TOWARDS A RIGOROUS STANDARD FOR THE GOOD FAITH ACQUISITION OF ANTIQUITIES

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Summary:

*When antiquities are acquired without a rigorous due diligence process, that acquisition defrauds our heritage by distorting the archaeological record; causing potential harm to other legitimate acquisition of antiquities; perverting the important role museums play in society; and ultimately warping the understanding of our common cultural heritage. Fraud occurs when a defendant intentionally deceives another. Given the flood of scandals plaguing museums, collectors, and dealers, we can state now with some confidence that many of these individuals have committed a fraud on our collective human heritage.*

*Combating this fraud is particularly difficult. Though an existing body of law prohibits and punishes a variety of activities which further the illicit trade, these measures are severely hampered by the mystery surrounding antiquities transactions. With increased scrutiny and a more rigorous and diligent title enquiry by buyers and sellers, these legal measures will become far more effective. At present, details regarding authenticity, title, or even more basic questions such as the origin of an object are intentionally hidden and disguised from public view.*

*Good faith has been used to merely promote commercial convenience and economic efficiency. This article proposes a new theoretical foundation for increased scrutiny of the antiquities trade by constructing a broad basis for the recognition of good faith as a mechanism for eliminating the illicit trade in antiquities. This article articulates three ways in which good faith can play a meaningful role in the trade and transfer of antiquities by examining fraud, limitations periods, and public pressure generally. A strong case for reform can be made if we consider that a family of art forgers living in modest public housing in Bolton, England can easily fool some of the World's leading cultural institutions.*

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## I. Some Observations on the Antiquities Trade

Late in 2007 a prosecution in England revealed the strange story of how one art forger and his family fooled some of the World's leading art institutions.[1] The Greenhalghs produced and sold an astounding number of forged works, some of which were displayed by the British Museum and the Art Institute of Chicago. The "Amarna Princess" was a forged statue in the Egyptian Amarna style purchased by the Bolton Museum for £440,000 in 2003 and displayed for three years, despite the fact it had been created in a garden shed.[2] George Greenhalgh, the forger's father, approached the Bolton Museum in 2002 claiming the object was from a "forgotten collection"; soon after it was purchased and displayed after both Christies auction house and the British Museum authenticated the piece as genuine. A badly flawed market allowed these forgeries to invade the display cases of some of the world's most hallowed museums.

Further evidence of the corrupt antiquities market came just after dawn on January 24, 2008 when Federal agents carried out coordinated raids on four Southern California museums and a Los Angeles art gallery, the culmination of a five-year investigation which traced the illegal movement of Southeast Asian and Native American artifacts into

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**1** The primary aim of this article is the antiquities trade, but other works of art are subject to many of the same difficulties. The Greenhalghs amassed an astounding number of forged works—including paintings, vases, sculptures, base reliefs, and reliquaries—some of which were displayed by leading arts institutions. For a decade a work supposedly by Paul Gauguin, "The Faun" had been displayed at the Art Institute of Chicago, before it was revealed in late 2007 to have been the work of Shaun Greenhalgh. It was authenticated by the Wildenstein Institute, sold at Sothebys in 1994 for £20,700 and purchased by the Art Institute in Chicago for $125,000. *See infra* notes 239 - 241 and accompanying text; Alan G. Artner, *Art Institute is forger's latest victim: Sculpture sold as a Gauguin is a fake*, CHICAGO TRIBUNE, Dec. 12, 2007 http://archives.chicagotribune.com/2007/dec/12/news/chi-forgery_12dec12. ; David Ward, *How garden shed fakers fooled the art world*, THE GUARDIAN, Nov. 17, 2007 http://www.guardian.co.uk/uk/2007/nov/17/artnews.art.

2 Deborah Linton, *Family con that fooled the art world*, MANCHESTER EVENING NEWS, Nov. 16, 2007, http://www.manchestereveningnews.co.uk/news/s/1024784_family_con_that_fooled_the_art_world

American Museums and galleries.[3] The raids resulted in a swift and immediate change in museum guidelines on the acquisition of antiquities.[4]

It may never be known how many more forgeries remain undetected in other collections throughout the world. Though the Greenhalghs had been suspected forgers as early as 1990, the state of the market is such that legitimate works cannot be distinguished from forgeries, let alone from objects that have been stolen or illegally excavated. A radical shift is needed in the way the art market guarantees authenticity and title. Increased scrutiny of the acquisition of antiquities can increase the protection of our common cultural heritage.[5] Achieving this level of scrutiny has been difficult as the trade and transfer of antiquities often violates national and international laws by preventing and obstructing diligent investigations into the histories of objects.

### A. Antiquities Law and the Consequences

If one were to devise a badly flawed market, one would be hard-pressed to surpass the antiquities trade. The reasons for this are numerous, but can be attributed to two main

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[3] Jason Felch, *4 Southland museums raided in looting probe*, L.A. TIMES, Jan. 25, 2008, http://articles.latimes.com/2008/jan/25/local/me-museums25. Agents from the Internal Revenue Service, and Immigration and Customs Enforcement carried out searches of the Mingei Museum in San Diego, the Bowers Museum in Santa Ana, the Pacific Asia Museum in Pasadena, and the L.A. County Museum of Art. The search warrants alleged Robert Olson had cultivated a smuggling network that had since 1980 helped transport thousands of antiquities from Native American sites, Thailand, China and Myanmar. *See, e.g.*, Search Warrant on Written Affidavit ¶¶ 15–19, United States v. The Premises Known as: Pacific Asia Museum, No. 08-0118M (C.D. Cal. Jan. 22, 2008).

[4] *See infra* notes 162 - 172 and accompanying text.

[5] Antiquities are a subset of objects which comprise our material cultural heritage. The term antiquity often lacks precision, and shifts based upon the age and material remains of the civilization in question. In most cases antiquities are objects from ancient cultures, in particular, the cultures of Classical Antiquity— such as Greece, Rome, Egypt, or the Near East. Often antiquities have an underground find-spot, are the product of excavation, but above all, are a source of important information about ancient cultures based in part on their archaeological and historical context. The U.S. federal government defines an "archaeological resource" as "any material remains of past human life or activities which are of archaeological interest" and are at least one hundred years old. 16 U.S.C. 470bb(1) (1994). *See* Antiquities Law No. 59 of 1936, *amended by* No. 120 (1974), No. 164 (1975) (Iraq); Law no. 117 of 1983 on the Protection of Antiquities art. 1 (Egypt), *quoted in* United States v. Schultz, 333 F.3d 393, 399 (2d Cir. 2003). Antiquities can be divided into three categories: (1) objects which have been unearthed or discovered and are not reported to the state, (2) objects which remain *in situ* in their archaeological context, and (3) objects which have been displayed or owned for years and which are in established collections. The primary difficulty is how to distinguish the first two classes, which are illicit, from the latter.

factors: a restricted supply and a trade plagued by anonymous buyers and sellers often shielded by auction house practices and traditions.

The supply is restricted for some very good policy reasons. Nations of origin are justifiably reluctant to sell or lose to foreign institutions many objects which are unearthed illegally. They are also reluctant to allow the export of other objects which may be excavated legitimately by archaeologists mindful of historical injustices such as colonial takings.[6] Although justified, many of the legal rules help to fuel the illicit trade in antiquities by eliminating any supply to meet the demand of purchasers.[7] Though one potential solution might be to eliminate all purchases of antiquities, that seems a very remote possibility. We are left, then, with a regulatory framework that rests upon prohibition of illicit antiquities, but which has no reliable means of distinguishing the legally-acquired objects from the illegal ones. One of the weaknesses with prohibitionism is that it restricts supply without taking account of the potential demand. This makes the targeted trade more profitable—allowing better, more sophisticated tactics to evade law enforcement.[8] In some cases prohibition helps create and incentivize

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[6] Mexico enacted a heritage protection scheme in 1897 that stopped short of outright nationalization of artifacts but declared "archaeological monuments" to be "the property of Nation" and stated that no one could "remove them ... without express authorization of Executive of the Union." *See* United States v. McClain, 545 F.2d 988, 997 (5th Cir. 1977) (quoting Article 1 of Mexico's Law on Archaeological Monuments, May 11, 1897). Peru has modern legislation that declares all antiquities State property. All pre-Hispanic, colonial and other material is presumed to be cultural property but cannot be exported unless for purposes of scientific, artistic, or cultural purposes. General Law of National Cultural Patrimony, No. 28296, Aug. 2004. Egypt's Law No. 117, 1983 provides for state ownership of antiquities. Italy's Law of June 1, 1939, no. 1089 provides for state ownership as well. In China the 1982 Constitution charges the state to protect "important items of China's historical and cultural heritage." People's Republic of China, Constitution, ch. 1, art. 22 (1982).

[7] Paul M. Bator, THE INTERNATIONAL TRADE IN ART, 49 (1983).

[8] *See* Raymond Fisman, Shang-Jin Wei, *The Smuggling of Art, and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiquities*, NBER Working Paper No. 13446 (2007). The authors undertook an empirical study of the illicit art and antiquities trade to account for the different treatment of cultural objects in nations of origin and in market nations. The authors capitalize on the differing treatments as "the exportation of broad classes of cultural objects is prohibited by most countries without a special permit. However, once these exported goods have left the country of origin, they are not generally regarded as contraband when imported into their destination." *Id.* at 2. This differing treatment leads to a "reporting gap" by which the illicit trade in antiquities can be measured. The preliminary findings indicate that antiquities smuggling shares a correlation with those nations of origin which suffer from corruption generally, finding "strong and robust evidence that the percentage under-recording of exports of cultural objects is highly correlated [to] the exporting country's level of corruption as measured by a commonly used subjective index." *Id.* at 12.

large-scale criminal operations and organized crime networks. It also creates a powerful deterrent to impart any kind of public scrutiny to many antiquities transfers. This article proposes a legal framework for effecting a heightened scrutiny of the trade, which can alleviate many of these difficulties by allowing for a licit trade in antiquities. Such a framework will have a profound impact on the existing body of public and criminal law aimed at stemming the illicit trade in antiquities.[9]

The current antiquities market is the product of tensions between two competing views on what should be done with the antiquities and their accompanying context which comprises our common cultural heritage.[10] This tension often precludes effective policy solutions, and perpetuates the current difficulties.[11] One group of scholars and policy makers argues that archaeological sites are limited resources which should not be exploited commercially.[12] They argue that the regulation of antiquities helps to reduce the looting of sites and smuggling of objects through deterrence and the high costs of avoiding these .

The opposing group argues that this strong source regulation deters individuals from declaring their chance finds of antiquities and drives any trade into the black market, further increasing the criminal and corrupt aspects of the trade.[13] By not allowing for a legitimate marketplace for these inherently valuable objects, restrictions

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[9] John Henry Merryman has advocated for a licit trade in cultural objects, arguing the art and antiquities trade could theoretically forge partnerships with nations of origin to help promote responsible protection of antiquities and archaeological sites. John Henry Merryman, *A Licit International Trade in Cultural Objects,* 4 INT'L J. CULTURAL PROP. 12 (1995). For this author's criticism of the weaknesses in the current criminal regulation *see* Derek Fincham, *Why U.S. Federal Penalties for Dealing in Illicit Cultural Property are Ineffective and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597 (2007).

[10] For a discussion of the importance of archaeology, *see* Derek Fincham, *The Fundamental Importance of Archaeological Context*, in ART AND CRIME: EXPLORING THE DARK SIDE OF THE ART WORLD, 3 (Noah Charney, ed., 2009).

[11] Alexander Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 Fordham Int'l L. J. 690 (2008) (noting "Debates over the trade in archaeological objects or antiquities are contentious, emotional, and often contain not-so-subtle claims about the relative morality of its interlocutors").

[12] *See* Lyndel V. Prott & Patrick J. O'Keefe, LAW AND THE CULTURAL HERITAGE: MOVEMENT 464-70 (1989); Lyndel V. Prott, *The International Movement of Cultural Objects*, 12 INT'L J. CULTURAL PROP. 225 (2005).

[13] *See* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986); John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11 (2005).

cause the illicit trade to flourish. Opponents of these strong source regulations argue that the law should protect only the most important display-quality objects, which would allow more people to come into contact with these objects, allowing them to own them privately or visit them in museums in other parts of the world.[14]

The fact is that both arguments have their merits, but we are left with a system of half-measures in which neither group's policies are effectively implemented. Making the matter more difficult is the sharp disagreements which often result in both sides shouting across a divide. This results in a stale argument, sometimes little better than entrenched talking points.[15] This division may be understandable, or perhaps even inevitable, if we consider the differing loyalties of these groups. Museums depend upon donations and support from collectors, who support a free antiquities market.[16] In turn, archaeologists have ties to nations of origin for things such as excavation permits.[17] This article attempts to carve out a middle ground which can serve to effectively police the antiquities trade, while placing liability upon the actors in the trade owing to their position as "heritage makers".[18] By focusing on the means of acquisition and by imparting a meaningful due diligence procedure under which antiquities are transferred in good faith, the destruction of ancient sites and the harm to museums and cultural institutions can be eliminated.[19] A number of efforts have been directed at the structure these increased

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[14] *See* James Cuno, WHO OWNS ANTIQUITY? (2008).

[15] *See* Alan Audi, *A Semiotics of Cultural Property Argument*, 14 INT'L J. CULTURAL PROP. 131, 132 (2007).

[16] *See* AAMD, "Art Museums, Private Collectors, and the Public Benefit", http://www.aamd.org/pdfs/Private%20Collectors.pdf, (last visited Jan. 8, 2008).

[17] *See* Steven Vincent, *The War on Collecting*, ART & AUCTION, Feb. 15, 1999 at 39.

[18] *See infra* notes 179-**Error! Bookmark not defined.** and accompanying text.

[19] To paraphrase Justice Holmes, what usually is done may evidence what should be done; but what ought to be done is measured against a standard of reasonable prudence, whether it is the usual practice or not. *See* Texas & Pacific Ry. Co. v. Behymer, 189 U.S. 468, 479 (1903). Due diligence is an ancient legal practice, dating to the dawn of commercial activity: "The notion and practice of due diligence--that is using reasonable efforts as measured by a prudent person standard to determine the accuracy and completeness of statements or the bona fides [of] . . . [a] transaction--has, at least informally, been in existence since the first unwary customer bought the first misrepresented goods or services from a shrewd merchant." Gary Lawrence, DUE DILIGENCE IN BUSINESS TRANSACTIONS § 5.01, at 5-1 (1994). *See* Janet Ulph, *Exercising Due Diligence, part I: Art transactions*, 3 J. ART, ANTIQUITY & L. 323 (1998).

efforts may require.[20] A necessary predicate for facilitating heightened diligence procedures is a theoretical basis for why we need this increased scrutiny. This article provides such a theoretical basis, a new fraud on heritage theory that acknowledges and examines the devastating consequences which invariably result from the current state of the insufficient good faith enquiry for the acquisition of antiquities.

By most accounts, many American museums have ceased acquiring antiquities with dubious histories and the trade in antiquities has diminished even among private collectors and auction houses. It appears, however, that looting, theft, and forgeries continue unabated, as unscrupulous dealers wait for a market to emerge somewhere for these objects. The challenge for heritage advocates (including archaeologists, dealers, auction houses and others) is to organize and implement an effective and workable heritage management framework. It is not enough for these groups to retreat to the same entrenched talking points. If any change takes place in heritage policy, it will be the result of effective compromise, and the creation of a middle ground. Cultural heritage policymakers ought to avoid dichotomies that inevitably lead to little positive dialogue, which in turn hampers efforts to create intelligent policy. Indeed, these groups cannot rely on policy makers to construct a framework for them; rather, these groups need to find common ground and work towards an effective compromise. This article proposes one starting point—the increased scrutiny of antiquities transactions, which would have the benefit of securing a licit and open trade in legal antiquities, while also preventing looting, theft and destruction of historical sites. All too often, interested observers make grand declarations about what the law should be, or how governments need to enact better regulation. The first step in that long process is a meaningful discourse.

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[20] *See* Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L. J. 955 (2001) (examining the private international law implications of the stolen art trade); Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 411-16 (1995) (arguing Nations of origin should "enter the market" to have some form of control over it, and to stem the flow of cultural property); Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631 (2000) (arguing purchasers of cultural property should bear the greater burden in researching the title history of objects).

B. "Good Faith" and Antiquities

Good or bad faith plays a prominent role in the resolution of disputes involving stolen or illegally exported cultural objects.[21] The Second Circuit Federal Court of Appeals predicted in 1987 that the legal issues raised when original owners attempt to recover cultural property from good-faith purchasers, though interesting, would not appear frequently; however, these disputes endure.[22] Underlying each controversy are the competing claims of two relative innocents, making it "impossible for the law to mete out exact justice."[23] These decisions are often reached via a complex body of laws incorporating burdens of proof, private international law, international law (much of which could be classified as soft law), and limitations provisions. The underlying substantive preference for original owners or good faith purchasers often plays an important role, but many of these other complicating factors ultimately determine the

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[21] The Uniform Commercial Code defines "good faith" as "Honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103(1)(b) (2003). It is the failure of courts to routinely examine the practices of the antiquities trade which this article attempts to correct.

[22] DeWeerth v. Baldinger, 836 F.2d 103, 108 n.5 (2d Cir. 1987), *but see* O'Keeffe v. Snyder, 416 A.2d *862* (N.J. 1980) (in 1980 quoting an affidavit by the International Foundation for Art Research which protested an "explosion in art thefts" and a "worldwide phenomenon of art theft which has reached epidemic proportions").

[23] Ray Brown, THE LAW OF PERSONAL PROPERTY 193 (3d ed. 1975). It should be stressed that the harm to the losing party can often be minimized. In some cases the original owner will have collected on an insurance policy if the work has been stolen. *See, e.g.*, Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *3-4 (E.D. Pa. Feb. 23, 1995), *aff'd* No. 95-1807, 1996 U.S. App. LEXIS 14999 (3d Cir. May 7, 1996) (noting that the owners had collected on an insurance policy covering art stolen from the owners' home). Although, because of their high value, many works are uninsurable, either because a policy is unobtainable or because its costs are prohibitive. In the U.S., a good-faith purchaser may be able to recover from her seller for breach of warranty. *See* U.C.C. § 2-312(1)(a) (1977) (creating an implied warranty by the seller that "the title conveyed shall be good and its transfer rightful"). A claim for breach of this warranty may often be difficult to make, however. Take for example the situation faced by the Seattle Art Museum when it returned a Matisse painting entitled *Odalisque* to the original owner's heirs. Regina Hackett, *Seattle's Matisse Will Go Back to Owners: Museum Return Art Stolen by Nazis*, SEATTLE POST-INTELLIGENCER, June 15, 1999, at A1. The museum sued the dealer who had sold the work to the Bloedels, who donated the work to the museum. The District Court dismissed the suit because the museum had not been defrauded and had not acquired the right to sue from the donors. Rosenberg v. Seattle Art Museum, 70 F. Supp. 2d 1163, 1167 (W.D. Wash. 1999). The court later vacated the dismissal order after the museum secured from the donors' heirs an assignment of the fraud claim. Rosenberg v. Seattle Art Museum, 124 F. Supp. 2d 1207, 1211, No. C98-1073L, 2000 U.S. Dist. LEXIS 7770, at *8 (W.D. Wash. Mar. 22, 2000).

outcome.[24] These difficulties can be substantially decreased or even eliminated with increased scrutiny of the antiquities trade.

C. Why Regulate the Antiquities Trade?

The current state of the antiquities destroys archaeological and historical context; priceless information which can tell us a great deal about our collective history. Most purchases or transfers of art and antiquities do not include any information on title history or provenance.[25] The state of the market promotes asymmetrical agreements in which one party to a transaction knows far more about the material facts of the trade than the other party. One of the consequences of this is a process that destroys archaeological context. But it also distorts the historical record by providing a market for modern forgeries. In a recent article, Charles Stanish argues that eBay, long thought to be rife with illegally excavated antiquities, may not be as big a problem for the looting of ancient sites as many had believed.[26] A growing body of evidence indicates that a substantial portion of antiquities appear in the market illicitly, or at least without addressing provenance. This leads not only to the looting of sites of course, but also to forgeries. Professor Ricardo Elia recently conducted a study on Italian vases from the Apulian region.[27] Elia analyzed Sotheby's auction catalogues between 1960 and 1998 and found

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[24] *See infra* notes 64- **Error! Bookmark not defined.** and accompanying text.

[25] When these details are included, the value of the antiquities soars. In the spring of 2007 the Albright-Knox museum in Buffalo, New York auctioned many of its antiquities to shift their focus to buying contemporary art. As a result, a number of objects with clean and detailed provenances dating back decades entered the market. One object, a Roman bronze sculpture of the goddess Artemis with a stag, was sold at Sotheby's in New York for a then-record (for an antiquity) $28.6 million. Many speculated its high price was earned because of its comparatively clean provenance, though there is no record of it before its initial publicized purchase in 1953, meaning, it was very likely illegally excavated. At minimum, we do not know even where it was discovered. *See* Lawrence Van Gelder, *Sculpture Sale is a Record*, N.Y. TIMES, June 8, 2007, at E5.

[26] Charles Stanish, *Forging Ahead: Or, how I learned to stop worrying and love eBay*, 62 ARCHAEOLOGY No. 3 (May/June 2009). He argues, "The wealthier collector who up to now has been laughing about the naive folks who buy on eBay is in for a surprise, too: those dealers that provide private sales are some of the forgers' best customers, knowingly or otherwise. In fact, the workshops reserve their "finest" pieces for collectors using the same backdoor channels as before, but now with a much higher profit margin because they are selling fakes."

[27] 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 146 (Neil Brodie et al. eds., 2001).

that of the 1,550 Apulian red-figure vases auctioned, only fifteen percent had any provenance information.[28] Another study by David Gill and Christopher Chippindale looked at Cycladic figurines.[29] It concluded that of the 1,600 known Greek Cycladic figurines, only 143 were recovered by archaeologists.[30] Another study examined the antiquities collections of seven prominent collectors, including Shelby White and Leon Levy, who loaned their respective collections to an exhibition at the Metropolitan Museum of Art in New York in 1990 and 1991.[31] Only ten percent of the 1,396 objects in these seven collections had a stated provenance.[32] Yet another study looked at five auction sales in 1991 and found that only eighteen percent of the objects in the catalogues had a stated provenance.[33]

A similar study was undertaken by Elizabeth Gilgan, which examined the American market for antiquities from Belize.[34] Gilgan looked at auction catalogues from the 1970s through the 1990s to trace pre-Columbian objects that appeared on the market. She found a substantial shift in the descriptions of objects in the catalogues so as to elude detection by customs authorities as the United States began to impose import restrictions on the nearby nations of Guatemala and El Salvador. She found that catalogue descriptions employed the term "lowlands" rather than describing the precise region of origin, such as "Petén in Guatemala." Such a generic description made it more difficult to restrict the illegal movement of these objects.

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[28] *Id.* at 150-51.

[29] Gill & Chippindale, *supra* note 144.

[30] *Id*.

[31] Christopher Chippindale & David W.J. Gill, *Material Consequences of Contemporary Classical Collecting*, 104 AM. J. ARCHAEOLOGY 463 (2000).

[32] *Id.* at 481. Note, both the Cycladic study and the Apulian study produced remarkably similar percentages.

[33] *Id.* at 481-82.

[34] Elizabeth Gilgan, *Looting and the Market for Maya Objects: A Belizean Perspective*, *in* TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE 73 (Neil Brodie et al. eds., 2001).

The illicit trade in antiquities presents more difficult regulatory challenges than the trade in stolen art. No records exist for newly discovered antiquities, and in some cases, source nations have not even documented the stores of antiquities which have been excavated but are not on display.[35] A great deal of the trade in antiquities may include objects which have been illegally excavated, illegally exported, or even stolen from museums or storehouses.[36] Illegal excavations destroy archaeological context and sometimes even the objects themselves, which are often chopped up or disguised to hide their value.[37] The illicit trade has the potential to divest a nation of a large part of its cultural heritage. In 2002, Italy reported over 18,000 objects stolen from its museums, churches, historic sites, and archaeological sites.[38] These objects are valuable for their artistic, cultural and historical importance. When they are stolen or destroyed, we lose the ability to study and learn about our past.

The absence of a clear international consensus on the laws, policy and penalties guiding ethe antiquities trade also indicates the need for a uniform standard of good faith that can navigate many of the difficulties bound up in the trade. Antiquities can move across borders easily, and enforcement of the existing laws still relies far too much on self-regulation by buyers, dealers and museums. Although the attitude is changing, because of the high-profile trials of individuals such as Marion True and Robert Hecht in

[35] The Ka-Nefer-Nefer mask on display at the Saint Louis Art Museum was most likely stolen from an Egyptian warehouse in the 1980s, where it had been stored since its discovery during a professional dig in 1951 at Saqqara south of Cairo. The Saint Louis Art Museum acquired the mask in 1998, but Egypt has requested its return. Malcolm Gay, *Out of Egypt*, RIVER FRONT TIMES, Feb. 15, 2006, http://www.riverfronttimes.com/2006-02-15/news/out-of-egypt/full.

[36] Richard McGill Murphy, *A Corrupt Culture*, NEW LEADER, Feb. 23, 1998, at 15 (arguing that "30 to 40 percent of the world's available antiquities pass through the sale rooms [of dealers] in New York and London. Roughly 90 percent of these pieces are of unknown provenance, meaning they were almost certainly stolen, smuggled or both.").

[37] A great deal of scholarship focuses on the damage done to archaeological sites as a result of the illicit trade. For two of the most persuasive articles, *see* Clemency Coggins, *United States Cultural Property Legislation: Observation of a Combatant*, 7 INT'L J. CULTURAL PROP. 52 (1998); Gerstenblith, *supra* n. **Error! Bookmark not defined.**.

[38] INTERPOL, *Cultural Property Theft Statistics* http://www.interpol.int/Public/WorkOfArt/statistics/StatPlace2003.asp (last visited Dec. 10, 2008).

Italy,[39] a great deal of progress is still needed. There exists a basic core of agreement within the heritage community that art theft and antiquities looting are pressing problems. There are sharp differences of opinion, however, with respect to the acquisition of these objects and the circumstances under which they should be acquired.

## II. The Role of Good Faith in Law and Commerce

One of the important potential legal mechanisms for the increased scrutiny of the antiquities trade is ensuring that purchasers of antiquities act in good faith when they acquire objects. Unfortunately, the law in the U.S. strongly favors original owners, and as a general rule, provides purchasers with the benefit of the doubt. Section III of this paper will examine how meaningful safeguards might be implemented, but first, one needs to understand the role good faith plays in U.S. law and elsewhere.

To begin to better understand the inherent difficulty of good faith generally, we examine the scenario of a stolen object sold on to an unwitting party. The owner, thief and purchaser form a difficult, perhaps irresolvable triangle of legal claims for lawmakers to resolve. Good faith acquirers of stolen goods are accorded very different legal positions in both Civilian and Common law legal systems. As we will see, there has been a general trend to increase the rights of good faith purchasers and to confer it more readily, in an attempt to increase the ease of commerce. As Grant Gilmore argues in his discussion of the steady shift in the American legal tradition towards a weaker standard of good faith:

> The triumph of the good faith purchaser has been one of the most dramatic episodes in our legal history. In his several guises, he serves a commercial function: he is protected not because of his praiseworthy character, but to the end that commercial transactions may be engaged in without elaborate investigation of property rights and in reliance on the possession of property by one who offers it for sale or to secure a loan. As the doctrine strikes roots in one or another field, the "good faith" component tends to atrophy and the commercial purchaser is protected with little more than lip service paid to his "bona fides".[40]

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[39] Elisabetta Povoledo, *Casting Blame for Looting in Trial of Getty Ex-Curator*, N.Y. TIMES, Jan. 18, 2007, at E3.

[40] Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L. J. 1057 (1954).

So many of the simple barriers to achieving good faith status have gradually eroded. Good faith first emerged in Roman law, which recognized that a promise can create an enforceable obligation. Thus, the idea of promissory liability was created and which provided a foundation for modern notions of good faith.[41] In medieval Europe, buyers and sellers would pledge their faith to the Roman Catholic Church, thus they pledged to discharge their duties or indicated their honesty at the risk of forfeiting their eternal salvation.[42] A buyer could maintain title to an object she had acquired if she had acquired it in good faith, as evidenced by her willingness to sacrifice eternal salvation.[43] Such an innocent infringer incurs liability, but courts have discretion in fashioning equitable remedies. Yet this leaves us with a question, what does it mean to be "in good faith"? We can gain a richer understanding of the doctrine by examining it in the context of contracts, property law, and finally, in the context of the antiquities trade.

## A. Good Faith in Contract

In American contract law, the obligations of good faith and fair dealing have been adopted by the *Restatement (Second) of Contracts*.[44] The terms are implied in every contract under the Uniform Commercial Code and have been introduced into contracts via the common law. As Professor E. Allan Farnsworth notes, "'Good faith' has also been used in other connections. It has traditionally been used to set the standard of honesty for good faith purchase, rather than for performance. Coupling it with the term *fair dealing* may help to make it more descriptive of performance."[45] By showing how commercial

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[41] Allan Farnsworth, The Past of Promise: An Historical Introduction to Contract, 69 COLUM. L. REV. 576, 588 (1969).

[42] Frederick Pollack And Frederic Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, VOL. 2, 189-90 (Cambridge Univ. Press, 2d ed., 1898 (1923 Reprint)).

[43] Canon law was instrumental in tying moral ideas to legal norms and reinforcing high standards of good faith, an essential component to commerce. *See* William S. Holdsworth, A HISTORY OF ENGLISH LAW, 80-81 (2d ed., 1931).

[44] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

[45] Allan Farnsworth, CONTRACTS § 7.17, at 504 n.3 (3d ed. 1999).

concerns have fundamentally shaped the application and definition of good faith we can see how similar arguments and policy concerns have shaped its application to the transfer of property. Despite its prevalence, the concept of how and under what circumstances parties have breached their good faith obligations eludes theoretical explanation. Two principal theories have emerged: (1) the foregone opportunities approach, and (2) the excluder analysis. Both theories have produced mixed results. In the absence of a prevalent/predominate theory, judges have often struggled to articulate a workable standard for good faith. Absent clear standards, then, a general preference for commercial ease has emerged in the wake of these two approaches. These economics-based formulations are designed to facilitate commerce—to make it easier and more efficient for the movement of goods and services. A specific class of property (non-commercial and intangible property) is, however, left under protected by the default economic foundations currently underpinning good faith.

The "forgone opportunities" approach first articulated by Steven Burton attempts to define good faith through economic theory by examining the potential costs of a breach of an obligation.[46] Contracts or transfers of property will often involve some discretion on the part of the parties and the "weaker" party may require some protection against the stronger party.[47] This may occur if the terms of a contract are unclear, ambiguous or omitted. Bad faith and simple breaches by failure to perform an express obligation both involve one party's attempt to recapture opportunities forgone (most often because of circumstances or perhaps they were unfairly divested of them) in the contract process. This may include recapturing resources that were committed at the time of the formation of the bargain to particular uses in the future.[48] The duty of good faith provides some measure of protection against this unfair recapturing, and its application depends on the legitimacy of the exercise of that discretion.[49]

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[46] Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 HARV. L. REV. 369, 378-94 (1980).

[47] Burton, *supra* note 46 at 380-84.

[48] Burton, *supra* note 46 at 373-78.

[49] *Id*. at 382-83.

Burton constructs this forgone opportunities theory to "make it possible to identify with greater particularity the relevant expectations and motives that have been held to constitute bad faith."[50] He assumes that contracting parties forgo opportunities to enter into other agreements during the contract formation process.[51] Under the theory, bad faith is an attempt by one party to recapture the opportunities "forgone" during contract formation because parties to the resulting contract should have known the contract precluded subsequent attempts to recall these foregone opportunities.[52] Burton argues that this approach enables courts to adopt a more rigorous and regimented analysis in determining whether parties have successfully discharged their implied obligation of good faith.[53] In applying this approach to antiquities transactions, buyers of objects who may be critical of the current system of regulation are essentially attempting to recapture opportunities which are precluded by the system of national ownership declarations and export restrictions.

The excluder analysis approach, first articulated by Robert Summers[54] and later adopted by the *Restatement (Second) of Contracts*,[55] defines good faith as the opposite of bad faith conduct occurring in the process of contract formation. In his approach, Summers critiqued Burton's foregone opportunities approach. Summers contends, "[G]ood faith ... is best understood as an 'excluder'--it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith."[56] For example, courts have deemed the withholding of material information in a bargain as bad faith. As a consequence, parties must disclose such

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[50] *Id*. at 387.

[51] *Id*. at 388.

[52] *Id*. at 388-89.

[53] *Id*. at 390-92.

[54] See Robert S. Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 VA. L. REV. 195, 199-207 (1968) [hereinafter Summers, Good Faith]; Robert S. Summers, The General Duty of Good Faith--Its Recognition and Conceptualization, 67 CORNELL L. REV. 810, 818-21, 825-30 (1982) [hereinafter Summers, Recognition and Conceptualization].

[55] RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

[56] Summers, *Good Faith*, *supra* note 54 at 196.

information to satisfy the implied obligation of good faith.[57] Summers argues that good faith can be described only through the exclusion of obvious forms of bad faith conduct in the course of performance.[58] The end result being a definition of good faith "in the nature of a principle or maxim," rather than a mere "rule".[59]

This excluder analysis can work in solving problems that courts deal with regularly. Standard commercial agreements or consumer agreements, for example, have been examined in some detail, and courts generally handle them quickly and efficiently.[60] It must be noted that when a dispute implicates other concerns such as fairness, or involves other concerns, such as the intersection between heritage and commerce or creation and commerce, the standard analytical patterns courts have used in the past begin to reveal some troubling consequences.

The consequence of both the forgone opportunities and excluder analysis approaches reflects an economic analysis of good faith. Economic analysis invariably favors certainty of outcome, which results in a substantial diminishment of the extent to which justice and equity determine good faith. Economic analysis attempts to produce conditions that approach efficient bargaining and correct market failures which might occur in the contracting process.[61] This line of reasoning has troubling consequences for the purchase and transfer of noncommercial objects whose primary value may lie merely

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[57] Summers, *Good Faith*, *supra* note 54 at 196.

[58] Summers, *Good Faith*, *supra* note 54 at 818-21.

[59] *Id*. at 821; *see* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("The phrase 'good faith' is used in a variety of contexts and its meaning varies somewhat with the context…. [I]t excludes a variety of types of conduct characterized as involving 'bad faith' ….").

[60] Emily M.S. Houh, *Critical Interventions: Toward and Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003) (arguing "courts should use the doctrine of good faith in contract law to prohibit improper considerations of race in contract formation and performance, and should recognize good faith as a device for eliminating racial subordination that can function beyond the scope of conventional civil rights discourse").

[61] *See* Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 5 (1986). Fiss argues:

> The aim of th[e] … normative[ ] branch of law and economics is not to describe or explain how decisions were in fact made or predict how they will be made, but rather to guide them…. According to this branch of law and economics, the normative concepts of the law should be construed and applied in such a way as to make the judicial power an instrument for perfecting the market.

in preserving their contextual information. The primary concern bound up in cultural heritage is stewardship, not ease-of-commerce. Thus, the dominance of conventional economic analysis in contract law would seem to suggest that, in an ideal bargaining process, judicial intervention would be required only in egregious circumstances. As the discussion below of the good faith purchase of stolen art and antiquities makes clear, this is precisely how the law has responded to claims for the repatriation and restitution of art and antiquities. In the context of contracts, this occurs if one party induces the other to enter into a bargain through fraud or duress.[62] The market cares little, however, about fairness or justice "[a]s long as there are no artificial barriers to success, no one should be offended by the functioning of the market."[63] Often, the only mechanism by which the details of a transaction are made fully public is the result of a criminal investigation or judicial enquiry. In an ideal state of affairs, a "fully functioning" antiquities market would leave many of the objects where they lay, in their historical and archaeological context. As a result then, property law is an important foundation of heritage preservation.

B. Good Faith Acquisition of Property

Much of the difficulty with the antiquities trade can be traced to the irresolvable triangle found in movable property law: A owns an object; B steals that object, and C eventually buys it in good faith. Legal systems can quickly and easily point to B since the culprit as theft produces a number of negative consequences while conferring few benefits. After all, both A and C have easily identifiable claims against B, but B has often proved an elusive party. When B does appear, courts have had little trouble classifying her as the wrongdoer.[64] In fact, in the antiquities trade, "B" is often a series of

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[62] *See* Robert Cooter & Thomas Ulen, LAW AND ECONOMICS 261-64, 275-77 (Addison Wesley Longman, Inc. 3d ed. 2000).

[63] Robin Paul Malloy, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 40 (1990).

[64] Most if not all legal systems point to her as the culprit, *see* Saltus & Saltus v. Everett, 32 Am Dec. 541 (N.Y. 1838) ("The universal and fundamental principle of our law of personal property, is that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser

individuals who may include the looter, various dealers, and even auction house and Museum personnel.

The law encounters a dilemma when A (the original owner) and C (the good faith purchaser) are left to dispute the property. Common law systems generally favor A, the original owner.[65] Civilian systems instead favor the good-faith purchaser.[66] Often these disputes hinge upon whether C can establish good faith. If we look with more care, however, we find a varied set of potential outcomes which have the effect of rendering the initial conclusion an all too simplistic one with respect to the antiquities trade. In fact, the underlying substantive rules often may have little to do with the resolution. Other rules, particularly the triggering of limitations periods or the acquisition policies of museums, have a much greater potential impact. One of the underlying reasons for the importance of these other legal mechanisms is the lack of scrutiny of good faith itself.

Focusing more on how parties can acquire an antiquity in good faith when they acquire ownership or possession of an antiquity can allow us to navigate this fundamental difference between legal systems. Any satisfactory discussion of good faith reflects not only the meaning of the concept, but also reveals the ebb and flow of the law itself as courts and lawmakers shape and interpret it.[67] There exists an uneasy tension in this area between equity and justice on the one hand and certainty and predictability of outcome on the other. Legal scholars have struggled to alleviate this tension in the context of property.

In an impressive work of comparative scholarship published in 1987, Professor Saul Levmore argued that there will always be variety among the treatments of a good faith purchaser of stolen property because of "the difficulty of discerning the best solution

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under a defective title cannot hold against the true proprietor. That, no one can transfer to another a better title than he has himself is a maxim says Chancellor Kent, 'alike of the common and the civil law, and a sale, *ex vi termini*, imports nothing more than that the bona fide purchaser succeeds to the rights of the vendor'.").

[65] In England and Wales, the Winkworth case highlights the opposition between the Italian Civilian approach and the Common Law approach. *See infra* notes 74- 77 and accompanying text.

[66] *See*, *e.g.*, French Civil Code, art. 2279; German Code, BGB § 937(2); Swiss Civil Code, arts. 714, 934; Italian Civil Code arts. 1153-1157; Netherlands Civil Code, arts. 637 & 2014.

[67] As Oliver Wendall Holmes noted, the law "will become entirely consistent only when it ceases to grow." O.W. Holmes, Jr., THE COMMON LAW 36 (1881).

to a hard question."[68] Levmore undertook an examination of Near Eastern law, post-biblical Jewish law, Roman law, French law, American law, and even Mongolian tribal law. He found that the extreme variety of solutions was consistent with the idea that different lawmakers can reasonably come to different potential solutions to seemingly unanswerable questions, not unlike the question at hand.

The more difficulty an owner might have in recovering lost or stolen goods, the more likely it is that he will to guard against theft. A legal system may attempt to encourage owners to be more vigilant with their property through security measures or other means. Conversely, we might argue that some systems should place burdens on C, the good faith purchaser, because she may be in a better position to remain vigilant for any suspicious circumstances.[69] Here, two issues confront courts and lawmakers: (1) what circumstances should exist in order to award good faith purchaser status; and (2) what rights are accorded these good faith purchasers. Purchasers may be in a better position to detect dubious circumstances, such as the reputation of a seller, the location if it may be unusual, the price, or other suspicious circumstances.[70] A party may be innocent, but did not investigate fully enough to assist law enforcement officers. This is the exact difficulty that arises out of the trade in arts and antiquities. Legal systems have been unable or unwilling to put sufficient pressure on the buyers and acquirers of stolen

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[68] Levmore, *supra* note 80 at 45.

[69] *See supra* notes 137-143 and accompanying text.

[70] Such circumstances are nicely illustrated by a 19th century Scots legal decision, *Faulds v. Townsend* (1861) 23 D. 437 *per* Lord Ordinary (Ardmillan) at 439. A chemist in Scotland bought a horse which it was later learned had been stolen in Ireland. The purchase occurred at midnight. The price was 12 shillings, far short of the ordinary value of such a horse, which would have been closer to £10. The chemist immediately killed and boiled the horse before morning for use in making fertilizer. The judgment of the Lord Ordinary, upheld by the First Division, held for the pursuer:

> This is not an action for vindication or restitution of the stolen horse. That has been rendered impossible by the act of the advocator. If the horse had still been alive, and in possession of the advocator, he must have restored it, and *bona fides* in the purchase would, in that case, have been no defence.

Restitution was an inapplicable remedy in this case, as the defender no longer had possession of the horse. The pursuer still received compensation since the chemist did not show the required due care and caution which the circumstances required, and was therefore liable for *culpa*, or what would be termed negligence today. *Id.*

and illegally exported objects for far too long. If the law were to put pressure on the means of acquisition, it seems likely that many individuals would alter the method of their acquisitions. The ability of A or C to absorb or insure against the risk of a loss also might help lawmakers decide whom to favor in such a dispute. None of these policy-shaping considerations can be effectively applied to the market in art and antiquities, however.[71] Adding to this difficulty, the thief, B, is often more than one individual. The increasing number of legitimate purchasers who effectively wash stolen objects are thusly eviscerating the good-faith hurdle.

Common law systems adhere to the *nemo dat quod non habet* rule—that no one can transfer title to stolen property.[72] In most Civil law jurisdictions, the evaluation between the original owner and the subsequent purchaser often favors the good faith purchaser.[73] An English decision in 1979, *Winkworth v. Christie's*,[74] highlights the underlying differences between both systems; but more importantly, it illustrates how a

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[71] *See supra* note 23.

[72] In England and Wales the general rule is found in Section 21(1) of the Sale of Goods Act 1979:

> Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

[73] In Civilian jurisdictions, this even extends to objects which may be owned by the state. A French court, applying Spanish law, upheld the good faith purchase of a church object because the item had been sold in France. *See* Kurt Siehr, *International Art Trade and the Law*, 243 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL 9, 83-84 (detailing the facts of the case, in which an abbess of a Spanish cathedral sold a ciborium to raise money for her convent (citing Judgment of Apr. 17, 1885 (Duc de Frias v. baron Pichon), Trib. de la Seine, reprinted in 13 Journal du Droit International Prive 593 (1886))). An Italian court has also upheld the good faith purchase of tapestries, even when they were illegally exported from France and sold in Italy to a bona fide purchaser. Judgment of June 27, 1987 (Stato francese c. Ministero per i beni culturali e ambientali e De Contessini) [France v. Ministry of Cultural and Enviornmental Goods], Trib. Roma (Italy), reprinted in part in 71 Rivista de diritto internazionale 920 (1988); *see also* Kurt Siehr, *The Beautiful One Has Come — To Return: The Return of the Bust of Nefertiti From Berlin to Cairo* in IMPERIALISM, ART AND RESTITUTION 114, 121-23 (John H. Merryman ed., 2006) (detailing the facts of the case, which involved the illegal exportation of two French tapestries). The Italian court held that Italian law governed the sale and that the Italian law of inalienability (found in Article 826 of the Codice Civile) applied only to Italian state property. Id. The court found for the defendant because Italian law allows a good-faith purchaser to obtain good title from a thief.

[74] Winkworth v. Christie, Manson & Wood Ltd., [1980] 1 Ch. 496.

more rigorous good faith enquiry can create a uniform approach. In *Winkworth*, a number of Japanese miniatures were stolen from their owner in England and were then taken to Italy where they were sold to the Marchese Paolo Da Pozzo, who soon after consigned the collection to Christie's back in London for sale. In Italy they were purchased in good faith and under Italian law, the purchaser had acquired good title to the objects. The case then presented a conflict of laws question for the English court. Under English law, the original owner would be left unprotected; if Italian law were applied, the subsequent purchaser would be the rightful owner. The court applied the *lex rei sitae* principle, which dictates that the law of the location of the transfer should govern the dispute. The defendant argued that, despite the fact that the objects had returned to the nation from which they had been stolen, the plaintiff, Winkworth, had no legal claim because the sale was executed in good faith and Italian law recognized the defendant's superior title.[75] The English court agreed, holding that validity would be determined according to Italian law, which was the law of the place where the goods were situated at the time of transfer.[76] The miniatures appeared in England, were stolen from an English citizen, but because they were taken abroad and laundered through another jurisdiction favorable to good faith purchasers, the Marchese retained title to the objects.[77]

A more diligent enquiry by the Marchese could have alleviated these difficulties, particularly with respect to the English court's choice of law analysis. Had the Marchese been required to conduct further research before acquiring good faith status, such as checking relevant law enforcement agencies, he may have uncovered the theft and even been able to bring to light the thieves or other middlemen who were responsible for transporting the miniatures onto the continent. In this way, a careful enquiry could

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[75] *Id.* at 500-501.

[76] *Id.* at 514.

[77] Perhaps the court in Winkworth adhered too strictly to the *lex situs* approach. A better approach may have applied the law of the nation of origin. *See* Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J. L. & ARTS 111 (2008). Prott and O'Keefe discuss the other factors the court should have analyzed, such as the nationality of the owner or the location of the miniatures in England originally and concluding "[t]he result in [Winkworth] seems bizarre." Prott, *supra* note 12 at 619.

complement the existing criminal and public law provisions which aim to prevent this kind of "heritage laundering".

Because of the ineffective good faith enquiry, the differences between Civilian and Common law jurisdictions are elevated and exacerbated. As a result of the difficulty we have seen in choosing between the two relatively innocent parties, some commentators have attempted to craft policy models that create a middle position. As Jeremy Epstein, a New York attorney, has argued, art litigation is:

> the classic zero-sum game. At the end of the litigation, one party emerges with the artwork, and the other party leaves with nothing. Although settlements can "split the baby," I have seen no judicial decision that apportions the value of a work between the claimants. The harshness of this result does push parties toward a settlement, but there are always cases that cannot be settled.[78]

Such a compromise seems at least plausible. If both parties to a transaction are relative innocents, why then should one party bear the entire loss? A persuasive case for loss-splitting in a number of situations may be made. With respect to the original owner/good faith purchaser, Saul Levmore's comparison of the treatment of the good faith purchaser problem across a number of different legal systems provides some compelling support for the argument that with respect to valuable cultural objects, increased scrutiny of an object's history is sorely needed. The fact that different legal systems offer quite different solutions to the same dispute suggests that no single solution works best. The solution, then, is to attempt to reconcile the different treatments in some way. Increased scrutiny into how good faith status is acquired is the most compelling way to accomplish this.[79]

The concept of voidable title was introduced as a similar middle ground, introduced for commercial convenience, to help navigate this problem. For a number of reasons, though, art and antiquities transactions and transactions involving other special classes of goods are quite different. Rather than attempting to harmonize the

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[78] Jeremy Epstein, "The Hazards of Common Law Adjudication" *in* Kate Fitz Gibbon (ed.), *Who Owns the Past? Cultural Property, Cultural Policy, and the Law* 123, 127 (2005).

[79] Levmore argues that loss-sharing between original owners and innocent purchasers has not been widely adopted is this sharing rule would generate significant potential valuation problems. Levmore, *supra* note 80 at 63-65. *See supra* notes 144-152 and accompanying text.

irreconcilable, we should focus instead on how and under what circumstances individuals acquire good faith purchaser status. Such a revision requires us to revisit the policy underpinnings currently anchoring good faith principles in place.

One of the major substantive differences between civilian and common law jurisdictions is their treatment of original owners and subsequent good faith purchasers in the irresolvable triangle discussed earlier. Saul Levmore argues that the differing treatments may be inevitable because "[r]easonable people can disagree over whether [the original owner or good faith purchaser] is the second-best target of the law-enforcement system."[80] As a result, when stolen goods are particularly valuable, they are often transported through various jurisdictions. This can have the practical effect of washing title to objects by filtering the object through a number of very different legal systems.[81]

Menachem Mautner argues that cases of competition for ownership between original owners and good faith purchasers should be analyzed much in the same way as an accident.[82] The issue of deciding between an original owner and a good faith purchaser should be decided in the same way we apportion blame in an accident. He presented three considerations that should guide the creation of rules in such cases. The first is to minimize the costs of preventing the accident. Such an approach dictates that liability should be imposed on the party that could have prevented the accident at a lower cost. Extending his argument, he argues the party who has not acted in a just way could have been expected to pay a greater share of the cost, because wrongdoers deserve to be punished more harshly.[83] Second, he strives to minimize the losses resulting from the conflict between the two relatively innocent parties. He presents this consideration in terms of distributive justice, because assets under competition should be awarded to the party who would suffer greater damages should they fail to secure judgment. The third

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[80] Saul Levmore, Variety and Uniformity in the Treatment of the Good-Faith Purchaser, 16 J. OF LEGAL STUDIES 43 (1987).

[81] *See infra* notes 144- 152 and accompanying text; Prott, *supra* note 12 at 396 (1989) (arguing that because many systems of law protect good faith purchases, works of art and antiquities often can be easily laundered through third parties).

[82] Menachem Mautner, "The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties, 90 MICH. L. REV. 95 (1991).

[83] *Id*. at 100-02.

and final of Mautner's considerations attempts to minimize litigation costs. Reviewing the balance of blame between the two parties and examining how and under what circumstances a good faith purchaser acquired an object can be very costly. Mautner argues that the "buyer in good faith and for consideration" should be preferred only in those cases in which it cannot be assumed that the first competitor could have efficiently prevented the loss or theft, or, what he deems "competition" in the first place.[84]

Hanoch Dagan has argued there are three more values which can be added to Mautner's concerns of efficiency and retributive justice: social responsibility, distributive justice, and personality.[85] The Societal responsibility element evaluates whether property owners who can prevent legal accidents should do so. Distributive justice gives weight to the parties' respective positions. Dagan argues, in contrast with Mautner, that the balance should be assessed even when both parties have equal economic status.[86] Finally, Dagan argues that *market overt* situations (wherein transaction costs are eliminated completely) can be justified because they give buyers the incentive to purchase only from vendors whose involvement may insure the competing parties against future legal accidents, while providing vendors an incentive to refine their ability to distinguish goods of questionable origin versus legitimate sources.[87]

These general preferences all signal a steady march towards commercial convenience, and away from any kind of routine examination in a transaction. Although, in the commercial setting generally, minimizing these transactional costs might be a sound idea. In the antiquities trade they have resulted in a trade that destroys heritage, archaeological context, and promotes forgery.

The shift really began to take hold during the middle part of the 20th Century, as evidenced by Grant Gilmore, one of the initial drafters of the Uniform Commercial Code.

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[84] *Id*. at 139-40.

[85] Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1544-45 (2003).

[86] Dagan, *supra* n. 85 at 1545. He argues the assessment may uncover whether the winners or losers might stem from societal or economic groups, justifying a preference for a rule which might benefit disadvantaged groups. Applying this to the antiquities trade, the "winners" may be market nations while the losers are future generations and nations of origin, who have lost cultural objects and the knowledge that flows from their accompanying context.

[87] *See infra* n. 91; Dagan, *supra* n. 85 at 1545-46.

In an influential 1954 article, Gilmore chronicled the beginning of the end of the era of good faith as an in-depth examination of justice and equity. Noting the good faith purchaser "serves a commercial function: he is protected not because of his praiseworthy character, but to the end that commercial transactions may be engaged in without elaborate investigation of property rights and in reliance on the possession of property."[88] Gilmore outlined the history of the law of the sale of goods and persuasively argued that, as economies shifted from a series of local distribution systems to a national marketplace, the initial common law position that the equities of ownership should be protected shifted dramatically as courts dealt with the difficulty of fraudulent agents.[89] The first widespread examples of this are the spread of the Factors Acts in the 19th century.[90] These Acts established that any person who entrusted goods to a factor (i.e. agent) for sale took the risk of the factor selling them beyond his authority. Later, the Acts were expanded to protect banks and other interests that took goods from a factor as security for loans made to the factor. The Factor's Acts were a substantial derogation from the common law.

Another development from this time was the introduction of the concept of "voidable title". Gilmore deems it a "vague idea, never defined, and perhaps incapable of definition, whose greatest virtue … may well have been its shapeless imprecision of outline." The doctrine of voidable title holds that if B buys movable property from A, he gets A's title and can transfer it to a subsequent purchaser. If B were to steal the movable property from A, he of course gets no title. "Voidable title" is an intermediate term between the two extremes: if B gets possession of A's goods by fraud, he has the power to transfer title to a good faith purchaser.[91] Voidable title, then, provided a compromise.

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[88] Gilmore, *supra* n. 40.

[89] Id.

[90] The first English Act (4 George IV, c. 83) was established in 1824. *See* 2 WILLISTON SALES §§ 318, 19 (rev. ed. 1948). Soon after, a number of American States enacted similar provisions. Gilmore, *supra* note 88 at 1058, n. 1.

[91] In England, however, an exception to this rule is recognized: a good faith purchaser was able to purchase a stolen object in good faith in a market overt. The market overt exception was abolished with the Sale of Goods (Amendment) Act 1994. The exception allowed title to be transferred in stolen property in daylight in established markets. The rule had disastrous consequences for owners of stolen property, including the Barrister's at Lincoln's Inn. Works by Gainsborough and Reynolds were taken from the walls

It made it possible to place risk on an original owner in typical commercial contexts while protecting him in a noncommercial situation. In the antiquities trade, "voidable title" has never been mentioned specifically, but seems to be the de facto rule governing the trade. If we return to the idea of an owner, a thief and a good faith purchaser, often the good faith purchaser is basically given the benefit of "voidable title" so long as she has no obvious evidence that an object was looted or stolen. In addition, seldom is there just one thief or looter; rather, there is a series of individuals, dealers and others who transport objects across national boundaries, publicize objects in auction house catalogues and the like, gradually "fabricating" a history and chain of title from thin air.[92]

In American law, the primary exception to the general rule favoring the original owner is that a good-faith purchaser (deemed a "holder" or "holder in due course") of money or a bearer instrument prevails over the original owner.[93] Gilmore noted that the good faith purchase doctrine becomes more complex when intangibles are concerned.[94] He posited "[i]ntangibles are not in themselves property, in the sense that goods are; they are claims to property. Thus when A gives his promissory note to B who negotiates to C who in turn negotiates it to D, what is being bought and sold is not the piece of paper which physically changes hands but the right to collect a certain amount of money from

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of the historic Inns of Court, and were sold for less than £200 at the Bermondsey Market. Sotheby's later valued the works at over £65,000. The barristers were apparently left with no recourse other than to purchase their paintings back, even though they had been stolen. Under the exception of market overt, the buyer had acquired good title to the paintings. The exception was abolished soon after, perhaps because the theft finally persuaded the Government as to the pitfalls inherent in the exception; but problems with the exception were plainly seen. The Lincoln's Inn theft appears to have been the final straw in a growing outcry over the exception. David L. Carey Miller, *Title to Art: Developments in the USA*, 1 SCOTTISH L. & PRAC. QUART. 115, 121 (1996) (citing a letter to The Independent of 8th December 1993 from Judge Stephen Tumin, Chairman of the British Art Market Standing Committee).

[92] *See* Peter Watson, Cecilia Todeschini, THE MEDICI CONSPIRACY (2007). In 2003 Kim Howells, the UK Culture Minister accused Britain's leading auction houses of trading in looted antiquities, "We know that some of the most famous sales outlets in the country have been involved, whether knowing or unknowingly . . . It is time that they got their act together to make sure they are not unwittingly part of organised crime. Fortunes have been made in London by gangsters dealing in art objects stolen from some of the poorest countries on earth. It is time we stopped this illicit trade and protected the good name of art dealers." Colin Brown and Catherine Milner, *Top auction houses sell looted art, claims Howells*, THE TELEGRAPH, May 24, 2003, http://www.telegraph.co.uk/news/uknews/1431084/Top-auction-houses-sell-looted-art-claims-Howells.html.

[93] *See* James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE 550-75, 798-809 (2d ed. 1980); and Brown, *supra* note 23 at 195-97.

[94] Gilmore, *supra* note 88 at 1062.

A which is represented by the piece of paper."[95] The law of these intangible commercial instruments flows from the proposition that these claims are not assignable. As Gilmore notes, "[t]he development of the law of good faith purchase in this field has thus had to take account of burdensome complexities which were not met with in the relatively simple case of [ordinary] goods. It has been necessary to work out a number of subordinate propositions in addition to the basic one that the purchaser in good faith and for value gets "title" or "good title" or even "perfect title."[96] These burdensome complexities are pervasive in the antiquities market, and yet there have been no corresponding legal corrections that have been able to navigate this difficulty. Placing increased scrutiny on the acquisition of good faith is the best way to accomplish this difficult task.

The steady weakening of the definition of good faith in commercial agreements and the resulting restriction in noncommercial situations was, as Gilmore argues, "[a]chieved by the manipulation of a set of concepts which did not purport to take 'commerciality' into account."[97] As a result, in sales law, there was little impetus to develop distinctions between commercial goods and noncommercial goods. The situation, however, was far different with respect to intangibles, where "we find a sharp distinction drawn between commercial and noncommercial property."[98] This then saw the rise of formal requirements in the law of negotiable instruments. The engine driving these changes was the increasing growth of a strong national American economy. Courts and lawmakers attempted to nurture these valuable commercial networks, all the while "good faith" became less and less important.

The Uniform Commercial Code governs the issue of stolen or involuntarily transferred property in the United States.[99] When property has been wrongfully taken

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[95] *Id.* at 1063.

[96] *Id.*

[97] *Id.* at 1068.

[98] *Id.*

[99] U.C.C. §2-403 (West 2005). Power to Transfer; Good Faith Purchase of Goods; "Entrusting": "[a] purchaser of goods acquires all title that the purchaser's transferor had or had power to transfer except that a

from its owner and the taker tries to sell or mortgage or otherwise transfer it, the owner is entitled to follow the asset and demand its restitution. This is true even if the subsequent acquirer is wholly innocent. Such is the case as long as the transferor of rights in the property owns voidable title. Under the UCC, a person with voidable title can transfer valid title to a buyer in good faith for consideration.[100] The purchaser has power to transfer good title to a good-faith purchaser even though the transferor was the victim of fraud as to the identity of the purchaser,[101] the delivery was in exchange for a dishonored check,[102] it was agreed that the transaction was to be a "cash sale,"[103] or the delivery was achieved through fraud prohibited by criminal law.[104] Such is the extent to which commercial convenience and economic "efficiency" has dominated the discussion of the law in this area. The Uniform Commercial Code (UCC) governs commercial transactions generally. The intersection of art and the UCC can sometimes lead to problems, because the UCC applies to goods and definitions of art are vague and often present more difficult issues than in general commercial dealings.

UCC article 2 provides different types of warranties, including warranty of title,[105] express warranties,[106] and implied warranties of merchantability.[107] Of particular

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purchaser of a limited interest acquires rights only to the extent of the interest purchased." *Id*. at § 2-403(1).

[100] U.C.C. § 2-403(1) (West 2005). A person with voidable title can transfer good title to a good faith purchaser for value. If goods have been delivered under a transaction of purchase, the purchaser has such power even if: (a) The transferor was deceived as to the identity of the purchaser; (b) the delivery was in exchange for a check that is later dishonored; (c) it was agreed that th transaction was to be a 'cash sale;' or (d) the delivery was procured through criminal fraud. *Id*. *See in re Coast Trading Co.*, Inc., 744 F.2d 686, 690 (9th Cir. 1984); *Am. Stand. Credit Inc. v. Natl. Cement Co.*, 643 F.2d 248, 268 (5th Cir. 1981); *In re Wathen's Elevators, Inc.*, 32 B.R. 912, 919 (W.D. Bankr. Ky. 1983); *Ledbetter v. Darwin Dobbs Co., Inc.,* 473 So. 2d 197, 200 (Ala. App. 1985); *Touch of Class Leasing v. Mercedes-Benz Credit of Canada, Inc.,* 591 A.2d 661, 666-67 (N.J. App. 1991).

[101] *Charles Evans BMW, Inc. v. Williams*, 395 S.E.2d 650 (651 (Ga. App. 1990); *United Road Machinery Co. v. Jasper*, 568 S.W.2d 242, 244 (Ky. App. 1978).

[102] Brumley Estate v. Iowa Beef Processors, Inc., 704 F.2d 1351, 1362 (5th Cir. 1983).

[103] In re Coast Trading Co., Inc., 744 F.2d at 690.

[104] *Suburban Motors, Inc.*, 268 Cal. Rptr. at 18.

[105] *See* U.C.C. § 2-312 (2004).

[106] *See* U.C.C. § 2-313 (2004).

relevance are the express and implied warranties imposed on sellers in commercial transactions. Dictum in *Jeanneret v. Vichey* indicates that a purchaser may have a claim under the UCC for breach of the implied warranty of merchantability.[108] The Official Comment of this sections states:

> Subsection (1) makes provision for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receives a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.[109]

The warranty of good title provision becomes especially germane in relation to the illicit trade in antiquities. A good faith purchaser who loses a claim may have a claim against the seller. Imagine a situation where a bona fide purchaser loses a replevin suit against an original owner of a stolen painting. The bona fide purchaser may have a claim against the dealer. Logically, if more replevin actions by original owners are successful, dealers should be encouraged to conduct a more careful investigation into the provenance of the objects they buy and sell. A more expansive application of these warranties may help to further limit the illicit trade or help to encourage more accurate documentation of provenance.

As more major art importing nations have enacted measures to prohibit illegally exported art, courts may, as a result, become more willing to find that illegal export could

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[107] *See* U.C.C. §2-314 (2004). *See* Balog v. Center Art Gallery-Hawaii, Inc., 745 F. Supp. 1556, 1563 n.16 (D. Haw. 1990) (rejecting implied warranties as applied to art).

[108] 693 F. 2d 259 (2d Cir. 1982).

[109] UCC § 2-312 (2004). Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

> (a) the title conveyed shall be good, and its transfer rightful; and
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> (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

cloud title as well.[110] A buyer may have good title in the US if an object has been illegally exported from abroad, but the potential market will likely be extremely limited, which would have a serious impact on the value of the object.

In *Porter v. Wertz*, the court differentiated individuals from professional art dealers, and held the gallery has an obligation to verify ownership of an item.[111] The plaintiff entrusted a painting by Maurice Utrillo to Von Maker for the purpose of contemplating its purchase while it hung in Von Maker's home. Von Maker then delivered the work to Wertz. Wertz then sold the painting to the Feigen Gallery. Feigen defended the action alleging the painting had been entrusted to Wertz and he assumed Wertz was an art dealer, making the purchase one carried out in the ordinary course of business. The New York Court of Appeals, however, found the sale was not in the ordinary course of business as Wertz was a "delicatessen" salesman, not an art dealer.

### C. The Law and Economics Approach to Antiquities Law

One of the key reasons for the attractiveness of the law and economics movement is its role in describing and justifying many of the default rules underlying the law. Both the forgone opportunities and excluder analysis approaches are separable, but they each reflect an economic analysis and justification for the role and importance of the legal principle.[112] Richard Posner's *Economic Analysis of Law*[113] has significantly impacted law and economics scholarship by building upon the work of Ronald Coase[114] and Guido Calabresi.[115] Because of the impact and importance of market analysis on the law

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[110] *See* Jeanneret v. Vichey, 693 F.2d 259 (2d Cir. 1982).

[111] Porter v. Wertz, 416 N.Y.S. 2d 254 (1979).

[112] Economics is the study of how society allocates its goods and is premised on the idea that individuals seek to maximize the utility they receive from their goods. *See* Daniel H. Cole & Peter Z. Grossman, PRINCIPLES OF LAW AND ECONOMICS 1 (2005).

[113] Richard A Posner, ECONOMIC ANALYSIS OF LAW (1972).

[114] R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (introducing the idea that if transaction costs are minimal, private bargaining will produce an efficient allocation of resources, irrespective of how rights are assigned).

[115] Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499 (1961).

generally, many default legal rules governing commercial goods reflect goals of economic efficiency, and as a consequence have direct application to discussions about what can or should be done to reform the antiquities trade. In *Economic Analysis of Law*, Posner demonstrates the importance of efficiency, which he defines as the "allocation of resources in which value is maximized".[116] In his introduction, Posner draws a cautious distinction between two efficiency models; one based on a concept of Pareto-superiority and the other on the Kaldor-Hicks constructions of efficiency as the maximization of wealth.[117] The former model describes an efficient transaction or reallocation of resources (such as the reallocation of antiquities, perhaps) as "one that makes at least one person better off and no one worse off."[118] Such a model may be difficult to apply to the transfer of antiquities since it often fails to account for future generations who may undertake archaeological excavation. Even still, the more flexible Kaldor-Hicks model is

> not concerned with whether or not a reallocation of resources will make certain individuals worse off, but rather whether or not society's aggregate utility has been maximized. [A] reallocation of resources is efficient if those who gain from it obtain enough to fully compensate those who lose from it . . . .[119]

Posner takes up the Kaldor-Hicks concept of efficiency, which he also expresses as "wealth maximization."[120] Posner, in his important foundational work on law and economics, thus rests his theories on the policy of wealth maximization. What about objects and classes of objects which are not subject to this "wealth maximization"? Cultural heritage encompasses a broader set of values and interests, and often ownership takes a backseat to the ideas of stewardship and preservation.

The potential flaw in law and economics scholarship will always be the difficult question of defining efficiency. Efficiency is inherently subjective; it relies on intentions. As we have seen, the different groups concerned with antiquities policy have very

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[116] Posner, *supra* note 113, §1.2, at 13.

[117] *See id.* § 1.2, at 14-15.

[118] *Id*. § 1.2, at 14.

[119] Robin Paul Malloy, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 40 (1990).

[120] Posner, *supra* note 113.

different notions of what can or should be done with antiquities. A value shift that allows the broader public and policy makers to increase their estimation of the inherent value of heritage is needed. Merely promoting the maximization of wealth fails to account for all of the value stemming from heritage sites and the knowledge and understanding we can gain if they are properly cared for. This section examines some recent attempts by law and economics proponents to adopt their theories to the antiquities trade. These theories can be criticized because they fail to account for broader notions of heritage preservation and the importance of an object in its archaeological context. Law and economics theories can perhaps offer some good models for heritage policy, but only if they properly value archaeological context, the objects which are lost due to looting, the forgeries which diminish the historical record, and the damage done to the educational missions of museums. The mere market value or price an object may fetch at an auction is merely one component of the "wealth" enshrined in any piece of heritage.

Professor Peter T. Wendel has argued that nations of origin should adopt a possessory interest and future interest approach.[121] He proposes that finders of antiquities should be given a reward of a limited possessory interest in which nations of origin would hold a future interest in the discovered objects.[122] Even setting aside the tremendous difficulty enacting such a politically unpopular model would pose, the approach fails to account for the notion that an object is often best placed in its archaeological context until excavated by professionals. Although Wendel argues that his approach would "maximize utility and social welfare by ensuring that the antiquities are transferred to those who value them the most",[123] it may actually serve to increase the looting or destruction of sites if archaeologists are not the ones who place the most "value" on this kind of pre-emptive excavation. He gives "finders" of objects valuable and lucrative possessory interests which will likely be extremely difficult to take away, but his idea also ignores the underlying basis for nearly every heritage policy enacted in the last 100 years—the preservation of heritage for future generations. The

[121] Peter T. Wendel, Protecting Newly Discovered Antiquities: Thinking Outside the "Fee Simple" Box, 76 FORDHAM L. REV. 1016 (2008).

[122] *Id.* at 1019-20.

[123] *Id.* at 1025.

overwhelming policy of nearly every nation of origin begins with the proposition that the World's ancient sites and cities are not to be regarded as untapped reserves waiting to be exploited.

Two influential proponents of law and economics, William Landes and Richard Posner, specifically address the art trade generally. They discuss the issue of the irresolvable triangle, and how the law should evaluate the claims between original owners and goodfaith purchasers:

> [T]he more rights that the original owner has against a purchaser of a stolen work (even though many transactions may separate the purchaser from the thief), the lower will be the price at which a thief can sell a work of art, thus reducing the incentive for art theft. But the less will be the incentive of the owner to protect his property against theft, which will reduce the cost of stealing to the thief. Analysis of the optimal legal regime is complicated….[124]

John Henry Merryman has found an apparent inconsistency in this argument, noting that "complete legal protection of the original owner … is the standard legal position in most countries"[125] is incorrect and fails to account for the myriad of civilian jurisdictions that have established exactly the opposite.[126] Indeed, Posner and Landes are not alone. A number of American legal thinkers have missed the primary role that the good faith purchaser plays in other jurisdictions.[127] The conclusion we can draw, then, is that good faith plays a very limited role and should be expanded to…. In fact, Professor Harold Weinberg has argued that shifting the loss to owners would lead to "efficiency gains," because owners may be better position to prevent theft, and might be able to acquire insurance; however, he supports his proposition by relying only on American history, ignoring the ancient and storied past of the civilian approach.[128]

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[124] William M. Landes and Richard A. Posner, *The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles*, in ESSAYS IN THE ECONOMICS OF THE ARTS, 184 (V.A. Ginsburgh and P.M. Menger eds., 1996).

[125] *Id*. at 208.

[126] Merryman at 13.

[127] Gilmore, *supra* n. 40.

[128] Harold R. Weinberg, *Sales Law, Economics, and the Negotiability of Goods*, 9 J. LEGAL STUDIES 569 (1980). Merryman strongly criticizes this argument, however. Weinberg partially supports his argument by relying on two hundred years of American history, but this ignores the fact that "the contrasting civil law

As many writers have pointed out, much of law and economic scholarship can be viewed as politically and economically conservative.[129] An important critical assessment of the conservative law and economics approach (Malloy's theory of law and market economy[130]) argues that creativity and discovery may also drive wealth formation and maximization.[131] Malloy uses semiotics to reinterpret the typical discourse and values of law and economics.[132] Thus, a semiotic interpretation of good faith illustrates that good faith may mean one thing to an antiquities dealer, another thing to a prominent museum director, and still another thing to an archaeologist or state official. In fact, a recent work on the semiotics of cultural heritage discourse may help to account for the difficulty in reaching sound policies.[133] Actors in the antiquities market are not always rational or objective and policy discussions often devolve into a stale and familiar argument in which compromise is abandoned in favor of familiar dichotomies. In fact, creativity and discovery may be better, more apt ideals for the promotion of wealth maximization. They may prove to be better models upon which to base antiquities regulation.[134] Put another way, if an antiquities transaction is efficient in terms of the financial end result, yet does not even take into account archaeological context, heritage, knowledge or discovery, then why should financial wealth maximization take precedence over the goals of heritage preservation that most nations have publicly endorsed?[135]

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position is hardly a modern invention. Rules favoring the good faith purchaser over the owner date back to the revival of commerce in the . . . early Renaissance and have long survived in many national legal systems." Merryman *supra* n. x at 11-12. **work in progress**

[129] *See*, *e.g.*, Richard A. Posner, *Law and Economics* Is *Moral*, 24 VAL. U. L. REV. 165-66 (1990).

[130] Robin Malloy, LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS (2000).

[131] *Id.* at 2-4.

[132] *Id.* at 23. *See* Houh *supra* note 60 at 1050-51 (arguing "As Malloy's semiotic reinterpretation demonstrates . . . is that the processes of legal analysis and interpretation are additive").

[133] *See* Audi *supra* note 15.

[134] Malloy *supra* note 130 at 3 (citations omitted).

[135] *See* UNESCO Cultural Property Convention, supra note 153, art. 7(b)(ii). At present there are 116 States Parties. For a current list see http://portal.unesco.org/culture/en/ev.php-URL_ID=8452&URL_DO=DO_TOPIC&URL_SECTION=201.html.

Many past economic models of the antiquities trade miss the mark because they do not properly account for the value in simply leaving objects undisturbed and unremoved from their context, or in preserving them for future generations. A much different approach was taken at a recent gathering of lawyers, archaeologists, antiquities dealers, economists, and members of the museum community at the Milken Institute.[136] The resulting report proposed some new models for the funding of archaeological study, including the increased use of long-term leases for museums and exhibitions to help satisfy demand, the use of museum and collector sponsored archaeological digs, and even the development of archaeological development bonds. The latter two suggestions are unique, perhaps even radical. They have a great deal more merit than many of the other economic models and theories proposed by economists who have discussed the antiquities trade. For economic theories to have any currency, they first must understand and value the supreme importance of the careful study and documentation of archaeological sites. They must also incorporate into their "efficiency" calculus the importance of archaeological context and heritage—a glaring weakness hampering the approaches of both Wendel and Posner and Landes.

### D. Current Standards for the Good Faith Acquisition of Antiquities

Defining "good faith" is a difficult task, particularly given its omnipresence in nearly every legal field. In the narrow context of antiquities, the tremendous intellectual and historical value of the World's heritage and the high value of the sale of these cultural objects necessitate a more careful enquiry. The sections that follow review some of the efforts in defining good faith within the context of the antiquities trade.

#### 1. Courts

Courts have applied and examined good faith conservatively, limiting their analysis of the doctrine only to cases in which good faith is clearly lacking: If a sale were to take place at an unusual location, such as the bond area of an airport[137] or the loading

[136] Milken Institute, Financial Innovations for Developing Archaeological Discovery and Conservation (Milken Inst. 2008), available at http://www.milkeninstitute.org/pdf/FIArchaelogyLab.pdf.

[137] Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, 717 F.Supp. 1374, 1382 (7th Cir. 1990).

dock of an airplane;[138] if the time of the sale were unusual;[139] or if there are indications that an antiquity has recently been in the ground, such as the presence of caterpillars crawling on the object[140] or mud and straw embedded in it.[141] There are also broad classes of antiquities that, either because of their find-spot or composition, perhaps warrant more in-depth research before a responsible acquisition can take place.[142] There are also broad classes of antiquities that, either because of their find-spot or composition, should warrant greater research before a responsible acquisition can take place. Courts have highlighted this problem in the past, indicating that additional safeguards should be put in place in such cases.[143]

In cases of clear misconduct, courts have deemed certain activities as exemplifying (or something) bad faith. In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.,*[144] the Seventh Circuit Court of Appeals

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[138]Such was reportedly the location of the transfer of the so-called Sevso treasure. *See* David D'Arcy, *The Sevso Melodrama: Who Did What and to Whom*, 31 THE ART NEWSPAPER, Oct. 1993, at 14.

[139] Reid v. Metropolis Police Comr. [1973] 2 All E.R. 97.

[140] The Sevso Treasure may have been covered in mud and caterpillars when it was acquired. *See* D'Arcy *supra* note 138.

[141] United States v. McClain, 545 F.2d 988 (1977).

[142] Antiquities from the Jakarta region of Iran should be treated with suspicion owing to the fact that recent floods there uncovered a large number of objects. Republic of Iran v. Barakat Galleries Ltd. [2007] EWHC 705 (QB). Cycladic figures are another example. In 1993, of the 1600 known figures at that time, only 143 could have been uncovered archaeologically, while 1400 others appeared on the market. Of course some of these may have been chance finds or fakes, but they certainly indicate purchasers should conduct a thorough provenance inquiry. Christopher Chippindale and David Gill, *Material and intellectual consequences of esteem for Cycladic figures*, 97 AM. J. ARCHAEOLOGY 601 (1993).

[143] As Chief Judge Bauer of the Federal Court of Appeals for the Seventh Circuit made clear in *Goldberg*:

> [I]n a transaction like this, 'All the red flags are up, all the red lights are on, all the sirens are blaring' . . . In such cases, dealers can (and probably should) take steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like.

*Goldberg*, 917 F.2d 278, 294.

[144] 717 F.Supp. 1374 (S.D. Ind., 1989) aff'd , 917 F.2d 278 (7th Cir. 1990).

held that a number of mosaics which were stolen from a Cypriot church were not acquired in good faith, and returned them to the Kanakaria Church in Cyprus, where they had been attached for nearly 1400 years. The mosaics had been taken from the Kanakaria Church sometime in the late 1970s, not long after armed conflict forced a prolonged evacuation of the area in 1976. Upon learning of the loss, the Kanakaria Church took nearly every conceivable precaution it could to secure the return of the mosaics and to alert the art world to the theft.[145] The mundane workings of the antiquities trade, however, has long attempted to avoid uncovering this kind of unpleasant information that might highlight any bad faith on the part of buyers and/or sellers.

Peg Goldberg, an Indiana art dealer, went to Europe in 1988 and was offered for sale "four early Christian mosaics."[146] The sale was arranged during a meeting with Michel van Rijn, now a well-known art smuggler and forger, who claimed to have been a descendant of both Rembrandt and Rubens. She was told the mosaics had been "found" in the rubble of an "extinct" church in northern Cyprus by the unknown seller, who was an archaeologist "assigned to Northern Cyprus".[147] The likelihood that any reputable archaeologist would sell objects which have been damaged or abandoned due to an ongoing armed conflict defies imagination.

Despite these clear warning signs, Goldberg proceeded with the purchase. In so doing, she conducted a cursory enquiry into the circumstances surrounding the sale. She did so in a manner designed to provide the appearance of a diligent enquiry, not intended to uncover any potential wrongdoing. She called the UNESCO offices in Geneva, and asked general questions about the removal of objects from Cyprus without mentioning the mosaics specifically.[148] Goldberg claimed, though the district court judge strongly questioned the veracity, that she telephoned customs officials in the United States,

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[145] The Church sought assistance from UNESCO, the International Council of Museums, the International Council of Museums and Sites, Europa Nostra, the Council of Europe, the leading auction houses Christie's and Sotheby's, Harvard University's Dumbarton Oaks Institute for Byzantine Studies, and leading Byzantine scholars. 717 F.Supp. at 1380.

[146] 917 F.2d 281.

[147] 917 F.2d 281-82.

[148] 917 F.2d 283.

Switzerland, Germany and Turkey.[149] She also claimed to have contacted the International Foundation for Art Research ("IFAR"), though no record of a requested search was provided, and any formal IFAR search at the time generated a bill. In fact, none of this seemed focused on uncovering the circumstances surrounding the removal of the mosaics from their context. Rather, they were focused on determining if customs or other officials might question the sale.

Indiana's state replevin provision provides "a speedy statutory remedy designed to allow one to recover possession of property wrongfully held or detained as well as any damages incidental to the detention."[150] In this case, the court reached the correct result in returning the mosaics to the plaintiff because the defendant was unable to establish bona fide status. The Federal District Court was perhaps not as confident that U.S. law applied in that it considered the relevant Swiss law and concluded the result would have been similar under Swiss law, since it was impossible for Mrs. Goldberg to claim she was in good faith even under Swiss law.[151] She purchased the objects in haste, had not consulted any registers or specialized agencies, and had not made the proper enquiries in Cyprus, where the object originated. In this case, both the Civilian approach and the Common law approach resulted in the same outcome because it is an example of a rare instance in which an antiquities middleman was discovered and subject to suit.[152] Such an examination should be the norm; however, the art and antiquities trade has not taken this kind of care with acquisitions.

2. International Law

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[149] 917 F.2d 283.

[150] State Exchange Bank of Culver v. Teague, 495 N.E.2d 262, 266 (Ind.App.1986).

[151] *Goldberg*, 717 F. Supp. 1394-95.

[152] Art. 3 of the Swiss Civil Code states:

1. Good faith is presumed when it is a legal condition for the existence or the effects of a right.

2. No one can claim being in good faith, if it is incompatible with the attention that he should have shown in the given circumstances.

Marc Andre-Renold, *The Ubiquitous Question of Good Faith*, in THE PERMANENT COURT OF ARBITRATION/PEACE PALACE PAPERS: RESOLUTION OF CULTURAL PROPERTY DISPUTES 251, 255 (2003).

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property discusses good faith specifically.[153] Article 7(b) (ii) states that the good faith purchaser should be compensated when she must return stolen or illegally exported cultural property. The UNESCO Convention provides an important prohibition on the acquisition of illicit objects which may not be barred by the relevant domestic law. In Section 5(a), curators, collectors and antiquities dealers are urged to adopt "ethical principles". Thus the Convention encourages other actors to act and pursue principles which exceed the bare legal minimum put forth in the implementation of the legislation.[154]

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("UNIDROIT Convention") was an ambitious effort aimed at harmonizing the private laws of various states so as to reduce the harmful effects that occur when laws conflict.[155] Under the UNIDROIT Convention, good faith acquirers of stolen or illegally exported cultural property are entitled to fair and reasonable compensation if they lose title to the original owner. Article 4(1) of the convention provides:

> The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

Article 6(1) provides for the same in cases of illegal export. These provisions strike an effective compromise. Giving sole title to either the good-faith purchaser or the original owner is a crude legal remedy, especially when one considers that many of these disputes span decades, require evidence and testimony that is difficult and expensive to

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[153] UNESCO Convention on the Means of prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *opened for signature* Nov. 14, 1970, 823 U.N.T.S. 231; [hereinafter UNESCO Convention].

[154] Patrick J. O'Keefe, *Museum Acquisition Policies and the UNESCO Convention*, 50 MUSEUM INT'L 20, 21 (1998).

[155] International Institute for the Unification of Private Law, Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, *available at* http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm [hereinafter UNIDROIT Convention].

procure, and implicate a number of legal systems. By compensating the diligent, the Convention is rewarding and promoting thorough provenance research.

Article 4(4) lays out the conditions for due diligence:

> In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

This noteworthy provision attempts to expand the kinds of activities a diligent acquirer should undertake. The UNIDROIT Convention could have been more specific about what actions should be taken, rather than leaving the issue open. A better system would have required that a buyer consult impartial experts (or at the very least, check the major art theft databases) in every art and antiquities transaction before she can claim good-faith status. The Convention leaves these specifics to be determined by individual nations. Nevertheless, any measure making it more likely that buyers conduct provenance research is a welcome change. The single biggest factor perpetuating illicit trade is the shadow and mystery that routinely surrounds cultural property transactions. Many of the problems associated with illicit trade in cultural property and that characterize the current market behavior can be traced to such omissions in provenance research. Newcomers to the cultural heritage field are often surprised to learn that the majority of cultural property transactions do not involve an exchange of information on title history (i.e., provenance).[156] Generally, very little information regarding the authenticity of title is given, and there are no guarantees that any of the provenance information that is given is even accurate.

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[156] Many archaeologists prefer the term "provenience" which indicates the history of an antiquity dating "back to its archaeological origin"; "provenance" generally connotes the title history of a work of art. Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, n.38 (2007). For a discussion of how provenance affects transactions, *see* Leslie P. Singer & Gary A. Lynch, *Are Multiple Art Markets Rational?*, 21 J. CULTURAL ECON. 197 (1997).

As early as 1972, American museums began voluntarily creating new ethical guidelines to restrict acquisition policies in light of the 1970 UNESCO Convention.[157] A number of reforms have been proposed for the acquisition of antiquities.[158] Clemency Coggins has proposed that museums should cease all acquisitions of antiquities for decades.[159] In fact, by failing to establish guidelines that respect the history of an object and its deeper value to heritage and archaeology, museums may be breaching their fiduciary obligations to the public.[160] Others have speculated that rigorous due diligence procedures would encourage nations of origin to "pillage back" from museums of the world.[161] The recent AAMD acquisition guidelines are the most recent culmination of this effort, but they still fall short of an ideal trade which remedies the paucity of accurate history of objects given when antiquities are transferred.

The 1970 UNESCO Convention seeks to change museum policies with ethical principles.[162] One way it accomplishes this is through the International Council of Museums ("ICOM")—an organization that encourages its members to exercise due diligence in researching the history of any object it may want to acquire by

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[157] See most notably the Harvard University Statement on Acquisitions (January 1972) and Smithsonian Institution Policy on Museum Acquisitions (May 1973) reproduced in Marie C. Malaro, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS, Figures IV.1 and IV.2 (2nd ed. 1998). The first museum to announce an acquisition policy of this nature was the University of Pennsylvania Museum on April 1, 1970. Others included the California State University at Long Beach, The Field Museum, Southern Illinois University, Washington State Museum in Seattle, Peabody Museum in Salem, Massachusetts, Arizona State Museum in Tucson, and the Utah Museum of Natural History. *See* Bator *supra* n. 7 note 144.

[158] For a discussion of acquisition policies in light of the conviction of antiquities dealer Fred Schultz *see* Ildiko P. DeAngelis, *How Much Provenance is Enough? Post-*Schultz *Guidelines for Art Museum Acquisition of Archeological Materials and Ancient Art*, in ART AND CULTURAL HERITAGE 398 (Barbara T. Hoffman ed., 2005).

[159] Clemency Coggins, *Essays: A Proposal for Museum Acquisition Policies in the Future*, 1 INT'L J. CULTURAL PROP. 434, 437 (1998).

[160] Patty Gerstenblith, Symposium: Traditional Knowledge, Intellectual Property, and Indigenous Culture: Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public, 11 CARDOZO J. INT'L & COMP. L. 409, 453 (2003).

[161] Ashton Hawkins, *'US v. Schultz:' US Cultural Policy in Confusion*, THE ART NEWSPAPER, Jan. 9, 2003, http://62.253.251.9/access/artnewspaper.html.

[162] *See supra* note 154.

acknowledging the 1970 UNESCO Convention as a benchmark.[163] ICOM maintains that museums have the duty to acquire, preserve, and promote their collections in order to safeguard cultural heritage.[164]

3. Codes of Ethics

A number of prominent American museums have instituted new, more rigorous acquisitions policies. In 2006, the Getty instituted an acquisition policy that requires "documentation or substantial evidence" that an object was taken from its probable nation of discovery after November 17, 1970.[165] The Indianapolis Museum of Art ("IMA") has a similarly ambitious policy, which requires that, in order for an object to be acquired by the Museum, it must have been removed after 1970 or evidence that the object was exported legally, and includes within that policy the donation of objects as well.[166] As Maxwell Anderson, the Director of the IMA noted in discussing his institution's rigorous new policy:

> [T]he act of purchasing unprovenanced works . . . connects . . . a chain of events leading back to their possibly clandestine removal from a country of origin. I believe that it is essential for all of us who care for the evidence of the past to take no actions that might unwittingly contribute to such removals . . . Our collective goal should be to persuade art-rich countries . . . in the creation of a legitimate market in antiquities. Archaeologically rich countries could use funds realized from the open sale of documented antiquities to bolster their efforts to police archaeological sites, and to support research, conservation, and interpretation in museums, while sharing their heritage the world over.[167]

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[163] *See* ICOM, Code of Ethics for Museums, 2006, http://icom.museum/ethics.html#section2 (last visited Mar. 29, 2009) ("Due diligence in this regard should establish the full history of the item from discovery or production").

[164] Id. § 2.

[165] The Getty, Acquisitions by the J. Paul Getty Museum, Oct. 23, 2006, http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf.

[166] Indianapolis Museum of Art Declares Moratorium on Acquisition of Archaeological Objects Lacking Adequate Provenance, Apr. 16, 2007, http://www.ifar.org/upload/PDFLink497df08ec2145IMA%20Acquisitions%20Moratorium.pdf.

[167] Maxwell Anderson, Why Indianapolis will no longer buy unprovenanced antiquities, THE ART NEWSPAPER (May, 2007).

In June, 2008, the Association of Art Museum Directors (AAMD) and its 190 members followed the general trend and set an aggressive new ethics policy.[168] The policy states that in most cases a museum should not acquire an object unless evidence exists that the object was outside its "country of probable modern discovery before 1970, or was legally exported from its probable country of modern discovery after 1970".[169] These new guidelines help define the course of conduct of buyers and sellers of antiquities.[170] Later, in August, 2008, the American Association of Museums (AAM) proposed more rigorous standards, which "require documentation that the object was out of its probable country of modern discovery by Nov. 17, 1970," and also that "museums should not acquire any object that, to the knowledge of the museum, has been illegally exported from its country of modern discovery or the country where it was last legally owned," a standard which goes beyond the minimum required under U.S. law.[171] Such a stringent new standard is a welcome change. One of the anticipated advantages of the new policy is a far more rigorous acquisition investigation on the part of museums, else they may risk running afoul of public opinion or attracting further notice from Federal Agents.

The debate has shifted now to encompass the date of 1970 as a cutoff, though these ethical guidelines are not hard and fast rules. They are guidelines, and art museums can derogate from them freely, though they do so at their own peril. They of course run

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[168] *See* Association of Art Museum Directors (AAMD), Members, http://www.aamd.org/about/#Members (last visited Jan. 27, 2009).

[169] AAMD, New Report on the Acquisition of Archaeological Materials and Ancient Art, June 4, 2008, http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf.

[170] Other organizations have set acquisitions policies as well, *see, e.g.*, ICOM Ethics of Acquisition, http://icom.museum/acquisition.html (last visited Jan. 12, 2009) (directing its member museums, inter alia, to observe the highest ethical standards "... in the very important process of acquisition," and providing that "[i]f a museum is offered objects, the licit quality of which it has reason to doubt, it will contact the competent authorities of the country of origin in an effort to help this country safeguard its national heritage"); American Association of Museums Code of Ethics for Museums, http:// www.aam-us.org/museumresources/ethics/coe.cfm (last visited Nov. Jan. 12, 2009) (directing museums to handle "competing claims of ownership that may be asserted in connection with objects in its custody... openly, seriously, responsively and with respect for the dignity of all parties involved.").

[171] American Association of Museums, Standards Regarding Archaeological Material and Ancient Art, Approved July 2008, http://www.aam-us.org/museumresources/ethics/upload/Standards%20Regarding%20Archaeological%20Material%20and%20Ancient%20Art.pdf.

grave public relations and financial risks when they do so. This has been the case in recent years, as evidenced by various repatriations to Italy by the MFA Boston, the Met, the Getty, Princeton, and elsewhere.[172] It should be noted, that under the AAMD guidelines, a museum may still acquire an object which was not legally removed from its nation of origin before 1970 if it is published as such on the AAMD website. Illicit objects may still appear on the market, and museums must still maintain careful acquisition procedures that are designed to reveal as much history of an object as possible. Museums, however, are still able to use their own discretion when they acquire objects.

The difficulty with museum acquisition policies is that they must be implemented and museums must not be allowed to circumvent the provisions for "special" cases. One way this can be accomplished is if courts use these acquisition policies to help them in determining the standards required for good faith.[173]

## III. Towards a Meaningful Due Diligence Standard

Heightened scrutiny of the transfer of antiquities can substantially eliminate their illicit trade. In fact, a meaningful and diligent acquisition procedure will diminish the illegal looting of the archaeological record and prevent the theft of monumental architecture. One of the difficulties with imparting some real hurdles to the good faith standard for the acquisition of antiquities is the strong presumption in American law favoring the original owner. There are, however, three ways in which a heightened good-faith standard can have an impact on the illicit trade.

### A. Three Ways to Increase Scrutiny

#### 1. Fraud on Our Heritage

If the illicit trade in antiquities ever disappears, it will be because policy-makers have effectively distinguished illicit objects. But as Kenneth Polk and Duncan Chappell

[172] *See infra* notes 227 - 229 and accompanying text.

[173] Patrick O'Keefe notes an anecdote of searching for the acquisition statement of a major museum because it had been filed away and forgotten. Patrick J. O'Keefe, *Museum Acquisition Policies and the UNESCO Convention*, 50 MUSEUM INTERNATIONAL 20, 21 (1998).

point out, "Art fraud . . . is a recurring problem for the international art market."[174] To understand how we can look at the basic requirement for establishing fraud. There are five elements: (1) the defendant made a false statement of a material fact; (2) the defendant knew the statement was false; (3) the defendant intended that the false statement induce a party to act; (4) the party reasonably relied on the false statement; and (5) the plaintiff suffered damages as a result of his reasonable reliance on the false statement.[175] Within the context of the antiquities trade, the first two elements will be most problematic.[176]

This would seem to require routine examinations of past transactions which would allow aggrieved claimants to bring actions, which would, of course, have consequences for those who attempt to launder antiquities through buyers, sellers, auction houses, and even museums. If a museum (an important link in the antiquities supply chain) acquires an antiquity that has been looted, stolen or illegally exported from its nation of origin, then the institution should incur substantial liability. The difficulty will be in establishing the wrongdoing, a task made even more difficult given how little history is made available when many antiquities are transferred. And even if wrongdoing can be established, punishing museums will always harm the public museums are meant to serve. Although the obstacles to such a change are arduous, we should remember that

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[174] Kenneth Polk & Duncan Chappell, *Fakes and Deception: Examining Fraud in the Art Market*, in ART AND CRIME: EXPLORING THE DARK SIDE OF THE ART WORLD 72 (Noah Charney ed., 2009).

[175] Tricontinental Industries Ltd v. Price Waterhouse Coopers, 475 F3d 824, 841 (7th Cir 2006).

[176] Whether a statement is material is determined by either considering what a reasonable person would consider material or by the specific notice standard. A fact is material under the reasonable man standard if the defendant should have known his misrepresentations about that fact would be considered important by the person to whom they were directed. *See* In re Mercer, 246 F3d 391, 416 (5th Cir 2001). Courts have used the specific notice standard in cases where the defendants knew the plaintiff viewed a particular fact as important. *See* Professional Cleaning v. Kennedy Funding, Inc, 245 Fed Appx 161, 167 (3d Cir 2007) (noting that the plaintiff corporation made clear what it needed and that the defendant was aware of the plaintiff's needs). *See also* Wal-Mart Stores, Inc v. AIG Life Insurance Co, 901 A2d 106, 116 (Del 2006) (holding that the companies made material misrepresentations when they failed to provide critical information about the tax breaks associated with a particular financial vehicle that the plaintiff was interested in for its tax benefits).

museums are often the terminus for these objects and these institutions owe a duty to scholars, the museum-going public, and the broader cultural heritage community.[177]

One way to navigate this difficulty may be through the recent and novel application of the fraud-on-the-market theory to the art trade generally.[178] The theory primarily has been applied in securities fraud cases. It applies when an individual's misrepresentations with respect to a security traded in the open market later affects the price of the security.[179] The doctrine has led to a number of class action suits, because under the theory, all those who purchased or sold shares in the market during the relevant period are said to have relied on the fraud. The art trade does not operate in the same way as these typical financial markets might, but recently it has been applied to counterfeit works case.

A New York trial court opinion involving a counterfeit work of art, which could have far-reaching consequences because it provides a means through which subsequent purchasers can bring claims against prominent auction houses. In the ongoing dispute *Tony Shafrazi Gallery Inc. v. Christie's Inc.*, New York Supreme Court Justice Cahn denied a motion to dismiss a claim for fraud made by a buyer who had acquired a counterfeit Jean-Michel Basquiat work from an art gallery, which had purchased the work from Christie's auction house in New York.[180] As a consequence, the plaintiff may be entitled to a claim for fraud and punitive damages from Christies despite the fact he did not buy the work from the auction house.

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[177] See 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).

[178] The theory, embraced by the Supreme Court presumes that a fraudulent statement or omission concerning a publicly traded security effects all trading of that security or firm's shares during the period in which the fraud remains uncorrected. *See* Basic Inc. v. Levinson, 485 U.S. 224, 246 (1988) ("Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.").

[179] An investor who purchased a stock in such a market is harmed if the price reflects false information as a consequence of a material misrepresentation. *See* Bell v. Ascendant Solutions, Inc. 422 F.3d 307, 310 n.2 (5th Cir. 2005).

[180] Tony Shafrazi Gallery Inc. v. Christie's Inc., 2008 WL 4972888 (N.Y.Sup. 2008).

In 1990, the Tony Shafrazi Gallery purchased the work at issue. In 1991, the work was sold to the collector, Guido Orsi. Fifteen years later, in 2006, the Basquiat Authentication Committee told Orsi his work was a fake. Shafrazi and Orsi then brought suit against Christie's. All of the plaintiff's claims were dismissed save the fraud claims, which were founded on the idea that art buyers rely on the expertise of a prestigious auction house such as Christie's, due to their position as a "market maker." When Christie's provides a warranty concerning the authenticity, or even the provenance of a painting, the usual consensus in the art industry is that the provenance of the work of art is established firmly. The plaintiffs alleged that Orsi purchased the painting in reliance on Christie's representations. The plaintiffs argued that the auction house's guarantee could be relied upon not only by bidders at its auctions, but also by subsequent purchasers. In the pending controversy, there was very little distinction drawn between Shafrazi and Orsi, but potentially any other subsequent buyer could have a claim— irrespective of the time considerations or the number of intervening transactions.

At the time of writing, the decision seems likely to advance to the Appellate Division. It should be noted, however, that the decision could have a profound impact on auction houses, since it places substantial burdens on them. This decision may also affect the antiquities trade in a very direct way. There would appear to be a strong potential claim for many of these subsequent acquirers. Such a rule makes for terrific policy and would serve to increase the scrutiny of the antiquities trade and have the effect of elevating the importance of good faith as a meaningful check on individual transactions. One of the difficulties, again, will be establishing the intent of these individual dealers and auction house employees. The recent Christie's litigation uses a fraud theory to place a burden on the auction house for a potentially misattributed work of art. A fraud theory, however, may be problematic, given how difficult it can be to establish wrongdoing on the part of individual actors when, absent massive criminal investigations, so little is known about the mundane details surrounding many of the antiquities.[181] Although powerful benefits would flow from this policy change (for example, a far more careful and rigorous system of title research on the part of museums when they acquire

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[181] *See* Watson & Todeschini, *supra* n 92.

antiquities), such a change would seem to be quite removed from the current state of antiquities law.

2. Limitations Provisions

The tremendous value associated with antiquities often encourages thieves or the dishonest to hide works for long periods of time. In other cases, the facts regarding an earlier theft or misappropriation may have only recently come to light.[182] As a result, limitations rules would be particularly relevant.[183] The relevant limitations rules in the US are implemented at the state level, which produces some very different approaches.[184]

If a limitations period has been exceeded, the original owner loses the right to sue the subsequent bona fide purchaser. Ownership then vests in the bona fide purchaser.[185] Another vehicle for imparting good faith into the antiquities trade would be via the operation of limitations periods. In fact, some museums have attempted to navigate the operation of the law by withholding evidence and refusing to display works in the hopes that a limitations period would confer title.[186] Statutes of limitations rest on the assumption that as time passes, an adjudication of claims becomes progressively more difficult.[187] This promotes justice by setting a limit on the amount of time a defendant may be susceptible to lawsuits; however, these underlying notions of justice should be reserved only for those claimants and possessors who have acted in true good faith. Statutes of limitation also have a punitive aspect in that, if a plaintiff does not bring a

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[182] *See* DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D. N.Y. 1987.

[183] Every state has comprehensive legislation establishing limitations periods for most actions arising under statutory or common law. Federal actions also have statutes of limitations. For a general discussion, see 4 AM. JUR. *Trials and Statutes of Limitations* § 5.5 (1966).

[184] For an interesting and thorough examination of the possible impact these state laws may have on the rules of limitation if adopted in the U.K., *see* David L. Carey Miller, David W. Meyers and Anne L. Cowe, *Restitution of Art and Cultural Objects: A Reassessment of the Role of Limitation,* 6 ART, ANT. & L. 1, 17 (2001).

[185] Ray Andrews Brown, THE LAW OF PERSONAL PROPERTY, 3[d.] ed. at 33 (Chicago 1975).

[186] *See infra* notes 230-234 and accompanying text.

[187] Jeremy Williams, *Limitations Periods on Personal Injury Claims*, 48 NOTRE DAME LAWYER 881, 884 (1973).

claim promptly to court, the claim is forever lost, regardless of its merit.[188] Some have analogized this policy to that of the plaintiff as a "sleeping claimant," who, intentionally or negligently, delays bringing their claim.[189]

As such, courts have used limiting considerations to allow time for claimants to bring suit.[190] Most statutes of limitations dictate that courts calculate the period within which a plaintiff may bring an action from the time the cause of action accrues. Most statutes, however, are quite vague when it comes down to how one is to determine the beginning of the running of a limitations period.[191] State legislatures are very specific about how long a limitations period will last. They leave the tricky question of the triggering event for the accrual, however, up to the courts.[192] As the New Jersey Supreme Court noted:

> Although New Jersey's Legislature has provided that every action at law for injury to the person shall be brought within two years after the cause of action shall have accrued, it has . . . never sought to define or specify when a cause of action shall be deemed to have accrued within the meaning of the statute. . . .[193]

Even when these triggering events are clearly defined, some courts have held the letter of the law the should yield to other factors. For example, an absolute bar could remove the

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[188] Limitations rules "stimulate litigants to prosecute their causes of action diligently…. They penalize dilatoriness and serve as a measure of repose [for potential defendants]." *Rosenau v. New Brunswick*, 238 A.2d 169, 172 (1968).

[189] Phoebe v. Jay, 1 Ill. 268, 273 (1820) (statutes of limitations "favor the diligent and not the slothful").

[190] See, e.g., DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), cert. denied, 486 US 1056 (1988); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), aff'd, 917 F.2d 278 (7th Cir. 1990); O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980); Porter v. Wertz, 68 A.D.2d 141 (1979), aff'd, 421 N.E.2d 500 (1981); Menzel v. List, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dept. 1964), on remand, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), modified on other grounds, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dept. 1967), modification rev'd, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969).

[191] *See, e.g.,* CAL. R. CIV. P. § 312 (West 1954) (requiring that an existing right to bring a cause of action cannot be summarily cut off without giving the parties a reasonable time to exercise that right, but what constitutes a reasonable time is not elaborated).

[192] John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statutes, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1128 (1980).

[193] Fernandi v. Strully, 173 A.2d 277, 285 (1961).

legal remedy for a claim with merit.[194] In some cases, state legislatures have extended special treatment to certain classes of objects. California, for example, has provided a special limitations extension for "Holocaust-era" artworks.[195] There seems to be ample precedent, then, for recognizing the pernicious effects which flow from certain aspects of the antiquities trade and for adapting the existing framework to accommodate a more rigorous good faith enquiry.

Courts and state legislatures have found two ways to work around statutes of limitations which may act to bar a just claim: first, there are case by case determinations that compel an exception to a limitations period because of policy considerations; and second, by concluding that a cause of action has not accrued until a more recent superseding event.[196] Four theories have been used by judges and lawmakers in contemplation of these difficult disputes, which can span decades: adverse possession, demand and refusal, the discovery rule, and laches. All of these theories impact the operation of the art trade, though there is substantial variation from state to state. In spite of the fact that limitations periods offer an excellent vehicle for increased examination of good faith, such a strategy would be implemented gradually and with a substantial lack of uniformity. If the primary art market States, New York and California, were to implement such a rule, its potential to impact the antiquities trade would be direct and dramatic. To see how these accommodations may be made, and the likely impact, we can examine how these limitations rules have evolved, beginning with adverse possession.

Adverse possession acts as another mechanism serving to limit the period in which the current possessor may be brought into court.[197] The doctrine focuses on the character of the defendant's possession to determine if an action is timely. Although it

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[194] Mary Devereaux, *Battle over a Monet: The Requirement of Due Diligence in a Lawsuit by the Owner Against a Good Faith Purchaser and Possessor*, 9 LOY. ENT. L. J. 57, 62 (1989).

[195] Cal. Civ. Proc. Code § 354.3, c. 332 (2002) (extending the limitations period for recovery of "Holocaust-era" works by owners, heirs or beneficiaries from galleries and museums to Dec. 31, 2010, notwithstanding other limitations provisions."

[196] Petrovich *supra* n. 192 at 1132.

[197] Brown *supra* n. 185 at 33.

primarily has been applied to real property in U.S. cases, courts have used it in suits involving personal property as well.[198]

Possessors with actual, exclusive, open and notorious, and continuous possession for a fixed statutory period take good title.[199] Possessors of stolen art or antiquities will find it very difficult to establish the required open and notorious element, because underpinning the doctrine itself is the policy that existing rights in property should be maintained only when original owners are put on guard and can sufficiently defend their interests.[200] Some courts have interpreted the open and notorious element to mean using the property as a normal owner would. Other courts have imposed a far stricter standard by requiring that the "open and notorious" element only encompass uses that could alert the previous owner, for example, displaying the object publicly in a museum.[201]

Although its actual application in civil cases involving the return of cultural property remains slight, adverse possession still has a major impact upon limitations periods generally, because it remains one of the default positions which both the demand and refusal and discovery rules work against. For example, in the *O'Keeffe* case, discussed below, the New Jersey Supreme Court used the discovery rule to circumvent the arbitrary and unjust results it would cause in the cultural property arena. An individual making use of land will be easy to ascertain in many cases, but the same is is not true with chattels. For example, a private owner of an antiquity may not display the work publicly—the object may be on display only for those who happen to enter the possessor's home. It may, however, display the object, but publish the in a small auction house catalogue, or even make it the subject of scholarly research in such a way that may not draw much notice from its nation of origin. Again, the key to reforming the trade is

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[198] Priester v. Milleman, 55 A.2d 540 (Penn. 1947) (holding the doctrine of adverse possession applies to personal property with the same result as cases involving real estate).

[199] O'Keeffe v. Snyder, 405 A.2d. 840, 844 (1979) (holding that defendants must have evidence of "clear and positive nature" to establish an adverse possession claim).

[200] Adina Kurjatko, *Are Finders Keepers The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art*, 5 U.C. DAVIS J. OF INT'L. L. AND POL'Y 59 at n. 103 (1999).

[201] *See O'Keeffe*, 405 A.2d at 845 (implying that only museum-type display would provide sufficient notice when the court held paintings stolen in New York and kept out of major metropolitan galleries and museums failed to demonstrate the open and notorious element).

adopting a set of recognized, widely accepted practices that promote honesty, transparency and the protection of sites. Of more practical use is the demand and refusal rule.

The demand and refusal rule measures the accrual of a cause of action based on the plaintiff's actions. To commence an action to recover property from a bona fide purchaser, the original owner must prove that the purchaser refused to return the property after a demand to do so by the plaintiff or claimant.[202] The rule is predicated on the policy that an innocent purchaser's possession of property cannot be deemed right or wrong until the original owner demands a return. Because the purchaser has not had any notice of a claim, the demand establishes that the possession is potentially wrongful.[203] By informing the purchaser of the defect in title, the purchaser may return the property before any court proceeding may become necessary. *Menzel v. List* is the first example of the rule in the cultural property context.[204] The plaintiff and her husband left a Marc Chagall painting in their Brussels apartment in 1941, upon their escape from Nazi occupation. After settling in the United States and after the war, the plaintiff began looking for the painting. In 1962, she located the work in the defendant's possession. After a demand for its return was refused, the plaintiff filed a replevin action. The defendant claimed the statute of limitations had expired since fourteen years had lapsed between the time the plaintiff asserted that the Nazis had stolen the painting and the initiation of the civil action. The court did not look with favor on this defense however, because the cause of action against a bona fide purchaser arose when the defendant refused to give the painting back, rather than upon any theft of the painting.

Some courts have tried to temper the advantage the demand and refusal rule holds for original owners. In *DeWeerth v. Baldinger*, the Second Circuit Court of Appeals applied the demand and refusal rule, but attempted to attach a limited diligence

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[202] *Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd,* 678 F.2d 1150 (2d Cir. 1982); *Gillet v. Roberts*, 57 N.Y. 28 (1874).

[203] *See* Butler v. Wolf Sussman, Inc., 46 N.E.2d 243, 244 (1943).

[204] Menzel v. List, 22 A.D.2d 647 (1963), *on remand,* 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified on other grounds,* 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dept. 1967), *modification rev'd,* 246 N.E.2d 74 (1969).

requirement.[205] The federal appeals court, applying New York state law, held that the statute of limitations did not begin to run until the owner of the stolen property made a demand from the good-faith purchaser, which is then refused. In *DeWeerth*, a Monet painting disappeared during the American occupation of Germany after WWII. It disappeared upon the departure of American soldiers who were housed on the owner's estate. The painting was exhibited in 1970 at an American gallery, but the plaintiff was not aware of its location until 1981. The court held that the action was not filed within New York's three-year statute of limitations. The court required that a claimant use some due diligence in looking for the stolen object.

The Second Circuit was applying New York State law in that case. Such difficult questions are sometimes sent to a State Supreme Court for a determination in a process called "certification". In this case, however, the Second Circuit did not certify the question, even though it was open, because "[it would not] recur with sufficient frequency to warrant use of the certification procedure."[206] That broad statement was soon proved incorrect.

The attachment of a diligence requirement was rejected by New York soon after in *Solomon R. Guggenheim Foundation v. Lubell*.[207] The New York Court of Appeals held that rightful owners do not have to exercise due diligence as a prerequisite to reclaiming stolen property from subsequent owners. The result being that the presumption favoring original owners firmly was entrenched in New York. The New York Court of Appeals noted:

> All owners of stolen property should not be expected to behave in the same way and should not be held to a common standard. The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property. We conclude that it would be difficult, if not impossible, to craft a reasonable diligence requirement ... that would not unduly burden the true owner.[208]

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[205] DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir.1987).

[206] *Id.* at 108.

[207] Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 320 (1991).

[208] *Id*.

This may indeed be the case. There are stolen art databases, but they vary widely in scope, and many less-valuable works of art may not justify the expense of publishing them or even checking the better-known databases for their presence. In addition, the Art Loss Register may be helpful in limited circumstances, but a search of its database cannot indicate whether a recently surfaced antiquity has been looted, or even if an object has been stolen from a museum that has not documented its holdings.[209] As such, a search of the Art Loss Register does not indicate whether or not an object has been legally excavated or transported from its nation of origin.

The demand and refusal rule certainly favors original owners. It recognizes that recovering cultural heritage is often a difficult proposition, and it ameliorates this difficulty by shifting the burden away from the original owner and onto the subsequent possessor. Some argue that the rule "reduces the repose of innocent purchasers to a nullity" by allowing original owners to bring claims long after the theft.[210] Given, however, the lack of provenance in most transactions, such a rule may be necessary to discourage theft. Other states have chosen instead to apply another doctrine to assist original owners and their attempts to return their cultural property.

Some states have expressly designated the date of discovery for a cause of action in their statutes of limitations. The discovery rule delays the running of the limitations period until the injured party, by exercising due diligence, discovers or reasonably should have discovered the facts constituting the basis of her claim.[211] California has a

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[209] If an antiquity was stolen from a known collection, it may be listed in one of the stolen art databases. Checking with such databases is an important part of the diligence process. The leader in such databases is the Art Loss Register, which lists items reported as stolen or missing. The ALR collects information from law enforcement, insurance companies, and individuals. The charge is approximately $75 per item searched for non-subscribers, which includes a number of museums.(http://www.artloss.com/Default.asp, accessed Jan. 25, 2009). ALR, however, cannot list objects that are undocumented, such as those which have been illegally excavated, so its effectiveness for archeological material may be limited. Museums should also check the U.S. Department of State's website for objects controlled pursuant to CPIA. The International Property Protection Homepage of the U.S. Department of State includes helpful images of the type of objects subject to temporary import restrictions. (http://exchanges.state.gov/culprop/, accessed Jan. 23, 2009).

[210] Petrovich *supra* n. 192 at 1140.

[211] *O'Keeffe*, 416 A.2d 862, 870. As the opinion states:

discovery rule specific to art and related objects under its statute of limitations for actions to recover stolen property.[212] The rule applies to a number of different contexts, not just to cultural property.[213]

As with rules of equity generally, the discovery rule serves to limit the sometimes harsh results that can occur from a strict application of statutes of limitations.[214] In applying the discovery rule, courts will balance the defendant's right to a period of repose against the hardship to a plaintiff if her claim is time-barred even though she could not have known she had a claim until after the expiration of the limitations period.[215] Courts have reasoned that the rule remains particularly applicable with regards to stolen cultural

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> When a party is either unaware that he has sustained an injury or, although aware that an injury has occurred, he does not know that it is, or may be, attributable to the fault of another, the cause of action does not accrue until the discovery of the injury or the facts suggesting the fault of another person.

[212] Cal. Civ. Proc. Code § 338(c). The Time of Commencing Actions Other Than for the Recovery of Real Property is

> Within three years ... (c) an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. The cause of action in the case of theft, as defined in Section 484 of the [California] Penal Code, of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft.

*See* Adler v. Taylor, 2005 WL 1452924 (9th Cir. 2007) (applying a limitations period from the time the purchaser obtained the painting at a public auction).

[213] The discovery rule first appeared in 1917, in a medical malpractice claim. Hahn v. Claybrook, 130 Md. 179 (1917) (plaintiff's cause of action began to run at the time of her discovery of her doctor's negligence in treating her stomach condition). It was adopted by the California Supreme Court in 1936. Huysman v. Kirsch, 57 P.2d 908 (1936) (finding that the plaintiff did not and could not have discovered through due diligence the drainage tube left in her body by her surgeon). The New Jersey Supreme Court later applied it in 1961. Fernandi v. Strully, 173 A.2d 277 (1961) (the statute of limitations should not have started running until the plaintiff knew or had reason to know of the presence of a wingnut left in her abdomen following surgery). Although the New Jersey court initially limited the application of the rule to medical malpractice cases, it has since been applied to a number of other contexts in which the plaintiff does not know about the cause of action. *See, e.g.,* Diamond v. New Jersey Bell Telephone Co., 242 A.2d 622, 624 (1968) (negligent installation of an underground conduit); Brown v. College of Medicine and Dentistry, 401 A.2d 288, 290-91 (1979) (breach of union's duty to fairly represent bargaining unit); Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 334 N.E.2d 160 (1975) (defamation); Praznik v. Sport Aero, Inc., 355 N.E.2d 686 (1976) (wrongful death action).

[214] Lopez v. Swyer, 300 A.2d 563, 566 (1973).

[215] Id. at 566-67; *see also* Mucha v. King, 792 F.2d 602, 611 (7th Cir. 1986); for a discussion of the case *see* Franzese, *"Georgia on my Mind" -- Reflections on O'Keeffe v. Snyder,* 19 SETON HALL L. REV., 1, 8-9 (1989).

property because the objects lose value if they are altered significantly, and people generally remember seeing these kinds of valuable objects on display.[216] Accordingly, original owners should have a better chance at successfully tracking down their objects than would most owners of stolen property.

In the first prominent case involving stolen art and the discovery rule, *O'Keeffe v. Snyder*, the plaintiff did not actively pursue the loss of three stolen paintings and thus the statute of limitations ran.[217] Georgia O'Keeffe had three works stolen in 1946, but she did not report the loss or attempt to find them. O'Keeffe's claim was denied since she had not made any effort to discover the location of the items which would satisfy the due diligence requirement. She never reported their disappearance to police or advertised the loss in any publications. She did discuss their disappearance with associates in the art community, but only formally reported them missing in 1972. They were finally located three years later. In holding that O'Keeffe had not exercised due diligence, New Jersey became the first court to apply the discovery rule to stolen art. It reasoned that the equitable considerations of the discovery rule would better mitigate the potentially harsh results than would the application of the adverse possession doctrine. It should be noted that if a more comprehensive system of registry or title recordation were implemented, it seems likely that more and more states would adopt some kind of discovery rule.

Finally, the equitable doctrine of laches may be asserted as an affirmative defense to temper the expansion of limitations periods. Laches rests on the maxim that equity aids the vigilant, not the inattentive. Under the doctrine of laches, no specific time limits are set, rather the facts of the case may demonstrate unreasonable delay. It may arise as an affirmative defense when neglect to assert a claim has prejudiced an opposing party, and may, in some cases, help a defendant if a statute of limitations defence cannot be raised. [218]

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[216] DeWeerth, 836 F.2d at 109.

[217] O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980).

[218] *See Sanchez v. Trustees of Univ. of Pennsylvania*, 2005 WL 94847 (S.D. N.Y. 2005) (which applied a diligence analysis and laches in granting summary judgment for the defendant because they (who?) had failed to search for the objects at issue for more than 50 years); *Stuart & Sons, L.P. v. Curtis Pub. Co., Inc.*, 456 F. Supp. 2d 336 (D. Conn. 2006) (in which the doctrine of laches barred defendants' claim of ownership over Norman Rockwell paintings because facts demonstrated an unreasonable delay that was

In *Solomon R. Guggenheim Foundation v. Lubell*, the court held that inaction by the museum constituted laches and found in favor of the possessor.[219] At issue was a Marc Chagall drawing from 1912 that had been stolen from the Museum during the 1960s. The Museum, however, did not inform anyone of the theft. The museum later discovered the work in 1985, but the good faith purchaser and current possessor refused to return it. In the twenty years following the disappearance of the drawing, the Museum took no positive steps toward its recovery. The court held that the Museum's inaction constituted an unwarranted delay and the drawing stayed with the defendant. Laches can best be understood as a check against the discovery rule. If a plaintiff has delayed bringing an action, the defendant may use the equitable doctrine of laches.

Limitations periods vary and are contingent on the laws of individual states. Often their application depends on the specific facts of the case, and without a specialized knowledge of the law, buyers and sellers of these valuable objects seem to be operating in the dark. The due diligence rule predominates, while the demand and refusal rule, which favours plaintiffs, generally, has been enacted in New York and other states. Both approaches seem to favor dispossessed owners. The demand and refusal rule does not impose a duty of due diligence, though laches may be an effective defense if the plaintiff rested on her laurels. In the end, statutes of limitation are potentially invaluable tools for buyers and sellers of cultural property since the lex situs doctrine mandates that the choice of limitations law that applies to the case will be dictated by the object's location.

### 3. Public Pressure

Finally, extra-legal means, such as public pressure, have the potential to be the most powerful tools to effectuate a meaningful impact on the antiquities trade and museum policies. One prominent example of the impact public controversy may have on the art and antiquities trade is the recent sabotage of Christie's Yves St. Laurent auction

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prejudicial); *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 1999 WL 673347 (S.D. N.Y. 1999) (delay of 70 years before bringing an action to recover a manuscript was unreasonable).

[219] *Lubell*, 569 N.E.2d 426.

in France.[220] The bronzes at issue were slated for auction and were bid upon by a Chinese citizen who refused to pay for the objects. He was protesting the St. Laurent estate's refusal to return the two bronzes, which likely had been looted from the Old Summer Palace in Beijing in 1860.

Another example are the efforts by Italy's Culture Ministry, which has set itself up as a model for other nations who want to impact the antiquities trade. Cultural property policy stands as a significant political issue in Italy, much more so than in many other countries. Consider the recent protest over the loan of Leonardo daVinci's *The Annunciation* to Japan. Italian Senator Paolo Amato chained himself to the entrance to the Uffizi gallery in Florence in protest over the loan.[221] It would be difficult to imagine a Senator or a Member of Parliament reacting in such a way to loans from the U.S. or UK.

Italy has adopted the usual approach of prohibiting export and declaring state ownership of undiscovered antiquities. It has taken the additional step of devoting substantial law enforcement and prosecutorial resources to art crime via the Carabinieri, and also tied those efforts to very public repatriation campaigns when objects slip through the Italian regulatory framework. Italian respect for and devotion to art and ancient Mediterranean cultures drives these successful efforts. Italy is an industrialized source nation and a member of the Group of Eight industrialized democracies. Despite this high standing, the losses to Italy's cultural heritage are substantial. Italy has devoted substantial enforcement resources to controlling the illicit trade. Two police entities investigate cultural property crime. The Carabinieri, Italy's domestic police force, even have a special art squad.[222] In addition, the Ministry of Finance has an office that investigates art thefts and illegal excavations as a branch of the Guardia di Finanza, an Italian military police force under the authority of the Minister of Economy and

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[220] Kelly Crow, *Bidder Refuses to Pay, Stating Protest of Looting*, WALL STREET JOURNAL Mar. 3, 2009, http://online.wsj.com/article/SB123603787513314493.html.

[221] *Senator in Da Vinci loan protest*, BBC NEWS, Mar. 12, 2007, http://news.bbc.co.uk/1/hi/world/europe/6443367.stm.

[222] *See* "Italy busts art trafficking ring", CBC, available at http://www.cbc.ca/arts/story/2006/12/14/italy-art-stolen.html, last accessed Jan. 18 2007.

Finance.[223] These enforcement entities are tasked with upholding Italy's patrimony laws and export restrictions. Italy has declared state ownership of all antiquities discovered in the country after 1902 under the Law of June 1, 1939, Regarding the Protection of Objects of Artistic and Historic Interest.[224] This renders any illicit excavation of antiquities a crime and has allowed Italy to reclaim stolen goods once they have left the country.[225] Export controls also forbid the unauthorized export of art and antiquities.

These restrictions are similar to others enacted in source nations, as we saw earlier in the overview of Guatemala's approach. What makes Italy unique is its ability to devote a large amount of resources to the problem. Also, it has operated an extremely sophisticated public relations strategy aimed at large museums, such as the Getty in California, and is increasingly aiming its efforts at high-profile private collectors.

The former Minister for Culture, Francisco Rutelli, routinely conducts interviews and often submits Op-Ed pieces to the foreign press.[226] Public pressure remains a vital tool for source nations and Italy has used it adroitly in recent years. The overwhelming success of this public pressure reveals substantial shortcomings in the body of international cultural property law. Many of Italy's most noteworthy successes have come not via the courts, but by stigmatizing the collections of foreign art museums, especially in the United States.

When Italy has to resort to the press to make a claim for return, it shows the gaps in the regulatory framework. In 2006, the Metropolitan Museum of Art agreed to return the magnificent Sixth-Century BC vase known as the Euphronios krater along with

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[223] *See* Andrew Slayman, *Italy Fights Back*, ARCHAEOLOGY, May-June 1998.

[224] *See* Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT'L L. & POL. 79, 92 (1998).

[225] *See* U.S. v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999).

[226] *See* Francesco Rutelli, *Rogue Gallery*, WALL STREET JOURNAL, Jan. 17, 2007, http://online.wsj.com/article/SB116900785965978585-search.html?KEYWORDS=Rutelli&COLLECTION=wsjie/6month (arguing "Italy will be ready, when it receives the full cooperation of the Getty Museum, to embark on a program of long-term scientific collaboration. The Getty Museum stands to benefit from this cooperation. So why does it continue to exhibit works of art that rightfully belong to Italy?"

Hellenestic silver and four other antique vessels.[227] Earlier in 2006, the Museum of Fine Arts, Boston returned 13 Classical antiquities to Italy.[228] There was also a very public, and sometimes acrimonious, dispute between Italy and the Getty regarding 41 antiquities in the Getty's collection. These negotiations ultimately led to an agreement to return 40 antiquities to Italy, including the so-called *Morgantina Aphrodite,* perhaps the most important example of ancient sculpture in any North American museum.[229] The Getty found itself in an awkward position since it did not receive its massive endowment until the early 1980s, just as the problem of the illicit trade in cultural property was gaining widespread attention in the US. As a result, many of its acquisitions were suspect. A number of purchases made by the Getty during this period are circumspect, because of the flaws within the cultural property trade, which made it so illicit objects could not be distinguished effectively from licit objects.

As a result, other nations of origin and even interested members of the public may be able to marshal similar efforts in an attempt to fill the gaps in the law and encourage antiquities dealers, auction houses and museums to continue to conduct their transactions in the open, subject to responsible public scrutiny.

### B. The Consequences of Inaction

Having presented three potential avenues for higher scrutiny, we can turn to the recent instances of the damage done to our collective cultural heritage so as to make a case for the urgency with which these changes need to be made.

One well-known example of a flawed antiquities trade is the "Lydian hoard" a collection of 363 objects taken from at least four grave mounds in Western Turkey and

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[227] Hugh Eakin and Elisabetta Povoledo, *Met's Fears on Looted Antiquities are Not New*, N.Y. TIMES, Feb. 20, 2006, http://www.nytimes.com/2006/02/20/arts/design/20anti.html.

[228] David Gill and Christopher Chippindale, From Boston to Rome: Reflections on Returning Antiquities, 13 INT'L. J. OF CULT. PROP. 311 (2006); David Gill and Christopher Chippindale, From Malibu to Rome: Further Developments on the Return of Antiquities, 14 INT'L. J. OF CULT. PROP 205 (2007).

[229] Jason Felch and Ralph Frammolino, *The return of antiquities a blow to Getty*, L.A. TIMES, Aug 2, 2007, http://www.latimes.com/news/printedition/front/la-me-getty2aug02,1,6979412.story?track=crosspromo&coll=la-headlines-frontpage&ctrack=8&cset=true.

transported through Izmir and Switzerland to the Metropolitan Museum of Art ("the Met") in New York.[230] The collection included fragments of wall paintings, gold, silver and bronze vessels, gold silver and glass jewelry, and marble sphinxes.[231] For over twenty-five years, Turkey attempted to secure the return of the looted objects. Over the course of many years, the objects were stored in the basement of the Met, unavailable to scholars and the public. In 1984, several of the objects were displayed, but were mislabeled as "East Greek" in origin, presumably to avoid any questions regarding the origins of the objects. When the works were finally exhibited and Turkey brought its claim, the Met filed a motion to dismiss the suit based on the running of the statute of limitations, irrespective of its knowledge that the objects had been illegally excavated and illegally exported.[232] It was only when this motion was denied that the Met agreed to return the objects in 1993. Thomas Hoving, a former Director of the Met, has stated that the institution knew at the time it purchased the objects that they had been illegally excavated and a curator had documented the original findspots in Turkey.[233] Despite this knowledge that the objects were likely illegally excavated, perhaps as early as 1966, the Met resisted returning the objects. Had it conducted an impartial and serious enquiry into the history of the objects, their illegal removal would have surely resulted. Despite a good outcome —the return of the objects to Turkey—the archaeological context and historical record was irrevocably damaged.[234]

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[230] A recent survey of the Usak region of Western Turkey shows that 357 of 397 tumuli showed signs of looting. Christopher H. Roosevelt & Christina Luke, *Looting Lydia: The destruction of an Archaeological Landscape in Western Turkey*, *in* ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 173, 179 (Neil Brodie et al. eds, 2006).

[231] Lawrence M. Kaye & Carla T. Main, *The Saga of the Lydian Hoard Antiquities: From Usak to New York and Back and Some Related Observations on the Law of Cultural Repatriation*, in ANTIQUITIES TRADE OR BETRAYED: LEGAL, ETHICAL AND CONSERVATION ISSUES 150 (Kathryn W. Tubb ed., 1995).

[232] Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990).

[233] Thomas Hoving, MAKING THE MUMMIES DANCE, 217 (1994).

[234] The objects have continued to be the subject of illegal actions. In 2006 it was revealed that parts of the collection had been stolen in 2006 and replaced by copies. Sebnem Arsu and Campbell Robertson, *Wealth of Croesus, Returned by the Met, Stolen From Turkish Museum*, NY TIMES, May 30, 2006 http://www.nytimes.com/2006/05/30/arts/design/30muse.html?sq=lydian%20hoard&st=cse&scp=5&pagewanted=print.

In some unfortunate cases recently surfaced antiquities may lose any ties or connection to their history or archaeology. The beautiful Sevso Treasure—a collection of fourteen Roman silver objects and the copper cauldron that perhaps contained them—may be the most dramatic example of antiquities stolen from their original context.[235] Currently stored in a vault in Bonham's Auction House in London, the objects were acquired over a period of years by the Marquess of Northampton based on some bad legal advice and at the urging of Peter Wilson, a former chairman of Sotheby's. The objects were acquired in contemplation of an eventual sale to the Getty Museum.[236] Questions about the origin of the objects, however, caused that deal to fall through and in 1990 the objects were consigned to Sotheby's in New York for a sale. Lebanon brought an action in New York state court claiming that the objects were illegally removed from Lebanon. Croatia and Hungary eventually joined the suit. None of the nation-claimants were able to establish that the objects had been discovered within their respective territories and the trust created to manage the objects was allowed to retain possession. Rarely seen by the public, the objects were recently displayed at Bonham's Auction House in London in 2006 in contemplation of an eventual sale, which thrust the Treasures back into the public debate about the proper place for orphaned antiquities.[237] A better remedy may have involved the creation of a constructive trust, in which the claimant nations could have shared title and possession of the objects.[238]

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[235] Lebanon v. Sotheby's, 167 A.D. 2d 142 (N.Y. App. Div. 1990); Croatia v. Trustee Of the Marquess of Northampton 1987 Settlement, 203 A..D.2d 167 (1994) appeal denied 84 N.E.2d 325 (1994).

[236] The Marquess of Northampton now regrets the decision to purchase the antiquities stating, "I do not want my wife or my son to inherit what has become a curse," In 1999 a malpractice suit against the law firm of Allen & Overy was settled for a reported $28 million in compensation after the firm advised him to proceed with the purchase. Paul Eddy, *On sale: 'cursed' £40m family silver*, THE TIMES available at http://www.timesonline.co.uk/tol/news/uk/article664997.ece?token=null&offset=0 (published October 8, 2006).

[237] Alan Riding, *14 Roman Treasures, On View and Debated*, N.Y. TIMES (published October 25, 2006). The treasure takes its name from a Latin verse on the treasure which reads "May these, O Sevso, yours for many ages be, small vessels fit to serve your offspring worthily." *Id.*

[238] The American Restatement of the Law of Restitution provides that in order for compensation to be just, it must be (a) equivalent to the value of the property taken, (b) paid at the time of taking or with interest, and (c) rendered in an economically useful form. RESTATEMENT OF THE LAW OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 1 (1936).

The failure of many diligence procedures also allows forgers to create modern imitations of antiquities, which can have the effect of distorting the modern record of Antiquity. The Greenhalghs, a family of forgers from Bolton, England, were able to fabricate a staggering number of objects, from Egyptian figurines to sculptures by Paul Gauguin which fooled some of the World's leading museums and auction houses.[239] In 1729, the Risley Park Lanx, a silver dish of Roman origin, was discovered in Risley Park, Derbyshire. It was lost, but later "emerged" in the 1990s when it was purchased from the Greenhalgh's for £100,000 and donated to the British Museum where it was displayed as a genuine period replica.[240] The plate, in fact, had been created by melting down genuine Roman silver coins with a small furnace.[241] In 2003, the Bolton metropolitan borough council purchased a fake Egyptian statue for £410,393 from the family of forgers, and it was not until 2005 that the Greenhalghs were uncovered when they attempted to sell forgeries of Assyrian reliefs. Because these forgeries were sold over a period of many years, and because of the enduring corruption in at least part of the antiquities trade, it took law enforcement officials many years to make the connection that so many forgeries were emanating from one public assistance housing flat in Bolton, England. The open question is just how many more forgeries the Greenhalghs may have created and which ones are in private or public collections. The amazing fact is the simple background of this family, who was able to repeatedly fool leading art institutions. Why was so much trust placed in a family with their simple background? One answer may be the repeated tendency to ignore obvious warning signs that an object may be stolen or even forged. Buyers must take responsibility for the consequences of their ineffective diligence procedures. It is no longer sufficient for the world's leading art and antiquities experts to do just enough to make their transaction appear legal. Rather, they

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[239] *Art Institute Resolves claims for fake Gauguin*, CHICAGO TRIBUNE, available at http://archives.chicagotribune.com/2008/feb/14/news/chi-forgery_14feb14 (published February 14, 2008).

[240] *The Antiques Rogue Show*, THE GUARDIAN available at http://www.guardian.co.uk/uk/2008/jan/28/ukcrime.art (published January 28, 2008).

[241] Cahal Milmo, *Family of forgers fooled art world with array of finely crafted fakes*, THE INDEPENDENT available at http://www.independent.co.uk/news/uk/crime/family-of-forgers-fooled-art-world-with-array-of-finely-crafted-fakes-400718.html (published November 17, 2007).

must undergo a rigorous diligence process—one that is designed to uncover *all* possible information which could tell the history of an object.

The precise dynamics of the diligence process might take a number of forms, but above all else, they must create an accurate, open and honest antiquities trade which allows law enforcement officials, officials from nations of origin, interested members of the public and scholars to monitor the trade. The time has long passed for the antiquities trade to police itself. This new system should be designed to uncover as much relevant information about an object as possible. All likely nations of origin should be contacted before acquisition; and full and honest title histories should accompany an object. Important pieces of information should be routinely made available. These should include an ownership history, the nations where the object has been transported to and from, its exhibition history, whether it has been researched by scholars, whether it has appeared in any auction house publications, whether any past claims have been made against the object, and whether the object appears in any theft databases. To facilitate that process, both buyers and sellers should be made public in all antiquities transactions, along with a photographic record and detailed description of the object. Such a system would be fairly straightforward to implement and the technology required for such an approach now costs very little.[242] Publication in such a registry should be an integral part of the due diligence process.

These safeguards will likely make it more difficult and burdensome for museums to acquire objects, and as a consequence, they will have to build more collaborative relationships with nations of origin that involve temporary loans or other agreements. To help understand why these increased diligence procedures are so necessary for the antiquities trade, we can examine in some detail the way in which the law generally handles "ordinary" transfers of objects.

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[242] The Association of Art Museum Directors has created another similar database:

> The AAMD Object Registry provides access to all relevant information known about our members' acquisitions of archaeological material and ancient art lacking complete provenance after November 1970, the date of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer of Ownership of Cultural Property. Art museums regularly acquire archaeological material and works of ancient art - of which objects with incomplete provenance represent but a fraction.

## IV. Conclusions

The loss of the material remains of ancient cultures continues at an alarming rate. There has been a paradigm shift in the way cultural policy makers view the antiquities trade and how it has led to the loss of our precious collective cultural heritage. Much work remains to be done, but the recent repatriations to Greece and Italy, and the new guidelines adopted by the American Museum community signal a dramatic shift. Heritage advocates need to move beyond merely trying to account for antiquities which have already been looted and must continue to press for public education, novel means of heritage protection and a renewed effort from all interested parties, including source nations and antiquities dealers to ensure their actions are preserving objects and context.

Despite some important recent successes, a vibrant trade in stolen, illegally excavated, and illegally exported antiquities still thrives. The widespread and unskilled illegal excavation of objects forever destroys invaluable archaeological context and knowledge. Nations are losing the physical remains of ancient cultures at an alarming rate. Cultural heritage is a precious and limited resource. The transfer of these objects typically involves highly educated, skilled individuals who are trained and are expected to know the laws regarding the import and export of cultural items throughout the world. No presumption as to good faith should be tolerated any longer. Rather, increased scrutiny of the antiquities trade is needed in which objective evidence of a purchaser's investigation of the legitimate title of the object in question must be the bare minimum for the acquisition of good faith in a given transfer.