Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions

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Cover Page Footnote
Leila Amineddoleh is an art and cultural heritage attorney, the Executive Director of the Lawyers’ Committee for Cultural Heritage Preservation, and an adjunct professor at Fordham University School of Law. She would like to acknowledge Filippa Anzalone, Jane Pakenham, Kelvin Collado, and Amanda Rottermund for their valuable insights and assistance.
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Leila Amineddoleh*

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INTRODUCTION

The protection of cultural heritage 1 against theft, looting, improper acquisition, and destruction is tremendously important because cultural heritage objects hold invaluable historic and cultural significance. First, the preservation of cultural heritage objects is important for human civilization, as developments in cultural heritage reflect mankind’s collective history and societal changes. A record of mankind’s evolution enables an examination

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1 Cultural heritage is the legacy of physical artifacts (such as buildings, monuments, landscapes, books, works of art, and artifacts) of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations. Cultural heritage is unique and irreplaceable, which places the responsibility of preservation on the current generation. The United Nations Educational Scientific and Cultural Organization (UNESCO) defines heritage as “the product and witness of the different traditions and of the spiritual achievements of the past . . . thus an essential element in the personality of peoples.” United Nations Educ. Scientific and Cultural Org., Records of the General Conference Fifteenth Session, 1968, U.N.E.S.C.O., available at http://portal.unesco.org/en/ev.php-URL_ID=13085&URL_DO=DO_TOPIC&URL_SECTION=201.html.
of humanity’s changes, including all aspects of social, religious, political, and scientific developments. Second, select pieces of cultural property hold great significance for various ethnic and cultural groups, because these works facilitate a sense of identity and pride, a value that should be fiercely guarded. Third, cultural heritage is a commodity that creates a stream of revenue through tourism, branding, and educational structures. The value that derives from cultural heritage has the ability to last for centuries in the future. Fourth, cultural heritage should be protected for equitable reasons; thieves should not be able to gain exclusive access to these objects and reap their value while simultaneously depriving the world from experiencing their value. Lastly, cultural heritage theft should be policed because of its link to global terrorism, money laundering, and drug and weapons trafficking. Over the past decade, the trade in looted antiquities remains one of the most prolific illicit trades globally, together with drug and arms trafficking.

There are many ways to protect cultural heritage as a valuable commodity. Although heightened security measures and extensive

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surveillance methods can deter theft, a more effective means for reducing theft is the elimination of the demand for black market art items. Trade in unprovenanced antiquities is a demand-driven crime; the market for illegal or undocumented items is driven by buyers’ wants. The most effective method of protection for cultural heritage is to eliminate the demand for black market for these precious objects, thereby reducing the market, a method known as the “market reduction approach.” There is a well-documented link between the demand for items without provenance and museums. To eliminate black market demand, legislation is necessary to prosecute and regulate buyers, such as museums.

As buyers, museums should be subject to greater scrutiny when acquiring objects. Museums have the ability and responsibility to appropriately research their acquisitions, as their objective is to house and preserve artwork. According to the International Council of Museums (“ICOM”), museums are “non-profit, permanent institution[s] in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.” Due to their educational and public purpose, museums are generally granted tax deductions and

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9 See generally *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* (Stefano Manacorda & Duncan Chappell eds., 2011).


12 Id.
government funding. A portion of these monetary resources should thus be mandated for the due diligence required for museums to properly conduct acquisition investigations. In fact, if museums continue to purchase and receive pieces from the black market, they are perpetuating the use of public dollars in the furtherance of illicit and terrorism-linked activities.\(^\text{13}\) The nexus between government dollars and black market trade requires the United States to take greater action in the prevention of museums’ acquisitions of looted artwork.

An increase in communication and knowledge within the art community is needed to deter cultural heritage destruction. With greater communication, the resale of stolen artwork will become more dangerous, increasingly difficult, and less profitable because the demand for these pieces will decrease. To further protect against art theft, the U.S. government should increase penalties on museums for acquiring questionable objects; monetary fines should be heightened, criminal charges should be brought against perpetrators, and the government should more aggressively investigate and pursue a greater number of cases. Museums regulate their own acquisition practices within industry guidelines (set forth through organizations such as ICOM\(^\text{14}\) and the Association of Art Museum Directors\(^\text{15}\)), but these guidelines are not enforceable as they are not codified in any federal or state laws that include sanctions or penalties for violators.\(^\text{16}\)

Although there are laws aimed to deter art theft,\(^\text{17}\) the United States government and the international community are not utilizing these legal tools to their fullest potential. The problem with the current status of the law is that many of the applicable

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\(^{13}\) See infra Part III.G.3 for discussion of links to terrorism.


\(^{17}\) See infra Part II.
laws derive from international treaties that have not been ratified by Congress. Since these treatises frequently concern treasures hailing from other nations, the United States has not placed high priority on these agreements. However, as the international community now recognizes the extent to which artwork is stolen, governments are finding it essential to take action. At the forefront of this movement are the Italian government, the Turkish government, and other nations rich in antiquities.

I. BACKGROUND

A. Cultural Heritage Looting

Despite the long history between art and cultural heritage misappropriation, modern day looting of cultural heritage is greater in scale and more damaging than pillaging witnessed in the past. The illicit art and antiquities market pre-date ancient Greece. In more recent history, cultural artifacts have commonly been stolen and smuggled by hiding their sources. By hiding their sources, such as hiding their information, cultural artifacts have been able to evade detection and law enforcement.

19 See Italy v. Marion True, Trib. Roma, sez. VI pen., n. 19360/10 (Oct. 13, 2010) (It.) (Italian prosecutors famously attempted to penalize the now infamous Getty ex-curatorial Marion True with criminal sanctions.).
20 See Dayla Alberge, Turkey Turns to Human Rights Law to Reclaim British Museum Sculptures, GUARDIAN, Dec. 8, 2012, http://www.guardian.co.uk/culture/2012/dec/08/turkey-british-museum-sculptures-rights (Turkish officials have taken action by demanding the restitution of cultural heritage objects, citing human rights principles.).
24 See id.
sources, looters deprive the world of accurate information about the artwork. The environment surrounding an object provides essential information about the piece because it helps archaeologists and historians properly date an object and understand its context. Artifacts ripped from the ground without adherence to any archaeological process lose context and scholarly value because the value of archaeological sites is realized through stratigraphic excavation. (Stratigraphic excavation entails removing artifacts and sediments from vertically discrete three-dimensional units of deposition and keeping those artifacts in sets based on their distinct vertical recovery proveniences for the purpose of measuring time. Additionally, art theft can lead to further destruction by disrupting objects found near the target artifact, as context is of the utmost importance for archaeologists. When art is acquired surreptitiously, archaeologists lose this valuable context information. In addition, art theft may also lead to the physical destruction of target objects because untrained looters unearth objects without adhering to the necessary preservation methods and using the appropriate tools.

that antiquities looted from Iran were found in Syria and Afghanistan); see also United States v. An Antique Platter of Gold, 184 F.3d 131, 133 (2d Cir. 1999) (antiquities smuggler stated that an object came from Switzerland, rather than Sicily).

See Katharyn Hanson, Why Does Archaeological Context Matter?, in CATASTROPHE! THE LOOTING AND DESTRUCTION OF IRAQ’S PAST 45 (Geoff Emberling & Katharyn Hanson eds., 2008) (“Archaeological context is provided by information about the archaeological level in which an artifact was found, the type of building where it was found, where it was found inside that building, objects found nearby, and how these artifacts were discarded.”).

See id. (stating “[d]uring an archaeological excavation an artifact’s context is carefully identified and recorded by archaeologists”).


See Brodie, Doole & Watson, supra note 23, at 16.

See Ask the Experts: AIA Archaeology FAQ, ARCHAEOLOGICAL INSTITUTE OF AMERICA, http://www.archaeological.org/education/askexpertsfaq (last visited May 24, 2014) (“Once an object is removed from its original setting, it often loses much of its informational value.”).

In order to transport cultural heritage objects, some thieves intentionally destroy the pieces by temporarily defacing or disguising the artwork to clear it through customs, and then later repair the pieces when they arrive at their destinations. Since these thieves may not be knowledgeable about the protection of artwork, they irreparably destroy the artifacts through such tactics. Furthermore, in an effort to maintain a discreet profile, thieves may be forced to transport objects in crude, unsafe, and unreliable ways that may lead to the physical destruction of the works.

B. The History of Museum Collecting

A museum is defined as an “institution dedicated to preserving and interpreting the primary tangible evidence of humankind and the environment.” The word museum has classical origins, deriving from the Greek mouseion, a sanctuary or temple dedicated to the Muses, meaning “seat of the Muses.” This term referred to a philosophical institution or a place of contemplation. Use of the Latin derivation, museum, appears in Roman times mainly to indicate places of philosophical discussion. In ancient Greece, art collections honoring the gods were sacred, and symbolized the glory and power of the city-state. The word museum was revived in fifteenth century Europe to describe the collection of Lorenzo de Medici in Florence, but the term conveyed the concept of

37 See id.
comprehensiveness rather than denoting a building.\textsuperscript{39} By the mid-seventeenth century the idea of the museum went public and the world’s first university museum, the Ashmolean Museum of Art and Archaeology in Oxford was opened in 1683.\textsuperscript{40} In 1759, the British Museum was formed to benefit the public “not only for the inspection and entertainment of the learned and the curious, but for the general use and benefit of the public.”\textsuperscript{41} Then in 1793, the Louvre opened in Paris, with the right to visit collections belonging to all citizens.\textsuperscript{42}

Museums were slow to develop in the United States, but their charters emphasized educational aims.\textsuperscript{43} From the inception of U.S. museums, people felt that the government should support art museums, in the way that schools, libraries, and parks were assisted.\textsuperscript{44} Nearly all of the early museums and galleries in the U.S. were nonprofit corporations under the control of a private board of trustees.\textsuperscript{45} The largest museum in the U.S., the Metropolitan Museum of Art (“the Met”),\textsuperscript{46} was founded with substantial support from the government.\textsuperscript{47} The Met’s earliest roots date back to 1866 in Paris, France, when a group of Americans agreed to create a “national institution and gallery of art” to bring art and art education to the American people.\textsuperscript{48} The museum was eventually founded in 1870.\textsuperscript{49} Pursuant to the institution’s charter, the

\textsuperscript{39} See Lewis, supra note 36.
\textsuperscript{41} See Lewis, supra note 36.
\textsuperscript{43} See MERRYMAN ET AL., supra note 38, at 906.
\textsuperscript{44} See PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW (3d ed. 2012).
\textsuperscript{45} See id. at 226.
\textsuperscript{47} See WINIFRED EVA HOWE & HENRY WATSON KENT, A HISTORY OF THE METROPOLITAN MUSEUM OF ART (1913).
museum was built with substantive city funds and it was maintained by expenditures paid by the city.\textsuperscript{50} To this day, ownership in the building remains with the city; however, a private group of trustees still controls the museum and its contents.\textsuperscript{51}

According to the International Council of Museums (“ICOM”), a museum is a “permanent non-profit institution at the service of society and its development, open to the public, which collects, conserves, researches, exhibits, and makes accessible the tangible and intangible heritage of humanity and its environment for study, education and enjoyment.”\textsuperscript{52} ICOM, created in 1946, is a non-governmental organization and the only worldwide organization of museums and museum professionals committed to the promotion and protection of tangible and intangible cultural heritage.\textsuperscript{53} ICOM maintains formal relations with UNESCO, and has approximately 21,000 members in 146 countries.\textsuperscript{54}

\textbf{II. State of the Law}

Although the United States government has not been particularly aggressive in pursuing charges against prominent art dealers or museum representatives, prosecutors have legal tools to use against art thieves. As stated by the English Court of Appeals in \textit{Government of the Islamic Republic of Iran v. Barakat Galleries Ltd.}, “it is essential for every State to become alive to the moral obligations to respect the cultural heritage of all nations and that the protection of cultural heritage could only be effective if organized [sic] both nationally and internationally among States working in close co-operation.”\textsuperscript{55} The international community first cooperated to protect cultural heritage after the substantial loss

\textsuperscript{50} See \textit{Gerstenblith}, supra note 44, at 227.

\textsuperscript{51} See \textit{id.}

\textsuperscript{52} See \textit{Merryman et al.}, supra note 38, at 907; see also ICOM, ICOM Internal Rules and Regulations, art. 2, sec. 1.1 (June 1, 2010), \textit{available at} \textit{http://archives.icom.museum/download/InternalRulesandRegulations.pdf}.


\textsuperscript{54} See \textit{id.}

of art resulting from the World Wars.\textsuperscript{56} The resulting agreement, the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict ("The Hague Convention"), addresses wartime looting and destruction, and has proven ineffective in the prevention of cultural heritage loss.\textsuperscript{57} Due to the chaotic and destructive nature of war, the Hague Convention has been unsuccessful in the protection of property.\textsuperscript{58}

Whereas the Hague Convention is limited in scope to the protection of cultural heritage during times of war,\textsuperscript{59} the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Expert, and Transfer of Ownership of Cultural Property of 1970 ("1970 UNESCO Convention") is broader in its application.\textsuperscript{60} The convention allows nations to seek the repatriation of cultural heritage in foreign jurisdictions.\textsuperscript{61} However, there are major shortcomings with this convention. The convention is not self-executing, meaning that the state party must enact implementing legislation; a change in the domestic law that will direct it to fulfill treaty obligations.\textsuperscript{62} Another shortcoming is that the convention allows treaty signors to cherry-pick portions of the agreement.\textsuperscript{63}

In 1972, the United States ratified Articles 7(b)(1) and 9 of the 1970 UNESCO Convention,\textsuperscript{64} calling for "necessary concrete

\textsuperscript{56} See Lisa J. Borodkin, \textit{The Economics of Antiquities Looting and a Proposed Legal Alternative}, 95 Colum. L. Rev. 377, 388 (1995) (explaining that the widespread looting and bombing during the World Wars played a major part in the destruction of art, and was the motivation for laws and policies aimed to better protect these objects).


\textsuperscript{58} See \textit{id.}


\textsuperscript{61} See \textit{id.}

\textsuperscript{62} See \textit{id.}

\textsuperscript{63} See \textit{id.}

measures” to restrict importation of cultural materials. As the convention did not have basis in U.S. law, legislation was needed to allow for its implementation. In 1983, Congress passed the Cultural Property Implementation Act ("CPIA") in order to implement the 1970 UNESCO Convention. The CPIA prohibits the importation of stolen cultural material from other state parties, and applies import controls over a state’s patrimony in danger of pillage. The benefit of the CPIA is that it is a civil regulation that allows the government to regulate importation without obtaining the heavy burden of a criminal conviction. The CPIA authorizes the government to seize property if the object meets the UNESCO definition of “cultural property.”

However, the CPIA is designed only as a civil customs statute, and it lacks the weight of criminal penalties. In addition, the CPIA leaves particular types of thefts unpunished because the law limits protection only to the restricted class of objects stolen from museums and cultural sites specified in the CPIA. Notwithstanding, the Second Circuit held that the CPIA is not the exclusive means for assessing penalties in cases involving objects stolen from other nations; essentially the CPIA does not prevent the pursuance of a criminal prosecution. In the action against Frederick Schultz, an antiquities dealer and the former president of

30, 2014) (Pursuant to Article 7(b)(1), state parties agree to prohibit the importation of documented cultural property stolen from museums or religious or secular public monuments in another state party to the Convention. Article 9 allows any state party whose cultural patrimony is in jeopardy from pillage to call for aid from other states parties to take actions to control of exports, imports, and international commerce in the cultural materials concerned.).

65 See UNESCO Convention, supra note 60, art. 9.
69 See id.
71 See id.
the National Association of Dealers in Ancient, Oriental, and Primitive Art, the Second Circuit found that not only did the CPIA apply, but the National Stolen Property Act applied as well.73 The National Stolen Property Act (“NSPA”), section 2315 of Title 18 of the United States Code, provides that a person is guilty of a crime if he “receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise . . . which have crossed a State or United States boundary after being stolen . . . knowing the same to have been stolen . . .”74 The Second Circuit ruled in United States v. Schultz, that this law applies to individuals who remove cultural objects from countries with patrimony laws.75

The CPIA, NSPA, the 1970 UNESCO Convention, and individual nation’s patrimony laws76 enable the global community to civilly and criminally charge individuals for dealing in artwork sold on the black market.77 These laws should be actively enforced to prevent museums from acquiring works with questionable histories. Unfortunately though, many charges against museums are not pursued because of the structure of these institutions.78 However, there is a sea change occurring within the art community due to massive looting occurring in war-torn areas such as Iraq, Afghanistan, and North Africa. With recent prosecutions of art

73 See Schultz, 333 F.3d at 409.
75 See Schultz, 333 F.3d at 416. The indictment of criminals for cultural heritage theft has a precedent dating back to the 1970s. In the late 1970s in United States v. McClain, antiquities dealers were prosecuted under NSPA for dealing in Mexican antiquities subject to a 1972 Mexican patrimony law that vested national ownership to antiquities discovered in Mexican soil. 545 F.2d 988, 991–92 (5th Cir. 1977). This case established the “McClain Doctrine” that established U.S. courts’ recognition that foreign patrimony laws may create ownership of undocumented antiquities in the national government. Id. at 1001.
78 See Part III.D.2 for discussion about the insulation of museums’ boards of trustees.
thieves, the international community is more aggressively pursuing the return of cultural property. 79 Museums play a crucial role (sometimes inadvertently) in the black market art network, thus it is essential for civil and criminal penalties to apply to museums and museum representatives as well. Museum employees and their host institutions should not be permitted to hide behind their non-profit educational status to evade punishment. In fact, as discussed in this Article, maintaining non-profit status should require greater due diligence. 80

In addition to the need for increased prosecution, changes in legislation are necessary in order to prevent the destruction of artwork. The federal government should increase penalties for cultural heritage theft—perpetrated by both individuals and institutions—museum acquisition requirements must be heightened by Federal law, not by mere museum guidelines or recommendations, acquisitions must be strictly scrutinized by legal authorities, and the Internal Revenue Service should have authority to regulate museums to ensure that these non-profit organizations are following appropriate acquisition practices.


80 See infra Part III.E.3.
III. THE NEED FOR INCREASING PENALTIES ON CULTURAL HERITAGE LOOTERS AND MUSEUMS ACQUIRING QUESTIONABLE ARTIFACTS

A. Museums Participate in the Market for Illicit Goods

In 2010, it was estimated that the global market for cultural heritage artifacts is around $6 billion.\(^81\) It is estimated by some that the illicit trade of antiquities is valued at around $8 billion.\(^82\) However, this number is a low estimate because art and cultural heritage crimes are underreported.\(^83\) The most effective way to protect cultural heritage is by eliminating the demand for illicit antiquities.\(^84\) Nations are robbed of their artwork by thieves who collect art for sale on the black market. Museums, including major U.S. institutions, historically have had a direct role in the purchase of black market items.\(^85\) In the 1960s, the Metropolitan Museum of Art purchased a looted hoard of golden coins from Turkey, now known as the Lydian Hoard,\(^86\) and then acquired the now famous looted Euphronios Krater in the early 1970s.\(^87\) Thomas Hoving,
former director of the Metropolitan Museum of Art, famously recounted the museum’s purchase of illicitly-gotten artifacts in his memoir “Making the Mummies Dance.”\(^{88}\) The Princeton University Art Museum returned an item that may have been looted in 1999.\(^{89}\) It was the second time between 2007 and March 7, 2012 that the Princeton University Art Museum “returned Greco-Roman antiquities to Italy amid concerns that the ancient artworks had been illegally excavated.”\(^{90}\) The university museum was criticized for its lack of transparency in its collecting practices.\(^{91}\) The Italian government demanded the return of forty-two items from the Cleveland Museum of Art (“CMA”), and eventually fourteen artifacts were returned after authorities proved that the items were looted or stolen.\(^{92}\) In fact, CMA recently acquired two more questionable objects, including a Roman bust purchased from the Phoenix Ancient Art Gallery, a gallery owned by brothers with a well-publicized criminal record for dealing in looted antiquities.\(^{93}\) The John P. Getty Museum had received so much media attention related to stolen artifacts that an entire book was written about its acquisition practices.\(^{94}\) After over two decades of battles, Boston’s Museum of Fine Arts returned the statue of the Weary Herakles to the Republic of Turkey in 2011.\(^{95}\) The museum acquired the looted object in early 1981,\(^{96}\) although

\(^{88}\) See Thomas Hoving, Making the Mummies Dance (1993).


\(^{90}\) Id.

\(^{91}\) See id.

\(^{92}\) See Steven Litt, Cleveland Art Museum to Return 14 Stolen Items to Italy; Authorities Prove the 14 Artifacts Were Looted or Stolen, PLAIN DEALER, Nov. 20, 2008, http://www.museum-security.org/2008/11/cleveland-art-museum-to-return-14-stolen-items-to-italy-authorities-prove-the-14-artifacts-were-looted-or-stolen.


\(^{94}\) See generally Felch & Frammolino, supra note 10.

\(^{95}\) See Greek God Hercules Reunited with His Bottom Half as Museum Agrees to Send Back ‘Looted’ Bust to Turkey, supra note 18.

the object lacked good provenance and good provenience. Provenance is a “historical record of its ownership,” and provenience is “an archaeological term referring to an artifact’s excavation site or find spot.” Most recently, the MFA in Boston acquired controversial Benin Bronzes in June 2012 “as a gift from New York banker and collector Robert Owen Lehman, who purchased the Benin pieces in the 1950s and 1970s.” The Nigerian government is demanding their return because the pieces were originally taken by British soldiers in the late 1890s, following the Benin massacre of 1897. These are just a few accounts of well-known looted objects appearing in major U.S. museums.

By purchasing illicit objects, museums and galleries increase the market demand for these objects, thus incentivizing robbers to steal art objects. To deter museums from engaging in illegal dealings, the United States government should more actively prosecute museum representatives responsible for underhanded dealings. The United States, in particular, should take action to prosecute because the American art market is the largest in the world, with the US importing $6.2 billion and exporting $17.5 billion of art and antiquities in 2010. According to the FBI, the U.S. is the preferred market for selling stolen art.

98 Id.
100 See id.
101 See generally FELCH & FRAMMOLINO, supra note 10.
102 See David Barboza et al., Forging an Art Market in China, N.Y. TIMES, Oct. 28, 2013, http://www.nytimes.com/projects/2013/china-art-fraud (showing that the U.S. was the largest market for art based on auctions, galleries, and private deals in 2012).
B. Current U.S. Law Does Not Properly Protect Cultural Heritage Against Looting

1. U.S. Law Provides Legal Tools to Halt the Trade in Looted Artifacts

United States laws currently address repercussions for stolen property, although the laws do not specifically focus on criminal penalties for cultural heritage thieves or museums. The National Stole Property Act (the “NSPA”) provides that a person is guilty of a crime if he “receives, possesses, conceals, stores, bar ters, sells, or disposes of any goods, wares, or merchandise . . . which have crossed a State or United States boundary after being stolen . . . knowing the same to have been stolen . . .” 105 In United States v. Schultz, the Second Circuit ruled that this law should be broadly construed and that it applies to individuals who remove cultural objects from countries with patrimony laws. 106 However, that factor is a major shortcoming with the NSPA. Although the court leveraged criminal sanctions onto Schultz for stealing Egyptian antiquities pursuant to Egypt’s patrimony laws, 107 not all nations have enacted patrimony laws. The NSPA applies when title to property is vested in a nation due to patrimony laws. 108 As patrimony laws enable foreign nations to prosecute for stolen property, 109 it is necessary for more nations to adopt patrimony laws in order to claim property rights. Without patrimony laws, foreign nations cannot claim that their property has been taken because ownership has not been vested in any entity when objects are merely found in a nation’s soil. 110 Patrimony laws vest

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106 See United States v. Schultz, 333 F.3d 393, 416 (2d Cir. 2003) (concluding that “the NSPA applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law” and affirming the district court’s conviction of appellant).
107 See id. at 396 (citing the Egyptian Law on the Protection of Antiquities (Law No. 117 of 1983), which declared all antiquities found in Egypt to be the property of the Egyptian government).
109 See United States v. McClain, 545 F.2d 988, 1000–01 (5th Cir. 1977).
ownership of undiscovered antiquities in the nation or state, depriving looters, middlemen, and subsequent purchasers of title. Without ownership of the property, nations cannot make a case for the return of the objects. The lack of valid title makes it difficult to sell the objects on the international market. Without the ability to sell the objects, the incentive to loot will be reduced and destruction of artifacts will decrease. Furthermore, using foreign patrimony laws in conjunction with the NSPA permits actions to be taken against art thieves and art purchasers within U.S. jurisdictions. The fear of litigation pursued by nations from which looted artifacts are taken will further reduce the incentive for theft.

2. U.S. Law Does Not Properly Prosecute Cultural Heritage Looters and Traders

Unfortunately, prosecutors have not readily pursued art thieves and certainly have not been using legal tools to their greatest capacity to prevent questionable acquisitions by museums. Since art thieves and museums have not been aggressively prosecuted, the body of case law is also limited. The lack of rigorous pursuit may be due to the fact that prosecutors and law enforcement agents view the art world as “elitist” and therefore do not regard international art crime as a serious crime. Law enforcement officers may ignorantly believe that smuggling art from abroad is not a matter of serious interest. In addition, some

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111 Id.
112 See cases cited supra note 25.
113 See United States v. Schultz, 333 F.3d 393, 416 (2d Cir. 2003).
116 See Dobovšek & Slak, supra note 115, at 398; Williams, supra note 115 (“But most police departments are unable (due to budget constraints) or unwilling (due to the perceived notion that art crimes are not serious crimes) to devote time, resources and manpower to solving art crimes.”).
mistakenly view art crime as a victimless crime. However, it is important to remember that this is not true—art and cultural heritage theft have links to organized crime syndicates. In addition, depriving a nation of its cultural treasures affects the global art world. The cultural treasures that are found abroad are valuable to all humanity, and the United States should actively sanction those who are responsible for the destruction of these cultural objects.

A reflection of the United States’ lack of interest in art and cultural heritage crime is reflected in the resources devoted to its prevention. In 2004, the FBI established an Art Crime Team which is now composed of 14 special agents with three special trial attorneys for prosecutorial support. Since its founding, the Art Crime Team has recovered more than 2,650 items valued at over $150 million. While this figure is impressive and the founding of this crime team is clearly beneficial, the U.S. government is not doing nearly enough. In a nation the size of the United States, with the largest market in the world for art and antiquities, the government should be doing more to halt the illicit trade. In light of the fact that the trade in looted antiquities helps to fund organized crime and terrorism, the U.S. should devote greater resources to this cause.

To prevent further art theft and looting, it is necessary for the government to actually prosecute art criminals and purchasers of

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117 See Dobovšek & Slak, supra note 115, at 398.
121 See id.
123 See infra Part.III.G.3 for discussion on the link between organized crime and cultural heritage looting.
looted objects.\textsuperscript{124} And as further deterrent, the United States government should also increase penalties on museums; monetary fines should be increased and incarceration may be appropriate in some circumstances.\textsuperscript{125} The international trade of stolen art is worth billions of dollar, and it relies on networks of dealers, collectors, museums, and auction houses. Driving this market forward is the demand by wealthy collectors and museums,\textsuperscript{126} so the only way to eliminate demand and shrink the market is to aggressively prosecute. Criminal penalties have a significant impact on dealers and collectors who lend support to thieves who feed the market with plundered art and antiquities.\textsuperscript{127}

C. To Prevent Cultural Heritage Looting, Nations Should Look Toward Italy in its Efforts to Reduce the Black Market for Antiquities

1. Italy Devotes Appropriate Resources for the Protection of Cultural Heritage

The Italian government’s emphasis on the protection of art and cultural heritage is evidenced by the attention and resources the European nation devotes to this cause.\textsuperscript{128} Whereas the United States FBI has 14 special agents focusing on art and cultural


\textsuperscript{125} See J. Scott Dutcher, Comment and Note, From the Boardroom to the Cell Block: The Justifications for Harsher Punishment of White-Collar and Corporate Crime, 37 ARIZ. ST. L.J. 1295, 1303–09 (2006) (explaining that only harsher crimes will deter white-collar crime perpetrators).


heritage, Italy’s Carabinieri\textsuperscript{129} art theft division employs 300 officers\textsuperscript{130} for a geographic area that is slightly larger than the state of Arizona.\textsuperscript{131} This is the most personnel in the world devoted to the prevention of art crime.\textsuperscript{132} And this statistic excludes informants and employees who maintain LEONARDO,\textsuperscript{133} a database with data on 2.6 million missing pieces of art, the largest national stolen art database in the world. However, even with these resources, the Carabinieri only boasts a meager ten percent recovery rate.\textsuperscript{134}

Italy devotes vast economic and human resources to art and cultural property protection. These resources are further supported by the nation’s extensive laws protecting art and cultural heritage. Although Italy is now aggressively vying for the return of its stolen art objects, legal protection for antiquities has existed in some parts of Italy for centuries.\textsuperscript{135} Parts of Italy have had patrimony laws in place since before the unification of the Italian Republic.\textsuperscript{136} Italian regions created laws to protect their own patrimony: the Edict Pacca in 1822 in Naples (which established a Commission for Fine Arts),\textsuperscript{137} a law in 1850 in Lombardy,\textsuperscript{138} and a law in Tuscany in

\begin{itemize}
\item \textsuperscript{129} See Historical References, CARABINIERI MINISTERO DELLA DIFESA, http://www.carabinieri.it/Internet/Multilingua/EN/HistoricalReferences/01_EN.htm (last visited Feb. 3, 2014) (the Carabinieri is the national military police of Italy, founded in 1814).
\item \textsuperscript{132} See Russell, supra note 130.
\item \textsuperscript{134} See Russell, supra note 130.
\item \textsuperscript{135} See Andrew L. Slayman, The Trial in Rome, ARCHAEOLOGY ARCHIVE (Feb. 6, 2006), http://www.archaeology.org/online/features/italytrial.
\item \textsuperscript{136} See Donata Levi, The Administration of Historical Heritage: The Italian Case, in NATIONAL APPROACHES TO THE GOVERNANCE OF HISTORICAL HERITAGE OVER TIME: A COMPARATIVE REPORT 103, 109 (Stefan Fisch ed., 2008).
\item \textsuperscript{137} See id.
\end{itemize}
Patrimony laws in Southern Italy were promulgated as early as 1822, while the first antiquities laws covering modern Italy were enacted in 1902. After the unification of Italy, the nation passed dozens of laws regulating art. The national patrimony law was updated in 1939 in the “General Regulations for the Protection of Things of Historical and Artistic Interest,” which claims national ownership of antiquities in addition to regulating their excavation and exportation. During Mussolini’s time, laws such as Law No. 1089/1939 continued being promulgated; the laws during this period were known as the Bottai Laws. The protection of Italian patrimony continues to this day. Not only does Italy have comprehensive art laws, but the Italian nation aggressively enforces these laws by seeking the return of objects, prosecuting art criminals, and pursuing law

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139 See id.

140 See Slayman, supra note 135.


142 See Protection of Items of Artistic and Historic Interest, Law No. 1089 of June 1, 1939 (It.). This law was cited in *United States v. An Antique Platter of Gold*, a forfeiture proceeding against an antiquities collector. 991 F. Supp. 222, 227 (S.D.N.Y. 1997).


144 Amongst other laws are Legge N. 386 “Tutela della conservazione dei monimenti e degli oggetto d’antichita e d’arte,” a law that protects artistic and archaeological objects was passed in 1907; Legge N. 823 “Riordinamento delle soprintendenze alle antichita e all’arte” was passed in 1939, and it provides for the protection of antiquities through a national ministry. Italy has dozens of art and antiquities laws, and in 2009 even addressed issues related to underwater archaeology. See Legge N. 15 “Rattifìca ed esecuzione della Convenzione sulla protezione del patrimonio culturale subacqueo, con Allegato, adottata a Parigi il 2 novembre 2001.”


Most impressively, the Italian government aggressively penalizes museum representatives for their contribution to the network of illegally acquired artwork. An examination of the country’s tremendous looting problem sheds light onto the motivation for Italy waging such an aggressive antiquities war on overseas entities. It is said that Italy is home to half of the world’s great art, and as recognized by officials, it is impossible to stop the looting because it is impossible to supply security at every archaeological site. Thus, the Italian government finds it necessary to prevent theft through post-looting sanctions.

2. The Sad, but “True” case, as Italy’s Prosecution of an American Museum Curator Drastically Altered the Landscape of Cultural Heritage Prosecution

In the spring of 2005, Italian prosecutors announced their decision to prosecute Marion True, a curator at the J. Paul Getty Museum in Los Angeles, for criminal association and receipt of stolen property in connection with antiquities believed to have been illegally unearthed in Italy and smuggled out of the country. True was the first American museum official under criminal prosecution abroad in connection with antiquities trade. Marion True, a curator of antiquities, was alleged to have knowingly obtained over forty archaeological finds illegally excavated by tomb raiders or stolen in Italy. Italian prosecutors

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150 CHARLES ABBOTT, CULTURE SMART! ITALY 101 (Geoffrey Chesler ed., 2004).

151 See id.

152 See Slayman, supra note 135.


154 Italy v. Marion True, Trib. Roma, sez. VI pen., n. 19360/10 (Oct. 13, 2010) (It.).
charged her with criminal association, receiving stolen Italian artifacts and laundering artworks purchased privately and sold to the J. Paul Getty Museum using allegedly fake documents. True faced up to ten years in prison if convicted, but she consistently denied the charges, which related to a period from the mid-1980s through 1998. True’s troubles began when authorities raided a Swiss warehouse belonging to Giacomo Medici, an infamous dealer of looted antiquities, and found “Polaroid photographs of hundreds of recently looted antiquities.” Marion True had dealt with Medici and his business partner, Robert Hecht, and this information was used in the trial against True.

By prosecuting Marion True for the acquisition of black market cultural objects, Italy hoped to reduce the flight of top-quality artifacts from the country. Italy hoped to deter museums from buying artifacts without provenance that may have originated from Italian soil. In October 2010, the case against Marion True ended without a verdict due to the expiration of the statute of limitations. The related case against Robert Hecht, a notorious dealer of stolen antiquities, was also dismissed due to the expiration of the statute of limitations. The True case is seen as an attempt to place pressure on international collectors to verify the origin of their artifacts. “Museums must learn you can’t turn a blind eye to art theft,” a member of the Italian prosecution team said. While the trial was pending, United States public prosecutor Matthew Bogdanos, explained that if True was found guilty and imprisoned, it would prevent future crimes.

155 Id.
156 See Lowe et al., supra note 126.
157 See generally Watson & Todeschini, supra note 32 (for information about Giacomo Medici’s criminal activities).
158 Felch, supra note 153.
159 See id; see also Felch & Frammolino, supra note 10 (describing Marion True and the Getty’s illegal acquisitions).
160 See Slayman, supra note 135.
161 Italy v. Marion True, Trib. Roma, sez. VI pen., n. 19360/10 (Oct. 13, 2010) (It.).
162 Id.
164 Id.
165 See Lowe et al., supra note 126.
believed that a conviction would act as a deterrent for future illegality, and he thought it necessary to set this example, as prison is a true deterrent for many art criminals.\textsuperscript{166} When dealing with criminals with great monetary reserves, criminal punishments, such as imprisonment, may be the only real deterrent.\textsuperscript{167} Monetary fines will not deter collectors or museums with unlimited funds, since those caught engaging in illegal activity may find financial support from other members of their circles.\textsuperscript{168} For those malfeasors, incarceration is the only deterrent as a prison sentence may be the only punishment that can outweigh the economic gain from the commission of white collar crimes.\textsuperscript{169} Since some museums (and some of their representatives) have large monetary resources and endowments, incarceration may be the appropriate penalty and deterrent for museum representatives.

Italy is leading the world in the prevention of illicit art exchanges. Rocco Buttiglione, the former Italian Minister of Cultural Heritage and Activities, said that the nation was paving the way for other countries to retrieve looted heritage. “The age of trafficking in art pieces is over,” he warned.\textsuperscript{170} The United States government should emulate the legal actions taken by Italy.

3. One of the Positive Effects of the True Prosecution Was Italy’s Innovative Loan Program

One way to decrease the acquisition of looted objects is to reduce the incentive to acquire these pieces. Rather than purchase or accept donations of objects with questionable or problematic provenance, museums can gain access to top-quality antiquities through loan programs.\textsuperscript{171} Italy has instated an innovative loan program to encourage the return of artwork and prevent future

\textsuperscript{166} See id.
\textsuperscript{167} See J. Scott Dutcher, supra note 125, at 1305 (“Only the possibility of a truly significant prison term could have deterred someone with no moral compass when the potential gains were so high.”).
\textsuperscript{168} See id.
\textsuperscript{169} See id.
\textsuperscript{170} Lowe et al., supra note 126.
Museums that cooperate with Italy’s repatriation efforts will gain greater access to an increased number of long-term loans of Italian archaeological materials, but those that do not, may find Italian works unavailable. The Italian Ministry of Culture touted this program when it settled an agreement with the Metropolitan Museum of Art (“the Met”) in New York City. In January 2006, the Italian Ministry of Culture sent a formal proposal to the Met, which the museum accepted the next month. In exchange for the return of twenty-one Italian antiquities, including the Eupronios Krater (a krater found in Cerveteri, Italy), the Italian government would lend the Met comparable artifacts for up to four years. In addition, the museum would be permitted to sponsor excavations in Italy and take finds to the United States.

The instatement of a loan program on the international level will benefit the preservation of art. A lawyer for the Italian Ministry of Culture, Maurizio Fiorilli, expressed hope that Italy’s

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174 See Slayman, supra note 135.


176 See Eakin, supra note 173.


loan program can become a model for cooperation in the exchange of cultural heritage objects.\textsuperscript{179} For example, Italy loans works to museums so that people around the world can view and enjoy the nation’s treasures.\textsuperscript{180} Returning undocumented pieces to gain access to loans enables museum directors to fulfill their fiduciary duties as it creates greater art access to the public, who are the actual museum beneficiaries. Through this loan program, the viewing public gets access to top-quality objects without museums driving the market for looted or undocumented art.\textsuperscript{181} With this type of program, museum curators will not need to use black market sources to acquire works; rather, museums will have an opportunity to collaborate with foreign nations to responsibly display licit objects.\textsuperscript{182} With a loan program, museums will have an incentive to cooperate with foreign nations and not acquire problematic pieces because museums demonstrating “good faith” in their purchases will be granted the benefit of loans.\textsuperscript{183} As recognized by former director of the Met, Philippe de Monetebello, a loan program paves the road to ethical norms while still providing millions of museums visitors with the opportunity to see rare and valuable archaeological material.\textsuperscript{184}

\textbf{D. There are Inherent Difficulties in Prosecuting Antiquities Looters and Dealers}

\textit{1. Proving Scienter Has Been a Major Stumbling Block}

One of the difficulties in prosecuting an art thief or purchaser of stolen goods under the NSPA, is proving scienter (the defendant’s state of mind indicating that he had knowledge that the

\textsuperscript{179} See Eakin, supra note 173.

\textsuperscript{180} See United States-Italy: Agreement Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, U.S.-It., Jan. 19, 2001, 40 ILM 1031.


\textsuperscript{182} See Eakin, supra note 173.

\textsuperscript{183} See id.

goods were stolen).  

Whereas scienter is often a stumbling block for prosecutors in any theft matter, it is more difficult in the case of undocumented art than for other goods.  

Art and cultural heritage items are unique. Unlike other sectors, such as the securities market, the art market is unregulated. As stated by art critic Robert Hughes, “[a]part from drugs, art is the biggest unregulated market in the world.” This market has been characterized as “a very dangerous place, populated by any number of unscrupulous figures.”  

Unlike goods that are prima facie illegal, such as illegal drugs that are unlawful to possess, art and cultural objects are not prima facie illegal. And whereas illegal items like endangered species and regulated items are readily identifiable, recognizing an art object as stolen is complex and difficult, even for art experts and archaeologists. Only antiquities that are stolen, looted, or improperly exported are illegal to import and purchase, and their illegal status is not obvious.

The exchange of antiquities is frequently completed through art dealers and auction houses, and this is often done without the verification of provenance or provenience; therefore, it may be very difficult to demonstrate a legitimate chain of title. Because of the often secret and anonymous nature of art exchanges, gaps in provenance exist, and stolen or looted objects may resurface on

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185 See 18 U.S.C. § 2315 (2012) (requiring knowledge that the object was “stolen, unlawfully converted or taken”). See generally United States v. McClain, 545 F.2d 988, 1002 (5th Cir. 1977) (noting that because defendants’ lacked the knowledge that the articles were deemed “stolen” under Mexican law, they were not liable under the NSPA).

186 See Kreder, supra note 114.


188 Id. (internal quotation marks omitted).

189 Id. (internal quotation marks omitted).

190 See United States v. Mask of Ka Nefer-Nefer, No. 4:11-CV-504-HEA, 2012 WL 1094652 (E.D. Mo. Mar. 31, 2012) (explaining that unlike illegal drugs, an antiquity such as a mummy mask is not contraband per se “as [artifacts] may be lawfully owned and become contraband only based on a connection with a criminal act”).


192 See Kreder, supra note 114.

193 See id.
the legitimate market without the buyer’s knowledge of its surreptitious background.\textsuperscript{194} For example, the art company ARIS promises anonymity in its brochure.\textsuperscript{195}

2. There Are Inherent Difficulties in Prosecuting Museum Representatives

One of the particular difficulties in regulating museums is that museum representatives are not often sanctioned for illegal behavior or actions carried out in bad faith. The structure of museums’ boards of trustees and self-regulators is an exclusive group of close-knit individuals.\textsuperscript{196} Yet, the dynamics of the museum hierarchy militate against whistle-blowing; the board members themselves are the people responsible for overseeing the inner-workings of the institutions.\textsuperscript{197} Since members of the museum community will not take action against or report fellow members of their board, these malfeasors are insulated.\textsuperscript{198} And it is unlikely that outsiders will discover problematic acquisitions in a timely manner, as there is generally no legal requirement for museums to publish their acquisitions.\textsuperscript{199} Actions against these institutions are rarely pursued.\textsuperscript{200} Without the shareholder reporting requirements that regulate publicly-traded companies, the

\textsuperscript{194} See id.


\textsuperscript{196} See generally Robin Pogrebin, Trustees Find Board Seats Are Still Luxury Items, NY TIMES, Apr. 2, 2010, http://www.nytimes.com/2010/04/03/arts/03center.html?pagewanted=all. The Board of Trustees lists notable members such as the editor of Vogue, Anna Wintour; New York City Mayor, Michael Bloomberg; and former CEO of March & McLennan, Jeffrey W. Greenberg. See METROPOLITAN MUSEUM OF ART, ANNUAL REPORT FOR THE YEAR 2012–2013, available at http://www.metmuseum.org/about-the-museum/annual-reports/~/media/Files/About/Annual%20Reports/2012_2013/Annual%20Report%202013.pdf.

\textsuperscript{197} See GERSTENBLITH, supra note 44, at 235.

\textsuperscript{198} See Michael Balter, $200 Million Gift for Ancient World Institute Triggers Backlash, 311 SCIENCE 1846, 1846 (2006) (noting that the Leon Levy foundation’s Levy-White collection contained looted objects and that around 200 artifacts from the Levy-White collection, over 90% of which had “no known provenance,” were shown at the Metropolitan Museum of Art); see also Officers & Staff, LEON LEVY FOUNDATION, http://leonlevyfoundation.org/category/the-foundation/officers-staff (last visited Mar. 15, 2014) (stating that Shelby White serves on the board of The Metropolitan Museum of Art).

\textsuperscript{199} See Boehm, supra note 16.

\textsuperscript{200} See Kreder, supra note 114.
non-profit structure of museums leads to difficulty in maintaining proper supervision. The lack of members with a financial interest—or of defined beneficiaries or owners—leads to difficulty in oversight and enforcement of appropriate standards of conduct for the managers of nonprofit organizations.201

Charitable organizations, such as museums, are generally considered public institutions,202 therefore, the entire public should benefit from their activities.203 The Attorney General represents the public and has standing to sue museums.204 The public does not have the power to take action, and thus must rely solely upon the Attorney General’s discretion to bring suit.205 Unfortunately though, there is nothing to compel legal action,206 particularly because museum trustees are usually wealthy and influential.207 Furthermore, each state’s Attorney General is understaffed and underfunded.208 There is often not enough knowledge or impetus for the Attorney General to initiate action. And since the preservation of artwork has historically not been the primary concern of governing officers, the improper acquisition of property has been left unchecked. With all of these factors, Attorney General intervention is too sporadic to be a credible threat of imminent, informed legal action.209

Other nations, such as Greece and Italy, have deemed it important to take action against cultural heritage destruction and the trade of objects without proper provenance.210 Italy’s


203 See GERSTENBLITH, supra note 44, at 236.


205 See id.

206 See MERRYMAN ET AL., supra note 38, at 966.

207 See Merryman, supra note 204.

208 See id.

209 See id.

aggressive prosecution tactics would be furthered by the support of other nations. And since the U.S. art market is probably still the largest in the world, the United States should have an ethical obligation to prevent these offenses against humanity. There are many very rich collectors who will pay exorbitant amounts of money to acquire stolen artwork. As one art investigator aptly stated, “Until the entire art world decides it can’t handle stolen goods, things are unlikely to get better.” Without criminal sanctions, art theft will continue, so it is necessary for government officials and regulating bodies to monitor museums and pursue both civil and criminal actions against these seemingly untouchable institutions.

E. Museums Acquisition Policies Should Be Federally Mandated and Museum Purchases Should Be Subject to Scrutiny from Federal and State Representatives

1. Stricter Oversight of Museums is Necessary

In addition to increasing penalties for illicit art acquisition, laws should mandate museums and galleries to exercise greater care when acquiring artwork. Museums are established to further society’s knowledge about art and culture, thus these institutions should act responsibly. According to the American Alliance of Museums in 2000 (then American Association of Museums), “[a]s society has come to rely more on museums for education about, as well as preservation of, its cultural heritage, it has also come to expect more of its museums—more accountability, more dealing in looted antiquities); Trib. Roma, sez. VI pen., n. 19360/10 (Oct. 13, 2010) (It.) (the nation of Italy leveraged criminal sanctions against museum curator, Marion True).  
211 See David Barboza et al., supra note 102.
213 See Lowe et al., supra note 126 (internal quotation mark omitted).
214 See Wyatt, supra note 85 (quoting law professor Patty Gerstenblith, stating “[a]s educational institutions, museums have a responsibility to look beyond that particular object’ that they may be acquiring”).
transparency of action, and more leadership in community . . . ”
However, there are no federally mandated civil penalties or
criminal penalties for violations of guidelines.216 In order to insure
that appropriate standards are being followed, museums should be
subjected to a higher level of scrutiny with legal ramifications. But
museums may hesitate to support stricter requirements because
they restrict curators to acquire only items that have a definitive
provenance and bill of sale, and museums would lose out on prize
items and desirable objects for their collections.

2. Museums are Not-for-Profit Organizations Entitled to Tax
Advantages, Thus Have an Obligation to Acquire Items
Responsibly and Fulfill Their Fiduciary Obligations of
Loyalty and Due Care

There should be no assumption that museums always act as
good faith purchasers. Placing pressure on museums to properly
research and authenticate the provenance of artwork is appropriate
since these institutions have the ability to adequately research their
acquisitions.217 In fact, these institutions are in the best position
possible to properly research their acquisitions, because these
institutions have full-time employees who devote their careers to
the study of art.218 As non-profit institutions, museums receive tax
benefits; 219 some of those funds should be used to properly
research purchases.

Museums, AM. ALLIANCE OF MUSEUMS 2000) (emphasis added).
216 See Boehm, supra note 16.
217 See Geoff Edgers, A Detective’s Work at the MFA, BOS. GLOBE, Dec. 11, 2011,
http://www.bostonglobe.com/arts/2011/12/11/detective-work-mfa/6iaeiiYQQOj83s9u3Y
fDZO/story.html (stating that, in 2010, Boston’s Museum of Fine Arts created a
curatorial position, curator of provenance, that is devoted solely to the research of
provenance for objects in the museum’s collection).
218 See AIMEE L. TABERNER, CULTURAL PROPERTY ACQUISITIONS, NAVIGATING THE
SHIFTING LANDSCAPE 55 (2011) (explaining the proposition that curators are “more likely
to recognize red-flag issues” related to illicit excavations and archaeological site
destruction); id. at 92 (finding that museums have research resources readily available to
“assist the museum staff in its investigation of foreign property laws”).
As defined by the International Council of Museums (“ICOM”), museums are a “permanent non-profit institution at the service of society and its development, open to the public, which collects, conserves, researches, exhibits, and makes accessible the tangible and intangible heritage of humanity and its environment for study, education and enjoyment.” 220 This definition clearly provides that museums are established for public service. 221 Museums are, or should be, the most passionate advocates for the preservation of antiquities, due to their educational missions. 222 To properly serve the public, museums must refrain from illegal acquisitions—or the purchase of objects with incomplete provenance—and protect cultural objects to fulfill their stated purpose. Some commentators assert that museums breach their duty of care, and therefore their fiduciary obligations to the public, when they fail to establish policies that respect the history of an object and its educational and scientific value. 223 Acquiring questionable objects and purchasing objects from dealers working with looted antiquities does not assist in preservation because it deprives society from valuable information about the objects. According to Paul Bator, former Harvard Law and Chicago Law School Professor who served as Deputy Solicitor General of the U.S. during the Reagan Administration, 224 speaking in 1982, the acquisition of smuggled objects by “public institutions” is inappropriate for museums that must commit to preservation. 225 He argued that when a museum acquires a smuggled object it cannot be certain that it did not help reward cultural destruction. 226 It is highly unethical and contrary to a museum’s stated purpose,

221 See GERSTENBLITH, supra note 44, at 236.
222 See TABERNER, supra note 218, at 108.
223 See Gerstenblith, supra note 201, at 453–54.
226 Id.
for a museum to support, directly or indirectly, an illicit market in looted antiquities.\textsuperscript{227}

Museums have fiduciary duties of loyalty and care\textsuperscript{228} arising from their statuses as charitable trusts or non-profit corporations.\textsuperscript{229} Yet museums differ from other trusts because the beneficiaries of museums are not named individuals, but the general public.\textsuperscript{230} The duty of loyalty is complete loyalty towards the beneficiary.\textsuperscript{231} In fact, the American Alliance of Museums’ Museum Director’s Code of Ethics acknowledges the principle that museums have a commitment to the public.\textsuperscript{232} The Code recognizes that a museum’s duty to the public is not to just act legally, but also ethically, responding and representing the public interest.\textsuperscript{233}

3. Museums’ Not-for-Profit Status Should Require Heightened Standards

Museums and non-profit organizations are given tax exemptions because of the public service that they perform.\textsuperscript{234} Within the category of nonprofit organizations exists a subset that

\textsuperscript{227} See generally Brodie, Doole & Watson, supra note 23, at 43.
\textsuperscript{230} See Patty Gerstenblith, The Fiduciary Duties of Museum Trustees, 8 Colum.-Vla J.L. & Arts 175, 177 (1983); Range, supra note 229, at 657.
\textsuperscript{231} See Graefe, supra note 229, at 494, 494 n.173 (citing Renz v. Beeman, 589 F.2d 735, 740 (2d Cir. 1978)); Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (stating that “[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior”); see also 3 Austin Wakeman Scott et al., Scott and Ascher on Trusts § 17.2 (5th ed. 2007); White, supra note 228, at 1052. See generally Victor Brudney, Contract and Fiduciary Duty in Corporate Law, 38 B.C. L. Rev. 595, 601–07 (1997) (providing an overview of the fiduciary duty of loyalty).
\textsuperscript{233} See id.
\textsuperscript{234} See GERSTENBLITH, supra note 44, at 230–31.
are classified as either public benefit or charitable organizations. In the United States, “most museums qualify as charitable or public benefit organizations because of their educational, and sometimes, scientific purposes.” As non-profit corporations, museums also follow state charitable trust laws, which are designed to promote the public good. The Supreme Court held that organizations classified as “charitable” and established for the public good must not act against established public policy. Public interest group Saving Antiquities For Everyone proposes that attorneys general in the US have a responsibility to guarantee that museums formed for charitable purposes operate in conformity with the public interest. Since museums are given tax deductions and government funding, they should use these monetary resources for their intended purpose—the public good. It is in the public’s welfare for museums to properly investigate their acquisitions. Members of museums should ask questions of their institutions to determine whether the museum’s acquisition and accession policies diverge from accepted ethical purchasing standards.

4. There are Federal Tax Justifications for Stricter Scrutiny

Non-profit organizations receive significantly greater advantageous tax treatment at the federal and state levels, but are restricted to a narrower category of permissible purposes and stricter regulation of their activities and dissolution processes. The purposes of this category are more restrictive, but include

235 See Gerstenblith, supra note 201, at 412 n.19 (stating that that “[n]onprofit organizations are typically divided into two categories: the public benefit and the mutual benefit organizations” (citing Howard L. Oleck & Martha E. Stewart, NONPROFIT CORPORATIONS, ORGANIZATIONS & ASSOCIATIONS 1-2 (6th ed. 1994)).

236 See Gerstenblith, supra note 201, at 413 (citations omitted).


educational missions. Since museums receive the benefit of tax deductions, they should also be subject to investigation by the Internal Revenue Service. The “security of [proper] title and the ability of a museum to know that the object was legally acquired is part of the market value of the object.” The understanding of good title should be incorporated into the valuation of a donated object for tax deduction purposes. Donors should not be given tax benefits for donating objects without provenance or good title. Some individuals derive financial benefits by donating looted art to unscrupulous museums. Donors purchase objects at “wholesale” value, receive inflated appraisals, donate the objects with the values stated on the appraisals, and then receive tax deductions for the gifts. The Getty has been recognized as carrying out this tax scheme, and assisting contributors such as Sy Weintraub make millions of dollars off of donations. Museum donors guilty of using inflated estimates for tax deductions have been threatened by the IRS with tax fraud charges. Thus, if the museum cannot prove proper title, then federal financial assistance through tax deductions should be denied.

F. As Institutions with a Charitable Purpose, and Their Position as the Caretakers of Art and History, Museums’ Actions Should be Subject to Heightened Due Diligence Standards as Seen in Other Areas of the Law

1. Changes in Acquisition Practices Should be Legally Mandated and Enforced

Deficient acquisition practices diminish society’s knowledge of history and cultural heritage. When dealing with antiquities, decontextualization is a major problem, and museums sometimes

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242 See People ex rel. Scott, 374 N.E.2d at 760.
243 See Gerstenblith, supra note 201, at 464.
244 See id.
245 See FELCH & FRAMMOLINO, supra note 10, at 32–36.
246 Id.
play a prominent role in this process. The loss of cultural, historical and scientific knowledge is in opposition to a museum’s educational purpose. To fulfill their educational mission, museums must refrain from poor acquisition practices.

The International Council of Museums ("ICOM") is an organization with voluntary membership that sets forth a Code of Ethics for Museums. To join ICOM, museums must agree to abide by the ICOM Code, which was set forth in 1986 and then updated in 2004. The Code establishes minimum standards of professional practice and performance for museum institutions. In the most recent edition, the Code calls for museums to recognize the necessity of ethical acquisition practices, stating that "[m]embers of the museum profession should not support the illicit traffic or market in natural and cultural property, directly or indirectly" and "[m]useums should not acquire objects where there is reasonable cause to believe their recovery involved unauthorized or unscientific fieldwork, or intentional destruction or damage of monuments, archaeological or geological sites, or of species and natural habitats." It should be noted that museums must do more than follow proper acquisition practices. In addition to not purchasing looted items, museums should also refrain from accepting problematic objects from donors or lenders.

However, the ICOM guidelines are not binding law and they do not carry any economic or criminal penalties. In the same way, the American Alliance of Museums ("AAM") and the Association of Art Museum Directors ("AAMD") also offer acquisition guidance, in the form of standards, reports, recommendations, and ethics codes. However, this guidance also has little impact, as

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249 See Gerstenblith, supra note 201, at 450.
250 See id.
253 See id.
254 Id. art. 8, sec. 5.
255 Id. art. 2, sec. 4.
256 See TABERNER, supra note 218, at 68 (suggesting obtaining a signed affidavit from the donor).
257 See id. at 40–41.
the guidelines and recommendations are not law or obligatory mandates. Currently though, museum acquisition policies allow for acquisitions without full documentation. Proper title and good faith actions on the part of the seller and acquiring party should not be the presumption. Museums must not simply accept the word of a seller or donor about the provenance or legitimacy of an object. Failure to provide a museum with documentation related to the works provenance and legitimacy should be a red flag to a museum. In addition, museums should consider a dealer’s or donor’s reputation and any criminal record or questionable sales or donations.

Yet even these guidelines have been ignored or disregarded. For example, the Getty Museum’s policy requires the museum to acquire only collections documented prior to 1995. This requirement was widely admired because it prohibited the museum from collecting looted or illegitimate items. However, shortly after this policy was enacted, the Getty acquired a collection of over 300 objects of Greek, Roman, and Etruscan origin from a private collector. Reportedly, provenience for eighty-five percent of these objects was unknown, but the Getty relied upon its own catalog from a loaned exhibition to manufacture provenance. Critics accused the museum of creating documentation to fulfill its own requirements for provenance and thereby tacitly condoning the flow of illegal antiquities.

258 See id. at 43; see also Boehm, supra note 16.
259 See TABERNER, supra note 218, at 49.
260 See id. at 66.
261 See id.
262 See id.
263 See DeAngelis, supra note 225, at 405.
265 See DeAngelis, supra note 225, at 405.
267 See id.
The St. Louis Art Museum (“SLAM”) was recently brought to federal court for purchasing a missing 3,000-year-old funerary mask that was originally discovered in Egypt in 1952. 268 Egyptian authorities claim that the piece was stolen; SLAM denies this charge, and claims to have purchased the mask in good faith, after examining the mask’s good provenance. 269 The museum purchased the antiquity from Phoenix Ancient Art, a gallery owned by Ali and Hicham Aboutaam, brothers with a criminal history of dealing in looted antiquities. 270 The brothers were accused of selling items with provenance gaps to the Cleveland Museum of Art, 271 Hicham pled “guilty to a misdemeanor charge of misrepresenting the origin of an Iranian drinking vessel on customs documents,” 272 the Aboutaams had connections with infamous dealer of looted antiquities, Giacomo Medici, 273 and Ali was indicted by Egypt, and found guilty in absentia, for helping to smuggle antiquities out of the country. 274 SLAM maintains its due diligence was properly conducted, although there were important documents missing from the provenance report and questionable pieces of information that should have raised a red flag for any curator or museum professional acquiring objects. 275 According to the Aboutaams, the piece was legitimately bought, although there is no record of any legal purchase or transport of the mask out of

269 Id.
273 See WATSON & TODESCINI, supra note 32, at 153, 183–84.
274 See Gay, supra note 272.
275 Id.
Egypt.\textsuperscript{276} Phoenix Ancient Art sold the mask to SLAM in 1998 for half a million dollars.\textsuperscript{277} Due to the Aboutamms’ well-known “‘criminal history,’ the [federal prosecutor] characterize[d] [SLAM’s] due diligence as ‘pro forma,’ charging the museum ‘knew or was willfully blind to the fact that the Mask was stolen property both before and after its importation.’”\textsuperscript{278}

2. In Developing the Appropriate Standard, We Should Examine Comparable Corporate Standards

By turning a blind eye to suspicious circumstances, museums breach their fiduciary duties when acquiring looted or questionable items.\textsuperscript{279} In the corporate world, business directors are held to the “business judgment rule.” Under this rule, it is assumed that corporation directors are motivated by the interests of the corporation.\textsuperscript{280} This standard, as articulated in \textit{Grobow v. Perot}, requires that business directors (1) act in good faith; (2) act on an honest belief that their actions are in the best interests of the corporation; (3) act on an informed basis; (4) not be wasteful; and (5) not act in self-interest.\textsuperscript{281} These requirements reflect the business directors’ fiduciary duties of good faith, loyalty, and due care.\textsuperscript{282} However, the business judgment rule standard may not be harsh enough, as directors are not liable for negligence—they are only liable for \textit{gross} negligence.\textsuperscript{283}

In exercising good faith and fulfilling their fiduciary duties, museums should be held to an elevated standard. Museums are not typical purchasers of art, they are institutions with vast resources.


\textsuperscript{278} Gay, \textit{supra} note 272.

\textsuperscript{279} See \textit{supra} notes 228 and 230.


\textsuperscript{281} Grobow v. Perot, 539 A.2d 180 (Del. 1988).

\textsuperscript{282} See Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

with the ability to properly investigate title and origin. 284 Museums should not contemplate the purchase of objects that would, in any actual or even perceived way, encourage the trade and illegal import of looted cultural heritage. 285 Because the danger of stolen artwork is so great, museum curators must assume that work was not legally acquired, rather than blindly accepting that all objects were properly obtained. In determining whether an action was made in “good faith” by a business director, it is unclear whether this standard is objective or subjective. 286 However, courts have recognized a limited objective element to the good faith standard. 287 Some courts have found that the failure of business directors to make an inquiry does not constitute bad faith, unless the facts are so cogent and obvious that passiveness amounts to the deliberate evasion of knowledge. 288 Although this recognizes the link between good faith and conscious avoidance, the mere lack of research would not constitute bad faith under the current standard. That is not the proper standard; museums should be required to complete a full investigation. The museum standard should be amended to hold that lack of research actually is an act of bad faith since such lack of investigation allows museums to willfully turn a blind eye towards acquisitions without proper provenance.

Rather than having curators merely assume that a work was properly acquired, museum officials should follow the lead of major museums in Philadelphia that have been at the forefront of arguing against the looted and stolen art trade. 289 The University of Pennsylvania Museum of Archaeology and Anthropology

285 See Taberner, supra note 218, at 49.
287 See id. at 441–42.
288 See Richards v. Platte Valley Bank, 866 F.2d 1583 (10th Cir. 1989).
follows a very strict acquisition policy.290 According to former Williams Director of the University of Pennsylvania Museum of Archaeology and Anthropology, Richard M. Leventhal, unless a seller or donor can unequivocally demonstrate that an object is legal, and provide the proper paperwork, the museum will not acquire the object.291 The burden of proof, according to Leventhal, is not to assume that the work is legal.292

3. It is Appropriate to Utilize the Security and Exchange Commission As a Model Through Which to Properly Monitor Museums

Museums are established to house, educate, and preserve.293 If these are truly the aims of museums, then applying greater scrutiny to these institutions is appropriate, as greater oversight from outside governance will champion the cause of preservation and education. Greater scrutiny will ensure that museum employees properly purchase works through ethical and responsible acquisition practices. There is a need for a uniform, and legally enforceable, standard in the U.S. on which to model museum acquisitions.294 Since museums control priceless objects of fundamental societal interest, it is appropriate to hold these organizations to a standard similar to other organizations and businesses controlling valuable assets. An appropriate model for guidance is the stock exchange listing requirements. During the past two decades, the Securities and Exchange Commission (“the SEC”) has made requirements more stringent to avoid scandal and protect stockholders.295 The SEC found it necessary to enact more

290 See id.
292 See id.
stringent requirements to protect consumers; in the same way, stricter standards are needed to protect the beneficiaries (the public) of museums. Just as corporate scandals were gaining greater attention during the past two decades and spurred the passage of the Sarbanes-Oxley Act, nations around the world are becoming acutely aware of the multi-billion dollar market for black market antiquities that finds their way into private collections and museums. Consequently, there is a need for stricter regulations of museums. Just as regulations are needed to protect the public good of stocks, regulations must protect the public and societal goods of priceless artifacts. The SEC requires that people within a corporate hierarchy inform authorities about improper practices. Similarly, museum representatives and lawyers working as in-house counsel should have a similar responsibility to report and receive information from employees and directors about improper business transactions. This type of requirement should be instated since requiring museum employees to disclose improper acquisition activities will help to further self-regulation.

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301 See MERRYMAN ET AL., supra note 38, at 966.
G. The Need for Federal Oversight is Apparent

1. Self-Regulation Conducted by Museums Has Not Been Effective

The continuing practice of acquiring problematic artifacts demonstrates that many museums cannot self-regulate in a responsible way that will fulfill their non-profit purposes, despite having policies that purportedly aim to eliminate such questionable acquisition practices. The federal government should intervene, and legislation must be enacted to regulate museums’ acquisition practices. At a minimum, museums should be required to use Internet government resources to investigate the legality of potential acquisition pieces. If an object in the collection was stolen at one time, there is a possibility that it is listed in a database of stolen art. Searching such databases should be a minimum first step. The Art Loss Register (“ALR”) is a preeminent international stolen art database that lists over 300,000 works reported as stolen or missing. The ALR collects information from law enforcement agencies, insurance companies, and individuals. However, ALR cannot list objects that are undocumented—such as those surreptitiously excavated—so its effectiveness for archeological material may be limited.


303 See Boston’s Museum of Fine Arts Urged to Return Looted Artifacts to Nigeria, supra note 99; MUSEUM OF FINE ARTS BOSTON, supra note 284.

304 See DeAngelis, supra note 225, at 262.


308 See DeAngelis, supra note 225, at 251.
Museums should also utilize the U.S. Department of State’s website for objects controlled pursuant to CPIA.  

2. With the Destruction of Wartime Looting, It Is Imperative That Museums Do Not Purchase Plundered Antiquities and Fuel a Market That Results in Widespread Pillaging

There is a well-documented pillaging of cultural heritage in nations affected by war, such as with the numerous political uprisings in North Africa and the Middle East. In fact, UNESCO has issued a warning to the international art market that artifacts coming from some of the war-torn regions may have been looted. Also, it should be required for museums to check the FBI Art Theft Program prior to purchasing items. Furthermore, statutes with sanctions (not just acquisition guidelines) should be enacted that require museums to publicize all new acquisitions, a practice undertaken by the Philadelphia Museum of Art, through both purchase and gift, and to disclose documentation that establishes good title. Publicizing new purchases will help to avoid situations such as the purchase of black market items such as

the Lydian Hoard and the Ka Nefer Nefer funerary mask. When acquisitions are not publicized, they may remain hidden in museum collections for years, as in the case with the Lydian Hoard, during which time the statute of limitations may expire. During this time, objects are hidden from the eyes of the appropriate individuals who could properly identify them, provide information about their true provenience, and champion their restitution.

3. The Connection Between Cultural Heritage Looting and Terrorism Necessitates Stricter Acquisition Practices

There is a proven link between black market cultural heritage objects and terrorism, as there is a connection between art crime and terrorism. There is a growing body of evidence that links the trade in looted antiquities to organized crime and terror. U.S. public prosecutor and former head of investigation into the

319 See Republic of Turkey v. Metro. Museum of Art, 762 F. Supp. 44, 45–47 (S.D.N.Y. 1990) (the court rejected the Metropolitan Museum of Art’s statute of limitations expiration contentions, and found that the Republic of Turkey’s claim had been made within the appropriate time period also in the light of the fact that the museum concealed a collection of looted antiquities in its storerooms for nearly two decades).
320 See Antiquity Smuggling Finances Terror, HERITAGE WATCH (Mar. 19, 2008), http://www.heritagewatchinternational.org/antiquity-smuggling-finances-terror.html (describing the sale of antiquities to sponsor terrorist activities).
looting of Iraq’s National Museum after the 2003 U.S. invasion, Matthew Bogdanos, states “the claim that the illicit art industry funds terrorism is undeniable.” Art crime has been reported as the third highest grossing criminal activity after illegal drug and arms sales. This alone makes it a rich source of funds for terrorist groups. The United States is the prime market for this enterprise, and many of the illicit antiquities are coming from Middle Eastern nations under the influence of terrorist networks such as the Hezbollah and Islamic Jihad. In addition, terrorists use art to instill fear. Infamously, the Taliban destroyed two huge statues of the Buddha in Afghanistan to further the discouragement of idolatry. Afterwards, the Taliban refused anyone access to examine the statues to verify the damage to the carvings.

Since the federal government provides money to museums through tax deductions, then the government facilitates black-market-funded activities when museums acquire art through crime syndicates. Purchasing objects without proper acquisition practices funnels money into the networks of smugglers, looters, thieves, and destroyers. This implication requires that the United States take greater steps to prevent art theft. As various government agencies and representatives have acknowledged, the trade in stolen and looted antiquities helps to fund terrorism. As explained by Marine Reserve Colonel Matthew Bogdanos, “the link between extremist groups and antiquities smuggling in Iraq was ‘undeniable.’” The government’s lack of action in preventing cultural heritage theft may contribute to struggles with global terrorist groups.

323 See Lowe et al., supra note 126.
324 See Charney, Denton & Kleberg, supra note 104.
325 See Torre, supra note 28.
326 See Leyden, supra note 322.
327 See id.
328 See Wyatt, supra note 85.
330 Becatoros, supra note 2.
4. Political Justifications for Not Halting the Black Market Antiquities Trade Are Inappropriate

Political considerations are inappropriate place in the debate on the ownership and exchange of cultural heritage. When artwork and cultural treasures originate from a nation that is viewed as an enemy to the U.S., the realm of antiquities takes on a distorted twist. The United States has not been particularly forthcoming in returning stolen objects to nations that are at political odds with the U.S. For example, the U.S. has not acted consistent with its intentions on returning a 2,500 year-old drinking vessel to Iran that was smuggled out of the Middle East. In that case, an ancient rhyton was seized after its illegal importation into the United States. Rather than return to the object to Iran, the U.S. has considered using the item to satisfy part of a legal judgment in an unrelated lawsuit.

Political alliances are inappropriate when dealing in the realm of cultural heritage preservation since these objects have significant values that outlive political spats and that will last into future generations. The historic significance of cultural items outweighs the political climate that may currently exist between two nations. For these reasons, the United States government should be uniform in its treatment of foreign antiquities and art. Simply because a nation is in political opposition to another political entity does not lessen the value of an opponent’s cultural treasures. And since it is a museum’s responsibility to preserve art, museums must not take advantage of a political situation to acquire controversial or questionable objects.

333 See id.
334 See id.
335 See id.
337 See id.
5. Museums Must Take Precautionary Measures to Not Acquire Items Looted During Times of War

Similarly, a consequence of war and political tensions is the destruction of cultural heritage. During times of conflict, museums and archaeological sites often go unguarded, leaving them vulnerable to looters. During the upheavals during the “Arab Spring” and the still-raging civil war in Syria, archeological sites have been pillaged. As a result, items are more easily smuggled during these times, and they enter the black market, and possibly find a final destination with a purchaser abroad. International organizations and representatives have warned antiquities buyers that thousands of objects from Syria have been looted and are appearing on the market. Museum directors must consider the fluctuating marketplace and the flux of items from warring nations when making acquisitions, and must be mindful not to fuel the market for plundered objects. Museums must give additional consideration to objects from areas of the world plagued by war and conflict, where the archaeological record is in peril. Julien Anfruns, director general of the International Council of Museums (“ICOM”), has warned buyers not to purchase objects from Syria, stating, “We really, really strongly advise any buyers to be extremely prudent . . . it’s a serious legal


339 See Fisher, supra note 338.


341 See Vlasic, supra note 7.


344 See TABERNER, supra note 218, at 96.
matter and due diligence is even more necessary in the current case.” The provenience or “find spot” of objects from a politically torn nation should act as a warning sign to government and museum agents responsible for monitoring acquisitions. Museums must exercise heightened scrutiny and not purchase items from war-torn nations, unless an ironclad provenance or provenience is provided. Consequently, it is necessary to enact a heightened scrutiny and museum acquisition procedures that take into consideration the country or origin and question whether art or cultural heritage was misappropriated during a time of conflict.

CONCLUSION

The destruction of cultural heritage through looting and black market trade has come to the attention of the international community due to its prevalence—as the second or third largest criminal activity globally—its links to terrorism, and the fact that it deprives future generations of the objects’ educational, cultural, and aesthetic value. The most effective method of protecting artwork is to reduce the size of the black market by reducing demand. One way to prevent the market for unprovenanced works is to regulate market intermediaries, including museums. Museums are established to protect art; therefore, museum directors must make a good faith effort to avoid questionable acquisitions. Museums cannot merely turn a blind eye to an object’s looted past. To ensure that museums engage in proper due diligence, it is necessary to enact mandates that effectively deter inappropriate acquisition practices. Following these mandates, the government should actively prosecute museum representatives who engage in underhanded dealings. Lastly, existing statutes should increase penalties to include incarceration and heavier fines.

345 Id.
346 See Vlasic, supra note 7.
348 See Taberner, supra note 218, 96–97.
It is imperative that museums be subjected to greater scrutiny. Museum representatives should not simply assume that works have valid title and were properly acquired; rather, museums should be required to research the works and prove proper ownership. Tax deductions for museums necessitate oversight by the Internal Revenue Service and the federal government. Cultural heritage is vested with a value for all humanity for generations to come; therefore, the government should aggressively protect these priceless and irreplaceable objects, a testament to humanity’s progress and shared achievements.