The Successes and Failures of Self-Regulatory Regimes for Dealing with Museum Holdings of Nazi-Looted Art and Looted Antiquities

Erin L. Thompson
Erin Thompson
John Jay College, City University of New York
Professor of Art Law and Art Crime

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Abstract

American museums have long recognized that their collections sometimes include two categories of artworks whose prior owners parted with them unwillingly: Nazi-looted art and illicitly exported archaeological objects. The relevant industry associations, American Association of Museums and the American Association of Museum Directors, have promulgated self-regulatory regimes that purport to ensure that museums return any objects to which they do not hold good title to their rightful owners. However, the success of these regimes has varied widely based on whether the artwork is an archaeological antiquity or a Nazi-looted piece. My paper identifies the ways in which the regimes and the contexts in which they were created diverge, applying scholarship on effective self-regulatory regimes to argue that museums need the outside scrutiny and internal convergence of opinion that have characterized the Nazi-looted art situation to assure the compliance that is lacking for their antiquities regime, which has little outside scrutiny and is marked by extreme differences in opinion within the museum community as to how to solve the problem (and even whether it is a problem at all).

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This paper examines American museums’ attempts to create effective self-regulatory responses to two problematic categories of objects in their collections: artworks looted by the Nazis and antiquities smuggled out of their country of origin. Museums have returned a number of such objects to their rightful owners, either to the heirs of the collectors who were victims of Nazi oppression or to the government of the source country for the antiquities. The American Alliance of Museums (AAM) and the Association of Art Museum Directors (AAMD), the organizations that together set standards for museums and lobby for their interests, have promulgated guidelines to regulate museums’ decisions about these returns.¹

This paper analyzes the AAM and AAMD guidelines, demonstrating that these organizations have reacted to structurally similar problems with widely divergent recommendations. I consider the factors that have led to this divergence, from governmental oversight and threats of lawsuits to philosophical divergence among the museum community as to the proper solution of these problems that has led to gaps between what museums have said they are obligated to do and what they have actually done. Ultimately, I will apply recent scholarship on self-regulatory regimes² to argue that what appears to be a self-created, self-regulating means of addressing the problem of Nazi-looted art has been successful precisely because it was neither entirely self-created

¹ The AAM, founded in 1906, currently represents 21,000 museums, offering
nor self-regulating. By contrast, I will argue that the current self-regulatory regime for museums’ treatment of smuggled antiquities is not effective. It fails by doing too much in some realms and not enough in others precisely because it is a self-regulatory regime without sufficient support or enforcement by outside bodies.

Part One: Nazi-Looted Art

The Problem of Nazi-Looted Art

The Nazis engaged in a sustained, highly organized program not just of physical genocide, but cultural and economic genocide as well, confiscating uncountable numbers of artworks owned by Jewish families. After the war, many of these works were returned to their owners, but many more had disappeared into the collections of new owners. Some, passed from seller to seller, were eventually purchased by or donated to American museums, which were unaware of the wartime history of their new acquisitions.³

American museums have long been involved in the return of Nazi-looted art, starting in 1943, when curators joined the United States Army’s Monuments, Fine Art and Archives section to return hundreds of thousands of Nazi-looted objects to their

³ Some of the most notable publications on the history of looting during World War II and on governmental returns after the war are Wojciech Kowalski, ART TREASURES AND WAR: A STUDY ON THE RESTITUTION OF LootED CULTURAL PROPERTY (1998); Nancy H. Yeide, Beyond the dreams of avarice: the hermann goering collection (2009); Michael J. Kurtz, nazi contraband: american policy on the return of european cultural treasures, 1945-1955 (1985); Lynn H. Nicholas, the rape of europe: the fate of europe’s treasures in the third reich and the second world war (1994); Jeanette Greenfield, The return of cultural treasures (2007); The spoils of war: world war II and its aftermath: the loss, reappearance, and recovery of cultural property (1997).
countries of origin. However, victims who did not benefit from these immediate returns faced considerable difficulties locating their lost property, since archival records needed to trace ownership of works of art were closed or inaccessible until the late 1980’s.

Museum Guidelines for Nazi-Looted Art

With the opening of these archives, claimants began to come forward, and the AAMD and AAM convened task forces to draft guidelines on how museums should deal with the problem of their potential holdings of Nazi-looted art. Substantially similar final guidelines were adopted by the AAMD in 1998 and the AAM in 1999 (“Nazi-era guidelines”).

From the beginnings of the drafting process, AAM and AAMD leadership, as well as those associated with museums, have uniformly affirmed the importance of the return of Nazi-looted art. Working from this principle, the guidelines require each member

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4 AAMD, ART MUSEUMS AND THE IDENTIFICATION AND RESTITUTION OF WORKS STOLEN BY THE NAZIS 1 (2007), https://aamd.org/sites/default/files/document/Nazi-looted%20art_clean_06_2007.pdf [hereinafter IDENTIFICATION AND RESTITUTION]. Note that these returns were generally not to specific possessors – that was supposed to be taken care of by individual countries, which did better and worse jobs – see France’s ongoing holding of artworks taken from its Jewish citizens without much effort to find their rightful owners.


6 IDENTIFICATION AND RESTITUTION, supra note 4, at 2.


8 See, e.g., Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic and International Monetary Policy of the

Thompson, Successes and Failures of Self-Regulatory Regimes, 4
museum to identify “all objects in its collection that underwent a change of ownership between 1933 and 1945, and that were in continental Europe between those dates” and make current provenance\(^9\) information on these objects accessible to the public.\(^{10}\) The guidelines direct museums to resolve any claims that emerge from their research “in an equitable, appropriate, and mutually agreeable manner”.\(^{11}\)

Initially, a number of museums posted information about their Nazi-era research on their own websites.\(^{12}\) However, in 2003, the AAMD and AAM launched the Nazi-Era Provenance Internet Portal, “a searchable registry of objects in U.S. museum collections that changed hands in Continental Europe during the Nazi era,” to meet the guidelines’

\(^9\) I use “provenance” in the sense of the record of where an object has been, and who has owned it, since its creation. Many antiquities excavated by archeologists have relatively complete provenances. For example, the Bust of Nefertiti was carved sometime during this Egyptian queen’s lifetime (c. 1370-1330 B.C.E) and was abandoned in a sculptor’s workshop in Tell el-Amarna until it was excavated on December 6\(^{th}\), 1912 by a German archeological team. After a brief period of possession by a German sponsor of the excavation, it was donated to the Berlin Egyptian Museum, where it has remained since.

\(^10\) AAMD, Nazi-Era GUIDELINES, supra note 7, at §§ II.A, II.B, II.C.

\(^11\) AAMD, Nazi-Era GUIDELINES, supra note 7, at §§ II.E.1, II.D.2, II.E.3.

\(^12\) The Metropolitan Museum of Art and the Museum of Modern Art in New York, the Art Institute of Chicago, Boston’s Museum of Fine Arts, and the Cleveland Museum of Art had previously created special areas of their websites for users to search for objects with incomplete or questionable Nazi-era provenance. Helen Wechsler & Erik Ledbetter, The Nazi-Era Provenance Internet Portal: collaboration creates a new tool for museums and researchers, 56.4 MUSEUM INT’L 53, 58 (2004) (authors are AAMD employees).
requirement to give information to claimants more efficiently (“Nazi-Era Portal”). The Nazi-Era Portal lists all holdings in museum collections that underwent a change of ownership between 1933 and 1945 and that were in continental Europe between those dates, even if there is no indication of any Nazi involvement in changes of ownership during this period.

The Efficacy of the Nazi-Era Guidelines

The provenance research required by the Nazi-era guidelines is a massive undertaking. American museums hold an estimated 18 million objects, and the AAM reported that, as of July 2006, its member museums had identified approximately 25,000 works that required study into their ownership history during the Nazi era. Museums have made substantial progress in looking at these holdings. When the Nazi-Era Portal launched in 2003, it included 5,700 objects from 66 museums; just ten months later, 110 museums were participating, with a total of 12,600 objects. Currently, ten years after the website’s launch, users can search 28,904 objects from 175 museums. Most importantly, as of May 2013, American museums have returned 27 Nazi-looted artworks to the heirs of their rightful owners; the great majority of these returns were carried out through negotiations and did not involve litigation.

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14 IDENTIFICATION AND RESTITUTION, supra note 4, at 1.
15 Wechsler & Ledbetter, supra note 12, at 61.
17 According to a periodically updated list, available at http://www.herrick.com/sitecontent.cfm?pageID=29&itemID=12567, compiled by the
External Scrutiny and Pressure on the Nazi-Era Guidelines

American museums were free to create a self-regulatory regime for dealing with the problem of Nazi-looted art because they are private entities (unlike much of the rest of the world, where museums are generally state-run) and are not overseen by any specific governmental regulatory agency. Nor are there any directly applicable federal or state laws about how museums should deal with Nazi-looted art.

However, the credit for the successful identifications and returns of Nazi-looted art held by American museums is not due to the museums alone. A substantial amount of governmental pressure and scrutiny accompanied the formulation of the guidelines and their continuing execution.

Thus, as the AAM and AAMD were drafting their guidelines, a Presidential Advisory Commission on Holocaust Assets in the United States, appointed by President Clinton in June 1998, was also considering the issue of how museums should treat Nazi-looted art. The Commission invited the participation of the AAM and AAMD, who

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18 Wechsler & Ledbetter, supra note 12, at 55.
19 The Commission was established by the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No.105-186, 112 Stat. 611 and was charged with researching the current status of assets taken from victims of the Holocaust that came into the possession of the U.S. federal government, reviewing the research done by others regarding assets that came to private collections and non–federal government organizations, and making recommendations to the President on policies that should be adopted to make restitution to the rightful owners of stolen property or their heirs. § 3(d)(1). The Commission was charged with focusing on art, cultural property, gold, and non-gold financial assets. § 3(a)(2).
20 Wechsler & Ledbetter, supra note 12, at 56; Michael J. Bazyler & Amber L. Fitzgerald, Trading with the Enemy: Holocaust Restitution, the United States Government, and
contributed to its final report. Notably, the possibility of legislation to set standards for return of Nazi-looted art was considered during Congressional hearings in 1998, but several museum directors successfully argued in their testimony that this issue should be left to museum professionals.

Simultaneously, in late 1998, the U.S. Department of State hosted the Washington Conference on Holocaust-Era Assets; delegations from 44 countries and numerous internationals organizations participated in drafting the Washington Principles, an 11-point plan to aid claimants to recover Nazi-looted art. The AAM and AAMD were key participants in this Conference, and their guidelines formed the basis for the Washington Principles. Conversely, the Conference and its Principles also served to give an official governmental stamp of approval to the AAM and AAMD guidelines – and also to solidify them, so that museums could not retreat from their self-imposed rules.

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24 IDENTIFICATION AND RESTITUTION, supra note 4, at 2.

25 There are a number of other smaller governmental organizations that also exert pressure on museums with regards to Nazi-looted art; for instance, the New York State Banking Department’s Holocaust Claims Processing Office, created in 1997 to provide assistance to individuals seeking to recover Holocaust-looted assets, explains its mission in regards to art as helping heirs make claims against museums: New York State Banking Department, Holocaust Claims Processing Office, “History and Mission,” http://www.claims.state.ny.us/hist.htm.
The external pressure applied to museums during the creation of the Nazi-era guidelines has been complemented by on-going governmental scrutiny of museum activities. Representatives of the AAM and AAMD have been repeatedly called to testify before Congress about the progress of museums’ dealing with Nazi-looted art, with members of Congress repeatedly stressing that “there is still much work to be done” on the part of the museums.

The government was not the only source of external pressure on museums. There was also the threat of legal action, as was demonstrated by a number of prominent lawsuits in the late 1990’s. In these lawsuits, victims of Nazi atrocities successfully obtained compensation for their losses, including from the American corporations whose German subsidiaries had benefited from slave labor. In a number of these lawsuits,

26 Specifically, in several hearings conducted from 1997 to 2006 by the U.S. House of Representatives’ Committee on Financial Services, Domestic and International Monetary Policy Subcommittee. See IDENTIFICATION AND RESTITUTION, supra note 4, at 2. The most recent of these hearings, held in July 2006, was the “Review of the Repatriation of Holocaust Art Assets in the United States,” conducted by the U.S. House of Representatives’ Committee on Financial Services, Domestic and International Monetary Policy Subcommittee, in July 2006; it featured testimony by Edward H. Able, Jr., AAM President and CEO, and James Cuno (then Director of the Art Institute of Chicago) and Timothy M. Rub (then Director of the Cleveland Museum of Art) on behalf of the AAMD.


28 Less directly related to art, but still undoubtedly of interest to the museum community pondering what to do with its holdings of potentially Nazi-looted art, were a series of class action suitsthat resulted in huge awards against companies that had somehow benefited from forced and slave labor, illegal seizure of private and communal property, and other personal injuries of Holocaust victims. In the mid to late 1990’s, a number of states passed laws allowing Holocaust victims to bring suit regarding WWII-era claims in state courts against corporations doing business in that state; for a listing of these laws, see Michael J. Bazyler, Nuremberg in America: Litigating the Holocaust in United States Courts, 34 U. RICH. L. REV. 1, app. B, at 272–83 (2000) [hereinafter Bazyler, Nuremberg in America]. The most prominent of the resulting class-action lawsuits were against three
victims or their heirs succeeded in recovering artwork stolen during WWII\(^\text{29}\) from its current holders.\(^\text{30}\) These lawsuits demonstrated to museums that ignoring the problem of

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\(^\text{30}\) The heirs of an American serviceman, Joe Meador, were sued by a German church seeking the return of medieval artworks stolen by Meador in the aftermath of WWII; the church discovered the whereabouts of the artwork when Meador’s heirs attempted to sell them in the late 1980’s, and the parties reached an out-of-court settlement in 1992, wherein the heirs agreed to return all of the works in exchange for $2.7 million. The heirs then faced charges for conspiracy to sell stolen property filed by the U.S. Attorney’s Office (ultimately dismissed as time-barred; see U.S. v. Meador, No. 4:96crl, 1996 U.S. Dist. LEXIS 22058, at *1 (E.D. Tex. Oct. 23, 1996), aff’d, 138 F.3d 986 (5th Cir. 1998) and an inquiry for tax evasion. See also Thomas R. Kline, *Legal Issues Relating to the Recovery of the Quedlinburg Treasures*, in *THE SPOILS OF WAR* (1997). Another prominent early claim was for a Degas painting, *Landscape with Smokestacks*, which had been confiscated by the Nazis during their occupation of France from the Gutmann family, whose heirs filed suit against the painting’s current owner, an American art collector, in federal court in 1996. After receiving widespread press coverage, the case settled with a partial payment to the heirs who agreed to donate the work to the Art
Nazi-looting art or failing to address the issue with rigorous self-regulation would mean that claims would be resolved by expensive litigation rather than cooperative negotiations.

The press also operated as a source of pressure and scrutiny. Beginning in early 2000, a number of influential newspapers pushed museums to complete their preliminary surveys of their collections for potential Nazi-looted art, accusing museums “of everything from laziness to stonewalling”.

Journalists have also given wide coverage to Congressional hearings about Nazi-looted art as well as Congress’ urgings of continued action by museums. And a large amount of scholarship, legal and art historical, has also appeared, much of it discussing how the continuing problem of Nazi-looted art should be resolved.

Finally, a number of private organizations play a role in exerting continuing pressure on museums to honor their Nazi-era guidelines. These organizations, such as the Institute of Chicago. See, e.g., Hector Feliciano, The Aftermath of Nazi Art Looting in the United States and Europe: The Quest to Recover Stolen Collections, 10 DEPAUL J. ART & ENT. L. 1 (1999); Rebecca Keim, Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art, 3 PEPP. DISP. RESOL. L. J. 295, 304-05 (2003); Anne-Marie Rhodes, On Art Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code, 43 SAN DIEGO L. REV. 495, 504-06 (2006); Barbara J. Tyler, The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?, 30 RUTGERS L. J. 441, 453-55 (1999); Stephen E. Weil, The American Legal Response to the Problem of Holocaust Art, 4 ART ANTIQUITY & L. 285, 294-95 (1999).

31 Wechsler & Ledbetter, supra note 12, at 57.

32 See, e.g., Jacqueline Trescott, Holocaust Art Recovery Goal Still Eludes Advocacy Groups, WASH. POST, July 28, 2006, at C02 (“A House panel urged representatives of American museums yesterday to continue searching their collections for objects that might have been stolen by Nazis during World War II, after a group that acts as a clearinghouse for Holocaust claims expressed frustration over the slow pace of the process.”)

Holocaust Art Restitution Project and the World Jewish Congress’s Commission for Art Recovery, were created to aid claimants with research and claims for the restitution of Nazi-looted art from museums.\(^{34}\)

Not all of this external attention has been negative or adversarial; it has also led to offers of assistance and funding. The design and development of the Nazi-Era Portal, for example, was funded by federal agencies and arts-related and Holocaust survivor-related charitable foundations.\(^{35}\)

Thus, what seems at first to have been an entirely self-regulatory regime was in reality spurred by the demands of the government, the press, and private interest organizations, as well as by the threats of lawsuits. The necessity for this external pressure is hardly surprising, given that both the AAM and AAMD have repeatedly emphasized the complexities and expense of Nazi-era provenance research, which can involve incomplete or destroyed ownership records, expert examination of works of art, photographic archives, and documents in many languages in the far-flung archives of museums, auction houses, galleries, and other sources.\(^{36}\) Even in a situation where, as

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35 Wechsler & Ledbetter, supra note 12, at 60. Specifically, these funders are: The Institute of Museum and Library Services; Commission for Art Recovery of the World Jewish Congress; Samuel H. Kress Foundation; The Getty Grant Program; The Conference on Jewish Material Claims Against Germany– Rabbi Israel Miller Fund for Shoah Research, Documentation and Education; and The Max and Victoria Dreyfus Foundation Inc. Wechsler & Ledbetter, supra note 12, at 61.
here, museums agree that the goal is a good one, this would not be enough to ensure that museums actually commit the resources to work towards this goal, since museums have a number of admirable goals, from community education to the advancement of scholarship, which all compete for their limited staff time and funds.37

Part Two: Looted Antiquities

The Problem of Smuggled Antiquities

“Our goal is to assure our many publics that American museums are committed to only having in their collections objects to which they have clear legal title, untainted by controversy or illegal, unjust appropriation,” Edward H. Able Jr., the then-President of

on Domestic and International Monetary Policy of the Comm. on Financial Services (2006) (statement of Edward H. Able, AAM President and CEO) (stating that the research required by the guidelines “is expensive. For objects with no prior indication of Nazi looting, the costs range anywhere from $40 to $60 per hour, and the time needed to document just one object can vary enormously, from a week to a year, and if initial research suggests an object has a history that may include unlawful appropriation by the Nazis, time and expense can double or triple. One museum spent $20,000 plus travel and expenses over the course of 2 years to have a researcher resolve the history of just three paintings….AAM encourages Congress to consider appropriating additional funding to the Institute of Museum and Library Services aimed specifically at provenance research”).

Gerstenblith points out that museums have not felt a similar need to create policies to respond to the theft of art during other conflicts, such as those in Cyprus, Afghanistan, or Iraq, because “these other examples of war and human misery have not received the same kind of universal recognition and attention surrounding the art works stolen during the Holocaust, in either the legal system, the art world or the media.” 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, 445-46 (2003), citing Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, 917 F.2d 278 (7th Cir. 1990) (6th century CE mosaics stolen from church as result of war in Cyprus); Celestine Bohlen, Cultural Salvage in Wake of Afghan War, N.Y. TIMES, April 15, 2002, at El (thefts of antiquities from Afghanistan during war); Elizabeth Neuffer, In War Scenario, Antiquities Seen in the Line of Fire, BOSTON GLOBE, January 24, 2003, at Al (thefts from Iraqi museums following 1991 Gulf War).
the AAM, told the Washington Post when the Nazi-Era Portal was launched. However, there is another category of objects in American museum collections that often bears the taint of controversy and illegal appropriation. These are the antiquities that were stolen within the meaning of both foreign and American law because they were smuggled in contravention of the laws of their source countries, which have declared national ownership of antiquities and prohibit their excavation and export without state permission.

38 Jacqueline Trescott, Museums Launch Database to Find Nazi Stolen Art, WASH. POST, September 8, 2003, at C05.
39 I will note here that I fall on the side of those favoring repatriation of antiquities because they believe that the damage done by looting is so extensive and destructive to the world’s heritage that we need to show that looting will not be tolerated; however, the purpose of the present paper is not to advocate for that point of view, but to show that the current AAMD antiquities guidelines are not working, regardless of one’s point of view regarding antiquities repatriation and collection.
40 In Italy, this law is Legge 1 giugno 1939, n. 1089 (It.), amended by Legge 1 marzo 1975, n. 44 (It.), Legge 30 marzo 1998, n. 88 (It.), and Legge 30 marzo 1998, n. 100 (It.). The existence of Italian national ownership of antiquities and prohibition of their export was recognized in US v. An Antique Platter of Gold, 991 F. Supp. 222, 231-32 (S.D.N.Y. 1997). In Greece, the relevant law is Nomos (1932:5351) O nomos Arxaiotitwn [The Antiquities Act], 1932 (Greece). For a selection of other countries’ antiquities legislation, see Lyndel V. Prott & Patrick J. O’Keefe, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (1988). American courts have also recognized the national ownership laws of Egypt (US v. Schultz, 178 F. Supp. 2d 445, 447-48 (S.D.N.Y. 2002)), Turkey (Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44, 45 (S.D.N.Y. 1990); Turkey v. OKS Partners, 1994 US Dist LEXIS 17032), Cyrus (Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 280-81 (7th Cir. 1990)), and Peru (Peru v. Johnson, 720 F.Supp. 810 (CD Cal. 1989)). These foreign laws influence the treatment of smuggled antiquities in the United States because “a possessor of stolen goods, no matter how innocently acquired, can never convey good title” Schrier v. Home Indem. Co., 273 A.2d 248, 250 (D.C. 1971). The principle that an antiquity owned by a foreign government thanks to a statutory declaration of national ownership will be treated as stolen property when removed from this country contrary to its export laws and thus may be subject to confiscation, and its American possessors subject to criminal prosecution, was established in United States v. McClain, 545 F. 2d 988 (5th Cir.), reh’g denied, 551 F.2d 52 (5th Cir. 1977). See also United States v. McClain, 593 F.2d 658 (5th Cir.), cert. denied, 444 U.S. 918 (1979). In McClain, U.S. prosecutors used the National Stolen Property Act, 18...
There has been widespread looting of archeological sites from many cultures, including Mesopotamia, Pre-Columbian cultures, ancient Greece and Rome, various U.S.C. 2314-2315, to return Pre-Columbian antiquities to Mexico. Notably, The AAM filed an amicus brief in a case involving the civil forfeiture of an ancient gold phiale claimed by Italy, arguing that the use of McClain in smuggled antiquities cases was not consonant with United States law. See Brief of Amici Curiae Am. Ass’n of Museums, et al. in Support of the Appeal of Michael H. Steinhardt in United States v. An Antique Platter of Gold, 184 F.3d 131 (2nd Cir. 1999), reprinted in 9 Int’l J. Cultural Prop. 76, App. I (2000).


African sites, and even Native American sites in the United States. Action by museums to prevent this looting is crucial, since America is one of the largest markets for antiquities, thanks to demand by museums and by American collectors who may eventually donate to museums. The supply of looted antiquities will slow as museums, collectors, and dealers became reluctant to buy antiquities without documentation of their provenance to show that they were legally excavated and exported from their countries of origin. Every antiquity sold without documentation of this history of legal ownership,
even if it itself was not looted, is an encouragement for looters and middlemen who can hope to sell the antiquities they uncover without having to provide a provenance. 49

Museum Guidelines for Antiquities

As with Nazi-looted art, there are no directly relevant statues governing American museums’ antiquities collections or acquisitions. 50 American museums have realized that

individuals and countries is to refrain from purchasing illicit cultural property). This idea of the interaction of the market and looting is also closely tied to archeologists’ disapproval of private ownership of antiquities, as is made clear in the official position on commercialization of the Society for American Archeology: “the buying and selling of objects out of archaeological context is contributing to the destruction of the archaeological record in the American continents and around the world. The commercialization of archaeological objects – their use as commodities to be exploited for personal enjoyment or profit – results in the destruction of archaeological sites and of contextual information that is essential to understanding the archaeological record.” “Third Ethical Principle” of the Society for American Archeology, quoted and discussed in M.J. Lynott, Ethical Principles and Archaeological Practice: Development of an Ethics Policy, 62 American Antiquity 589, 592 (1997). See also L. E. Murphy et al., Commercialization: Beyond the Law or Above it? Ethics and the Selling of the Archaeological Record, in Ethics in American Archaeology: Challenges for the 1990s 45 (Mark Lynott and Alison Wylie eds., 1995).

49 Dealers, who consider their own practices to be highly ethical, often feel insulted by archeologists’ boycotts. James Ede, The Antiquities Trade: Towards a More Balanced View, in Antiquities: Trade or Betrayed: Legal, Ethical, and Conservation Issues 211, 211 (Kathryn Walker Tubb ed., 1995). It is easier to understand archeologists’ refusal to recognize even ethical dealers if one understands the reasons for their condemnation of the trade as a whole.


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the problem of their holdings of potentially stolen antiquities needs to be addressed, and

U.N.T.S. 231; Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention on Cultural Property), May 14, 1954, 249 U.N.T.S. 240 (1970 UNESCO Convention). The U.S. became a party in 1983. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, November 14, 1970, 823 U.N.T.S. 231. On the Convention, see generally: Guido Carducci, *The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions and EU Regulations, in Art and Cultural Heritage: Law, Policy and Practice* 68 (B. Hoffman ed., 2006); Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (2006). Article 9 of this Convention allows state parties “whose cultural patrimony is in jeopardy from pillage of archaeological or ethological materials” to call upon other state parties, who must endeavor to “determine and to carry out the necessary concrete measures, including the control of exports and imports” of the endangered materials. In order to fill this obligation, Congress passed the Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. 2600. Under the CPIA, other state parties to the 1970 UNESCO Convention may request that the U.S. restrict the import of designated archaeological or ethological material from the requesting state into the U.S. 19 U.S.C. § 2602(a)(1)(A)–(D). Congress is advised on these requests by the Cultural Property Advisory Committee (CPAC), which is composed of representatives of various interests such as scholars, museum officials, dealers, and the general public. 19 U.S.C. § 2605(b)(1)(A)–(D), (f)(1)(A)–(C). If granted, import restrictions have a five year effective period and may be renewed in five year increments after review by CPAC. The U.S. may also choose to impose emergency import restrictions for a limited period of time, not to exceed eight years; the effect is the same as the five year restrictions. The U.S. Customs Service must publish in the Federal Register a descriptive list designating the categories of archaeological or ethnological material subject to import restrictions. 19 U.S.C. § 2602(f)(1). So far, fifteen states have concluded agreements with the U.S. under the CPIA: Peru, Bolivia, Mali, Cambodia, Columbia, Canada, Italy, Cyprus, Honduras, Nicaragua, Guatemala, El Salvador, Honduras, China, Mali and Greece. “Bilateral Agreements,” http://exchanges.state.gov/heritage/culprop/listactions.html. If a request is granted, any designated artifact which enters the United States without either an export permit issued by the state of origin or documentation showing that the artifact was out of the state of origin at the time the restrictions become effective will be confiscated by the U.S. Customs Service and returned to the state of origin. For an analysis of reported statistics on imports and exports of cultural objects that suggests that the illicit trade in antiquities is still high, despite the 1970 UNESCO agreement and domestic American law, see Raymond Fisman & Shang-Jin Wei, *The Smuggling of Art and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques*, 1 Am. Econ. J.: Applied Econ. 82–96; and Silvia Beltrametti, *Museum Strategies: Leasing Antiquities*, 36.2 Colombia J. of L. & Arts 203 (2013).

51 A number of government-run and smaller private museums revised their collection policies to address the issue of smuggled antiquities substantially before the promulgation of the AAMD guidelines. Among the earliest of these revisions were those of the

Thompson, Successes and Failures of Self-Regulatory Regimes, 18
on first glance, the guidelines passed by the AAMD\textsuperscript{52} to guide museum decisions about antiquities seem similar to the Nazi-era guidelines. These guidelines, promulgated in 2004 and revised in 2008 and 2013, advise museums not to acquire antiquities without accompanying documentation showing that they were not illegally removed from their country of origin after 1970 (a date chosen because of a relevant international convention) (“antiquities guidelines”).\textsuperscript{53} In practice, this means that acquisitions satisfy the guidelines when they are accompanied by documentation showing their ownership history since 1970; for example, a Roman statue that has been in the home of an American collector since 1950 will satisfy the guidelines, since it was logically exported from Italy before 1970, even if the museum does not know exactly when it was exported (and even though this export may have been contrary to Italy’s laws, which have prohibited the export of antiquities without permits since 1939).\textsuperscript{54}

The guidelines allow for museums to make exceptions to this general rule.

Museums may acquire antiquities without the required post-1970 provenance on the basis

\textsuperscript{52} AAMD, REPORT OF THE AAMD TASK FORCE ON ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (2004) [hereinafter AAMD, 2004 ANTIQUITIES GUIDELINES]; AAMD, Report of the AAMD Subcommittee on the Acquisition of Archaeological Materials and Ancient Art (2008) [hereinafter AAMD, 2008 ANTIQUITIES GUIDELINES]. An AAMD survey from 2006 showed that 53 member museums actively collected antiquities at that time, and of these 53, 87% had a collections policy specifically addressing the responsible acquisition of antiquities, 66% of these collections policies were based on the 2004 AAMD antiquities guidelines, and a further 17% were in the process of revising their policies to incorporate the AAMD guidelines. AAMD, Survey Shows Museum Antiquities Purchases Are Less than 10% of Global Trade (Feb. 7, 2006).

\textsuperscript{53} AAMD, 2004 ANTIQUITIES GUIDELINES at Part II(C). The 1970 date was chosen to accord with the 1970 UNESCO.

\textsuperscript{54} Legge 1 giugno 1939, n. 1089 (It.), amended by Legge 1 marzo 1975, n. 44 (It.), Legge 30 marzo 1998, n. 88 (It.), and Legge 30 marzo 1998, n. 100 (It.).
of case-by-case determinations.\textsuperscript{55} The 2004 version of the guidelines, “recognizing 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,”\textsuperscript{56} gave two specific examples of circumstances in which an exception to the 1970 rule could be made: if the object was in danger of neglect or destruction and if acquisition would “make the work of art publicly accessible, providing a singular and material contribution to knowledge” because of the work’s “rarity, importance, and aesthetic merit.”\textsuperscript{57}

The 2008 guidelines removed the exception for acquisitions with outstanding artistic, historic, or scholarly value. Instead, the 2008 guidelines permit an exceptional acquisition of an antiquity without full post-1970 provenance only if the museum can make an educated guess that the object was out of its country of origin before 1970 by considering “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.”\textsuperscript{58}

A set of 2013 Revisions to the guidelines provided more detail about the considerations museums could take into account when deciding whether to acquire an antiquity despite its lack of full post-1970 provenance history. The new or expanded considerations include instructions to museums to examine the provenance history of other works excavated from the same site or area (presumably, instructing museums to be cautious if the work seems to come from a site that has been targeted by looters); the

\textsuperscript{55} AAMD, 2004 ANTIQUITIES GUIDELINES at Part II(E).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} AAMD, 2008 ANTIQUITIES GUIDELINES.
prior owner(s) of the work and any claims made against them with respect to other works (thus instructing museums to avoid acquiring works previously owned by known antiquities smugglers); and communications regarding the work between the country of modern discovery and the current owner, a prior owner, or the museum (seemingly encouraging museums or potential donors to check if the presumed source country is likely to make a repatriation claim).59

Similarly to the creation of the Nazi-Era Portal, the AAMD complimented its antiquities guidelines by launching a Registry of New Acquisitions of Archaeological Material and Works of Ancient Art (“Antiquities Registry”) in order to make information available to potential claimants.60

The Differences between the Nazi-Era and Antiquities Guidelines

The crucial difference between the Nazi-era and antiquities guidelines is in their scope.61 Both sets of guidelines require museums to carry out provenance research.

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61 Another difference of scope is that the antiquities guidelines require that museums use the Antiquities Registry to list only those acquisitions deemed by the acquiring museum to have non-complete post-1970 provenance rather than all new antiquities acquisitions. By contrast, the Nazi-era guidelines require museums to list on the Portal all of the objects in their collections which could conceivably have been Nazi-looted, even if the museum knows that they were not. This difference is key for the accountability of museums and the usefulness of the websites to potential claimants. For Nazi-looted art, claimants can discover the reasons why a museum has decided that an object was not Nazi-looted; for antiquities, claimants are given no ability to make their own decisions about the reliability of museums’ reasoning. Imagine if a claimant has discovered that a dealer was in the habit of forging crucial export paperwork. This claimant could easily locate objects that passed through the hands of this dealer using the Nazi Portal, but would have no ability to ascertain if museums had similarly relied on forged paperwork.
However, the Nazi-era guidelines require museums to look at every object they plan to acquire and every object currently in their collections, while the antiquities guidelines require museums to look only at planned acquisitions, not at their current holdings. Thus, while Nazi-era guidelines are designed both to preempt and avoid ownership disputes, the antiquities guidelines do nothing to address the issue of repatriation claims for objects already in a museum’s collection.

This difference in scope is rather curious, since there is no dispute that museums acquired, before the promulgation of the guidelines, antiquities that were taken from their countries of origin illegally. This has been proven in a number of repatriation demands by Italy, Greece, Turkey, Egypt, and other countries, which have resulted in over a hundred antiquities returned to these countries since 2005 by museums including the Metropolitan Museum of Art, the Getty Museum, the Princeton University Museum of Fine Arts, when deciding that their new antiquities acquisitions had sufficient provenance and thus did not need to be posted on the Antiquities Registry.

62 Which is not to say that museums only apply the guidelines to research antiquities of which they have no prior knowledge, since some of the recent acquisitions of antiquities have been of objects that had been displayed in the acquiring museum on a long-term loan.


64 The Getty has so far repatriated around 40 antiquities, worth around $44 million, to
the Museum of Fine Arts in Boston, the Cleveland Museum of Art, and others. These repatriations continue; in late 2012, the Dallas Museum of Art returned a mosaic to Turkey, while in 2013, the Getty repatriated a sculpture two Italy and the Metropolitan Museum announced that it would return two sculptures to Cambodia. There is no sign that such repatriation demands are likely to cease.

Despite these showings that they have owned smuggled antiquities, museums


Stephen Litt, Cleveland Museum of Art strikes deal with Italy to return 14 ancient artworks, CLEVELAND PLAIN DEALER, November 19, 2008.

See Randy Kennedy, Dallas Museum Volunteers to Return Mosaic to Turkey, N.Y. TIMES, Dec. 3, 2012; and http://www.dallasmuseumofart.org/PressRoom/dma_507374.


Tom Mashberg & Ralph Blumenthal, Cambodia Says It Seeks Return Of Met Statues, N.Y. TIMES, June 1, 2012.

Hope does continue to spring eternal that each set of repatriations will be the last; for example, Michael Conforti, then the incoming AAMD president, said in a 2008 interview about the smuggled antiquities issues that “[w]hat the Italians were very anxious about has now been returned. They feel quite good about that…. I can’t say there will be no more requests for things, but that’s certainly not the future of conversation between Italy and the United States. It has to be about other things. I think that’s true of many countries. Italy may be a little more willing at this point, because of the particular nature of return. But I think we’re going to see that the Americans are now in harmony with much of the rest of the world and we can start engaging with the rest of the world without focusing on what we’ve done in the past vs. what we might do in the future.” Lee Rosenbaum, Michael Conforti Q&A About AAMD and Antiquities, ARTS J., July 23, 2008. Conforti’s perception has surely been changed by the post-2008 repatriation demands by Italy and other countries.
have not committed to researching the provenance of antiquities in their collections. So far, only the Getty Museum has announced that it is carrying out this type of research for its existing collections. This reluctance to investigate existing collections is all the more striking since museums are in a much better position to deduce that an antiquity has been illegally exported than a source country.\(^7\) For example, a museum can know which of their antiquities was acquired from a dealer who was later shown to have been a conduit for smuggled art,\(^3\) and can re-examine the paperwork submitted with an antiquity when it was acquired with a more skeptical eye for possible omissions or forgeries than did the

\(^7\) There has not been much sustained comparison of the relative difficulty and expense of provenance research for Nazi-looted art versus smuggled antiquities; one of the only statements on record about this issue is that of Victoria Reed, the Boston Museum of Fine Art’s curator of provenance, charged with investigating the provenance of the museum’s collections for Nazi-era issues and new antiquities acquisitions, who told the Boston Globe in 2011 that Nazi-era provenance research is more complicated than antiquities provenance research: “If something was looted out of the ground in Italy, it’s a pretty clear issue…. Some of the Nazi-era claims are accompanied by ownership questions that may not have a paper trail. Many of the key players may be deceased. You may be dealing with 10 different archives. And even if you have the pieces lined up, there many be disagreement about how to interpret those facts.” Geoff Edgers, *A Detective’s Work at the MFA, Boston Globe*, Dec. 11, 2011.

\(^3\) For example, the Kimbell Art Museum in Fort Worth, Texas, owns a 7th century CE Khmer sculpture from what is now Cambodia (AP 1988.01; see https://www.kimbellart.org/collection-object/harihara). The Museum purchased the statue in 1988 from a dealer, Douglas Latchford, with no documented ownership history aside from a guarantee from Latchford claiming that he had purchased it in Thailand in 1968. Latchford was also the source for several other Khmer statues in American museums whose repatriation the Cambodian government is now seeking, claiming that they were looted from a temple complex in the early 1970s and smuggled to Thailand; for some of these statues, the broken feet are still in situ, leading the Metropolitan Museum to return two statues so far, with other museums still considering claims. See *Latchford’s Footprints: Suspect Khmer Art at the Kimbell and the Met*, Dec. 24, 2012, http://chasingaphrodite.com/2012/12/24/latchfords-footprints-suspect-khmer-art-at-the-kimbell-and-the-met/ and *The Met Returns Two Khmer Statues to Cambodia, Citing Clear Evidence of Looting*, May 3, 2013, http://chasingaphrodite.com/2013/05/03/breaking-the-met-returns-two-khmer-statues-to-cambodia-citing-clear-evidence-of-looting/.
acquiring curator, who may have been less aware of the problem of looted antiquities and was certainly biased in favor of obtaining the object.\textsuperscript{74}

By contrast, if all goes well from the point of view of looters and smugglers, a source country will never know that an antiquity even existed before it is removed from the ground and taken out of the country. A looted archeological site only rarely bears traces of what has been taken from it, making it extremely hard for a source country to prove that it is the rightful owner of a smuggled antiquity.\textsuperscript{75} The majority of Italian repatriation demands have been based on the lucky results of a single investigation of an antiquities smuggler whose extensive, and exceptional, archive of correspondence, receipts, photographs, and other records showing that he obtained illegally excavated antiquities and smuggled them out of Italy in order to sell them to, among others, American dealers and curators was seized by the Italian police.\textsuperscript{76}

\textsuperscript{74} A similar resistance to self-examination of collections has been taken by the AAM\textsuperscript{D} on the subject of sacred objects, which some members of the tribes or communities that created them might wish to not be in museums: “Art museums cannot be expected to singularly determine if a work of art is a sacred object. Instead, art museums should respond to inquiries or claims regarding sacred objects submitted by religious leaders or groups who have standing within a traditional religion with which an object is associated.” AAM\textsuperscript{D}, REPORT OF THE AAM\textsuperscript{D} TASK FORCE ON THE ACQUISITION AND STEWARDSHIP OF SACRED OBJECTS 2 (2006). If museums are not expected to carry out independent inquiries or to publish objects of potential interest so interested groups can research, it is not clear how interested groups are supposed to know that museums own objects of interest at all.

\textsuperscript{75} The exceptions being when a looted object is so large that parts of it were left by looters \textit{in situ}, or when looters take whole objects from a site and leave behind broken fragments and the objects are so different from other antiquities that experts can use the fragments to tie the objects to this, and only this, site; however, both of these situations are rare.

\textsuperscript{76} Italy’s investigation into Medici and his associated is detailed in Peter Watson \& Cecilia Todeschini, \textit{THE MEDICI CONSPIRACY: THE ILLEGITIMATE JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY’S TOMB RAIDERS TO THE WORLD’S GREATEST MUSEUMS} (2006). See also Christine L. Green, \textit{Comment: Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums}, 14 VILL. SPORTS \& ENT. L.
It is hardly surprising that source countries for antiquities, having realized that they rarely will be able to muster the type of proof of ownership and theft required for an American court to order the return of claimed antiquities, have decided to take other approaches in their quest. One approach that has evolved in recent years is a threatened or actual boycott of good relations with a museum or country that refuses to give up some claimed antiquities, for example, by refusing to allow any loans for special exhibitions or cancelling archeological excavation permits. Such boycotts or protests by source countries also involve bad publicity, something museums are eager to avoid. The

J. 35 (2007); Peter Watson, SOTHEBY’S: INSIDE STORY (1997). Based on the records uncovered during its investigation of Medici, Italy has successfully demanded the return of antiquities from the Getty Museum, the Boston Museum of Fine Arts, the Cleveland Museum of Art, and the Metropolitan Museum of Art: Catherine Elsworth, Getty Museum to return antiquities to Italy, TELEGRAPH, August 2, 2007 (Getty agreed to return 40 objects to Italy because of Medici links); Elisabetta Povoledo, Boston Art Museum Returns Works to Italy, N.Y. TIMES, September 29, 2006 (Boston Museum of Fine Arts agreed to return 13 objects to Italy because of Medici links); Stephen Litt, Cleveland Museum of Art strikes deal with Italy to return 14 ancient artworks, CLEVELAND PLAIN DEALER, November 19, 2008; Elisabetta Povoledo, Italy and U.S. Sign Antiquities Accord, N.Y. TIMES, February 22, 2006 (Metropolitan Museum of Art agreed to return 21 objects to Italy because of Medici links).

77 For example, Turkey has made a large number of repatriation demands within the past few years, including for objects exported before the passage of its national ownership laws, and has threatened to or actually has cut off relations with museums and others who have not returned objects. For example, Turkey revoked French archaeologists’ excavation permits at the Xanthos World Heritage site after the Louvre Museum refused to repatriate objects donated to it in 1985, and threatened that it would terminate a German archeological project if the Pergamon Museum in Berlin did not return a Hittite sphinx that had been in Germany since 1917, which the museum did. See Jason Farago, Turkey’s restitution dispute with the Met challenges the ‘universal museum,’ THE GUARDIAN, 7 October 2012; Committee on Cultural Property, Art War with Turkey?, http://committeeforculturalpolicy.org/category/weblibrary/middle-east-turkey-iran-and-central-asia/; Dan Bilefsky, Seeking Return of Art, Turkey Jolts Museums, N.Y. TIMES, September 30, 2012; and Martin Bailey, Turkey Blocks Loans to US and UK, ART NEWSPAPER, March 1, 2012.

78 “When foreign nations rely on moral arguments and threats of bad publicity rather than on legally sustainable claims, repatriation demands start to look less like negotiation based on law and more like blackmail. Museum administrators and trustees are extremely
antiquities guidelines do nothing to help museums avoid such threats, disputes, and retaliations by claimant governments.

**The Efficacy of The Antiquities Guidelines**

The antiquities guidelines have a much narrower scope than the Nazi-era guidelines, but it would seem that they have not greatly changed museum behavior even within that narrow scope. Information on museum adherence to the guidelines is difficult to find; for example, the AAMD released a survey in 2006, claiming that 86% of the purchased or donated antiquities acquired by member museums over the five years previous to the survey (that is, both before and after the promulgation of the guidelines) had complete post-1970 provenance, but giving no information on whether acquisitions without the required provenance went down after the promulgation of the 2004 guidelines. However, it is possible to draw some conclusions about the level of museum adherence to the antiquities guidelines by analyzing the entries on the Antiquities Registry.

There has not yet been any study of whether museums have entered all of the antiquities they have acquired since the establishment of the Registry into the Registry (indeed, such a study would be hard to carry out, since the guidelines do not require the listing of all new acquisitions of antiquities, but only those deemed by the acquiring

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susceptible to threat of public criticism because they are dependent upon good public relations for basic funding and exhibition sponsorship. It may be easier to quietly give up title to works of art than to risk embarrassment in the courts and the press or to suffer the loss of public goodwill.” Kate Fitz Gibbon, *Dangerous Objects: Museums and Antiquities in 2008* (2009), ssrn.com/abstract=1479424.

museum to have non-complete post-1970 provenance, and the publically-available records of acquisitions generally do not go into the detail necessary to distinguish between satisfactory and non-satisfactory provenance).\textsuperscript{80}

However, an examination of these entries carried out in early 2012, when the Antiquities Registry included 235 acquisitions from 11 museums, found that five of these museums did not provide any justification for their acquisitions of antiquities without a post-1970 provenance and three of the remaining museums justified their acquisitions on the basis of the object’s rarity or importance to scholarship or the museum’s collections, that is, on the basis of an exception allowed by the 2004 guidelines but specifically rejected by the 2008 guidelines.\textsuperscript{81} For example, the first object listed on the Antiquities Registry was an 10\textsuperscript{th} or 11\textsuperscript{th} century CE Southeast Asian sculpture of the deity Ganesha, acquired by the Portland Art Museum in 2008. This acquisition was listed on the

\textsuperscript{80} Among the only sources of information is the fact that, in 2012, the new Director of the Dallas Museum added 14 objects to the Antiquities Registry that had been acquired since June 4, 2008 but before his tenure: Lee Rosenberg, \textit{Turkey’s Repatriation Claims: Met’s Schimmel Benefactions Targeted (plus AAMD database)}, ARTS J., March 20, 2012.

\textsuperscript{81} AAMD, 2004 \textsc{Antiquities Guidelines} at Part I(D) and Part II(E). Alyssa Cathleen Hagen, \textit{The Efficacy of the Association of Art Museum Directors Online Antiquities Registry} 9, 24-25 (2012). The museums participating at the time of Hagen’s study were the Asian Art Museum in San Francisco, the Dallas Museum of Art, the Iris & B. Gerald Cantor Center for Visual Arts at Stanford University, the Museum of Fine Arts, Boston, the Philadelphia Museum of Art, the Portland Art Museum, the Art Institute of Chicago, the Cleveland Museum of Art, the Metropolitan Museum of Art in New York, the Walters Art Museum in Baltimore, and the Virginia Museum of Fine Arts. As of December 2013, the Asia Society Museum of New York, the Denver Art Museum, the Detroit Institute of Arts, the Frances Lehman Loeb Art Center of Vassar College, the Harvard Art Museums, the Memorial Art Gallery in Rochester, New York, the Seattle Art Museum, the Los Angeles County Museum of Art, and the Minneapolis Institute of Arts, have also listed acquisitions, for a total of 20 participating museums. These new listings show similar problems as those identified by Hagen, such as using the importance the acquisition would have to the museum’s collection to justify its purchase despite lack of provenance information; e.g., https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/569.
Antiquities Registry because it did not have a full post-1970 provenance history; indeed, it had ownership documentation only as far back as 2000, and was not even accompanied with any information about or documentation of its import into the United States, much less its export from India, its probable country of origin.\(^\text{82}\) In the entry on the Antiquities Registry for this acquisition, the Portland Art Museum stated that it depended on the “cumulative facts and circumstances” of the acquisition to justify its exception to the 1970 rule; specifically, the entry describes the interest the statue would hold to Portland’s South Asian population, the “new commitment to South Asian art” its acquisition would symbolize for the museum, the fact that the work is both “[l]arge enough to visually anchor a gallery” but also “intimate and approachable”.\(^\text{83}\) None of the listed reasons qualify for an exception under the 2008 guidelines.

Interestingly, the purchasing curator seemed to indicate the variables that the


\(^{83}\) The explanation offered in the entry is “In the past, South Asian art had not been an area of collecting focus in Portland, but today the region is home to a large, vibrant, and highly educated South Asian population. The Museum’s commitment under Director Brian Ferriso to ‘bringing the world to Portland’ and strong expressions of interest from the local community led to a search for a significant historical work of South Asian art. No choice could have been more appropriate than an icon of Ganesha, a deity widely worshiped throughout the subcontinent. As the ‘Remover of Obstacles’ who is invoked at the outset of any major enterprise, Ganesha perfectly symbolizes a new commitment to South Asian art. The Ganesha stele, as an outstanding example of stone sculpture of the Pala period, has become the core object in Museum narratives about Hindu art and culture. Large enough to visually anchor a gallery, it is also intimate and approachable….” https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/1000. Maribeth Graybill, the museum’s curator of Asian art, gave another reason for acquiring the statue when interviewed by a local paper – donor relations: “Graybill felt the work could be a critical addition to Portland’s collection: It would help expand its Southeast Asian holdings and bolster the museum's reputation among local collectors who might one day donate their work to the museum.” Quoted in Row, *supra* note 82.
museum were really concerned about when making the acquisition decision when she told a local newspaper that India, the country of likely origin, has somewhat relaxed export laws and that there are many similar sculptures on the art market.\textsuperscript{84} This would seem to indicate that the museum believes that the chances of a successful repatriation demand are low.\textsuperscript{85}

That museums have been listing acquisitions on the Antiquities Registry with no justification for making an exception to the guidelines, or justifications that don’t align with those permitted by the guidelines, demonstrates both to potential claimants and to the museum community as a whole that the AAMD would tolerate less than full compliance with even the narrow scope of its guidelines. Observers have criticized these failures to adhere to the guidelines, arguing that deficient listings will allow museums to seem like they are practicing responsible acquisition behaviors when in fact they are not.\textsuperscript{86}

In 2013, the AAMD issued revisions to the antiquities guidelines to require museums to post all provenance information of which the museum is aware, as well as specific details about how the acquisition meets the standards of the guidelines.\textsuperscript{87} It

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\item \textsuperscript{84} Row, supra note 82.
\item \textsuperscript{85} Similarly, Brian Ferriso, the Portland Museum’s executive director, also told the same interviewer that “he thinks the museum’s transparency and the museum’s educational and historical mission would persuade any claimant to allow the Portland museum to keep the object.” Row, supra note 82.
\item \textsuperscript{86} \textit{E.g.}, “This intended benefit [of the antiquities guidelines] is lost if museums repeatedly demonstrate a willingness to shell out money for pieces with problematic pasts, using their publication on a registry as a pretext to skirt the UNESCO guidelines that they purport to uphold.” Rosenbaum, supra note 69.
\item \textsuperscript{87} AAMD, \textsc{Revisions to the 2008 Guidelines on the Acquisition of Archaeological Material and Ancient Art (2013)}. The 2013 Revisions also amended the AAMD’s Code of Ethics to requiring museum directors to adhere to the antiquities guidelines’ requirement to use the Antiquities Registry to post antiquities
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remains to be seen if the 2013 revision to the guidelines will result in entries that adhere more closely with the guidelines, but the situation could hardly be less promising.\textsuperscript{88}

**Explanations for the Failings of Antiquities Guidelines**

There are a number of reasons that explain why the antiquities guidelines are so much narrower in scope than the Nazi-era guidelines and why museums do not seem to be fully cooperating with even these narrow guidelines. The most practical reason is cost. It would require an enormous amount of staff time and associated research expenses to investigate the provenance of every antiquity (even though the Getty, at least, has decided that this cost is justified for its 45,000 antiquities). Museums’ research into Nazi-era provenance has been funded not only by museums but by grants from the government and private foundations; I could find no similar evidence of grants to support antiquities provenance research or even the Antiquities Registry, which seems to be entirely self-funded by the AAMD.

Another reason for museum resistance to strict antiquities acquisition policies is donor relations. Several collector lobbyist groups have argued that the AAMD guidelines are harmful to collectors who are no longer able to donate some antiquities, as they had wished, to museums, and thus cannot obtain the pleasures of making a public contribution or the resultant tax deductions. A representative of one of these groups has called the AAMD guidelines “a self-administered slow poison, completely illogical and

\textsuperscript{88} There have so far not been any repatriation claims for antiquities arising from the Antiquities Registry (perhaps not surprisingly, since a number of museums describe in their entries a practice of circulating information about the objects they are considering acquiring among potential source countries for comment before completing the acquisition).
not required under any law.\textsuperscript{89}

Donor relations are extremely important to museums, 90\% of whose collections were donated by private collectors.\textsuperscript{90} It is easy to see the difficulties faced by museums that recognize that “the development and cultivation of strategic relationships with private collectors is a high priority”\textsuperscript{91} in situations where the donors in question wish to donate their antiquities, are frustrated that they cannot, and consider the AAMD guidelines to cast aspersions on their judgment and morality as collectors.\textsuperscript{92} Museums are keenly aware that collectors often donate funds or other resources along with their collected objects,\textsuperscript{93} and it must be painful to think that these resources are being denied to museums by disappointed collectors. The former director of the Nelson-Atkins Museum

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\textsuperscript{90} AAMD, ART MUSEUMS, PRIVATE COLLECTORS, AND THE PUBLIC BENEFIT 1 (2007).
\textsuperscript{91} Id.
\textsuperscript{92} “The museums themselves are driving away one of the most important engines of support. A relationship had heretofore been symbiotic between the collector whose passion and love the collector wished to share and found a natural partner with the museum. The collection eventually goes to the museum, the curator and director have all done their jobs. The public benefits through intelligent display, they enjoy, they learn. When it comes time to disperse wealth, the collector takes the museum into account in the will. That is going away. I know of a number of incidents where the museum has said, "I am sorry, you have no documentation." The museum will not end up with the collection. The museum will not end up with that support.” Statement by Marc Wilson, former director of the Nelson-Atkins Museum of Art, at The Future of the Past: Collecting Ancient Art in the 21st Century (symposium), March 18, 2012, transcript available at http://www.cprinst.org/lecture-services/the-future-of-the-past---collecting-ancient-art-in-the-21st-century.
\textsuperscript{93} AAMD, ART MUSEUMS, PRIVATE COLLECTORS, AND THE PUBLIC BENEFIT 1 (2007) (“Many collectors donate additional resources to support scholarship, publications, educational programming, capital projects and administrative expenses. As business and civic leaders, many bring professional expertise to their role as trustees or advisors to museum boards and committees. As individuals who are not only passionate but knowledgeable about a specific field, they often provide perspective and insight that can assist directors and curators in the display and interpretation of works of art.”).
of Art told the *New York Times* in 2012 that a museum’s decision to decline a gift because of incomplete provenance can strain relations with even a longstanding benefactor, who might feel that “You can’t take my items? So you can’t take my $30 million either?”

By far the largest obstacle standing in the way of an effective self-regulatory regime for antiquities is that, in contrast to a near-universal agreement that acquiring or holding Nazi-looted art is to be avoided, there is intense disagreement in the museum community about whether antiquities should be not be acquired merely because they were exported contrary to the law of their source country. One very instructive document for understanding this disagreement was published by the AAMD itself, in 2001, three years before the promulgation of its antiquities guidelines. This document, “Art Museums and the International Exchange of Cultural Artifacts,” argues for the free acquisition of antiquities, mentioning that museums are responsible for “the presentation, study, protection, and care of much of the artistic achievement of mankind” and that a “vital part” this mission is carried out through the acquisition of art, since “[n]ew acquisitions spur research, stimulate exhibitions, and contribute to the enjoyment and enlightenment of the visitor.” The document goes on to state that while the loss of

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95 Perhaps the biggest indication of lack of shared agreement is that the antiquities guidelines, unlike the Nazi-era guidelines, have not been co-promulgated by AAM.
archeological context is regrettable, works without this context can still yield valuable information.\(^97\)

Similar sentiments were expressed in a 2002 document that, although not associated directly with the AAM or AAMD, was signed by the Directors of the Art Institute of Chicago, Cleveland Museum of Art, Getty Museum, Guggenheim Museum, Los Angeles County Museum of Art, Metropolitan Museum, Boston Museum of Fine Arts, New York Museum of Modern Art, Philadelphia Museum of Art, and Whitney Museum of American Art.\(^98\) Titled the “Declaration on the Importance and Value of the Universal Museums,” the document states that

The international museum community shares the conviction that illegal traffic in archaeological, artistic, and ethnic objects must be firmly discouraged. We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era. Today we are especially sensitive to the subject of a work’s original context, but we should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source. Calls to repatriate objects that have belonged to museum collections for many years have become an important issue for museums. Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation.

Several prominent museum directors continue to express similar points of view about the value of museums acquiring and keeping antiquities without provenance or

\(^97\) *Id.* at 1-2 (“While 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 archaeological context has been lost”).

\(^98\) *The Declaration on the Importance and Value of Universal Museums* (2003), reprinted in *M. Bailey, We Serve All Cultures, Say Big Global Museums*, 23 THE ART NEWSPAPER 1, 6 (2003).
information about their find-spot,⁹⁹ in striking contrast to the archeologists who insist that antiques can convey information about the past only if they are scientifically excavated from an archeological context,¹⁰⁰ and in even more striking contrast to other museum directors who have argued that antiquities without a provenance “are almost without scholarly value”.¹⁰¹

Part Three: Theories of Self-Regulation Applied to Museum Guidelines

Theories of Self-Regulation

I have argued that there are significant differences in the scope, context, and efficacy of the Nazi-era and antiquities guidelines, even though they both purport to be self-regulatory regimes addressing similar problems of stolen goods in museum

⁹⁹ See, e.g., James Cuno, The Whole World’s Treasures, BOSTON GLOBE, March 11, 2001, at Ell (advocating museums acquisitions of unprovenanced antiquities as an act of rescue and mentioning that a museum can repatriate the object if it is “caught out”); Randy Kennedy, Museum Defends Antiquities Collecting, N.Y. TIMES, August 12, 2012 (interviewing David Franklin, Director of the Cleveland Museum, who argues in favor of acquiring antiquities without full provenance: “Museums should still be buying antiquities, and we shouldn’t shirk that responsibility, and I think it’s almost an ethical responsibility… It’s to the benefit of these objects not to be shunted away into the dark but to exist….It’s almost as if the objects themselves need a bill of rights”).

¹⁰⁰ Archeologists learn about the past not mainly from individual objects, but rather from “context” - the totality of information available from an excavated site. One archeologist has explained the importance of context by describing her excavation of flakes of obsidian, less that 5mm in diameter, in the Paleolithic stratification of a trash heap in an archeological site on a Greek island. This obsidian had to be imported, and the position of the flakes in the context of the Paleolithic layer, rather than a higher one, showed that those islanders and their trading partners had the sea-going capacities necessary to import obsidian millennia before scholars had previously thought. Here, it was the exact placement of the chips that provided the information; the chips themselves, sold to an archeologist on the market, could not have revealed their importance. Karen D. Vitelli, Introduction, in ARCHAEOLOGICAL ETHICS 17, 24-27 (Karen D. Vitelli ed., 1996).

¹⁰¹ Giles Constable, The Looting of Ancient Sites and the Illicit Trade in Works of Art, 10.4 J. FIELD ARCHAEOLOGY 482, 484 (1983) (written by the then-Director of the Dumbarton Oaks Museum).
collections. I will now argue that the fact that they are self-regulatory regimes is precisely the cause for the failings of the antiquities guidelines.

Self-regulation has mainly been studied in the for-profit world, where it has recently come under attack. Critics maintain that corporations who create voluntary regulatory regimes instead of submitting to government regulation create rules that are subject to massive failures and that have led to devastating environmental and financial catastrophes. For example, the United States Securities and Exchange Commission halted its Consolidated Supervised Entities program, which had allowed certain banks to set and adjust capital requirements for themselves based on their own internal risk assessments, in the wake of the collapse of the investment bank Lehman Brothers and the subsequent global financial crisis. Similarly, the self-regulation of offshore drilling by oil

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103 Edward J. Balleisen, The Prospects for Effective Coregulation in the United States: A Historian’s View from the Early Twenty-First Century, in Government and Markets: Toward a New Theory of Regulation 443 (Edward J. Balleisen and David A. Moss, eds., 2010). In making this announcement, SEC Chairman Christopher Cox, who had previously been an advocate of self-regulation, explained that “[t]he last six months have made it abundantly clear that voluntary regulation does not work.” U.S. Securities and Exchange Commission, Chairman Cox Announces End of Consolidated Supervised
companies has been blamed for permitting the activities that led to the explosion and fire on British Petroleum's Deepwater Horizon offshore drilling rig and the subsequent dumping of millions of gallons of crude oil into the Gulf of Mexico.\textsuperscript{104}

Scholars have found that for-profit corporate self-regulation is most likely to succeed when the government has sufficient resources to monitor and sanction corporations who fail to comply with the self-regulatory guidelines and when there is reasonable consensus among the self-regulating corporations and others, like the government, interested in the regulations about what norms or standards should govern the regulated behavior.\textsuperscript{105} Specifically, corporate compliance with self-regulatory regimes is much higher when the self-created regulations are backed by government enforcement, such as inspections or other forms of monitoring\textsuperscript{106} or the threat of more stringent government regulation if the government concludes that compliance with self-regulation

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\textsuperscript{104} See, e.g., Russell Gold and Stephen Power, \textit{Oil Regulator Ceded Oversight to Drillers}, \textit{WALL STREET J.}, 7 May 2010, at Al.


is too low.107 Outside pressure is so crucial that one scholar of corporate self-regulation has concluded that “self-regulation has succeeded primarily under conditions where it is not really self-regulation at all,” that is, when the self-regulation serves merely as a support to the enforcement efforts of a governmental or other external, robust, regulator.108

**Theories of Self-Regulation Applied to Museum Guidelines**

The differences between the Nazi-era guidelines and the antiquities guidelines are precisely those differences between a successful and unsuccessful self-regulatory regime. There was not only outside pressure on museums to initiate a solution to the problem of Nazi-looted art, but there has been continuing scrutiny and pressure, both positive and negative, ever since, from the government, press, interest groups, and potential litigants. This consistent outside pressure has been crucial to ensure the continued functioning of museums’ self-regulation regime, since the museums’ voluntary regime is shaped by what the involuntary regime would look like – a situation museums are eager to avoid. Moreover, following the second criterion for a successful self-regulatory regime, there is widespread agreement, both within the museum community and outside of it, about what the goals of regulating potential Nazi-looted art should be. This widespread agreement and strong outside oversight ensures that museums adhere to the Nazi-era guidelines, keeping Nazi-era provenance research was a top priority instead of letting these tasks be

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buried under the myriad of other things that an underfunded museum has to accomplish.

By contrast, there has been no governmental monitoring of museums’ antiquities collections and few successful lawsuits claiming antiquities. Attention from outside interest groups and the press has been divided, with archeologists advocating much stricter antiquities rules and collectors’ groups advocating much looser rules. Even within the museum community, there is dissent about how the situation of potentially looted antiquities should be treated, with a desire to prevent looting competing with strong feelings about the benefit to the public and scholars of and acquiring displaying antiquities.

The antiquities guidelines must reflect a unified position and benefit from oversight by the government, press, and private interest groups before museums’ attempts to self-regulate their antiquities collections can succeed. One area in which this outside involvement would bear immediate fruit is in negotiations with the foreign governments that have demanded repatriations in the absence of definite evidence of looting through threats to cut off relations with museums. Self-regulation of museums can do little to fight this type of unfair or overreaching demands from foreign governments. The only American entity with the power to negotiate away from unreasonable repatriation demands on the part of foreign governments is the American government itself, since it has far more to offer or withhold from foreign governments.

But the government cannot help turn away unjustified claimants if it plays no role in American museums’ antiquities regulation. The problem of the looting of antiquities is ongoing and has a hugely destructive effect on our shared past. It is time that we all share the responsibility to solve the problem.