

Successes and Failures of Self-Regulatory Regimes Governing Museum Holdings of Nazi-Looted Art and Looted Antiquities

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ABSTRACT

American museums have long recognized that their collections sometimes include two categories of artwork whose prior owners parted with the pieces unwillingly: Nazi-looted art and illicitly exported archaeological objects. The relevant industry associations—the American Alliance of Museums and the Association of Art Museum Directors—have promulgated self-regulatory regimes that purport to ensure that museums return any objects to their rightful owners when they do not hold good title. However, the success of these regimes has varied widely based on whether the artwork is an archaeological antiquity or a Nazi-looted piece. This Article identifies the ways in which the regimes and the contexts in which they were created diverge. It argues that museums dealing with looted antiquities require outside scrutiny and internal convergence of opinion, elements present in the effective self-regulatory regime surrounding Nazi-looted art. These factors would assure the compliance that is lacking in antiquities regimes, which have little outside scrutiny and are fraught with extreme differences in opinion within the museum community as to how to solve the problem, or whether there is a problem at all.

INTRODUCTION

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

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decisions about these returns.¹

This paper analyzes the AAM and AAMD guidelines, demonstrating that these organizations have reacted to structurally similar problems with widely divergent recommendations. Many factors, from governmental oversight and threats of lawsuits to philosophical divergence within the museum community as to the proper solution of these problems, have led to gaps between what museums have said they are obligated to do and what they have actually done. Ultimately, this Article applies recent scholarship on self-regulatory regimes to argue that what appears to be a self-created, self-regulating means of addressing the problem of Nazi-looted art has been successful precisely because it was neither entirely self-created nor self-regulating.² By contrast, the current self-regulatory regime for museums' treatment of smuggled antiquities is not effective. It fails by doing too much in some realms and not enough in others precisely because it is a self-regulatory regime without sufficient support or enforcement by outside bodies.

I. NAZI-LOOTED ART

A. THE PROBLEM OF NAZI-LOOTED ART

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

1. The AAM, founded in 1906, currently represents 21,000 museums, offering accreditation, advocacy and standard setting. *About Us*, AAM, <http://www.aam-us.org/about-us> (last visited Mar. 20, 2014). The AAMD, founded in 1916, currently has 232 member museum directors, representing an equivalent number of museums in the U.S., Canada and Mexico. *Membership*, AAMD, <https://aamd.org/about/membership> (last visited Mar. 20, 2014). The AAMD has promulgated a Code of Ethics as well as standards on topics such as deaccessioning art from museum collections, the use of intellectual property in museums' digital initiatives and the relationship between museums and corporate sponsors. *Standards and Practices*, AAMD, <https://aamd.org/standards-and-practices> (last visited Mar. 20, 2014). The AAMD also lobbies the federal government on matters such as tax deduction rules that relate to museums. *Advocacy: Key Issues*, AAMD, <https://aamd.org/advocacy/key-issues> (last visited Mar. 20, 2014).

2. Self-regulation is "the systematic undertaking by private, regulated organizations of governance responsibilities traditionally allocated to government regulators, including standard-setting, compliance monitoring, and enforcement." Jodi Short, *Self-Regulation in the Regulatory Void: "Blue Moon" or "Bad Moon"?*, 649 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 24 (2013). Self-regulation includes "the set of practices adopted voluntarily by organizations for the purpose of complying with legal or normative obligations." *Id.*

3. Notable publications on the history of looting during World War II and on governmental returns after the war include WOJCIECH KOWALSKI, ART TREASURES AND WAR: A STUDY ON THE RESTITUTION OF LOOTED CULTURAL PROPERTY (1998); NANCY H. YEIDE, BEYOND THE DREAMS OF AVARICE: THE HERMANN GOERING COLLECTION (2009); MICHAEL J. KURTZ, NAZI CONTRABAND: AMERICAN POLICY ON THE RETURN OF EUROPEAN CULTURAL TREASURES, 1945-1955 (1985); LYNN H. NICHOLAS, THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994); JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES (2007);

American museums have been involved in the return of Nazi-looted art since 1943, when curators joined the U.S. Army's Monuments, Fine Art and Archives section to return hundreds of thousands of Nazi-looted objects to their countries of origin.⁴ However, victims who did not benefit from these immediate returns faced considerable difficulties locating their lost property, since archival records necessary to trace ownership of works of art were closed or inaccessible until the late 1980's.⁵

B. MUSEUM GUIDELINES FOR NAZI-LOOTED ART

With the opening of these archives, claimants began to come forward, and the AAMD and AAM convened task forces to draft guidelines on how museums should deal with the problem of their potential holdings of Nazi-looted art.⁶ Substantially similar final guidelines were adopted by the AAMD in 1998 and the AAM in 1999 ("Nazi-era guidelines").⁷

From the beginning of the drafting process, AAM and AAMD leadership, as well as those associated with museums, uniformly affirmed the importance of the return of Nazi-looted art.⁸ Working from this principle, the guidelines require each

THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY (Elizabeth Simpson ed., 1997).

4. AAMD, ART MUSEUMS AND THE IDENTIFICATION AND RESTITUTION OF WORKS STOLEN BY THE NAZIS 1 (2007), available at https://aamd.org/sites/default/files/document/Nazi-looted%20art_clean_06_2007.pdf [hereinafter IDENTIFICATION AND RESTITUTION]. Note that these returns were generally not to specific possessors. Although individual countries were supposed to take care of returning artwork to individuals, this was accomplished with varying levels of success. For example, see France's ongoing holding of artworks taken from its Jewish citizens without much effort to find their rightful owners. See *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade & Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 106 (2006) (prepared statement of Stuart E. Eizenstat, former Commissioner, Presidential Advisory Comm'n on Holocaust Assets in the U.S.).

5. *Id.*; see also Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 243, 255–56 (2006).

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

7. AAM, GUIDELINES CONCERNING THE UNLAWFUL APPROPRIATION OF OBJECTS DURING THE NAZI ERA (1999), available at http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/aam_guidelines.pdf [hereinafter AAM, NAZI-ERA GUIDELINES]; AAMD, REPORT OF THE AAMD TASK FORCE ON THE SPOILATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933–1945) (1998), available at <https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.docx> [hereinafter AAMD, NAZI-ERA GUIDELINES].

8. See, e.g., *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade & Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 15 (2006) (statement of Edward H. Able, Jr., President & CEO, AAM) (stating that the AAM has "a strong passion for, and commitment to, correcting the injustices to the victims of the Holocaust. The museum community has taken thoughtful and aggressive steps befitting the seriousness with which we take this issue"); *id.* 19–20 (statement of James Cuno, President & Director, The Art Institute of Chicago) (stating on behalf of the AAMD that "I am aware of the physical and psychological trauma of warfare, and like everyone, I deplore the circumstances during World War II that resulted in the unjust deaths of millions of people and the illegal taking of their personal property. All of us want to resolve any and all legitimate claims against U.S. art museums regarding the possible existence within our collections of works of art looted during World War II and not restituted to their rightful owners").

member museum to (1) identify all objects in its collection that underwent a change of ownership and were reasonably thought to be in continental Europe between 1933 and 1945 and (2) to make current provenance information on these objects accessible to the public.⁹ The Nazi-era guidelines direct museums to resolve any claims that emerge from their research “in an equitable, appropriate, and mutually agreeable manner.”¹⁰

Initially, a number of museums posted information about their Nazi-era research on their own websites.¹¹ However, in 2003, the AAM and AAMD launched the Nazi-Era Provenance Internet Portal (“Nazi-Era Portal”)—“a searchable registry of objects in U.S. museum collections that changed hands in Continental Europe during the Nazi era”—to meet the Nazi-era guidelines’ requirement to give information to claimants more efficiently.¹² The Nazi-Era Portal lists all holdings in museum collections that underwent a change of ownership and were in continental Europe between 1933 and 1945, even if there is no indication of any Nazi involvement in changes of ownership during that period.¹³

C. THE EFFICACY OF THE NAZI-ERA GUIDELINES

The provenance research the Nazi-era guidelines require is a massive undertaking. American museums hold an estimated 18 million objects, and the AAM reported that as of July 2006 its member museums had identified approximately 25,000 works for which study was required into Nazi-era ownership history.¹⁴ Museums have made substantial progress in reviewing and publishing information on these holdings. When the Nazi-Era Portal launched in 2003, it included 5,700 objects from sixty-six museums; just ten months later, 110 museums were participating, with a total of 12,600 objects.¹⁵ Currently, ten years after the website’s launch, users can search 28,904 objects from 175 museums.¹⁶

9. AAM, NAZI-ERA GUIDELINES, *supra* note 7, at 2–3. I use “provenance” to mean the record of where an object has been, and who has owned it, since its creation. Many antiquities excavated by archeologists have relatively complete provenances. For example, the Bust of Nefertiti was carved sometime during this Egyptian queen’s lifetime (c. 1370–1330 B.C.E.) and was abandoned in a sculptor’s workshop in Tell el-Amarna until it was excavated by a German archeological team in 1912. After a brief period of possession by a German sponsor of the excavation, it was donated to the Berlin Egyptian Museum, where it has remained since.

10. AAMD, NAZI-ERA GUIDELINES, *supra* note 7, at §§ I.I.D.2, I.I.E.2.

11. The Metropolitan Museum of Art and the Museum of Modern Art in New York, the Art Institute of Chicago, Boston’s Museum of Fine Arts and the Cleveland Museum of Art each created special areas of their websites for users to search for objects with incomplete or questionable Nazi-era provenance. Helen Wechsler & Erik Ledbetter, *The Nazi-Era Provenance Internet Portal: Collaboration Creates a New Tool for Museums and Researchers*, 56 MUSEUM INT’L 53, 58 (2004) (authors are AAMD employees).

12. IDENTIFICATION AND RESTITUTION, *supra* note 4, at 2.

13. See AAM, *About the Portal*, NAZI-ERA PROVENANCE INTERNET PORTAL, http://nepip.org/public/info/about.cfm?menu_type=info (last visited Mar. 20, 2014).

14. IDENTIFICATION AND RESTITUTION, *supra* note 4, at 1.

15. Wechsler & Ledbetter, *supra* note 11, at 61.

16. AAM, NAZI-ERA PROVENANCE INTERNET PORTAL, <http://www.nepip.org> (last visited Mar. 20, 2014). The Portal also maintains a list of museums with no relevant holdings; currently there are

Most importantly, as of May 2013 American museums have returned twenty-seven Nazi-looted artworks to the heirs of their rightful owners. The great majority of these returns were carried out through negotiations and did not involve litigation.¹⁷

D. EXTERNAL SCRUTINY AND PRESSURE ON THE NAZI-ERA GUIDELINES

American museums are free to create a self-regulatory regime for dealing with the problem of Nazi-looted art because they are private entities and are not overseen by any specific governmental regulatory agency.¹⁸ Nor are there any directly applicable federal or state laws about how museums should deal with Nazi-looted art.

The credit for American museums' successful identification and return of Nazi-looted art, however, is not due to the museums alone. A substantial amount of governmental pressure and scrutiny accompanied the formulation of the Nazi-era guidelines and their continuing successful execution.

While the AAM and AAMD were drafting their Nazi-era guidelines, President Clinton appointed the Presidential Advisory Commission on Holocaust Assets in the United States.¹⁹ Like the AAM and AAMD, the Commission considered the issue of how museums should treat Nazi-looted art.²⁰ The Commission invited the participation of the AAM and AAMD, and both entities contributed to its final report.²¹ Notably, the possibility of legislation to set standards for return of Nazi-looted art was considered during Congressional hearings in 1998, but several museum directors successfully argued in their testimony that this issue should be left to museum professionals.²²

thirty-two museums on this list. AAM, *Museums Holding No Relevant Objects*, NAZI-ERA PROVENANCE INTERNET PORTAL, http://www.nepip.org/public/info/nocov.cfm?&menu_type=info (last visited Mar. 20, 2014).

17. *Resolved Stolen Art Claims*, HERRICK, FEINSTEIN LLP (2013), <http://www.herrick.com/sitecontent.cfm?pageID=29&itemID=12567> (compiled by the law firm of Herrick, Feinstein LLP from information derived from published news articles and services available mainly in the U.S. or on the Internet, as well as from law journal articles, press releases and other sources).

18. Wechsler & Ledbetter, *supra* note 11, at 55. This differs from the governance and structure of museums in much of the rest of the world, where museums are generally state-run. *Id.*

19. The Commission, established in June 1998 by the U.S. Holocaust Assets Commission Act of 1998, was charged with researching the current status of assets taken from victims of the Holocaust that came into the possession of the U.S. federal government. This included reviewing the research done by others regarding assets that came to private collections and non-federal government organizations and making recommendations to the President on policies that should be adopted to make restitution to the rightful owners of stolen property or their heirs. U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611 (1998). The Commission was charged with focusing on art, cultural property, gold and non-gold financial assets. *Id.* § 3(a)(2), 112 Stat. at 612-13.

20. Wechsler & Ledbetter, *supra* note 11, at 56; Michael J. Bazyler & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT'L L. 683, 748-49 (2003).

21. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., *The Museum Community Has Agreed to Full Disclosure of Holocaust-Era Works and Their Provenance*, in PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES (2000); Wechsler & Ledbetter, *supra* note 11, at 56.

22. See Judith Dobrzynski, *Capitol Hill Looks at Issue of Art Stolen in Wartime*, N.Y. TIMES,

Simultaneously, in late 1998, the U.S. Department of State hosted the Washington Conference on Holocaust-Era Assets. During this conference, delegations from forty-four countries and numerous international organizations participated in drafting the Washington Principles—an eleven-point plan to aid claimants in recovering Nazi-looted art.²³ The AAM and AAMD were key participants in this Conference, and their Nazi-era guidelines formed the basis for the Washington Principles.²⁴ The Conference and its Principles served to give an official governmental stamp of approval to the AAM and AAMD guidelines as well as to solidify them so that museums could not retreat from their self-imposed rules.²⁵

The external pressure applied to museums during the creation of the Nazi-era guidelines has been complemented by ongoing governmental scrutiny of museum activities. Representatives of the AAM and AAMD have repeatedly been called to testify before Congress about the progress of museums' dealings with Nazi-looted art,²⁶ with a former member of the Commission stressing that there is still much work to be done on the part of the museums.²⁷

The government was not the only source of external pressure on museums. There was also the threat of legal action, demonstrated by a number of prominent lawsuits in the late 1990s in which victims of Nazi atrocities successfully obtained compensation for their losses.²⁸ In a number of these lawsuits,²⁹ victims or their

Feb. 15, 1998, at 17.

23. U.S. DEP'T OF STATE, WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART (1998), available at <http://www.state.gov/p/eur/rt/hlcst/122038.htm>; see Bazylar & Fitzgerald, *supra* note 20, at 710; Norman Kempster, *44 Nations Set Guidelines for Retrieving Nazi Looted Art: Washington Conference*, L.A. TIMES, Dec. 4, 1998, at A8.

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

25. There are a number of other smaller governmental organizations that also exert pressure on museums with regards to Nazi-looted art; for instance, since 1997 the Holocaust Claims Processing Office, within the New York State Department of Financial Services, has provided assistance to individuals seeking to recover Holocaust-looted assets from museums. *Holocaust Claims Processing Office*, N.Y. STATE DEP'T OF FIN. SERVS., <http://www.dfs.ny.gov/consumer/holocaust/hcpindex.htm> (last visited Mar. 20, 2014).

26. Specifically, in several hearings conducted from 1997 to 2006 by the U.S. House of Representatives' Committee on Financial Services, Domestic and International Monetary Policy Subcommittee. See IDENTIFICATION AND RESTITUTION, *supra* note 4, at 2. The most recent of these hearings featured testimony from Edward H. Able, Jr., the President and CEO of the AAM, and, on behalf of the AAMD, James Cuno, then Director of the Art Institute of Chicago, and Timothy M. Rub, then Director of the Cleveland Museum of Art. *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade & Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 11 (2006).

27. See, e.g., *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade & Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 10 (2006) (statement of Stuart E. Eizenstat, former Commissioner, Presidential Advisory Comm'n on Holocaust Assets in the U.S.).

28. Less directly related to art, but still undoubtedly of interest to the museum community pondering what to do with its holdings of potentially Nazi-looted art, was a series of class action suits resulting in huge awards against companies that had somehow benefited from forced and slave labor, illegal seizure of private and communal property and other personal injuries of Holocaust victims. In the mid to late 1990s, a number of states passed laws allowing Holocaust victims to bring suit regarding WWII-era claims in state courts against corporations doing business in that state; for a listing of these

heirs succeeded in recovering artwork stolen during World War II from their current holders.³⁰ These lawsuits demonstrated to museums that ignoring the problem of Nazi-looted art or failing to address the issue with rigorous self-

laws, see Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, app. B, at 272–83 (2000) [hereinafter Bazylar, *Nuremberg in America*]. The most prominent of the resulting class-action lawsuits were against three Swiss banks for failing to return monies that had been deposited by Holocaust victims and against a variety of German industrial companies such as DaimlerChrysler, Volkswagen and BMW for benefiting from slave labor. *Id.* at 31–93 (Swiss lawsuits); see MICHAEL J. BAZYLAR, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 59–109 (2005) (German lawsuits). These lawsuits were heavily covered in the American press, both by articles and by an aggressive advertising campaign launched by lawyers for the plaintiffs to inform consumers about the wartime activities of the defendant companies. Bazylar & Fitzgerald, *supra* note 20, at 695.

29. Most Nazi-looted art claims are conducted as ordinary replevin actions for the return of stolen property; for the mechanics of these lawsuits, see, for example, Bazylar, *Nuremberg in America*, *supra* note 28, at 171; Donald S. Burris & E. Randol Schoenberg, *Reflections on Litigating Holocaust Stolen Art Cases*, 38 VAND. J. TRANSNAT'L L. 1041 (2005); Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199 (2005); Alexandra Minkovich, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 COLUM. J. L. & ARTS 349 (2003–2004); Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203 (2008); Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955 (2000–2001); Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1 (1998–1999); Barbara J. Tyler, *Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 RUTGERS L.J. 441 (1998–1999); Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549 (1998–1999).

30. The heirs of an American serviceman, Joe Meador, were sued by a German church seeking the return of medieval artworks stolen by Meador in the aftermath of WWII. The church discovered the whereabouts of the artwork when Meador's heirs attempted to sell them in the late 1980s. The parties reached an out-of-court settlement in 1992, wherein the heirs agreed to return all of the works in exchange for \$2.7 million. William H. Honan, *Quiet Conclusion for Case of Art Stolen During the War*, N.Y. TIMES, Sept. 2, 2000, at B10. The heirs then faced charges for conspiracy to sell stolen property filed by the U.S. Attorney's Office and an inquiry for tax evasion. See *U.S. v. Meador*, No. 4:96cr1, 1996 U.S. Dist. LEXIS 22058, at *1 (E.D. Tex. Oct. 23, 1996), *aff'd*, 138 F.3d 986 (5th Cir. 1998) (dismissing conspiracy charges as time-barred); William H. Honan, *Quiet Conclusion for Case of Art Stolen During the War*, N.Y. TIMES, Sept. 2, 2000, at B10 (discussing tax evasion settlement); see also Thomas R. Kline, *Legal Issues Relating to the Recovery of the Quedlinburg Treasures*, in THE SPOILS OF WAR 156 (Elizabeth Simpson ed., 1997). Another prominent early claim was for a Degas painting, *Landscape with Smokestacks*, which had disappeared during the Nazi occupation of France and had originally belonged to the Gutmann family, whose heirs filed suit against the painting's current owner, an American art collector, in federal court in 1996. See Hector Feliciano, *The Aftermath of Nazi Art Looting in the United States and Europe: The Quest to Recover Stolen Collections*, 10 DEPAUL J. ART & ENT. L. 1, 4–5 (1999). After receiving widespread press coverage, the case settled with a partial payment to the heirs, who agreed to donate the work to the Art Institute of Chicago. See *id.* For further discussion of claims by victims or heirs for art stolen during World War II, see Rebecca Keim, *Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295 (2003); Anne-Marie Rhodes, *On Art Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code*, 43 SAN DIEGO L. REV. 495 (2006); Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 RUTGERS L.J. 441, 453–55 (1999); Stephen E. Weil, *The American Legal Response to the Problem of Holocaust Art*, 4 ART ANTIQUITY & L. 285 (1999).

regulation would mean that claims would be resolved by expensive litigation rather than cooperative negotiations.

The press also operated as a source of pressure and scrutiny. Beginning in early 2000, a number of influential newspapers pushed museums to complete their preliminary surveys of their collections for potential Nazi-looted art, accusing museums of “everything from laziness to stonewalling.”³¹ Journalists have also given wide coverage to Congressional hearings about Nazi-looted art, as well as to Congress’ urgings of continued museum action.³² In addition, there is a large amount of legal and art historical scholarship on the subject, much of it discussing how the continuing problem of Nazi-looted art should be resolved.³³

Finally, a number of private organizations played a role in exerting continuing pressure on museums to honor their Nazi-era guidelines. These organizations, such as the Holocaust Art Restitution Project and the World Jewish Congress’s Commission for Art Recovery, were created to aid claimants with research and claims for the restitution of Nazi-looted art from museums.³⁴

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

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

31. Wechsler & Ledbetter, *supra* note 11, at 57.

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

33. See, e.g., Jennifer Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT’L L. 1199 (2005).

34. The Commission for Art Recovery describes its mission as bringing “moral suasion” to bear on museums who may hold looted art. *About*, COMM’N FOR ART RECOVERY, <http://www.commartrecovery.org/content/about> (last visited Mar. 20, 2014).

35. Specifically, these funders were the Institute of Museum and Library Services, the Commission for Art Recovery of the World Jewish Congress, the Samuel H. Kress Foundation, the Getty Grant Program, the Conference on Jewish Material Claims Against Germany, the Rabbi Israel Miller Fund for Shoah Research, Documentation and Education and the Max and Victoria Dreyfus Foundation, Inc. Wechsler & Ledbetter, *supra* note 11, at 60–61.

36. IDENTIFICATION AND RESTITUTION, *supra* note 4, at 2. Not all museums possessed the expertise to carry out this research, requiring the AAM to publish step-by-step guides. See MUSEUM POLICY AND PROCEDURE FOR NAZI-ERA ISSUES (Helen Wechsler ed., 2001) and NANCY H. YEIDE, KONSTANTIN AKINSHA & AMY L. WALSH, THE AAM GUIDE TO PROVENANCE RESEARCH (2001) (both

good one, this alone would not be enough to ensure that museums actually commit the resources to work towards this goal. After all, museums have a number of admirable goals, from community education to the advancement of scholarship, which all compete for their limited staff time and funds.³⁷

II. LOOTED ANTIQUITIES

A. THE PROBLEM OF SMUGGLED ANTIQUITIES

When the Nazi-Era Portal was launched, Edward H. Able, Jr., then-President of the AAM, told the *Washington Post* that the organization's goal was to "assure our many publics that American museums are committed to only having in their collections objects to which they have clear legal title, untainted by controversy or illegal, unjust appropriation."³⁸ There is, however, another category of objects in American museum collections that often bears the taint of controversy and illegal appropriation: antiquities stolen within the meaning of both foreign and American law. Such is the case with regard to antiquities smuggled illegally from countries where national ownership of antiquities has been declared and their excavation and export prohibited without state permission.³⁹

published by the AAM); *see also Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade & Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 16 (2006) (statement of Edward H. Able, Jr., President & CEO, AAM) (stating that the research required by the guidelines "is expensive. For objects with no prior indication of Nazi looting, the costs range anywhere from \$40 to \$60 per hour, and the time needed to document just one object can vary enormously, from a week to a year, and if initial research suggests an object has a history that may include unlawful appropriation by the Nazis, time and expense can double or triple. One museum spent \$20,000 plus travel and expenses over the course of 2 years to have a researcher resolve the history of just three paintings AAM encourages Congress to consider appropriating additional funding to the Institute of Museum and Library Services aimed specifically at provenance research").

37. Professor Patty Gerstenblith points out that museums have not felt a similar need to create policies to respond to the theft of art during other conflicts, such as those in Cyprus, Afghanistan or Iraq, because "these other examples of war and human misery have not received the same kind of universal recognition and attention surrounding the art works stolen during the Holocaust, in either the legal system, the art world or the media." Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 *CARDOZO J. INT'L & COMP. L.* 409, 445-46 & n.153 (2003) (citing *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 917 F.2d 278 (7th Cir. 1990) (discussing sixth century C.E. mosaics stolen from church as result of war in Cyprus)); *accord* Celestine Bohlen, *Cultural Salvage in Wake of Afghan War*, *N.Y. TIMES*, Apr. 15, 2002, at E1 (discussing thefts of antiquities from Afghanistan during war); Elizabeth Neuffer, *In War Scenario, Antiquities Seen in the Line of Fire*, *BOS. GLOBE*, Jan. 24, 2003, at A1 (discussing thefts from Iraqi museums following the 1991 Gulf War).

38. Jacqueline Trescott, *Museums Launch Database to Find Nazi Stolen Art*, *WASH. POST*, Sept. 8, 2003, at C05.

39. In Italy, this law is Legge 1 giugno 1939, n. 1089 (It.), *amended by* Legge 1 marzo 1975, n. 44 (It.), Legge 30 marzo 1998, n. 88 (It.), *and* Legge 30 marzo 1998, n. 100 (It.). The existence of Italian national ownership of antiquities and prohibition of their export was recognized in *U.S. v. An Antique Platter of Gold*, 991 F. Supp. 222, 231-32 (S.D.N.Y. 1997). In Greece, the relevant law is *Nomos (1932:5351) O nomos Arxaiotitwn [The Antiquities Act]*, 1932 (Greece). For a selection of other countries' antiquities legislation, see *LYNDEL V. PROTT & PATRICK J. O'KEEFE, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY* (1988). American courts

There has been widespread looting from the archeological sites of many cultures,⁴⁰ including Mesopotamia,⁴¹ pre-Columbian cultures,⁴² ancient Greece and Rome,⁴³ various African sites⁴⁴ and even Native American sites in the United

have also recognized the national ownership laws of Egypt (U.S. v. Schultz, 178 F. Supp. 2d 445, 447–48 (S.D.N.Y. 2002)), Turkey (Republic of Turkey v. Metro. Museum of Art, 762 F. Supp. 44, 45 (S.D.N.Y. 1990); Republic of Turkey v. OKS Partners, 1994 U.S. Dist. LEXIS 17032 (D. Mass. June 8, 1994)), Cyprus (Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 280–81 (7th Cir. 1990)), and Peru (Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989)). These foreign laws influence the treatment of smuggled antiquities in the U.S. because “a possessor of stolen goods, no matter how innocently acquired, can never convey good title.” Schrier v. Home Indem. Co., 273 A.2d 248, 250 (D.C. 1971). The principle that an antiquity will be treated as stolen property when it is owned by a foreign government by way of a statutory declaration of national ownership and is removed from that country contrary to its export laws—and thus may be subject to confiscation, and its American possessors subject to criminal prosecution—was established in U.S. v. McClain, 545 F.2d 988 (5th Cir. 1977) (*McClain I*). In the *McClain* cases, U.S. prosecutors used the National Stolen Property Act, 18 U.S.C. §§ 2314–2315, to prosecute defendants charged with smuggling pre-Columbian antiquities because of Mexico’s unambiguous claims of national ownership over the artifacts. *See id.*; U.S. v. McClain, 593 F.2d 658 (5th Cir. 1979) (*McClain II*). Notably, the AAM filed an amicus brief in a case involving the civil forfeiture of an ancient gold *phiale* claimed by Italy, arguing that the use of *McClain* in smuggled antiquities cases was not consonant with U.S. law. *See* Brief of Amici Curiae Am. Ass’n of Museums, et al. in Support of the Appeal of Michael H. Steinhardt in U.S. v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999), reprinted in 9 INT’L J. CULTURAL PROP. 76, App. I (2000).

40. *See generally* Neil Brodie, *An Archeologist’s View of the Trade in Unprovenanced Antiquities*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 52 (Barbara T. Hoffman ed., 2006); Julie Hollowell-Zimmer, *Digging in the Dirt—Ethics and “Low-End Looting,”* in ETHICAL ISSUES IN ARCHAEOLOGY (Larry J. Zimmerman et al. eds., 2003); Neil Brodie & David Gill, *Looting: An International View*, in ETHICAL ISSUES IN ARCHAEOLOGY (Larry J. Zimmerman et al. eds., 2003); SIMON R.M. MACKENZIE, GOING, GOING, GONE: REGULATING THE MARKET IN ILLICIT ANTIQUITIES (2005); COLIN RENFREW, LOOT, LEGITIMACY AND OWNERSHIP: THE ETHICAL CRISIS IN ARCHAEOLOGY (2000); RUSSELL CHAMBERLAIN, LOOT!: THE HERITAGE OF PLUNDER (1983); KARL E. MEYER, PLUNDERED PAST (1977); NEIL BRODIE, JENNY DOOLE & PETER WATSON, STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL (2000); PATRICK J. O’KEEFE, TRADE IN ANTIQUITIES: REDUCING DESTRUCTION AND THEFT (1997); TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD’S ARCHAEOLOGICAL HERITAGE (Neil Brodie et al. eds., 2001); Giles Constable, *The Looting of Ancient Sites and the Illicit Trade in Works of Art*, 10.4 J. FIELD ARCHAEOLOGY 482 (1983).

41. MCGUIRE GIBSON & AUGUSTA MCMAHON, LOST HERITAGE: ANTIQUITIES STOLEN FROM IRAQ’S REGIONAL MUSEUMS (1992); THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA (Milbry Polk & Angela M.H. Schuster eds., 2005); Zainab Bahrani, *Iraq’s Cultural Heritage: Monuments, History, and Loss*, 62 ART J. 10 (2003); Robin Greeley, *Ancient Iraq, Contemporary Crisis*, 62.4 ART J. 4 (2003); John Malcolm Russell, *Why Should We Care?*, 62 ART J. 22 (2003).

42. M.C. Coe, *From Huaquero to Connoisseur: The Early Market in Pre-Columbian Art*, in COLLECTING THE PRE-COLUMBIAN PAST 271 (E.H. Boone ed., 1983); K. Bruhns, *The Methods of the Guaqueria: Illicit Tomb Robbing in Colombia*, 25.2 ARCHAEOLOGY 140 (1972); David Matsuda, *The Ethics of Archaeology, Subsistence Digging, and Artifact Looting in Latin America: Point Muted Counterpoint*, 7 INT’L J. CULTURAL PROP. 87 (1998); David M. Pendergast, *And the Loot Goes On: Winning Some Battles, but Not the War*, 18 J. FIELD ARCHAEOLOGY 89 (1991).

43. R.M. Cook, *Excavations and the Antiquities Trade*, in PERIPLUS: PAPERS ON CLASSICAL ART AND ARCHAEOLOGY PRESENTED TO SIR JOHN BOARDMAN 68 (G.R. Tsetschladze et al. eds., 2000); PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY’S TOMB RAIDERS TO THE WORLD’S GREATEST MUSEUMS (2006); Diura Thoden van Velzen, *The World of Tuscan Tomb Robbers: Living with the Local Community and the Ancestors*, 13.1 INT’L J. CULTURAL PROP. 111 (1996); ROGER ATWOOD, STEALING HISTORY: TOMB RAIDERS, SMUGGLERS, AND THE LOOTING OF THE ANCIENT WORLD (2004); Rebecca Mead, *Den of*

States.⁴⁵ Museum action to prevent this looting is crucial, since America is one of the largest markets for antiquities thanks to demand by museums and by American collectors (who may eventually donate their collections to museums).⁴⁶ The supply of looted antiquities would slow if museums, collectors and dealers were sufficiently reluctant to buy antiquities without documentation of provenance showing that the works were legally excavated and exported.⁴⁷ Every antiquity sold without documentation of this history of legal ownership, even if that antiquity itself was not looted, is an encouragement for looters and middlemen who hope to sell illegally obtained antiquities without having to provide a provenance.⁴⁸

Antiquity, NEW YORKER, Apr. 9, 2007, at 52–61.

44. Patrick R. McNaughton, *Malian Antiquities and Contemporary Desire*, 28.4 AFRICAN ARTS 22 (1995); Daniel Shapiro, *The Ban on Mali's Antiquities: A Matter of Law*, 28.4 AFRICAN ARTS 42 (1995); Samuel Sidibé, *The Pillage of Archaeological Sites in Mali*, 28.4 AFRICAN ARTS 52 (1995); Folarin Shyllon, *The Nigerian and African Experience on Looting and Trafficking in Cultural Objects*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 137 (Barbara T. Hoffman ed., 2006).

45. Ann M. Early, *Profiteers and Public Archaeology: Antiquities Trafficking in Arkansas*, in THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 39 (Phyllis Mauch Messenger ed., 1999); F.P. McManamon, *The Protection of Archaeological Resources in the United States: Reconciling Preservation with Contemporary Society*, in CULTURAL RESOURCE MANAGEMENT IN CONTEMPORARY SOCIETY: PERSPECTIVES ON MANAGING AND PRESENTING THE PAST 40 (F.P. McManamon & A. Hatton eds., 2000); S.P.M. Harrington, *The Looting of Arkansas*, 44.3 ARCHAEOLOGY 22 (1991); Bruce E. Rippeteau, *Antiquities Enforcement in Colorado*, 6.1 J. FIELD ARCHAEOLOGY 85 (1979).

46. ASIF EFRAT, *Preventing Plunder: International Cooperation Against the Illicit Trade in Antiquities*, in GOVERNING GUNS, PREVENTING PLUNDER: INTERNATIONAL COOPERATION AGAINST ILLICIT TRADE 115, 134, 137 (2012).

47. See, e.g., David Pendergast, *And the Loot Goes On: Winning Some Battles, but Not the War*, in ANTIQUITIES: TRADE OR BETRAYED: LEGAL, ETHICAL, AND CONSERVATION ISSUES (Kathryn Walker Tubb ed., 1995); Mark J. Lynott, *Ethical Principles and Archaeological Practice: Development of an Ethics Policy*, 62 AM. ANTIQUITY 589, 590 (1997) (citing S.P.M. Harrington, *The Looting of Arkansas*, 44.3 ARCHAEOLOGY 22 (1991) (“[T]he increasing commercial value of archeological objects within the art market has led to a significant expansion in the market and the looting of archeological sites.”); Hugue de Varine, *The Rape and Plunder of Cultures*, 35 MUSEUM 152, 157 (1983) (stating that the “fundamental responsibility” of antiquities-buying individuals and countries is to refrain from purchasing illicit cultural property). This idea of the interaction of the market and looting is also closely tied to archeologists’ disapproval of private ownership of antiquities, as is made clear in the official position on commercialization of the Society for American Archeology:

[T]he buying and selling of objects out of archaeological context is contributing to the destruction of the archaeological record on the American continents and around the world. The commercialization of archaeological objects—their use as commodities to be exploited for personal enjoyment or profit—results in the destruction of archaeological sites and of contextual information that is essential to understanding the archaeological record.

SOC’Y FOR AM. ARCHAEOLOGY, *Third Ethical Principle*, reprinted in Mark J. Lynott, *Ethical Principles and Archaeological Practice: Development of an Ethics Policy*, 62 AM. ANTIQUITY 589, 592 (1997). See also L.E. Murphy et al., *Commercialization: Beyond the Law or Above it? Ethics and the Selling of the Archaeological Record*, in ETHICS IN AMERICAN ARCHAEOLOGY: CHALLENGES FOR THE 1990S 45 (Mark Lynott & Alison Wylie eds., 1995).

48. Dealers, who consider their own practices to be highly ethical, often feel insulted by archeologists’ boycotts. See James Ede, *The Antiquities Trade: Towards a More Balanced View*, in ANTIQUITIES: TRADE OR BETRAYED: LEGAL, ETHICAL, AND CONSERVATION ISSUES 211 (Kathryn Walker Tubb ed., 1995). It is easier to understand archeologists’ refusal to recognize even ethical dealers when one understands the reasons for their condemnation of the trade as a whole.

B. MUSEUM GUIDELINES FOR ANTIQUITIES

As with Nazi-looted art, there are no directly relevant statutes governing American museums' antiquities collections or acquisitions.⁴⁹ American museums have realized their holdings of potentially stolen antiquities are a problem that

49. The U.S. government does have several mechanisms for combatting the illegal trade in cultural property in general. See generally Andrea Cuning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT'L L. 449 (2003–2004); James R. McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art into the United States*, 85 DICK. L. REV. 565 (1980–1981); James R. McAlee, *The McClain Case, Customs, and Congress*, 15 N.Y.U. J. INT'L L. & POL. 813 (1982–1983); James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, 5 VILL. SPORTS & ENT. L.J. 19 (1998). The most important of these mechanisms has been the formation of bilateral agreements, which impose import restrictions on other countries' endangered artifacts through means of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention), Nov. 14, 1970, 823 U.N.T.S. 231; Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention on Cultural Property), May 14, 1954, 249 U.N.T.S. 240. The U.S. became a party to the Convention in 1983. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231. For further discussion of the Convention, see generally Guido Carducci, *The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions and EU Regulations*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 68 (Barbara T. Hoffman ed., 2006); ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS (2006). Article 9 of this Convention allows state parties "whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials" to call upon other state parties, who must endeavor to "determine and to carry out the necessary concrete measures, including the control of exports and imports" of the endangered materials. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 9, Nov. 14, 1970, 823 U.N.T.S. 231. In order to fulfill this obligation, Congress passed the Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. § 2601 et seq. Under the CPIA, other state parties to the 1970 UNESCO Convention may request that the U.S. restrict the import of designated archaeological or ethnological material from the requesting state into the U.S. 19 U.S.C. § 2602(a)(1)(A)–(D). Congress is advised on these requests by the Cultural Property Advisory Committee (CPAC), which is composed of representatives of various interests, such as scholars, museum officials, dealers, and the general public. 19 U.S.C. § 2605(b)(1)(A)–(D), (f)(1)(A)–(C). If granted, import restrictions have an effective five-year period, which may be renewed in five-year increments after review by CPAC. 19 U.S.C. § 2602. The U.S. may also choose to impose emergency import restrictions for a limited period of time, not to exceed eight years; the effect is the same as the five-year restrictions. 19 U.S.C. § 2603. The U.S. Customs Service must publish in the *Federal Register* a descriptive list designating the categories of archaeological or ethnological material subject to import restrictions. 19 U.S.C. § 2602(f)(1). So far, fifteen states have concluded agreements with the U.S. under the CPIA: Peru, Bolivia, Mali, Cambodia, Columbia, Canada, Italy, Cyprus, Honduras, Nicaragua, Guatemala, El Salvador, Honduras, China, Mali and Greece. *Bilateral Agreements*, U.S. BUREAU OF EDUC. & CULTURAL AFFS., <http://exchanges.state.gov/heritage/culprop/listactions.html> (last visited Mar. 20, 2014). If a request is granted, any designated artifact that enters the United States without either an export permit issued by the state of origin or documentation showing that the artifact was out of the state of origin at the time the restrictions become effective will be confiscated by the U.S. Customs Service and returned to the state of origin. For an analysis of reported statistics on imports and exports of cultural objects that suggests that the illicit trade in antiquities is still high, despite the 1970 UNESCO agreement and domestic American law, see Raymond Fisman & Shang-Jin Wei, *The Smuggling of Art and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques*, 1 AM. ECON. J. APPLIED ECON. 82 (2009); and Silvia Beltrametti, *Museum Strategies: Leasing Antiquities*, 36 COLUM. J.L. & ARTS 203 (2013).

needs to be addressed,⁵⁰ and that, at first glance, the guidelines passed by the AAMD to guide museum decisions about antiquities (“antiquities guidelines”) seem similar to the Nazi-era guidelines.⁵¹ These guidelines, promulgated in 2004 and revised in 2008 and 2013, advise museums not to acquire antiquities without accompanying documentation showing that they were not illegally removed from their country of origin after 1970.⁵² In practice, this means that acquisitions satisfy the antiquities guidelines when they are accompanied by documentation showing their ownership history since 1970. For example, a Roman statue that has been in the home of an American collector since 1950 will satisfy the antiquities guidelines because the statue was necessarily exported from Italy before 1970. This is true even if the museum does not know exactly when it was exported, and even though this export may have been contrary to Italy’s 1939 prohibition on the export of antiquities.⁵³

The antiquities guidelines allow museums to make exceptions to this general rule. Museums may acquire antiquities without the required post-1970 provenance on the basis of case-by-case determinations.⁵⁴ The 2004 version of the antiquities guidelines recognized that “the work of art, the culture it represents, scholarship, and the public may be served best through the acquisition of the work of art by a public institution dedicated to the conservation, exhibition, study, and interpretation of works of art.”⁵⁵ With this in mind, the antiquities guidelines gave two specific examples of circumstances in which an exception to the 1970 rule could be made: (1) if the object was in danger of neglect or destruction and (2) if acquisition would “make the work of art publicly accessible, providing a singular and material contribution to knowledge” because of the work’s “rarity, importance, and aesthetic merit.”⁵⁶

50. A number of government-run and smaller private museums revised their collection policies to address the issue of smuggled antiquities substantially before the promulgation of the AAMD guidelines. Among the earliest of these revisions were those of the University of Pennsylvania Museum (1970), Harvard Art Museums (1972) and Smithsonian Museums (1973). See MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS (1998).

51. See AAMD, NEW REPORT ON ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART ISSUED BY ASSOCIATION OF ART MUSEUM DIRECTORS (2008) [hereinafter AAMD, 2008 ANTIQUITIES GUIDELINES]; AAMD, REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (2004) [hereinafter AAMD, 2004 ANTIQUITIES GUIDELINES]. An AAMD survey from 2006 showed that 53 member museums actively collected antiquities at that time, and, of these 53 members, 87% had a collections policy specifically addressing the responsible acquisition of antiquities, 66% of which were based on the 2004 AAMD antiquities guidelines, and a further 17% were in the process of revising their policies to incorporate the AAMD guidelines. Neil Brodie, *U.S. Art Museum Accessions*, CULTURE WITHOUT CONTEXT (Illicit Antiquities Res. Ctr., Cambridge, U.K.), Spring 2006, at 23, 24, available at <http://traffickingculture.org/wp-content/uploads/2012/07/CWC-18.pdf> (citing Press Release, AAMD, Survey Shows Museum Antiquities Purchases Are Less than 10% of Global Trade (Feb. 7, 2006)).

52. AAMD, 2004 ANTIQUITIES GUIDELINES, *supra* note 51, at Part II.D. The 1970 date was chosen to accord with the 1970 UNESCO Convention.

53. Legge 1 giugno 1939, n. 1089 (It.), amended by Legge 1 marzo 1975, n. 44 (It.), Legge 30 marzo 1998, n. 88 (It.), and Legge 30 marzo 1998, n. 100 (It.).

54. AAMD, 2004 ANTIQUITIES GUIDELINES, *supra* note 51, at Part II.E.

55. *Id.*

56. *Id.*

The 2008 version of the antiquities guidelines removed the exception for acquisitions with outstanding artistic, historic or scholarly value. Instead, the 2008 version permitted an exceptional acquisition of an antiquity without full post-1970 provenance only if the museum could conclude that the object was out of its country of origin before 1970 by considering “the cumulative facts and circumstances resulting from provenance research, including, but not limited to, the independent exhibition and publication of the work, the length of time it has been on public display, and its recent ownership history.”⁵⁷

In 2013, the AAMD revised the antiquities guidelines to provide more detail about the considerations museums might take into account when deciding whether to acquire an antiquity despite its lack of complete post-1970 provenance history. The expanded considerations include instructions to museums to examine: (1) the provenance history of other works excavated from the same site or area, presumably instructing museums to be cautious if the work seems to come from a site that has been targeted by looters; (2) the prior owner(s) of the work and any claims made against them with respect to other works, thus instructing museums to avoid acquiring works previously owned by known antiquities smugglers and (3) communications regarding the work between the country of modern discovery and the current owner, a prior owner or the museum, seemingly encouraging museums or potential donors to check if the presumed source country is likely to make a repatriation claim.⁵⁸

Like the creation of the Nazi-Era Portal, the AAMD complimented its antiquities guidelines by launching a Registry of New Acquisitions of Archaeological Material and Works of Ancient Art (“Antiquities Registry”) in order to make information available to potential claimants.⁵⁹

C. THE DIFFERENCES BETWEEN THE NAZI-ERA AND ANTIQUITIES GUIDELINES

The crucial difference between the Nazi-era guidelines and the antiquities guidelines is their varying scope. Both sets of guidelines require museums to carry out provenance research. The antiquities guidelines, however, only require museums to look at planned acquisitions, while the Nazi-era guidelines require museums to look at both planned acquisitions and every object currently in their collections.⁶⁰ Thus, while Nazi-era guidelines are designed both to preempt and

57. AAMD, 2008 ANTIQUITIES GUIDELINES, *supra* note 51, at Part II.G.

58. See AAMD, REVISIONS TO THE 2008 GUIDELINES ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIAL AND ANCIENT ART (2013) [hereinafter AAMD, 2013 ANTIQUITIES GUIDELINES].

59. *New Acquisitions of Archeological Material and Works of Ancient Art*, AAMD, <https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/more-info> (last visited Mar. 20, 2014) (main page of Antiquities Registry).

60. See AAMD, 2008 ANTIQUITIES GUIDELINES, *supra* note 51, at 1; AAM, NAZI-ERA GUIDELINES, *supra* note 7, at 2, 3. Another difference of scope is that the antiquities guidelines require museums to use the Antiquities Registry to list only those acquisitions deemed by the acquiring museum to have incomplete post-1970 provenance rather than all new antiquities acquisitions. See AAMD, 2013 ANTIQUITIES GUIDELINES, *supra* note 58. By contrast, the Nazi-era guidelines require each museum to list on the Nazi-Era Portal all of the objects in its collections that could conceivably have been Nazi-

avoid ownership disputes, the antiquities guidelines do nothing to address the issue of repatriation claims for objects already in a museum's collection.

This difference in scope is rather curious given that there is no dispute that museums have acquired works illegally taken from their countries of origin prior to the promulgation of the antiquities guidelines. This fact has been proven in a number of repatriation demands by Italy, Greece, Turkey, Egypt and other countries, which resulted in the return of over one hundred antiquities to these countries since 2005 by museums including the Metropolitan Museum of Art,⁶¹ the Getty Museum,⁶² the Princeton University Museum of Fine Arts,⁶³ the Museum of Fine Arts in Boston⁶⁴ and the Cleveland Museum of Art.⁶⁵ And the repatriations continue: in late 2012, the Dallas Museum of Art returned a mosaic to Turkey,⁶⁶

looted, even if the museum knows that they were not. *See infra* Part I.B. This difference is key for the accountability of museums and the usefulness of the websites for potential claimants. For Nazi-looted art, claimants can discover the reasons why a museum has decided that an object was not Nazi-looted; for antiquities, claimants are given no ability to make their own decisions about the reliability of museums' reasoning. *See id.* Imagine that a claimant has discovered that a dealer was in the habit of forging crucial export paperwork. This claimant could easily locate objects that passed through the hands of this dealer using the Nazi-Era Portal, but would have no way to ascertain if museums had similarly relied on forged paperwork when deciding that their new antiquities acquisitions had sufficient provenance and thus did not need to be posted on the Antiquities Registry.

61. The Metropolitan Museum of Art returned an ancient Greek vase by the painter Euphronios, a set of sixteen silver vessels from Morgantina, and four additional items in return for Italy's agreement to loan works of equivalent importance. The Metropolitan Museum of Art-Republic of Italy Agreement, Feb. 21, 2006, reprinted in 13 INT'L J. CULTURAL PROP. 427 (2006); *Statement by the Metropolitan Museum of Art on Its Agreement with Italian Ministry of Culture*, METRO. MUSEUM OF ART (Feb. 21, 2006), <http://www.metmuseum.org/about-the-museum/press-room/news/2006/statement-by-the-metropolitan-museum-of-art-on-its-agreement-with-italian-ministry-of-culture>; *see also* Aaron K. Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 623 (2007). The Metropolitan Museum also repatriated nineteen objects from King Tutankhamen's tomb to Egypt. *Metropolitan Museum of Art and Egyptian Government Announce Initiative to Recognize Egypt's Title to 19 Objects Originally from Tutankhamun's Tomb*, METRO. MUSEUM OF ART (Nov. 10, 2010), <http://www.metmuseum.org/about-the-museum/press-room/news/2010/metropolitan-museum-and-egyptian-government-announce-initiative-to-recognize-egypts-title-to-19-objects-originally-from-tutankhamuns-tomb>.

62. So far, the Getty has repatriated around forty antiquities, worth around \$44 million, to Italy. *The Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome*, GETTY TRUST (Aug. 1, 2007), http://www.getty.edu/news/press/center/italy_getty_joint_statement_080107.html. The Getty has also returned six antiquities to Greece. *Ministry of Culture for the Hellenic Republic and J. Paul Getty Museum Sign Agreement Finalizing Return of Objects to Greece*, GETTY TRUST (Feb. 7, 2007), http://www.getty.edu/news/press/center/getty_greece_wreath_kore_release020707.html.

63. Princeton University has agreed to return sixteen antiquities claimed by Italy. Cass Cliatt, *University Art Museum, Italy Sign Antiquities Agreement*, PRINCETON WKLY. BULL., Nov. 12, 2007, at 3, available at <https://www.princeton.edu/pr/pwb/07/1112/art/>; *Princeton University Art Museum, Italy Reach New Antiquities Agreement*, PRINCETON U. (Jan. 25, 2012), <http://www.princeton.edu/main/news/archive/S32/75/13K74>.

64. Elisabetta Povoledo, *Boston Art Museum Returns Works to Italy*, N.Y. TIMES, Sept. 29, 2006, at E27.

65. Elisabetta Povoledo, *Pact Will Relocate Artifacts to Italy from Cleveland*, N.Y. TIMES, Nov. 20, 2006, at C3.

66. Randy Kennedy, *Dallas Museum Volunteers to Return Mosaic to Turkey*, N.Y. TIMES BLOG (Dec. 3, 2012), <http://artsbeat.blogs.nytimes.com/2012/12/03/dallas-museum-volunteers-to-return-mosaic-to-turkey>.

while in 2013, the Getty repatriated a sculpture to Italy⁶⁷ and the Metropolitan Museum announced that it would return two sculptures to Cambodia.⁶⁸ There is no sign that such repatriation demands are likely to cease.⁶⁹

Despite these examples of museums having owned smuggled antiquities, most museums have not committed to researching the provenance of all antiquities in their collections. Thus far, only the Getty Museum has announced that it is carrying out this type of research for its existing collections.⁷⁰

Museums' reluctance to investigate existing collections is all the more striking given that they are in a much better position to deduce that an antiquity has been illegally exported than a source country would be.⁷¹ A museum can know which of its antiquities were acquired from a dealer who was later revealed to have been a conduit for smuggled art.⁷² The museum can then re-examine an antiquity's

67. Lee Rosenbaum, *Getty's Latest Repatriation (Plus AAMD Members' Loose Interpretation of Cultural-Property Guidelines)*, ARTS J. BLOG (Jan. 13, 2013), http://www.artsjournal.com/culturegrll/2013/01/gettys_latest_repatriation_plu.html.

68. Tom Mashberg & Ralph Blumenthal, *Cambodia Says It Seeks Return of Met Statues*, N.Y. TIMES, June 2, 2012, at A1.

69. Hope continues to spring eternal that each set of repatriations will be the last; for example, Michael Conforti, then the incoming AAMD president, said in a 2008 interview about the smuggled antiquities issues that

[w]hat the Italians were very anxious about has now been returned. They feel quite good about that I can't say there will be no more requests for things, but that's certainly not the future of conversation between Italy and the United States. It has to be about other things. I think that's true of many countries. Italy may be a little more willing at this point, because of the particular nature of return. But I think we're going to see that the Americans are now in harmony with much of the rest of the world and we can start engaging with the rest of the world without focusing on what we've done in the past vs. what we might do in the future.

Lee Rosenbaum, *Michael Conforti Q&A About AAMD and Antiquities*, ARTS J. BLOG (July 23, 2008), http://www.artsjournal.com/culturegrll/2008/07/michael_conforti_qa_about_aamd.html. Conforti's perception has surely been changed by the post-2008 repatriation demands by Italy and other countries.

70. Jason Felch, *Getty Studies Its Antiquities*, L.A. TIMES, Jan. 19, 2013, at D1.

71. There has not been much sustained comparison of the relative difficulty and expense of provenance research for Nazi-looted art versus smuggled antiquities. One of the only statements on record about this issue is that of Victoria Reed, the Boston Museum of Fine Art's curator of provenance, charged with investigating the provenance of the museum's collections for Nazi-era issues and new antiquities acquisitions. Reed told the *Boston Globe* in 2011 that Nazi-era provenance research is more complicated than antiquities provenance research:

If something was looted out of the ground in Italy, it's a pretty clear issue Some of the Nazi-era claims are accompanied by ownership questions that may not have a paper trail. Many of the key players may be deceased. You may be dealing with 10 different archives. And even if you have the pieces lined up, there may be disagreement about how to interpret those facts.

Geoff Edgers, *A Detective's Work at the MFA*, BOS. GLOBE, Dec. 11, 2011, at N1.

72. For example, the Kimbell Art Museum in Fort Worth, Texas, owns a seventh century C.E. Khmer sculpture from what is now Cambodia. See *Harihara*, KIMBELL ART MUSEUM, <https://www.kimbellart.org/collection-object/harihara> (last visited Mar. 20, 2014). The Museum purchased the statue in 1988 from a dealer, Douglas Latchford, with no documented ownership history aside from a guarantee from Latchford claiming that he had purchased it in Thailand in 1968. See Jason Felch, *Latchford's Footprints: Suspect Khmer Art at the Kimbell and the Met*, CHASING APHRODITE (Dec. 24, 2012), <http://chasingaphrodite.com/2012/12/24/latchfords-footprints-suspect-khmer-art-at-the-kimbell-and-the-met>. Latchford was also the source for several other Khmer statues in American museums for which the Cambodian government is now seeking repatriation, claiming that they were looted from a

paperwork with a more skeptical eye for possible omissions or forgeries than the acquiring curator—who may have been less aware of the problem of looted antiquities and more biased in favor of obtaining the object—would have used⁷³

By contrast, source countries may have difficulty becoming aware of illegal exportation of antiquities. A looted archeological site rarely bears traces of what has been taken from it, making it extremely difficult for a source country to prove that it is the rightful owner of a smuggled antiquity.⁷⁴ The majority of Italian repatriation demands have been based on the lucky results of a single investigation of an antiquities smuggler whose extensive, and exceptional, archive of correspondence, receipts, photographs and other records seized by the police showed that he obtained illegally excavated antiquities and smuggled them out of Italy in order to sell them to, among others, American dealers and curators.⁷⁵

It is hardly surprising that some source countries, having realized that they rarely will be able to muster the type of proof of ownership and theft required for an American court to order the return of claimed antiquities, have determined to take alternative approaches. One approach that has evolved in recent years is a threatened or actual suspension of good relations with a museum or country that refuses to give up claimed antiquities (e.g., by refusing to allow any loans for special exhibitions or cancelling archeological excavation permits).⁷⁶ Such

temple complex in the early 1970s and smuggled to Thailand. For some of these statues, the broken feet are still *in situ*, leading the Metropolitan Museum to return two statues so far, with other museums still considering claims. See *id.*; see also Jason Felch, *The Met Returns Two Khmer Statues to Cambodia, Citing Clear Evidence of Looting*, CHASING APHRODITE (May 3, 2013), <http://chasingaphrodite.com/2013/05/03/breaking-the-met-returns-two-khmer-statues-to-cambodia-citing-clear-evidence-of-looting>.

73. A similar resistance to self-examination of collections has been shown by the AAMD on the subject of sacred objects, which some members of the tribes or communities that created them might wish to not be displayed in museums: “Art museums cannot be expected to singularly determine if a work of art is a sacred object. Instead, art museums should respond to inquiries or claims regarding sacred objects submitted by religious leaders or groups who have standing within a traditional religion with which an object is associated.” AAMD, REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION AND STEWARDSHIP OF SACRED OBJECTS 2 (2006), available at <https://aamd.org/sites/default/files/document/Sacred%20Objects%20Guideline%2008.06.pdf>. If museums are not expected to carry out independent inquiries or to publish objects of potential interest so interested groups can research, it is not clear how interested groups are supposed to know that museums own objects of interest at all.

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

75. For a more detailed account of Italy’s investigation into Medici and his associates, see PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY’S TOMB RAIDERS TO THE WORLD’S GREATEST MUSEUMS* (2006). See also PETER WATSON, *SOTHEBY’S: INSIDE STORY* (1997); Christine L. Green, Comment, *Antiquities Trafficking in Modern Times: How Italian Skulduggery Will Affect United States Museums*, 14 VILL. SPORTS & ENT. L.J. 35 (2007). Based on the records uncovered during its investigation of Medici, Italy has successfully demanded the return of antiquities from the Getty Museum, the Boston Museum of Fine Arts, the Cleveland Museum of Art and the Metropolitan Museum of Art. See Rebecca Mead, *Den of Antiquity*, NEW YORKER, Apr. 9, 2007, at 52; Elisabetta Povoledo, *Getty Ex-Curator Testifies in Rome Antiquities Trial*, N.Y. TIMES, Mar. 21, 2009, at C3.

76. Turkey, for example, has made a large number of repatriation demands within the past few

boycotts or protests by source countries also create bad publicity, which museums are eager to avoid.⁷⁷ The antiquities guidelines do nothing to help museums prevent such threats, disputes and retaliations by claimant governments.

D. THE EFFICACY OF THE ANTIQUITIES GUIDELINES

The antiquities guidelines have a much narrower scope than the Nazi-era guidelines, but it does not seem that the antiquities guidelines have greatly changed museum behavior even within that narrow scope. Information on museum adherence to the guidelines is difficult to find. For example, the AAMD released a survey in 2006, claiming that there was complete post-1970 provenance for 86% of the purchased or donated antiquities acquired by member museums over the five years prior to the survey (that is, both before and after the promulgation of the guidelines).⁷⁸ But the survey gave no information on whether acquisitions without the required provenance occurred after the promulgation of the 2004 guidelines. It is nonetheless possible to draw some conclusions about the level of museum adherence to the antiquities guidelines by analyzing the entries on the Antiquities Registry.

Since the establishment of the Antiquities Registry, there has not been any study on whether museums have entered all of their newly acquired antiquities into the Registry. Indeed, such a study would be difficult to carry out, since the antiquities guidelines do not require the listing of all new acquisitions of antiquities, but only those deemed by the acquiring museum to have incomplete post-1970 provenance. Moreover, the publicly available records of acquisitions generally do not go into

years—some for objects exported before the passage of its national ownership laws—and has threatened to or actually has cut off relations with museums and others who have not returned demanded objects. In one such instance, Turkey revoked French archaeologists' excavation permits at the Xanthos World Heritage site after the Louvre Museum refused to repatriate objects donated to it in 1985, and threatened that it would terminate a German archeological project if the Pergamon Museum in Berlin did not return a Hittite sphinx that had been in Germany since 1917, which the museum ultimately did. See Dan Bilefsky, *Seeking Return of Art, Turkey Jolts Museums*, N.Y. TIMES, Oct. 1, 2012, at A1; *Art War with Turkey?*, COMM. FOR CULTURAL PROP., <http://committeeforculturalpolicy.org/art-war-with-turkey> (last visited Mar. 20, 2014); Martin Bailey, *Turkey Blocks Loans to US and UK*, ART NEWSPAPER, Mar. 2012, at 1, available at <http://www.theartnewspaper.com/articles/Turkey-blocks-loans-to-US-and-UK/25869#>; Jason Farago, *Turkey's Restitution Dispute with the Met Challenges the 'Universal Museum'*, GUARDIAN (Oct. 7, 2012), <http://www.theguardian.com/commentisfree/2012/oct/07/turkey-restitution-dispute-met/print>.

77. See Kate Fitz Gibbon, *Dangerous Objects: Museums and Antiquities in 2008*, at 10 (Mar. 1, 2009) (unpublished manuscript), available at ssrn.com/abstract=1479424 (“When foreign nations rely on moral arguments and threats of bad publicity rather than on legally sustainable claims, repatriation demands start to look less like negotiation based on law and more like blackmail. Museum administrators and trustees are extremely susceptible to threat of public criticism because they are dependent upon good public relations for basic funding and exhibition sponsorship. It may be easier to quietly give up title to works of art than to risk embarrassment in the courts and the press or to suffer the loss of public goodwill.”).

78. Neil Brodie, *U.S. Art Museum Accessions*, CULTURE WITHOUT CONTEXT (Illicit Antiquities Res. Ctr., Cambridge, U.K.), Spring 2006, at 23, 23, available at <http://traffickingculture.org/wp-content/uploads/2012/07/CWC-18.pdf> (citing Press Release, AAMD, Survey Shows Museum Antiquities Purchases Are Less than 10% of Global Trade (Feb. 7, 2006)).

the detail necessary to distinguish between satisfactory and non-satisfactory provenance.⁷⁹

One examination of entries on the Antiques Registry, carried out in early 2012, did find that five out of eleven museums had not provided any justification for their acquisitions of antiquities without a post-1970 provenance. Furthermore, three of the remaining museums justified their acquisitions on the basis of the object's rarity or importance to scholarship or the museum's collections—that is, on the basis of an exception allowed by the 2004 guidelines but specifically rejected by the 2008 guidelines.⁸⁰ The first object listed on the Antiques Registry, for example, was a tenth or eleventh century C.E. Southeast Asian sculpture of the deity Ganesha, acquired by the Portland Art Museum in 2008.⁸¹ This acquisition was listed on the Antiquities Registry because it did not have a full post-1970 provenance history; indeed, it had ownership documentation only as far back as 2000, and was not even accompanied with any information about or documentation of its import into the United States, much less its export from India (its probable country of origin).⁸² In the entry on the Antiquities Registry for this acquisition, the Portland Art Museum said that it depended on the “cumulative facts and circumstances” of the acquisition to justify its exception to the 1970 rule.⁸³ Specifically, the museum said that the

79. Among the only sources of information is the fact that, in 2012, the new Director of the Dallas Museum added fourteen objects to the Antiquities Registry that had been acquired since June 4, 2008. Lee Rosenbaum, *Turkey's Repatriation Claims: Met's Schimmel Benefactions Targeted (Plus AAMD Database)*, ARTS J. BLOG (Mar. 20, 2012), http://www.artsjournal.com/culturegrl/2012/03/turkeys_repatriation_claims_me.html.

80. Alyssa Cathleen Hagen, *The Efficacy of the Association of Art Museum Directors Online Antiquities Registry* 9, 24–25 (May 2012) (unpublished M.A. thesis, Rutgers University), available at <http://rucore.libraries.rutgers.edu/rutgers-lib/37411/PDF/1/>. The museums participating at the time of Hagen's study were the Art Institute of Chicago; the Asian Art Museum in San Francisco; the Cleveland Museum of Art; the Dallas Museum of Art; the Iris & B. Gerald Cantor Center for Visual Arts at Stanford University; the Metropolitan Museum of Art; the Museum of Fine Arts, Boston; the Philadelphia Museum of Art; the Portland Art Museum; the Virginia Museum of Arts and the Walker Art Museum in Baltimore. *Id.* at 9. As of March 2014, the Asia Society Museum of New York; the Denver Art Museum; the Detroit Institute of Arts; the Frances Lehman Loeb Art Center of Vassar College; the Harvard Art Museums; the Herbert F. Johnson Museum of Art, Cornell University; the Los Angeles County Museum of Art; the Memorial Art Gallery in Rochester, New York; the Minneapolis Institute of Arts and the Seattle Art Museum have also listed acquisitions, for a total of twenty-one participating museums. *New Acquisitions of Archaeological Material and Works of Ancient Art*, AAMD ANTIQUITIES REGISTRY, <https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/browse> (last visited Mar. 20, 2014). These new listings show similar problems as those Hagen identified, such as justifying an acquisition's purchase based on the importance it would have to the museum's collection, despite lack of provenance information. *E.g.*, *Goddess Palden Lhamo*, AAMD, <https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/569> (last visited Mar. 20, 2014) (“The work is an important addition to the collection of Asia Society because it fills a major gap in the fourteenth-century metal sculpture from Central Tibet.”).

81. D.K. Row, *Museum's Find Opens Window on Art Ethics*, OREGONIAN, Nov. 3, 2008, at A1.

82. *Ganesha, Lord of Obstacles*, AAMD, <https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/1000> (last visited Mar. 20, 2014); see Row, *supra* note 81.

83. The full explanation offered in the Antiquities Registry entry is:

In the past, South Asian art had not been an area of collecting focus in Portland, but today the region is home to a large, vibrant, and highly educated South Asian population. The Museum's

statue would be of particular interest to Portland's South Asian population and would symbolize the Museum's "new commitment to South Asian art."⁸⁴ Further, the work is both "[l]arge enough to visually anchor a gallery" but also "intimate and approachable."⁸⁵ None of the listed reasons qualify for an exception under the 2008 guidelines.⁸⁶

Interestingly, the purchasing curator told a local newspaper that India, the country of likely origin, has somewhat relaxed export laws and that there are many similar sculptures on the art market.⁸⁷ This would seem to indicate that the museum is more concerned with the low probability of a successful repatriation than with strict adherence to the 2008 guidelines.⁸⁸

That museums have been listing acquisitions on the Antiquities Registry with no justification for making an exception to the antiquities guidelines, or with justifications that do not align with those permitted by the guidelines, demonstrates both to potential claimants and to the museum community as a whole that the AAMD would tolerate less than full compliance with even the narrow scope of its guidelines. Observers have criticized these failures to adhere to the antiquities guidelines, arguing that deficient listings will allow museums to seem as if they are practicing responsible acquisition behaviors when in fact they are not.⁸⁹

In 2013, the AAMD issued revisions to the antiquities guidelines to require museums to post all known provenance information, as well as specific details about how the acquisitions meet the guidelines' standards.⁹⁰ It remains to be seen

commitment under Director Brian Ferriso to "bringing the world to Portland" and strong expressions of interest from the local community led to a search for a significant historical work of South Asian art. No choice could have been more appropriate than an icon of Ganesha, a deity widely worshiped throughout the subcontinent. As the "Remover of Obstacles," who is invoked at the outset of any major enterprise, Ganesha perfectly symbolizes a new commitment to South Asian art. The Ganesha stele, as an outstanding example of stone sculpture of the Pala period, has become the core object in Museum narratives about Hindu art and culture. Large enough to visually anchor a gallery, it is also intimate and approachable.

Ganesha, Lord of Obstacles, AAMD, <https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/1000> (last visited Mar. 20, 2014).

84. *Id.*

85. *Id.*

86. Maribeth Graybill, the Portland Art Museum's Curator of Asian Art, gave another reason for acquiring the statue when interviewed by a local paper: donor relations. She said, "Graybill felt the work could be a critical addition to Portland's collection: It would help expand its Southeast Asian holdings and bolster the museum's reputation among local collectors who might one day donate their work to the museum." Row, *supra* note 81.

87. *Id.*

88. Similarly, Brian Ferriso, the Portland Art Museum's Executive Director, told the same interviewer that "he thinks the museum's transparency and the museum's educational and historical mission would persuade any claimant to allow the Portland museum to keep the object." *Id.*

89. *E.g.*, Rosenbaum, *supra* note 67 ("This intended benefit [of the antiquities guidelines] is lost if museums repeatedly demonstrate a willingness to shell out money for pieces with problematic pasts, using their publication on a registry as a pretext to skirt the UNESCO guidelines that they purport to uphold.").

90. AAMD, 2013 ANTIQUITIES GUIDELINES, *supra* note 58, at 7. The 2013 Revisions also amended the AAMD's Code of Ethics to require museum directors to adhere to the antiquities guidelines' requirement to use the Antiquities Registry to post antiquities acquisitions without a full post-1970 provenance. *Id.* at 9.

whether the 2013 revision to the guidelines will result in entries that adhere more closely with the antiquities guidelines, but the situation could hardly be less promising.⁹¹

E. EXPLANATIONS FOR THE FAILINGS OF ANTIQUITIES GUIDELINES

There are a number of reasons why the antiquities guidelines are so much narrower in scope than the Nazi-era guidelines, and why museums do not seem to be fully cooperating with even these narrow guidelines. The most practical reason is cost. It would require an enormous amount of staff time and associated research expenses to investigate the provenance of every antiquity—though the Getty, at least, has decided that this cost is justified for its 45,000 antiquities.⁹² Museums' research into Nazi-era provenance has been funded not only by museums but also by grants from the government and by private foundations;⁹³ it does not appear that there are similar grants to support antiquities provenance research or even to support the Antiquities Registry, which seems to be entirely self-funded by the AAMD.

Another reason for museum resistance to strict antiquities acquisition policies is donor relations. Several collector lobbyist groups have argued that the AAMD guidelines are harmful to collectors who are no longer able to donate some antiquities to museums, and thus cannot obtain the pleasures of making a public contribution or the resultant tax deductions. A representative of one of these groups has called the AAMD guidelines “a self-administered slow poison, completely illogical and not required under any law.”⁹⁴

Donor relations are extremely important to museums: more than 90% of the art collections in American museums were donated by private collectors.⁹⁵ It is easy to see the difficulties museums face, considering that “the development and cultivation of strategic relationships with private collectors is a high priority.”⁹⁶ When donors become frustrated that they cannot donate their antiquities, they see the AAMD guidelines as casting aspersions on their judgment and morality as

91. There have so far not been any repatriation claims for antiquities arising from the Antiquities Registry—perhaps not surprisingly, since a number of museums describe in their entries a practice of circulating information about the objects they are considering acquiring among potential source countries for comment before completing the acquisition. See, e.g., *Vase Fragments and Groups of Fragments*, AAMD, <https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/993> (last visited Mar. 20, 2014) (including fact that the Ministry for Cultural Heritage of Italy consented to the Metropolitan Museum's acquisition in Registry entry).

92. See *supra* note 70 and accompanying text.

93. See *supra* note 35 and accompanying text.

94. Symposium, *The Future of the Past: Collecting Ancient Art in the 21st Century*, CULTURAL POL'Y RES. INST. (Mar. 18, 2012), <http://www.cprinst.org/lecture-services/the-future-of-the-past---collecting-ancient-art-in-the-21st-century> (statement of Kate Fitz Gibbon, Cultural Policy Research Institute Board Member).

95. AAMD, ART MUSEUMS, PRIVATE COLLECTORS, AND THE PUBLIC BENEFIT 1 (2007), available at <https://aamd.org/sites/default/files/document/PrivateCollectors3.pdf>.

96. *Id.*

collectors.⁹⁷

Museums are keenly aware that collectors often donate funds or other resources along with their collected objects, but now disappointed collectors deny these resources to museums.⁹⁸ In 2012, the former director of the Nelson-Atkins Museum of Art told *The New York Times* that a museum's decision to decline a gift because of incomplete provenance can strain relations with even a longstanding benefactor, who might respond: "You can't take my items? So you can't take my \$30 million either?"⁹⁹

By far the largest obstacle standing in the way of an effective self-regulatory regime for antiquities is that, in contrast to a near-universal agreement that acquiring or holding Nazi-looted art is to be avoided, there is intense disagreement in the museum community about whether or not antiquities should be acquired.¹⁰⁰ One document instructive in understanding this disagreement was published by the AAMD itself in 2001, three years before the promulgation of its antiquities guidelines. This document, "Art Museums and the International Exchange of Cultural Artifacts," argues for the free acquisition of antiquities. It supports its proposition by reasoning that museums are responsible for "the presentation, study, protection, and care of much of the artistic achievement of mankind." Furthermore, it argues that a "vital part" of this mission is carried out through the acquisition of art, since "[n]ew acquisitions spur research, stimulate exhibitions, and contribute to the enjoyment and enlightenment of the visitor."¹⁰¹ The document goes on to state

97. Marc Wilson, the Director of the Nelson-Atkins Museum of Art in Kansas City, Missouri from 1982 to 2010, explained that

[t]he museums themselves are driving away one of the most important engines of support. A relationship had heretofore been symbiotic between the collector whose passion and love the collector wished to share and found a natural partner with the museum. The collection eventually goes to the museum, the curator and director have all done their jobs. The public benefits through intelligent display, they enjoy, they learn. When it comes time to disperse wealth, the collector takes the museum into account in the will. That is going away. I know of a number of incidents where the museum has said, "I am sorry, you have no documentation." The museum will not end up with the collection. The museum will not end up with that support.

Symposium, *The Future of the Past: Collecting Ancient Art in the 21st Century*, CULTURAL POL'Y RES. INST. (Mar. 18, 2012), <http://www.cprinst.org/lecture-services/the-future-of-the-past—collecting-ancient-art-in-the-21st-century>.

98. In a 2007 report, the AAMD stated that

[m]any collectors donate additional resources to support scholarship, publications, educational programming, capital projects and administrative expenses. As business and civic leaders, many bring professional expertise to their role as trustees or advisors to museum boards and committees. As individuals who are not only passionate but knowledgeable about a specific field, they often provide perspective and insight that can assist directors and curators in the display and interpretation of works of art.

AAMD, ART MUSEUMS, PRIVATE COLLECTORS, AND THE PUBLIC BENEFIT 1 (2007), available at <https://aamd.org/sites/default/files/document/PrivateCollectors3.pdf>.

99. Ralph Blumenthal & Tom Mashberg, *Collectors Cursed by Dubious Artifacts*, N.Y. TIMES, July 15, 2012, at AR1 (quoting Marc Wilson, Director of the Nelson-Atkins Museum of Art in Kansas City, Mo. from 1982 to 2010).

100. Perhaps the biggest indication of lack of shared agreement is that the antiquities guidelines, unlike the Nazi-era guidelines, have not been co-promulgated by the AAM.

101. AAMD, ART MUSEUMS AND THE INTERNATIONAL EXCHANGE OF CULTURAL ARTIFACTS 1

that while the loss of archeological context is regrettable, works without this context can still yield valuable information.¹⁰²

Similar sentiments were expressed in a 2002 document that, although not associated directly with the AAM or AAMD, was signed by the Directors of the Art Institute of Chicago, the Cleveland Museum of Art, the Getty Museum, the Guggenheim Museum, the Los Angeles County Museum of Art, the Metropolitan Museum of Art, the Boston Museum of Fine Arts, the New York Museum of Modern Art, the Philadelphia Museum of Art and the Whitney Museum of American Art.¹⁰³ The document—the “Declaration on the Importance and Value of Universal Museums”—states that

The international museum community shares the conviction that illegal traffic in archaeological, artistic, and ethnic objects must be firmly discouraged. We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era Today we are especially sensitive to the subject of a work's original context, but we should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source Calls to repatriate objects that have belonged to museum collections for many years have become an important issue for museums. Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation.¹⁰⁴

Several prominent museum directors continue to express similar points of view about the value of museums acquiring and keeping antiquities without provenance or information about their find-spots.¹⁰⁵ This is in stark contrast with the viewpoint of archeologists, who insist that antiquities can convey information about the past only if they are scientifically excavated from an archeological context.¹⁰⁶ Other

(2001), available at <https://aamd.org/sites/default/files/document/Cultural%20Property%2010.01.pdf>.

102. *Id.* at 1–2 (“While it is highly desirable to know the archaeological context in which an artifact was discovered because this can reveal information about the origin of the work and the culture that produced it, this is not always possible. Nevertheless, much information may be gleaned from works of art even when the circumstances of their discovery are unknown. Indeed, most of what we know about early civilizations has been learned from artifacts whose archaeological context has been lost.”).

103. THE DECLARATION ON THE IMPORTANCE AND VALUE OF UNIVERSAL MUSEUMS (2003), reprinted in Martin Bailey, *We Serve All Cultures, Say the Big Global Museums*, ART NEWSPAPER, Jan. 2003, at 1, 6.

104. *Id.*

105. See, e.g., James Cuno, *The Whole World's Treasures*, BOS. GLOBE, Mar. 11, 2001, at E7 (advocating for museums' acquisition of antiquities lacking provenance as an act of rescue); Randy Kennedy, *Museum Defends Antiquities Collecting*, N.Y. TIMES, Aug. 13, 2012, at C1 (interviewing David Franklin, Director of the Cleveland Museum of Art, who argues in favor of acquiring antiquities without full provenance: “Museums should still be buying antiquities, and we shouldn't shirk that responsibility, and I think it's almost an ethical responsibility It's to the benefit of these objects not to be shunted away into the dark but to exist It's almost as if the objects themselves need a bill of rights”).

106. Archeologists learn about the past not mainly from individual objects, but rather from “context,” the totality of information available from an excavated site. One archeologist has explained the importance of context by describing her excavation of flakes of obsidian, less than five millimeters in diameter, in the Paleolithic stratification of a trash heap in an archeological site on a Greek island.

museum directors have even argued that antiquities without a provenance “are almost without scholarly value.”¹⁰⁷

III. THEORIES OF SELF-REGULATION APPLIED TO MUSEUM GUIDELINES

A. THEORIES OF SELF-REGULATION

In Parts I and II of this Article I have argued that there are significant differences in the scope, context and efficacy of the Nazi-era and antiquities guidelines, even though they both purport to be self-regulatory regimes addressing similar problems of stolen goods in museum collections. In this Part, I will now argue that the fact that they are self-regulatory regimes is precisely the cause for the failings of the antiquities guidelines.

Self-regulation has mainly been studied in the for-profit world, where it has recently come under attack.¹⁰⁸ Critics maintain that corporations who create voluntary regulatory regimes instead of submitting to government regulation create rules that are subject to massive failures and that lead to devastating environmental and financial catastrophes. For example, following the collapse of the investment bank Lehman Brothers and the subsequent global financial crisis, the U.S. Securities and Exchange Commission halted its Consolidated Supervised Entities program, which allowed certain banks to set and adjust capital requirements for themselves based on their own internal risk assessments.¹⁰⁹ Similarly, some have

This obsidian had to be imported, and the position of the flakes in the context of the Paleolithic layer, rather than a higher one, showed that those islanders and their trading partners had the sea-going capacities necessary to import obsidian millennia before scholars had previously thought. Here, it was the exact placement of the chips that provided the information; the chips themselves, sold to an archeologist on the market, could not have revealed their importance. Karen D. Vitelli, *ARCHAEOLOGICAL ETHICS* 17, 24–27 (Karen D. Vitelli ed., 1996).

107. Giles Constable, *The Looting of Ancient Sites and the Illicit Trade in Works of Art*, 10 *J. FIELD ARCHAEOLOGY* 482, 484 (1983) (written by the then-Director of the Dumbarton Oaks Museum).

108. For additional resources on self-regulation in general, see CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* (2002); PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* (1992). For additional resources on self-regulation in the non-profit sphere, see generally *BEYOND THE MAGIC BULLET: NGO PERFORMANCE AND ACCOUNTABILITY IN THE POST-COLD WAR WORLD* (Michael Edwards & David Hulme eds., 1996); PAUL C. LIGHT, *MAKING NONPROFITS WORK* (2000); Evelyn Brody, *Accountability and Public Trust*, in *THE STATE OF NONPROFIT AMERICA* 471 (Lester M. Salamon ed., 2002); David C. Hammack, *Accountability and Nonprofit Organizations: A Historical Perspective*, 6 *NONPROFIT MGMT. & LEADERSHIP* 127 (1995); Laura B. Chisolm, *Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework*, 6 *NONPROFIT MGMT. & LEADERSHIP* 141 (1995); Angela L. Bies, *Accountability, Organizational Capacity, and Continuous Improvement: Findings from Minnesota's Nonprofit Sector*, 31 *NEW DIRECTIONS FOR PHILANTHROPIC FUNDRAISING* 51 (2001); Robert O. Bothwell, *Trends in Self-Regulation and Transparency of Nonprofits in the U.S.*, 2 *INT'L J. NOT-FOR-PROFIT L.* (2000).

109. Edward J. Balleisen, *The Prospects for Effective Coregulation in the United States: A Historian's View from the Early Twenty-First Century*, in *GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION* 443 (Edward J. Balleisen & David A. Moss eds., 2010). In making this announcement, SEC Chairman Christopher Cox, who had previously been an advocate of self-regulation, explained that “[t]he last six months have made it abundantly clear that voluntary regulation

blamed oil companies' self-regulation of offshore drilling for permitting the activities that led to the massive oil spill at British Petroleum's offshore drilling rig, Deepwater Horizon, in the Gulf of Mexico.¹¹⁰

Scholars have found that for-profit corporate self-regulation is most likely to succeed when: (1) the government has sufficient resources to monitor and sanction corporations who fail to comply with the self-regulatory guidelines and (2) there is reasonable consensus among the self-regulating corporations and other parties interested in the regulations (such as the government) about what norms or standards should govern the regulated behavior.¹¹¹ Specifically, corporate compliance with self-regulatory regimes is much higher when the self-created regulations are backed by government enforcement, such as inspections or other forms of monitoring,¹¹² or when there is a threat of more stringent government regulation if the government concludes that compliance with self-regulation is too low.¹¹³ Outside pressure is so crucial that one scholar of corporate self-regulation concluded, "self-regulation has succeeded primarily under conditions where it is not really self-regulation at all."¹¹⁴ That is, self-regulation only succeeds when the self-regulation serves merely as a support to the enforcement efforts of the government or another external, robust regulator.

B. THEORIES OF SELF-REGULATION APPLIED TO MUSEUM GUIDELINES

The differences between the Nazi-era guidelines and the antiquities guidelines are precisely those differences between a successful and unsuccessful self-regulatory regime. There was not only outside pressure on museums to initiate a solution to the problem of Nazi-looted art, but there has been continuing scrutiny

does not work." Press Release, SEC, Chairman Cox Announces End of Consolidated Supervised Entities Program (Sept. 26, 2008), available at <http://www.sec.gov/news/press/2008/2008-230.htm>.

110. See, e.g., Russell Gold & Stephen Power, *Oil Regulator Ceded Oversight to Drillers*, WALL ST. J., May 7, 2010, at A1.

111. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* (2002); Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACAD. MGMT. J. 698 (2000); Matthew Potoski & Aseem Prakash, *Green Clubs and Voluntary Governance: ISO 14001 and Firms' Regulatory Compliance*, 49 AM. J. POL. SCI. 235 (2005); Jodi L. Short & Michael W. Toffel, *Coerced Confessions: Self-Policing in the Shadow of the Regulator*, 24 J.L. ECON. & ORGS. 45 (2008); Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361 (2010); Short, *supra* note 2; Michael W. Toffel & Jodi L. Short, *Coming Clean and Cleaning Up: Does Voluntary Self-Reporting Indicate Effective Self-Policing?*, 54 J.L. & ECON. 609 (2011).

112. See, e.g., Eun-Hee Kim & Thomas P. Lyon, *Strategic Environmental Disclosure: Evidence from the DOE's Voluntary Greenhouse Gas Registry*, 61.3 J. ENVIRON. ECON. & MGMT. 311 (2011); Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361 (2010); Short, *supra* note 2.

113. See, e.g., Erin M. Reid & Michael W. Toffel, *Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies*, 30.11 STRATEGIC MGMT. J. 1157 (2009); John W. Maxwell, Thomas P. Lyon, & Steven C. Hackett, *Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism*, 43 J.L. & ECON. 583 (2000).

114. Short, *supra* note 2, at 30.

and pressure (both positive and negative) ever since, from the government, press, interest groups and potential litigants. This consistent outside pressure has been crucial to ensure the continued functioning of the self-regulatory regime; museums are eager to avoid a truly involuntary regime, so the voluntary regime is shaped by what an involuntary regime might look like. Moreover, following the second criterion for a successful self-regulatory regime, there is widespread agreement, both within the museum community and outside of it, about what the goals of regulating potential Nazi-looted art should be. This widespread agreement and strong outside oversight ensures that museums adhere to the Nazi-era guidelines, keeping Nazi-era provenance research as a top priority instead of letting these tasks be buried under the myriad of other things that an underfunded museum has to accomplish.

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

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

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