

## ASSESSING ETHICAL MUSEUM COLLECTIONS IF NO ONE OWNS WHAT THEY DO NOT HAVE

By: Derek Fincham\*

### ABSTRACT

*Caring for collections has become a crucial issue in the cultural heritage sector, prompting museums to critically evaluate their practices and policies. This essay examines this issue through internal thefts at the British Museum, the rise of provenance curators, and the role that legislative mandates such as the Native American Graves Protection and Repatriation Act (“NAGPRA”) play. These varied elements—internal thefts, provenance research, and legislative frameworks—are interconnected facets of modern collection stewardship. By exploring these components, the discussion aims to provide insights into developing robust strategies for collection management, ensuring museums not only preserve and protect cultural heritage, but also uphold the highest ethical standards.*

### I. INTRODUCTION: NO ONE OWNS WHAT THEY DO NOT HAVE

The issue of stolen art, looted antiquities, and sacred cultural objects represents a complex and ethically charged area. The problems and the role of museums in addressing these issues revolve around two important dilemmas. First is the historical context of many museum collections. Historical instances of art theft and looting occurred during periods of colonialism and imperialism.<sup>1</sup>

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\* Associate Dean and Professor, South Texas College of Law, Houston. Ph.D. University of Aberdeen, Scotland; J.D. Wake Forest; BA University of Kansas. The Author wishes to express his deepest gratitude to the Symposium Editor Megan Gannon, the staff of the Journal, and the fellow participants at the symposium. In particular he wishes to express his deepest thanks to Professor Michael H. Hoeflich for his sage advice in opening up the possibility of a career in law and the arts.

<sup>1</sup> See generally CARSTEN STAHN, CONFRONTING COLONIAL OBJECTS: HISTORIES, LEGALITIES, AND ACCESS TO CULTURE (2024); Folarin Shyllon, *Unraveling History: Return of African Cultural Objects Repatriated and Looted in Colonial Times*, in CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 159 (James A.R. Nafziger & Ann M. Nicgorski eds., 2009); Katie Sinclair, Article, *Blood and Treasure: How Should Courts Address the Legacy of Colonialism When Resolving Ownership Disputes Over Historic Shipwrecks?*, 38 BERKELEY J.

Powerful nations often took cultural artifacts from colonized regions, considering them trophies or symbols of cultural superiority.<sup>2</sup> Armed conflict has historically led to the widespread looting and destruction of cultural heritage.<sup>3</sup> The Nazi looting during World War II is a well-known example,<sup>4</sup> as is the looting during recent conflicts in Iraq and Syria.<sup>5</sup> Second, determining the rightful ownership of art and antiquities can be challenging.<sup>6</sup> Determining the history and proper ownership of works of art and recent antiquities will be an evergreen challenge due to the historical nature of discretion within the art market and the lack of reporting and other requirements. In short, the art market still relies on the latin maxim of caveat emptor, or “buyer beware”.<sup>7</sup> One way to resolve these ownership disputes is tracing the provenance, or ownership history, of an object. This research is essential to tracing an item’s provenance, but records can be incomplete or falsified, particularly given the art market’s inability to self-regulate coupled with extreme reticence about divulging

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INT’L L. 307 (2020); Teresa McGuire, *African Antiquities Removed during Colonialism: Restoring a Stolen Cultural Legacy*, 1990 DET. C.L. REV. 31 (1990).

<sup>2</sup> See George Abungu, “Universal Museum”: *New Contestations, New Controversies*, in UTIMUT: PAST HERITAGE—FUTURE PARTNERSHIPS, DISCUSSIONS ON REPATRIATION IN THE 21ST CENTURY 32 (Mille Gabriel & Jens Dahl eds., 2008).

<sup>3</sup> For background reading on the problems armed conflict pose to cultural heritage, see ROGER O’KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* (2007); JĀRĪ TOMAN, *PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* (1996); Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT’L L. 203 (2011); Roger O’Keefe, *The Meaning of ‘Cultural Property’ Under the 1954 Hague Convention*, 46 NETH. INT’L L. REV. 26 (1999); Harvey E. III Oyer, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict - Is It Working - A Case Study: The Persian Gulf War Experience The 1954 Hague Convention*, 23 COLUM.-VLA J.L. & ARTS 49 (1999).

<sup>4</sup> For background reading on the difficult issue of resolving Nazi-era disputes over cultural objects, see ROBERT M EDSSEL & BRET WITTER, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES AND THE GREATEST TREASURE HUNT IN HISTORY* (2009); NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE* (2000); Michael Rebholz, *Recovery of Nazi-Related Art: Legal Aspects under German and U.S. Law Exemplified by the Gurlitt Case*, 37 HASTINGS COMM. & ENT. L.J. 305 (2015); Bert Demarsin, *Let’s Not Talk about Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT’L L. 117 (2011–2012).

<sup>5</sup> See generally Anne Barnard, *Race in Iraq and Syria to Record and Shield Art Falling to ISIS*, N.Y. TIMES (Mar. 8, 2015), <http://www.nytimes.com/2015/03/09/world/middleeast/race-in-iraq-and-syria-to-record-and-shield-art-falling-to-isis.html> [<https://perma.cc/7YGW-XX6T>]; C. J. Chivers, *Syrian War Devastates Ancient Sites*, N.Y. TIMES (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/world/middleeast/syrian-war-devastates-ancient-sites.html> [<https://perma.cc/DVH5-5SN2>]; Steven Lee Myers, *Iraq’s Looted Treasures in a Revolving Door*, N.Y. TIMES (Sep. 7, 2010), <http://www.nytimes.com/2010/09/08/world/middleeast/08iraq.html?r=1&hp> [<https://perma.cc/J26R-QD3E>].

<sup>6</sup> See Patty Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities*, 14 ART ANTIQUITY & L. 21, 46 (2009) (defining undocumented antiquities as “looted directly from the ground and are therefore unknown and unrecorded before their theft”).

<sup>7</sup> See Valerie Medelyan, *Says Who: The Futility of Authenticating Art in the Courtroom*, 36 HASTINGS COMM. & ENT. L.J. 1, 6 (2013–2014) (noting that courts have traditionally applied the principle of caveat emptor, but courts are increasingly reticent to do so as auction houses charge buyers’ premiums and increasingly sell art to a wider public).

information about buyers and sellers.<sup>8</sup> As a result of these dilemmas, museums are increasingly devoting attention to the objects in their care to make sure mistakes of the past are not repeated.<sup>9</sup>

The art and antiquities market, characterized by high-value transactions and culturally significant objects, has a long-standing history of secrecy and discretion.<sup>10</sup> This history is shaped by various factors, including the market's structure, the nature of the objects traded, and the legal and ethical issues surrounding these objects. The trade in art and antiquities dates back to ancient civilizations, where art objects were often exchanged as gifts among elites or as spoils of war.<sup>11</sup> The market changed during the Renaissance with the rise of art collecting among the European aristocracy.<sup>12</sup> The trade of art again expanded significantly in the 18th and 19th centuries with the advent of public museums and increased archaeological activity, particularly in regions like the Bay of

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<sup>8</sup> The problem of anonymity allows the secondary market to traffick in looted antiquities, and allows for incomplete or fraudulent information about authenticity or history of cultural objects. Mary Genevieve Sanner, Note, *Settling Old Scores: Proposing Targeted Regulation to Mitigate the Problem of Looted Antiquities*, 72 DUKE L.J. 235, 244 (2022).

<sup>9</sup> As Victoria Reed, a provenance curator at the Museum of Fine Arts Boston has described:

Until recently, it was routine practice in the art trade to ask few if any questions. During much of the twentieth century, curatorial staff and museum administration turned a blind eye to gaps in provenance and other red flags, such as the names of known victims and perpetrators of Nazi looting, fanciful ownership histories, or indications of illegal export. Museums failed to ask specific questions about the origins of their purchases and gifts, usually because they were unaware of the various risk factors that could accompany the acquisition of a work of art.

Victoria Reed, *Due Diligence, Provenance Research, and the Acquisition Process at the Museum of Fine Arts, Boston*, 23 DEPAUL J. ART TECH. & INTELL. PROP. L. 363, 365–66 (2013).

<sup>10</sup> In a dispute involving the sale of a Mark Rothko painting titled “Red Rothko”, plaintiff Marguerite Hoffman wanted to keep a 2007 sale of the painting confidential. However the painting was later publicly offered for sale for \$17.6 million, which allegedly violated assurances of confidentiality. Judge Elrod writing for a three judge panel held that Hoffman could not expect perpetual confidentiality, revealing the complex balance between privacy and transparency in the art market. *Hoffman v. L & M Arts*, 838 F.3d 568, 573, 586 (5th Cir. 2016).

<sup>11</sup> See generally MARGARET M. MILES, ART AS PLUNDER: THE ANCIENT ORIGINS OF DEBATE ABOUT CULTURAL PROPERTY (2008); Margaret M. Miles, *Cicero’s Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art*, 11 INT’L J. CULTURAL PROP. 28 (2002).

<sup>12</sup> See LEAH R. CLARK, COLLECTING ART IN THE ITALIAN RENAISSANCE COURT: OBJECTS AND EXCHANGES (2018).

Naples,<sup>13</sup> Egypt, and Mesopotamia.<sup>14</sup> Art and antiquities often command high prices due to their rarity, historical significance, and cultural value.<sup>15</sup> This command creates a market where buyers and sellers exchange large sums of money, often with a desire for privacy.<sup>16</sup> The desire for confidentiality is also driven by the personal nature of collecting and concerns over security and theft.<sup>17</sup> A researcher with the Norwegian Police University College recently determined that selling a stolen work of art by Munch would be feasible because of a “culture of discretion” which is fueled by the reality that “[e]very work sold that lacks provenance . . . provides hope and encouragement to thieves and middlemen.”<sup>18</sup> While collectors often prefer to remain anonymous, auction houses and dealers meet this desire for extreme discretion by offering private sales and discreet channels for high-profile clients.<sup>19</sup>

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<sup>13</sup> Stefano De Caro, *Excavation and Conservation at Pompeii: A Conflicted History*, 3 FASTI ONLINE DOCUMENTS AND RESEARCH: ARCHAEOLOGICAL CONSERVATION SERIES 1, 1 (2015) (“The discovery of Pompeii, even more than that of Herculaneum, presented the Neapolitan antiquarians and the Bourbon Court, already engaged in financing the first exploits in archaeology of the young Kingdom of Naples, with an entirely new set of problems, new even compared to an Italian tradition of the excavation of antiquities by now several centuries old . . .”).

<sup>14</sup> See generally OSCAR WHITE MUSCARELLA, *The Antiquities Trade and the Destruction of Ancient Near Eastern Cultures*, in ARCHAEOLOGY, ARTIFACTS AND ANTIQUITIES OF THE ANCIENT NEAR EAST 837 (2013).

<sup>15</sup> The highest published price for an antiquity was the sale of the Guennol Lioness for \$57 million at an auction to an anonymous buyer in 2007. The figure is only 3.25 inches tall, is likely from 3,000 BCE and was discovered near Baghdad. *Lion Sculpture Gets Record Price*, BBC NEWS (Dec. 6, 2007), [http://news.bbc.co.uk/2/hi/middle\\_east/7130337.stm](http://news.bbc.co.uk/2/hi/middle_east/7130337.stm) [<https://perma.cc/PD8K-B9WV>]. The highest published price for a work of flat art was \$450 million paid for a work attributed to Leonardo da Vinci, *Salvator Mundi*. Hannah Ellis-Peterson & Mark Brown, *How Salvator Mundi Became the Most Expensive Painting Ever Sold at Auction*, THE GUARDIAN (Nov. 16, 2017), <http://www.theguardian.com/artanddesign/2017/nov/16/salvator-mundi-leonardo-da-vinci-most-expensive-painting-ever-sold-auction> [<https://perma.cc/79WK-U7Q2>]; Gaby Del Valle, *How a Long-Lost Leonardo Da Vinci Painting Got Dragged into a Trump-Russia Conspiracy Theory*, VOX (Jan. 22, 2019), <https://www.vox.com/the-goods/2019/1/22/18192927/salvator-mundi-trump-conspiracy-theory> [<https://perma.cc/6JLQ-MMBU>]; Scott Reyburn, *How This Leonardo's Mind-Blowing Price Will Change the Art Market*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/arts/design/salvator-mundi-leonardo.html> [<https://perma.cc/R25J-Z5TQ>].

<sup>16</sup> See Silvia Beltrametti & James V. Marrone, *Market Responses to Court Rulings: Evidence from Antiquities Auctions*, 59 J.L. & ECON. 913, 917 (2016) (noting that “[w]hile the art market has developed into a fully fledged commodities market trading on the interplay of supply and demand, it lacks the transparency of regulations that rule most such markets.”).

<sup>17</sup> See Alessandra Dagirmanjian, Note, *Laundering the Art Market: A Proposal for Regulating Money Laundering through Art in the United States Notes*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 687, 713 (2019) (Correctly arguing that “a valuable work becomes vulnerable to theft if it is sold to a collector whose name is publicly disclosed”, while the remedy can be “[a]nonymous transactions and confidential storage spaces such as freeports . . .”).

<sup>18</sup> Siv Rebekka Runhovde, *In the Dark, All Art Dealers Are Grey: Discretion and Rationalisation in the Munch Art Market*, INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY 1, 11 (Nov. 2020).

<sup>19</sup> See, e.g., Derek Fincham, *Authenticating Art by Valuing Art Experts*, 86 MISS. L.J. 567, 608–09 (2017).

The legality of handling many artifacts, especially antiquities, can be murky however.<sup>20</sup> Many States have declared ownership of undiscovered archaeological objects;<sup>21</sup> others have enacted export restrictions limiting the movement of certain cultural objects.<sup>22</sup> Issues also arise regarding the provenance of items because many objects lack clear documentation of their history.<sup>23</sup> The market has been criticized for facilitating the trade of looted or illicitly obtained items, especially from war-torn or impoverished countries.<sup>24</sup> One example of this no-questions-asked mentality was the wave of buying that took place at the Getty Foundation in the 1980s and 1990s as a consequence of the massive \$700 million that J. Paul Getty left to the Foundation on his passing in 1976.<sup>25</sup> The market's secretive nature facilitates the entry of illegal artifacts into these markets. In response to these issues, there have been increased efforts at regulation at the national and international level. Laws and conventions, like the 1970 UNESCO Convention,<sup>26</sup> aim to curb the illicit trade of art and antiquities, but enforcement is challenging due to the market's opaque nature.

There is an ongoing ethical debate about the trade of cultural objects, especially those considered sacred or integral to a community's heritage.<sup>27</sup> As

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<sup>20</sup> See generally Debbie De Girolamo, *Art Disputes and Their Resolution through ADR: A Matter of Creativity Rather than of Brexit Implications*, 22 ART ANTIQUITY & L. 143 (2017).

<sup>21</sup> See Gerstenblith, *supra* note 6, at 21.

<sup>22</sup> See Kristina F. Harris, *Seeking an Equitable Standard for Transactions in the International Antiquities Trade: A Critique of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 27 U.C. DAVIS J. INT'L L. & POL'Y 1, 3 (2020) (describing the recent returns by collectors, including Shelby White, who have acquired ancient objects in violation of national export restrictions).

<sup>23</sup> See e.g., PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS* (2007); STEFANO MANACORDA, *ORGANISED CRIME IN ART AND ANTIQUITIES* (2009); Neil Brodie & Jennifer Doole, *Illicit Antiquities*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* (Neil Brodie & Kathryn Walker Tubb eds., 2001); Simon Mackenzie, Article, *Illicit Antiquities, Criminological Theory, and the Deterrent Power of Criminal Sanctions for Targeted Populations*, 7 J. OF ART, ANTIQUITY, & L. 125 (2002); Neil Brodie, Morag M. Kersel, Simon Mackenzie, Isber Sabrine, Emiline Smith, & Donna Yates, *Why There is Still an Illicit Trade in Cultural Objects and What We Can Do About It*, 47 J. OF FIELD ARCHAEOLOGY 117 (2022).

<sup>24</sup> See, e.g., JANET ULPH & IAN SMITH, *THE ILLICIT TRADE IN ART AND ANTIQUITIES: INTERNATIONAL RECOVERY AND CRIMINAL AND CIVIL LIABILITY* (2015).

<sup>25</sup> JASON FELCH & RALPH FRAMMOLINO, *CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD'S RICHEST MUSEUM* 38 (2011).

<sup>26</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, T.I.A.S. 83-1202, 823 U.N.T.S. 231 (entered into force Dec. 2, 1983).

<sup>27</sup> See, e.g., Vanessa Tümsmeyer, *Repatriation of Sacred Indigenous Heritage in U.S. Law*, in *REPATRIATION OF SACRED INDIGENOUS CULTURAL HERITAGE AND THE LAW: LESSONS FROM THE UNITED STATES AND CANADA* 183 (Vanessa Tümsmeyer ed., 2022); Marie Cornu, *About Sacred Cultural Property: The Hopi Masks Case*, 20 INT'L J. CULTURAL PROP. 451 (2013); Tom

calls for repatriation of such objects have increased, museums are increasingly pressured to carefully evaluate the objects held in their collections. Once major purchasers in this market, museums are now more cautious due to the ethical concerns about provenance and growing demands for transparency and repatriation.<sup>28</sup> Advances in technology are slowly bringing more transparency to the market.<sup>29</sup> For example, online databases and digital archives help in tracking the provenance and ownership history of artworks.<sup>30</sup> Such advances in technology demonstrate a growing movement towards greater openness, as collectors and institutions become more aware of the ethical implications of their acquisitions.<sup>31</sup>

The art and antiquities market's history of secrecy is deeply intertwined with its structure, the nature of the objects traded, and the complex web of legal and ethical issues surrounding them. While the market has traditionally valued discretion, global demands for cultural heritage protection and legal compliance have produced a clear shift towards greater transparency and ethical responsibility. After all, artifacts often hold significant cultural, religious, and historical value for their communities of origin.<sup>32</sup> Their loss can be a source of ongoing grief and cultural disconnection.

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Mashberg, *Secret Bids Guide Hopi Indians' Spirits Home*, N.Y. TIMES (Dec. 16, 2013), <http://www.nytimes.com/2013/12/17/arts/design/secret-bids-guide-hopi-indians-spirits-home.html> [<https://perma.cc/3LSJ-GY8J>].

<sup>28</sup> See generally Victoria Reed, *Due Diligence, Provenance Research, and the Acquisition Process at the Museum of Fine Arts, Boston*, 23 DEPAUL J. ART TECH. & INTELL. PROP. L. 363 (2013); Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409 (2003).

<sup>29</sup> See, e.g., Derek Fincham, *2019 AELJ Spring Symposium: Digital Art & Blockchain: Assessing the Viability of Blockchain to Impact the Antiquities Trade*, 37 CARDOZO ARTS & ENT. L.J. 605, 618 (2019) (considering whether decentralized public ledgers, like blockchain, might add some measure of traceability to the antiquities trade).

<sup>30</sup> In November of 2022 a digital platform, Digital Benin, has served as an online catalog of 5,000 objects which aims to connect the community in Nigeria with Benin material that has been lost or looted. Gouri Sharma, *The Online Art Catalogue that Chronicles a Stolen African Heritage*, MIT TECH. REV. (Jan 4, 2024), <https://www.technologyreview.com/2024/01/04/1084777/digital-benin-project-nigeria-art-repatriation/> [<https://perma.cc/NV7W-2BSD>].

<sup>31</sup> See STAHN, *supra* note 1.

<sup>32</sup> Emery Patrick Effiboley, an African Art Historian, on reflecting on the language of return and repatriation of African cultural objects concluded:

After this reflection on African cultural objects removed from their original contexts, it is clear that their histories are far more complex than the issues of repatriation/restitution for which African states are vehemently demanding and which the West is denying equally strongly. It is about the structural relations established by Western countries since the early years of European modernity and to their single and exclusive advantage. Discussing the fate of these exiled objects and artworks is about re-balancing the relationships between the West and the African continent in terms of knowledge production, economic development, and much more. But this change cannot occur without the active participation of

The handling of sacred or religious objects poses unique ethical challenges as these items are not merely artistic but hold spiritual significance. The Native American Graves Protection and Repatriation Act (“NAGPRA”) defines sacred objects as “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.”<sup>33</sup>

In recent years, there has been a noticeable shift in how museums approach the handling of art and antiquities with contested origins. A growing number of institutions are engaging in proactive repatriation efforts, acknowledging historical injustices and striving to right the wrongs of the past.<sup>34</sup> This proactive repatriation involves returning items to their countries of origin, reflecting a shifting ethical responsibility on the returning institution.<sup>35</sup>

In addition to repatriation, museums continue to play a crucial educational role. They are not only the repositories of material culture, art and history, but also educators tasked with informing the public about the origins and histories of the objects in their collections. Museums increasingly are expected to demonstrate how objects were acquired, which is often a complex story involving colonialism, exploration, and sometimes controversial circumstances.<sup>36</sup> However, the debate between preservation and restitution should be recognized as a false choice. Given the increasing investment many nations of origin have put towards their cultural institutions, no corner of the globe can any longer claim to have an exclusive capacity for preservation of

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Africans themselves. Only this participation will help to change the (negative) rhetoric about the continent.

Emery Patrick Effiboley, *Reflections on the Issue of Repatriation of Looted and Illegally Acquired African Cultural Objects in Western Museums*, 7 CONTEMP. J. AFR. STUD. No. 1, 67, 81 (2020).

<sup>33</sup> 25 U.S.C. § 3001(3)(C).

<sup>34</sup> For example in 2023 the American Museum of Natural History announced it would remove all human remains from public display and work to improve its repatriation procedures involving an estimated 12,000 sets of human remains. Elizabeth Blair, *American Museum of Natural History Will Remove Human Remains from Public Display*, NPR (Oct. 30, 2023), <https://www.npr.org/2023/10/30/1209377275/american-museum-of-natural-history-will-remove-human-remains-from-public-display> [<https://perma.cc/5ABS-4HCN>].

<sup>35</sup> See generally Jennifer Anglim Kreder, *The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities*, 64 U. MIAMI L. REV. 997, 1029 (2010) (“Museums can—and are—taking the lead and slowing down acquisitions. They are looking for documentation. Perhaps they could slow down even further and display some of the less visually spectacular objects from storage and create exhibits that emphasize their historical significance more than their physical aspects.”).

<sup>36</sup> As Christa Roodt has argued: “Like good ambassadors who are committed to promoting peace and good will, art and cultural objects express diverse cultural values without declaring a preference.” Christa Roodt, *Restitution of Art and Cultural Objects and Its Limits*, 46 COMPAR. & INT’L L. J. S. AFR. 286, 286 (2013).

cultural objects.<sup>37</sup> Fewer and fewer museums attempt to argue they are better equipped to preserve and protect these artifacts. Increasingly, the cultural significance and rightful ownership by the countries of origin are emerging as important aspects of repatriation decisions.<sup>38</sup>

An emerging trend which aims to balance these competing interests is the development of collaborations and partnerships. For example, museums are increasingly working alongside countries of origin to create shared stewardship programs or rotating exhibits.<sup>39</sup> Such arrangements aim to respect the need for repatriation while acknowledging the educational and cultural value these items hold in museum settings. This approach represents a more inclusive and cooperative model for handling cultural heritage and offers a promising path forward in the often complex relationship between museums and the communities connected to their collections.<sup>40</sup> Although the process of decolonizing museum practices is ongoing, true decolonization requires the active repatriating of stolen objects, and dismantling the assumptions leading to colonial-era hoarding of material.<sup>41</sup> The Museum of Us, in San Diego is one of the institutions leading the way in this effort, which works to “acknowledge and

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<sup>37</sup> See, e.g., Anthee Carassava, *In Athens, Museum Is an Olympian Feat*, N.Y. TIMES (Jun. 19, 2009), <http://www.nytimes.com/2009/06/20/arts/design/20acropolis.html> [https://perma.cc/L62R-C8Z3]; Christopher Hitchens, *A Home for the Marbles*, N.Y. TIMES (Jun. 18, 2009), <http://www.nytimes.com/2009/06/19/opinion/19iht-edhitchens.html> [https://perma.cc/P8NA-LTNG]. One example among many is the New Acropolis museum in Athens. See, e.g., Michael Kimmelman, *Elgin Marble Argument in a New Light*, N.Y. TIMES (Jun. 23, 2009), <http://www.nytimes.com/2009/06/24/arts/design/24abroad.html> [https://perma.cc/ZL6V-XEYY].

<sup>38</sup> See Derek Fincham, *Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes*, 20 VA. J. SOC. POL'Y & L. 43, 86 (2012) (“With respect to returning stolen art or repatriating looted objects, correcting the wrongdoing can often be effective. However, with respect to the destruction of heritage through the looting of archaeological context at sites, the knowledge that those sites contained is lost forever and cannot be reconstructed.”).

<sup>39</sup> In 2022, the Smithsonian adopted a “Shared Stewardship and Ethical Returns Policy” which allows the museum to return collections where appropriate based on ethical considerations or the manner of acquisition. *Shared Stewardship and Ethical Returns*, SMITHSONIAN, <https://naturalhistory.si.edu/research/shared-stewardship-and-ethical-returns>. [https://perma.cc/H9QS-S5EV].

<sup>40</sup> Serena Iervolino, *Museums, Migrant Communities, and Intercultural Dialogue in Italy*, in MUSEUMS AND COMMUNITIES: CURATORS, COLLECTIONS AND COLLABORATION 121 (Viv Golding & Wayne Modest eds., A&C Black May 2013) (“The practical difficulties as well as their rather simplistic interpretation on the museum side suggest that even if museums have come a long way in their attempts to challenge traditional approaches and to become more democratic and inclusive, they still have far to go in the ongoing processes of decolonizing museological practices and becoming truly postcolonial institutions”).

<sup>41</sup> See Rachel Hatzipanagos, *The ‘Decolonization’ of the American Museum*, WASHINGTON POST (Oct. 11, 2018), <https://www.washingtonpost.com/nation/2018/10/12/decolonization-american-museum/> [https://perma.cc/Q3VD-K5AZ] (“Decolonization is perhaps most drastic way museums are changing how they view themselves, from neutral custodians of knowledge to living entities curated by real people with their own biases. This often means diversifying and listening to concerns from visitors from underrepresented communities.”).



redress the ways that our museum participated in the colonial enterprise, both intentionally and unintentionally.<sup>42</sup>

This work can also make use of digital or other means of display or return. Advances in technology, like 3D scanning and virtual reality, offer new ways for originating communities to access and engage with their cultural heritage.<sup>43</sup>

A growing public and academic interest in the history of looted art and antiquities has led to more activism and calls for action. One such activist is Vijay Kumar of the India Pride Project, who has described the importance of return of sacred material: “Many of these are not just random objects but gods who were being actively worshipped . . . by different communities . . . Empty temples and eager devotees await their return in small villages and towns. Theft and colonial loot have left gaping holes in our religious and cultural identity.”<sup>44</sup>

The problems of stolen art, looted antiquities, and sacred cultural objects are deeply intertwined with historical injustices, legal challenges, ethical considerations, and cultural sensitivities. Museums play a critical role in this landscape, balancing their mission of preservation and education with ethical responsibilities towards repatriation and cultural respect. The path forward involves ongoing dialogue, legal action, technological innovation, and a reevaluation of historical practices within the context of modern values and understanding.

We safeguard collections of cultural objects for many reasons, but the best reason may be how terribly difficult and expensive it can be to secure the return of wrongfully taken art and artifacts.<sup>45</sup> The phrase “*nemo dat quod non habet*” is a legal maxim from Roman law that translates to “no one gives what they do not have.”<sup>46</sup> This principle means that a person cannot transfer a better title to

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<sup>42</sup> *Decolonizing Initiatives*, MUSEUM OF US, <https://museumofus.org/decolonizing-initiatives> [<https://perma.cc/FN52-ZBGM>].

<sup>43</sup> Kate Hennessy, *Virtual Repatriation and Digital Cultural Heritage: The Ethics of Managing Online Collections*, ANTHROPOLOGY NEWS, Apr. 2009, at 5. (“Material culture in museum collections is being digitally photographed for online collections databases and virtual exhibits, while documentation of intangible cultural expressions is being transformed from analog photographs, film, video and tape recordings into digital files. Significantly, these technologies are allowing members of originating communities to access images of objects, audio and video recordings, and texts documenting their relatives and their material, cultural and linguistic history.”).

<sup>44</sup> Shreejaya Nair, *Activists in India and Africa Are Leading the Global Push to Repatriate Looted Artifacts*, ARTNEWS (Nov. 16, 2022), <https://www.artnews.com/art-news/news/repatriation-looted-artifacts-activists-social-media-campaigns-1234646757/> [<https://perma.cc/2624-D98K>].

<sup>45</sup> Julian Radcliffe of the Art Loss Register estimated in 2021 that the recovery rate of stolen art after 20 years is a slim 15%. “*We Must Keep Up Our Hopes*”: *Art Detective Says About Recovering Stolen Gardner Museum Paintings*, CBS NEWS (Nov. 20, 2021), <https://www.cbsnews.com/boston/news/isabella-stewart-gardner-museum-julian-radcliffe-art-detective-stolen/> [<https://perma.cc/SZ7C-7X5J>].

<sup>46</sup> *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 961 (9th Cir. 2017).

property than they themselves possess. Roman jurists recognized that a seller cannot transfer ownership of something they do not own.

Over time, various exceptions to the “nemo dat” rule have been developed.<sup>47</sup> For example, in many jurisdictions provisions like the market overt rule, which allow bona fide purchasers to obtain good title in certain circumstances, even if the seller did not have the title.<sup>48</sup> The principle remains extremely relevant, especially in cases involving contested works of art. For example, in the *Winkworth v. Christie* decision of 1980, the legal focus was on the application of the “nemo dat quod non habet” rule within the context of property law.<sup>49</sup> The case involved Mr. Winkworth, who owned a valuable collection of Japanese netsukes.<sup>50</sup> Unfortunately Mr. Winkworth had several of his netsukes stolen, and they were smuggled abroad to Italy, where they were sold to a good faith purchaser who was unaware of their earlier theft.<sup>51</sup> The objects were then consigned for sale at Christie’s in England.<sup>52</sup> Christie’s contended that the purchaser from the thief had obtained good title under the “market overt” rule—an exception to the “nemo dat” principle in English law—which generally protects buyers who acquire items in good faith within an open and public market.<sup>53</sup>

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<sup>47</sup> The principle of “nemo dat quod non habet” has influenced international conventions and laws. For instance, the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) incorporates aspects of this principle, adapting it to the context of international trade.

<sup>48</sup> As the Supreme Court explained:

No one in general can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. Nemo dat quod non habet. Persons, therefore, who buy goods from one not the owner, and who does not lawfully represent the owner, however innocent they may be, obtain no property whatever in the goods, as no one can convey in such a case any better title than he owns, unless the sale is made in market overt, or under circumstances which show that the seller lawfully represented the owner.

*Mitchell v. Hawley*, 83 U.S. 544, 550 (1872).

<sup>49</sup> *Winkworth v. Christie*, [1980] 1 All ER 1121.

<sup>50</sup> Raymond Bushell, a lawyer and collector of netsuke described them as:

The word *netsuke* has no English equivalent. *Netsuke* is a toggle and part of an ensemble which is worn with the traditional Japanese *kimono*; the simple garment is wrapped around the body like a loose cloak and secured with a belt or sash (*obi*). The *netsuke* hangs outwardly over the upper edge of the sash while other objects, such as a purse, are attached by a cord and hang below the sash. The carving of netsuke, as much as the ukiyoe print, is an art form peculiarly characteristic of the Japanese. It developed during the period of self-imposed national isolation and was free of foreign influence. It was intended to please Japanese taste and as such reveals the basic nature of the people, their interests and amusements.

Raymond Bushell, *Concerning the Walters Collection of Netsuke*, 35 THE J. OF THE WALTERS ART GALLERY 77, 77–78 (The Walters Art Museum 1977).

<sup>51</sup> *Winkworth*, [1980] 1 All ER at 1123.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1124–25.

The court weighed which law should apply, English Law, which adhered to the *nemo dat* rule, or Italian law, which favored the good faith purchaser.<sup>54</sup> Ultimately the court found that the defendant had obtained good title and the legal action was discontinued.<sup>55</sup> While the Court admitted that the original owner should receive some protection, the interest of the good faith purchaser and the certainty of applying Italian law, as the *lex rei sitae*, meant that the subsequent good faith purchaser could retain possession of the contested objects.<sup>56</sup> Italian law favored the good faith purchaser, and for the sake of consistency and judicial certainty, the Italian law was applied.<sup>57</sup>

A similar principle should govern the ways in which museums care for the objects in their own collections. Should institutions continue to own objects they do not *know* they have?

## II. INTERNAL COLLECTION SAFEGUARDS: NO ONE HAS WHAT THEY HAVE LOST

The idea of a museum is a relatively recent one. The word comes from the latin *mouseion*, referring to a temple dedicated to the Muses that inspire artistic creation.<sup>58</sup> Early “museums” were meant to reference ancient Greek temples which contained offerings, paintings, precious gold or silver, and other objects meant to attract veneration.<sup>59</sup> In other words, their origins were likely religious in nature. Ancient Romans with the means to do so collected paintings and sculptures to display in their homes.<sup>60</sup> Starting in the 18th century, the more modern concept of museums took shape, aiming to enlighten and entertain visitors through the display of various objects.<sup>61</sup> Anthony Clark, writing in *Art Journal*, noted that in Europe in the 1700s, there “were three prototypes of the modern art museum” which included “scientific collections”; “palatial collections of the ruling class” and even “actual museums with a custodial staff”.<sup>62</sup> The 19th century marked a significant evolution of the museum into a key public entity, paralleling the rise of nation-states. A pioneering example of this evolution was the Louvre, which originated largely from the spoils of

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<sup>54</sup> *Id.* at 1124.

<sup>55</sup> *Id.* at 1136.

<sup>56</sup> Winkworth, [1980] 1 All ER at 1134.

<sup>57</sup> *Id.* at 1136.

<sup>58</sup> Stephanie Eva Koester, *Interactive Multimedia in American Museums*, 16 Archives and Museum Informatics Technical Report 1, 4 (1993).

<sup>59</sup> *Id.*

<sup>60</sup> Koester, *supra* note 58, at 5.

<sup>61</sup> See generally CAROLE PAUL, *THE FIRST MODERN MUSEUMS OF ART: THE BIRTH OF AN INSTITUTION IN 18TH- AND EARLY-19TH-CENTURY EUROPE* (2012) (bringing together several essays which detail the history of public art museums in Europe).

<sup>62</sup> Anthony M. Clark, *The Development of the Collections and Museums of 18th Century Rome*, 26 ART J. 136, 136 (1966).

Napoleon's military conquests, setting a precedent for similar institutions.<sup>63</sup> These museums, often described today as "universal" or "encyclopedic," strive to showcase a comprehensive array of human history's most remarkable achievements.<sup>64</sup>

One of the most important universal museums is the British Museum, a revered institution and cornerstone of cultural and historical knowledge, which has both a storied origin and a complex legacy marked by controversy and debate. Established in 1753, and opening its doors in 1759, the British Museum was the first national public museum in the world.<sup>65</sup> Its foundation was primarily based on the collections of the physician and naturalist Sir Hans Sloane.<sup>66</sup> Sloane bequeathed his extensive collection of artifacts, books, and natural specimens to King George II under the condition that it be publicly accessible.<sup>67</sup> This bequest marked a shift in the accessibility of knowledge and culture, previously the exclusive domain of the elite.<sup>68</sup>

The British Museum's vast and diverse collection, spanning continents and history, is often described as encyclopedic.<sup>69</sup> However, this breadth has been a source of criticism. Critics argue that the museum's attempt to represent a universal survey of human culture results in superficial coverage and an inability to provide detailed context for many of its artifacts.<sup>70</sup> Additionally, the museum's encyclopedic nature is closely tied to the history of British

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<sup>63</sup> Koester, *supra* note 58, at 5–6.

<sup>64</sup> For a spirited defense of the idea of the universal museum, see James Cuno, *View from the Universal Museum*, in *IMPERIALISM, ART AND RESTITUTION* 15 (John Henry Merryman ed., 2006).

<sup>65</sup> *History: British Museum*, BRITISH MUSEUM, <https://www.britishmuseum.org/about-us/british-museum-story/history> [https://perma.cc/V9XX-CQZE ]; *Sir Hans Sloane*, BRITISH MUSEUM, [https://www.britishmuseum.org/about-us/british-museum-story/sir-hans-sloane?\\_gl=1\\*1yzih96\\*\\_up\\*MQ..\\*\\_ga\\*MTcwMzg1MTEwNi4xNzEwNjMxMDIx\\*\\_ga\\_JHR77E3EZ1\\*MTcxMDYzMTAxOC4xLjEuMTcxMDYzMTA2Ni4wLjAuMA..\\*\\_ga\\_08TLB9R8X1\\*MTcxMDYzMTAyMi4xLjEuMTcxMDYzMTA2Ni4wLjAuMA](https://www.britishmuseum.org/about-us/british-museum-story/sir-hans-sloane?_gl=1*1yzih96*_up*MQ..*_ga*MTcwMzg1MTEwNi4xNzEwNjMxMDIx*_ga_JHR77E3EZ1*MTcxMDYzMTAxOC4xLjEuMTcxMDYzMTA2Ni4wLjAuMA..*_ga_08TLB9R8X1*MTcxMDYzMTAyMi4xLjEuMTcxMDYzMTA2Ni4wLjAuMA). [https://perma.cc/PA79-U3FB ].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See generally Anne Goldgar, *The British Museum and the Virtual Representation of Culture in the Eighteenth Century*, 32 *ALBION* 195 (2000).

<sup>69</sup> See David A. Scott, *Modern Antiquities: The Looted and the Faked*, 20 *INT'L J. CULTURAL PROP.* 49, 52 (2013) (criticizing the views of noted encyclopedic museum proponent James Cuno for supporting the "Eurocentric concept that Western museums should continue to collect, based in their shared vision of a multi-cultural human fraternity").

<sup>70</sup> Dan Hicks, an archaeologist, and curator at the Pitt Rivers Museum argues:

A generation ago, this use of the idea of the 'social life of things' became an important analytical tool for the study of material culture. But it has come, through sustained use by curators, over time to be used by the press officers of British national museums to distract our attention from, to relativise and thus to diminish, claims for the restitution of objects collected during European colonialism, and to encourage us in the fallacy that we might ever reasonably think ourselves back to some past 'regime of value' in which wrongful action might have been okay, in order to justify ongoing and unresolved injustices.

DAN HICKS, *THE BRITISH MUSEUMS: THE BENIN BRONZES, COLONIAL VIOLENCE AND CULTURAL RESTITUTION* 26 (2020).

colonialism.<sup>71</sup> Many of its collections were acquired during the era of the British Empire, raising questions about the ethics of such acquisitions.<sup>72</sup> Critics contend the museum's collections are emblematic of a colonial mindset, where artifacts were removed from their cultural contexts and displayed as trophies of imperial conquest.<sup>73</sup>

The British Museum is one party to one of the longest-running cultural heritage disputes—that over the removal and display of the Parthenon sculptures removed by the agents of Lord Elgin from the Acropolis in Athens.<sup>74</sup> One of the more recent controversies surrounding the British Museum involves serious allegations of insider theft by a curator.<sup>75</sup> Reports emerged that a curator at the museum was involved in the theft of valuable artifacts from the collection, raising serious concerns about security and oversight of objects held by the institution.<sup>76</sup>

The story of the thefts begins in 1993, marking the onset of a prolonged and clandestine theft of around 2,000 Greek and Roman antiquities from the British Museum.<sup>77</sup> This extensive pilfering, unfolding over nearly three decades until 2022, was characterized as an "inside job" by George Osborne, the chair of the museum's trustees.<sup>78</sup> Initial suspicions arose in 2021 when Ittai Gradel, a dealer

<sup>71</sup> See, e.g., *Stuff The British Stole* | CBC Podcasts, CBC LISTEN, <https://www.cbc.ca/listen/cbc-podcasts/1030-stuff-the-british-stole> [<https://perma.cc/6NTV-988T>].

<sup>72</sup> For a helpful overview of the 1897 punitive campaign, see Afolasade A. Adewumi, *Possessing Possession: Who Owns Benin Artefacts?*, 20 ART ANTIQUITY & L. 229, 230 (2015).

<sup>73</sup> See, e.g., Stuart Frost, 'A Bastion of Colonialism' *Public Perceptions of the British Museum and Its Relationship to Empire*, 33 THIRD TEXT 487 (2019).

<sup>74</sup> For background reading on the current state of the dispute over the Parthenon sculptures, see generally ALEXANDER HERMAN, *THE PARTHENON MARBLES DISPUTE: HERITAGE, LAW, POLITICS* (2023); CATHARINE TITI, *THE PARTHENON MARBLES AND INTERNATIONAL LAW* (2023); CHRISTOPHER HITCHENS, *THE PARTHENON MARBLES: THE CASE FOR REUNIFICATION* (Verso Updated ed. 2008); IAN JENKINS, *CLEANING AND CONTROVERSY: THE CLEANING OF THE PARTHENON SCULPTURES, 1811–1939* (2001); DOROTHY KING, *THE ELGIN MARBLES* (2006); WILLIAM ST CLAIR, *LORD ELGIN AND THE MARBLES: THE CONTROVERSIAL HISTORY OF THE PARTHENON SCULPTURES* (3d ed., 1998); Derek Fincham, *The Parthenon Sculptures and Cultural Justice*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 943 (2013); David Rudenstine, *Lord Elgin and the Ottomans: The Question of Permission*, 23 CARDOZO L. REV. 449 (2001).

<sup>75</sup> Alex Marshall, *British Museum Sues Former Curator for Return of Stolen Items*, N.Y. TIMES (Mar. 27, 2024), <https://www.nytimes.com/2024/03/27/arts/design/british-museum-thefts-peter-higgs.html> [<https://perma.cc/CF6U-ALF3>].

<sup>76</sup> Joe Ware, *British Museum's Legal Action over Thefts is 'Locking the Stable Door after the Horse Has Bolted', Experts Say*, THE ART NEWSPAPER, <https://www.theartnewspaper.com/2024/03/28/british-museums-legal-action-over-thefts-locking-the-stable-door-after-the-horse-has-bolted-experts-say> [<https://perma.cc/APP3-TX43>].

<sup>77</sup> Nadia Khomami, *British Museum thefts were 'inside job', says George Osborne*, THE GUARDIAN (Oct. 18, 2023), <https://www.theguardian.com/culture/2023/oct/18/british-museum-thefts-were-an-inside-job-says-george-osborne> [<https://perma.cc/BBP2-ATAN>].

<sup>78</sup> Alex Marshall, *British Museum Was Warned Gems Were Being Sold on EBay, Emails Show*, N.Y. TIMES (Aug. 22, 2023), <https://www.nytimes.com/2023/08/22/arts/design/british-museum-thefts.html> [<https://perma.cc/KA64-FCEX>].

from Denmark, alerted the museum to the sale of three stolen gems on eBay.<sup>79</sup> At about the same time, Malcolm Hay, another dealer, had returned one of these gems to the museum, suspecting it was stolen.<sup>80</sup> Gradel's correspondence with the museum, obtained by The N.Y. Times, suggested that these incidents were merely the "tip of a much larger iceberg."<sup>81</sup>

Despite launching an investigation, the British Museum initially concluded that nothing untoward had occurred. However, it later acknowledged that approximately 1,500 artifacts were stolen or missing from its Greek and Roman collections, with another 350 items damaged, including gold pieces likely sold to scrap metal merchants.<sup>82</sup> In a surprising twist, all returned items were sourced from Gradel, the very individual who first raised alarms about the thefts.<sup>83</sup> The museum later disclosed that the stolen items included jewelry and small objects like gems, often used in rings.

An independent review, spurred by these revelations, recommended that the British Museum maintain a comprehensive register of its collections.<sup>84</sup> This review was initiated after the museum acknowledged the thefts, which not only caused significant reputational damage but also highlighted serious security lapses and inadequate documentation of artifacts.<sup>85</sup> Amidst these developments, the museum's director resigned, and the museum announced digitization plans for its collection, a massive endeavor involving at least 8 million objects.<sup>86</sup> Mark Jones, the interim director, emphasized the need for increased access to collections, arguing that better-known and utilized collections would more quickly reveal any absences.<sup>87</sup>

Such a sustained period of theft certainly opens the door to consider broader implications of the theft. Lina Mendoni, Greece's culture minister, criticized the British Museum's handling of its collections, linking this scandal to broader debates about the repatriation of cultural artifacts.<sup>88</sup> The situation also illuminates the challenges many museums face in cataloging and managing extensive collections, with as much as half of the British Museum's 8 million

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Alex Marshall, *British Museum Details Extent of Stolen and Damaged Items*, N.Y. TIMES (Dec. 12, 2023), <https://www.nytimes.com/2023/12/12/arts/design/british-museum-missing-items.html> [<https://perma.cc/DHX3-FPEH>].

<sup>83</sup> *Id.*

<sup>84</sup> *British Museum Independent Collection, Security, and Governance Review*, BRITISH MUSEUM, [https://www.britishmuseum.org/sites/default/files/2023-11/British\\_Museum\\_Independent\\_Review\\_Terms\\_Reference.pdf](https://www.britishmuseum.org/sites/default/files/2023-11/British_Museum_Independent_Review_Terms_Reference.pdf). [<https://perma.cc/2P8G-L3YA>].

<sup>85</sup> Harriet Sherwood, *British Museum told to keep better records after theft of 1,500 items*, THE GUARDIAN (Dec. 12, 2023), <https://www.theguardian.com/culture/2023/dec/12/british-museum-told-to-keep-better-records-after-theft-of-1500-items> [<https://perma.cc/97V3-WAPC>].

<sup>86</sup> Jo Lawson-Tancred, *A Weak Cataloguing System Made It Easy to Steal From the British Museum. Institutions Around the Globe Are Reckoning With the Same Vulnerabilities*, ARTNET NEWS (Sept. 7, 2023), <https://news.artnet.com/art-world/british-museum-cataloging-debacle-2356464> [<https://perma.cc/AQP3-AW3J>].

<sup>87</sup> Khomami, *supra* note 77.

<sup>88</sup> Lawson-Tancred, *supra* note 86.

objects never fully cataloged.<sup>89</sup> Finally, the insider theft uncovers the complexities of digitizing and maintaining museum collections.<sup>90</sup> The British Museum, despite efforts to modernize its systems, struggles to account for the sheer volume of its holdings. This situation is not unique, as other institutions like the Museum of Fine Arts in Boston face similar challenges in cataloging and archiving their collections.<sup>91</sup>

This incident has sparked a broader debate about the safeguarding of cultural heritage in museums. Critics argue that the size and scope of the British Museum's collection make it vulnerable to such incidents.<sup>92</sup> Certainly the British Museum's emphasis on acquisition and display has come at the cost of proper conservation and security measures. The insider theft controversy also highlights the challenges of maintaining transparency and accountability in large cultural institutions. The British Museum, with its global reputation, is under scrutiny to uphold the highest standards in the preservation and ethical management of its collection given how many of the world's cultures have important pieces of their material cultural heritage residing in the collection. Not only should this incident lead to loud calls for more stringent security protocols but a general reevaluation of internal policies regarding the handling and documentation of artifacts. The British Museum's journey from its 18<sup>th</sup> century origins to the present day is a narrative rich in cultural significance and complexity. Its encyclopedic collection, while a testament to human creativity and history, also raises important questions about cultural representation, ethics in acquisition, and the responsibilities of such institutions in the modern world. The recent insider theft controversy further underscores the need for rigorous ethical and security standards in the management of cultural heritage. As the museum continues to evolve, it faces the challenge of balancing its self-appointed role as a custodian of global culture with the need for ethical care of the objects in its collection and the need for renewed cultural sensitivity.

### III. CURATORS OF PROVENANCE: NO ONE HAS WHAT THEY DO NOT RESEARCH

One remedy for the vexing problems of insider theft, as well as the presence of problematic material in a collection, is increased attention on the history of

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<sup>89</sup> *Id.*

<sup>90</sup> For an illustration of the complexity of managing and cataloging museum collections, see Heather Hope Stephens, *All in a Day's Work: How Museums May Approach Deaccessioning as a Necessary Collections Management Tool*, 22 DEPAUL J. ART TECH. & INTELL. PROP. L 119, 128 (2011).

<sup>91</sup> Lawson-Tancred, *supra* note 86.

<sup>92</sup> As the art historian Elizabeth Marlowe argues: "That concentration of resources in a single place is not only totally impractical, its totally unethical," pointing out that new leadership "could start a semi-permanent long-term loan initiative where the collections are distributed more evenly across the country and, ideally, across the world. To redistribute wealth, and also to distribute the burden of cataloguing." *Id.*

objects already in collections. In furthering their missions, cultural institutions must consider the risks which threaten the objects in their care, including the risk of natural disaster, fire, theft, to name a few.<sup>93</sup> Some forward-thinking institutions are beginning to employ dedicated provenance curators which help institutions consider the risk that institutions may have in their possession potentially problematic material.<sup>94</sup> A provenance curator plays a crucial role in museums and is primarily focused on researching the history of ownership, origin, and authenticity of items in a museum's collection.<sup>95</sup> The position has seen significant growth and evolution, especially in light of increasing concerns about the ethical acquisition of art and cultural objects.

Provenance research involves the examination of an artwork itself and historical research to reveal its chain of possession.<sup>96</sup> Many collections still reveal very little about the history of objects within a collection.<sup>97</sup> The reason why may be reflected in the comments of Charles Gatty, the curator of a 19<sup>th</sup> century private collection of antiquities from the ancient mediterranean:

Antiquities may go through many stages. They are appreciated for their market value in the hands of the dealer, for their beauty in the hand of the fine art connoisseur, and by the time that the antiquarian gets to them, the dealer has forgotten where he picked them up, and probably the auctioneer's man has destroyed the old bit of paper with the clue to their locality, and which certainly did not help their appearance at the sale.<sup>98</sup>

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<sup>93</sup> See generally BARCLAY G. JONES, PROTECTING HISTORIC ARCHITECTURE AND MUSEUM COLLECTIONS FROM NATURAL DISASTERS (Barclay G. Jones, 1<sup>st</sup> ed., 1986).

<sup>94</sup> Reed, *supra* note 9, at 363 (Noting, "In recent years, museums in Europe and the United States have received and resolved an increasing number of high-profile restitution claims for works of art in their collections.").

<sup>95</sup> Jacques Schuhmacher was the first dedicated provenance curator to be hired at a museum in the United Kingdom in 2019. Javier Pes, *With a New Show, the V&A Has Become One of a Handful of Museums Outside Germany to Address the Legacy of Nazi-Era Loot*, ARTNET NEWS (Aug. 27, 2019), <https://news.artnet.com/art-world/museums-nazi-looted-art-1632652>, [<https://perma.cc/C3PV-3TAA>].

<sup>96</sup> Patrick J. O'Keefe, *Provenance and Trade in Cultural Heritage Part IV: International Repatriation and Protection of Cultural Property*, 1995 U.B.C. L. REV. 259, 261 (1995) (emphasizing the importance of provenance because it "one, places the object in context and gives it meaning and, two, explains the grounds which govern legal relations").

<sup>97</sup> See Paulo Bianco, *Blockchain as a Technology Applied to Authenticity Issues: A Possible New Resource for Building up a Catalogue Raisonné?*, 25 ART ANTIQUITY & L. 285, 292 (2020) ("For centuries, wealthy and powerful people have collected works of art, objects and other artefacts that they deemed special. Throughout history, collectors developed the habit of marking on the recto of paintings and drawings an indication of the owner or the collection that the artwork belonged to. As the art object changed hands, new owners successively added their own notation close to the previous marking on it. Hence, the art object itself carries its own ownership history, and these inscriptions are quite a useful resource for provenance research, as well as adding value and prestige to the work itself.").

<sup>98</sup> Charles T. Gatty, *On Some Ancient Glass in the Mayer Collection* 29 *The Historic Soc'y of Lancashire and Cheshire*, Vol. V. 105, 113 (1877).



Provenance curators investigate the history of artifacts, artworks, and other items in a museum's collection.<sup>99</sup> This investigation involves tracing the chain of ownership back to the creation of the piece, verifying authenticity, and confirming legal acquisition.<sup>100</sup> The curators ensure due diligence in new acquisitions and confirm that items have not been illicitly obtained, especially in contexts like looted art, archaeological theft, or cultural heritage items taken during colonial times.<sup>101</sup> They also ensure compliance with international and national laws and agreements, such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.<sup>102</sup> Jane Levine, Worldwide Compliance Counsel with Sotheby's Auction House summarizes the key importance of a thorough provenance search:

Higher provenance standards reduce the chances that law-abiding and legitimate institutions, collectors and vendors contribute to the cycle of looting and destruction of archaeological sites . . . . A higher standard of care in due diligence research provides the best mechanism to distinguish between objects that are legal to sell either because they have been excavated and exported legally or because they have been out of the ground and their countries of modern discovery for so long that they are not reasonably connected with recent criminal looting, and objects that are the products of recent and ongoing looting and destruction of sites.<sup>103</sup>

Though Levine was describing the particular problems of antiquities looting and theft, thorough provenance research also helps to ensure objects are authentic and may not have been wrongfully taken from previous possessors.<sup>104</sup>

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<sup>99</sup> Reed, *supra* note 9, at 365 (Pointing out that, "In order to avoid . . . time-consuming and costly scenarios in our future, it is necessary for the MFA not to repeat the mistakes of our past.").

<sup>100</sup> See, e.g., *Using the Getty Provenance Index*, THE GETTY, <https://www.getty.edu/research/tools/provenance/faq.html#trace> [<https://perma.cc/P8T7-MMJZ>] ("The inventories list works of art from private collections in France, Italy, the Netherlands, and Spain from 1520 to 1880. The GPI has descriptions of more than 13,000 documents, from which more than 276,000 individual records have been extracted.").

<sup>101</sup> Reed, *supra* note 9 at 366–67.

<sup>102</sup> 823 U.N.T.S. 231.

<sup>103</sup> Jane A. Levine, *Importance of Provenance Documentations in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past*, 19 DEPAUL J. ART TECH. & INTELL. PROP. L. 219, 221 (2009).

<sup>104</sup> See, e.g., Laurie A. Stein & Barbara Aikens, *A Guide to Provenance Research at the Archives of American Art*, SMITHSONIAN INST., <https://www.si.edu/spotlight/a-guide-to-provenance-research-at-the-archives-of-american->

Provenance curators also have an educational role of providing insights into the history of objects, which can enrich the public's understanding of cultural and historical contexts.<sup>105</sup> The role has gained prominence in recent years, especially after high-profile cases of repatriation and disputes over ownership of cultural property.<sup>106</sup> Museums are increasingly recognizing the importance of ethical stewardship of their collections.<sup>107</sup> While provenance curators were initially focused more on art history, the role now encompasses legal, ethical, and historical perspectives, reflecting a more interdisciplinary approach.<sup>108</sup>

Provenance curators play a key role in ensuring that museums act as ethical stewards of their collections, respecting the cultural, historical, and legal implications of ownership.<sup>109</sup> Their work helps build trust between museums and the public, particularly communities seeking the return of cultural and ancestral artifacts.<sup>110</sup> Accurate provenance research enhances the academic and educational value of museum collections.<sup>111</sup> Holocaust-related research has prompted many European and North American museums to employ provenance curators, especially for art looted during World War II.<sup>112</sup> Provenance curators examine museum holdings to identify items with gaps or issues in their provenance, often delving into archives, databases, and historical records.<sup>113</sup>

Though these roles serve a critical function, it must be acknowledged that the work is often resource-intensive and can be limited by available funding and

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art#:~:text=Scholars%20and%20curators%20undertake%20provenance,they%20changed%20hands%20over%20time. [https://perma.cc/6N5M-S5EG].

<sup>105</sup> Reed, *supra* note 9.

<sup>106</sup> See, e.g., Elisabetta Povoledo, *After Legal Odyssey, Homecoming Show for Looted Antiquities*, N. Y. TIMES (Dec. 18, 2007), <http://www.nytimes.com/2007/12/18/arts/design/18trea.html>.

<sup>107</sup> See, e.g., Elaine Velie, *Do You Have What It Takes to Be the Met Museum's Head of Provenance?*, HYPERALLERGIC (Jun. 7, 2023), <http://hyperallergic.com/832099/do-you-have-what-it-takes-to-be-the-met-museums-head-of-provenance/> [https://perma.cc/98PQ-2B43].

<sup>108</sup> See, e.g., Victoria Reed, *The Art of Restitution at the Museum of Fine Arts, Boston*, AM. ALL. OF MUSEUMS (Nov. 1, 2023), <https://www.aam-us.org/2023/11/01/the-art-of-restitution-at-the-museum-of-fine-arts-boston/> [https://perma.cc/7DDB-NSSG].

<sup>109</sup> Reed, *supra* note 9, at 372.

<sup>110</sup> Reed, *supra* note 108 (“In fact, you often hear that we hold our collections in the public trust. Taking a broad view, we reconstitute because displaying stolen art is not in the interest of the public trust.”).

<sup>111</sup> See, e.g., *Provenance and Collecting History*, BROOKLYN MUSEUM, <https://www.brooklynmuseum.org/opencollection/research/provenance> [https://perma.cc/W6VR-VM9F] (“We aim to be responsible stewards of the works in the Museum’s collections. Provenance research enables us to confront our institution’s history and examine how we can move forward as an anti-oppressive and equitable organization.”).

<sup>112</sup> See, e.g., Luke X. Martin, *Meet The Kansas City Gumshoe Who Uncovers The Stories Of The Nelson-Atkins’ Nazi-Looted Art*, KCUR, <https://www.kcur.org/show/up-to-date/2019-03-17/meet-the-kansas-city-gumshoe-who-uncovers-the-stories-of-the-nelson-atkins-nazi-looted-art> [https://perma.cc/S7EV-R67J].

<sup>113</sup> Reed, *supra* note 108 (“As public, educational institutions, it is reasonable to expect museums to go beyond the letter of the law and uphold a high ethical standard in building and maintaining our collections. Unlike the law, however, which is relatively fixed, ethical considerations on collecting are constantly evolving.”).

staffing.<sup>114</sup> Provenance research can be hindered by incomplete or lost records, leading to ambiguities. In addition, decisions about the disposition of objects can be influenced by the subjective interpretation of evidence or institutional biases.<sup>115</sup> Museums should address ownership claims of colonial-era acquisitions with ethical considerations, beyond just legal obligations.<sup>116</sup>

So while provenance curators are integral to the ethical and legal management of museum collections, their role is also vital in navigating the complex histories of objects and ensuring that museums remain trusted, responsible custodians of cultural heritage.

#### IV. SACRED MATERIAL IN COLLECTIONS: NO ONE HAS WHAT IS SACRED TO OTHERS

Relying on institutions to voluntarily do the right thing may not be enough. A statutory scheme, which links funding to appropriate collections management can also make a big impact. The Native American Graves Protection and Repatriation Act (“NAGPRA”), enacted in 1990, represents a significant legislative milestone in the history of Native American rights.<sup>117</sup> Its requirements have significantly reshaped the relationship between Native American communities and institutions holding Native American cultural items.<sup>118</sup>

Prior to NAGPRA, numerous Native American cultural items, human remains, and sacred objects were held by museums, universities, and federal agencies without the consent of the relevant tribes.<sup>119</sup> NAGPRA provides a framework, which requires federal agencies and federally supported museums to document their holdings and return human remains and associated sacred objects to appropriate tribes.<sup>120</sup> In addition, “the desecration of Native American

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<sup>114</sup> Germany and France are working to combat this with a three-year pilot project slated to begin in 2024. Catherine Hickley, *Germany and France Set up Joint Provenance Research Fund Focussed on Africa*, THE ART NEWSPAPER, <https://www.theartnewspaper.com/2023/10/11/germany-and-france-set-up-joint-provenance-research-fund-focussed-on-africa> [https://perma.cc/RN6Z-HMMH].

<sup>115</sup> See, e.g., Graham Bowley, *Provenance of a Museum’s Greek Exhibit Is Questioned, Fueling a Debate*, N.Y. TIMES (Sep. 17, 2023), <https://www.nytimes.com/2023/09/17/arts/curator-fired-provenance.html>.

<sup>116</sup> Reed, *supra* note 108.

<sup>117</sup> 25 U.S.C. § 3001–13.

<sup>118</sup> See, e.g., Julia Jacobs & Zachary Small, *Leading Museums Remove Native Displays Amid New Federal Rules*, N.Y. TIMES (Jan. 26, 2024), <https://www.nytimes.com/2024/01/26/arts/design/american-museum-of-natural-history-nagpra.html>.

<sup>119</sup> See *The Native American Graves Protection and Reperation Act Before the Senate Comm. on Indian Affairs*, 109 Cong. 2-6 (2005) (statement by Paul Hoffman, Deputy Assistant Secretary for Fish and Wildlife, and Parks, Dept. of the Interior).

<sup>120</sup> 25 U.S.C. §§ 3003–3005; see *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 263–66 (3d Cir. 2014) (providing a history and overview of NAGPRA).

graves and other sacred sites” which had been a source of longstanding distress and contention for Native American communities helped spur passage of the law.<sup>121</sup> The enactment of NAGPRA was a direct result of persistent advocacy and activism by Native American groups and their allies.<sup>122</sup> These efforts were part of a broader movement aimed at recognizing and respecting Native American sovereignty and cultural rights.<sup>123</sup> The Native American rights movement, which encompasses a wide range of issues including land rights, cultural preservation, and political recognition, has been active in various forms for decades.<sup>124</sup> The process of getting NAGPRA enacted involved extensive lobbying, awareness campaigns, and testimonies by Native American leaders to educate lawmakers about the cultural and spiritual significance of the items and remains held by institutions.<sup>125</sup>

NAGPRA requires institutions receiving federal funding to return Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony to lineal descendants and culturally affiliated tribes.<sup>126</sup> NAGPRA designates control and ownership of remains and objects found on federal or tribal lands based on specific priorities.<sup>127</sup> Ownership is granted to lineal descendants of the remains if they are identifiable, although this is infrequently the case.<sup>128</sup> If no lineal descendants are found, the tribe owning or overseeing the land where the discovery occurred gains ownership.<sup>129</sup> On federal land not associated with any Indian tribe, the tribe most culturally

<sup>121</sup> Rice v. Cayetano, 528 U.S. 495, 531 (2000).

<sup>122</sup> See Karolina Kuprecht, *The Concept of “Cultural Affiliation” in NAGPRA: Its Potential and Limits in the Global Protection of Indigenous Cultural Property Rights*, 19 INT’L J. CULTURAL PROP. 33, 43 (2012) (“Even though NAGPRA stands in a property law context, the act is generally qualified as human rights legislation. Important driving forces behind its enactment was the national and international claim for respect of indigenous peoples’ right of self-determination and the insight that Native Americans need to be included in terms of humanity.”).

<sup>123</sup> See John E. Echohawk, *The Future of Native American Civil Rights Native American and Alaska Native Rights and Issues*, 49 HUM. RTS. 2, 2–3 (2024) (describing the work involved in securing Native American Civil Rights).

<sup>124</sup> In 2021, the Lawrence City Commission voted to return the Sacred Red Rock, I<sup>h</sup>zhúje’waxóbe, to the Kaw Nation, rectifying a 94-year separation initiated when Lawrence moved the rock to honor its white founders. This gesture of reconciliation, supported by a \$5 million grant from the Mellon Foundation for the rock’s relocation, was complemented by a formal apology from the City of Lawrence for the appropriation of the sacred boulder in 1929. Katie Bernard, *After Nearly a Century, Lawrence is Returning a Sacred Boulder to the Kaw Nation*, KANSAS CITY STAR, <https://www.kansascity.com/news/politics-government/article278739914.html> [<https://perma.cc/VW9G-JXEF>].

<sup>125</sup> See Rebecca Tsosie, *NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework Repatriation Symposium*, 44 ARIZ. ST. L.J. 809, 810 (2012) (pointing out that the context of enactment revealed the law as one primarily devoted to Native American human rights).

<sup>126</sup> *Native American Graves Protection and Repatriation Act*, U.S. DEPT. OF INDIAN AFFAIRS, <https://www.bia.gov/service/nagpra> [<https://perma.cc/S3J7-9GVA>].

<sup>127</sup> 25 U.S.C. § 3002(a)(1).

<sup>128</sup> See, e.g., Wendy Crowther, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 J. LAND RES. & ENVTL. L. 269, 273 (2000).

<sup>129</sup> 25 U.S.C. § 3002(a)(2)(A).

connected to the remains or objects is given ownership rights.<sup>130</sup> If a clear cultural link cannot be established, and the land is acknowledged as aboriginal territory of a tribe by the Indian Claims Commission or the Court of Claims, that tribe has control rights, unless another tribe demonstrates a stronger cultural affiliation.<sup>131</sup>

Institutions must thoroughly document their collections and consult with Native American tribes to identify items subject to repatriation. This process includes inventorying and summarizing collections and providing this information to the National NAGPRA Program.<sup>132</sup> Compliance with NAGPRA is a prerequisite for receiving federal funding. Institutions that fail to comply with NAGPRA risk losing federal support, a significant deterrent to ensure adherence to the law.<sup>133</sup>

Some critics argue that NAGPRA's implementation has been slow and inconsistent.<sup>134</sup> Issues include bureaucratic delays, inadequate funding for the repatriation process, and occasional resistance from institutions.<sup>135</sup> Certain terms in NAGPRA, such as "cultural affiliation" and "significant cultural or historical importance," are subject to interpretation, leading to disputes and legal challenges.<sup>136</sup> In addition, NAGPRA applies only to institutions receiving federal funding, leaving a gap in protection for items held by private collectors or organizations not dependent on federal support.<sup>137</sup> Finally, NAGPRA does not address Native American cultural items held in foreign institutions, leaving a significant portion of such items outside its purview.

Some Native Americans feel that NAGPRA, while important, places too much emphasis on physical remains and objects, potentially overshadowing broader issues of sovereignty, land rights, and cultural preservation.<sup>138</sup> Consider the Wabanaki tribes' prolonged struggle to reclaim ancestral remains from Harvard University's Peabody Museum.<sup>139</sup> Despite NAGPRA, Harvard

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<sup>130</sup> 25 U.S.C. § 3002(a)(2)(B).

<sup>131</sup> 25 U.S.C. § 3002(a)(2)(C).

<sup>132</sup> 25 U.S.C. § 3004; *see* Crowther, *supra* note 128.

<sup>133</sup> Crowther, *supra* note 128.

<sup>134</sup> *See, e.g.*, Mitch Smith & Julie Bosman, *Congress Told Colleges to Return Native Remains. What's Taking So Long?*, N.Y. TIMES (Sep. 15, 2022), <https://www.nytimes.com/2022/09/15/us/native-american-remains-university-of-north-dakota.html>. [<https://perma.cc/DLD9-YB8X>].

<sup>135</sup> Ellie S. Klibaner-Schiff and Jade Lozada, *The Painful Progress of Native American Repatriation*, THE HARVARD CRIMSON (March 2, 2024), <https://www.thecrimson.com/article/2024/3/2/nagpra-scrut/> [<https://perma.cc/SV54-CS9B>].

<sup>136</sup> 25 U.S.C. § 3001.

<sup>137</sup> *Native American Graves Protection and Repatriation Act*, *supra* note 119.

<sup>138</sup> Klibaner-Schiff & Lozada, *supra* note 135.

<sup>139</sup> Mary Hudetz & Ash Ngu, *Tribes in Maine Spent Decades Fighting to Rebury Ancestral Remains. Harvard Resisted Them at Nearly Every Turn.*, PROPUBLICA (Dec. 4, 2023),

employed loopholes to delay the process while technically complying with the law.<sup>140</sup> The tribes, representing the Penobscot, Passamaquoddy, Maliseet, and Mi'kmaq, faced repeated rejections from Harvard, which questioned their cultural ties to the remains.<sup>141</sup> Indigenous tribes face considerable hurdles in reclaiming their heritage combatting considerable institutional hurdles in the repatriation process.<sup>142</sup>

NAGPRA has been a crucial step in recognizing and addressing historical injustices against Native American communities by ensuring the return and respectful treatment of cultural items and human remains. While it has made significant progress in rectifying past wrongs, the critiques highlight ongoing challenges and areas for improvement. The act remains a seminal piece of legislation in the broader context of Native American rights and cultural preservation.

## V. CONCLUSION

Museums face increasing pressure to critically assess their collection practices, balancing ethical considerations with legal requirements. The complexities surrounding internal thefts, the rise of provenance curators, and the legislative mandates like NAGPRA are vital elements in modern collection stewardship. These aspects underscore the necessity for museums to not only safeguard and preserve material cultural heritage but also uphold the highest ethical standards, ensuring transparency and accountability in their acquisitions and holdings. Provenance research and proactive repatriation efforts are essential steps towards addressing these challenges, fostering trust between museums and the public, and respecting the cultural and historical significance of the objects in their care.

Ultimately, museums must embrace a more inclusive and cooperative model for handling cultural heritage than they have in the past. By integrating ethical considerations, leveraging technological advancements, and fostering collaborations with communities of origin, museums can strike a balance between preserving cultural heritage and honoring the rightful disposition of cultural artifacts. This approach not only enhances the educational and cultural value of museums, it also paves the way for a more ethical and transparent future. As stewards of material culture, museums have a profound responsibility to act with integrity, ensuring that their practices reflect the evolving values and ethical standards of our time.

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[https://www.propublica.org/article/inside-wabanaki-tribes-struggle-to-reclaim-ancestral-remains-from-harvard?taid=656fb99894562e0001b9308b&utm\\_campaign=trueantheam&utm\\_medium=social&utm\\_source=twitter](https://www.propublica.org/article/inside-wabanaki-tribes-struggle-to-reclaim-ancestral-remains-from-harvard?taid=656fb99894562e0001b9308b&utm_campaign=trueantheam&utm_medium=social&utm_source=twitter) [https://perma.cc/2ZFH-DPP3].

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*