return Two Antiquities to Greece*, NEW YORK TIMES, July 11, 2006, at B1. While the former is an example of traditional theft, the latter is an example of "archaeological theft"; such objects are the product of the looting of archaeological sites.

20. Market proponents deny this cause-and-effect relationship between the acquisition of undocumented antiquities and the ongoing looting of sites. *See infra* notes 78–79 & accompanying text.
21. The first federal law in the United States to address the archaeological heritage was the Antiquities Act of 1906, 16 U.S.C §§ 431–433m, which vested ownership and control of artifacts found on federally owned or controlled land in the federal government. The Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa–470hh (1979), superseded the Antiquities Act as the latter applied to archaeological sites. ARPA also contains an anti-trafficking provision, which can apply to stolen artifacts that originate in other countries, and thus has international applications as well. 16 U.S.C. § 470ee(b)–(c).
22. *U.S. v. McClain*, 545 F.2d 988 (5th Cir. 1977). *McClain* was preceded by *U.S. v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), which was decided on the same principle of national ownership.
23. National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2006) (prohibiting the interstate or international movement of stolen property and the receipt, transfer, and possession of stolen property that has been transported across state or international boundaries, is worth more than $5,000, and is known to have been stolen).
24. The defendants' conviction on the substantive counts was reversed because the Fifth Circuit held that only Mexico's 1972 law was truly a vesting statute, but the defendants' conviction on the conspiracy count was affirmed. *U.S. v. McClain*, 593 F.2d 658 (1979).
25. See, e.g., the comments of James Cuno, director of the Art Institute of Chicago, written in 2001: "the issue of whether U.S. law respects a foreign country's claims of ownership on property illegally exported from its borders remains unclear (at least to me)." James Cuno, *U.S. Art Museums and Cultural Property*, 16 CONN. J. INT'L L. 189, 195 (2001), and the comments of a London dealer, "I think when they [source governments] say that things that they don't even know exist are theirs, you know[,] things so far undiscovered, that seems to me not an easy thing to claim. And you very easily get confused between real theft and that kind of

theft, . . ." quoted in Simon Mackenzie, GOING, GOING, GONE: REGULATING THE MARKET IN ILLICIT ANTIQUITIES 57 (2005)

26. See, e.g., *Gov't of Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989).
27. See, e.g., *Repub. of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass 1992); Lawrence M. Kaye and Carla T. Main, *The Saga of the Lydian Hoard: U ak to New York and Back Again*, in ANTIQUITIES TRADE OR BETRAYED: LEGAL, ETHICAL & CONSERVATION ISSUES 150, 153–54 (Kathryn W. Tubb ed. 1995).
28. *U.S. v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, U.S. v. Schultz, 333 F.3d 393 (2d Cir. 2003).
29. NADAOPA had filed *amicus* briefs in most of the major cultural property cases over the past 30 years. It also opposed implementation of the 1970 UNESCO Convention, the form of the 1995 Unidroit Convention, and most, if not all, of the bilateral agreements that the United States has entered into pursuant to the Convention on Cultural Property Implementation Act, for which, see *infra* notes 30–34 and accompanying text.
30. 19 U.S.C. §§ 2601–13.
31. Articles 7(b)(ii) and 9.
32. 19 U.S.C. § 2607. The definition of "cultural property" tracks that given in Article 1 of the UNESCO Convention and is very broad. 19 U.S.C. § 2601 (6).
33. 19 U.S.C. §§ 2602–03.
34. 19 U.S.C. § 2609.
35. 18 U.S.C. §§ 542, 545. However, archaeological objects raise an interesting question for the definition of "country of origin." In *United States v. An Antique Platter*, 184 F.3d 131 (2d Cir. 1999), the Second Circuit held that the country of origin of an ancient gold bowl or phiale was Sicily, where it was excavated, rather than Switzerland (as declared by the importer) through which it was transported en route to the United States.
36. 16 U.S.C. § 470ee(c) (1979).
37. Mackenzie, *supra* note 25.
38. United States implementation of the Convention on Trade in Endangered Species and other conventions concerning endangered species of plant and animal life is codified at 16 U.S.C. §§ 1531–40. This statute authorizes civil penalties (fines and seizure and forfeiture of all equipment, including vessels, used in the violation of the statute), criminal penalties, and citizen suits to ensure enforcement. 16 U.S.C. § 1540.
39. Mackenzie, *supra* note 25, at 25–32.
40. Some writers use the term "provenience" to indicate the history of an antiquity back to its archaeological find-spot and use the term "provenance" to indicate the history of ownership of a work of art. If a provenance for an antiquity is complete, then it would satisfy the criteria of provenience. However, many art market professionals provide

only an incomplete ownership history of an antiquity. Unfortunately, usage even among scholars varies; however, as used here "provenience" indicates a complete history of an artifact back to its find-spot.

41. Mackenzie, *supra* note 25, at 32–38.
42. *Id.* at 56.
43. *Id.* at 163–65. This rationalization—that the source of unprovenanced antiquities is chance finds—ignores the fact that chance finds are generally not in sufficiently good condition to be saleable on the international antiquities market. True chance finds are found near the surface and are fragmentary, scattered, and weathered; objects that are of sufficiently high quality and condition to be collectible by a high-end collector or museum are most likely found in tombs. It therefore is not credible that most antiquities on the international market are chance finds. In fact, one collector went so far as to classify any objects found by digging not carried out by an archaeologist as chance finds! *Id.* at 56–57. In the United Kingdom, where the Portable Antiquities Scheme requires the reporting of finds, the following data were reported for the year 2004–05: almost 70% of finds were discovered by metal detecting; another 9% were discovered during deliberate field-walking but without the use of a metal detector; only 9% were found during construction, agricultural, and gardening activities. The Portable Antiquities Scheme Annual Report 2004–05, p. 88 and Table 8, available at http://www.finds.org.uk/documents/PAS_2004_05.pdf. For further discussion of chance finds, see *infra* note 79.
44. Mackenzie, *supra* note 25, at 47–60.
45. The nation of origin met its burden of proof, at least to a sufficient degree that the defendant settled, in the case of the Lydian hoard in which Turkey recovered over 360 artifacts purchased by the Metropolitan Museum of Art in New York (Kaye and Main, *supra* note 27, and in the case of the OKS Coin hoard, in which Turkey recovered more than 1,500 coins (*Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass. 1992)). However, in two other cases, *Gov't of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), aff'd sub nom. *Peru v. Wendt*, 933 F.2d. 1013 (9th Cir. 1991), and the Sevso silver case, *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 561 N.Y.S.2d 566 (1990), the claimant nation was unable to establish that the artifacts at issue came from within its modern borders.
46. See, e.g., *Schultz*, 333 F.3d 393, 413–414 (discussing the government's burden in proving a defendant's conscious avoidance).
47. Auction houses typically have none of their own funds at stake in an art market transaction because they do not own the objects they sell; they merely act as agent for the owner. If a purchaser is required to return an antiquity to its proper owner, the purchaser seeks recourse from the seller. The auction house loses only its commission. Dealers, on the other hand, typically own the works they sell and therefore

have more of their own funds at stake in a transaction. To some extent, these distinctions between auction houses and dealers have been blurred in recent years.

48. Joanne Farchakh, *Témoignages d'une Archéologie Héroïque*, ARCHEOLOGIA, May 2004, at 14, 25.
49. Press Release, U.S. Immigration and Customs Enforcement, Cultural Antiquity Returned to Iraqi Government after ICE Investigation (January 18, 2005), http://www.ice.gov/graphics/news/newreleases/articles/iraqiartifact_011805.htm. The seals stolen from the Iraq Museum were of good but not top quality.
50. Cylinder seals sold at an auction in London in May 2003 ranged from $400 to $4,000 with an average of $1,000, while a seal auctioned by Christie's in 2001 sold for $424,000. Neil Brodie, *The Plunder of Iraq's Archaeological Heritage 1991–2005 and the London Antiquities Trade, in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE TRADE IN ANTIQUITIES 206, (N.J. Brodie et al. eds 2006); Suzanne Charle, *Tiny Treasures Leave Big Void in Looted Iraq*, NEW YORK TIMES, July 18, 2003, at E3.
51. See, e.g., www.sandsoftimeantiquities.com/; www.arsantiqua-online.com; www.artemission.com (last visited on August 19, 2006). This is not intended to indicate that these particular artifacts are recently looted from Iraq; however, it demonstrates one market value that may be placed on artifacts.
52. CHRISTIE'S, ANTIQUITIES, 16 June 2006, 25 (2006) (lot #28). The provenance given in the catalogue for the tablet and envelope went back to 1989. Iraq's antiquities law declaring national ownership dates to 1936; any artifact removed after this date without consent of the Iraqi government is stolen property. The sale price includes the buyer's premium and may be found at http://www.christies.com/auction/results/results_lotlist.asp?saleno=NYC1679&page=1
53. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003), available at http://daccess-dds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement. The U.K. provision is section 8 of Statutory Instrument 2003 No. 1519, available at http://www.hmso.gov.uk/si/si2003/20031519.htm.
54. See Kevin Chamberlain, *The Iraq (United Nations Sanctions) Order 2003—Is It Human Rights Act Compatible?*, 8 ART, ANTIQUITY & L. 357 (2003).
55. Mackenzie, *supra* note 25, at 132.
56. See http://www.fbi.gov/hq/cid/arttheft/arttheft.htm.
57. Mackenzie, *supra* note 25, at 135.
58. A recent example of this political pressure is the State Department's announcement that it will delay making a decision whether to impose import restrictions on undocumented archaeological artifacts from China. Jeremy Kahn, *U.S. Delays Rule on Limits to Chinese Art Imports*, NEW YORK TIMES, October 18, 2006, at E2.
59. See, e.g., James Cuno, *View from the Universal Museum*, in IMPERIALISM, ART AND RESTITUTION 15, 15–16 (John H. Merryman ed. 2006).

60. Declaration on the Importance and Value of Universal Museums (2003), available at http: www.clemusart.com/museum/info/CMA206_Mar7_03.pdf (last visited Sept. 17, 2006).
61. Neil MacGregor, the director of the British Museum, commented at the AAMD symposium, "Museums and the Collecting of Antiquities: Past, Present and Future," held May 4, 2006, that the British Museum, the true encyclopedic museum, was a product of eighteenth-century British empire and that such a museum could be created only as part of empire.
62. Christopher Chippindale & David W.J. Gill, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 97 AM. J. ARCHAEOLOGY 601 (1993); Christopher Chippindale & David Gill, *Cycladic Figures: Art versus Archaeology? In* ANTIQUITIES TRADE OR BETRAYED: LEGAL, ETHICAL AND CONSERVATION ISSUES 131, 132 (Kathryn W. Tubb ed. 1995).
63. Many rely on connoisseurship, the study of objects based on form, decoration, and other aesthetic criteria, to determine authenticity. However, connoisseurship cannot reliably determine authenticity as is demonstrated by the story of several Rembrandt paintings that were originally accepted as authentic, then considered inauthentic, and recently returned to authentic status. Kristine Wilton, *Deauthenticated Rembrandts Real After All*, ARTNEWS 84 (March 2006). Furthermore, because connoisseurship determines authenticity by comparing newly discovered objects with previously known exemplars, there is no opportunity to expand our knowledge. When a new type of archaeological artifact is excavated, it adds to our corpus of knowledge; when a new type is known only from the market, it is generally rejected as fake. Therefore, while the market is often considered a source of fake objects that corrupt the historical record, it can do a further disservice to the historical record by leading to rejection of authentic artifacts.
64. Chippindale & Gill, *Cycladic Figures*, *supra* note 62, at 133–34.
65. See, e.g., Cuno, *supra* note 59, at 29–30.
66. Quoted by Randy Kennedy & Hugh Eakin, *Met Chief, Unbowed, Defends Museum's Role*, NEW YORK TIMES, Feb. 28, 2006, at E1. Even if Mr. de Montebello's statistic of 98 percent is in some way accurate, then it only points out how much more we would know about the ancient world if all those artifacts had been recovered through controlled scientific excavation. Some of the information we would know if the Euphronios krater had been properly excavated include the age, sex, health, cause of death, and probably occupation of the person buried in the grave; what other grave goods accompanied the krater, in particular whether the other Euphronios vases that surfaced on the market at about the same time came from the same or nearby graves; the socioeconomic status of the individual; who else was buried with this individual. These facts would tell us about economy, religious beliefs, social class structure, and trade patterns of the ancient Etruscan world from which this rare krater originated.

67. Christopher Chippindale & David W.J. Gill, *Consequences of Contemporary Classical Collecting*, 104 AM. J. ARCHAEOLOGY 463, 504–05 (2000). See also Neil Brodie & Christina Luke, *Conclusion: The Social and Cultural Contexts of Collecting*, in ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 303, 309–10 (N. Brodie, M. Kersel, C. Luke, & K.W. Tubb eds. 2006).
68. See, e.g., Cuno, *supra* note 59, at 17–18; Brief of *Amici Curiae* American Association of Museums, *et al.* in Support of the Appeal of Claimant Michael H. Steinhardt, *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999). The AAM Brief (and Cuno, in reliance on it, *supra* note 57, at 20) states that the United States does not claim ownership of Native American cultural heritage objects (including human remains) found on federal land but rather gives these to lineal descendants or culturally affiliated tribes. AAM Brief, at 14–15. This is true only to a limited extent. Those cultural heritage remains and objects that are *not* related to a presently existing Native American tribe are not classified as Native American and ownership is vested in the United States. *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004). Therefore, even if one were to accept the notion that there is no cultural affiliation between the ancient peoples who occupied a particular land and the modern nation that controls the same land, it would be consistent with the law of the United States to vest ownership of culturally unaffiliated remains and objects in the modern nation.
69. See Patty Gerstenblith, *The Public Interest in Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 234–36 (2001).
70. For a comparison of the perspectives presented in the briefs presented by the AAM and by the Archaeological Institute of America, see Claire L. Lyons, *Objects and Identities: Claiming and Reclaiming the Past*, in CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 116 (Elazar Barkan & Ronald Bush eds. 2002).
71. Much modern collecting by both museum curators and private collectors is motivated by the notion of rescue. See, e.g., Shelby White, *A Collector's Odyssey*, 7 INT'L J. CULTURAL PROP. 170 (1998) (describing her acquisition and care for an ancient silver box of unknown origin).
72. In the wake of the looting of the Iraq Museum in Baghdad, commentators advocated that cultural objects should have been taken to Western nations where they would be better protected from war and chaos. See, e.g., John Tierney, *Did Lord Elgin Do Something Right?* NEW YORK TIMES, April 20, 2003, at Sec. 4, 1.
73. De Montebello stated, "As archaeologists have said, these unprovenanced objects are orphans, as their parentage, through the absence of a known find spot, is lost. But would these same archaeologists abandon a shivering, orphaned child on a cold rainy day in the street or would they look for an orphanage? We museums *are* the orphanage of these objects." Philippe de Montebello, Address to the National Press Club, April 17, 2006, at 17 (transcript on file with author).

74. It is reported that incomplete cuneiform tablets are destroyed; incomplete texts are not desirable for the market because there are so many complete ones available. Joanne Farchakh, Lecture at the University of California at Berkeley, "Mesopotamia Endangered: Witnessing the Loss of History" (Feb. 7, 2005), available at http://webcast.berkeley.edu/events/search.php?search_value=Farchakh&category=all&type=events&courseid=&semesterid=&submit=Go; Benjamin A. Foster, Karen Polinger Foster & Patty Gerstenblith, IRAQ BEYOND THE HEADLINES: HISTORY, ARCHAEOLOGY, AND WAR 209, 222 (2005). Human remains are left scattered by the looters in places such as the southwestern United States—*United States v. Shumway*, 112 F.3d 1413 (10th Cir. 1997)—and Peru—Lori Jahnke, "Research potential of looted cemeteries in the Norte Chico region of Peru," Presentation at the Society for American Archaeology Annual Meeting, Salt Lake City, Utah (2005).
75. See, e.g., the damage done to the Kanakaria mosaics to make them more saleable, Catherine Sease & Danae Thimme, *The Kanakaria Mosaics: the conservators' view*, in ANTIQUITIES TRADE OR BETRAYED: LEGAL, ETHICAL & CONSERVATION ISSUES 122, 124–27 (Kathryn W. Tubb ed. 1995), and the recutting of Neo-Assyrian reliefs to make them more attractive for the market, JOHN MALCOLM RUSSELL, THE FINAL SACK OF NINEVEH 48 (1998).
76. One of the best-studied examples of this are the Cycladic figurines of the third millennium B.C., 90 percent of which are known only from the market and of which a large proportion are suspected to be fakes. Chippindale & Gill, *Cycladic Figures*, *supra* note 62, at 132, 138–39.
77. Professor Elia has estimated that in southern Italy, nine tombs must be looted to yield one painted South Italian Apulian vase. Therefore some 36,000 tombs have been looted to supply the approximately 4,200 vases that appeared new on the market between 1980 and 1992. Ricardo Elia, *Analysis of the Looting, Selling, and Collecting of Apulian Red-Figure Vases: A Quantitative Approach*, in TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE 145,146, 151 (N. Brodie, J. Doole & C. Renfrew eds. 2001).
78. James Cuno, director of the Art Institute of Chicago, wrote: "[W]hen an antiquity is offered to a museum for acquisition, the looting, *if indeed there was any*, has already occurred. . . . Museums are havens for objects that are already, *and for whatever reason*, already alienated from their original context. Museums do not alienate objects." Cuno, *supra* note 59, at 29 (emphasis added). Cuno's use of the passive voice and the doubt he attempts to cast on the question of whether an undocumented artifact is the product of looting indicate his denial of any link between a museum's acquisitions (and the funds it puts into the market) and the looting. See also Mackenzie, *supra* note 25, at 142–45 (quoting from dealers' comments on the relationship between looting and market demand).
79. I do not include in the category of accidental finds those artifacts found through metal detecting activities. The vast majority of "accidental" finds reported in the United

Kingdom are found by metal detecting. See *supra* note 43. Such activity is not, however, "accidental" in the sense that the metal detectorist is intentionally looking for metal artifacts, such as coins, jewelry, or belt buckles. Such activity has no other purpose (unlike agriculture and construction) and often does a great deal of harm to archaeological and historic sites, both in the United States and in other countries. In addition, the failure to report such finds, whether accidental or not, is generally illegal.

80. See Roger Atwood, STEALING HISTORY: TOMB ROBBERS, SMUGGLERS, AND THE LOOTING OF THE ANCIENT WORLD (2004) (Peru); Farchakh, *supra* note 74 (Iraq); C.H. Roosevelt and C. Luke, *Looting Lydia: The Destruction of an Archaeological Landscape in Western Turkey*, in ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE 173 (N. Brodie, M.M. Kersel, C. Luke, & K. Walker Tubb eds. 2006) (Turkey); Kersel, *supra* note 17 (Israel and the West Bank); Watson & Todeschini, *supra* note 19 (Italy); Rachanie Thosarat, *The Destruction of the Cultural Heritage of Thailand and Cambodia*, in TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE 7 (N. Brodie, J. Doole, & C. Renfrew eds. 2001) (Thailand).
81. See generally Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409 (2003).
82. Report of the AAMD Task Force on the Acquisition of Archaeological Artifacts and Ancient Art, available at httpe://aamd.org/papers/documents/TaskForceReportwithCoverPage_Final.pdf. The AAMD is an association of approximately 175 of the larger art museums in North America. The American Association of Museums, with a much larger membership, has so far remained silent on the particular problems of acquisition of antiquities.
83. Report, *supra* note 82, at 4.
84. ICOM CODE OF ETHICS FOR MUSEUMS, 2006, art. 2.3, available at http://icom.museum/ethics.html#intro, states that "Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item from discovery or production."
85. Report, *supra* note 82, at section E.
86. *Id.*
87. See the discussion of the Field Museum of Natural History by Willard L. Boyd, *Museums as Centers of Cultural Understanding*, in IMPERIALISM, ART AND RESTITUTION 47, 50, 62–63 (John Henry Merryman ed. 2006).
88. See Brodie and Luke, *supra* note 67, at 306–14.
89. See http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf. Despite the Getty's recent woes and the trial of its former antiquities curator, Marion

True, the Getty's previous acquisitions policy was more stringent than the AAMD Guidelines. In contrast to the AAMD's moving date, the Getty's previous policy established a fixed cutoff of 1995, which today (in 2007) is more than ten years in the past.

90. Shelby White, the owner of one of the largest collections of antiquities in the United States, wrote that the extent of public subsidy when art works are donated to museums from larger estates is approximately one-fourth of the art's fair market value. Shelby White, *Building American Museums: The Role of the Private Collector*, *in* WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 165, 174 (Kate Fitz Gibbon ed. 2005).
91. Randy Kennedy, *Italy Lends Antiquities to 2 Museums*, NEW YORK TIMES, Nov. 29, 2006, at B5.