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“ORPHANED OBJECTS,” ETHICAL STANDARDS, AND THE ACQUISITION OF ANTIQUITIES

Richard M. Leventhal & Brian I. Daniels*

In recent years, there has been an intense debate about the legality and ethics surrounding the acquisition of antiquities by museums and private collectors. Much of this recent discussion has centered upon what are known in the museum field as “orphaned objects” or “orphans.” To date, little attention has been paid to what is meant by the term, and various definitions are often given. Our intention in this article is, first, to evaluate the ways in which these definitions have been wielded in the debate over antiquities ownership, and, second, to suggest the policies and remedies necessary to address the status of these objects. Our policy-based approach therefore focuses principally on the ethics regarding the acquisition of “orphans,” rather than their particular legal status.

I. DEFINITIONS OF “ORPHANED ANTIQUITIES.”

The term “orphan” has been employed to describe archaeological finds in three different ways. The first involves the sale of a specific kind of fragmentary archaeological object. The second describes antiquities that are missing contextual information about their findspot or context. The third applies to those objects that museums, for ethical reasons, decline to acquire. Each of these definitions has been used in particular historical contexts and for strategic reasons, which we aim to make clear.

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A. Orphans As Ancient Ceramic Vase Fragments for Sale

The first category of orphaned antiquities encompasses broken fragments of Greek vases, often by well-known painters or potters such as the Berlin Painter, Euphronios, Exekias, and Onesimos, and often come from Etruscan burial contexts in present-day Italy. The Italian Carabinieri referred to these objects as *orfanelli*, and, as part of its investigations into the network of looters operated by an antiquities dealer named Giacomo Medici, researched the frequency with which such fragments enter the antiquities market illegally.¹ When looters uncover a broken vase, they will often purposely keep it in a broken state.² Some orphans also show signs of fresh breaks—suggesting that looters or smugglers cracked the pottery deliberately and recently.³ Such fragments enter the art market over a span of several years, and once a sufficient number have been acquired by a collector or a museum, conservators are utilized to reconstruct a vase.⁴

There are several incentives for this trade in orphans. First, the fragmentary quality and small size of broken pottery are likely to raise little suspicion from customs authorities, which reduces the overall risk of engaging in the illicit antiquities trade.⁵ Second, there may be a financial incentive for museums and collectors when collecting a vase in pieces. It costs less for a purchaser to

1. PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS* 77-79 (2006). For other accounts of Giacomo Medici's trading network, see JASON FELCH & RALPH FRAMMOLINO, *CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD'S RICHEST MUSEUM* (2011).

2. WATSON & TODESCHINI, *supra* note 1, at 77.

3. *Id.* at 224 (on deposition of a curator concluding some orphans derived from recent breaks and observation of a conservator regarding fresh tool marks on orphans).

4. *Id.* at 227.

5. James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States* 5 VILL. SPORTS & ENT. L.J. 19, 19 (1998) (on the ease with which cultural property is smuggled into the United States). See also Christina Luke, *U.S. Policy, Cultural Heritage, and U.S. Borders* 19 INT'L J. CULT. PROP. 175 (2011) (for a discussion of the U.S. customs and the antiquities trade more generally).

acquire the orphans of a broken vase than it does to acquire an intact vase.⁶ Third, orphaned fragments are means of testing foreign governments to see if any will lodge a protest for an acquisition.⁷ Although orphans come to a museum or collector only occasionally—it might take a decade to gather all the fragments for a pot—they are more likely to escape the notice of authorities looking for looted material already on the market or on museum acquisition lists.⁸ If a country lodges a claim against a vase once it has been reassembled, it may face the hurdle of additional statute of limitations concerns.⁹ Fourth, in the Italian case, orphans take many routes through dealers to collectors and museums overseas, although they originated within the same clandestine looting network in Italy.¹⁰ These diversions mask the origins and extent of the illicit trade.¹¹ Fifth and finally, there are advantages for antiquities dealers in the sale of orphans. These transactions represent a means of interesting collectors in potential future acquisitions. Dealers have also been known to ingratiate themselves to a museum by donating orphans that will complete a vase.¹² Fragments may themselves become incentives for larger purchases.¹³ For instance, Giacomo Medici offered the Getty thirty-five orphans by the Berlin Painter for a reduced price of \$125,000, if the museum bought twenty Attic plates he then had for sale.¹⁴

This use of the term orphans is specific to a kind of antiquity—fragments of Greek vases—and a particular kind of pernicious sales practice. While the trade in orphans is common and implicates collectors and museums in potentially embarrassing if not criminal activity, this definitional sense is narrow and atypical. Rather, there are more frequent applications of the concept of the orphan when applied to the archaeological record.

6. WATSON & TODESCHINI, *supra* note 1, at 226, 229.

7. *Id.* at 229.

8. *Id.* at 228, 229.

9. *Id.* at 229.

10. *Id.* at 77-79.

11. *Id.* (on triangulation by antiquities dealers to mask sources).

12. WATSON & TODESCHINI, *supra* note 1, at 78.

13. *Id.* at 77-78.

14. *Id.* at 222-29.

B. Orphans As Objects Lacking Information About Their Findspot

A second usage of “orphan” is associated with antiquities that lack information about their findspot. A findspot is the precise location where an object was unearthed, and, when taken together with data about the other objects found with it and its three-dimensional position, permits archaeologists to create a context and to interpret its use in antiquity.¹⁵ The absence of this information presents problems when analyzing the archaeological record. The characterization of objects with a missing findspot as “orphans” likely originates with Pam Getz-Preziosi’s 1989 study of prehistoric Mediterranean figurines, which devoted some discussion to the special category of Cycladic figures.¹⁶ This highly stylized representational form dates to 2000-3300 BCE, and is a much sought-after collector’s item due to its aesthetically “modernist” appearance.¹⁷ Because of their popularity, Cycladic figures have been targeted by looters and have entered the international art market often without precise information about their findspot.¹⁸ Getz-Preziosi, theorizing on their likely use, described Cycladic figures as orphans if they were missing such contextual data.¹⁹ “With orphaned Cycladic images, as with orphaned images from other regions,” she speculated, “one can never be certain in what context they were used, although the chances are good that it was a sepulchral one.”²⁰

Reviewing Getz-Preziosi’s work, David W. J. Gill and Christopher Chippindale noted that the popularized western image

15. Philippe de Montebello, *Whose Culture Is It? Museums and the Collection of Antiquities*, 15 THE BERLIN J. 33, 34 (Fall 2007), available at http://www.americanacademy.de/sites/default/files/BJ15_Web.pdf (on an object’s findspot); ROBERT J. SHARER AND WENDY ASHMORE, *ARCHAEOLOGY: DISCOVERING OUR PAST* 134 (3d ed. 2003) (on evaluating the nature of context).

16. See generally, PAM GETZ-PREZIOSI, *Prehistoric Stone Images of the Greater Mediterranean Area*, in *IDOLS* (Ariadne Galleries, ed. 1989).

17. *Id.*

18. David W. J. Gill & Christopher Chippindale, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 97 AM. J. ARCH. 601, 610-11 (1993).

19. GETZ-PREZIOSI, *supra* note 16, at 9.

20. *Id.*

of orphans held some appeal for collectors in labeling their acquisitions:

[A]n orphan is a little soul, lost through misfortune, who cries out to be adopted and given a home; a good home will compensate for what it has already suffered. Does not the word 'orphan' carry a similar burden, behind it the fear of losing self, losing the individual, becoming nameless and lost?²¹

Their purpose was not to condone such a position, but to draw attention to the self-reinforcing cycle by which esteem for Cycladic figures led to the looting of Cycladic sites and the creation of orphaned objects without their context.²²

In a follow-up 2000 study, Chippindale and Gill applied the term orphan to other categories of antiquities from the ancient Mediterranean world that were missing information about their findspots.²³ They described *unprovenanced* antiquities—those with “no declared or credible findspots”—as “orphans without history.”²⁴ While concerned primarily with the question of provenance, Chippindale and Gill also called attention to the dates at which archaeological material entered the art market for the first time.²⁵ After reviewing several hundred objects in seven major public and private antiquities collections, they concluded that 75% lacked provenance and 81% had no identified collecting history prior to 1974.²⁶ Recognizing that the loss of the contexts associated

21. Gill & Chippindale, *supra* note 18, at 657.

22. *Id.*

23. Christopher Chippindale & David W. J. Gill, *Material Consequences of Contemporary Classical Collecting*, 104 *AM. J. ARCH.* 463, 463, 467-68 (2000).

24. *Id.* at 463.

25. *Id.* at 467.

26. *Id.* at 463, 476-77. These patterns suggested a link between the looting of archaeological sites and the acquisition of antiquities, and inspired additional research into the antiquities market and the illicit trade. The literature in this area is vast. See generally Neil Brodie and Colin Renfrew, *Looting and the World's Archaeological Heritage: The Inadequate Response*, 34 *ANN. REV. ANTH.* 343 (2005); *ARCHAEOLOGY, CULTURAL HERITAGE, AND THE*

with archaeological finds presented an obstacle to the full interpretation of the material past, they argued that scholars conducting research about antiquities had to rely upon similar pieces with contexts to provide clear parallels.²⁷ As they noted:

On the basis of parallels, usually from excavated contexts, an archaeologist or art historian might try to determine where and when an object was made and perhaps even try to attribute it to an (anonymous) artist, but other questions are unlikely ever to be answered. For example, does the object come from a tomb, sanctuary, or domestic context? What other objects were found with it? Is the object representative of this class of material at this site? No amount of informed guesswork will answer those questions.²⁸

Thus, their definition of orphaned antiquities applied to those objects that surfaced with little or no explanation and which had “to wait until an object comes to light with context” in order to be interpreted.²⁹ Crucially, because this framing emphasized the *loss* of archaeological data due to non-scientific excavations, the debate turned into a question about the value of archaeological methods over other forms of knowledge production that did not require a scientific excavation.

ANTIQUITIES TRADE (Neil Brodie, Morag Kersel, Christina Luke, and Kathryn Walker Tubb, eds., 2008); TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD’S CULTURAL HERITAGE (Neil Brodie, Jennifer Doole and Colin Renfrew, eds., 2001); ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY (Neil Brodie and Kathryn Walker Tubb, eds., 2002); MORAG M. KERSEL, LICENSE TO SELL: THE TRADE IN ANTIQUITIES IN ISRAEL (2006); SIMON MACKENZIE, GOING, GOING, GONE: REGULATING THE MARKET IN ILLICIT ANTIQUITIES (2005); Blythe Bowman Proulx, *Archaeological Site Looting in “Glocal” Perspective*, 117 AM. J. ARCH. 111 (2013).

27. Chippindale & Gill, *supra* note 23, at 500.

28. *Id.*

29. *Id.*

Chippindale and Gill's usage of "orphan" thus proved to be influential and set the terms of the debate surrounding the collection of antiquities during the 2000s.³⁰ The questions now focused on what information, if any, might be recoverable from an orphaned object.³¹ Many archaeologists pointed to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) and its implementing legislation in the United States, the 1983 Convention on Cultural Property Implementation Act (CCPIA), as legal and ethical standards against the sale of orphaned objects.³² Noting that these conventions and laws existed to prevent the looting of ancient sites, archaeologists insisted on a fidelity to their spirit.³³ To defend against the argument that the acquisition of orphans encouraged the illicit trade, the collecting community insisted that valuable knowledge could nonetheless be derived from archaeological objects lacking a context.³⁴ Adopting a traditional art historical approach, some museum directors, such as James Cuno (then at the Art Institute of Chicago, now President and CEO of the Getty Trust) and Neil MacGregor (British Museum) argued that moral and aesthetic truths could be derived from the study of orphans because such an exercise did not require archaeological

30. Brodie & Renfrew, *supra* note 26, at 346; Neil Brodie & Jennifer Doole, *Illicit Antiquities*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S CULTURAL HERITAGE* 3 (Neil Brodie, Jennifer Doole & Colin Renfrew, eds., 2001).

31. See, e.g., Ricardo J. Elia, *Analysis of the Looting, Selling, and Collecting of Apulian Red Figure Vases: A Quantitative Approach*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S CULTURAL HERITAGE* 151 (Neil Brodie, Jennifer Doole & Colin Renfrew, eds., 2001) (on the loss to archaeology and the inability to reconstruct ancient cultures due to the looting of Apulian vases).

32. For an extended discussion on the relationship between archaeology and the CCPIA, see Maria Papa Sokal, *The U.S. Legal Response to the Protection of the World Cultural Heritage*, in *ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE* 36 (Neil Brodie, Morag Kersel, Christina Luke, & Kathryn Walker Tubb, eds., 2008).

33. COLIN RENFREW, *LOOT, LEGITIMACY, AND OWNERSHIP* 65 (2000).

34. Philippe de Montebello, *supra* note 15, at 34.

context as such.³⁵ Philippe de Montebello, in a 2006 speech at the National Press Club, argued that this is precisely the purpose of an art museum in regard to orphaned objects:

As archeologists have said, these unprovenanced objects are orphans, as their parentage through the absence of a known find spot is lost. But would these same archeologists abandon a shivering orphaned child on a cold rainy day in the street or would they look for an orphanage? We museums are the orphanage of these objects. . . . They bring the works they acquire into the public domain. We display them. We publish them electronically as well as on paper. So to those who say do not buy an unprovenanced object, no matter how unique, brilliantly conceived and masterfully crafted it is, I would again ask, and what do you propose should be done with that object? Of course, it is to be deplored that works of ancient art are removed clandestinely from their site. Much knowledge is lost as a result, but we should not compound that loss by helping the work of art to disappear. That would be a violation of our *raison d'être*.³⁶

While the archaeological community and collecting community disagreed with what ought to be done with orphaned antiquities, all sides agreed that they were arguing over objects that resulted from non-archaeological excavations. By focusing on the loss of

35. JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE xix-xxi (2008); Neil MacGregor, *To Shape the Citizens of "That Great City, the World,"* in WHOSE CULTURE? THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES 39 (James Cuno, ed., 2009).

36. Philippe de Montebello, Public Lecture at the National Press Club: Museums and Cultural Property, (Apr. 17, 2006), available at <http://www.c-spanvideo.org/program/192075-1>, at 40:18. A version of the same speech was delivered at the 2006 New York Library Forum on Antiquities and published in essay form in Philippe de Montebello, *And What Do You Propose Should Be Done With Those Objects?*, in WHOSE CULTURE? THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES 55 (James Cuno, ed. 2009).

archaeological context associated with orphaned objects, archaeologists placed the onus on the museum and collecting community to justify the continued acquisition of objects with suspect provenance.³⁷ For this reason, a backlash has developed among certain quarters of the collecting community against this definitional sense of an orphaned object.³⁸

C. Orphans As Objects That Museums Will Not Acquire

The third category of orphans references those unprovenanced objects that museums, for legal or ethical reasons, decline to acquire. Responding to criticism from the archaeological community and foreign criminal investigations into the acquisition practices of American museums at institutions like the Getty Museum and the Metropolitan Museum of Art,³⁹ in 2008, the Association of Art Museum Directors (AAMD) issued an update to its ethical guidelines regarding the acquisition of antiquities. Acknowledging that “the acquisition of archaeological materials and ancient art [had] in recent years become an increasingly complex task,” the AAMD recognized the 1970 UNESCO Convention “as providing the most pertinent threshold for the application of more rigorous standards to the acquisition of archaeological materials and ancient art as well as for the development of a unified set of expectations for museums, sellers and donors.”⁴⁰ The guidelines declared that “[museums] normally should not acquire a work unless provenance research substantiates that the work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970.”⁴¹ There were some exceptions built in to the policy. If museums could establish

37. COLIN RENFREW, *supra* note 33, at 27.

38. Philippe de Montebello, *supra* note 15, at 34.

39. See, e.g., WATSON & TODESCHINI, *supra* note 1; and FELCH & FRAMMOLINO, *supra* note 1.

40. REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART, ASS'N OF ART MUSEUM DIRECTORS 3,4 (2008), available at <https://aamd.org/sites/default/files/document/Antiquities%20Guidelines%20with%20Intro%2006.08.pdf>

41. *Id.*

“an informed judgment” as to whether an object was outside the country of modern discovery before 1970 or legally exported after 1970, then an acquisition could proceed.⁴² The institution was encouraged to “promptly publish acquisitions of archaeological materials and ancient art” and to post the object on an AAMD website known as the “Object Registry.”⁴³ All entries on the AAMD’s Object Registry were to include an image of the object, any provenance information leading the acquiring institution to conclude that its acquisition fell within the AAMD’s parameters, and “all facts relevant to the decision to acquire it.”⁴⁴

The immediate concern among some members of the collecting community was that the 2008 AAMD Guidelines created a special class of orphans, specifically those unprovenanced antiquities in private collections acquired between 1970 and 2008.⁴⁵ The problem was that if the AAMD’s member institutions followed the association’s own recommendations, then they would be unable to ethically receive these objects as donations.⁴⁶ This difficulty was highlighted by a non-profit organization called the Cultural Policy Research Institute (CPRI), which incorporated in 2009. “Dedicated to the study of national and international policies to protect and preserve the world’s antiquities, monuments, and archaeological sites, and to advance human knowledge for the benefit of all,”⁴⁷ CPRI’s board consisted of a number of well-known pro-collecting figures in the antiquities debates, among them Arthur A. Houghton, III, Kate Fitz Gibbon, and Peter K. Tompa.⁴⁸ Houghton, a former curator at the Getty Museum,

42. *Id.*

43. *Id.* The AAMD Object Registry is accessible at *AAMD Object Registry*, ASS’N OF ART MUSEUM DIRECTORS, <http://aamdobjectregistry.org> (last visited Mar. 10, 2013).

44. ASS’N OF ART MUSEUM DIRECTORS, *supra* note 40.

45. *See, e.g., Project on Unprovenanced Ancient Objects in Private US Hands*, CULTURAL POL’Y RES. INST. (Nov. 10, 2009), <http://www.cprinst.org/Home/issues/project-on-unprovenanced-ancient-objects-in-private-us-hands>.

46. *Id.*

47. *Id.* (listing the Cultural Policy Research Institute’s mission).

48. *Board of Directors*, CULTURAL POL’Y RES. INST., <http://www.cprinst.org/cpri-bo> (last visited Mar. 10, 2013) (listing CPRI’s directors, with links to biographical information for each).

developed the institution's theory of "optical due diligence," in which an antiquity's provenance would be accepted without stringent investigation as to validity.⁴⁹ Fitz Gibbon had previously served on the President's Cultural Property Advisory Committee, and is a prominent lawyer for the collecting community.⁵⁰ Tompa is an officer and counsel to the Ancient Coin Collectors Guild (ACCG),⁵¹ which is, at the time of this writing, testing the validity of import restrictions imposed under the authority of the CCPIA on certain coins produced in Cyprus and China in antiquity.⁵² Heavily weighted toward collecting interests and unburdened by a museum of its own to manage, CPRI was free to advance the issue of orphaned objects without risking backlash from foreign governments or other interests.

Shortly after its incorporation, the CPRI released a study titled the "Project on Unprovenanced Ancient Objects in Private US Hands," the purpose of which was ostensibly to work out a methodology for quantifying the number of unprovenanced antiquities held in private collections.⁵³ The reasoning behind the study related chiefly to the objects that the AAMD recommended that institutions not acquire and set forth a new definition and story for what counted as an orphan:

Objects that the AAMD guidelines exclude from acquisition by Member museums include all archaeological material or ancient art in private hands whose provenance is uncertain. . . . By the self-rule of the AAMD, objects excluded from acquisition by Member museums cannot have the benefit of professional museum exhibition, publication, or conservation. Because such objects

49. FELCH & FRAMMOLINO, *supra* note 1, at 61.

50. *Vice President: Kate Fitz Gibbon*, CULTURAL POL'Y RES. INST., <http://www.cprinst.org/cpri-bo/kate-fitz-gibbon> (last visited Mar. 10, 2013).

51. *Legal Officer: Peter K. Tompa*, CULTURAL POL'Y RES. INST., <http://www.cprinst.org/cpri-bo/peter-k-tompa> (last visited Mar. 10, 2013).

52. The most recent decision in this case is *Ancient Coin Collectors Guild v. U.S. Customs & Border Protection*, 866 F. Supp. 2d 28 (D.D.C. 2012), *petition for cert. filed* (U.S. Feb. 12, 2013) (No. 12-996).

53. CULTURAL POL'Y RES. INST., *supra* note 45.

can have no permanent parentage or protection (many run the risk, over time, of deterioration, damage or destruction), these objects are here informally termed “orphans.”⁵⁴

The study released no methodology, provided no sampling strategy, and was not submitted to peer-review. It did, however, release numbers for Greek, Roman, and other objects from the ancient Mediterranean world, estimating that there were 67,500-111,900 objects in private collections that were now excluded from acquisition under the AAMD guidelines.⁵⁵

Despite the shortcomings inherent to the study, the CPRI succeeded in shifting the discourse surrounding orphaned objects to its terms. Throughout 2012, articles in the *New York Times* began reporting on the problem of orphans, describing difficulties private collectors faced in convincing art museums to accept their pieces as donations in the wake of the 2008 AAMD guidelines.⁵⁶ One piece even referenced the CPRI study as a source.⁵⁷ Similarly, Timothy Rub, director of the Philadelphia Museum of Art, in a 2011 presentation at the University of Pennsylvania Museum, argued that the field needed “to come to terms with the vast number of ‘orphaned objects’—to use a term with which all of us are familiar but no one likes—that have come into circulation since 1970 as well as those that will appear in future years.”⁵⁸ In a veiled reference to the CPRI report, he noted that “[s]ome have

54. *Id.*

55. *Id.*

56. Ralph Blumenthal & Tom Mashberg, *The Curse of the Outcast Artifact*, N.Y. TIMES, July 12, 2012, http://www.nytimes.com/2012/07/15/arts/design/antiquity-market-grapples-with-stricter-guidelines-for-gifts.html?pagewanted=all&_r=0; Randy Kennedy, *Museum Defends Antiquities Collecting*, N.Y. TIMES, Aug. 12, 2012, http://www.nytimes.com/2012/08/13/arts/design/cleveland-museum-buys-antiquities-stirs-ethics-debates.html?pagewanted=all&_r=0.

57. Blumenthal & Mashberg, *supra* note 56.

58. Timothy Rub, Director of Phila. Museum of Art, Public Lecture at the University of Pennsylvania Museum of Archaeology and Anthropology: The Shape of Things to Come: Developing Collections of Antiquities and Archaeological Materials in the 21st Century (Oct. 6, 2011).

estimated that there may be as many as 100,000 works that now fall into this category."⁵⁹ The Asia Society, with participation by CPRI officers, convened a 2012 conference on the topic of collecting ancient art, which also dealt with the problem of objects orphaned by the 2008 AAMD guidelines.⁶⁰ Michael Bennett, curator of Greek and Roman Art at the Cleveland Museum of Art was quoted by the *Art Newspaper* as saying there was an urgent need "for 'policy shapers' such as the AAMD to ensure that the 'numerous' antiquities 'dispersed' throughout private collections 'land in homes' for the public."⁶¹ These are precisely the orphans upon which CPRI intended to refocus acquisition policy questions.⁶² Whereas archaeologists associated orphaned objects with a loss of knowledge, the CPRI redefined orphans as those objects missing from American museums.⁶³

II. ADDRESSING THE PROBLEM OF ORPHANED ANTIQUITIES.

Given these concerns about orphans, there have been a number of efforts to address the problem of unprovenanced antiquities. A recent effort by the AAMD gives special weight to the orphans identified by the CPRI. Here, we evaluate the AAMD's effort and propose the outline of an alternative resolution.

A. AAMD 2013 Response

One solution to the orphaned object question was offered by the AAMD in early 2013, when the organization adopted a new set of guidelines for the acquisition of archaeological material and

59. *Id.*

60. For a video and summary of the program, see *Collecting Ancient Art in the 21st Century*, ASIA SOC'Y (Mar. 18, 2012), <http://asiasociety.org/video/arts/collecting-ancient-art-21st-century>.

61. Erica Cook, *What Should We Do With "Our" Antiquities?* ART NEWSPAPER (Nov. 17, 2011), <http://www.theartnewspaper.com/articles/What-should-we-do-with-our-antiquities/25018>.

62. CULTURAL POL'Y RES. INST., *supra* note 45.

63. *Id.*

ancient art.⁶⁴ The organization reasserted its commitment to the preservation of cultural heritage and to use the 1970 UNESCO Convention's date as the "most pertinent threshold" for guiding the acquisition of antiquities by its member museums,⁶⁵ declaring that "[m]ember museums normally should not acquire a Work unless provenance research substantiates that the Work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970."⁶⁶ Even while holding this standard, the guidelines accorded each museum the "right to exercise their institutional responsibility to make informed and defensible judgments about the appropriateness of acquiring such an object."⁶⁷ As such, the guidelines provide a number of exceptions under which museums can acquire unprovenanced material.⁶⁸ Critically, the new guidelines accepted the CPRI's basic premise in the debate over orphaned objects, creating opportunities for the acquisition of antiquities exported from their countries-of-origin after 1970 but in private collections or on loan to museums by 2008.⁶⁹ In effect, the

64. GUIDELINES ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIAL AND ANCIENT ART, ASS'N OF ART MUSEUM DIRECTORS (2013), *available at* <http://www.aamd.org/papers/documents/GuidelinesontheAcquisitionofArchaeologicalMaterialandAncientArtrevised2013.pdf>.

65. *Id.* at 3-4.

66. *Id.* at 6.

67. *Id.* at 4.

68. *Id.* at 6-7.

69. *Id.* The four exceptions for the acquisition of material exported after 1970 and in private collections or on loan prior to 2008 are as follows:

The donor/testator signed prior to 2008 a promise to gift, a will, a trust, or other document setting forth her/his intent to donate or bequeath the Work to the museum;

[T]he Work was on long term loan to the museum prior to 2008;

[T]he museum had an expectation prior to 2008 of receiving the Work by gift or bequest, as reflected in (i) a writing to or from the donor or a prior owner, (ii) communications with the donor or a prior owner, provided that the communications have been memorialized by the museum prior to acceptance of the gift or bequest or (iii) other documentation, or

problem of orphans, at least as defined by the CPRI, has ceased to exist because the AAMD established a generous mechanism permitting their acquisition.

B. Orphaned Antiquities Are Not Truly Lost

In revising the AAMD guidelines, the collecting community gave tacit endorsement to the CPRI's theory that AAMD member museums' refusal to acquire orphaned objects would somehow result in those objects forever being lost to the public by means of damage, destruction, or theft. We remain unpersuaded. Simply, we are not convinced that the objects or the visual information associated with them will be lost if museums do not acquire them. Nor do we think it likely that orphaned objects will be hidden from public view and possibly destroyed. There are several reasons as to why. First, for many collectors, antiquities represent a significant personal investment in terms of money, devotion, and interest. Placing an object at risk acts against rational economic action and any intellectual sensibilities held by a collector. Second, many collectors desire the academic study of their personal collections and are eager to make their objects available to a wider audience through publications and loans. Finally, little if any evidence suggests that collectors are disposing of their antiquities in ways adverse to the preservation of the objects themselves. Rather, we expect that orphans will most likely remain in private hands and, unfortunately, the objects will be eventually offered to institutions that do not follow the ethical guidelines set forth by the AAMD.

Although this situation results in an undesirable outcome, we do not believe that the alternative is viable. The AAMD's ethical guidelines for acquisition should not be discarded whenever member museums find those standards to be inconvenient. Such revisionism makes a mockery of having guidelines in the first place. Museums in North America have the opportunity to act as

The acquisition is of a fractional interest in the Work by gift, bequest or purchase and the museum acquired prior to 2008 a fractional ownership interest in the Work.

Id.

moral institutions for our communities in many ways. One of the most important is to respect not only other cultures and the art from those cultures, but also to respect the laws of countries that today encompass those cultures.

C. Alternative approaches to the issue of orphaned objects

If, as we have argued, the solution offered by the AAMD's 2013 guidelines is unsatisfactory because it accepts a definition of orphaned objects that intends to streamline the acquisition process, what alternatives might be envisioned for unprovenanced material? We find that Timothy Rub's 2011 presentation at the University of Pennsylvania Museum offers a productive starting point. At that time, he argued at length that:

[B]y declining to participate in this market museums incur (to use a term favored by economists) a significant "opportunity cost." In other words, they forego the opportunity to acquire works of art that may have gaps in their provenance but—in the absence of any evidence that they were looted or illegally exported—can legally be accessioned or made part of their collections if their policies allow for this. The truth of this observation notwithstanding, I hardly consider it to be a compelling reason to acquire antiquities that do not have an acceptable provenance. And for the time being, the revised guidelines adopted several years ago by the Association of Art Museum Directors essentially discourage its members from doing so.

As a short-term measure I think that such a solution—that is to say, not acquiring works that have an incomplete provenance (or none at all) through gift or purchase — is, in fact, not only acceptable, but also desirable. In the long term, however, I believe that continuing to address the issue in this particular (and peculiar) way—that is to say, taking the moral high ground but ignoring

the long-term consequences of such a decision—will be counterproductive and only serve to compound a problem that needs to be resolved not because we have an obligation to develop our collections *but because we have a custodial responsibility to care for, study, and share with the public and the scholarly community objects of historical and aesthetic value.*⁷⁰

We find ourselves in agreement with Rub that the decision not to acquire antiquities without clear provenance is “not only acceptable, but also desirable.”⁷¹ On this point there should be little debate. If it is unethical to acquire unprovenanced material now, why would it be any less unethical in the future? At the same time, we also acknowledge that there needs to be some long-term solution to the issue of unprovenanced material currently in the United States.⁷² However, we enter this discussion with the caveat that such a resolution cannot be stacked in favor of museums that desire the acquisition of unprovenanced material. A true balance involves an investigation into provenance where the outcome may be uncertain.

As we see it, there are two principal issues involved in resolving the question of orphaned antiquities: first, how to identify the provenance of orphans; and, second, what actions ought to be taken when provenance cannot be identified through good faith due diligence.

1. How to identify the provenance of orphans

The first problem is one of methodology. Museums, when considering an acquisition of an object through purchase or donation, need to investigate whether it was looted or illegally

70. Rub, *supra* note 58 (emphasis added).

71. *Id.*

72. On the arguments surrounding looting and proposed legal remedies, see generally Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169 (2007).

exported from its country-of-origin. While such a conclusion may be difficult to reach, we do not think it unreasonable to ask that public museums, operating in a cosmopolitan political environment, ensure that they are acting in accordance with the international agreements, national laws, and the sensibilities of local and international publics. For this reason, we maintain that an acquiring institution must always demonstrate the negative—that an object was not looted nor exported illegally—before proceeding with the purchase or gift. It is also clear that it is virtually impossible in most cases to demonstrate the negative proposition for both unless there is paperwork associated with an object.⁷³

Generally speaking, however, if an object has been excavated legally and sanctioned by a government, today or in the past, there should be associated papers such as an excavation permit.⁷⁴ Similarly, if the object has been exported legally, there should also be associated papers such as an export permit.⁷⁵ Indeed, there is a long history of archaeological permits and export documentation in many of the so-called source countries for antiquities.⁷⁶ Does the absence of such paperwork indicate the opposite: that an object had been looted or illegally exported? We cannot state this proposition with absolute certainty, but the lack of documentation suggests a taint associated with the object in question. But a fair question here is the date for which clear provenance must be identified. At a minimum, this date should be 1970, reflecting the date of the 1970 UNESCO Convention, and a marker that ratifying

73. There have been notable exceptions, which have permitted the recovery of provenance information. Giacomo Medici took Polaroid photographs of unexcavated material that was later looted, and at least two other similar photographic archives are known to law enforcement. WATSON & TODESCHINI, *supra* note 1, at 57; FELCH & FRAMMOLINO, *supra* note 1, at 152. Museum curators at the Metropolitan Museum and the Getty Museum were also apparently aware of the archaeological site from which the Euphronios Krater was looted. FELCH & FRAMMOLINO, *supra* note 1, at 209.

74. For a discussion of archaeological permits, see CHRISTINA LUKE & MORAG KERSEL, U.S. CULTURAL DIPLOMACY AND ARCHAEOLOGY: SOFT POWER, *HARD HERITAGE* 47 (2013).

75. *Id.*

76. *Id.*

countries, archaeologists, and the collecting community themselves have cited as a clear line regarding acquisitions.

Provenance research, an important aim for museums and art historians alike, represents a growing field. The Boston Museum of Fine Arts has employed a provenance researcher since 2003 and the Cleveland Museum of Art hired such a curator in early 2013.⁷⁷ These researchers have been focusing, and probably will continue to focus, on the provenance of artworks during the period of the Holocaust in order to properly acknowledge the ownership status of pieces obtained unlawfully through force or coercion during Nazi-era Germany and Europe. The potential for expanding such provenance research into a study of antiquities is clear and needs to become a regular component of museum acquisition and curatorial practice. Such provenance research would answer two questions as its primary goal:

1. Does the object in question come with any documentation stating that it was both excavated legally and exported legally from the country-of-origin?
2. Is there clear evidence that the object in question was out of its probable country-of-origin prior to 1970?

Each of these questions is answerable by different lines of evidence. The first is directly addressed by the existence of proper documents. Either such a paper trail exists and can be identified through adequate archival research, or it does not. The second question can be satisfied through the publication of the object with identifying information in a scholarly publication or catalogue prior to 1970; or through clear evidence from *secondary*

77. Geoff Edgers, *A Detective's Work at the MFA*, BOSTON GLOBE, Dec. 11, 2011, <http://www.bostonglobe.com/arts/2011/12/11/detective-work-mfa/6iaei4YOQOj83s9u3YfDXO/story.html>; Stephen Litt, *Cleveland Museum of Art Hires Victoria Sears Goldman as Its First Full-Time Provenance Researcher*, PLAIN DEALER, Feb. 14, 2012, http://www.cleveland.com/arts/index.ssf/2013/02/cleveland_museum_of_art_hires_1.html.

documentation that the object was exported from its country-of-origin prior to 1970. By secondary documentation we have in mind material such as family photographs, journals, estate records, and oral histories. Since the enactment of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990, such evidence has been widely employed to address questions about the ownership status of Native American objects that come under the law's purview.⁷⁸ Tribes lodging NAGPRA claims have found such material to be useful in answering similar questions of date and context, although their efforts have been to justify repatriation rather than museum acquisition.

Investigation into available secondary documentation will consume the time of any provenance researchers, museum curators, and archaeologists. Yet it offers a reasonable path forward. Even in cases where due diligence has occurred, we acknowledge that provenance research may not produce documentation about legal excavation and export or will not be able to demonstrate that an object left its country-of-origin prior to 1970. If this situation results from the research, the object must be identified as the property of another country—even when that country is unknown—and therefore should not, under the AAMD guidelines, be acquired by museums either through purchase or donation.

2. Actions needed when provenance cannot be identified.

The second difficulty arises in situations when provenance cannot be determined following a good-faith research process. If, as we have insisted, those objects missing provenance following proper research are identified as the property of another country, then to which county should they be returned? As has often been argued, the boundaries of modern countries and those of ancient

78. See, e.g., Robert W. Preucel, Lucy F. Williams, Stacey O. Espenlaub, and Janet Monge, *Out of Heaviness, Enlightenment, NAGPRA and the University of Pennsylvania Museum of Archaeology and Anthropology*, 45 EXPEDITION 25 (2003).

cultures do not correspond in any regular way.⁷⁹ The ancient Roman Empire crossed over twenty-five modern countries, and ancient Maya culture extended over an area that today includes the countries of Mexico, Belize, Guatemala, Honduras and El Salvador, with additional stylistic influence extending southward into lower sections of Central America and even northward into the southwestern regions of the United States.⁸⁰ Therefore, it is often difficult, if not impossible, to know the precise context of an antiquity and therefore to which country an object should be returned.

Present-day geography should not provide an excuse to avoid returning unprovenanced antiquities and acknowledging the legitimate claims of the modern countries associated with the objects. Again, the experience with NAGPRA proves to be instructive. In many cases, present-day tribal communities hold equally strong claims to archaeological material and sacred cultural objects. NAGPRA asks that research be conducted, "based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion," in order to determine the most likely affiliated tribe.⁸¹ In such cases where multiple claimants remain, the tribes must agree among themselves on the deposition of the object in question.⁸²

A NAGPRA-like model is suitable to address our international concerns here. Using the preponderance of evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other information or expert opinion, provenance researchers could identify the most

79. See, e.g., Chipplindale & Gill, *supra* note 23, at 505; Philippe de Montebello, *supra* note 15, at 33.

80. CHRISTOPHER KELLY, ROMAN EMPIRE: A VERY SHORT INTRODUCTION 1 (2006) (on the ancient spread of the Roman empire); GORDON R. WILLEY, AN INTRODUCTION TO AMERICAN ARCHAEOLOGY, VOL. 1, NORTH AND MIDDLE AMERICA 85 (1966) (on the spread of Maya culture).

81. 25 U.S.C. § 3005(a)(4) (2006).

82. *Id.* § 3005(e). Models for international repatriation by cultural region are explored in Marion P. Forsyth, *International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities* 8 CHI. J. INT'L L. 197 (2007).

likely countries of origin in a region for particular unprovenanced objects. Why not return title to these countries and allow the countries to decide for themselves the ultimate disposition of the object? By adopting a regional approach, this solution avoids the need to identify the precise modern country from which an object was originally unearthed, while also acknowledging the imperative to return unprovenanced material. Moreover, it also involves source countries in the decision-making process of how American museums treat cultural objects originating within their borders, thereby engaging multiple, competing interests in stewardship of our ancient heritage.⁸³

III. CONCLUSION:

NARRATIVES, NEGOTIATIONS, AND POWER RELATIONS.

As we have argued in this paper, an “orphaned object” is a complex and loaded term that has gone through several definitional incarnations. Caught up in a discourse about the preservation of the world’s ancient heritage, the entire discussion about orphans is enmeshed in a broader debate about the relative worth of different classes of knowledge about the ancient past and an asymmetrical power structure in which North American museums can rely upon wealth and a legal system to enforce their collecting rights. Most recently, the collecting community has seemingly prevailed with a narrative that imbues inanimate ancient objects with a life story that casts them as lost, abandoned children with no hope of finding a good home in the world due to misguided ethical regulations. Such a narrative, we maintain, is counterproductive, as it erases differences in effective decision-making power and control between the museums of North America and source countries from the Mediterranean, Asia, and Central and South America.

In many ways, narrative of orphaned objects makes for a poor analogy. There are objects that have been circulating on the art market prior to the 1970 UNESCO Convention, which are

83. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT’L L. 197 (2000-2001) (advancing restitution as a remedy in order to advance the public interest).

currently perceived to be acceptable acquisitions. There are objects looted and exported from their countries-of-origin after 1970, which are not. This latter category must be returned, or at least deeded, to their country-of-origin. The burden of proof must at all times remain on museums to prove a pre-1970 provenance for their acquisitions. Detailed provenance research, something museums have now initiated with Nazi-era art, can assist in the creation of a new discussion between museums and source countries because both parties must be engaged in a negotiation prior to an acquisition. Following these practices, museums are not guaranteed an acquisition as they are almost invariably now; instead, they would only be entitled to enter a research process that might result in an acquisition or in the restitution of an object to its rightful owner. Such a step forward would help bring parity in structural power relationships.

Museums can only begin to create a new narrative that is structured along the lines of such a symmetrical relationship. A crucial step is to permit countries-of-origin to have a voice in the decision-making process about the deposition of antiquities that were removed from their borders after 1970. Museums have tried to emphasize their position in our society as educational institutions that can teach us about all the world's cultures. But institutions can only claim the mantle of morality when they treat source countries as having legitimate interests in the fate of antiquities and not to use caring for the world's orphans as an excuse for acquisitions.

