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## Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past

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# Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past

Patty Gerstenblith\*

The recent restitution of antiquities from several major American museums and the trial in Italy of former Getty antiquities curator Marion True and art dealer Robert Hecht have focused public attention on the illegal trade in looted antiquities to an extent rarely seen in the past.<sup>1</sup> The looting of the Iraq Museum in Baghdad in April 2003 and the even more disastrous large-scale looting of archaeological sites in southern Iraq since the beginning of the current Gulf War have brought the devastating effects of the international market in looted antiquities into even starker relief.<sup>2</sup> The looting of archaeological sites and the dismemberment of ancient monuments are problems that afflict countries as wealthy as the United States and the United Kingdom and as poor as Mali and Bolivia. Recent revelations concerning the functioning of the art market and the acquisition of antiquities with unknown origins now demonstrate that the looting of archaeological sites is a well-organized big business motivated primarily by profit.

The looting of archaeological sites creates negative externalities that harm society. Because the legal regime aims to eliminate societal harms, the law should force the actor to internalize the costs<sup>3</sup> and thereby discourage the negative

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<sup>1</sup> For general discussions, see Tracy Wilkinson, *Ex-Getty Antiquities Curator Appears at Italian Court Session*, LA Times A9 (Nov 17, 2005) (discussing the trial of Getty curator Marion True); Jason Felch and Ralph Frammolino, *Several Museums May Possess Looted Art*, LA Times A16 (Nov 8, 2005) (discussing the trial of dealer Robert Hecht).

<sup>2</sup> For general discussion, see Micah Garen, *The War within the War*, 57 Archaeology 28, 31 (July–Aug 2004) (discussing site looting in Iraq); Neela Banerjee and Micah Garen, *Saving Iraq's Archaeological Past from Thieves Remains an Uphill Battle*, NY Times A16 (Apr 4, 2004) (discussing antiquities looting in Iraq); Joanne Farchakh, *Le Massacre du Patrimoine Irakienne*, Archaeologia 14, 25–29 (July–Aug 2003).

<sup>3</sup> Howard Demsetz, *Toward a Theory of Property Rights*, 57 Am Econ Rev 347 (1967) (presenting the classic statement of the effects of negative externalities, focusing on costs only in the monetary

activity. In this Article, the term “cost” indicates any harmful effect imposed on an individual or on society as a whole. The loss of cultural value is a cost paid by society. In the field of cultural heritage law, “value” usually indicates the intangible worth and significance of original contexts and rarely connotes monetary value.<sup>4</sup> This Article addresses the unique aspects of the trade in antiquities, that is, archaeological objects that have, over time, been buried in the ground with an associated assemblage of other artifacts, architectural remains, and natural features. Because of its link to the looting of sites, the trade in undocumented antiquities raises legal, ethical, and societal concerns distinguishing it from the trade in other forms of artwork.

In this Article, I will discuss three components. First, I will examine the harms that the looting of archaeological sites imposes on society. Second, I will discuss the responses to the problem, particularly in terms of the law that attempts to regulate this conduct, and some of the characteristics of the current legal regime and of the market in antiquities that prevent the law from achieving its full potential for deterrence. Third, this Article will examine and propose solutions to discourage site looting and encourage preservation of the remains of the past for the benefit of the future.

## I. UNDERSTANDING THE PAST

There are several detrimental consequences of looting. First, the looting of archaeological sites imposes negative externalities on society by destroying our ability to fully understand and reconstruct the past. Humans have long been interested in the material remains of past cultures, and they have often collected artifacts as political symbols of domination<sup>5</sup> or as a means of enjoying past artistic accomplishments. The manner in which artifacts are recovered from the

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sense). Demsetz uses these concepts to justify the development of a system of private property rights, reducing transaction costs and thereby eliminating economic inefficiencies. *Id.* at 349.

<sup>4</sup> The translation of this type of value into economic terms is difficult. One attempt is codified in the Cultural Heritage Resource Crimes Sentencing Guideline in which “archaeological value” must be included in the valuation of a cultural heritage resource for sentencing purposes, 18 USC Appx § 2B1.5 Application Note 2(A)(i), and is defined as the cost of retrieving the scientific information from the archaeological resource, from research design to final publication, that was harmed through commission of the cultural heritage resource crime. See 18 USC Appx § 2B1.5 Application Note 2(C)(i).

<sup>5</sup> The Romans took cultural and religious symbols from the people and nations they conquered as a way of displaying their victories. One example is the depiction on the Arch of Titus in Rome of the triumphal parade including the Menorah removed from the Second Temple in Jerusalem, later destroyed by the Romans in 70 CE. Napoleon brought to Paris artistic and other cultural works from Europe, particularly Italy, both to flaunt his conquests and to establish Paris as an artistic center. John Henry Merryman and Albert E. Elsen, *Law, Ethics and the Visual Arts* 1–8 (Kluwer 3d ed 1998).

ground only became important after the development of archaeology as a science, with examples of stratigraphic excavation and recording known as early as the seventeenth century. Borrowing in large measure from the emerging fields of Darwinian evolutionary biology and paleontology that rely on the stratigraphic placement of fossils to reconstruct the chronological evolution of life forms, a modern understanding of the role of stratigraphic excavation as key to understanding human cultural evolution developed by the late eighteenth century.<sup>6</sup> Archaeology became a truly interdisciplinary field in the middle and late twentieth century with the adoption of scientific techniques, such as radiocarbon and thermoluminescence dating<sup>7</sup> and more sophisticated methods, in conjunction with the use of linguistic, philological, art historical, and anthropological analyses to understand the past.

Controlled scientific excavation of archaeological sites relies on an understanding of stratigraphy; remains of past cultures are deposited in layers (or strata), and each stratum represents a particular time period. Stratigraphic excavation requires that each layer be removed in reverse chronological order and that the remains be recovered separately by each stratum, with all the remains of the same period in association with each other. In this way, the archaeologist can determine the spatial and chronological relationship of all the remains, and many aspects of past life can be reconstructed including economics, trade, health, diet, religious ritual and function, burial methods, family structure, political organization, technology, and literature. Artistic and utilitarian objects, faunal and floral remains, architectural features, human remains, and their original contextual relationship to each other are all equally

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<sup>6</sup> Excavations carried out by such diverse individuals as Thomas Jefferson in the late eighteenth century and William Pitt Rivers in the nineteenth century laid the groundwork for an understanding of the importance of stratigraphic excavation. Mortimer Wheeler, *Archaeology from the Earth* 25–29, 57–59 (Penguin 1956). In the mid-twentieth century, Sir Mortimer Wheeler and Dame Kathleen Kenyon, working in India and the Levant, respectively, further demonstrated the importance of scientific, controlled excavation and the recovery of contemporary material cultural remains in association with each other in order to reconstruct the past. *Id.* at 20–37; Kathleen M. Kenyon, *Beginning in Archaeology* 68–114 (Praeger 1957).

<sup>7</sup> Radiocarbon (C-14) dating is a method of measuring the decay of the radioactive isotope of carbon in once living materials (such as trees or other organic materials). Living organisms absorb radiocarbon from the atmosphere; when they die they stop taking in C-14. The C-14 decays at a known rate; radiocarbon dating measures the amount of C-14 remaining in the sample. Thermoluminescence dating determines when ceramic materials were last fired and is useful for dating pottery and other fired materials. Thermoluminescence dating has an advantage over radiocarbon because it can date inorganic materials such as pottery and flint, and it can do so beyond the 50,000 year limit of C-14 dating. Yorke Rowan and Morag Kersel, *Glossary*, in Colin Renfrew and Paul Bahn, *Archaeology: Theories, Methods and Practice* (Thames & Hudson 4th ed 2004), available online at <<http://www.thamesandhudsonusa.com/web/archaeology/glossary.html>> (visited Apr 21, 2007).

essential in achieving an optimal understanding of the past. This full body of contextualized information is a destructible, nonrenewable cultural resource. Once it is destroyed, it cannot be regained. The looting of archaeological sites destroys this knowledge and forever impairs our ability to understand our past and ourselves.

A second detrimental consequence of looting is the corruption of the historical record through the introduction of artifacts that may be forgeries. The willingness of buyers to accept undocumented antiquities permits the proliferation of forged artifacts on the market. Looted, decontextualized artifacts provide no information beyond what is intrinsic in their shape and decoration. Little is known about their find-spot, their age, their original context, and even their authenticity. Entire categories of ancient artifacts, such as Cycladic figurines, are represented almost completely by looted examples.<sup>8</sup> Because of the large-scale looting of Cycladic figurines, it is impossible to determine what they were used for, whether they were primarily grave goods, what their date is, and from which of the islands in the Aegean they originate.<sup>9</sup> It is also impossible to tell which Cycladic figurines are authentic and which are fake.<sup>10</sup> Because authenticity is determined by comparing newly discovered objects with previously known exemplars, looted artifacts do not expand our knowledge. When a new type of archaeological artifact is excavated, it adds to our corpus of knowledge; when a new type is known only from examples sold on the market, it is generally rejected as fake. Therefore, while the market is often considered a source of fake objects that corrupt the historical record, it can do a further disservice to the historical record by leading to rejection of authentic artifacts. These points are explained by Chippindale and Gill:

[T]he central *intellectual* consequence of the contemporary classical collections . . . [is] an unwitting and unthinking conservatism. The new objects and the way they are treated contribute to our consolidated knowledge insofar as they confirm, reinforce, and strengthen the existing

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<sup>8</sup> Christopher Chippindale and David W.J. Gill, *Cycladic Figures: Art versus Archaeology?* in Kathryn W. Tubb, ed., *Antiquities Trade or Betrayed: Legal, Ethical & Conservation Issues* 131, 132 (Archetype 1995) (noting that many Cycladic figures “surface” on the market with no recorded history); David W.J. Gill and Christopher Chippindale, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 97 *Am J Archaeology* 601 (1993). Cycladic figurines are small stone sculptures found on the Cycladic islands located in the Aegean Sea and are generally dated to the mid-third millennium BCE. New excavations being conducted by Colin Renfrew may help to explain many of the mysteries surrounding these figurines.

<sup>9</sup> Chippindale and Gill, *Cycladic Figures* at 133–34 (cited in note 8).

<sup>10</sup> Many rely on connoisseurship, the study of objects based on form, decoration, and other aesthetic criteria, to determine authenticity. However, connoisseurship cannot reliably determine authenticity as is demonstrated by the history of several Rembrandt paintings that were originally accepted as authentic, then considered inauthentic, and recently returned to authentic status. Kristine Wilton, *Deauthenticated Rembrandts Real after All*, ARTnews 84 (Mar 2006).

patterns of knowledge. Surfacing without secure information beyond what is immanent in themselves, the objects are unable to broaden our basis of knowledge. Interpreted and restored in light of prior expectations, they are reconciled with what we presently know, but they cannot amend and improve our present knowledge much, if at all. Where they do in themselves offer an anomaly or contradiction to established understanding, the ever-present dangers of overrestoration and falsity kick in; the truly unusual items that surface remain incomprehensible until their oddity is matched by a find for which there is a real security of knowledge. At that point, they can take up their accustomed role of confirming the correctness of that knowledge.<sup>11</sup>

The development of interdisciplinary methodologies for the study of the past coincided with the growth of the international art market in the years following World War II. The controlled excavation of archaeological sites, which is an inherently slow and painstaking process, inevitably conflicts with the desire of public and private collectors to have the maximum number of objects available on the market immediately and with minimal regulation. The proliferation of interdisciplinary methodologies for studying human history have reduced the relative importance of art historical analyses and connoisseurship, as they are now but one among many disciplines that are used in understanding the past. Furthermore, unlike other commodities, new antiquities cannot be manufactured to satisfy market demand (unless they are fakes). Therefore, as the wealth of Western nations increased and the art market grew to keep pace with the demand from collectors, the looting of archaeological sites to satisfy this demand became a significant detriment to the study of the past.

Ethnographic studies of looting in many countries demonstrate that looters loot for the money they earn. Looting activities respond to market demand for particular types of artifacts, and looting has moved from an occasional, opportunistic activity to a sophisticated, well-funded, well-organized business, including the hiring of looters on retainer so that they work full-time for particular middlemen.<sup>12</sup> While it is obviously important that looting at sites be

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<sup>11</sup> Christopher Chippindale and David W.J. Gill, *Material Consequences of Contemporary Classical Collecting*, 104 *Am J Archaeology* 463, 504–05 (2000) (emphasis in original); see also Neil Brodie and Christina Luke, *Conclusion: The Social and Cultural Contexts of Collecting*, in Neil Brodie, et al, eds, *Archaeology, Cultural Heritage, and the Antiquities Trade* 303, 309–10 (Florida 2006).

<sup>12</sup> The contemporary nature of site looting is now documented in such disparate countries as Iraq, Italy, Israel and the West Bank, Peru, Turkey, and Thailand. See Morag K. Kersel, *License to Sell: The Legal Trade of Antiquities in Israel* (2006) (unpublished PhD Dissertation, University of Cambridge) (on file with author) (discussing Israel and the West Bank), Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, From Italy's Tomb Raiders to the World's Greatest Museums* (Public Affairs 2006) (discussing Italy); Joanne Farchakh, *Mesopotamia Endangered: Witnessing the Loss of History*, Lecture at University of California, Berkeley (Feb 7, 2005), transcript available online at <<http://webcast.berkeley.edu/events/details.php?webcastid=10048>> (visited Apr 21, 2007) (discussing Iraq); Roger Atwood, *Stealing History. Tomb Robbers, Smugglers, and the Looting of the Ancient World* (St Martin's 2004) (discussing looting in Peru); C.H.

interdicted, the law in market countries should also impose detrimental consequences on sellers and purchasers in order to reduce demand and the incentive to loot archaeological sites.

## II. THE MARKET AND THE LAW

### A. LEGAL CONTROL OF THE MARKET

Looting imposes costs on society by destroying the original contexts of archaeological artifacts and impairing our ability to reconstruct and understand the past. Because looting is motivated by profit, the rate of looting should respond to the basic economic law of supply and demand. If collectors in the market nations refuse to buy undocumented artifacts, then incentives for the looting of artifacts will decrease. The law should therefore impose a cost on those who contribute directly or indirectly to the looting of sites by punishing the handling, selling, and buying of looted antiquities. The law in the US, which is generally regarded as the single largest market for antiquities in the world, may be examined as an example of a market nation's attempt to control the market in antiquities.<sup>13</sup>

In the nineteenth and twentieth centuries, many nations with a rich archaeological heritage enacted laws vesting ownership of undiscovered artifacts in themselves. While a free market proponent would view these laws only as inhibitions on the market,<sup>14</sup> others see these laws as a means of discouraging looting of sites by denying the finder and subsequent purchasers title to the artifacts. Despite these debates, US courts have recognized the efficacy of national ownership laws. In *United States v McClain*, the Fifth Circuit held that Mexico's law vested ownership of not-yet-discovered artifacts in Mexico, and

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Roosevelt and C Luke, *Looting Lydia: The Destruction of an Archaeological Landscape in Western Turkey*, in Brodie, et al, eds, *Archaeology, Cultural Heritage, and the Antiquities Trade* 173 (cited in note 11) (discussing Turkey); Rachanie Thosarat, *The Destruction of the Cultural Heritage of Thailand and Cambodia*, in Neil Brodie, Jennifer Doole, and Colin Renfrew, eds, *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage* 7 (McDonald Inst 2001) (discussing Thailand).

<sup>13</sup> The first federal law in the US to address the domestic archaeological heritage was the Antiquities Act of 1906, 16 USC §§ 431–433n (2000), which vested ownership and control of artifacts found on federally owned or controlled land in the federal government.

<sup>14</sup> While everyone involved in the debates surrounding antiquities decries the looting of archaeological sites, those who favor a free market in antiquities view national ownership laws as a particularly problematic form of restraint on the international market. See, for example, John Henry Merryman, *The Free International Movement of Cultural Property*, 31 NYU J Int L & Pol 1, 4–12 (1998). Both national ownership laws and export controls are a restraint on the free circulation of antiquities through the market, but national ownership laws constitute a more severe restraint because antiquities taken in violation of national ownership laws are stolen property in market nations, as well as in the country of origin.

that any artifacts removed from Mexico without permission constituted stolen property.<sup>15</sup> The defendants were convicted of violating the National Stolen Property Act<sup>16</sup> by conspiring to deal in pre-Columbian artifacts owned by Mexico.<sup>17</sup> In *United States v Schultz*,<sup>18</sup> the Second Circuit adopted the *McClain* holding with the conviction of Frederick Schultz, a prominent New York antiquities dealer and former president of the National Association of Dealers in Ancient, Oriental, and Primitive Art ("NADAOPA"),<sup>19</sup> for conspiring to deal in antiquities removed from Egypt in violation of its 1983 national ownership law.<sup>20</sup> In addition to the National Stolen Property Act, the trafficking provisions of the Archaeological Resources Protection Act can be utilized to prosecute individuals involved in the interstate or international transport of stolen archaeological resources, including those taken in violation of a national

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<sup>15</sup> The defendants' conviction on the substantive counts was reversed because the Fifth Circuit held that only Mexico's 1972 law was truly a vesting statute. Nonetheless, the defendants' conviction on the conspiracy count was affirmed. *United States v McClain*, 593 F2d 658, 671–72 (5th Cir 1979).

<sup>16</sup> See National Stolen Property Act, 18 USC §§ 2314–2315 (2000) (prohibiting the interstate or international movement of stolen property and the receipt, transfer, and possession of stolen property that has been transported across state or international boundaries, is worth \$5,000 or more, and is known to have been stolen).

<sup>17</sup> See *United States v McClain*, 545 F2d 988, 1004 (5th Cir 1977). *McClain* was preceded by *United States v Hollinshead*, 495 F2d 1154, 1155 (9th Cir 1974), which recognized Guatemala's ownership of its pre-Columbian artifacts.

<sup>18</sup> *United States v Schultz*, 333 F3d 393 (2d Cir 2003).

<sup>19</sup> NADAOPA has filed amicus briefs in most of the major cultural property cases over the past thirty years. It also opposed implementation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970), 823 UN Treaty Ser 231 ("1970 UNESCO Convention"), the form of the 1995 Unidroit Convention on Stolen and Illegally Exported Cultural Objects (1995), 34 ILM 1322 (1995), and most, if not all, of the bilateral agreements that the US has entered into pursuant to the Cultural Property Implementation Act, 19 USC §§ 2601–13 (2000). For examples of these objections, see Celestine Bohlen, *Old Rarities, New Respect: U.S. Works with Italy*, NY Times E5 (Feb 28, 2001); *Statement of Position of Concerned Members of the American Cultural Community regarding the Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects* (May 31, 1995) (copy on file with author); Unidroit Convention on Stolen and Illegally Exported Cultural Objects (1995), 34 ILM 1322 (1995), available online at <<http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>> (visited Apr 21, 2007).

<sup>20</sup> Egyptian Law 117, art 6, quoted in *Schultz*, 333 F3d at 399–400

ownership law.<sup>21</sup> The status of foreign national ownership laws is now clearly established in those circuits with the most robust art markets.<sup>22</sup>

Other legal restraints under US law include the requirement of proper declaration of value and country of origin for archaeological artifacts, as with all imported commercial goods.<sup>23</sup> Improper declaration can lead to the forfeiture of the goods and criminal prosecution of the importer if the misstatements were made knowingly or intentionally.<sup>24</sup> The requirement to declare the proper country of origin is crucial in determining what laws apply to the importation of the artifact.

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property ("UNESCO Convention")<sup>25</sup> was the first international attempt to control the market in artworks and cultural objects. It was promulgated in response to the growth of the market in the 1960s and, in particular, the dismemberment of ancient monuments and sites to satisfy market demand.<sup>26</sup> There are currently 112 State Parties.<sup>27</sup> While the US was the first major market nation to ratify it,<sup>28</sup> most of the other major market nations, including Switzerland, the UK, France, and Japan, are now also parties.<sup>29</sup>

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<sup>21</sup> Archaeological Resources Protection Act, 16 USC § 470ee(c) (2000). Criminal prosecution would also be available under state statutes prohibiting possession and dealing in stolen property. See Ricardo A. St. Hilaire, *International Antiquities Trafficking: Theft by Another Name*, paper presented at the Feb 26, 2007 meeting of ICOM-CC, Issues in the Conservation of Cultural Heritage, 4–5.

<sup>22</sup> Those circuits include the Second Circuit (*Schultz*, 333 F3d 393), the Fifth and Eleventh Circuits (*McClain*, 593 F2d 658), and the Ninth Circuit (*United States v Hollinshead*, 495 F2d 1154 (9th Cir 1974)).

<sup>23</sup> 18 USC §§ 542, 545 (2000).

<sup>24</sup> See *United States v An Antique Platter of Gold*, 184 F3d 131, 136–37 (2d Cir 1999) (holding that the country of origin of an ancient gold *phiale* was Sicily, where it was excavated, rather than Switzerland, as declared by the importer, through which it was transported en route to the US); US Immigration and Customs Enforcement Press Release, *Department of Homeland Security Returns Rare Artifacts to the Pakistani Government* (Jan 23, 2007), available at <<http://www.ice.gov/pi/news/newsreleases/articles/070123newark.htm>> (visited Apr 21, 2007) (announcing the restitution of several Buddha statues and other antiquities to Pakistan because their country of origin was incorrectly stated to be Dubai).

<sup>25</sup> 1970 UNESCO Convention (cited in note 19).

<sup>26</sup> Clemency Chase Coggins, *United States Cultural Property Legislation. Observations of a Combatant*, 7 Int'l J Cultural Prop 52, 52–54 (1998).

<sup>27</sup> For a list of State Parties, see <<http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha>> (visited Apr 21, 2007).

<sup>28</sup> The Senate voted unanimously to accept the UNESCO Convention in 1972, but implementing legislation was delayed for eleven years due largely to the objections of the art market community and of Senator Daniel Patrick Moynihan. At the time of acceptance, the US stated one understanding and six reservations Patrick J. O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic* 106–12 (Inst of Art and Law 2000); see generally Barbara B. Rosecrance,

In 1983, the US enacted the Convention on Cultural Property Implementation Act ("CPIA"),<sup>30</sup> implementing two sections, article 7(b) and article 9, of the UNESCO Convention. The CPIA prohibits the importation into the US of stolen cultural property that had been documented in the inventory of a museum, religious or secular public institution in another State Party.<sup>31</sup> The CPIA also grants the President the authority, pursuant to a request from a State Party, to impose import restrictions on designated categories of archaeological and ethnological materials that are subject to pillage in that State Party.<sup>32</sup> The CPIA provides only for civil forfeiture of the cultural materials at stake and has no criminal penalties.<sup>33</sup>

In addition to criminal prosecution and forfeiture actions that the government can take, the original owner (typically a foreign government) can bring a replevin claim in US court to recover its stolen property. Basing its right to ownership on the national vesting laws recognized in the *McClain* and *Schultz* decisions, a foreign nation can recover antiquities looted and removed without permission after the effective date of its national ownership law. Many such successful claims have been brought, including Turkey's recovery of the 360 objects in the Lydian hoard from the Metropolitan Museum of Art<sup>34</sup> and its recovery of the Elmalı coin hoard from private collectors.<sup>35</sup> The recent successes of Italy and Greece in recovering artifacts from the Metropolitan Museum, the Boston Museum of Fine Arts, and the Getty Museum were also based on these nations' ability to recover stolen artifacts in actions for replevin.<sup>36</sup>

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*Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 Cornell Intl LJ 311 (1986).

<sup>29</sup> Id. For a more detailed discussion of the British and Swiss implementing legislation, see Patty Gerstenblith, *From Bamyan to Baghdad: Warfare and the Protection of Cultural Heritage at the Beginning of the 21<sup>st</sup> Century*, 37 Geo J Intl L 245, 332–34 (2006).

<sup>30</sup> 19 USC §§ 2601–13 (2000).

<sup>31</sup> 19 USC § 2607 (2000). The definition of "cultural property" tracks that given in Article 1 of the UNESCO Convention and is very broad. 19 USC § 2601(6) (2000).

<sup>32</sup> 19 USC §§ 2602–03 (2000). For a more detailed discussion of the CPIA process, see Gerstenblith, 37 Geo J Intl L at 319–24 (cited in note 29).

<sup>33</sup> 19 USC § 2609 (2000).

<sup>34</sup> Lawrence M. Kaye and Carla T. Main, *The Saga of the Lydian Hoard: Uşak to New York and Back Again*, in Tubb, ed, *Antiquities Trade or Betrayed* 150 (cited in note 8).

<sup>35</sup> *Republic of Turkey v OKS Partners*, 797 F Supp 64 (D Mass 1992).

<sup>36</sup> The agreements between Italy and the Metropolitan Museum of Art and between Italy and the Boston Museum of Fine Arts implicitly recognize Italy's proper title to the antiquities that were returned. For the Metropolitan Museum agreement, see *Agreement between The Ministry for Cultural Heritage and Activities of the Italian Republic and the Metropolitan Museum of Art, New York* (copy on file with author); for the Boston Museum of Fine Arts agreement, see *An Agreement with the Italian Ministry of Culture*, available at <<http://www.mfa.org/collections/index.asp?key=2656>> (visited

## B. THE PROBLEM PERSISTS

A recent study of the international antiquities market by S.M.R. Mackenzie identifies reasons that existing legal restraints are less effective in this area than in other criminal markets.<sup>37</sup> White-collar criminals are heavily influenced by the risk of detection and the likelihood and severity of punishment. It is estimated that approximately 80 to 90 percent of the antiquities on the market lack sufficient provenience<sup>38</sup> to establish that they were discovered long enough ago that their acquisition would not raise legal problems. With such a large proportion of the antiquities on the international market lacking an adequate documented history, two conclusions can be drawn. First, market participants convince themselves that many of the market's undocumented antiquities are chance finds and that this excuses sales that may be illegal.<sup>39</sup> This rationalization

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Apr 21, 2007). The fact that these museums agreed to return these artifacts suggests a recognition by the parties that Italy could likely have recovered these artifacts in a legal action.

<sup>37</sup> S.M.R. Mackenzie, *Going, Going, Gone: Regulating the Market in Illicit Antiquities* (Inst of Art and Law 2005). In contrast to the limited remedies available under the US laws described in the preceding section, Endangered Species Act, Pub L No 93-205, 81 Stat 884 (1972), codified at 16 USC §§ 1531–44 (2000 & supp 2004), authorizes civil penalties (fines and forfeiture of all equipment, including vessels, used in the violation of the statute), criminal penalties, and citizen suits to ensure enforcement. 16 USC § 1540 (2000). This legal regime regulating trade in endangered species is more stringent than that which addresses the trade in antiquities because of the wider availability of criminal sanctions and because of stricter enforcement; it is therefore also regarded as more effective. Mackenzie, *Going, Going, Gone* at 122–27 (cited in note 37). It is also more stringent because it prohibits trade in artifacts that incorporate body parts of endangered species, even though the artifacts were legally acquired before enactment of the legislation and is, in that sense, retroactive in nature. *Andrus v Allard*, 444 US 51 (1979) (holding that the retroactive application of the Eagle Protection Act and the Migratory Bird Treaty Act does not violate the Fifth Amendment's Takings Clause).

<sup>38</sup> Mackenzie, *Going, Going, Gone* at 32–50 (cited in note 37). One dealer interviewed by Mackenzie put the number of artifacts that come to him with information of their archaeological origins at 1 percent. Id at 32. Stephen Dyson estimates that in 1990, 80 percent of the antiquities available for sale on the market were illegally excavated and exported. Stephen L. Dyson, *In Pursuit of Ancient Pasts: A History of Classical Archaeology in the Nineteenth and Twentieth Centuries* 225 (Yale 2006). The term “provenience” is often used to indicate the history of an antiquity back to its archaeological origin. The term “provenance” indicates the history of ownership of a work of art. If a provenance for an antiquity is complete, then it satisfies the criteria of provenience. However, most antiquities on the market have only a very incomplete ownership history. Coggins, 7 *Intl J Cultural Prop* at 57 (cited in note 26), Mackenzie, *Going, Going, Gone* at 5–6 (cited in note 37).

<sup>39</sup> Mackenzie, *Going, Going, Gone* at 32–38, 163–65 (cited in note 37). One collector went so far as to classify any objects found by digging not carried out by an archaeologist as chance finds! Id at 56–57. This rationalization—that unprovenanced antiquities are chance finds—ignores the fact that chance finds are generally not in sufficiently good condition to make it into the international antiquities market. True chance finds are found near the surface and will be fragmentary, scattered, and weathered, objects that are of sufficiently high quality and condition to be collectible by a high-end collector or museum are most likely found in tombs. Tubb and Brodie commented that “true chance finds are difficult to come by . . . Very few, if any, intact antiquities have been found [in twenty years

permits market participants to deny the causal connection between the funds they put into the market and site looting. Second, because the government, in a forfeiture or criminal prosecution, or the claimant in a civil suit bears the burden of proving that a particular artifact is stolen, even those who trade in antiquities that are the likely product of recent site looting often escape the reach of the law.

Mackenzie's study demonstrates that market participants indulge in a significant amount of denial about what they do. Many recognize that there are looted and stolen artifacts and unethical dealers, but they all claim that they themselves do not engage in any shady practices and that they conduct their business in an ethical manner. Some buyers delude themselves into thinking that they are legally protected by dealing only with those they know and trust and by engaging in transparently ridiculous ruses.<sup>40</sup> Market participants excuse their failure to research the backgrounds of the antiquities they acquire by saying they want to protect the seller by not asking too many questions, they want to maintain a competitive edge against other dealers, and they believe that lack of complete provenience information does not necessarily mean that an artifact is looted.<sup>41</sup>

While the potential for punishment may serve as a disincentive to the trade in undocumented antiquities, certain aspects of the structure of the legal regime restrain the full efficacy of the law. The most important restraint is that the government or claimant bears the burden of proof to establish the required elements. By definition, looted antiquities are undocumented before they appear on the international market. As a result, the claimant or the government can meet the legally required standard<sup>42</sup> only in the unusual circumstance that the

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of archaeological surface surveys] The published material consists largely of pieces of broken pottery and small architectural fragments. The idea that there are large quantities of antiquities lying about waiting to be found is a myth." Kathryn Walker Tubb and Neil Brodie, *From Museum to Mantelpiece: The Antiquities Trade in the United Kingdom*, in Robert Layton, Peter G. Stone & Julian Thomas, eds, *Destruction and Conservation of Cultural Property* 102, 106 (Routledge 2001). In the UK, where the Portable Antiquities Scheme requires the reporting of finds, only 9 percent of the finds reported in 2004–05 were found during construction, agricultural, and gardening activities and are therefore true chance finds. See *The Portable Antiquities Scheme Annual Report 2004–05*, 88 and Table 8, available at <[http://www.finds.org.uk/documents/PAS\\_2004\\_05.pdf](http://www.finds.org.uk/documents/PAS_2004_05.pdf)> (visited Apr 21, 2007).

<sup>40</sup> Mackenzie, *Going, Going, Gone* at 25–32 (cited in note 37).

<sup>41</sup> Id. at 47–60.

<sup>42</sup> In a criminal prosecution, the government must establish beyond a reasonable doubt that the artifact is stolen and that the current possessor knew or consciously avoided learning that the artifact was stolen. See *Schultz*, 333 F3d at 413–14 (discussing the government's burden in proving a defendant's conscious avoidance). The plaintiff who seeks to recover stolen property must establish by a preponderance of the evidence his or her right to own the property and that it was stolen. See *Autocephalous Greek-Orthodox Church of Cyprus v Goldberg and Feldman Fine Arts*, 917 F2d 278, 290–92 (7th Cir 1990). The standard of proof in a civil forfeiture action brought under Title

artifact's time and place of discovery can be determined. The fact that so many of the artifacts on the market are undocumented poses an additional challenge for a prosecutor to establish that the possessor knew that this particular artifact was looted.

Because of the difficulty in establishing the required elements for a criminal prosecution, cases involving looted antiquities are more likely to be civil forfeitures and private replevin claims.<sup>43</sup> However, civil actions do not carry sufficiently meaningful punishment because possessors of looted artifacts face the possibility of losing only the artifacts' monetary value, and the amount of money that market participants have at stake is relatively small.<sup>44</sup> A few examples of the prices paid for antiquities at the source compared to their value in transit and destination markets<sup>45</sup> illustrate the point that sellers of antiquities have little financial investment in the antiquities they sell. While it is difficult to obtain first-hand information as to the price of looted antiquities paid at the source, the journalist Joanne Farchakh reported in May 2004 that at archaeological sites in southern Iraq a cuneiform tablet would sell for four dollars, a decorated vase would sell for between twenty and fifty dollars, and a sculpture would sell for about one hundred dollars.<sup>46</sup> In Baghdad, the journalist Joseph Braude paid two hundred dollars for each of three cylinder seals looted from the Iraq Museum.<sup>47</sup> In comparison, cylinder seals sold on the market in London or New York have

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19 (the Customs statute) is one of probable cause, Civil Asset Forfeiture Reform Act, 18 USC § 983 (2000). However, in civil forfeiture actions brought under other statutory provisions, the government must prove its case to the usual civil standard of the preponderance of the evidence. Stefan D. Cassella, *Using the Forfeiture Laws to Protect Archaeological Resources*, in Sherry Hutt, Marion P. Forsyth, and David Tarler, eds, *Presenting Archaeology in Court: Legal Strategies for Protecting Cultural Resources* 169, 183 (AltaMira 2006).

<sup>43</sup> Mackenzie, *Going, Going, Gone* at 243–44 (cited in note 37).

<sup>44</sup> Auction houses traditionally have none of their own funds at stake in an art market transaction because they do not own the objects they sell, they merely act as agent for the owner. If a purchaser is required to return an antiquity to its proper owner, then the purchaser or the auction house recovers the purchase price from the seller. The auction house loses only its commission. Dealers, on the other hand, typically own the works they sell and therefore have more of their own funds at stake in a transaction, but because the mark-up on antiquities is so high, even dealers lose relatively little if they must give up an antiquity.

<sup>45</sup> For an explanation of transit and destination markets, see Morag M. Kersel, *From the Ground to the Buyer: A Market Analysis of the Trade in Illegal Antiquities*, in Brodie, et al, eds, *Archaeology, Cultural Heritage, and the Antiquities Trade* 188, 189–94 (cited in note 11)

<sup>46</sup> Joanne Farchakh, *Témoignages d'une Archéologue Hérouique*, *Archeologia* 14, 25 (May 2004).

<sup>47</sup> US Immigration and Customs Enforcement, *Press Release, Cultural Antiquity Returned to Iraqi Government after ICE Investigation* (Jan 18, 2005), available online at <[http://www.ice.gov/pi/news/newsreleases/articles/iraqiartfact\\_011805.htm](http://www.ice.gov/pi/news/newsreleases/articles/iraqiartfact_011805.htm)> (visited Apr 21, 2007). The seals stolen from the Iraq Museum were of good but not top quality.

an average value of one thousand dollars.<sup>48</sup> A recent cursory survey of comparable objects being offered on eBay showed that cylinder seals were priced at \$350 to \$2,000; cuneiform tablets were offered at a range of \$350 up to £550 (approximately equivalent to \$1027).<sup>49</sup> A recent Christie's catalogue gave high and low estimates of \$1200 and \$1800 for a cuneiform envelope and tablet, but it sold for \$10,800.<sup>50</sup>

These price differentials demonstrate that from the source at a looted archaeological site (in southern Iraq), to the transit points (such as Baghdad), to the ultimate market in locations such as New York and London, mark-ups for antiquities can be a hundredfold or more. If a collector or dealer in London or New York must relinquish an artifact, he or she loses relatively little out-of-pocket. As Mackenzie points out,<sup>51</sup> so long as the risks of detection and meaningful punishment remain low, the conduct of those market participants who violate the law will not be deterred. It is difficult, however, to craft a legal system in which these impediments to meaningful punishment are eliminated.

### III. SOLUTIONS

The problem that has been identified is the looting of archaeological sites and the harm that this imposes through the loss of context and knowledge of the past. Many mechanisms have been suggested for reducing the looting of sites.<sup>52</sup> However, within the scope of this Article, the only proposals that will be

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<sup>48</sup> Cylinder seals sold at an auction in London in May 2003 ranged from \$400 to \$4,000 with an average of \$1,000, while a seal auctioned by Christie's in 2001 sold for \$424,000. See Neil Brodie, *The Plunder of Iraq's Archaeological Heritage 1991–2005 and the London Antiquities Trade*, in Brodie, et al, eds, *Archaeology, Cultural Heritage, and the Antiquities Trade* 206, 212 (cited in note 11); see Suzanne Charle, *Tiny Treasures Leave Big Void in Looted Iraq*, NY Times E3 (July 18, 2003).

<sup>49</sup> See, for example, <<http://www.sandsoftimeantiquities.com>> (visited Apr 21, 2007); <<http://www.arsantiqua-online.com>> (visited Apr 21, 2007); <<http://www.artemission.com>> (visited Apr 21, 2007). This is not intended to indicate that these particular artifacts are recently looted from Iraq; however, it demonstrates one market value that may be placed on artifacts.

<sup>50</sup> See Christie's, *New York Antiquities, Friday 16 June 2006* 25 (2006), Christie's, *Auction Result*, available online at <[http://www.christies.com/auction/results/results\\_lotlist.asp?saleno=NYC1679&page=1](http://www.christies.com/auction/results/results_lotlist.asp?saleno=NYC1679&page=1)> (visited Apr 21, 2007). The provenance given in the catalogue for the tablet and envelope went back to 1989. Iraq's antiquities law declaring national ownership dates to 1936; any artifact removed after this date without consent of the Iraqi government is stolen property. Article 3, Antiquities Law No 59 of 1936 and the two amendments, No 120 of 1974 and No 164 of 1975, available online at <<http://developmentgateway.org/download/181160/Iraq-Antiquities-Law.rtf>> (visited Apr 21, 2007). The sale price includes the buyer's premium. See <[http://www.christies.com/auction/results/results\\_lotlist.asp?saleno=NYC1679&page=](http://www.christies.com/auction/results/results_lotlist.asp?saleno=NYC1679&page=)> (visited Apr 21, 2007).

<sup>51</sup> Mackenzie, *Going, Going, Gone* at 243 (cited at note 37)

<sup>52</sup> See, for example, Patrick J. O'Keefe, *Trade in Antiquities: Reducing Destruction and Theft* (Archetype 1997) (discussing increased education of the public in both archaeologically rich nations and

examined are those that are premised on manipulation of market demand for undocumented antiquities. Virtually all proposals involving the market focus on the question of the extent to which the market in undocumented antiquities should or should not be regulated. One approach focuses on decreasing regulation of the market; other approaches focus on increasing regulation of the market, through either direct or indirect means. Some of these representative proposals will be analyzed.

## A. DECREASING REGULATION OF THE MARKET IN ANTIQUITIES

One group of proposals advocates for less regulation of the market in antiquities. Some of the proposals advocating for less regulation do not seem to regard the deterrence of all looting as a priority.<sup>53</sup> These proposals suggest that the increased movement of ancient art works through the world that can be achieved through a less regulated market is of greater value than what is learned through controlled excavation<sup>54</sup> or they reject the connection between site

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market nations, greater publicity, and greater financial assistance to nations to aid them in guarding their sites).

<sup>53</sup> There is admittedly a certain amount of contradiction in that everyone decries intentional looting or looting of identified or official archaeological sites, but some distinguish this from other forms of looting, although the basis for doing so is unclear. See, for example, John Boardman, *Archaeologists, Collectors, and Museums*, in Eleanor Robson, Luke Treadwell, and Chris Gosden, eds, *Who Owns Objects? The Ethics and Politics of Collecting Cultural Artefacts* 33, 35–41 (Oxbow 2006).

<sup>54</sup> See, for example, the recent comments of John Boardman, *Who Owns Antiquities?*, Review of Jonathan Tokeley, *Rescuing the Past: The Cultural Heritage Crusade*, available online at <<http://www.jonathantokeley.com/default>> (visited Apr 21, 2007) (stating that “it is arguable that as much or more progress in understanding our past has been made by study of objects, excavated or not, than by excavation alone”), Randy Kennedy and Hugh Eakin, *Met Chief, Unbowed, Defends Museum’s Role*, NY Times E1 (Feb 28, 2006) (quoting Philippe de Montebello, the director of the Metropolitan Museum of Art, who stated, “the information that is lost [when an object is looted] is a fraction of the information that an object can provide. . . . How much more would you learn from knowing which particular hole in—supposedly Cerveteri—[the Euphromios krater] came out of? . . . Everything is on the vase”). This approach can be identified with the “cultural internationalist” view first propounded by John Henry Merryman. John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 Am J Int’l L 831 (1986). However, this so-called “cultural internationalist” view of cultural property is not really internationalist and should more appropriately be termed a free market approach. As Kersel wrote, “The term internationalist conjures up positive connotations, providing access to all. Rather than being internationalist in approach the free-market position, in this context, advocates for the unfettered movement of cultural material in the marketplace—those who can afford to purchase the artifacts are allowed access. . . . The international exchange of free-market proponents is primarily a flow of objects from less-developed nations to collectors usually with a much higher per capita income. And the exchange is usually financial, not intellectual.” Kersel, *License to Sell*, at 5 n 13, 10–11 (citations omitted) (cited in note 12). These proposals also generally fail to recognize the harm that the international market can do to individual objects to make them more appealing and more

looting and market demand.<sup>55</sup> While accepting that the country of origin has the right to criminalize the looting of sites, these proposals reject the holding of the *McClain* and *Schultz* decisions—that antiquities taken in violation of a national ownership law are stolen property in the destination countries, such as the US and England.<sup>56</sup> If such objects are regarded as legal, rather than stolen, then the number of legal objects available to be traded on the international market will expand considerably.<sup>57</sup>

Those who reject the characterization of looted antiquities as stolen property argue that criminalizing the trade in looted antiquities has created a black market.<sup>58</sup> If the trade in looted artifacts were no longer criminalized, then the black market would largely disappear. This is, of course, correct, but it would not deter the looting of sites—the true harm caused by the trade in undocumented artifacts and the underlying detrimental conduct. If the looting of sites and the trade in stolen artifacts were decriminalized, the result would be more looting, not less, as there would no longer be any reason for restraint. Without national ownership laws, buried antiquities would be regarded as having no owner, or it would be impossible to prove who the true owner is. In a variation on the paradigmatic “tragedy of the commons,”<sup>59</sup> the first finder (that

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saleable, in addition to the loss of context and knowledge. One may refer, as examples, to the damage done to the Kanakaria mosaics by the dealer’s resetting of the mosaic tiles, Catherine Sease and Danae Thimme, *The Kanakaria Mosaics: The Conservators’ View*, in Tubb, ed, *Antiquities Trade or Betrayed* 122, 124–27 (cited in note 8), and the looting and recutting of Neo-Assyrian reliefs to make them more attractive for the market, John Malcolm Russell, *The Final Sack of Nineveh* 48 (Yale 1998). They also fail to recognize that it does not have to be a choice between excavation and objects—when objects are properly excavated, the objects remain available to be studied, curated, and displayed in museums.

<sup>55</sup> James Cuno, the director of the Art Institute of Chicago, has written that, “when an antiquity is offered to a museum for acquisition, the looting, *if indeed there was any*, has already occurred . . . Museums are havens for objects that are already, *and for whatever reason*, alienated from their original context. Museums do not alienate objects.” James Cuno, *View from the Universal Museum*, in John H. Merryman, ed, *Imperialism, Art and Restitution* 15, 29 (2006) (emphasis added) Cuno’s use of the passive voice and the doubt he attempts to cast on the question of whether an undocumented artifact may be the product of looting indicate his denial of any link between a museum’s acquisitions (and the funds it puts into the market) and the looting. See also Mackenzie, *Going, Going, Gone* at 142–45 (cited in note 37) (quoting from dealers’ comments on the relationship between looting and market demand).

<sup>56</sup> John Henry Merryman, *A Licit International Trade in Cultural Objects*, 4 *Intl J Cultural Prop* 13, 25–30 (1995).

<sup>57</sup> *Id* at 30 (stating that “by enlarging the number and variety of cultural objects that could be licitly acquired, the suggested redefinition of a licit trade can divert trade from the black market and reduce the material, social and economic harm it causes”).

<sup>58</sup> John Henry Merryman, *Cultural Property Internationalism*, 12 *Intl J Cultural Prop* 11, 23 (2005).

<sup>59</sup> In the classic problem of the “tragedy of the commons,” overexploitation of a resource leads to economic inefficiency. “In a commons, by definition, multiple owners are each endowed with the privilege to use a given resource, and no one has the right to exclude another. When too many

is, the looter) would be able to gain and transfer title to looted artifacts. Looters would therefore have a greater incentive to take as much and as quickly as possible. Decriminalization would encourage, rather than discourage, more looting.

Other proposals that rely on decreased regulation of the market proffer that by decreasing regulation and moving toward a managed but less strictly regulated market in antiquities, demand for illegal objects will decrease and site looting will be deterred.<sup>60</sup> According to this argument, by providing a stream of properly excavated and legitimately obtained artifacts, the legitimate market would drive out the market for illegal and looted artifacts,<sup>61</sup> as buyers would presumably prefer to buy legal, rather than illegal, objects. However, the experiences of several countries with a managed market indicate that the managed market system will not deter site looting because of several intractable difficulties that the managed market poses. The difficulties that a managed market raises include: from where would these legitimate objects come, whether buyers will prefer these over looted objects, and whether the managed market will be sufficiently regulated to prevent newly-looted objects and those that have not been legitimately placed in the market from entering the legitimate market.

In a managed market, the legitimate artifacts would be those that are properly excavated and documented, and, once this process is completed, those that a country does not want to keep. Countries that are rich in archaeological resources would sell off less important or “duplicate” artifacts that are presumed to be stored in museums and storage depots.<sup>62</sup> Yet many countries are unlikely to sell off their antiquities and there is no realistic mechanism by which a

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owners have such privileges of use, the resource is prone to overuse—a tragedy of the commons” Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv L Rev 621, 623–24 (1998). The solution to the problem of overexploitation is the creation of private property rights, including rights to exclude others and rights based on constructive possession. The analogy in the case of antiquities is the vesting of ownership of antiquities in the nation, which can then regulate the “exploitation” of archaeological sites through the awarding of excavation permits to those who are adequately trained in studying the past so that the full potential (non-economic) benefit of the sites can be realized. Preservation of sites can also bring sustainable economic benefits to the local population through archaeo-tourism and other forms of exploitation that do not harm our ability to understand the past.

<sup>60</sup> O’Keefe, *Trade in Antiquities* at 66–69 (cited in note 52).

<sup>61</sup> Merryman, 12 Int’l J Cultural Prop at 23 (cited in note 58).

<sup>62</sup> Id. One of the difficulties with this proposal is determining which artifacts are unimportant, “duplicates,” or “redundant.” Those favoring this proposal believe that countries and museums should sell off those artifacts that are similar to each other or those that are of low market value. Merryman, 4 Int’l J Cultural Prop at 36–37 (cited in note 56); O’Keefe, *Trade in Antiquities* at 69–75 (cited in note 52).

country can be forced to do so.<sup>63</sup> While the market determines the significance of an object by its monetary value, nations do not necessarily take this same approach.<sup>64</sup> Therefore, nations may not perceive that they have an “excess” of antiquities to sell on the international market.<sup>65</sup> Finally, there is some evidence that there is an insufficient number of antiquities in storerooms to satisfy market demand.<sup>66</sup>

Furthermore, a managed market is not likely to deter the looting of sites. Looted artifacts fill a variety of market niches, ranging from the relatively low-priced artifacts that are found in many similar forms to the high-priced “museum quality” piece. Even if a nation were to place the low-end objects on the market for sale, the desire of high-end collectors and some museums to acquire the “museum quality” pieces would not be satisfied through permitted sales.<sup>67</sup> The looting of sites would therefore continue in the search to satisfy the high-end demand, while artifacts of low economic value become the by-product of the looting. In fact, the availability of large numbers of cheaper artifacts on the market may encourage more people to enter the market and therefore increase, rather than decrease, demand.<sup>68</sup>

Examples of several nations that currently permit some form of a legal market or have done so in the past demonstrate that the looting of sites persists despite the availability of legally obtained artifacts on the market. Israel permits the legal sale of artifacts found on private land before enactment of its national ownership law in 1978 so long as the artifacts have been registered.<sup>69</sup> However,

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<sup>63</sup> It is not for members of the market community to force a market-based solution on other countries. It is an inherent attribute of sovereignty for a nation to determine where to draw the line between public and private property and to determine how it wishes to conserve or dispose of its resources. For a general discussion, see Joseph W. Singer, *Sovereignty and Property*, 86 Nw U L Rev 1, 41–42, 47 (1991).

<sup>64</sup> Tubb and Brodie, *From Museum to Mantelpiece* at 108 (cited in note 39).

<sup>65</sup> O’Keefe points out that no one knows whether there are “excess” artifacts in museum storage and that there are reasons for keeping artifacts from a single site together since they serve as an archive from which further research can be conducted. O’Keefe, *Trade in Antiquities* at 71, 73 (cited in note 52). He also states that if museums are to be required to sell off objects in storage, then this principle should be applied equally to museums in all countries and not in a discriminatory manner that distinguishes between collections in the archaeologically rich nations and those in the market nations. *Id.* at 73

<sup>66</sup> Kersel, *License to Sell* at 13 (cited at note 12) (stating that studies indicate that the sale of artifacts from the storerooms of the Israel Antiquities Authority would deplete the storerooms in less than a year).

<sup>67</sup> *Id.* (stating that high-end collectors and museum are not interested in acquiring duplicate or surplus objects); O’Keefe, *Trade in Antiquities* at 69 (cited in note 52).

<sup>68</sup> O’Keefe, *Trade in Antiquities* at 68 (cited in note 52).

<sup>69</sup> Kersel, *License to Sell* at 88–94 (cited in note 12).

because merchants swap registration numbers and exploit other loopholes in the law, many of the artifacts sold on the market do not come from the legal stock;<sup>70</sup> rather, the looting continues because a fresh stream of looted artifacts can enter the legitimate market.<sup>71</sup> There is even evidence of looting to obtain specific artifacts to satisfy market demand.<sup>72</sup> Cyprus has allowed the export of antiquities in the past, yet the looting of sites was not deterred.<sup>73</sup> The US permits a legal trade in antiquities found on private land,<sup>74</sup> but again sites in the US are still looted.<sup>75</sup> Canada and England permit private ownership and sale of antiquities found on private land and their markets are controlled only through an export licensing system.<sup>76</sup> Yet the presence of a managed market in privately owned and legally obtained artifacts does not seem to satisfy market demand and thereby deter the looting of archaeological sites.<sup>77</sup> The inescapable conclusion is that site looting is not deterred through a solution that encourages, rather than discourages, the market. Proposals that advocate less regulation of the market

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<sup>70</sup> Id at 162–67

<sup>71</sup> Id at 55–58.

<sup>72</sup> Id at 184–86.

<sup>73</sup> Ellen Herscher, *Destroying the Past in Order to “Save” It: Collecting Antiquities from Cyprus*, in Neil Asher Silberman and Ernest S Frenichs, eds, *Archaeology and Society in the 21st Century: The Dead Sea Scrolls and Other Case Studies* 138, 146 (Israel Expl Soc 2001) (stating that “there is no indication that the availability of antiquities for legal export nor the opportunity for museums to obtain a share of the finds by licensed archaeological excavations had any impact on deterring rampant looting throughout the island”).

<sup>74</sup> The Archaeological Resources Protection Act applies only to sites located on federally owned or controlled land. 16 USC § 470CC(a) (2000) (restricting excavation and removal of archaeological resources found on federal or Indian lands) State statutes that are similar to ARPA apply only to state-owned land. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 BU L Rev 559, 596–601 (1995) (citing state statutes) Approximately half of the states have laws that apply to burials found on private land, but burials on private land in the other states and settlement sites on private land are generally not protected by statute. For a list of state statutes applying to burials on private land, see Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine after Lucas*, 13 St Thomas L Rev 65, 101–03 (2000).

<sup>75</sup> Veletta Canouts and Francis P. McManamon, *Protecting the Past for the Future: Federal Archaeology in the United States*, in Brodie, Doole, and Renfrew, eds, *Trade in Illicit Antiquities* 97, 100–02 (cited in note 12).

<sup>76</sup> For the Canadian export licensing system, see the Canada Cultural Property Export and Import Act, RSC 1985, c C-51, § 37. For a description of the British export licensing system, see Sara E. Bush, *The Protection of British Heritage. Woburn Abbey and the Three Graces*, 5 Intl J Cultural Prop 269, 277–81 (1996)

<sup>77</sup> See, for example, the case of the Icklingham bronzes looted from a scheduled archaeological site in England and acquired by New York collectors Shelby White and Leon Levy. John Browning, *A Layman's Attempts to Precipitate Change in Domestic and International 'Heritage' Laws*, in Tubb, ed, *Antiquities Trade or Betrayed* 145 (cited in note 8).

provide a veneer of respectability that encourages trading in artifacts that are likely to be the product of contemporary site looting.

## B. INCREASING REGULATION OF THE MARKET IN ANTIQUITIES

The alternative to a less regulated market is a more regulated market with the goal of decreasing demand for undocumented antiquities. There are several ways in which more regulation can be achieved. Direct regulation relies on methods by which the government imposes direct consequences on market participants. Market participants can achieve regulation through voluntary self-regulation. Indirect regulation is accomplished through the granting or denial of government benefits that are aimed at encouraging individuals and institutions to avoid acquiring undocumented artifacts.

### 1. Increasing Direct Regulation of the Market in Antiquities

There are several means by which direct regulation of the market in antiquities could be increased. As Mackenzie has pointed out, for the deterrent effect of the legal regime to be most effective, the risk of detection and the certainty and severity of punishment must be high.<sup>78</sup> The most obvious way to increase direct regulation would be to reverse the burden of proof so that the current possessor of an antiquity would carry the burden of proving the legitimate origin of the antiquity in civil forfeiture actions, private replevin claims, and criminal prosecutions. In June 2003, in fulfillment of its obligations under UN Security Council Resolution 1483, the UK adopted Statutory Instrument 2003 No 1519, which reverses the burden of proof in a criminal prosecution of individuals dealing in Iraqi cultural property illegally removed after August 6, 1990.<sup>79</sup> There is evidence from market statistics that this criminal provision is depressing the London market in Mesopotamian cylinder seals.<sup>80</sup>

<sup>78</sup> As Mackenzie states, "Just as justice must not only be done but be seen to be done, so antiquities must not only be licitly excavated and traded, but must be seen to be licitly excavated and traded." Mackenzie, *Going, Going, Gone* at 21 (cited in note 37).

<sup>79</sup> Iraq (United Nations Sanctions) Order, Statutory Instrument 2003 No 1519, available at <<http://www.hmso.gov.uk/si/si2003/20031519.htm>> (visited Apr 21, 2007). Section 8 (3) states, "Any person who deals in any item of illegally removed cultural property [from Iraq] shall be guilty of an offence . . . unless he proves that he did not know and had no reason to suppose that the items in question was illegally removed Iraqi cultural property." See also Kevin Chamberlain, *The Iraq (United Nations Sanctions) Order 2003—Is It Human Rights Compatible?*, 8 Art, Antiquity and Law 357, 361–68 (2003) (discussing whether this reversal of the burden of proof is compatible with European human rights law and concluding that it is).

<sup>80</sup> Brodie, *The Plunder of Iraq's Archaeological Heritage* at 217–18 (cited in note 48). The vast majority of Mesopotamian cylinder seals come from Iraq. Id at 215.

However, such a reversal of the burden of proof, particularly in criminal cases, would likely be unconstitutional in the US.

Another method of increasing direct regulation is to broaden the availability of criminal prosecution and increase the severity of punishment for those who have been convicted. One way of broadening the availability of criminal prosecution would be to make the knowing, intended, or attempted import of cultural materials in violation of an import restriction enacted pursuant to the CPIA a criminal violation.<sup>81</sup> The possibility of criminal prosecution, rather than simple civil forfeiture, should have a greater deterrent effect.

The Cultural Heritage Resource Crimes Sentencing Guideline (“Sentencing Guideline”), promulgated in 2002, significantly increases the criminal penalties available for those who have been convicted of a broad range of cultural heritage resource crimes, including trading in stolen antiquities.<sup>82</sup> In particular, the Sentencing Guideline has, as one of its goals, reducing reliance on market value to determine the severity of a sentence and focusing reliance, instead, on the harm done to the historical and archaeological record.<sup>83</sup> However, it is clear that this new guideline is not yet adequately understood by federal prosecutors and federal judges, as demonstrated by the way in which the author Joseph Braude, who smuggled into the US three cylinder seals stolen from the Iraq Museum in Baghdad in 2003, was charged, and the light sentence he was given.<sup>84</sup>

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<sup>81</sup> St. Hilaire has argued that a knowing violation of a CPIA import restriction would constitute a criminal violation under 18 USC § 545, which states: “Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law [shall be subject to criminal penalties].” St. Hilaire, *International Antiquities Trafficking* at 4 (cited in note 21).

<sup>82</sup> 18 USC Appx § 2B1.5 (2000).

<sup>83</sup> The US Sentencing Commission said, among the reasons for the new guidelines, that “[b]ecause individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects, the effects of cultural heritage resource crimes transcend mere monetary considerations. Accordingly, this new guideline takes into account the transcendent and irreplaceable value of cultural heritage resources and punishes in a proportionate way the aggravating conduct associated with cultural heritage resource crimes.” Reason for Amendment, 18 USC Appx § 2B1.5. See Paula J. Desio, *Crimes and Punishment: Developing Sentencing Guidelines for Cultural Heritage Resource Crimes*, in Jennifer R. Richman and Marion P. Forsyth, eds, *Legal Perspectives on Cultural Resources* 61 (AltaMira 2004). The US Supreme Court’s decision in *United States v Booker*, 543 US 220 (2005), has rendered the status of all sentencing guidelines uncertain.

<sup>84</sup> Braude was not even charged with violations of the National Stolen Property Act, despite the fact that the cylinder seals still had their Iraq Museum registration numbers partially visible. He was charged only with three counts of smuggling and making false statements in violation of 18 USC §

Mackenzie has proposed a radical shift in the way in which the criminal law could operate to deter trafficking in recently looted archaeological materials by instituting clearer legal prohibition with the consequence of higher risk of criminal conviction and more severe punishment. The essence of Mackenzie's proposal is that nations should adopt a legal rubric based on the registration of all antiquities that are currently held in collections (whether museums, private collections, or dealer and auction house inventory).<sup>85</sup> All antiquities currently in collections could be freely registered and this would, admittedly, launder title to these objects, regardless of whether they were obtained legitimately or not.<sup>86</sup> However, for any antiquity to be registered after this system was enacted, the owner would have to demonstrate clear legitimate title and excavation history.<sup>87</sup> Trading in any unregistered antiquities would be a criminal offense.

The trade-off of legitimating antiquities currently in collections might be worthwhile, if we could thereby assure that all antiquities looted in the future would become unmarketable and the legal consequences to those who trade in such antiquities would be sure, swift, and severe. However, before such a system could be seriously considered, we must recognize the difficulties in creating a foolproof registration system. Can antiquities (other than major pieces) be sufficiently identified in a registry so that recently looted artifacts could not be switched for others that were previously known and registered? Could we assure, even with modern technology, that no new artifacts would enter the legitimate market? It is not likely that this system would be workable and foolproof. Kersel's study of the registration system of antiquities in Israel demonstrates the difficulties in enforcing such a system.<sup>88</sup> It requires the devotion of government and law enforcement resources as well as the voluntary cooperation of dealers—elements that are clearly not present in the Israeli system. It also requires the technological ability to uniquely identify each artifact. There is no reason at this time to believe that a registration system would be reliably administered and enforced, technologically feasible, and cost effective.

## 2. Increasing Regulation through Voluntary Self-Regulation

Controlling the market through voluntary self-regulation is another way of reducing demand for looted antiquities. While some scholars participate in the

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545. Braude was sentenced to six months of house arrest and two years of probation. See US Immigration and Customs Enforcement, *Press Release* (cited in note 47).

<sup>85</sup> Mackenzie, *Going, Going, Gone* at 237–46 (cited in note 37).

<sup>86</sup> *Id.* at 240.

<sup>87</sup> *Id.*

<sup>88</sup> Kersel, *License to Sell* at 162–67 (cited in note 12).

trade by authenticating undocumented artifacts<sup>89</sup> and by collecting, professional organizations, such as the Archaeological Institute of America (“AIA”) and the Society for American Archaeology (“SAA”), have codes of ethics that prohibit activities by their members that enhance the value of undocumented artifacts, including prohibitions on direct involvement in the trade, authentication, and appraisal of artifacts,<sup>90</sup> and the publication or presentation at their scholarly meetings of undocumented artifacts.<sup>91</sup>

Dealers’ associations have adopted codes of ethics that regulate the conduct of their membership.<sup>92</sup> However, the codes of dealers’ associations rarely address the specifics of the trade in antiquities or are ambiguous in doing so.<sup>93</sup> Only the Code of Practice for the Confédération Internationale des Négociants en Oeuvres d’Art specifies that members should not trade in “an imported object that was acquired dishonestly or illegally from an official excavation site or monuments or originated from an illegal, clandestine or

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<sup>89</sup> Brodie, *The Plunder of Iraq’s Archaeological Heritage* at 217–18 (cited in note 48).

<sup>90</sup> The AIA’s Code of Ethics states that “members of the AIA should: . . . [r]efuse to participate in the trade in undocumented antiquities and refrain from activities that enhance the value of such objects.” The Code applies to both lay and professional members of the Institute. *AIA Code of Ethics*, available online at <[http://www.archaeological.org/pdfs/AIA\\_Code\\_of\\_EthicsA5S.pdf](http://www.archaeological.org/pdfs/AIA_Code_of_EthicsA5S.pdf)> (visited Apr 21, 2007). The SAA’s Principles of Archaeological Ethics states, “Whenever possible [archaeologists] should discourage, and should themselves avoid, activities that enhance the commercial value of archaeological objects . . .” SAA, *Principles of Archeological Ethics*, available online at <<http://www.saa.org/aboutSAA/committees/ethics/principles.html>> (visited Apr 21, 2007).

<sup>91</sup> The AIA’s Code of Ethics defines “undocumented antiquities” as “those which are not documented as belonging to a public or private collection before December 30, 1970, the date when the AIA Council endorsed the 1970 UNESCO Convention, or which have not been excavated and exported from the country of origin in accordance with the laws of that country.” AIA Code of Ethics (cited in note 90). The AIA’s policy for its publications states that they “will not serve for the announcement or initial scholarly presentation of any object in a private or public collection acquired after December 30, 1973, unless its existence is documented before that date, or it was legally exported from the country of origin” AIA, *Publications Policy for the AIA and Archaeology*, available online at <<http://www.archaeological.org/webinfo.php?page=10040>> (visited Apr 21, 2007). A similar policy pertains to papers presented at the AIA’s Annual Meeting, see, for example, AIA, *Open Session Submission Form*, available online at <<http://www.archaeological.org/formmaker.php?page=10178>> (visited Apr 21, 2007).

<sup>92</sup> Merryman, 12 Intl J Cultural Prop at 27 (cited in note 58); O’Keefe, *Trade in Antiquities* at 47–51 (cited in note 52).

<sup>93</sup> Brodie notes that Article 2 of both the Antiquities Dealers Association’s Code of Ethics and the Code of Ethics of the International Association of Dealers in Ancient Art say that their members should not trade in antiquities stolen from excavations. However, Brodie interprets the use of the phrase “stolen antiquities” as referring only to antiquities looted from known or designated archaeological sites or from private land. Brodie, *The Plunder of Iraq’s Archaeological Heritage* at 218–19 (cited in note 48).

otherwise unofficial site.”<sup>94</sup> In 1999, UNESCO promulgated an International Code of Ethics for Dealers in Cultural Property, which states in Article 1 that “[p]rofessional traders in cultural property will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported.”<sup>95</sup> While some but not all of these codes address the particular problems of the trade in undocumented antiquities, there is little evidence that these codes are internally enforced, and therefore they seem to have little impact on the actual conduct of the trade.<sup>96</sup>

Individual museums and the museum organizations have policies that regulate their acquisitions. The Code of Ethics for Museums of the International Council of Museums (“ICOM”) requires that acquisitions be in full compliance with the laws of the country of origin of artifacts, transit countries, and the country where the museum is located.<sup>97</sup> On the other hand, the two major American museum associations do not take as clear a position. The Code of Ethics of the American Association of Museums says little about the particular problems of the acquisition of antiquities,<sup>98</sup> while the Association of Art Museum Directors’ guidelines, adopted in June 2004, on the acquisition of ancient art and antiquities have numerous loopholes.<sup>99</sup> In contrast, several

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<sup>94</sup> Code of Practice for the Control of International Trading in Works of Art, reprinted in 7 Intl J Cultural Prop 203 (1998).

<sup>95</sup> International Code of Ethics for Dealers in Cultural Property, available online at <[http://www.unesco.org/culture/legalprotection/committee/html\\_eng/ethics1.shtml](http://www.unesco.org/culture/legalprotection/committee/html_eng/ethics1.shtml)> (visited Apr 21, 2007).

<sup>96</sup> O’Keefe, *Trade in Antiquities* at 50–51 (cited in note 52). The UNESCO Code refers to professional traders and therefore includes both dealers and auction houses. There does not seem to be any other code of conduct that includes auction houses, but both Christie’s and Sotheby’s maintain their own internal rules of compliance. However, other than references to these compliance rules, the rules themselves are not publicly available. There is only one association of private collectors, and it has no code of conduct. *Id.* at 44.

<sup>97</sup> ICOM, *Code of Ethics for Museums*, 2006, art 2.3, available online at <[http://icom.museum/code2006\\_eng.pdf](http://icom.museum/code2006_eng.pdf)> (visited Apr 21, 2007).

<sup>98</sup> The Code states: “acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials.” American Association of Museums, *Code of Ethics for Museums*, available online at <<http://www.aam-us.org/museumresources/ethics/coe.cfm>> (visited Apr 21, 2007).

<sup>99</sup> Association of Art Museum Directors, *Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art*, available online at <[http://www.mta-hq.org/pdf/Assem06\\_AAMD\\_Hdt.pdf](http://www.mta-hq.org/pdf/Assem06_AAMD_Hdt.pdf)> (visited Apr 21, 2007). For more detailed analysis of the AAMD guidelines, see Patty Gerstenblith, *Collecting Antiquities in the International Market: Philosophy, Law and Heritage*, in Sherry Hutt, ed., *Yearbook of Cultural Property Law 2007* (Left Coast forthcoming 2007).

individual museums, such as the Field Museum of Natural History in Chicago<sup>100</sup> and, more recently, the Getty Museum<sup>101</sup> and the Indianapolis Museum of Art,<sup>102</sup> have adopted policies that prohibit the acquisition of antiquities that are not documented before 1970 or that do not have an export license from the country of origin. Such policies assure that these museums will not be contributing, either directly or indirectly, to the funding of the contemporary looting of sites. However, most actively acquiring art museums do not make their acquisitions policies public and so it is not possible to determine what standards they follow.

While codes of ethics and practice could be a useful source of restraint on the market in undocumented antiquities, these codes seem not to be numerous, are often vague or ambiguous in referring to the particular problems of looted artifacts, and are often not enforced within the association. Without some external inducement to encourage the promulgation of codes that address the problems of undocumented antiquities, transparency of the codes' provisions, and adherence to them, it is difficult to assess their efficacy. To the extent that market participants are private individuals or corporations, it is also difficult to imagine what would provide this inducement other than greater direct regulation of the market.

### 3. Increasing Indirect Regulation of the Market in Antiquities

While most of the participants in the market are private actors (dealers, auction houses, and private collectors), museums are public institutions and they receive a significant amount of financial subsidy from federal, state, and local governments. They are therefore susceptible to various forms of indirect governmental regulation.<sup>103</sup> Most museums in the US are incorporated as

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<sup>100</sup> The Field Museum's policy on accessions states that "the museum and staff 'shall be in full compliance with laws and regulations, both domestic and foreign, governing transfer of ownership and movement of materials across political boundaries.'" Willard L. Boyd, *Museums as Centers of Cultural Understanding*, in Merryman, ed, *Imperialism, Art and Restitution* 47, 50 (cited in note 55).

<sup>101</sup> See The J. Paul Getty Trust, *Policy Statement, Acquisitions by the J. Paul Getty Museum*, available online at <[http://www.getty.edu/about/governance/pdfs/acquisitions\\_policy.pdf](http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf)> (visited Apr 21, 2007).

<sup>102</sup> See Press Release, *IMA Declares Moratorium on Acquisition of Archaeological Objects Lacking Adequate Provenance*, available online at <<http://www.ima-art.org/pressrelease.asp?sectionid=174>> (visited Apr 21, 2007).

<sup>103</sup> The Native American Graves Protection and Repatriation Act requires museums that receive federal funding to create inventories and summaries of Native American cultural items in their collections and to make these available for restitution to lineal descendants and culturally affiliated tribes under various circumstances. 25 USC § 3001(8) (2000) (defining "museum" as "any institution or State or local government agency . . . that receives Federal funds . . ."). These

charitable organizations and receive their favored tax-exempt status under section 501(c)(3) of the Internal Revenue Code on the basis that they serve an educational or scientific purpose.<sup>104</sup> They therefore have a legal obligation to make this scientific or educational purpose paramount in their practices and functions and must give priority to the preservation of the cultural and historical record. American museums, as educational institutions, have a particular role to play in diminishing the demand for undocumented artifacts. Museums violate their educational or scientific purpose when they contribute, even if indirectly, to the looting of archaeological sites and the destruction of knowledge.

Museums in the US are, in many senses, the collectors of last resort due to both their highly visible leadership role among museums throughout the world and the US tax structure that encourages donations of art works, thereby reducing the cost of antiquities to the American purchaser.<sup>105</sup> However, if a museum accepts as a gift or bequest artifacts to which the museum is not receiving title, then the museum is receiving nothing of value and the American public is subsidizing the trade in undocumented artifacts. The IRS should be taking into consideration the certainty of title in determining whether to permit a collector to take a deduction for a gift of antiquities so as to eliminate this additional subsidy to the acquisition of undocumented antiquities.<sup>106</sup> In determining certainty of title, the burden of proving the artifact's legitimate

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requirements could not have been directly imposed but were imposed in exchange for the benefit of federal funding.

<sup>104</sup> Section 501(c)(3) defines those organizations that qualify as charitable organizations as "corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes" 26 USC § 501(c)(3). Charitable organizations are exempt from the payment of taxes on any profits they earn, like other nonprofit organizations, but donations made to a § 501(c)(3) organization are eligible as deductions from the income of the donor (both individuals and corporations) under § 170, subject to certain limitations and so long as the organization is not classified as a private foundation. Section 642(c) allows a comparable deduction from the income of an estate or trust and section 2055 gives a similar deduction in the valuation of an estate for estate tax purposes. For a general discussion, see Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 Cardozo J Intl & Comp L 409, 413 (2003).

<sup>105</sup> Shelby White, the owner of one of the largest private collections of antiquities in the US, wrote that the extent of public subsidy when art works are donated to museums from larger estates is approximately one-fourth of the art's fair market value. Shelby White, *Building American Museums: The Role of the Private Collector*, in Kate Fitz Gibbon, ed, *Who Owns the Past? Cultural Policy, Cultural Property, and the Law* 165, 174 (Rutgers 2005).

<sup>106</sup> When a donor donates art that is valued at more than \$5,000, an appraisal must be obtained, if the artwork is worth more than \$20,000, then the appraisal must be filed with the tax return. See IRS, *Instructions for Form 8283*, available online at <<http://www.irs.gov/pub/irs-pdf/i8283.pdf>> (visited Apr 21, 2007). In such cases, the IRS Art Advisory Panel reviews the valuation. However, the Panel considers only fair market value of the work and not the question of whether the museum is receiving good title. For a similar proposal, see Atwood, *Stealing History* at 245–46 (cited in note 12).

background should be placed on the donor. If a collector knows that he or she may not be able ultimately to donate an antiquity to a museum because the artifact's legitimate background cannot be affirmatively established, then the collector is more likely to avoid purchasing the undocumented artifact. This could have a significant impact on the prices that American collectors are willing to pay for undocumented antiquities and this should, in turn, discourage the market for such antiquities.

The state attorney general could also take a more active role in enforcing museum trustees' fiduciary obligations. When a museum purchases antiquities of undocumented background and the museum later returns them to the proper owner, this constitutes waste of the museum's assets and a violation of the fiduciary obligation of care.<sup>107</sup> The large numbers of artifacts returned to Italy and Greece in the past year alone by the Metropolitan Museum of Art, the Boston Museum of Fine Arts, and the Getty all represent, to the extent that these objects were purchased, funds that were wasted. The state attorney general should hold the museums' trustees responsible for such breaches of their obligations and impose personal liability for the waste of museum assets.

Museums also receive a considerable amount of direct funding from federal, state, and local governments, such as grants and funds for their operating budgets, and they often receive indirect subsidies such as free or below market leases on the land on which they are located.<sup>108</sup> In exchange for these subsidies, museums could be required to make public their acquisitions policies and their acquisitions with their ownership history.<sup>109</sup> In this way, the public would be able to determine how the museums are conducting themselves and whether they are acquiring undocumented antiquities. Indirect regulation of museums holds significant potential for reducing the demand for undocumented antiquities and thereby helping to diminish the looting of archaeological sites.

#### IV. CONCLUSION

The buying of undocumented antiquities that are the likely product of contemporary looting of archaeological sites contributes significantly to the destruction of our cultural heritage, a nonrenewable, finite resource, by providing a financial incentive for this looting. The destruction of sites imposes a harm on society and should be curtailed through a combination of efforts

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<sup>107</sup> On the fiduciary duty of care of museum trustees, see Gordon H. Marsh, *Governance of Non-Profit Organizations: An Appropriate Standard of Conduct for Trustees and Directors of Museums and Other Cultural Institutions*, 85 Dickinson L Rev 607, 610-11 (1980-81).

<sup>108</sup> See Gerstenblith, 11 Cardozo J Int L & Comp L at 415-16 (cited in note 104).

<sup>109</sup> The new Getty policy on acquisitions states that information concerning acquisitions will be made available to the public. *Acquisitions by the J. Paul Getty Museum* ¶ 6 (cited in note 101).

encompassing more vigorous enforcement of the laws that currently exist, more flexible approaches to the international and national legal regimes, indirect regulation of museum acquiring practices through compliance and transparency requirements for acquisitions in exchange for receipt of financial benefits from federal, state, and local governments, increased supervision of museum boards of trustees, and curtailment of the tax deduction available to donors of undocumented ancient works of art and antiquities. Increased regulation of the market should be realized through a combination of expansion of legal rules and law enforcement, greater observance of codes of practice with more precise prohibitions on participation in the trade in undocumented antiquities, and more regulation of American museums. These solutions are premised on the recognition that a loosely regulated market is a major contributor to the problem of site looting and not the source of a solution. While there has been considerable progress over the past twenty-five years, more progress is needed if our heritage will be preserved and future generations will be able to continue to enjoy and learn from the past.