

Museums and Cultural Property: A Retreat from the Internationalist Approach

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Abstract: Responding to J. H. Merryman's discussion of cultural property internationalism in the preceding *IJCP* issue, this article examines the currency of the internationalist perspective within the museum community. Perhaps surprisingly, there is little evidence of adherence to an internationalist perspective, at least among the official policies and publications of museums and museum organizations. The article proposes that the current dissociation with cultural internationalism in the acquisitions arena signals an important shift, and bears significant long-term consequences for many museums.

In a 1986 article, *Two Ways of Thinking About Cultural Property*, Professor Merryman first identified the *cultural internationalist* approach to the disposition of cultural property, contrasting it with a *cultural nationalist* position. Nearly 20 years later, his framing of the debate continues to set the stage for conversations about cultural property.

As Merryman explains in the preceding *IJCP* issue, he and fellow internationalists posit “a legally cognizable international interest in cultural property.” They detect recognition of that interest in a number of international legal instruments, including the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954) and UNESCO's *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970). They also see an internationalist agenda mandated by the duties set forth in UNESCO's constitution, which include, among others, conservation and protection of cultural property and encouragement of international exchange. The proper way to meet these obligations, the internationalist opines, is to permit in-

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ternational movement of cultural property, whereby works will find their way to those who value them most and who will be their most able protectors. A licit market, they contend, will also promote protection of cultural property by reducing or eliminating the black market in antiquities. They do not go so far as to advocate for an unregulated market (“[n]o thinking person argues for free trade in cultural property”)¹, and they recognize that sometimes the additional information provided by a work’s context will render it more important—to the whole world—in its place of origin than it would be elsewhere. The internationalists also carve out an exception for objects of ritual/religious importance to living cultures, observing in such cases an overriding noneconomic value.

The opposing camp—populated in part by archaeologists and art-rich nations—regards international trade as inimical to the protection of cultural property. The cultural nationalists would vest custody over cultural property in its nation of origin, where it is less likely to be severed from its context, or where, as part of a national patrimony, it assumes a value that supersedes any economic value. They understand the UNESCO obligation to encourage international exchange to contemplate temporary loans and maybe bartering among public institutions but not a market in cultural property.

In his recent assessment of the case for cultural internationalism, Merryman observes that the nationalist viewpoint has been incorporated, implicitly or explicitly, in a series of UNESCO initiatives that he casts as major deviations from the organization’s internationalist constitution.² He notes that, predictably, the archaeological community continues to promote this position, whereas antiquities dealers and collectors continue to advocate against its embodiment in what they consider excessive restraints on the international trade of cultural property.

Merryman’s assessment does not discuss the current stature of cultural internationalism within the museum community. In earlier writings, he grouped museums among the *acquisitors*, whose discourse concerning the movement of cultural property, while underdeveloped, nonetheless “favor[s] the free international movement of privately held cultural objects and oppose[s] the enforcement of source nation export restrictions.” Merryman continues:

At the most pragmatic level, museums exist to acquire and conserve cultural objects for study and display. Without free movement there will be fewer opportunities for acquisition. . .

Acquisitors also base their support for the free international movement of privately held cultural objects on other arguments. The existence of a market preserves cultural objects that might otherwise be destroyed or neglected by providing them with a market value. In an open, legitimate trade, cultural objects can move to the people and institutions that value them most and are therefore most likely to care for them. Museum collections are built on occasional market acquisitions and, often more important, gifts from collectors. The range and quality of major private collections depend on the existence of an internationally active and ex-

perienced art trade. . . In basic agreement with the international free trade movement, acquirers argue that export controls should receive at most only selective international enforcement. . . .³

Merryman's assessment makes sense. It describes a stance that we would expect the museum community, at least that portion of the museum community engaged in the collection and display of international cultural property, to adopt. Even friendly adversaries of Merryman agree that alternative, context-driven approaches to cultural property present difficult questions for museums.⁴

This article proposes that, logical as an association between museums and cultural internationalism may appear, it is not borne out in the stated policies of museums and museum organizations. Cultural internationalism does not shape current museum acquisition policies. Its application within the museum community is largely confined to defending against restitution claims, and even that application is controversial. The temporary exchange of cultural property through international loan exhibitions has proven to be the only form of international exchange in cultural property that the museum community broadly and openly endorses.

This article explores why there is relatively little museum advocacy of cultural internationalist ideals, even among members of the museum community whose collections feature cultural property from other nations; even among the so-called universal museums. Focusing on collecting institutions primarily, but not exclusively, in the United States, it asks whether this reticence reflects a sea change in museum ideology and practice or reflects politically expedient equivocation. It also asks, "if not acquisition, what then for the Getty, the Metropolitan Museum of Art, the British Museum, and other acquirers?"

The Museum Community

One reason why the museum community does not broadly adopt the acquirers' discourse is clear: only a small proportion of the museum community is made up of acquirers, institutions that actively collect cultural heritage from beyond the borders of their home country. It is possible, then, that the voice of such museums has been drowned out by the rest of the museum community for which international acquisitions are a nonissue or even a threat.⁵ Understanding the relative absence of cultural internationalist advocacy requires that we find out who speaks on behalf of the museum community.

1. ICOM

The International Council of Museums (ICOM) is a vast international association of museums, museum professionals, and related organizations. With more than 17,000 members in 140 countries, ICOM represents the museum community at its broadest, most inclusive level. It includes art museums but also historical houses, science centers, retired naval ships, etc. Among its museum professionals are

curators, collection managers, archaeologists, and anthropologists. ICOM's broad constituency and its symbiotic relationship with UNESCO, with which it has been formally affiliated since its founding in 1946, color ICOM's official stance concerning cultural property.⁶

If museums that collect cultural property internationally (acquirors) do indeed embrace a different perspective on the movement of cultural property from other members of the museum community, then ICOM is unlikely to represent adequately the interests of such collecting institutions. Like the United Nations, ICOM has a nation-based approach to museum issues. ICOM's General Assembly, its supreme policymaking body, acts through a voting system whereby each of some 116 national committees has five votes; each of 29 international committees, five votes; and each eligible affiliated organization, three votes. The museum community in Nepal thus has the same voting power as the U.S. museum community. Oman and Qatar, collectively, have twice the United States' votes. That observation is not a criticism—ICOM's organizational scheme may be the best available to meet its goals. However, it seeks to underscore two points; first, that the museum community does not divide proportionately along national lines; second, that because relatively few nations are home to a significant number of acquirors, the acquirors' voice will be overwhelmed where it diverges from that of institutions that collect nationally, locally, or not at all.

ICOM supports UNESCO's mandate to conserve and protect cultural property and to encourage international exchange. Like UNESCO, its approach to these responsibilities diverges from the cultural internationalist approach. While it promotes the preservation of cultural property as the heritage of all humankind, on balance, ICOM considers cultural property primarily the province of its country of origin.⁷ It is in its home nation that cultural property assumes its greatest significance, informing a national identity and contributing to a national heritage.⁸

ICOM's approach does not reject all forms of international exchange of cultural property. ICOM has facilitated international exchange by encouraging and standardizing loans and temporary exhibitions. In 1970, ICOM went so far as to include among the responsibilities of museums in art-rich countries the duty "to cooperate with foreign museums and other scientific institutions to ensure adequate representation of that culture on an international scale."⁹ But like UNESCO's 1976 *Recommendation Concerning the International Exchange of Cultural Property*, which grew out of a 1974 study conducted by ICOM, the breed of international exchange ICOM endorses is exchange on the terms of the country of origin, whereby cultural property can and should cross borders but only under extensive institutional or government supervision. ICOM shares, or perhaps fuels, UNESCO's distrust of the market. If, as Professor Merryman suggests, UNESCO's 1976 *Recommendation* represents a sharp turn away from cultural property internationalism, then ICOM has followed (or indeed led) UNESCO in that direction.

ICOM's efforts to protect cultural property, dominated by its role in the campaign to curb the illicit trade in antiquities, has further informed its understand-

ing that cultural objects belong at home, in the country of origin. In the 1995 *Declaration of Cuenca*, for example, ICOM joined UNESCO and affiliated organizations in developing a strategy to curtail the illicit trade in Latin American cultural property. The declaration observes “[t]hat the State has diminished its governing role, as the custodian entity responsible for the social function and capitalization of the benefits of the cultural heritage.” It also urges that nations “assume the appropriate role in reinforcing the cultural identity of our peoples” by, among other things, endorsing international cultural property initiatives, like the UNESCO *Convention* and UNIDROIT, developing or enforcing national legislation, assuming “a more active attitude concerning recovery of expatriated cultural heritage,” and promoting their cultural institutions.

In addition to its declarations and press releases, ICOM publishes its position on cultural property through its *Code of Ethics for Museums*. The *Code*, adopted in 1986 and amended in 2001 and again in 2004, urges member institutions to refuse the acquisition or display of works with an incomplete or questionable provenance, as “such displays or usage can be seen to condone and contribute to the illicit trade in cultural property.” (§ 4.5)

Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in or exported from, its country of origin or any intermediate country in which it might have been owned legally (including the museum’s own country). Due diligence in this regard should establish the full history of the item from discovery or production. (§ 2.3)

There is a narrow exception to the prohibition:

In very exceptional cases an item without provenance may have such an inherently outstanding contribution to knowledge that it would be in the public interest to preserve. The acceptance of such an item into a museum collection should be the subject of a decision by specialists in the discipline concerned and without national or international prejudice. (§ 3.4)

The *Code* imposes upon ICOM members an ethical obligation to uphold foreign nations’ export laws, and to establish a work’s full history prior to considering its acquisition. As critics are quick to point out, this means an object is guilty until proven innocent. Exemption from the full-history rule appears to require the consent of specialists beyond the acquiring institution itself. The *Code* evinces a distrust, perhaps well founded, not only of the market but also of museums’ individual capacities to resist justifying acquisitions that ICOM fears facilitate an illicit trade.

The *Code* further obliges members to adhere to the principles laid out in the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954), UNESCO’s *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970), UNIDROIT (1995), and recent UNESCO conventions. They should also be willing to consider the restitution of cultural property:

Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level. (§ 6.2)

When a country or people of origin seek the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return. (§ 6.3)

2. Museum Organizations in Acquisitor Nations

Even in art-market nations, museum associations, such as the American Association of Museums (AAM) and the UK Museums Association (UKMA), do less than one might expect to promote the international movement of cultural property. Acquisitors stand at a significant disadvantage if their views are not endorsed by such national associations, which serve as the principal interface between the museum community and governments, international organizations, and courts.

UKMA Although it represents a number of acquisitors among its 600 institutional members, UKMA's cultural property agenda seems to steer far clear of cultural internationalism. In its *Code of Ethics for Museums*, UKMA follows ICOM in requiring members to reject considering the acquisition of:

any item if there is any suspicion that, since 1970, it may have been stolen, illegally excavated or removed from a monument, site or wreck contrary to local law or otherwise acquired in or exported from its country of origin (including the UK), or any intermediate country, in violation of that country's laws or any national and international treaties, unless the museum is able to obtain permission from authorities with the requisite jurisdiction in the country of origin. (§ 5.10)

UKMA's *Code* also instructs member institutions to:

[d]eal sensitively and promptly with requests for repatriation both within the UK and from abroad of items in the museum's collection, taking into account: the law; current thinking on the subject; the interests of actual and cultural descendants; the strength of claimants' relationship to the items; their scientific, educational, cultural and historical importance; their future treatment. (§ 7.7)

In recent years, UKMA has lent considerable resources to address the problem of illicit trade in cultural property. Its efforts, including statements before the UK parliament and an influential report that it commissioned, culminated in the UK ratification of the UNESCO *Convention* in 2002. The 64-page report, *Stealing History*, authored by members of the McDonald Institute for Archaeological Research, rejects the internationalist position that a legitimate market might curb the black market in antiquities. It calls for more effective controls over the move-

ment of cultural property and urges the UK government to resist any World Trade Organization (WTO) initiatives that would limit such controls.¹⁰ The report concedes that museums may need the market, but it warns of the legal and ethical dangers that museums face there.¹¹ It cites alternatives to the continued pursuit of ownership of cultural property, observing “a growing realisation that the best way forward for museums that don’t want to encourage the illicit trade may be ambitious programmes of inter-museum loans.” Quoting Martin Sullivan, former chair of the U.S. Cultural Property Advisory Committee, the authors suggest that “[t]oo many museums are still thinking in terms of ownership. . . . Museums started out being institutions for the preservation of cultural heritage. We have to get back to that—and find some new ways to do it.”¹² That view, that the focus on acquisition is outdated or uncreative has some traction in the UK (and U.S.) museum community.¹³

UKMA has weighed in on the topic of restitution as well. It has been highly critical of the position adopted by a number of acquirers in their 2002 *Declaration on the Importance and Value of Universal Museums* (discussed later), and of the British Museum in particular for its handling of the Parthenon Marbles controversy.¹⁴

AAM The American Association of Museums (AAM) represents a museum community that stands apart from others in its high proportion of private funding and in the independence and the sizeable acquisition budgets that sometimes follow. Some posit that well-funded American acquirers lag behind their European counterparts in rethinking acquisitions policies.¹⁵ But even if the U.S. community trails behind Europe in this regard, it is certainly moving in the same direction. AAM’s enthusiasm for cultural internationalism has cooled to lukewarm.

Provisions in the AAM *Code of Ethics*, first established in 1993 and revised in 2000, require that “acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials” and that “competing claims of ownership that may be asserted in connection with objects in its custody should be handled openly, seriously, responsively and with respect for the dignity of all parties involved.”¹⁶ The *Code* does not define what it means by illicit.

In 1999, responding to heightened media attention, AAM clarified its position in a *Statement on Cultural Property*. The statement outlined a basic problem of paucity of provenance information:

From earliest times, works of art have passed from country to country with few if any records of their travels. They have frequently been the victims of theft or plunder, and laws and policies of nations vary widely concerning the effect of such events on the issue of title. This means that those who are concerned about title because they wish to acquire or use a work of art are often unable to clarify title status with reasonable certainty because essential information is not readily available.

The statement went on to affirm AAM support of the UNESCO *Convention*: “[S]ince 1983, when the United States implemented the UNESCO Convention . . . AAM has aggressively promoted the objectives of that Convention. It has done this in its code of ethics, in its educational programs and in its encouragement of museums to adopt self-imposed collection management policies that articulate acquisition criteria.”¹⁷

That communication was at least in part a response to the negative press and the disapproval of some AAM constituents surrounding an amicus brief the organization had filed a year earlier in a case involving prominent New York collector Michael Steinhardt (discussed later).¹⁸ The brief urged the court against an expansive interpretation of what is known as the McClain doctrine—a principle established in a case before the Fifth Circuit that allows the application of the National Stolen Property Act to protect ownership derived from a foreign patrimony law, even if the foreign government had not reduced its ownership to possession.¹⁹ In short, the brief opposed broad U.S. enforcement of foreign export controls. This was an unambiguously cultural internationalist move. It was also consistent with past policies, including the group’s opposition to U.S. ratification of UNIDROIT in 1995. But attitudes were changing, and support for the amicus brief was mixed. When the same legal questions were again before the court two years later, AAM chose not to get involved.

AAMD The Association of Art Museum Directors (AAMD), its membership limited in size and collecting interests, represents more specifically the interests of acquirers such as the Metropolitan Museum of Art, the Getty Museum, and others. AAMD accordingly espouses a more robust cultural internationalist position than any other museum organization, but recent statements and decisions suggest that even at AAMD, open support for cultural internationalism may be tapering off.

In a 2002 statement, *Art Museums and the International Exchange of Cultural Artifacts*, AAMD set forth the following internationalist rationale:

The United States government has adopted a global perspective on culture, believing that citizens of other countries benefit from exposure to American works of art just as Americans benefit from exposure to the arts of other cultures. American museums are committed to the free exchange of ideas and the responsible acquisition of cultural artifacts.

While this basic commitment to internationalist principles was affirmed in a 2004 *Report on the Acquisition of Archaeological Materials and Ancient Art*, the point of the report was to introduce a series of guidelines for acquisitions of international cultural property. The guidelines represent a significant shift. They require broad inquiry prior to acquisition and broad disclosure following acquisition. They also advise members to comply with relevant domestic laws and to become familiar with foreign laws, “[s]ince the status of a work of art under foreign law may bear on its legal status under U.S. law. . .” While the guidelines stop short of

advising members to comply with foreign export or patrimony laws, they present whether “the importation [is] consistent with applicable law, including relevant international conventions”²⁰ as a factor to consider in any acquisition decision. The guidelines contemplate scenarios in which a museum may and should acquire an important work with an incomplete provenance, but the examples proffered sound a lot like the *very exceptional* standard enunciated in the ICOM *Code of Ethics*.²¹

Although AAMD remains, on the whole, an actively internationalist organization,²² one could interpret the rigorous guidelines, along with its decision not to take a stand in the *Schultz* case (discussed later) and the emergence of a new non-affiliated internationalist advocacy group, as at least a partial retreat from the spotlight on AAMD’s part.

Museum Policies and Practices

A survey of acquirers’ published policies suggests a general consensus that the principles adopted in ICOM and national associations’ codes of ethics constitute the only acceptable approach to the acquisition of cultural property.²³ Of course, a number of acquirers’ policies are unpublished (or unwritten), and that may be significant, yet it underscores the general idea that if a museum harbors a robust cultural internationalist agenda, it does so in private. Moreover, certain acquirers that have delayed in adopting more rigorous acquisition policies have been singled out for criticism.²⁴ While there is more room for debate—and for the introduction of internationalist principles—on the topic of restitution, ironically, the deployment of a cultural internationalist justification for *retaining* cultural property operates against an internationalist justification for *acquiring* it today.

1. Acquisition

According to Merryman’s acquirers’ discourse, we should expect that a museum actively engaged in collecting international cultural property would incorporate internationalist ideals into its acquisition policies as far as it could do so legally and without breaching compliance obligations under applicable ethics codes, but that does not appear to be the case. Indeed, major collecting institutions have tended to follow acquisitions policies that uphold foreign nations’ export laws whether or not it is a legal requirement,²⁵ and some have adopted policies that limit acquisitions significantly further than ICOM and the UNESCO *Convention* would require.

In 1972, thirty years before the United Kingdom ratified the UNESCO *Convention*, the British Museum, keeper of the Parthenon Marbles, announced it would not acquire illegally exported cultural property. In its current form, the museum’s policy states that “[w]herever possible the Trustees will only acquire those objects that have documentation to show that they were exported from their country of origin before 1970 and this policy will apply to all objects of major importance.” (§ 4.2.5) For minor antiquities, the museum reserves the right to allow its cura-

tors to use their judgment as to whether acquisition should be pursued in spite of an inadequate provenance.

The Berlin State Museums likewise adopted a strict acquisitions policy early on. According to Wolf-Dieter Heilmeyer, director of the Museum of Classical Antiquities, the policy means that the museums “will no longer acquire, display, or restore any objects that do not have clear provenances.” In short, “if there is any doubt about provenance we don’t go further.”²⁶

The Metropolitan Museum of Art has not published an acquisitions policy, electing instead to be “guided in its acquisition pursuits by the policies set forth by the [AAMD].”²⁷ After the acquisition guidelines enunciated in the 2004 AAMD *Report* (discussed previously), that means the museum will be subject to a fairly rigorous policy, even if vicariously. The conspicuously missing ingredient is an unequivocal ban on acquiring works exported in contravention of foreign nations’ laws.

Another major collector, the Getty Museum, once the very symbol of the aggressively acquisitive American museum, has adopted a particularly stringent acquisition policy. Antiquities that were not published by 1995 are flat out ineligible for acquisition at the Getty.²⁸ Acquisition protocol also requires contacting potential nations of origin to confirm that there are no known claims on the object. Whereas a policy like the British Museum’s is arguably required at least in its basic form by membership in ICOM and/or UKMA, bright-line policies like the Getty’s clearly exceed the mandate of ICOM or other associations.

What is one to make of such a policy? Does it reflect a sea change in museum ideology? Have even the acquirers become convinced that the best hope for protecting cultural heritage rests in curtailing pursuit of new acquisitions? Another possibility is that the shift in policy comes instead as a politically expedient concession to a cultural nationalist position that has been effectively promoted and widely embraced by the public. In light of a number of embarrassing incidents in recent years, one might speculate that among the many acquirers that have reined in support for cultural internationalist ideals, at least some are seeking to avoid undesirable associations and special scrutiny as much as they are contemplating a reinvention of museum goals and responsibilities. A few examples from the U.S. museum community experience illustrate this point.

The Kanakaria Mosaics In 1988, Peg Goldberg, an Indiana dealer trading primarily in modern art, acquired in Switzerland and attempted to sell in the U.S., four Byzantine mosaic fragments that had been removed from the Church of the Panagia Kanakaria in northern Cyprus. A year later, Cypriot efforts to recover the mosaics wooed an international media and filled an Indiana federal courthouse. American museums emerged largely unscathed from Cyprus’ recovery of the mosaics from American soil.²⁹ They had done the right thing. The Getty refused to purchase the mosaics and made the Republic of Cyprus aware of their whereabouts. Another museum’s director provided expert testimony on Cyprus’ behalf

in the proceedings. Still, a new era of due diligence and intense media scrutiny had arrived for all collectors, public as well as private.

The Lydian Hoard A great deal of negative press for the Metropolitan Museum of Art surrounded the ultimate return to Turkey—following six years of legal wrangling—of a massive sixth-century BC treasure, the *Lydian Hoard*. While it denied Turkey's claims that the museum knew the treasure was stolen when it chose to acquire it and further denied that it intentionally mislabeled it the museum eventually acknowledged publicly that some staff members “were likely aware, even as they acquired these objects, that their provenance was controversial.”³⁰ Other source nations, encouraged by Turkey's settlement with the museum, have brought claims to the attention of the courts and the media. These challenges have kept museums in the news, more often than not in a defensive posture.

The Achyris Phiale In *United States v. An Antique Platter of Gold*,³¹ a gold *phiale* acquired by prominent New York collector Michael Steinhardt was seized by U.S. Customs agents and ultimately returned to Italy. Although museums were only peripherally involved in the case, it proved to be a conspicuous ground for the Archaeological Institute of America (AIA) and AAM/AAMD to slug it out as *amici curiae* (friends of the court) for either side in the debate over international trade in cultural property.³²

Before the Second Circuit Court of Appeals, AAM and AAMD argued that enforcing foreign export laws “threatens the ability of U.S. museums to collect . . . and make available for public exhibition objects from around the world that have not been stolen or been the object of looting, but rather have been the subject of sweeping foreign cultural patrimony laws that are, in significant respects, antithetical to fundamental principles of United States law and public policy.”³³ The court never reached that issue, but the associations' involvement had an effect just the same. Although they framed their involvement as a pure policy stance, detached from the particular facts of the case, AAM and AAMD were nonetheless perceived by some as aligned in interest with unscrupulous collectors and dealers. Consider the way AAMD support was described by the *Boston Globe*: “[T]he same museum directors' association has . . . quietly decided to join a legal battle to protect the booming multibillion-dollar trade in antiquities, objects often plundered from archeological sites in countries like Italy and Turkey and then illegally exported.”³⁴ The case revealed the intense media interest in *stolen art* and prompted both AAM and AAMD to elect against weighing in the next time that this legal question was considered by the court, in *United States v. Frederick Schultz*.³⁵

The Schultz Scandal The July 2001 indictment and subsequent conviction of Frederick Schultz, a well-known antiquities dealer, for smuggling and forgery was a major embarrassment for museums as well as dealers. Not only had Schultz supplied a number of museums with Egyptian antiquities over the years, but in his capacity as president of the National Association of Dealers in Ancient, Oriental

and Primitive Art, Schultz had participated in AAMD strategy meetings surrounding the Steinhardt appeal. Newspapers were quick to point out that the disgraced dealer was the same Schultz that museums had teamed up with to argue against U.S. enforcement of foreign patrimony laws. The AIA got its jabs in, too, proposing that this time around, “[r]ather than bemoan the prosecution of those who deal in illicitly excavated antiquities, museum officials should support efforts to curtail their activities.”³⁶

These and other less-publicized embarrassments in the United States and abroad have no doubt contributed to acquirers’ reticence. Even if they believe that the current nation-based cultural property model is the wrong one, with their acquisitions policies and practices under greater scrutiny than ever before,³⁷ it is not an easy moment for museums to stand up as proponents for greater availability of another nation’s cultural property. One result has been that advocacy for cultural internationalism in museum acquisitions more and more occurs outside of the museums themselves. Museum directors have shared cultural property internationalist perspectives on the acquisition of works, but primarily on their own behalf and not on behalf of a particular institution or group of institutions. James Cuno, former director of Harvard University Museums and now director of the Art Institute of Chicago, has been a vocal proponent of an internationalist position that recognizes the importance of keeping museums in the business of acquisition. “Indeed,” Cuno suggests, “it is often only through the act of acquiring an object, doing due diligence, exhibiting it, publishing it, and further studying it, that one comes to know what is most important about it and what in fact its legal standing is.”³⁸ But that view is not reflected in Harvard Museums’ policies, which as early as 1971 demanded “reasonable assurance that the object has not, within a recent time, been illegally exported from its country of origin.” Prior to acquisition, Harvard policies require evidence “that the University can acquire valid title to the object in question, meaning that the circumstances of the transaction or knowledge of the object’s provenance must be such as to give adequate assurance that the seller or donor has valid title to convey.”³⁹ Other directors have likewise expressed cultural property internationalist sentiments outside of their museums’ press offices or policy handbooks.⁴⁰

The same trend toward dissociation with cultural internationalist advocacy is evident in the 2002 emergence of a new American lobbying organization, the American Council for Cultural Property (ACCP).⁴¹ The group, headed by Ashton Hawkins, formerly counsel to the Metropolitan Museum of Art Trustees, operates with the stated intention of providing a counterweight to *retentionist* policies. Goals include revision of the U.S. Cultural Property Implementation Act and advocacy in aid of “legitimate dispersal of cultural material through the market.”⁴² These are roles that, in the past, one might have expected AAM or AAMD to assume. ACCP was also willing to take to the field in the *Schultz* appeal, a battleground too hot for AAM and AAMD. While ACCP may prove an able advocate for cultural internationalism, an organization that is not directly accountable to the museum

community is likely to have less leverage than an organization that counts museums as institutional members.

2. Consequences of Acquisition Reform

Whether the new acquisition policies represent a genuine commitment to a new ideology or a perceived political necessity, they bear significant long-term consequences. Chief among these is the prospect of little or no acquisition of international cultural property in years to come. True, the effect of a policy banning acquisitions of recent export may not be felt at present or even in the near future. For one thing, some museums may persist as cultural internationalists in practice though they do not advertise it in public statements. Even where new rules have been introduced, it is possible that former acquisition practices continue largely unfettered, either because policies are routinely ignored, or because they leave enough loopholes that they are easily circumvented. In her 1998 assessment of acquisition policies, Clemency Coggins suggests that the Getty's acquisition policy is relatively unique, "especially in that it is actually carried out."⁴³ Avoidance of the *spirit* of acquisition policy reforms may indeed occur to some degree (some think to a high degree), but as the failure to follow comprehensive and transparent procedures in the acquisition of works of international cultural property becomes less and less defensible, there will be less and less room for resistance. One suspects, moreover, that the negative association with freewheeling acquisitions, both in the media and in the museum community itself, will continue to limit noncompliance.

The impact of acquisition reform is also forestalled at some museums—U.S. museums especially—by a steady stream of new acquisitions furnished by gifts and sales from private collections. One might again, with good cause, entertain concerns that such acquisitions evade the spirit of the new policies. Such a high percentage of acquisitions hail from private collections that the exception surely swallows the rule when acquisition standards are not applied to donations.⁴⁴ Perhaps some museums have failed to close this loophole, but that oversight seems perilous enough in the current climate that it almost has to be short lived. The Schultz scandal has revealed to the whole world how easy (and common?) it is to fabricate a private collection provenance that satisfies museum requirements. As the new AAMD guidelines indicate, acquirors can no longer accept proffered provenance details at face value, nor keep such details to themselves. And the Getty's experience with the Fleischman collection, both in the criticism it received over accepting a collection with incomplete provenance and in the eventual return of an object from the collection that had been illegally removed from Italy, made it clear that nothing short of comprehensive inquiry is acceptable, even for the most eminent of private collections.⁴⁵

There is a large body of provenance-ready works held in private collections, but it is not infinite (nor is it renewable), it is deep in some subject areas and thin in others, and not all of it has been earmarked for museum acquisition. It cannot, in

the long term, sustain more than a trickle of museum acquisitions. That means that acquirers need to sort out a method of acquisition capable of satisfying all relevant parties that it does not facilitate the black market, or they need to seek out alternatives to acquisition. The substantial obstacles to the first option have been examined by others.⁴⁶ The latter option now looms over acquirers.

3. Alternatives to Acquisition

Patty Gerstenblith has argued that antiquities acquisitions are no longer prudent. She repeats the observations of a Getty Museum curator that “a decrease in acquisitions can encourage museums to provide much-needed resources for the existing collections. . . [and] the lack of purchasing power provides a great incentive for exchanges among collections and meaningful loan programs.”⁴⁷ There is considerable support for the view that temporary exchanges should replace the practice of acquisition.

The 1976 UNESCO *Recommendation Concerning the International Exchange of Cultural Property* contemplated barter and temporary exchange at the institutional level. Over the past 30 years, barter has not been a significant factor. A handful of interesting long-term loans have been negotiated, but the practice is hampered by cultural patrimony laws in some nations. Turkey’s laws, for instance, forbid loans of antiquities that extend beyond one year.⁴⁸ Long-term loans hold promise as an acquisition alternative if the kinks can be worked out. A creative arrangement, for example, saw the Pergamon Museum lend an important marble statue of Roman Emperor Marcus Aurelius to the Getty Museum, which, for its part, provided extensive conservation work. Although in that example the loan was from one acquirer to another, the model seems broadly practicable.

In contrast to the minimal impact of barter and long-term exchange, short-term loan exhibitions have proven an immensely popular, if lopsided, forum for international exchange. Such exhibitions have presented acquirers and other museums with opportunities never before imagined.⁴⁹ Still, loaned works—at least at present—come with substantial limitations. The associated costs of mounting an international exhibition are high and can raise related concerns of sponsorship; preparation is time consuming; the condition of a work can preclude frequent travel; international politics can restrict loan availability; borrowers may be unable to present a loaned work in the manner they find most effective or intellectually honest particularly in prepackaged, traveling exhibitions; and borrowers generally cannot perform conservation or examine a work’s composition or authenticity. In short, borrowing a work is not the equivalent to owning it, and a museum community that does not acquire international cultural property will be a different one.

Different may turn out to be better or it may turn out to be worse. Some of the limitations currently in place may be overcome. Compromises with reluctant lenders may be reached. Other mutually beneficial arrangements may evolve. Museums may be able to reach out just as effectively to their communities and their

donors without new acquisitions of cultural property from abroad. It would be reassuring, however, to see more evidence that acquirers are thinking about and preparing for their future. To date, acquirers appear reluctant to share with an interested public the forecasts and strategies, the soul-searching, that must accompany such a major change in museum practice.

4. Restitution

Whereas the museum community may have reached some consensus that, for now at least, cultural internationalism cannot shape acquisition policies, internationalist principles continue to inform conversations about restitution. A sizeable quantity of cultural property has been returned to places of origin in recent decades. The recent dismantling and preparation for the return of Ethiopia's *Axum* obelisk from Rome represents the largest-scale restitution project, but it is just one of numerous examples—large and small, complete and partial.⁵⁰

In spite of a mounting number of works repatriated, it is important to distinguish those that stem from recent acquisitions that were later recognized to contravene laws or museum policies from those that stem from acquisitions made during the age of imperialism, before the UNESCO *Convention* and before acquisition practices were modernized.⁵¹ In the former category, there is general agreement that restitution should be considered and carried out if legal and practical; many museums' and museum associations' policies so state. In the latter context there are far fewer examples of restitution to report (although NAGPRA and related national programs stand out as an exceptional example), and there remains a wide range of opinions in the museum community, including opinions that espouse cultural internationalist principles.

One strand of cultural internationalism opposes restitution on the ground that the physical preservation of important examples of some nations' cultural property is better secured in the foreign museums where objects currently reside. This argument grows less and less compelling as museums in so-called source nations continue to emerge better equipped and better organized. Still, in specific instances it has persisted as a justification. The Royal Museum for Central Africa in Tervuren, Belgium, for instance, opposes restitution following its experience of returning 114 ethnographic works in 1976 to the custody of the Kinshasa Museum only to see a large number of them stolen amidst subsequent political turmoil in the Congo. Such disappointing results convinced the Royal Museum's director, Guido Gryseels, that wholesale return of objects collected during the colonial era is not a viable option: "The past is what it is."⁵²

Another cultural internationalist perspective has been aired primarily in response to the ultimate restitution debate of recent decades, namely Greece's demand for the return of the British Museum's Parthenon Marbles. The protracted demand, now decades old, was voiced with heightened urgency in recent years, as Athens prepared to host the 2004 Olympic games and as a new museum on the Acropolis was designed to house the Marbles. Pressure to return the Marbles has

come from all corners—the press, UKMA, the Greek government, even the U.S. Congress. The British Museum continues to resist restitution of the Marbles, and in 2002–2003, was joined by a large group of many of the world's preeminent acquirers in a statement in defense of universal museums.

The *Declaration on the Importance and Value of Universal Museums*, issued in December 2002, reads as follows:

The international museum community shares the conviction that illegal traffic in archaeological, artistic, and ethnic objects must be firmly discouraged. We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era. The objects and monumental works that were installed decades and even centuries ago in museums throughout Europe and America were acquired under conditions that are not comparable with current ones.

Over time, objects so acquired—whether by purchase, gift, or partage—have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them. Today we are especially sensitive to the subject of a work's original context, but we should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source.

The universal admiration for ancient civilizations would not be so deeply established today were it not for the influence exercised by the artifacts of these cultures, widely available to an international public in major museums. Indeed, the sculpture of classical Greece, to take but one example, is an excellent illustration of this point and of the importance of public collecting. The centuries-long history of appreciation of Greek art began in antiquity, was renewed in Renaissance Italy, and subsequently spread through the rest of Europe and to the Americas. Its accession into the collections of public museums throughout the world marked the significance of Greek sculpture for mankind as a whole and its enduring value for the contemporary world. Moreover, the distinctly Greek aesthetic of these works appears all the more strongly as the result of their being seen and studied in direct proximity to products of other great civilizations.

Calls to repatriate objects that have belonged to museum collections for many years have become an important issue for museums. Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation. Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation. Each object contributes to that process. To narrow the focus of museums whose collections are diverse and multifaceted would therefore be a disservice to all visitors.⁵³

Immediately noteworthy is the *Declaration's* failure to assume a cultural internationalist position when it comes to the acquisition of cultural property in the present. It seeks, instead, to convince the interested public, governments, and the

museum community that there is a wide gulf separating the past from the present; that one must not consider cultural property transferred prior to the UNESCO *Convention* or modern collecting policies and practices in the same way that one perceives cultural property transfers under the UNESCO regime. In other words, the *Declaration* does not say that current nation-based attitudes are wrong, just that they should not apply retroactively.⁵⁴ Such a stance seems poised to seal the fate of cultural internationalism in the acquisition arena.

It is hard to gauge at present what impact, if any, the *Declaration* will have on the restitution debate. It demonstrated that, for now at least, some acquirors remain willing to assume a cultural internationalist posture, even if it has been reduced from a *modus operandi* to a defense. The *Declaration* garnered attention to a cultural internationalist position, but along with attention came renewed criticism of that position, both within the museum community and beyond.⁵⁵ It will be interesting to see whether these acquirors hold fast to the internationalist model when it comes to repatriation, or whether—as in the acquisitions arena—policies and practices will be reconfigured to fit a different model.

CONCLUSION

After 20 years, Professor Merryman's framing of the cultural property debate still makes sense. As his recent article indicates, there continue to be individuals and organizations poised to take up nationalist and internationalist positions. For museum acquirors, however, an internal push for reform and great external pressure have made a cultural internationalist agenda untenable. They are no longer willing to stand up with the rest of the acquirors group that Merryman describes.⁵⁶ Cultural internationalism no longer shapes their practices or policies, except as an occasional defense against restitution claims.

If the current dissociation with cultural internationalism persists, some museums face major changes. Without a steady stream of new acquisitions, such museums will have to find new ways of sharing other cultures with their visitors. The movement away from cultural internationalism signals a new direction for museums, but they have given little indication to date where they would like that new direction to lead them.

ENDNOTES

1. Merryman, "Cultural Property Internationalism," 12.

2. Merryman, "Cultural Property Internationalism," 27. The 1976 *Recommendation Concerning the International Exchange of Cultural Property*, for instance, clearly excludes international trade, and limits acceptable international exchange to loans and barter among governments and public institutions. The 2001 *Convention on Protection of the Underwater Cultural Heritage* states simply: "Underwater cultural heritage shall not be commercially exploited."

3. Merryman, "The Free International Movement of Cultural Property," 307.

4. Gerstenblith, *Art, Cultural Heritage, and the Law*, 537, observes that museums' traditional role "as collectors of cultural objects from throughout the world. . . inherently contradicts the placement of objects in their original social, historical and even geographical milieu."

5. Consider, for example, the divergent interests when it comes to international trade in cultural property of the National Museum, Athens, on the one hand, and the Getty Museum, on the other hand.

6. And vice versa. ICOM was a key proponent behind UNESCO's official stance on a broad range of cultural property topics.

7. ICOM, *1970 Ethics of Acquisitions*, imposes a responsibility on museum professionals "to control the international movement of objects belonging to [the national] heritage" they are charged with preserving, and requires that collecting institutions observe the laws and interests of the country of origin in acquisitions of cultural property.

8. ICOM, *Illicit Traffic of Cultural Property*, recognizes cultural property as "the surest testimony to the history of a people or a civilisation. . . an integral part of a country's heritage"; ICOM, *Arusha Appeal*, declares that the theft and illegal excavation of cultural property deprive African nations "of the knowledge of their past, by removing from the communities the symbols of their identity"; Lewis, *Universal Museum*, remarks that the focus should be on "the ability of a people to present their cultural heritage in their own territory."

9. ICOM, *1970 Ethics of Acquisitions*, Recommendation 9. In its 1989–2001 *Code of Ethics*, ICOM refrains from imposing an affirmative duty upon source-nation museums to ensure international representation. See also Noble, "International Museum Exchanges," 77–82.

10. Brodie *et al.*, *Stealing History*, 31.

11. Brodie *et al.*, *Stealing History*, 48. UKMA has also published a guide for museums, *Buying in the Market*.

12. Brodie *et al.*, *Stealing History*, 54.

13. Gerstenblith, "Museums, the Market and Antiquities," calls attention to proposed advantages of temporary custody (as opposed to ownership) of cultural property.

14. UKMA's deputy director, Maurice Davies, called the *Declaration* "a George Bush approach to international relations." See Bailey, "A George Bush approach to international relations." *The Art Newspaper* (Feb. 2003). The same deputy director, before an Athens audience, described the British Museum as "rude, high-handed, and offensive," and suggested that listeners may take comfort in the fact that "UK museums do not all behave like the British Museum." See Davies, "UK Museums Association Talks in Athens on Repatriation."

15. Eakin, "Debating 'Illegal Archeology,'" reports a conspicuous absence of American museum representatives at an international conference dedicated to stemming traffic in looted antiquities: "One important point that emerged from the discussions is that there is a widening divide between the collecting policies of large, donor-driven American institutions and the more rigorous practices pursued by smaller university collections and adopted by major European museums in recent years."

16. AAM, *Code of Ethics for Museums*.

17. AAM, *Statement on Cultural Property*. Note that the *Statement*, while acknowledging AAM support for the 1970 UNESCO *Convention*, fails to define precisely what that support entails.

18. See the Web report submitted by Claire Lyons concerning the Steinhardt appeal, at <http://www.museum-security.org/99/046.html>, citing disagreement engendered by the brief. See also Robinson, "Museums' stance on Nazi loot belies their role in a key case." *The Boston Globe* (Feb. 13, 1998), A01, available at <http://www.dhh-3.de/biblio/news/1998/0213a/>, noting that the brief "provoked objections from some museum directors, who find the smuggling indefensible and fear the museums will be tainted by joining the effort to overturn the judge's decision."

19. The doctrine is explained in some detail in the context of the *Achyris phiale* in Shapreau, "Second Circuit Holds that False Statements Contained in Customs Forms Warrant Forfeiture of Ancient Gold Phiale—Hotly Contested Foreign Patrimony Issue Not Reached by the Court: *United States v. An Antique Platter of Gold*."

20. AAMD, *Art Museums and the International Exchange of Cultural Artifacts*.

21. AAMD, *Report on the Acquisition of Archaeological Materials and Ancient Art*, 4.
22. AAMD, *Testimony to CPAC on Colombian Art and Artifacts*.
23. O'Keefe, "Museum Acquisitions Policies."
24. Brodie *et al.*, *Stealing History*, 47.
25. While many art-collecting countries like Japan, Germany, and the Netherlands have not joined the *Convention*, the museums and museum organizations there have endorsed UNESCO principles nonetheless. See O'Keefe, "Museum acquisitions policies."
26. See Heilmeyer's comments reported in Eakin, "Debating 'Illegal Archeology.'"
27. See Eakin, "Debating 'Illegal Archeology,'" quoting the museum's senior vice president for external affairs, Harold Holzer.
28. Papageorge Kouroupas, "Illicit Trade in Cultural Objects."
29. Hofstadter, "Annals of the Antiquities Trade," 39. There were allegations leveled by one of those implicated in the scheme, that looted Cypriot objects were housed in many museums, including the British Museum, the Metropolitan Museum of Art, the Getty Museum, the Museum of Fine Arts in Antwerp, and Dumbarton Oaks.
30. Maier, "The Met Digs In." *Newsday* (May 23, 1995), B36.
31. *United States v. An Antique Platter of Gold aka Gold Phiale Mesomphalos, c. 400 BC, 991 F. Supp. 222* (S.D.N.Y. 1997); 184 F.3d 131 (2nd Cir. 1999).
32. The briefs filed by AAM/AAMD and AIA are reproduced in Shapreau, "Second Circuit Holds that False Statements Contained in Customs Forms Warrant Forfeiture of Ancient Gold Phiale—Hotly Contested Foreign Patrimony Issue Not Reached by the Court: *United States v. An Antique Platter of Gold*," 76–137.
33. See Shapreau, "Second Circuit."
34. Robinson, "Museums' Stance on Nazi Loot Belies Their Role in a Key Case." *The Boston Globe* (Feb. 13, 1998), A01, available at (<http://www.dhh-3.de/biblio/news/1998/0213a/>).
35. *United States of America v. Frederick Schultz*, 178 F. Supp. 2nd 445 (S.D.N.Y. 2002); affirmed at the Second Circuit, 333 F.3d 393 (2nd Cir. 2003).
36. Wilkie, "Landmark Decision."
37. Stoll, "Whose Art Is This, Anyway?"
38. Cuno, "U.S. Art Museums and Cultural Property," 195.
39. Harvard University Museums, "General Principles." See also Robinson and Yemma, "Harvard Museum Acquisitions Shock Scholars." *The Boston Globe* (Jan. 16, 1998).
40. Lowry, "Cultural Property: A Museum Director's Perspective;" Anderson, "Art Market Challenges;" Baker, "Selling the Past," quoting Vikan's frustration with the existing paradigm: "Right now the model is that this stuff moves like drugs: evil, ugly, rotten and terrible. Why can't it move like oranges and bananas?"
41. The group maintains an Internet presence, at (<http://www.culturalpolicycouncil.org/index.htm>).
42. D'Arcy, "Legal group to fight 'retentionist' policies." *The Art Newspaper* (Fall, 2002), available at (<http://www.theartnewspaper.com/news/article.asp?idart=10176>).
43. Coggins, "A Proposal," 434–5. See also Robinson and Yemma, "Harvard Museum Acquisitions Shock Scholars."
44. Gerstenblith, "Museums, the Market and Antiquities."
45. The limits of the Getty's new policy were tested shortly after its implementation when the museum acquired the Fleischman antiquities collection in 1996. The only source of the required "well-established provenance" for the bulk of the collection came in the form of a Getty catalog of the objects published in 1994. As a postscript to the story, in 1999, one of the Fleischman objects, which was shown to have been stolen from an excavation storeroom, was returned to Italy.
46. See for example Merryman, "Cultural Property Internationalism," and Coggins, "A Proposal for Museum Acquisition Policies in the Future."
47. Gerstenblith, "Museums, the Market and Antiquities."
48. Getty Conservation Institute, "Conversation with Engin Özgen."

49. Consider the Metropolitan Museum of Art's recent exhibition *Byzantium: Faith and Power*, in which curator Helen Evans assembled more than 350 works from 135 institutions in 30 countries.

50. Examples of recent activity in this area include the 2002 return of a mummy to Egypt by the Carlos Museum at Emory University; Princeton University's 2002 return of a Roman marble funerary monument to Italy; the Denver Art Museum's 1999 return of a Maya wooden lintel to Guatemala; the Royal Albert Memorial Museum's 1997 return of Truganini's necklace and bracelet to the Tasmanian Aboriginal Centre in Australia; the Getty Museum's return of three antiquities to Italy in 1999; the Berlin Museum of Indian Art's return of an 800-year old Nepalese carving to Katmandu; and the National Ethnographic Museum of Stockholm's decision to send a totem pole to the Haisla nation in Canada. As well as the unconditional return of an object, there have been some creative compromises reached during restitution negotiations, including the 1981 agreement between the Fine Arts Museums of San Francisco and the Instituto Nacional de Antropología e Historia de Mexico, providing for the joint conservation and custody of an important set of Teotihuacan Murals.

51. A useful third category comprises works seized before and during the Second World War. A final category might consider works lost from museums during more recent armed conflicts.

52. Gryseels, "Assuming our Responsibilities in the Present," 8.

53. The *Declaration* was signed by the directors of the following institutions: The Art Institute of Chicago; Bavarian State Museum, Munich; State Museums, Berlin; Cleveland Museum of Art; J. Paul Getty Museum, Los Angeles; Solomon R. Guggenheim Museum, New York; Los Angeles County Museum of Art; Louvre Museum, Paris; The Metropolitan Museum of Art, New York; The Museum of Fine Arts, Boston; The Museum of Modern Art, New York; Opificio delle Pietre Dure, Florence; Philadelphia Museum of Art; Prado Museum, Madrid; Rijksmuseum, Amsterdam; State Hermitage Museum, St. Petersburg; Thyssen-Bornemisza Museum, Madrid; Whitney Museum of American Art, New York; The British Museum, London.

54. Ronald de Leeuw, director of the Rijksmuseum, was careful to distinguish the *Declaration's* principles from acquisition policies: "Of course, we would not now dream of buying illegally exported antiquities or ethnographic objects, or of not returning a painting to a rightful Jewish owner." See also Bailey, "Shifting the Blame," *The Art Newspaper* (Jan. 2003), available at http://www.forbes.com/2003/01/21/cx_0121hot.html.

55. ICOM, "Repatriation of Cultural Property." See also Lewis, "Universal Museum," 3; Leyten, "Return—Restitution—Repatriation." For a recent assessment from a museum director's perspective, see O'Neill, "Enlightenment Museums," 191 (where he observes "[t]he gladiatorial appeal for the media of anything to do with repatriation").

56. Merryman, "The Free International Movement of Cultural Property," 307. See also Merryman, "Two Ways of Thinking About Cultural Property."

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