

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

ONE EAGLE FEATHERED WAR  
BONNET

CIVIL ACTION NO. 00-CV-0599

**GOVERNMENT'S MOTION TO DISMISS CLAIMS OF INDIAN TRIBES  
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

The United States of America, by its attorneys, Patrick L. Meehan, United States Attorney for the Eastern District of Pennsylvania, and J. Alvin Stout, III and Robert E. Goldman, Assistant United States Attorneys, respectfully moves this Court, pursuant to Fed. R. Civ. P. 2(b)(1) and 12(b)(6), for entry of an order dismissing the claims of the Indian tribes, or, under Fed. R. Civ. P. 56, granting summary judgment in favor of the United States.

A civil complaint was filed alleging that defendant eagle feathered war bonnet (the "war bonnet") was subject to forfeiture to the United States pursuant to 16 U.S.C. § 668b(b) which provides for the forfeiture of bald and golden eagle parts sold or offered for sale. Two Indian Tribes, the Apache Tribe of the Mescalero Reservation and the Comanche Tribe of Oklahoma, filed claims asserting ownership interests in the war bonnet.

The government moves the Court to dismiss the Tribes' claims for lack of jurisdiction, lack of standing, and failure to state a claim upon which relief can be granted. Specifically, the Tribes' claims are based upon the provisions of the Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001 et seq. Pursuant to that statute, a claim of a tribe for repatriation of an object of cultural patrimony must be made to the federal agency that is in possession or control of the object. The Tribes have not complied with NAGPRA and therefore have failed to exhaust administrative remedies. Secondly, the Tribes lack standing to file a claim in the forfeiture action since there is no statutory innocent owner exception to

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forfeiture under 16 U.S.C. § 668b. Third, the Tribes have also failed to meet their initial burden of establishing that they have any ownership interest in the war bonnet.

Therefore, the government respectfully requests the Court enter an Order in the attached form dismissing the claims of the Tribes or in the alternative granting summary judgment.

Respectfully submitted,  
PATRICK L. MEEHAN  
United States Attorney

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J. ALVIN STOUT, III  
Assistant United States Attorney  
Chief, Asset Forfeiture

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ROBERT E. GOLDMAN  
Assistant United States Attorney

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :  
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 v. : CIVIL ACTION NO. 00-CV-0599  
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 ONE EAGLE FEATHERED WAR :  
 BONNET :

**MEMORANDUM OF LAW IN SUPPORT OF  
GOVERNMENT'S MOTION TO DISMISS CLAIMS OF INDIAN TRIBES  
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

The government seeks to dismiss the claims filed by the Apache Tribe of the Mescalero Reservation and the Comanche Tribe of Oklahoma (jointly referred to as "the Tribes") in this forfeiture action for lack of jurisdiction at this time over the subject matter; lack of standing because there is no statutory innocent owner exception to forfeiture under 16 U.S.C. § 668b; and, if this Court concludes that it has jurisdiction to adjudicate these claims, for the Tribes' failure to meet their burden of establishing that they have any ownership interest in the defendant property. Thus, there is no issue of material fact and summary judgment is appropriate.

**I. BACKGROUND STATEMENT OF FACTS**

On September 3, 1999, defendant eagle feathered war bonnet (the "war bonnet") was offered for sale over the Internet for one million dollars. An undercover agent with the Federal Bureau of Investigation (FBI) responded to the solicitation and engaged in discussions with Thomas Marciano, a broker for the seller, Leighton Deming, Jr. Marciano sent to the agent a picture of the war bonnet and documents which Marciano represented established that the war bonnet had been worn by the Apache warrior, Geronimo. Marciano also sent a copy of the Bald Eagle Protection Act which prohibits the sale of parts of bald and golden eagles. See

photographs of war bonnet and correspondence, attached as Exhibit A. Those documents claimed the war bonnet was worn by Geronimo in 1907 to mark the occasion of the last Pow-Wow in Collinsville, Indian Territory, which became part of the state of Oklahoma. The documents further stated that the owner, Leighton Deming, had acquired the war bonnet from his grandmother. The Deming family claimed to have received it from Jack Moore. Moore reportedly escorted Geronimo to the last Pow-Wow, and was given the costume, including the war bonnet, chaps, moccasins and blanket Geronimo wore during the last dance, by Geronimo, in appreciation for his loyalty. Moore gave these items to the Demings.

Over several following weeks, the agent negotiated for the purchase of the war bonnet with Marciano, who represented himself as acting on behalf of Deming. On October 12, 1999, Deming and Marciano traveled to Philadelphia, Pennsylvania and sold the war bonnet to the agent for one million dollars. The FBI seized the war bonnet and it remains in their evidence room pending this forfeiture action. It has been determined by Lucinda Schroeder, a Fish and Wildlife agent with twenty-five years experience, and who is trained in the identification of eagle feathers, that the war bonnet is composed of bald and golden eagle feathers. A copy of the FBI agent's affidavit filed in support of a complaint and warrant obtained for the arrest of Deming and Marciano is attached as Exhibit B.

## II Procedural History

### I. Criminal case

On January 6, 2000, the United States Attorney for the Eastern District of Pennsylvania filed an Information charging Leighton Deming and Thomas Marciano with violation of the Migratory Bird Protection Act, 16 U.S.C. §§ 703 and 707(a). (Exhibit C). The defendants entered into plea agreements with the United States to plead to the offense and agreed to forfeit the war bonnet to the United States. (Exhibit D). The defendants entered pleas of guilty to the Information and were sentenced to a term of probation. See United States v. Marciano, et al., Criminal Nos. 00-CR-00013 and 99-M-871.

Deming's interest in the war bonnet was criminally forfeited pursuant to 16 U.S.C. § 706. That statute provides that upon conviction of a violation of the Migratory Bird Act, all parts of migratory birds offered for sale shall be forfeited to the United States and disposed of by the Secretary of the Interior in such manner as he deems appropriate. The preliminary order of forfeiture was signed by the court on February 16, 2000. (Exhibit E).

2. Civil forfeiture action<sup>1</sup>

On February 2, 2000, a civil complaint for forfeiture was filed alleging the war bonnet was subject to forfeiture to the United States because the sale of the war bonnet was in violation of the Bald Eagle Protection Act, 16 U.S.C. § 668, which prohibits the sale, or offering for sale, of any bald or golden eagle, alive or dead, or any part thereof.

On March 23, 2000, the Apache Tribe of the Mescalero Reservation (Apache Tribe) filed a claim asserting an interest in the war bonnet. They then filed an answer to the complaint on April 13, 2000. On April 24, 2000, the Comanche Tribe of Oklahoma (Comanche Tribe) filed a claim and answer. No other claims were filed. The government and claimants engaged in discovery until August 10, 2001.

Claim of the Apache Tribe

In its answer to the government's complaint for forfeiture, the Apache tribe bases its claim on the war bonnet on the provisions of NAGPRA. (Apache Tribe Answer at ¶11). As set forth in that pleading, the Apache Tribe asserted "its ownership or possessory interest, or right of repatriation, of the eagle-feathered war bonnet as an object of cultural patrimony pursuant to the Native American Graves Protection and Repatriation Act, Title 25, United States Code, Sections 3001 - 3013 (NAGPRA)."

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<sup>1</sup> While the criminal forfeiture disposed of Deming's interest in the war bonnet, a civil action was filed to address any third party claims.

That the Tribe's claim is based on NAGPRA is also made clear in the Tribe's prayer for relief which states, "WHEREFORE, Claimant prays, for the reasons set forth above, the Court . . . find the Defendant Eagle-Feathered War Bonnet an object of cultural patrimony of the Apache Tribe . . ." (Id. at p. 9).

#### Claim of the Comanche Tribe

The Comanche Tribe's claim is also based on NAGPRA. In its verified claim, the Tribe states, "the War Bonnet is an object of cultural heritage to the Tribe and meets the definition of cultural patrimony which is defined in 25 U.S.C. § 3001(3) . . . . Repatriation and return of the War Bonnet is being sought pursuant to 25 U.S.C. §§ 3004 and 3005, which specifically address repatriation of objects in possession or control of a federal agency . . ." (Comanche Verified Claim at ¶¶ 1-2).

Again in its answer to the government's complaint for forfeiture, the Tribe raises NAGPRA as the basis for its claim. (Comanche Answer at ¶¶ 3 - 9, 12).

### **III. ARGUMENT**

#### **A. The War Bonnet is Subject to Forfeiture.**

The Bald and Golden Eagle Protection Act provides for the forfeiture of

All bald or golden eagles, or parts, nests, or eggs thereof, taken, possessed, sold, purchased, bartered, offered for sale, purchase, or barter, transported, exported, or imported contrary to the provisions of the [Bald and Golden Eagle Protection Act], or of any permit or regulation issued hereunder.<sup>2</sup>

16 U.S.C. § 668b(b). Deming and Marciano, knowing that it was illegal to offer for sale, or sell, eagle feathers in the United States, offered the war bonnet for sale over the Internet, negotiated for its sale, and subsequently sold the war bonnet to an undercover FBI agent in Philadelphia,

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<sup>2</sup> The Act does not prohibit the possession or transportation of any bald or golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940.

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Pennsylvania on October 12, 1999. The war bonnet was examined by an experienced Fish and Wildlife agent trained in the identification of eagle feathers and by experts for both the government and the tribes. The Tribes agree that the war bonnet is composed of eagle feathers. The war bonnet is therefore subject to forfeiture to the United States pursuant to 16 U.S.C. § 668b(b). 16 U.S.C. § 707 provides that such forfeited property shall be disposed of and accounted for by, and under the authority of, the Secretary of the Interior.

**B. The Court Lacks Jurisdiction to Adjudicate the Tribes' Repatriation Claims Because They Have Failed to Exhaust Their Administrative Remedies Under NAGPRA.**

As previously discussed, the Tribes' claims in this forfeiture proceeding are NAGPRA based. Enacted in 1990, NAGPRA safeguards the rights of Native Americans by protecting tribal burial sites and rights to items of cultural significance to Native Americans. See 43 C.F.R.

§ 10.1. Cultural items protected under NAGPRA include Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. The Tribes assert that the war bonnet is an object of cultural patrimony.<sup>3</sup>

NAGPRA provides a systematic process for determining the rights of claimants to certain objects of cultural patrimony. 43 C.F.R. § 10.1. Repatriation of cultural items currently held by federal agencies may be attained provided that certain requirements are met. See 25 U.S.C. §§

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<sup>3</sup> An item of cultural patrimony is "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group." 25 U.S.C. § 3001(3)(D).

3004, 3005.

Under NAGPRA, a lineal descendant of an owner or an Indian tribe may make a claim for repatriation of an object of cultural patrimony from the federal agency that is in possession or control of the object. 43 C.F.R § 10.2 defines the term "possession" as "having physical custody of objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations." The term "control" is defined as "having a legal interest in objects of cultural patrimony sufficient to lawfully permit the Federal agency to treat the objects as part of its collection for purposes of these regulations."

The agency in possession or control of the object may either agree to repatriation or deny the request. In case of the latter, NAGPRA provides a procedure for the claimant to then follow. The statute and regulations provide a method for the resolution of any disputes between the federal agency and the Indian tribe.<sup>4</sup> Administrative decisions are then subject to review by the United States District Courts which have jurisdiction over any action brought by any person alleging a violation of NAGPRA. 25 U.S.C. § 3013.

The Tribes in the pending action have bypassed the NAGPRA procedure. In fact, they

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<sup>4</sup> 43 C.F.R. § 10.17 provides as follows:

(a) Formal and informal resolutions. Any person who wishes to contest actions taken by museums, Federal agencies, Indian tribes, or Native Hawaiian organizations with respect to the repatriation and disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. The Review Committee may aid in this regard as described below. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

(b) Review Committee Role. The Review Committee may facilitate the informal resolution of disputes relating to these regulations among interested parties that are not resolved by good faith negotiations. Review Committee actions may include convening meetings between parties to disputes, making advisory findings as to contested facts, and making recommendations to the disputing parties or to the Secretary consistent with these regulations and the Act.

have acted prematurely in bringing their NAGPRA claim. Clearly at this stage of the forfeiture proceedings, no federal agency is in possession or control of the war bonnet for purpose of NAGPRA.<sup>5</sup> The government seeks forfeiture of the war bonnet to United States for disposition by the Secretary of the Interior. Once forfeiture is ordered by this Court, NAGPRA claims for repatriation are ripe for consideration. The government has advised the Tribes that their NAGPRA claims would be considered at that time by the Secretary of the Interior. A copy of that correspondence is attached as Exhibit F .

It is a general rule of law that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. McKart v. United States, 395 U.S. 185 (1969). Cf. Bonnichsen v. United States, 969 F.Supp. 614, 620 (D. Or. 1997) (exhaustion of administrative remedies under NAGPRA is not required if those remedies are inadequate or not efficacious, or where pursuit of administrative remedies would be a futile gesture).

Exhaustion of administrative remedies under NAGPRA occurs when the person has filed a written claim for repatriation with the responsible Federal agency and the claim has been

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<sup>5</sup> The Tribes may contend that the war bonnet is the "possession" or "control" of the FBI. That is not the case. The war bonnet was seized by the FBI pursuant to the criminal investigation. It was initially maintained as evidence for criminal proceedings. At this time, it is held by the FBI pending further order of this court. Clearly the FBI does not assert a possessory interest in the war bonnet other than that as evidence custodian. The FBI's present custodial role does not meet the possession or control definition provided in 43 C.F.R. § 10.2. In any event, the Tribes have not filed a NAGPRA claim with the FBI. Even were the Court to conclude that the FBI is in possession or control of the war bonnet for purpose of NAGPRA, the Tribes have failed to exhaust administrative remedies with the FBI. This Court would still lack jurisdiction to consider the pending claim.

<sup>6</sup> 43 C.F.R. § 10.15 provides: "Exhaustion of remedies. No person is considered to have exhausted his or her administrative remedies with respect to the repatriation or disposition of objects of cultural patrimony subject to subpart B of these regulations, or, with respect to Federal lands, subpart C of these regulations, until such time as the person has filed a written claim for

denied. 43 C.F.R. § 1015(c).<sup>6</sup> The Tribes cannot begin to seek, much less exhaust, administrative remedies as required by NAGPRA until the order of forfeiture is signed by this Court. Therefore, the Tribes' claims should be dismissed.

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repatriation or disposition of the objects with the Federal agency and the claim has been duly denied following these regulations."

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**C. The Tribes Lack Standing to Contest Forfeiture of the War Bonnet and Their Claims Should be Dismissed.**

There is no innocent owner defense to forfeiture contained in the Bald and Golden Eagle Protection Act. Therefore, the tribes lack standing to contest forfeiture of the war bonnet to the United States. See 16 U.S.C. § 668b.

Whether a claimant has a constitutional entitlement to assert an innocent owner defense even if the statute does not provide for it was addressed by the Supreme Court in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). In that case, a pleasure yacht leased from the claimant was forfeited under Puerto Rican law after authorities found marihuana aboard. The Puerto Rican forfeiture law contained no innocent owner provision. It was conceded that the claimant was not involved in the crime and that it had no knowledge that its property was being used in connection with drug offenses. The claimant contended the law unconstitutionally deprived it of its property without just compensation. The Court, in holding that the forfeiture scheme was not unconstitutional because of its applicability to the property of innocent owners, traced the historical background of the law of forfeiture and noted that “the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.” 416 U.S. at 683 (and discussing cases). There may be an exception where the object is stolen or taken from the owner without his consent. See Van Oster v. Kansas, 272 U.S. 465, 467 (1926).

In 1996, the Supreme Court revisited the question of whether a forfeiture statute is unconstitutional if it lacks an innocent owner provision. In Bennis v. Michigan, 516 U.S. 442 (1996), the claimant alleged her interest in a vehicle she co-owned with her husband was taken in

violation of the Fifth Amendment and that she was entitled to contest the abatement of the car by showing she did not know her husband would use it to violate Michigan's indecency law. The claimant relied on dictum in Calero-Toledo, which said that it would be difficult to conclude that

forfeiture serve legitimate purposes and was not unduly oppressive where an owner proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property. The Court held that Michigan's failure to provide an innocent owner defense was without federal constitutional consequence and explicitly rejected the dicta in Calero-Toledo. Bennis, 516 U.S. at 449-50, 116 S.Ct. at 999. After Calero-Toledo there can be no doubt that Congress has the authority to provide for the forfeiture of an innocent party's property where such forfeiture serves a legitimate governmental purpose, such as deterring the type of illegal activity in which the property was involved. Calero-Toledo, 416 U.S. at 687; Bennis, 516 U.S. at 452.

The Bald Eagle Protection Act and the Migratory Bird Treaty Act are conservation statutes designed to prevent the destruction of certain species of birds. Andrus v. Allard, 444 U.S. 51, 53 (1979). Congress recognized that "the possibility of commercial gain presents a special threat to the preservation of the eagle because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds." Id. at 58. Congress signaled its strong intent to provide protections to the eagle, "no longer a mere bird of biological interest but a symbol of the American ideals of freedom," by enacting a forfeiture provision which did not provide for an innocent owner exception to forfeiture. 54 Stat. 251, Chapter 278,; H.R. 4832, Public, No. 567, Preamble, June 8, 1940. Similarly, other statutes

that protect wildlife lack innocent owner provisions. See, e.g., United States v. Fifty-Three Eclectus Parrots, 685 F.2d 1131, 1133-1134 (9<sup>th</sup> Cir. 1982) (forfeiture of protected wild birds imported into the United States, 19 U.S.C. § 1527); 16 U.S.C. § 5305a (forfeiture of rhinoceros or tiger products); United States v. 2,507 Live Canary Winged Parakeets, 689 F.Supp. 1106, 1117 (S.D. Fla. 1998) (forfeiture of wildlife under the Lacey Act, 16 U.S.C. §§ 3372, 3374); United States v. One Handbag of Crocodilus Species, 856 F.Supp. 128, 134 (E.D.N.Y. 1994) (forfeiture under the Endangered Species Act, 16 U.S.C. § 1540).

To read such a defense into these statutes would undermine their purpose. "Where . . . a statute is silent as to the availability of an innocent owner defense, the Supreme Court has made clear that courts should not read such a defense into the statute." United States v. An Antique Platter of Gold, 991 F.Supp. 222, 230 (S.D.N.Y. 1997), aff'd 184 F.3d 131 (2<sup>nd</sup> Cir. 1999), cert. denied 528 U.S. 1136, (2000), citing Bennis, 416 U.S. at 448-449.

Because there is no innocent owner exception to forfeiture under the Bald and Golden Eagle Protection Act, the Tribes lack standing to contest forfeiture of the war bonnet and therefore their claims should be dismissed.

**D. Summary Judgment is Appropriate Because the Tribes Have Failed to Meet Their Initial Burden of Establishing That They Owned or Controlled the War Bonnet.**

Standing under Article III to the Constitution to contest a forfeiture action requires that a claimant must "show an interest in the property sufficient to create a 'case or controversy.'" United States v. Contents of Accounts Nos. 3034504504 & 144-07143 at Merrill, Lynch, Pierce,

Fenner & Smith, Inc., 971 F.2d 974, 984 (3d Cir. 1992), cert. denied. 507 U.S. 985 (1993).

Generally, ownership of property consists of a possessory interest in the property with consequential dominion and control over it. United States v. Fifteen Thousand Five Hundred Dollars (\$15,500.00) United States Currency, 558 F.2d 1359 (9th Cir. 1977); One Datsun 280ZX, 563, F.Supp. 470, 474 (E.D. Pa. 1983); United States v. 427 Chestnut Street, Reading, Pennsylvania, 731 F.Supp. 183, 190 (E.D. Pa. 1990). It is the claimant who bears the burden of demonstrating standing to contest a federal forfeiture case. Contents of Accounts, supra, 971 F.2d at 986; Rakas v. Illinois, 439 U.S. 128, 130-131 n.1 (1978); United States v. Real Property & Improvements Located at 5000 Palmetto Drive, 928 F.2d 373, 375 (11<sup>th</sup> Cir. 1991); United States v. One 1987 Cadillac DeVille, 774 F.Supp. 221, 224 (D.Del. 1991).

The Comanche Tribe has not offered any evidence that they owned or possessed the war bonnet, and relies solely on their expert's opinion that it was constructed by a member of the

Comanche Tribe.<sup>7</sup> Clearly a claim that a member of a tribe produced a war bonnet over 95 years ago is insufficient to establish an ownership claim in this proceeding. Of course, the claim that the war bonnet is an object of cultural patrimony subject to repatriation would properly be considered in a NAGPRA proceeding after forfeiture is ordered by this Court.

The Apache Tribe is also unable to establish that they have an ownership interest in the war bonnet. The Tribe structures its argument in the following fashion. First, they rely on the assertions of Leighton Deming's grandmother's letter, written in 1936, that Geronimo had possession of the war bonnet during the Collinsville Pow-Wow in 1907 and then gave the war bonnet after the Pow-Wow to his guard or escort who later gave it as a gift to a Deming ancestor. The Tribe next contends that if Geronimo wore the war bonnet, it must have been given to him from a leader of another tribe. The receipt of the war bonnet was therefore a gift of state to the Apache tribe in which ownership rests, they contend.

Even if the Court were to accept the Demings' family history as fact, it is insufficient to establish the ownership claim of the Apache Tribe because the circumstances under which Geronimo received and then disposed of the war bonnet are the subject only of the Tribe's conjecture. It cannot be established therefore that Geronimo did not have the right to gift or otherwise dispose of the war bonnet to another. Moreover, the Deming family correspondence and the newspaper clippings offered by the Apache tribe are inadmissible hearsay that would not be available to the claimant in a forfeiture trial. The Apache Tribe was unaware that this war bonnet even existed prior to its seizure from Deming. They cannot establish at a trial through admissible evidence that Geronimo in fact ever possessed or wore this particular war bonnet. They offer no admissible evidence to make the required threshold showing that Geronimo

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<sup>7</sup> The Apache Tribe's experts dispute that the war bonnet is of Comanche origin and conclude instead that it is of the Northern Plains style.

received the war bonnet on behalf of the Tribe with no right to give the object away.

The Tribes therefore fail to present admissible evidence which if believed at trial would establish that they have an ownership interest in the war bonnet. Their claim based on cultural patrimony is best considered under the provisions of NAGPRA.

Summary judgement is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R.Civ. P. 56(c); See J.F. Feeser,

Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 449 U.S. 921 (1991); Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991). The materiality of facts must be determined with reference to the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party has the initial responsibility of demonstrating that there is no genuine issue of material fact to be decided. Celotex Corp. V. Catrett, 477 U.S. 317, 323 (1986). As to any issue on which the moving party does have the burden of proof, the moving party may satisfy its burden by "pointing out to the district court . . . that there is an absence of evidence to support the non-moving party's case." Id. at 325.

"If the movant satisfies the burden of establishing that there is no genuine issue of material fact, then the burden shifts to the non-movant to proffer evidence demonstrating that a trial is required because a disputed issue of material fact exists." Weg v. Macchiarola, 995 F.2d 15, 18 (2d Cir. 1993); see Anderson, 477 U.S. at 250. In satisfying this burden, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." F.R.Civ.P. 56(e); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. ), cert. denied, 474 U.S. 1010 (1985). The opponent of summary judgement "must do more than simply show that there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "Merely colorable" evidence will not suffice as a basis for opposing summary judgment. Anderson, 477 U.S. at 249-250.

#### **IV. CONCLUSION**

The claims of the Apache Tribe of the Mescalero Reservation and the Comanche Tribe of Oklahoma should be dismissed for lack of jurisdiction over the subject matter based on the Tribes' failure to exhaust administrative remedies. The Tribes also lack standing because there is no innocent owner defense to forfeiture available to claimants under the Bald and Golden Eagle Protection Act. Alternatively, summary judgment should be granted in favor of the United States, because the Tribes have failed to present sufficient admissible evidence to support a claim that they owned, possessed, or controlled the war bonnet.

Respectfully Submitted,  
PATRICK L. MEEHAN  
United States Attorney

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J. ALVIN STOUT, III  
Assistant United States Attorney  
Chief, Asset Forfeiture

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ROBERT E. GOLDMAN  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :  
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 : CIVIL ACTION  
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 ONE EAGLE FEATHERED WAR : No. 2000-cv-0599  
 BONNET :  
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ORDER

AND NOW, this 5 day of November, 2001, upon consideration of the Government's Motion for Summary Judgment and opposition thereto by the Intervening parties, it is hereby **ORDERED** that:

- (1) The Government's Motion for Summary Judgment is **GRANTED**. All ownership rights of Thomas Marciano and Leighton Deming, Jr. to the Eagle Feathered War Bonnet are hereby forfeited. See 16 U.S.C. § 706. All of Marciano's and Deming's rights, title, and interest in the Eagle Feathered War Bonnet is forfeited to the United States and title to the property vests in the United States. See 16 U.S.C. § 668b(b). The United States Marshall shall transfer the forfeited Eagle Feathered War Bonnet to the Department of the Interior for further disposition in accordance with 16 U.S.C. § 706.
- (2) Because of representations by the Government to this Court, the forfeiture to the United States set forth in paragraph one is subject and subordinate to claims by claimants Apache Tribe of the Mescalero Reservation and Comanche Tribe of Oklahoma under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* ("NAGPRA"). Counsel for the government, Robert

Goldman, has repeatedly asserted to this Court that the Eagle Feathered War Bonnet would be subject to NAGPRA repatriation proceedings. Charles P. Raynor, Acting Associate Solicitor within the U.S. Department of the Interior, confirmed that position by letter to the Court. (July 11, 2001 letter attached to Government's summary judgment motion). Upon entry of this order, the Government will have possession and control of the Eagle Feathered War Bonnet within the meaning of NAGPRA and its implementing regulations. NAGPRA proceedings are to begin forthwith.

- (3) An appeal to a federal court of competent jurisdiction shall remain available pursuant to 25 U.S.C. §§ 3005, 3013 to review proceedings before the Department of the Interior.

BY THE COURT  
  
Berle M. Schiller, J.

## H

United States Court of Appeals,  
Eleventh Circuit.

TUG ALLIE-B, INC., a corporation, as owner of the  
tug ALLIE B, a commercial tug  
boat, official document number 524008, Dann Ocean  
Towing, as operator of said  
vessel, in a cause of action for exoneration from or  
limitation of liability,  
Plaintiffs-Appellants,  
v.

UNITED STATES of America, Claimant-Appellee,  
Allied Towing Corp., Claimant.

No. 00-15305.

Nov. 16, 2001.

Owner of vessel that had run aground and collided with coral reefs in national park brought action against United States seeking exoneration from or limitation of liability pursuant to Limitation of Vessel Owner's Liability Act. United States counterclaimed, alleging that, pursuant to Park System Resources Protection Act (PSRPA), it was entitled to all damages due to injuries to resources in Park resulting from grounding. The United States District Court for the Middle District of Florida, No. 98-02671-CV-T-23B, Steven D. Merryday, J., 114 F.Supp.2d 1301, granted United States' motion for dispositive relief. Owner appealed. The Court of Appeals, Barkett, Circuit Judge, held that Limitation Act did not apply to claims brought under PSRPA. The Court of Appeals, Black, Circuit Judge, further held that whether courts had taken restrictive view of Limitation Act would not be considered in determining whether Limitation Act applied to PSRPA.

Affirmed.

Black, Circuit Judge, specially concurred and filed opinion.

Tidwell, District Judge, sitting by designation, specially concurred and filed statement.

West Headnotes

### [1] Shipping 205 354k205 Most Cited Cases

When faced with liability for a maritime accident, a vessel owner may file a petition in federal court seeking protection under the Limitation of Vessel Owner's Liability Act. 46 App.U.S.C.A. § 181 et seq.

### [2] Shipping 210 354k210 Most Cited Cases

If limitation is granted under the Limitation of Vessel Owner's Liability Act, and the vessel owner subsequently is found liable, the admiralty court distributes the limitation fund among the damage claimants in an equitable proceeding known as concursus. 46 App.U.S.C.A. § 181 et seq.

### [3] Shipping 210 354k210 Most Cited Cases

Claimants asserting valid claims under the Limitation of Vessel Owner's Liability Act receive a pro rata distribution of the fund deposited or secured, or the proceeds of the vessel and pending freight. 46 App.U.S.C.A. § 181 et seq.

### [4] Federal Courts 776 170Bk776 Most Cited Cases

District court's determination that Park System Resources Protection Act (PSRPA) claims were not subject to Limitation of Vessel Owner's Liability Act involved purely an issue of law, that is, statutory construction, and thus would be reviewed *de novo*. 16 U.S.C.A. § 19jj et seq.; 46 App.U.S.C.A. § 181 et seq.

### [5] Statutes 142 361k142 Most Cited Cases

A newer statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled.

### [6] Statutes 223.2(.5) 361k223.2(.5) Most Cited Cases

### [6] Statutes 223.4

361k223.4 Most Cited Cases

Courts generally adhere to the principle that statutes relating to the same subject matter should be construed harmoniously if possible, and if not, that more recent or specific statutes should prevail over older or more general ones.

**[7] Statutes**  **188**  
361k188 Most Cited Cases

The starting point for all statutory interpretation is the language of the statute itself.

**[8] United States**  **57**  
393k57 Most Cited Cases

The Park System Resources Protection Act (PSRPA) is a strict liability statute. 16 U.S.C.A. § 19jj et seq.

**[9] Shipping**  **207**  
354k207 Most Cited Cases

The Limitation of Vessel Owner's Liability Act is typically applied when the claim at issue is based on a theory of negligence. 46 App.U.S.C.A. § 181 et seq.

**[10] Shipping**  **208**  
354k208 Most Cited Cases

Under the Limitation of Vessel Owner's Liability Act, a defendant can avoid or limit liability by demonstrating a lack of privity or knowledge of the negligence or unseaworthiness of the vessel. 46 App.U.S.C.A. § 181 et seq.

**[11] Shipping**  **204**  
354k204 Most Cited Cases

Even if a judgment is *in personam*, under the Limitation of Vessel Owner's Liability Act, the amount of the judgment is limited to the post-accident value of the *res* causing the damage. 46 App.U.S.C.A. § 181 et seq.

**[12] Statutes**  **206**  
361k206 Most Cited Cases

Courts are discouraged from adopting a reading of a statute that renders any part of the statute mere

surplusage.

**[13] Statutes**  **184**  
361k184 Most Cited Cases

**[13] Statutes**  **205**  
361k205 Most Cited Cases

In determining the meaning of an ambiguous statute, the Court of Appeals looks not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.

**[14] Statutes**  **190**  
361k190 Most Cited Cases

Congressional silence can be interpreted in a number of ways; silence may indicate that the question never occurred to Congress at all, or it may reflect mere oversight in failing to deal with a matter intended to be covered, or it may demonstrate deliberate obscurity to avoid controversy that might defeat the passage of legislation.

**[15] Shipping**  **203**  
354k203 Most Cited Cases

The Limitation of Vessel Owner's Liability Act was passed to encourage ship building and to induce capitalists to invest money in this branch of industry, and it achieves this purpose by exempting innocent shipowners from liability, beyond the amount of their interest. 46 App.U.S.C.A. § 181 et seq.

**[16] United States**  **57**  
393k57 Most Cited Cases

The Park System Resources Protection Act (PSRPA) was enacted to protect and preserve the resources of the United States' national parks, prompted, in part, by grounding of freighter in Biscayne National Park. 16 U.S.C.A. § 19jj et seq.

**[17] Statutes**  **223.1**  
361k223.1 Most Cited Cases

**[17] Statutes**  **223.4**  
361k223.4 Most Cited Cases

If two statutes conflict, the more recent or more specific statute controls.

**[18] Shipping**  **207**  
354k207 Most Cited Cases

Limitation of Vessel Owner's Liability Act did not apply to claims brought under Park System Resources Protection Act (PSRPA); such statutes contained conflicting congressional expressions as to scope of liability when Government sues defendant for allowing marine vessel to injure park land, such conflicting expressions could not be harmonized without affecting intent or directives of one or the other, and PSRPA controlled since it was more recent and more specific. 16 U.S.C.A. § 19jj et seq.; 46 App.U.S.C.A. § 181 et seq.

**[19] Shipping**  **203**  
354k203 Most Cited Cases

**[19] Shipping**  **207**  
354k207 Most Cited Cases

Whether courts had taken restrictive view of Limitation of Vessel Owner's Liability Act would not be considered in determining whether Limitation Act applied to claims brought under Park System Resources Protection Act (PSRPA), inasmuch as implicitly repealing otherwise valid statute was much harsher outcome than merely construing statute narrowly, and apparently strict construction of Limitation Act should therefore not influence whether Limitation Act should be implicitly repealed (Per specially concurring opinion of Black, Circuit Judge, for a majority of the court). 16 U.S.C.A. § 19jj et seq.; 46 App.U.S.C.A. § 181 et seq.

\*938 P/C Opinion of Black, Circuit Judge

\*939 Robert B. Parrish, Samuel Allen Maroon, Phillip A. Buhler, Moseley, Warren, Prichard & Parrish, Jacksonville, FL, for Plaintiffs- Appellants.

Michelle T. Delemarre, U.S. Dept. of Justice, Torts Branch, Civil Div., Washington, DC, for Claimant-Appellee.

David W. McCreadie, Lau, Lane, Pieper, Conley & McCreadie, P.A., Tampa, FL, for Claimant.

Appeal from the United States District Court for the Middle District of Florida.

Before BLACK and BARKETT, Circuit Judges, and TIDWELL [FN\*], District Judge.

FN\* Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.

BARKETT, Circuit Judge:

Tug Allie-B, Inc., and Dann Ocean Towing, Inc. (collectively "Tug Allie") appeal an order declaring that claims by the United States brought pursuant to the Park System Resources Protection Act, 16 U.S.C. § 19jj et seq. ("PSRPA"), for damages caused by the tug ALLIE-B to a coral reef while towing a barge owned by Allied Towing Corporation ("Allied"), are not subject to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. app. § 181 et seq. ("Limitation Act"). The question of whether the United States' claims brought pursuant to PSRPA are subject to the Limitation Act is one of first impression.

#### BACKGROUND

On July 20, 1998, the tug ALLIE-B, a commercial tug boat towing Allied's 354- foot barge, ATC-350, ran aground and collided with coral reefs in the vicinity of Ledbury Reef in Biscayne National Park ("National Park"). The tug managed to power itself off the reef, but, in doing so, caused a crater-like blow hole in the ocean floor. The tug boat then pulled the barge free from its grounded position atop the reef. The grounding of the tug boat and barge, and the efforts to remove them from the reef, caused significant injury to natural resources located within the National Park. The hulls of both vessels, and the cable connecting the vessels, destroyed extensive tracts of coral reef, including hard and soft corals and reef framework.

[1][2][3] After the collision, Tug Allie-B, Inc., as owner of the tug boat, and Dann Ocean Towing, Inc. ("Dann Towing"), as operator of the tug boat, filed a petition for exoneration from or limitation of liability, pursuant to the Limitation Act, for damages arising out of the grounding of the tug boat and barge. The Limitation Act limits a vessel owner's liability for any damages arising from a maritime

accident to the post-accident value of the vessel and its pending freight. 46 U.S.C. app. \*940 § 183(a). [FN1] Tug Allie alleged that the post-accident value of the vessel and pending freight amounted to \$1,204,860 which would limit liability to that amount pursuant to the Limitation Act. [FN2] The United States and Allied filed an Answer to the limitation claims and filed their own claims for damages against Tug Allie in an amount that exceeded the limitation fund by approximately \$2,864,340. Allied sought \$1,000,000 for damages incurred as a result of the grounding of its barge. The United States sought \$3,069,200 in damages, claiming that, pursuant to the PSRPA, it was entitled to all damages due to injuries to resources in the National Park as a result of the grounding. [FN3] The relevant provisions of the PSRPA include:

FN1. The Limitation Act provides, in relevant part: The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. app. § 183(a). See also Hartford Acc. & Indem. Co. of Hartford v. Southern Pac. Co., 273 U.S. 207, 214, 47 S.Ct. 357, 71 L.Ed. 612 (1927) ("liability as owner shall be limited to the value of the vessel as appraised after the occurrence of the loss and the pending freight for the voyage").

FN2. When faced with liability for a maritime accident, a vessel owner may file a petition in federal court seeking protection under the Limitation Act. In re: Beiswenger Enters. Corp., 86 F.3d 1032, 1036 (11th Cir.1996). If the limitation is granted, and the vessel owner subsequently is found liable, the admiralty court distributes the

limitation fund among the damage claimants in an equitable proceeding known as concursus. Id. at 1036. Claimants asserting valid claims receive a pro rata distribution of the fund deposited or secured, or the proceeds of the vessel and pending freight. Supp. Adm. R. F(8). See also Bouchard Transp. v. Updegraff, 147 F.3d 1344, 1347 (11th Cir.1988). As limitation is based on the post-accident value of the vessel and its freight, damages can be significantly limited, especially in cases in which the vessel sinks or the freight is lost. The court "may enter judgment in personam against the owner as well as judgment in rem against the res, or the substituted fund." Hartford Accident & Indemnity Co. of Hartford, 273 U.S. at 215, 47 S.Ct. 357.

FN3. Although the United States has subsequently amended its damages figure to \$2,000,000, the combined amount sought by the United States and Allied still exceeds the limitation fund by a substantial amount. In amending its complaint, the United States also added Allied as a defendant.

16 U.S.C. § 19jj-1(a):

[A]ny person who destroys, causes the loss of, or injures any park system resource is liable to the United States for the response costs and damages resulting from such destruction, loss, or injury.

16 U.S.C. § 19jj-1(b):

[a]ny instrumentality, including but not limited to a vessel, vehicle, aircraft, or other equipment that destroys, causes the loss of, or injures any park system resource or any marine or aquatic park resource shall be liable in rem to the United States for response costs and damages resulting from such destruction, loss, or injury to the same extent as a person is liable under subsection (a) of this section.

16 U.S.C. § 19jj(c):

"Response costs" means the costs of actions taken by the Secretary of the Interior to prevent or minimize destruction or loss of, or injury to, park system resources; or to abate or minimize the imminent risk of such destruction, loss, \*941 or injury; or to monitor the ongoing effects of incidents causing such destruction, loss or injury.

16 U.S.C. § 19jj(b):

"Damages" includes the following:

- (1) Compensation for--
    - (A) (i) the cost of replacing, restoring, or acquiring the equivalent of a park system resource; and
    - (ii) the value of any significant loss of use of a park system resource pending its restoration or replacement or the acquisition of an equivalent resource, or
  - (B) the value of the park system resource in the event the resource cannot be replaced or restored.
- (2) The cost of damage assessments under section 19jj-2(b) of this title.

[4] The district court determined that the Government's claims under the PSRPA are not subject to the Limitation Act, and the United States would be entitled to a complete recovery of its damages, if proven. This appeal followed. [FN4] Because the district court's ruling involved purely an issue of law, that is, statutory construction, we review its determination *de novo*. *Marine Trans. Serv. Sea-Barge Group, Inc. v. Python High Performance Marine Group*, 16 F.3d 1133, 1138 (11th Cir.1994).

FN4. We deny Tug Allie's motion to strike the brief of Appellee Allied. Allied's brief simply adopts the United States' brief in its entirety; it makes no separate arguments.

#### DISCUSSION

Tug Allie argues on appeal that the Limitation Act and the PSRPA can be read harmoniously by holding that although claims can be brought under the PSRPA, damages would be limited in accordance with the Limitation Act. The Government argues that both the relevant statutory language and the congressional intent underlying the statutory schemes reflect a clear conflict that cannot be reconciled without limiting one statutory enactment to accommodate the other. Because the PSRPA is the later-enacted statute, as well as the more specific, the Government argues that the conflict must be resolved by applying the PSRPA without limiting its claims for damages pursuant to the Limitation Act.

[5][6][7] To resolve the issue presented, we employ the fundamental principles of statutory construction.

*See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Additionally, we follow the long established rule, that "a new[er] statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). Stated alternatively, "[c]ourts generally adhere to the principle that statutes relating to the same subject matter should be construed harmoniously if possible, and if not, that more recent or specific statutes should prevail over older or more general ones." *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1373 (11th Cir.1999) (quotations and citations omitted). Consistent with this view, we begin by reviewing the language of both the PSRPA and the Limitation Act, and then examine the purpose and structure of each Act to determine whether the two Acts can be read harmoniously or if when read together they present "a positive repugnancy" or conflict that cannot be \*942 reconciled. *Regional Rail Reorganization Act Cases*, 419 U.S. at 134, 95 S.Ct. 335. The starting point for all statutory interpretation is the language of the statute itself. *Federal Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1239 (11th Cir.2000). We note first that there is nothing in the language of the PSRPA which suggests that any damages under the Act should be in any way limited. To the contrary, the PSRPA expressly speaks to the liability for "response costs and damages" in terms of making the government whole for all of its losses. Response costs are those taken to prevent, abate or minimize any injury, or imminent risk of injury, to park system resources, as well as whatever costs are incurred to monitor the ongoing effects of incidents causing destruction, loss or injury. *See* 16 U.S.C. § 19jj(c). Damages include compensation for replacing, restoring, or acquiring the equivalent of a park system resource or its value; for the loss of use until the restoration, replacement or acquisition of an equivalent resource is accomplished; and for the cost of damage assessments under section 19jj-2(b). *See* 16 U.S.C. § 19jj(b). As the above language shows, the measure of damages under the PSRPA is defined solely by reference to the damage an entity has

inflicted on the park land at issue, and secondary losses stemming from that injury. Nothing in the statute suggests that the damages are capped by any external factor. Therefore, in the absence of any explicit statutory language limiting damages under the PSRPA, we conclude that Congress contemplated that the Government could seek full recovery under the statute for accidents causing injury to park lands.

On the other hand, the language of the Limitation Act provides for a limitation on the total of all recoverable damages in a marine accident to the post-accident value of the ship and its cargo, no matter how many claimants there may be. See 46 U.S.C. app. § 183(a). See also *Hartford Accident & Indemnity Co. of Hartford*, 273 U.S. at 214, 47 S.Ct. 357 ("liability as owner shall be limited to the value of the vessel as appraised after the occurrence of the loss and the pending freight for the voyage"). Accordingly, application of the Limitation Act here, in a case where a ship has destroyed Government park land, would prevent the United States from recovering all of the costs itemized as damages under the PSRPA. Indeed, in some circumstances, the Limitation Act's application would result in the inability of the United States to recover any of the PSRPA damage remedies, such as when the ship causing the damage is a total loss, rendering its post-accident value as zero. Therefore, on review of the plain language of the PSRPA and the Limitation Act we conclude that the statutes present a conflict regarding the scope of a defendant's liability when the Government sues the defendant for allowing a marine vessel to injure park land.

[8][9] Close reading of the two statutes reveals even more central conflicts, as each is based upon a fundamentally different theory of liability, and each is governed by different rules controlling which assets a finding of liability will attach. Beginning with the theory of liability, we note that the PSRPA is in effect a strict liability statute, with statutorily defined defenses. [FN5] \*943 16 U.S.C. § 19jj-1(c). Specifically, under the PSRPA, a defendant can avoid liability for damages only if "(1) the destruction, loss of, or injury to the park system resource was caused solely by an act of God or an act of war; (2) such person acted with due care, and the destruction, loss of, or injury to the park system resource was caused solely by an act or omission of a third party, other than an employee or agent of such person; or (3) the destruction, loss, or injury to the

park system resource was caused by an activity authorized by Federal or State law." 16 U.S.C. § 19jj-1(c). In contrast, the Limitations Act is typically applied when the claim at issue is based on a theory of negligence. *In re Beiswenger Enters. Corp.*, 86 F.3d at 1036 (noting that in a limitation proceeding under the Limitation Act, the court engages in a two-step analysis with the first being a negligence or unseaworthiness finding and the second being the privity or knowledge of the vessel owner). Indeed, all of the cases Tug Allie identifies to support its view that the Limitation Act could limit PSRPA liability concern maritime statutes that are based in negligence, and thus a vessel owner can seek to limit or avoid liability depending on whether he or she was at fault. See, e.g., 46 U.S.C. app. § 688, ("The Jones Act"), 46 U.S.C. app. § 761 *et seq.* ("The Death on the High Seas Act") ("DOHSA"), & 46 U.S.C. app. § 190 *et seq.*, ("The Harter Act"). [FN6]

FN5. As this is the first case addressing the PSRPA, this Circuit has not held previously that the PSRPA is a strict liability statute. However, the *in personam* liability provision of the PSRPA is substantially the same as that of the Marine Protection, Research and Sanctuaries Act ("MPRSA"), compare 16 U.S.C. § 19jj-1(a) with 16 U.S.C. § 1443(a)(1), and this Circuit has held that the MPRSA imposes strict liability. See *United States v. M/V JACQUELYN L.*, 100 F.3d 1520, 1521 (11th Cir.1996). Accordingly, viewing the language of the PSRPA, and using this Circuit's analysis of the language of the MPRSA, we conclude that the PSRPA is a strict liability statute.

FN6. See DOHSA, 46 U.S.C. app. § § 761 and 766 (imposing liability when death caused by "wrongful act, neglect, or default occurring on the high seas" and mandating that a court "reduce the recovery" when "decedent has been guilty of contributory negligence"); Harter Act, 46 U.S.C. app. § 192 (providing that vessel owners can limit liability if they "exercise due diligence"); Jones Act, 46 U.S.C. app. § 688. See also Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 3rd Ed., at 490 (2001)

("Liability [under the Jones Act] depends on proving negligence.")

Also, as noted above, the Harter Act specifically preserves a vessel owner's right to limitation. See 46 U.S.C. app. § 196.

The Longshoreman and Harbor Workers Compensation Act, 33 U.S.C. §§ 901- 950 ("LWHCA"), is the only other act relied upon by Tug Allie. At first glance, the LWHCA may appear analogous, as it establishes a no-fault scheme. In fact, however, the LWHCA establishes a no-fault scheme with respect to employer liability, and it further provides a statutory cause of action for negligence against third party vessel owners. See 33 U.S.C. § 905(b). Thus, it is distinguishable from the PSRPA.

Relatedly, because the PSRPA is a strict liability statute that looks exclusively to the cause of the damage, it permits only a very limited number of defenses, as is customary with strict liability statutes. See, e.g., Clean Water Act, 33 U.S.C. § 1321(f); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9607- 9675. Indeed, the legislative history of the PSRPA suggests that defenses under the Act were intended to be narrow and exclusive. [FN7] See Senate Comm. on Energy & \*944 Nat. Res., S.Rep. No. 328, 101st Cong., 2d Sess. 1, reprinted in 1990 U.S.C.C.A.N. 603, 605 (1990). The Supreme Court has held that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980). This recognition presents another source of conflict, for if we applied the Limitation Act to PSRPA claims, we would effectively incorporate its defenses into the PSRPA.

FN7. Similarly, courts have held that the enumerated defenses of other strict liability schemes are exclusive and should be narrowly construed. See, e.g., *United States v. West of England Ship Owner's Mutual Prot. & Indem. Assoc.*, 872 F.2d 1192, 1200 (5th Cir.1989) (Clean Water Act defendants have burden of proof that one of the four

liability exceptions exists; these exceptions must be narrowly construed); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316-17 (9th Cir.1986) (CERCLA statutory defenses exclusive); *Stewart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir.1979) (shipowner may only recover costs under Clean Water Act if discharge was due to one of the causes that would excuse all liability); *United States v. Price*, 577 F.Supp. 1103, 1113-14 (D.N.J.1983) (CERCLA intended to impose strict liability subject only to listed affirmative defenses).

[10] The last conflict between the statutes is perhaps the greatest: the PSRPA and the Limitation Act provide for different attachment rules upon a finding of liability. Specifically, the PSRPA holds a party responsible *in personam* or *in rem* for "response costs and damages." 16 U.S.C. § 19jj-1(a) and (b). [FN8] Therefore, to establish liability, the PSRPA looks to the cause of the injuries to the park resources, and may hold the responsible person or instrumentality liable for damages which have no relation to the value of the instrumentality causing the injury. 16 U.S.C. § 19jj(a) and (b). In contrast, under the Limitation Act, a defendant can avoid or limit liability by demonstrating a lack of privity or knowledge of the negligence or unseaworthiness of the vessel. See *Hercules Carriers*, 768 F.2d at 1563-64 (In a limitation proceeding, the court undertakes the following analysis: "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness.") (internal quotations and citation omitted); see also *In re Beiswenger Enters. Corp.*, 86 F.3d at 1036; *Farrell Lines Inc. v. Jones*, 530 F.2d 7 (5th Cir.1976).

FN8. Moreover, the *in rem* liability provision of the PSRPA imposes liability to "the same extent as" is imposed *in personam*. 16 U.S.C. § 19jj-1(b). This further suggests that the PSRPA conflicts with any statute, including the Limitation Act, that attempts to limit liability to the

value of the vessel or instrument that causes the destruction or injury to park system resources.

[11][12] In other words, even if the judgment is *in personam*, under the Limitation Act, the amount of the judgment is limited to the post-accident value of the *res* causing the damage. As noted earlier, in addition to an *in rem* cause of action, the PSRPA provides for an action *in personam*. A judgment against an individual need not be related to any *res* and can look to all of a defendant's resources for satisfaction. To conclude the Limitation Act applies to the PSRPA would have the effect of rendering the *in personam* clause meaningless, as recovery would be limited to the value of the *res*. Such a result would violate the canon of statutory construction that discourages courts from adopting a reading of a statute that renders any part of the statute mere surplusage. See *Bailey v. United States*, 516 U.S. 137, 146, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) (noting that each word in a statute is intended to have "particular, nonsuperfluous meaning").

Thus, our reading of the Limitation Act and the PSRPA shows that the two present an irreconcilable conflict or a "positive repugnancy" as the statutes' provisions are inconsistent on their face, and a deeper reading of their terms shows that they are based on conflicting concepts of liability and different rules for the compensation of injury.

\*945 [13] Tug-Allie seeks to avoid this result by arguing that the ambiguity created by the apparent applicability of both statutes to the situation before us requires that we look to congressional intent. Specifically, Tug-Allie argues that the absence of reference to the Limitation Act in the PSRPA proves that Congress intended that the Limitation Act apply. [FN9] To support its view, Tug Allie directs our attention to the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.* ("OPA"), and the Marine Sanctuaries Act, 16 U.S.C. § 1431 *et seq.* ("MSA"), pointing out that both the OPA and the M.S.A. § contain specific provisions precluding the application of the Limitation Act to damage claims under those statutes. Thus, Tug Allie argues that if Congress intended to preclude the application of the Limitation Act, it would have said so as it did in the OPA [FN10] and the MSA.

FN9. Under the rules of statutory construction set out by the Supreme Court, in determining the meaning of an ambiguous statute, "we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990); see also *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir.1994) ("In interpreting the language of a statute ... we do not look at one word or one provision in isolation, but rather look to the statutory scheme for clarification and contextual reference."). We thus carefully analyze both Acts to discern whether either Act contemplated the application of the other.

FN10. In specifically precluding application of the Limitation Act, the OPA imposed its own liability scheme. See 33 U.S.C. § § 2704 and 2718(c). Accordingly, the OPA explicitly limits liability of the responsible party under the Act, unless one of the enumerated exceptions applies (e.g., such as the incident was caused by gross negligence, willful misconduct, or violation of applicable Federal regulations, or failure to report the incident and provide cooperation in removal activities). 33 U.S.C. § 2704(c). The liability scheme set out in the OPA parallels that of the Limitation Act. That is, the OPA provides for limitation of liability, unless the responsible party was grossly negligent or engaged in willful misconduct, just as the Limitation Act limits liability unless the vessel owner had privity or knowledge of the negligence or unseaworthiness that caused the damage or loss. The liability provisions of the OPA suggest that Congress acted because it intended to limit liability in a manner that differed from the Limitation Act's scheme.

From this, however, it does not follow that Congress must include provisions related to limitation of liability in a statute not intended to limit liability.

[14] Congressional silence, however, can be interpreted in a number of ways. As this Circuit has stated "[s]ilence may indicate that the question never occurred to Congress at all, or it may reflect mere oversight in failing to deal with a matter intended to be covered, or it may demonstrate deliberate obscurity to avoid controversy that might defeat the passage of legislation." *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085 (5th Cir.1980). [FN11] Moreover, with respect to the Limitation Act itself, we have previously noted that the Supreme Court has taken a "restrictive view" of the Limitation Act, and courts have been reluctant to read into congressional silence an implied deference to the Limitation Act. See *Hercules Carriers, Inc. v. Claimant State of Fla., Dept. of Transp.*, 768 F.2d 1558, 1564 (11th Cir.1985) (citing *Maryland Casualty Co., v. Cushing*, 347 U.S. 409, 437, 74 S.Ct. 608, 98 L.Ed. 806 (1954); and \*946*The Main v. Williams*, 152 U.S. 122, 132-33, 14 S.Ct. 486, 38 L.Ed. 381 (1894)).

FN11. In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

Indeed, in an analogous case, this Court rejected Tug Allie's argument in the context of the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 401 *et seq.* (sections collectively known as the "Wreck Act"). *University of Texas Med. Branch at Galveston v. United States*, 557 F.2d 438 (5th Cir.1977), *cert. denied* 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978). In *University of Texas Medical Branch at Galveston*, appellants' vessel collided with another ship causing a dredge to sink. In addition to destroying the dredge, the wreck impeded shipping in the area. The United States acted immediately to remove the wreck, at a cost of \$3,000,000. In turn, appellants sought a limitation of liability, based on the claimed value of their ship, \$240,000. The Wreck Act did not make any reference to the Limitation Act.

However, this Court declined to read Congress' silence as an intention to apply the Limitation Act. Relying on *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), this Court noted that, although the *Wyandotte* Court did not address the applicability of the Limitation Act, "*Wyandotte* has been interpreted as impliedly ousting the Limitation Act from application to the government's recovery of wreck removal expense." *University of Texas Med. Branch at Galveston*, 557 F.2d at 447. [FN12]

FN12. Tug Allie relies on a recent Fifth Circuit case, *Barnacle Marine Management, Inc., v. Vulcan Materials Co.*, 233 F.3d 865 (5th Cir.2000), to suggest that *Wyandotte* is inapposite. They argue that the analogous section of the Wreck Act is Section 408, which was addressed in *Barnacle*. Even if we put aside the fact that this Court is bound by *University of Texas Medical Branch at Galveston* and *Wyandotte*, and not by *Barnacle*, we still conclude that *Barnacle* does not apply here. In *Barnacle*, the Fifth Circuit found that "the plain language of § 408, § 411, and § 412 does not give the United States a civil *in personam* remedy against a violator of § 408" and thus the vessel owner was not precluded from seeking a limitation of liability. Here, however, the plain language of the PSRPA explicitly creates an *in personam* remedy. Accordingly, we find the holding in *Barnacle* to be irrelevant to determining whether the Limitation Act applies to claims brought under the PSRPA.

Moreover, if Congress intended that its silence be read to mean that the Limitation Act applies, what then would be the significance of other enactments specifically providing that the Limitation Act does apply? Under Tug Allie's analysis, silence would then mean the converse of what Tug Allie suggests here. That is, because Congress included language providing for the application of the Limitation Act in the Carriage of Goods by Sea Act, 46 U.S.C. app. § 1300 *et seq.* ("COGSA"), and the Harter Act, 46 U.S.C. app. § 190 *et seq.*, silence must mean that the Limitation Act should not apply. Both COGSA and the Harter Act expressly preserve a vessel owner's

right to seek a limitation of liability under the Limitation Act. See COGSA, 46 U.S.C. app. § 1308 ("the provision of this chapter shall not affect the rights and obligations of the carrier ... under the provisions of sections 175, 181 to 183 and 183b to 188 of this title"); Harter Act, 46 U.S.C. app. § 196 ("Sections 190-195 of this title shall not be held to modify or repeal sections, 181, 182, and 183 of this title"). We find that the only reasonable conclusion is that Congress' silence on the applicability of the Limitation Act is, by itself, not sufficient to determine congressional intent.

[15][16] Turning to the purposes of the two enactments, we note that the Limitation Act was passed in 1851 "to encourage ship building and to induce capitalists to \*947 invest money in this branch of industry," and that it achieves this purpose by "exempting innocent shipowners from liability, beyond the amount of their interest." *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 121, 20 L.Ed. 585 (1871). It was passed at a time when Congress sought to encourage the United States' fledgling shipping industry. The PSRPA was enacted in 1990 to protect and preserve the resources of the United States' national parks. The PSRPA was prompted, in part, by the grounding of a freighter in Biscayne National Park. See Senate Comm. on Energy & Nat. Res., S.Rep. No. 328, 101st Cong., 2d Sess. 1, reprinted in 1990 U.S.C.C.A.N. 603, 605 (1990). Accordingly, as stated by Congress, a central purpose of the PSRPA was to authorize the United States to "initiate legal action against individuals who destroy or injure living or non-living marine or Great Lakes aquatic resources within units of the National Park System, and to allow the Secretary [of the Interior] to use funds recovered as a result of damage to living or non-living resources ... for restoration of such resources." *Id.*

The purpose of the Limitation Act is to provide an exemption from or a limitation on liability in order to encourage shipping, while the PSRPA is aimed at full restoration of park resources that have been damaged by third parties. As noted above, under the Limitation Act, in many instances, destroyed resources could not be fully restored. Thus, application of the Limitation Act would obviously frustrate the restoration goals articulated in the PSRPA.

The Ninth Circuit reached a similar conclusion in addressing the applicability of the Limitation Act to the analogous Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. § § 1651-55 ("TAPAA"). See *In re Glacier Bay*, 944 F.2d 577 (9th Cir.1991). TAPAA's purpose, in part, was to establish a comprehensive liability scheme applicable to damages to natural resources resulting from the transportation of trans-Alaska pipeline oil. The Ninth Circuit held: "[s]imply stated, the Limitation Act is contrary to every goal of the TAPAA. It allows vessel owners virtually to eliminate liability for catastrophic damages. Application of the Limitation Act to any aspect of the TAPAA would frustrate completely TAPAA's comprehensive remedial nature." *Id.* at 583. Likewise, in rejecting a claim that the procedural aspects of the Limitation Act apply to the OPA, the First Circuit found that the OPA is in irreconcilable conflict with the Limitation Act, as application of the Limitation Act to the OPA would enable a responsible party to escape liability for catastrophic damages. See *Complaint of Metlife Capital Corp.*, 132 F.3d 818, 822 (1st Cir.1997); see also *United States v. CF Industries, Inc.*, 542 F.Supp. 952, 955-56 (D.Minn.1982) (holding that the Limitation Act did not apply to the Clean Water Act and explaining that "[t]his country's policy of cleaning up and preserving the environment is one that becomes, if anything, more important with the passage of time. As the population of the country increases, the natural resources are subjected to greater pressures and accordingly need greater safeguards. On the other hand, the policy embodied in the Limitation Act has been achieved to such an extent that it has been called 'hopelessly anachronistic.' ") (citations omitted).

Moreover, unlike the OPA and the MSA, which are primarily maritime statutes, the PSRPA protects park system resources whether on land or in maritime parks. To apply the Limitation Act to the PSRPA would require assuming that Congress intended to create a statutory scheme that ensured full protection for park resources on land but only partial protection of our marine park resources. Nothing in the \*948 statute or the legislative history supports such a view, nor do we think that Congress would have intended such a dichotomous result. See, e.g., *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) ("[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.")

(citations and internal quotations omitted); *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 869 (4th Cir.1989) (stating that common sense is the "most fundamental guide to statutory construction"), *cert. denied*, 493 U.S. 1070, 110 S.Ct. 1113, 107 L.Ed.2d 1020 (1990). See also Justice Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L.Rev. 527, 535 (1947) (stating that "[j]udges must not read [meaning] out [of a statute] except to avoid patent nonsense or internal contradiction"). The only conclusion that avoids such an illogical reading of the PSRPA is that Congress intended to protect parks resources to the same extent, whether such resources are on land or at sea.

Viewing both the statutory language of the PSRPA and its broader remedial aim of protecting and preserving our nation's natural resources, we find nothing that suggests that Congress intended the PSRPA's statutory scheme to provide for only limited recovery, thereby burdening the government, and ultimately the taxpayer, with the costs associated with destruction, loss, or injury to park resources that are in fact attributable to an identifiable person or instrumentality. [FN13] On the contrary, the PSRPA is aimed at ensuring that the person or instrumentality responsible for any destruction, loss, or injury covers all of the costs associated with such destruction, loss, or injury, and applying the Limitation Act to PSRPA claims would completely frustrate this purpose.

[FN13. We find no merit to Tug Allie's argument that the PSRPA's purpose has nothing to do with the *amount* of funds available as damages or a party's liability, but was intended merely as a means of ensuring that funds would be available to the Secretary of the Interior to repair or replace the damaged or lost resources "without further congressional action," see 16 U.S.C. § 19jj-3, rather than having to wait for congressional authorization from general Treasury funds. If the PSRPA was intended to provide funds to the Secretary of Interior in an expeditious manner in order to avoid further injury to park resources, it seems implausible that Congress envisioned making only a pro rata share of such necessary funds available. It is far more likely that Congress aimed to provide a

means by which the Secretary of the Interior could recover the full amount needed for response costs and damages. The absence of any provision on prioritization of funds from the language of the PSRPA further suggests that Congress envisioned full recovery.

All the foregoing reasons dictate that the PSRPA and the Limitation Act are conflicting congressional expressions that cannot be harmonized without affecting the intent and directives of one or the other. Having concluded that the two statutes pose an irreconcilable conflict in this case, we must consider whether one of the statutes implicitly overrules the other or creates an exception which limits one statute's application in this class of cases.

[17] In making this determination, we rely on the long-standing principle that, if two statutes conflict, the more recent or more specific statute controls. See, e.g., *Southern Natural Gas Co.*, 197 F.3d at 1373 ("more recent or specific statutes should prevail over older or more general ones") (quotation and citation omitted); *United States v. Devall*, 704 F.2d 1513, 1518 (11th Cir.1983) (because the conflict between the Bankruptcy Code and the Social Security Act is apparent and cannot be reconciled without limiting one to accommodate the other, the later enacted statute \*949 must prevail over the earlier enacted, more general statute); *Hines v. United States*, 551 F.2d 717, 725 (6th Cir.1977) (when the purposes of two statutes appear to be in conflict with each other, and there is no statutory language which makes any cross reference and the legislative history is silent as to the possible conflict, it is generally assumed that the later statute constitutes an amendment of the earlier one); *I.C.C. v. Southern Ry. Co.*, 543 F.2d 534, 539 (5th Cir.1976) (where there is conflict, the subsequent enactment governs).

[18] Obviously, the PSRPA is the most recent in time, enacted almost 140 years after the Limitation Act. Thus, on this basis alone, we can conclude that the PSRPA controls. [FN14] We also conclude that the PSRPA is the more specific statute. The PSRPA's provisions are narrowly tailored to address incidents involving destruction, loss, or injury only to "park system resources" (a term defined by the PSRPA), and allows the government to recover only

for response costs and damages associated with such incidents. In contrast, the Limitation Act applies to "embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or ... any loss, damage, or injury by collision, or ... any act, matter, or thing, loss, damage or forfeiture, done, occasioned, or incurred." 46 U.S.C. app. § 183(a). Although the Limitation Act's reference to "any loss, damage, or injury by collision" may be read to include loss or damage to park system resources, when a conflicting statute--the PSRPA--specifically defines, and is tailored to address, "park system resources," we must find that the more specific statute governs.

FN14. Tug Allie is correct that the Limitation Act has not been repealed or overruled, but we note that it has been called into question during the past century and a half of litigation. See, e.g., *Hercules Carriers*, 768 F.2d at 1564 (noting that the Supreme Court has taken a "restrictive view" of the Limitation Act); *University of Texas Med. Branch at Galveston*, 557 F.2d at 441 (referring the Limitation Act as "hopelessly anachronistic").

For all of the foregoing reasons, the decision of the district court holding that the Limitation Act does not apply to claims under the PSRPA is

AFFIRMED.

BLACK, Circuit Judge, specially concurring:

I write separately because I think this is a much closer case than does the majority. In fact, my initial view was to dissent. It was only after going through the following process that I came to the same conclusion.

The Supreme Court has demanded courts meet a high standard before taking the drastic recourse of implicitly repealing one statute in the face of another. In light of this standard, my first course of action is to vigorously attempt to construe harmoniously the Limitation of Vessel Owner's Liability Act, 46 U.S.C.App. § § 181-189 (Limitation Act), and the

Park System Resource Protection Act, 16 U.S.C. § § 191j-191j-4 (PSRPA). I cannot ignore, however, that the PSRPA is strict liability statute, while the Limitation Act incorporates a negligence standard, and that the PSRPA allows for unlimited *in personam* liability, while the Limitation Act would effectively restrict liability to the extent allowed in an *in rem* action. I ultimately conclude these structural differences are so integral to the two statutes as to render them irreconcilably in conflict.

I rely, however, on narrower grounds than does the majority. I do not look to the apparent purposes of the two statutes, their legislative histories, or their underlying \*950 policies. I also do not consider that courts have apparently taken a restrictive view of the Limitation Act or that Congress recently amended the Limitation Act.

Following on the irreconcilable conflict between the two statutes, I conclude the Limitation Act should be implicitly repealed to the extent it interacts with the PSRPA solely because the PSRPA was enacted more recently than the Limitation Act. I think it is unnecessary to invoke the canon that a specific statute can repeal a more general statute, and, in any case, I think both statutes are general.

Finally, my hesitancy in reaching the conclusion of implicit repeal in this case is due, in large part, to the fundamental principles of judicial restraint. After much deliberation, however, I conclude this is the rare case where the statutes are so irreconcilably in conflict that we are left with no choice but to hold the later one implicitly repeals the earlier one.

I.

I agree with the majority that we must follow here the "principle that statutes relating to the same subject matter should be construed harmoniously if possible, and if not, that more recent or specific statutes should prevail over older or more general ones." *S. Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1373 (11th Cir.1999). This statement, however, is based on precedent from the Supreme Court and this Court which demands that a high standard be met prior to undertaking the drastic step of implicitly repealing one statute in light of another. See *Amell v. United States*, 384 U.S. 158, 165-66, 86 S.Ct. 1384, 1388, 16 L.Ed.2d 445 (1966) (explaining that a party requesting the implicit repeal

of one statutory provision in the face of a later-enacted provision "bears a heavy burden of persuasion"). The Supreme Court has articulated this high standard as follows: "[T]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 618-19, 100 S.Ct. 1905, 1911, 64 L.Ed.2d 548 (1980) (quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974)); see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018-19, 104 S.Ct. 2862, 2881, 81 L.Ed.2d 815 (1984) (quoting the above language and explaining that congressional silence in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) concerning the remedy under the Tucker Act "cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy"); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 133-34, 95 S.Ct. 335, 353-54, 42 L.Ed.2d 320 (1974) (quoting *Morton v. Mancari* and explaining that the remedy under the Tucker Act should not be read to withdraw the Regional Rail Reorganization Act of 1973); *Pan. R.R. Co. v. Vasquez*, 271 U.S. 557, 561-62, 46 S.Ct. 596, 597, 70 L.Ed. 1085 (1926) (requiring "certainty" in statutory language in order to depart from "long-prevailing policy evidenced by" other statutes); *In re E. River Towing Co.*, 266 U.S. 355, 367, 45 S.Ct. 114, 115, 69 L.Ed. 324 (1924) ("an intention to depart from a policy deliberately settled in a general statute is not lightly to be assumed"). The Supreme Court has long adhered to the principle that repeals by implication are not favored. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 266-67, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981); *\*951 Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n*, 393 U.S. 186, 193, 89 S.Ct. 354, 359, 21 L.Ed.2d 334 (1968); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963) ("the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted"); *FTC v. A.P.W. Paper Co.*, 328 U.S. 193, 202, 66 S.Ct. 932, 936, 90 L.Ed. 1165 (1946); *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible."); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 105, 19 L.Ed. 332 (1868) (habeas corpus context).

Early on, the Supreme Court articulated the high standard that must be met as follows: "[Repeals by implication] are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act." *Ex Parte Yerger*, 75 U.S. (8 Wall.) at 105. More than 100 years later, the Supreme Court reiterated this high standard, approvingly quoting the following language: "'A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.'" *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 134, 95 S.Ct. at 354 (quoting *In re Penn Cent. Transp. Co.*, 384 F.Supp. 895, 943 (Sp.Ct.R.R.A.1974)); see also *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 565, 83 S.Ct. 520, 526, 9 L.Ed.2d 523 (1963) (requiring "some manifest inconsistency or positive repugnance between the two statutes" to effect an implicit repeal); *Borden Co.*, 308 U.S. at 198-99, 60 S.Ct. at 188 (quoting *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363, 10 L.Ed. 987 (1842) (demanding a "positive repugnancy" between two statutory provisions for one to implicitly repeal the other)); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 504, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936) (quoting *Town of Red Rock v. Henry*, 106 U.S. (16 Otto) 596, 601, 1 S.Ct. 434, 439, 27 L.Ed. 251 (1883) (requiring for an implicit repeal either "irreconcilable conflict" between two statutes or complete substitution of one by the other)).

The Supreme Court has worked arduously to construe statutes in harmony with each other. See, e.g., *Ruckelshaus*, 467 U.S. at 1018-19, 104 S.Ct. at 2880-81 (construing FIFRA provision under which failure to submit to arbitration proceeding results in forfeiture of right to compensation as exhaustion prerequisite to Tucker Act remedy, rather than as substitute for Tucker Act remedy); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156-57, 96 S.Ct. 1989, 1994, 48 L.Ed.2d 540 (1976) (holding statute that allows for venue broadly and statute that restricts venue are not irreconcilably in conflict, since applying narrow venue provision in case would not affect the vast majority of actions, and suits could still be filed under the former statute); *Pan. R.R. Co.*, 271 U.S. at 561-62, 46 S.Ct. at 597 (construing Jones Act provision regarding jurisdiction in district courts to relate only to venue so as not to conflict with other statutes which permit suit both in district court and

state court); *see also In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 787 (7th Cir.1992) (reconciling policies of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Bankruptcy Act of 1898 rather than concluding the Bankruptcy Act bars CERCLA claims). By contrast, this Court has held a rule of civil procedure to implicitly repeal a statutory provision based on the determination that the two conflict to the point they simply cannot co-exist. *See S. Natural Gas Co.*, 197 F.3d at 1375 (holding that where a rule granted district courts discretion to appoint \*952 a commission to hear a case, and a separate statute allowed for a jury trial in accordance with state practice and procedure, the former superseded the latter).

## II.

In accordance with the dictates of the Supreme Court, *see supra* Part I, my first course of action in analyzing the Limitation Act and the PSRPA is to assiduously attempt to harmonize these two statutes if at all possible. [FN1] I therefore focus on what I consider to be the most compelling arguments to allow for the harmonization of the Limitation Act and the PSRPA.

[FN1]. By contrast, the majority seems to begin with the premise that neither harmonization nor implicit repeal is a more favorable option than the other. *See* Opinion at 942 ("[W]e begin by reviewing the language of both the PSRPA and the Limitation Act ... to determine whether the two Acts can be read harmoniously or if when read together they present 'a positive repugnancy' or conflict that cannot be reconciled.").

First, it is arguable that the Limitation Act and the PSRPA do not irreconcilably conflict since the Limitation Act limits recovery to a relatively narrow subset of claims arising under the PSRPA--only to those claims involving a vessel. The PSRPA provides: "[A]ny person who destroys, causes the loss of, or injures any park system resource is liable to the United States...." 16 U.S.C. § 1911-1(a). A "park system resource" is, in turn, defined broadly as "any living or non-living resource that is located within the boundaries of a unit of the National Park

System, except for resources owned by a non-Federal entity." 16 U.S.C. § 1911(d). "Park system resource," therefore, encompasses both terrestrial and marine resources. While PSRPA claims can be based on destruction or injury to both terrestrial and marine resources, the Limitation Act applies, by definition, only to the small fraction of claims involving marine resources. [FN2] Perhaps on this basis, therefore, the two statutes are not "positively repugnant" and can co-exist in the vast majority of situations.

[FN2]. The majority acknowledges the PSRPA covers both terrestrial and marine resources. *See* Opinion at 948. Based on this observation, however, the majority argues the implicit repeal of the Limitation Act is supported by the need to avoid potentially disparate awards under the PSRPA for terrestrial and marine resources. *See id.* at 948. I respectfully suggest that it is not the role of this Court to determine Congress' intentions. *See infra* Part V. Had Congress wanted to avoid this potential result, it could have addressed the Limitation Act in the PSRPA.

Even in situations involving marine resources, it is arguable the Limitation Act does not completely obliterate the PSRPA's recovery scheme. Specifically, the Limitation Act allows for some measure of recovery to the United States for damages to park system resources under the PSRPA, and there is no reason to think the PSRPA guarantees complete recovery to the United States. Under the Limitation Act, a vessel owner's maximum liability, and thus an injured party's recovery, are highly variable, as these amounts depend on the value of the vessel and its freight. *See* 46 U.S.C. app. § 183(a). While the vessel and its freight could be destroyed in the course of a loss incident, there is no reason to assume this worst case scenario would be the norm. The Supreme Court has pointed out "[t]he [Limitation] Act is not one of immunity from liability but of limitation of it." *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152, 77 S.Ct. 1269, 1272, 1 L.Ed.2d 1246 (1957).

Turning to the PSRPA, while the majority is correct that there is nothing in the statute suggesting any limitation of liability, \*953 *see* Opinion at 942, there

is also nothing in the statute to suggest the United States is entitled to complete recovery. While "damages" and "response costs" are defined broadly in the PSRPA, *see* 16 U.S.C. § § 19jj(b), (c), the statute merely states that the Attorney General "may commence a civil action ... for response costs and damages[.]" *id.* § 19jj-2(a). The PSRPA makes no suggestion of and evinces no expectation of full recovery. As I do not believe broadly defined damages and response costs translate to full recovery of these sums, I respectfully disagree with the majority's inference that the PSRPA contemplates full recovery. *See* Opinion at 942.

Furthermore, there are any number of defenses that could be asserted against a PSRPA claim which would limit the United States' recovery. For example, in holding the Limitation Act applies to claims under the Jones Act, the Supreme Court explained, "The bankruptcy act might provide a bar to recovery--homestead and other exemptions might make collection of a judgment impossible--yet we do not suppose that it would be argued that such laws were overridden by section 33 [of the Jones Act]." *In re E. River Towing Co.*, 266 U.S. 355, 368, 45 S.Ct. 114, 115, 69 L.Ed. 324 (1924). The Court observed that although the Jones Act does not explicitly restrict the applicability of the Limitation Act, "there can be no doubt that [the Limitation Act] would apply unless repealed." *Id.* at 367, 45 S.Ct. at 115. In fact, the Court drew this conclusion even while noting the Limitation Act is not mentioned in the Jones Act's list of statutory provisions to be repealed. *See id.* The Court therefore strongly implied the Limitation Act can apply to limit liability under a statute despite the Act's absence from the governing statute's list of repealed provisions. It follows that the Limitation Act can apply despite its absence from the PSRPA's list of defenses. *See* 16 U.S.C. § 19jj-1(c). I therefore respectfully disagree with the majority's suggestion that the PSRPA's defenses are exclusive. [FN3] *See* Opinion at 942-44.

FN3. In support of this suggestion of exclusivity, the majority cites PSRPA's legislative history, as well as *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17, 100 S.Ct. 1905, 1910, 64 L.Ed.2d 548 (1980), for the proposition that additional exceptions should not be inferred in the face of enumerated exceptions to a

general prohibition. First, I would not rely on legislative history in the absence of a textual basis. *See infra* Part V. Second, I believe *Andrus* is distinguishable. In *Andrus*, a statute listed 15 exceptions to a general rule, the fifteenth of which applied to the given situation. Elsewhere, the statute prohibited the specific contract at issue unless it was authorized by one of a subset of the 15 exceptions. The fifteenth exception was not included in this subset. *Andrus*, 446 U.S. at 615-16, 100 S.Ct. at 1909-10. The Court therefore held that the fifteenth exception could not be implied with respect to the contract, as the exception was explicitly mentioned in one place and omitted in another. *Id.* This situation is distinguishable from the case at issue, since the three defenses permitted under the PSRPA, *see* 16 U.S.C. § 19jj-1(c), are not a subset of defenses mentioned elsewhere in the statute. I therefore believe *Andrus* does not provide a basis for precluding a Limitation Act defense.

In sum, the recovery permitted under the Limitation Act is highly variable, the recovery under the PSRPA need not be complete, and the PSRPA's enumerated defenses are not exclusive. That the Limitation Act, therefore, does not completely eviscerate recovery under the PSRPA could, arguably, support the harmonization of the Limitation Act and the PSRPA.

The goal of harmonization may draw support not only from the structure and language of the statutes themselves, but also from congressional activity with respect to another statute, the Marine Protection, Research, and Sanctuaries Act of \*954 1972, 16 U.S.C. § § 1431-1445c-1 (MPRSA). The MPRSA was amended in 1988 to establish liability for any person or vessel that destroys, causes the loss of, or injures any sanctuary resource. *See* Act of Nov. 7, 1988, Pub.L. No. 100-627, § 312, 102 Stat. 3215 (codified as amended at 16 U.S.C. § § 1443(a)). Prior to 1992, the MPRSA was silent on the issue of whether the Limitation Act would apply. In 1992, however, Congress amended the MPRSA to preclude application of the Limitation Act. *See* Oceans Act of 1992, Pub.L. No. 102-587, § 2110(c), 106 Stat. 5039 (codified as amended at 16 U.S.C. § 1443(a)(4)). An inference can be drawn from this amendment that

silence with regard to the Limitation Act is construed by Congress as permitting the unimpeded applicability of the Act. Otherwise, Congress would have had no need to amend the MPRSA to explicitly preclude the Limitation Act's applicability.

### III.

Despite a concerted effort to harmonize the Limitation Act and the PSRPA, I cannot ignore two extremely compelling arguments undermining this attempted harmonization.

First, I agree with the majority that the PSRPA is a strict liability statute. See Opinion at 942-43 & n. 5. In drawing this conclusion, I would, like the majority, rely on the narrow defenses enumerated in the text of the PSRPA, see 16 U.S.C. § 19jj-1(c), and on the comparison between the PSRPA's defenses and the substantially similar ones in the MPRSA, a statute which imposes strict liability, see 16 U.S.C. § 1443(a)(3). See also *United States v. M/V Jacquelyn L.*, 100 F.3d 1520, 1521 (11th Cir.1996). In fact, I note the defenses in the PSRPA are even slightly more narrow than those in the MPRSA, as the latter includes a defense for negligible destruction, whereas the former does not. Compare 16 U.S.C. § 1443(a)(3)(C), with 16 U.S.C. § 19jj-1(c). I would not, however, rely on the legislative history cited by the majority. See Opinion at 942-43; see *infra* Part V.

By contrast, the Limitation Act incorporates a negligence standard. The Act limits the liability of vessel owners for destruction occasioned "without the privity or knowledge of such owner[s]...." 46 U.S.C. app. § 183(a). The Supreme Court has explained that "mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute." *Deslions v. La Compagnie Generale Transatlantique*, 210 U.S. 95, 122, 28 S.Ct. 664, 673, 52 L.Ed. 973 (1908). The Former Fifth Circuit has elaborated that the Limitation Act "relieve[s] the owner of personal liability, where he has not been personally negligent or privy to the negligence of his servants or agents, where in short the negligence or fault which causes the injury is attributable to him, not personally, but only under the doctrine of *respondeat superior*." *Cont'l Ins. Co. v. Sabine Towing Co.*, 117 F.2d 694, 698 (5th Cir.1941);

[FN4] see also *Craig v. Cont'l Ins. Co.*, 141 U.S. 638, 646, 12 S.Ct. 97, 99, 35 L.Ed. 886 (1891) (explaining the Limitation Act meant to exempt vessel owners from liability due to neglect of their agents or of third parties without the owners' knowledge or concurrence, but not to diminish the owners' responsibility for their own willful or negligent acts). In this case, while the PSRPA would hold vessel owners liable for the \*955 destruction of marine resources regardless of fault (with a few minor exceptions), the Limitation Act would limit this broad liability if the owners are negligent under *respondeat superior*, without more. The Limitation Act in this case would allow for unimpeded PSRPA liability only in the narrow circumstance that these owners have acted in privity or with knowledge. [FN5] Applied in concert with the PSRPA, the Limitation Act would, therefore, eviscerate the strict liability standard at the core of the PSRPA.

FN4. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

FN5. I note that corporate owners, like individual owners, are subject to the privity or knowledge standard. See, e.g., *Craig v. Cont'l Ins. Co.*, 141 U.S. 638, 646, 12 S.Ct. 97, 99, 35 L.Ed. 886 (1891) ("When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation."); see generally 3 David E.R. Woolley, *Benedict on Admiralty* § 42 (7th ed.1998).

Second, the Limitation Act would limit the *in personam* remedy provided in the PSRPA to such an extent that it would have the effect of an *in rem* remedy. The PSRPA provides for both *in personam* and *in rem* liability. See 16 U.S.C. § 19jj-1. The Limitation Act limits the liability of a vessel owner to the value of the vessel and its pending freight. See 46 U.S.C. app. § 183(a). While the effect of the Limitation Act on an *in rem* remedy is not completely clear, [FN6] it is clear that the Limitation

Act would reduce *in personam* liability from, potentially, the full extent of an owner's personal assets to merely the value of the vessel and its freight. *In personam* liability under the Limitation Act would thus be effectively limited to the extent of *in rem* liability generally. [FN7] See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 207 n. 23, 97 S.Ct. 2569, 2581 n. 23, 53 L.Ed.2d 683 (1977) (noting that liability in an *in rem* action is limited to the value of the property). By basing liability on the value \*956 of the vessel and its freight, *i.e.*, on the *res*, rather than on the value of the full range of an owner's personal assets, the Limitation Act would severely undercut the PSRPA's extensive *in personam* liability and replace it with a more limited liability. Furthermore, the Limitation Act would impose liability resembling *in rem* liability, thereby substantially changing the character of the PSRPA's *in personam* liability.

FN6. The Supreme Court has stated that in a Limitation Act proceeding, "the court may enter judgment *in personam* against the owner as well as judgment *in rem* against the *res* ...." *Hartford Accident & Indem. Co. of Hartford v. S. Pac. Co.*, 273 U.S. 207, 215, 47 S.Ct. 357, 359, 71 L.Ed. 612 (1927). Earlier, however, the Court explained that "[t]he proceeding to limit liability is not an action against the vessel and her freight, except when they are surrendered to a trustee...." *Morrison v. Dist. Court of United States for S. Dist. of N.Y.*, 147 U.S. 14, 34, 13 S.Ct. 246, 253, 37 L.Ed. 60 (1893). I have difficulty understanding how the Limitation Act could apply to an *in rem* proceeding, as the statute explicitly applies solely to "the owner of any vessel." 46 U.S.C. app. § 183 (emphasis added). In any case, since recovery in an *in rem* action is limited, by definition, to the value of the *res*, the Act's limitation of liability to the value of the vessel and its freight would seem to have no practical effect in the context of an *in rem* suit.

FN7. I do not reach the conclusion drawn by the majority that the Limitation Act renders the PSRPA's *in personam* liability provision "mere surplusage." See Opinion at 943-

44Bates v. Merritt Seafood, Inc., 663 F.Supp. 915 (D.S.C.1987).

#### IV.

After much deliberation, I conclude the differences between the Limitation Act and the PSRPA regarding negligence versus strict liability and limited versus unlimited *in personam* liability go to the heart of the two statutory schemes. In my opinion, these differences in liability standards are repugnant to each other and evince irreconcilable conflicts between the two statutes. This is most clearly shown by the example of a vessel owner whose employees negligently cause damage to marine resources, but absent the owner's privity or knowledge. Under the PSRPA and without the application of the Limitation Act, this owner would be held liable under the PSRPA's strict liability standard to the extent that his or her personal assets would permit, without regard to the value of the vessel. By contrast, under the Limitation Act, this same owner--who could ordinarily be held negligent under *respondet superior*--would be liable only in the amount of the vessel and its pending freight.

It is true that many situations may arise where the Limitation Act may not substantially affect the recovery under the PSRPA. For example, where terrestrial resources are involved, the Limitation Act would not apply to limit recovery under the PSRPA. Additionally, where a vessel remains intact, recovery based on the value of the vessel may approach the potential *in personam* recovery against the vessel owner. See *supra* Part II. In this case, however, vessels and marine resources are at issue, and the alleged post-accident value of the vessel and its pending freight is approximately \$2.8 million less than the damages sought by the United States and Allied Towing Corporation. See Opinion at 940. It misses the point to venture outside the bounds of this case and to speculate about situations involving terrestrial resources or minimal vessel damage. Here, both the PSRPA and the Limitation Act are, by their terms, potentially applicable, and they have substantially different consequences.

The argument that the two statutes will not always conflict to a significant extent is not only speculative, but also relates only to the practical outcome of the interplay between the PSRPA and the Limitation Act.

That is, circumstances can be devised such that the Limitation Act will not substantially reduce PSRPA recovery. By contrast, the divide between negligence and strict liability and between limited and unlimited *in personam* liability will arise in every situation where a vessel injures marine resources, and these differences go to the theoretical foundations underpinning the PSRPA and the Limitation Act. Since they are integral and essential to the two statutory regimes, these differences in liability are sufficient to render the PSRPA and the Limitation Act repugnant to each other and irreconcilably in conflict.

Finally, an examination of maritime statutes with Limitation Act references detracts from the argument that the MPRSA amendment precluding the Limitation Act is evidence that silence permits the application of the Act. Of the various maritime statutes mentioned in the parties' briefs, the Carriage of Goods By Sea Act, 46 U.S.C. app. § § 1300-1315 (COGSA), and the Harter Act, 46 U.S.C. app. § § 190-196, \*957 explicitly allow for the application of the Limitation Act. *See* 46 U.S.C. app. § 1308 (COGSA); 46 U.S.C. app. § 192 (Harter Act). [FN8] By contrast, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § § 901-950 (LHWCA), the Oil Pollution Act, 33 U.S.C. § § 2701-2761 (OPA), and the MPRSA, *see supra* Part II, explicitly preclude the application of the Limitation Act. *See* 33 U.S.C. § 948 (LHWCA); [FN9] 33 U.S.C. § 2718(c)(OPA); 16 U.S.C. § 1443(a)(4) (MPRSA). [FN10] As an initial matter, I therefore agree with the majority that the PSRPA's silence with respect to the Limitation Act, without more, cannot yield a conclusion about the Act's applicability. This determination does not affect the negative inference to be drawn from the MPRSA amendment.

[FN8]. The Jones Act, 46 U.S.C. app. § 688, and the Death on the High Seas Act, 46 U.S.C. app. § § 761-767 (DOHSA), are silent as to the application of the Limitation Act. These statutes, therefore, will not be considered here. Courts, however, have held that these Acts allow for the application of the Limitation Act. *See, e.g., Pettus v. Jones & Laughlin Steel Corp.*, 322 F.Supp. 1078 (W.D.Pa.1971) (permitting assertion of Limitation Act defense to Jones Act claim); *The Four Sisters*, 75 F.Supp. 399

(D.Mass.1947) (allowing for the possibility that Limitation Act applies to DOHSA claim).

[FN9]. At least one court has inexplicably addressed the merits of a Limitation Act defense against a LHWCA claim, rather than citing the LHWCA's language precluding the Limitation Act's applicability. *See Bates v. Merritt Seafood, Inc.*, 663 F.Supp. 915 (D.S.C.1987).

[FN10]. I will not here address the alternate, statute-specific liability schemes set forth in the OPA, *see* 33 U.S.C. § 2704, and the COGSA, *see* 46 U.S.C. app. § 1304(5).

There is, however, a pattern that statutes explicitly allowing for the application of the Limitation Act incorporate a negligence standard, while those explicitly precluding the application of the Limitation Act utilize a strict liability standard. *Compare* 46 U.S.C. app. § 1304(1)-(3) (COGSA) (no liability for carriers and ships so long as due diligence was used and absent actual fault, privity, or neglect), *and* 46 U.S.C. app. § 192 (Harter Act) (no liability for vessel and for its owners, agents, and charterers so long as owners exercise due diligence), *with* 33 U.S.C. § 905(a) (LHWCA) (in the absence of securing payment of compensation as otherwise required, a maritime employer is liable to deceased or disabled employees and may not invoke the defenses of fellow servant negligence, assumption of the risk, or contributory negligence), [FN11] 33 U.S.C. § 2703(a)(OPA) (the only permitted complete defenses are act of God, act of war, and act or omission of a third party), *and* 16 U.S.C. § 1443(a)(3) (MPRSA) (the only permitted defenses are act of God, act of war, act or omission by a third party, injury caused by legally authorized activity, and negligible injury). This dichotomous pattern cuts against the conclusion that the pre-amendment silence in the MPRSA means the Limitation Act should apply. *See supra* Part II. When the MPRSA was amended in 1992, the dichotomous pattern was established, as the COGSA, the Harter Act, the LHWCA, and the OPA--with their Limitation Act references--were all in effect in 1992. It therefore seems reasonable to suppose that in amending the MPRSA, a strict liability statute, to

preclude the application of the Limitation Act, Congress may have simply been explicitly bringing the MPRSA in line with its statutory counterparts. The negative inference drawn from the MPRSA \*958 loses some of its luster in the face of this possibility. I therefore conclude the MPRSA's pre-amendment silence is indeterminate.

FN11. LHWCA permits suits against vessels (*i.e.*, *in rem* actions) under a negligence standard. See 33 U.S.C. § 905(b). This provision is not relevant here since the Limitation Act appears to apply only to *in personam* actions. See *supra* note 6.

#### V.

In reaching the conclusion that the Limitation Act and the PSRPA are in conflict, I rely exclusively on the irreconcilable conceptions of liability in the PSRPA and the Limitation Act. See *supra* Parts III & IV. There are other bases invoked by the majority on which I do not rely. Although I ultimately reach the same conclusion as the majority, my reasoning is more narrow.

First, I would not rely on the apparent purposes of the Limitation Act and the PSRPA, respectively, as understood by the majority. [FN12] See Opinion at 945-48. I similarly would not rely on the statutes' legislative histories, [FN13] or the policies underlying the statutes. [FN14] Rather, statutory structure is a sufficient basis from which to draw a conclusion in this case.

FN12. For example, from legislative history that explains the PSRPA was enacted to allow for legal action that would result in funds for resource recovery, the majority infers "the PSRPA is aimed at *full* restoration of park resources...." Opinion at 751 (emphasis added). Similarly, the majority concludes "the PSRPA is aimed at ensuring that the person or instrumentality responsible for any destruction, loss, or injury covers *all* of the costs associated with such destruction, loss, or injury...." *Id.* at 946 (emphasis added). As discussed above, see *supra* Part II, I do not believe the

PSRPA exhibits an expectation of full recovery. In any case, I have difficulty seeing how the inference of full recovery follows from the cited legislative history.

FN13. Based on these principles, I would not, like the majority, approvingly discuss the Ninth Circuit's invocation of legislative purpose in holding the Limitation Act implicitly repealed in the face of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § § 1651-56 (TAPAA). See *In re the Glacier Bay*, 944 F.2d 577 (9th Cir.1991). The Ninth Circuit determined that Congress' purpose in enacting the TAPAA was to establish a comprehensive liability scheme for oil spills, and that "Congress, in enacting TAPAA, was clearly concerned about the ability of existing laws to compensate innocent victims of a disastrous trans-Alaska oil spill." *Id.* at 583. On this basis in part, the Ninth Circuit concluded "[t]he Limitation Act is contrary to every aspect of TAPAA." *Id.* I respectfully disagree with this approach.

FN14. For example, the majority mentions that limiting the liability of the owners of vessels causing damage to natural resources would ultimately burden the taxpayer. See Opinion at 948.

[19] Also, I would not consider the fact that courts have apparently taken a restrictive view of the Limitation Act. See Opinion at 945. Implicitly repealing an otherwise valid statute is a much harsher outcome than merely construing a statute narrowly. The apparently strict construction of the Limitation Act should therefore not influence whether the Act should be implicitly repealed. I would examine only whether the Limitation Act and the PSRPA are irreconcilably in conflict, not which statute has been judicially favored. [FN15] \*959 By the same token, I also would not consider that Congress has recently amended the Limitation Act, see Coast Guard Authorization Act of 1996, Pub.L. No. 104-324, § 1129(a), 110 Stat. 3901 (codified as amended at 46 U.S.C. § 183(g)), in support of the position that the Limitation Act is vibrant and should not be implicitly

repealed.

FN15. In any case, the cases cited by the majority for the proposition that the Limitation Act has been viewed restrictively do not conclusively establish this proposition. First, any criticism of the Limitation Act from Maryland Cas. Co. v. Cushing, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954), comes from the statements of the dissent. See id. at 437, 74 S.Ct. at 623 (Black, J., dissenting). By contrast, the plurality--whose remarks on this issue are not disputed by the lone concurring justice--sings the praises of the Limitation Act with respect to its underlying policies. See id. at 416-17, 74 S.Ct. at 612. As stated by the Court: "[I]f [the Limitation Act] is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment." Id. at 422, 74 S.Ct. at 615 (quoting Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 588-89, 3 S.Ct. 379, 385-86, 27 L.Ed. 1038 (1883)). Second, in Hercules Carriers, Inc. v. Claimant State of Florida, Department of Transportation, 768 F.2d 1558 (11th Cir.1985), this Court concluded that courts are obligated to apply the Limitation Act as it is written, despite apparent judicial reservations about the Act. See id. at 1565.

## VI.

Upon reaching the conclusion that the Limitation Act and the PSRPA are irreconcilably in conflict, the second step of the analysis is to conclude the Limitation Act is implicitly repealed to the extent it interacts with the PSRPA. As with the question of irreconcilable conflict, see supra Part V, I reach the same answer as the majority, but on a narrower basis. I would repeal the Limitation Act rather than the PSRPA for the sole reason that the Limitation Act was enacted earlier in time than the PSRPA. See, e.g., S. Natural Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1373 (11th Cir.1999). I would not, however, invoke the majority's determination that

this implicit repeal should also be based on the fact that the PSRPA is a more specific statute than the Limitation Act. See Opinion at 949. Given that the PSRPA is the more recent statute, the specific versus general basis is not necessary to reach the outcome that the PSRPA governs. Furthermore, I conclude the Limitation Act and the PSRPA are both general statutes. [FN16]

FN16. I draw this conclusion because the two statutes cover broad sets of circumstances, which are mutually exclusive to a considerable extent and which intersect narrowly. That is, the Limitation Act covers the vessel-induced destruction of the sweeping range of property outside the realm of park system resources--including all private property--while the PSRPA does not extend to this property. Similarly, the PSRPA covers injury to the vast expanse of terrestrial park system resources, while the Limitation Act does not. The intersection of the two statutes is the narrow circumstance where a vessel injures marine park system resources.

This confluence of two general statutes is exemplified in Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). In Silver, the Supreme Court confronted the interplay between the Securities Exchange Act of 1934, which allows for self-regulation by securities exchanges, see 15 U.S.C. § 78f, including rules restricting interaction between exchange members and non-members, and the Sherman Anti-Trust Act, see 15 U.S.C. § 1, which proscribes collective action by exchange members to the detriment of non-members. See generally Silver, 373 U.S. at 347, 352-53, 83 S.Ct. at 1252, 1254-55. The Securities Exchange Act broadly regulates exchanges regardless of anti-trust implications, while the Sherman Act prohibits anti-trust activity generally, including circumstances not involving securities exchanges. The two statutes intersect in the narrow circumstances where securities exchanges are involved in potential restraints of trade. See id. at 349, 83 S.Ct. at 1252-53. Silver thus provides a model for this case. While I conclude the

Limitation Act and the PSRPA are both general statutes, my primary reason for not broaching the specific versus general basis is that it is not necessary in this case.

VII.

My anguish in reaching the conclusion that the Limitation Act should be implicitly repealed is due in large part to the principles of judicial restraint and separation of powers which underlie the particularly high standard required for an implicit repeal. Despite concerted attempts to \*960 reconcile the PSRPA and the Limitation Act, however, I found myself unable to do so. The conceptions of liability embedded in these two statutes are simply too far apart and too integral to allow for reconciliation. Therefore, I am satisfied with the outcome of this case. I wish to stress, however, that this outcome is atypical and should arise only after an earnest attempt at statutory reconciliation.

VIII.

For all the reasons described above, I concur.

TIDWELL, District Judge, specially concurring:

I concur with Judge Barkett's Opinion in all respects, except I agree with Judge Black's conclusion in her Special Concurrence that we should not consider the fact that courts have taken a restrictive view of the Limitation Act.

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**H**

United States Court of Appeals,  
Fourth Circuit.

R.M.S. TITANIC, INCORPORATED, successor in  
interest to Titanic Ventures,  
limited partnership, Plaintiff-Appellant,  
v.

The WRECKED AND ABANDONED VESSEL, its  
engines, tackle apparel, appurtenances,  
cargo, etc., located within one (1) nautical mile of a  
point located at 41° 43'  
32" North Latitude and 49° 56' 49" West Longitude,  
believed to be the R.M.S.

Titanic, in rem; Robert C. Blumberg, Attorney-  
Advisor, Office of Oceans  
Affairs, United States Department of State; Ole  
Varmer, Attorney-Advisor,  
National Oceanic and Atmospheric Administration,  
United States Department of  
Commerce; Madeleine K. Albright, Secretary of  
State, United States Department  
of State; William M. Daley, Secretary of Commerce,  
United States Department of  
Commerce; D. James Baker, Administrator, National  
Oceanic and Atmospheric  
Administration, United States Department of  
Commerce, Defendants,  
Liverpool and London Steamship Protection and  
Indemnity Association, Limited,  
Claimant,  
Deep Ocean Expeditions; Wildwings Worldwide  
Travel; Bakers World Travel;  
Quark Expeditions, Incorporated; Mike McDowell;  
Ralph White; Don Walsh,  
Ph.D.; Alfred S. McLaren, Ph.D.; Christopher S.  
Haver; R/V Akademik Mstislav  
Keldysh; United States of America; Blackhawk  
Television, Parties in Interest,  
John A. Joslyn, Movant.  
University of Virginia Appellate Litigation Clinic;  
David Shuttle, Amici  
Curiae.

**No. 01-2227.**

Argued Feb. 25, 2002.  
Decided April 12, 2002.

In action regarding salvage of wrecked vessel, the  
United States District Court for the Eastern District  
of Virginia, Rebecca Beach Smith, J., entered sua  
sponte interlocutory orders preventing sales of  
individual artifacts from the vessel by salvor in  
possession. Salvor appealed. The Court of Appeals,

Niemeyer, Circuit Judge, held that: (1) orders were  
appealable, but (2) salvor did not have title in  
artifacts sufficient to permit their sale.

Affirmed.

West Headnotes

**[1] Admiralty**  **103**  
16k103 Most Cited Cases

Interlocutory orders confirming that district court's  
earlier orders prohibiting sale of artifacts salvaged  
from submerged shipwreck "were proper and  
necessary when entered" were appealable; new  
developments were presented by two organizations'  
interest in purchasing some or all of the artifacts, and  
later review of the orders might have been  
impossible. 28 U.S.C.A. § 1292(a)(1).

**[2] Salvage**  **1**  
344k1 Most Cited Cases

"Salvor" in admiralty is one who voluntarily saves  
life or property at sea.

**[3] Salvage**  **1**  
344k1 Most Cited Cases

By saving property at sea, salvors do not become  
property's owner; rather, they save it for owners and  
become entitled to reward from owner or from his  
property.

**[4] Salvage**  **42.1**  
344k42.1 Most Cited Cases

Principal method of enforcing salvor's award is  
through recognition of salvor's lien in property saved.

**[5] Salvage**  **39**  
344k39 Most Cited Cases

Salvor's lien arises from moment salvage service is  
performed, and secures payment of as-yet-to-be-  
determined salvage award; such liens are temporary  
encumbrance of property saved, lasting only until  
payment of salvage award can be made.

**[6] Salvage**  **41**  
344k41 Most Cited Cases

If owner of salvaged property appears and pays  
salvage reward determined by court, salvor's lien is

discharged and owner takes property clear of lien.

**[7] Salvage**  27  
344k27 Most Cited Cases

In determining appropriate salvage reward for salvor of property, following factors are considered: (1) labor expended by salvors in rendering salvage service; (2) promptitude, skill, and energy displayed in rendering service and saving property; (3) value of property employed by salvors in rendering service, and danger to which such property was exposed; (4) risk incurred by salvors in securing property from impending peril; (5) value of property saved; and (6) degree of danger from which property was rescued.

**[8] Salvage**  35  
344k35 Most Cited Cases

If sale of salvaged property yields too little to satisfy salvor's lien for reward, then all proceeds from sale of salvaged property are paid to salvor.

**[9] Salvage**  1  
344k1 Most Cited Cases

**[9] Salvage**  39  
344k39 Most Cited Cases

Salvor does not have direct right to title in salvaged property; rather, salvor has only lien on property which may, upon execution or foreclosure and in discretion of court, be satisfied by court's conveying title to salvor after court determines that appropriate amount of award cannot be satisfied by sale of property.

**[10] Salvage**  41  
344k41 Most Cited Cases

Once salvor's lien is executed and salvor as lienholder is paid its reward, whether in money or in kind, reward becomes property of salvor to do with what it wants.

**[11] Salvage**  1  
344k1 Most Cited Cases

Under salvage law, salvor receives lien in property, not title to property, and as long as case remains salvage case, lienholder cannot assert right to title even though he may end up with title following execution or foreclosure of lien.

**[12] Abandoned and Lost Property**  10

1k10 Most Cited Cases

Under finds law, title to abandoned property vests in person who reduces that property to his or her possession; before such conversion is made, however, prerequisites for divesting title must be satisfied.

**[13] Salvage**  1  
344k1 Most Cited Cases

Salvor of artifacts found in submerged vessel did not have title in artifacts sufficient to permit their sale, since court, in declaring salvor-in- possession, could not legally have awarded full title to artifacts to enforce salvage lien until amount of lien was decided and value of the artifacts determined, or evidence taken that sale would produce less than amount of lien.

**\*196 ARGUED:** Mark Steven Davis, Carr & Porter, L.L.C., Portsmouth, Virginia, for Plaintiff-Appellant. Neal Lawrence Walters, Appellate Litigation Clinic, University of Virginia School of Law, Charlottesville, Virginia, for Amicus Curiae Clinic. **ON BRIEF:** Robert C. Scaro, Jr., Mark A. Stallings, Carr & Porter, L.L.C., Portsmouth, Virginia, for Plaintiff-Appellant. Craig A. Markham, Elderkin, Martin, Kelly & Messina, Erie, Pennsylvania, for Amicus Curiae Shuttle.

Before WILKINS, NIEMEYER, and KING, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge WILKINS and Judge KING joined.

**OPINION**

NIEMEYER, Circuit Judge.

**\*\*1** R.M.S. Titanic, Inc. ("RMST"), as salvor-in-possession of the submerged wreck of the *R.M.S. Titanic* and the artifacts salvaged from it, challenges the district court's orders of September 26, 2001, and October 19, 2001. These orders were entered after the court discovered RMST's plans to sell some of the artifacts and confirmed that the court's earlier orders prohibiting the sale of artifacts "were proper and were necessary when entered." RMST contends that, because in 1994 it was granted absolute title to all the artifacts it retrieved, the district court cannot now restrict its right, as owner of the artifacts, to sell them

at its discretion.

Finding that RMST's arguments are grounded on a fundamental misunderstanding of its role as salvor-in-possession, we reject its arguments and affirm the orders of the district court.

I

In 1985, a joint American-French expedition discovered the wreck of the *Titanic* in the North Atlantic Ocean in international waters. Two years later, Titanic Ventures, a limited partnership, explored the wreck, bringing up approximately 1,800 artifacts. Thereafter, it sold its interests in the salvage operations and the artifacts to RMST.

In 1993, RMST commenced this *in rem* action against the *Titanic* to become its salvor-in-possession. In its complaint, RMST requested, among other things, that, under the law of finds, it be declared "the true, sole and exclusive owner of any items salvaged from the wreck" or, alternatively, that, under salvage law, it be "awarded a liberal salvage award ... as may be determined by this Court." Acting under principles of salvage law and consistent with the inchoate lien that RMST obtained as salvor, the district court exercised *in rem* jurisdiction and issued a warrant directing the United States Marshal to arrest the wreck and all artifacts already salvaged and yet to be salvaged. Simultaneously, it ordered that RMST be substituted for the Marshal as the custodian of the wreck, the wreck site, and the artifacts. Notice of the proceedings was duly published. Following a claim made by an insurance company and settlement of that claim, the court approved the settlement \*197 and issued an order, dated June 7, 1994, declaring RMST salvor-in-possession. In its order, the court stated:

The Court FINDS AND ORDERS that R.M.S. Titanic, Inc. is the salvor-in- possession of the wreck ... and that R.M.S. Titanic, Inc. is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as R.M.S. Titanic, Inc. remains salvor-in-possession, items salvaged in the future, and is entitled to all salvage rights....

During the course of the hearing leading to this order, the district court confirmed its understanding that it was RMST's "intention to display these artifacts and to try to get [its] money back out of admissions to the display rather than selling them off." Counsel for RMST affirmed that understanding and explained further "that the process [of] going forward with the exhibition of the artifacts and not

sell[ing them] continues and ... that is the position of the salvors in this case, that the 1987 artifacts and the 1993 artifacts will not be sold, but rather will be exhibited."

\*\*2 Two years after entry of the June 1994 order appointing RMST salvor-in- possession, John A. Joslyn filed a motion in this action requesting that the district court rescind its June 1994 order naming RMST salvor-in-possession because RMST had failed to salvage the *Titanic* diligently and lacked the financial capacity to undertake future salvage operations. The district court rejected Joslyn's claims and denied his motion. But in doing so, it ordered RMST to make more frequent reports to the court about its salvage efforts. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, the R.M.S. Titanic*, 924 F.Supp. 714, 724 (E.D.Va.1996). In addition, the district court entered a preliminary injunction prohibiting Joslyn, as well as anyone else, from visiting the site of the wreck and from photographing it. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, No. 2:93CV902, 1996 WL 650135 (E.D.Va. Aug. 13, 1996). The court reasoned that because RMST was "not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income." *Id.* at \*2.

In 1998, when a British Virgin Islands corporation headquartered on the Isle of Man, Great Britain, began marketing to the public an expedition to visit the *Titanic* wreck, which it called "Operation Titanic," RMST filed a motion for a more specific injunction to prevent that corporation as well as its principals and customers from visiting and photographing the wreck site. The district court issued an expanded injunction, enjoining that corporation, as well as its principals and a named passenger, from visiting a yet more generously defined site in the North Atlantic and from photographing the wreck. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 9 F.Supp.2d 624, 626 (E.D.Va.1998). The court reasoned that because RMST was not selling the artifacts, it needed a stream of income, and the exclusive photographic and visitation rights would help insure this income. *Id.* at 635-36. We reversed that order, concluding that it was beyond the power of the district court and inconsistent with salvage law to confer those rights: "Neither prohibition is justified by the law of salvage or allowed by the law of free navigation on the high seas." *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 970 (4th Cir.1999). RMST maintains that this refusal to give it exclusive visitation and photographic rights has had a substantial adverse impact on its income stream and has impaired its ability to finance further

salvage operations.

RMST has continued to conduct salvage operations and to display the artifacts recovered in order to obtain income. In \*198 November 1999, the management of RMST changed, and the new management articulated a new business plan designed "to maximize shareholder value while still protecting the archeological and historical value of the wreck." While the financial strategy of RMST's previous management had focused on generating earnings through the exhibition of artifacts, RMST's new management expanded this strategic plan to include "the possible disposition of artifacts to increase revenues" and thereby to maintain its status as salvor-in-possession. But these plans were undeveloped, and during a hearing in March 2000, the new president of RMST testified before the district court that RMST had "no plans to sell any portion of the collection."

\*\*3 Several months later, however, "it [came] to the attention of the court that there ha[d] been a change in management in R.M.S. Titanic, Inc. and that there [was] a concern held by some persons and organizations that R.M.S. Titanic, Inc. [was] considering disposal of some artifacts recovered." In response to this information, the district court issued an order *sua sponte*, dated July 28, 2000, directing RMST "not [to] sell or otherwise dispose of any artifacts or any object recovered from the wreck site and further that it must continue to treat and preserve any such artifacts and objects recovered from the wreck site." In its order, the court noted that "[t]his court has continued R.M.S. Titanic, Inc. as salvor-in-possession of the wreck of the *Titanic* from year to year on the understanding that R.M.S. Titanic, Inc. would treat and preserve all artifacts recovered and would exhibit them to the public and would not sell or dispose of any of said artifacts."

In its periodic report to the court several weeks later, RMST acknowledged the court's July 2000 order, stating, "RMST notes that since it had never sold any artifacts or objects recovered from the *Titanic* without first advising the Court (i.e. sales of coal and encumbrance of coins and currencies), and since it had advised the Court earlier in its July 5, 2000 periodic report that it would not cut into the wreck, the only new effect of the [July 28] order was the prohibition on detaching any part of the wreck." Consistent with this position, RMST did not appeal the district court's July 2000 order prohibiting the sale or dispersion of the artifacts.

In April 2001, RMST sought a clarification of the

July 2000 order to permit it to sell the coal it had recovered from the wreck. During the hearing on this issue, RMST broached, for the first time, plans to form a new foundation which might "explore the acquisition of the artifact collections at some time in the future." RMST's counsel explained that the "desire on the part of [RMST] to explore transfer ... raise[d] some questions ... with the [July 2000] order," which had confirmed the prohibition against selling any artifacts. On the issue of whether selling coal--which RMST had already done--violated the court's orders, counsel explained that coal recovered from the site was always treated as "organic matter, rather than artifacts," and that RMST had always felt free to sell coal. After the court invited RMST to submit a clarifying order authorizing the sale of coal, the court reiterated its position about selling artifacts:

You have to remember now that during the whole time that R.M.S. Titanic has worked with the court, they have always taken the position that they are not going to sell any artifacts, that their purpose in getting them is to get them, preserve them, and put them on display.

Counsel for RMST confirmed the court's understanding, stating, "That is exactly what has been represented to the court. The company has never taken the position \*199 that it wanted to sell the artifacts." In accordance with the hearing, the district court signed an order dated April 30, 2001, modifying the July 28, 2000 order "to reflect the fact that the Salvor remains free to sell or encumber any coal that it has recovered or that it might recover in the future from the TITANIC wreck site." Again, RMST did not appeal this modification of the July 2000 order.

\*\*4 Beginning in July 2001, RMST's gently leaked idea to form a foundation became concrete, and RMST submitted a supplemental report to the court, describing the formation of The Titanic Foundation, Inc. and the Foundation's interest in purchasing the artifacts from RMST. Upon receiving the report, the district court issued an order, again *sua sponte*, dated July 31, 2001, reiterating that RMST could not "convey in any manner any of the R.M.S. Titanic's artifacts" until the court had held a full hearing.

That hearing was held on September 24, 2001. The court then learned in detail about the formation of The Titanic Foundation and noted that the principals of RMST and The Titanic Foundation were the same people, observing "so it is really a one man show; is that not right?" The court noted that this might create irreconcilable conflicts of interest with respect to the principals' duties to both the public corporation and the nonprofit foundation. Counsel for RMST

(Cite as: 286 F.3d 194, 2002 WL 548765 (4th Cir.(Va.)))

explained that the foundation would be able to solicit charitable contributions which then could be used to purchase the artifacts. Counsel justified the need for the foundation in part by our decision in *Haver*, in which we denied RMST exclusive rights to visit the site and to photograph the wreck. 171 F.3d at 971. At the hearing, the district court did not reject the notion that the collection of artifacts as a whole-- rather than piecemeal-- could possibly be sold pursuant to an acceptable plan, approved by the court. But counsel then explained a practical difficulty in having to obtain the court's approval of any such transfer of artifacts. As counsel explained, approval "puts the company in a very awkward position in dealing with those who want to acquire collections, in that you have to say to them, well, do your due diligence, you go out and get your appraisal, you do everything else that you have to do, and then we as a company will do the things that we have to do.... So it requires opinions, various things that have to be done for due diligence, and then to the potential acquirer, we will come to the court and ask for approval of that." After the court explained the difficulty in foregoing approval, it stated that, "[t]here is no sense in the court or your taking the time to decide some abstract question. If you have got some sort of an agreement or deal worked out, submit that to the court, and the court will say whether or not it approves it." Following the hearing and apparently out of concern over the possibility that artifacts might be sold, the district court entered another order, dated September 26, 2001, stating:

The Court FINDS after the September 24, 2001 hearing that its previous Orders entered in this case, designed to prevent sales of individual artifacts recovered from the Wreck of R.M.S. Titanic, were proper and were necessary when entered.

Two weeks later, RMST appealed that order. And after RMST appealed the September 26 order, the district court entered another order dated October 19, 2001, amending the September 26 order, essentially explaining its position, as well as earlier orders. In its explanation, the court indicated that it first learned in April 2001 of the possibility that RMST might convey the collection and recognized "that circumstances change and it becomes necessary to change plans and approaches." \*200 The court invited further motions on the disposition of artifacts. RMST appealed this October 19, 2001 order as well.

\*\*5 Because there was no party in opposition to represent the district court's position, this court asked the University of Virginia School of Law's Appellate Litigation Clinic to file an *amicus* brief to serve as the answering brief. The clinic did so ably, and we

have considered the arguments of both RMST and its counsel as well as counsel from the clinic.

## II

The *amicus* appropriately raises the question of whether we have jurisdiction to review the September 26 and October 19, 2001 orders. RMST has asserted jurisdiction under 28 U.S.C. § 1292(a)(1) (authorizing appeals of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions") and 28 U.S.C. § 1292(a)(3) (authorizing appeals of interlocutory decrees "determining the rights and liabilities of the parties to admiralty cases").

The *amicus* argues that RMST cannot appeal under § 1292(a)(1) because: (1) RMST consented earlier to the same order of July 28, 2000, see *Haitian Refugee Ctr. v. Civiletti*, 614 F.2d 92, 93 (5th Cir.1980); (2) no factual or legal change has occurred to justify appealing an ongoing injunction which RMST did not earlier appeal, see *SEC v. Suter*, 832 F.2d 988, 990 (7th Cir.1987); and (3) the district court left open alternative avenues of relief, inviting RMST to submit a formal motion for approval of any new deal. Also challenging jurisdiction under § 1292(a)(3), the *amicus* argues that Congress limited interlocutory review in admiralty cases to interlocutory decrees that determine rights and liabilities, and it did not grant a right to appeal every interim order. See *Pickle v. Char Lee Seafood, Inc.*, 174 F.3d 444, 448 n. 1 (4th Cir.1999); *Evergreen Int'l (USA) Corp. v. Standard Warehouse*, 33 F.3d 420, 425 (4th Cir.1994).

We agree with the *amicus* that if RMST is appealing orders under § 1292(a)(1) that simply clarify or interpret earlier orders that it failed to appeal, its appeal rights would be forfeited by its failure to appeal the earlier orders. See, e.g., *Major v. Orthopedic Equip. Co.*, 561 F.2d 1112, 1115 (4th Cir.1977) (holding that court lacked jurisdiction on appeal from injunction because the order was "simply an interpretation" of an earlier order). This principle is based on the notion that the more recent appealed orders add nothing in substance to earlier orders left unappealed. If either of the appealed orders, on the other hand, modifies the substance of an earlier order or extends its duration, the new order is appealable under § 1292(a)(1). See, e.g., *Pickle*, 174 F.3d at 448 (finding appealable an order that denied a party's request for modification of an injunction); *Sierra Club v. Marsh*, 907 F.2d 210, 213-14 (1st Cir.1990) (noting that an order that extends or prolongs the

restraint imposed by an earlier order is appealable). Similarly, if the factual and legal circumstances applicable to an earlier order change, the substantive effect of a restated injunction may cause it to become appealable. See, e.g., *Suter*, 832 F.2d at 990 (suggesting that "changes in fact of law since [the injunction's] entry" may justify an appeal).

**\*\*6** The question of jurisdiction in this case is a close one which RMST could have made easier by filing in the district court a motion to vacate or modify the July 28, 2000 injunction, based on the new factual developments. Although RMST filed no such motion, it advances a persuasive argument that the periodic reports and hearings prior to the orders appealed in this case provide support for a position that the **\*201** circumstances had changed and that, therefore, the September 26 and October 19, 2001 orders, which were aimed at the new circumstances, had a new substantive effect.

As RMST accurately points out, the April 2001 periodic report indicated that two organizations had expressed interest in purchasing some or all of the *Titanic* artifacts, The Titanic Foundation and the Museums and Galleries of Northern Ireland. To acquire information about the possible arrangements, the court conducted a hearing on September 24, 2001, where witnesses testified about the details of a potential artifact sale to those entities. After hearing testimony about these new developments, the district court, *sua sponte*, issued the September 26 and October 19, 2001 orders from which RMST appealed.

RMST suggests that not only did the September 26 and October 19, 2001 orders focus on the new developments, but in substance they also extended the scope of the earlier injunctions to cover new circumstances. It argues that the district court itself observed that the court had earlier only prohibited the sale of *individual* artifacts but had never enjoined the sale of the artifacts as a collection. With its September 26 and October 19 orders, the court was enjoining any sale of the artifacts "as a group."

[1] We believe that the new developments that preceded the September 26 and October 19 orders were sufficiently material as to justify RMST's challenge to the renewed injunctions entered following the hearing on September 24, 2001. While the court may not have explicitly expanded its earlier injunctions, it acknowledged that the earlier injunctions were "designed to prevent sales of *individual* artifacts" and that it would consider a modification of them if the modification was

"designed to keep the recovered and to-be-recovered artifacts together as a group." The court also acknowledged that "circumstances change and it becomes necessary to change plans and approaches."

Moreover, this case presents the rare circumstance that might render a later review of these interlocutory orders impossible. It is unclear how long the *in rem* action will continue because it is unclear how long salvage will continue. It could be years depending on RMST's capacity, will, and diligent performance of salvage services. Because no final termination of these proceedings is currently in sight, RMST could be left without a remedy for challenging the two orders entered in light of the new developments.

Accordingly, in the peculiar circumstances before us, we conclude that we have jurisdiction under 28 U.S.C. § 1292(a)(1). We need not, therefore, reach the question of whether this case presents a decree appealable under 28 U.S.C. § 1292(a)(3).

### III

**\*\*7** On the merits, RMST, relying heavily on language taken from the district court's June 7, 1994 order appointing RMST salvor-in-possession, directs our focus to the district court's declaration in that order that RMST "is the *true, sole and exclusive owner* of any items salvaged from the wreck of the defendant vessel in the past and, so long as [RMST] remains salvor-in-possession, items salvaged in the future, and is entitled to all salvage rights." (Emphasis added). RMST maintains that, for several reasons, this language confirms that it became the absolute owner of the artifacts, free and clear, as they were retrieved from the *Titanic* and, therefore, that it is entitled to sell them, notwithstanding **\*202** its earlier expressions to the court of an intent not to sell them.

Specifically, RMST argues first that there were no "contingencies or exceptions" to the district court's "*in specie*" award. Second, RMST maintains that the maritime law "does not permit a District Court to impose such restrictions on disposition of artifacts, awarded *in specie*, for some perceived public benefit. These restrictions equate to a 'taking' of private property." Third, RMST asserts that the district court had no justification for "converting statements by RMST regarding a business plan into a binding restriction upon disposition of items recovered from the wreck." Fourth, RMST observes that the district court speaks only through its orders and not through its opinions, whether oral or written, and its June 1994 order contains no restrictions on disposition.

Fifth, RMST argues that the doctrine of judicial estoppel is inapplicable to its statements of intent about not selling the artifacts because it never made misleading statements to the court in order to obtain any benefit. And finally, RMST contends that the restrictions are substantively "inappropriate" in view of the public policy behind salvage law, arguing that the restrictions against resale of the artifacts actually inhibit incentives to perform salvage operations and that RMST, as a publicly traded company, "has an obligation to maximize shareholder value," which should be considered. Indeed, the adverse effects of the district court's orders on the continuing financial viability of RMST runs throughout RMST's arguments that the court acted illegally and inappropriately.

Before addressing RMST's specific arguments, it is necessary to set forth the relevant fundamental principles of salvage law and to recognize the significance of this case as an *in rem* proceeding instituted under the salvage law to enforce RMST's inchoate lien for a salvage reward.

#### A

[2][3] A salvor in admiralty is one who voluntarily saves life or property at sea. Because of the dangers of the sea and the mutual interest of seamen and seafaring nations to traverse the sea notwithstanding its dangers, the law of admiralty for almost 3,000 years has uniformly held that those who voluntarily come to the assistance of fellow seamen in distress and perform salvage are entitled to be rewarded. Haver, 171 F.3d at 962; *see generally* Martin J. Norris, 3A *Benedict on Admiralty* § § 5-13 (7th ed.1998). As Chief Justice Marshall eloquently explained, this is a policy for seamen, not landlubbers:

**\*\*8** If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample award will be bestowed in the courts of justice.

Mason v. The Ship Blaireau, 6 U.S. (2 Cranch) 240, 266, 2 L.Ed. 266 (1804). By saving property at sea, salvors do not become the property's owner; rather, they save it for the owners and become entitled to a

reward from the owner or from his property. Haver, 171 F.3d at 963; The Amethyst, 1 F. Cas. 762, 764 (D.Me.1840) (No. 330) (stating that a salvor stands as a "voluntary agent" and thus is "bound to act for the interest of the owner as well as his own"). The reward provides an incentive \*203 for rendering salvage service at sea, and courts of admiralty have long enforced claims to this award against owners. Mason, 6 U.S. (2 Cranch) at 266 (allowing "a very ample compensation for those services, (one very much exceeding the mere risk encountered, and labour employed in effecting them)"). As one court early explained:

Salvage, it is true, is not a question of compensation *pro opera et labore*. It rises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers, a premium, by way of honorary award, for prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that affecting chivalry, which forgets itself in an anxiety to save property, as well as life.

The Henry Ewbank, 11 F. Cas. 1166, 1170 (D.Mass.1833) (No. 6,376).

[4][5] The principal method of enforcing a salvor's award is through the recognition of a salvor's lien in the property saved. The SABINE, 101 U.S. 384, 386, 25 L.Ed. 982 (1879) (explaining that a salvage lien "ordinarily affords the best mode of securing the payment of [a salvor's] claims"); Haver, 171 F.3d at 963. This maritime lien arises from the moment salvage service is performed, United States v. ZP Chandon, 889 F.2d 233, 237 (9th Cir.1989), and, as with any other lien, secures the payment of the as-yet-to-be-determined salvage award. Such liens are a temporary encumbrance of the property saved, lasting only until payment of a salvage award can be made. The Everosa, 93 F.2d 732, 735 (1st Cir.1937).

Although there are substantive differences between maritime and common law liens, *see generally* Grant Gilmore & Charles Black, Jr., *The Law of Admiralty* § 9.1-9.2 (2d ed.1975), the maritime lien enforcement process--*i.e.*, the execution of the lien--parrots the lien foreclosure process in civil law. The process begins when the salvor commences an *in rem* proceeding in admiralty against the property. Fed.R.Civ.P., Supp. R. C(1)(a) (stating that "[a]n action in rem may be brought ... [t]o enforce any maritime lien"); *see also* Haver, 171 F.3d at 963; Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560, 567 (5th

Cir.1981). The salvor must provide notice of the *in rem* proceeding to the owner, other lienholders, and potential claimants to the property. Fed.R.Civ.P., Supp. R. C(4) (requiring public notice of the action and arrest if the property has not been released under Rule E).

**\*\*9** [6][7] If the owner appears and pays the salvage reward determined by the court, [FN\*] the lien is discharged and the owner takes the property clear of the salvage lien. Cf. *Ferrous Financial Servs. Co. v. O/S Arctic Producer*, 567 F.Supp. 400, 401 (W.D.Wash.1983) (permitting judicial sale to go forward because owner was in default and could not obtain bond to release arrested ship). On the other hand, if the owner does not appear, then the case continues as an *in rem* action, and the court determines the award, sells the property, \*204 and, from the proceeds, pays the salvor. Fed.R.Civ.P., Supp. R. E(9)(c). Any remainder from the sale is remitted to the owner. If the owner is no longer living, the court presumably pays the excess to the owner's heirs, and, if there are no heirs, to the state according to its escheat law.

FN\* In determining the appropriate award, courts generally rely on the six factors set out in *The Blackwall*, 77 U.S. (10 Wall.) 1, 14, 19 L.Ed. 870 (1869): 1. The labor expended by the salvors in rendering the salvage service. 2. The promptitude, skill, and energy displayed in rendering the service and saving the property. 3. The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. 4. The risk incurred by the salvors in securing the property from the impending peril. 5. The value of the property saved. 6. The degree of danger from which the property was rescued.

[8][9] If the sale of the salvaged property yields too little to satisfy the salvor's lien for a reward, then all of the proceeds from the sale of the salvaged property are paid to the salvor. Courts have held that an award cannot exceed the value of the property itself. Even if it does, though, in an *in rem* proceeding, there certainly cannot be a deficiency judgment against the owner because the action is against the property and any judgment therefore is limited to the value of the property. See *Allseas Maritime, S.A. v. M/V Mimosa*, 812 F.2d 243, 246 (5th Cir.1987) ("The salvage award is therefore limited by the value of the

property saved after all of the appropriate factors are taken into account"); *Lambros Seaplane Base, Inc. v. The Batory*, 215 F.2d 228, 237 (2d Cir.1954) (concluding that where owner did not appear to claim a salvaged seaplane, the owner could not be held personally liable to the salvor). If it becomes apparent to the court that the proceeds of any sale would clearly be inadequate to pay the salvor its full reward, then the court might, as a matter of discretion, award the salvor title to the property in lieu of the proceeds of sale, thus saving the costs of sale. The salvor does not have a direct right, however, to title in the property. See *Platoro Ltd. v. Unidentified Remains*, 695 F.2d 893, 903-04 (5th Cir.1983) ("We cannot find a case where the salvage award was expressed in terms of the *res* rather than in dollars"); *Chance v. Certain Artifacts Found & Salvaged from The Nashville*, 606 F.Supp. 801, 808 (S.D.Ga.1984) (declining "to accept the *in specie* award as a valid award in a salvage action"), *aff'd* 775 F.2d 302 (11th Cir.1985). Rather, the salvor has only a lien on the property which may, upon execution or foreclosure and in the discretion of the court, be satisfied by the court's conveying title to the salvor after the court determines that the appropriate amount of award cannot be satisfied by a sale of the property. *Haver*, 171 F.3d at 966.

Thus, hypothetically, if RMST were to recover an artifact valued at \$50 million (we know, for instance, that paintings have at times sold for more) and the court were to determine that the appropriate salvage award was \$5 million, the court could not give the property to RMST in satisfaction of its salvage lien because the lien exists only to the extent of \$5 million. The court instead would have to sell the property and remit to RMST \$5 million from the proceeds. On the other hand, if RMST were to recover an artifact valued at \$2 million (a historic vase, for example) and the court were to determine, again, that the appropriate salvage award was \$5 million, a sale would be useless. In lieu of a sale to foreclose the salvage lien, the court could simply convey title in the \$2 million vase to RMST, essentially providing RMST what is analogous to a "deed in lieu of foreclosure."

**\*\*10** [10] Once the lien is executed and the salvor as lienholder is paid its reward, whether in money or in kind, the reward becomes the property of the salvor to do with what it wants. *Point Landing Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 866 (5th Cir.1958) ("The [judicial] sale cuts off the rights of all non-parties. The title from the marshal is good against the world.")

[11] It is critical to note that under salvage law, the salvor receives a lien in the property, not title to the property, and \*205 as long as the case remains a salvage case, the lienholder cannot assert a right to title even though he may end up with title following execution or foreclosure of the lien. See, e.g., *The Akaba v. Burg*, 54 F. 197, 200 (4th Cir.1893) ("When articles are lost at sea the title of the owner in them remains"); see also *Adams v. Unione Mediterranea Di Sicurta*, 220 F.3d 659, 670-71 (5th Cir.2000) (explaining that the owner of the salvaged goods "does not lose title even though the property may become the subject of salvage services," because, through the lien, the salvor obtains only a "right of possession" in the property and not "ownership or title to the salvaged property") (quoting *Benedict on Admiralty* § 150); *Treasure Salvors*, 640 F.2d at 567 ("Although the law of salvage grants the salvor a right to possession of the property, the salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor"); *Continental Ins. Co. v. The Clayton Hardtop Skiff*, 367 F.2d 230, 236 (3d Cir.1966) ("The salvor has the right to salvage but he does not achieve ownership of the vessel by salving it"); *Chance*, 606 F.Supp. at 804 (stating that "even though a vessel is abandoned without the hope of recovery or return, the title of the vessel remains in her owner" and "[t]he salvor of property has a right to an award or a lien against the property"), *aff'd* 775 F.2d 302 (11th Cir.1985); *Hener v. United States*, 525 F.Supp. 350, 357 (S.D.N.Y.1981) (explaining that salvage law grants the salvor "only a superior right of possession, and not title, until a court has passed on title and the salvage fee") (citing *The Akaba*, 54 F. 197 (4th Cir.1893)); *The Port Hunter*, 6 F.Supp. 1009, 1011 (D.Mass.1934) (stating the salvors have a claim "paramount to all others" and the control to enforce the claim, "[b]ut 'their interest in the goods did not amount to ownership.... Th[e] right is merely a lien, a right to retain the goods till the salvage be paid' ") (quoting *Whitwell v. Wells*, 41 Mass. 25, 24 Pick (Mass.) 25, 30 (1834)); *The Carl Schurz*, 5 F. Cas. 84, 86 (W.D.Tenn.1879) (No. 2414) (stating that the salvor "is, to all intents and purposes, a joint owner" of the property along with the original owner); *The Amethyst*, 1 F. Cas. at 763 ("The finder of property, left derelict at sea, does not acquire the dominion or the absolute property in what is found. He acquires the right of possession only, with a title to a reasonable reward for his services").

\*\*11 [12] This principle, while firm in the salvage law, does not mean that a salvage case could not be converted into a finds case. See *Platoro Ltd.*, 695

F.2d at 904 (noting that salvage awards can be made by award of title to the *res* under the law of finds); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 336-37 (5th Cir.1978) (recognizing that title to lost ships can be divested from the owner under the law of finds). Under finds law, "title to abandoned property vests in the person who reduces that property to his or her possession." *Id.* at 337. Before such a conversion is made, however, the prerequisites for divesting title under the law of finds must be satisfied. See, e.g., *Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 464- 65 (4th Cir.1992) (requiring clear and convincing evidence of abandonment before the law of finds is applied).

Turning to the specifics in the case before us, RMST, as salvor, obtained an inchoate lien in the artifacts upon performing salvage service in connection with the *Titanic*, and it became entitled to enforce that lien through the *in rem* proceeding which is now pending before the district court. It did not, however, obtain a lien in any property that it merely discovered; \*206 discovery alone does not amount to salvage service, although it can lead to salvage service. *The SABINE*, 101 U.S. 384, 384, 25 L.Ed. 982 (1879) (setting out three requirements for a salvage award: existence of a marine peril, voluntary action by the salvor, and successful salvage). When RMST performed salvage service, the district court exercised "constructive" *in rem* jurisdiction over the wreck and declared RMST the sole salvor-in-possession of the *Titanic*. *Haver*, 171 F.3d at 967. And through that order, the court gave RMST the exclusive right to salvage artifacts from the *Titanic* and to obtain a reward through enforcement of its salvor's lien in the artifacts. If and when RMST abandons its role as salvor or the court dispossesses RMST of that role, the unsalvaged wreck will remain as any other unsalvaged wreck at the bottom of the sea, subject to salvage service by others.

Many of these basic principles of salvage and lien law have been overlooked by RMST in its arguments. In addition to claiming title as a lien-holder, it has, for example, also extensively argued that the district court should have taken into account RMST's financial viability. But this issue has no relevance to whether RMST is entitled to enforce its salvage lien against the artifacts that it salvaged. When RMST voluntarily salvaged property--even with profit in mind--it became entitled only to a yet-to-be-determined reward, enforceable against the property. *The Camanche*, 75 U.S. (8 Wall.) 448, 475, 19 L.Ed. 397 (1869) (allowing recovery even by those salvors "whose business it is to be always ready and at

command whenever assistance is required"); *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333, 339 (2d Cir.1983). RMST is not entitled to a guarantee that it remain in business as a viable company to conduct salvage services. Surely if RMST abandoned its efforts, others would take over. In this case, other potential salvors have unsuccessfully petitioned the district court to do exactly that. See *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 924 F.Supp. 714 (E.D.Va.1996) (rejecting claim of potential salvor to rescind RMST's salvor-in-possession rights). And if no others were to do so, then the wreck of the *Titanic* would lie unsalvaged as it did for the first 75 years after it sank.

\*\*12 With these important principles in hand, we now turn to address RMST's specific arguments *ad seriatim*.

### B

The first and most fundamental issue raised by RMST is the meaning to be given to the district court's June 7, 1994 order. Resting on its contention that this order gave RMST full, unrestricted title to the salvaged artifacts, RMST argues as a matter of property law that the court cannot now reverse itself to impose restrictions on the disposition of the artifacts which belong to RMST.

[13] First, it must be pointed out that the June 1994 order, drafted by counsel for RMST, is inherently ambiguous, repeating the language of RMST's complaint in which it appears that RMST sought both absolute title in the artifacts through the law of finds and salvage rights through the law of salvage. Because RMST pursued only salvage rights and the court only declared it a salvor, not a finder, any suggestion that it obtained title to the wreck of the *Titanic* is misplaced. Yet, the order submitted to give RMST salvage rights uses both salvage language and finds language. It says:

The court FINDS AND ORDERS that R.M.S. Titanic, Inc. is the salvor-in- possession of the wreck and wreck site of the R.M.S. Titanic, including without limitation the hull, machinery, engine, \*207 tackle, apparel, appurtenances, contents and cargo, and that R.M.S. Titanic, Inc. is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as R.M.S. Titanic, Inc. remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights, and that default judgment is entered against all potential claimants who have not yet filed claims and such claims are therefore barred and precluded so long

as R.M.S. Titanic, Inc. remains salvor in possession, and the Court accordingly enters judgment in favor of R.M.S. Titanic, Inc.

Just as this order gives property rights, it also takes them away. It appears to give ownership of the artifacts to RMST--declaring RMST the "true, sole and exclusive owner"--but then in the same sentence states that RMST "is entitled to all salvage rights" as long as it maintains its role as salvor. Indeed, the lead-in to the same sentence also states that RMST is the salvor- in-possession--not the finder--of the wreck and the wreck site. Because the court was clearly applying the law of salvage and not the law of finds, it could only convey possession, not title. *Haver*, 171 F.3d at 961-62.

Moreover, contemporaneously with entry of the June 1994 order, the parties expressed their unequivocal intent that RMST's role be that of salvor, not finder. And RMST has never argued that the *Titanic* had been abandoned and that it was entitled to full title to the entire ship and the artifacts from it, as would be required if this case progressed under the law of finds. See *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel*, 177 F.3d 491, 498 (6th Cir.1999) (explaining that under law of finds, claimant must show that the property has been abandoned and that courts apply a presumption against abandonment); *Columbus-America*, 974 F.2d at 461, 464-65 (explaining that, in maritime law, "a strong *actus* element [is] required to prove the necessary intent" of abandonment, such as express declaration abandoning title). RMST's position that it was only the salvor is consistent with admiralty law's strong preference for recognizing persons who discover wrecks as salvors rather than finders. See *Haver*, 171 F.3d at 961; *Columbus-America*, 974 F.2d at 464 (explaining that "when sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds").

\*\*13 Also contemporaneous with the entry of the June 1994 order, the district court and RMST understood the order's language to give RMST exclusive *possession* of the artifacts to permit RMST to earn money through the exhibition of the artifacts as an interim advance to fund further salvage efforts. But it was clear that RMST was not authorized to sell the artifacts. At the hearing before entry of the June 1994 order, the court sought reconfirmation from RMST that it had in fact advised the court of its "intention to display these artifacts and to try and get [its] money back out of admissions to the display rather than selling them off. Is that still the intention of the *Titanic* people?" Counsel for RMST stated

unequivocally, "Yes, sir, Your Honor." Co- counsel for RMST then explained further "that the 1987 artifacts and the 1993 artifacts will not be sold, but rather will be exhibited."

But of overarching importance to the party's contemporaneous understanding of the June 1994 order was the nature and status of the court proceedings. RMST had filed an *in rem* action against the *Titanic* to enforce its salvage lien. The fact that no claimants appeared--other than an insurance company, which settled--\*208 does not mean that RMST's lien in the artifacts automatically became converted to title to the artifacts. RMST must first complete the salvage service that it intends to perform and have its reward determined, unless it intends to seek periodic awards. Only after its reward is determined can it seek to enforce the lien against the artifacts themselves.

Yet none of these necessary steps had taken place as of 1994. No determination of a reward had been made; no one had submitted an appraisal of the artifacts or testified that sale of the artifacts would produce an inadequate sum to satisfy the lien. The determination of the reward itself is an involved process that encompasses evaluation of the salvage services in light of the *Blackwall* factors. See, e.g., *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976, 984-85 (5th Cir.1998) (describing the extensive district court process of evaluating *Blackwall* factors). Thus, at the early stage of the proceedings in 1994, the court could only have given RMST exclusive possession of the artifacts pending further necessary proceedings.

But even if this understanding was not apparent to RMST, the court's July 28, 2000 order made it apparent. That order, confirming what the court believed about its June 1994 order, categorically prohibited the sale of artifacts as follows:

This court has continued RMS TITANIC, Inc. as salvor in possession of the wreck of the TITANIC from year to year on the understanding that RMS TITANIC, Inc. would treat and preserve all artifacts recovered and would exhibit them to the public and would not sell or dispose of any of said artifacts....

It has come to the attention of the court that there has been a change of management in RMS TITANIC, Inc. and that there is a concern held by some persons and organizations that RMS TITANIC, Inc. is considering disposal of some of the artifacts recovered....

**\*\*14** It is ORDERED that RMS TITANIC, Inc. and any of its employees, agents or subcontractors

may not sell or otherwise dispose of any artifacts or any object recovered from the TITANIC wreck site and further that it must continue to treat and preserve any such artifacts or objects recovered from the wreck site.

No one suggests that this July 2000 order did not unequivocally restate that RMST was still the appointed salvor and confirm that it was not authorized to "sell or dispose of any of said artifacts." Moreover, when, in April 2001, RMST proposed an amendment to the July 2000 order to permit the sale of coal, an amendment to which the court agreed, RMST agreed with the court's interpretation of its June 1994 order. During the hearing that led to entry of the April 30, 2001 order permitting the sale of coal, the court also stated that "[i]t had earlier in 1994 issued an order awarding R.M.S. Titanic salvor-in-possession status, and that was based in part upon the understanding, I believe, of the court that the company intended to conserve and exhibit artifacts recovered from the wreck site."

Moreover, RMST never took issue with the court's clarifications and interpretations of the June 1994 order made in the July 2000 and April 2001 orders. It did not appeal either order. Any question about what the June 1994 order meant, therefore, was answered by the court's unappealed July 2000 order, as restated in the court's April 2001 order. Now, some 18 months after entry of the July 2000 order, RMST is simply not free to reargue that order, nor the April 2001 order.

In sum, while the language of the June 1994 order declaring RMST salvor-in- possession may have been ambiguous with \*209 respect to ownership of the artifacts, the contemporaneous understanding between the court and RMST at least put in doubt any claim to absolute ownership. More importantly, the court could not legally have awarded title to the artifacts to enforce RMST's salvage lien until the amount of the lien was decided and the value of the artifacts determined or evidence taken that the sale would produce less than the amount of the lien. As everyone understood, these determinations had not been made. Finally, the court construed its June 1994 order by its July 2000 and April 2001 orders, interpretations with which RMST agreed and which it did not appeal. Accordingly, we will not now permit RMST to take a few words from the June 1994 order out of their context--both the context of that order and the context of the legal proceedings--to claim that it was granted absolute title to the artifacts at that time.

C

The remaining arguments do not require much discussion because they depend on RMST's reading of the June 1994 order as giving it absolute title to the artifacts as they were removed from the Titanic.

RMST's position that once it was awarded the artifacts "in specie," the district court was not free to restrict the disposition of the property and any such restriction amounted to a "taking of private property" may be a tenable position. But as pointed out above, the district court did not award RMST absolute title in the property, nor could it have in the circumstances. As a condition to such an award in a salvage proceeding, it would have had to complete execution or foreclosure of RMST's salvor's lien. Indeed, the reward secured by the salvor's lien had not yet been determined. Accordingly, this argument, while probably correct as an abstract statement, is irrelevant to what occurred in these proceedings.

**\*\*15** Similarly, RMST may have a valid point when it asserts that RMST's expression of business plans cannot be converted to restrictions on property awarded to it as its reward. But again, this position is irrelevant because it assumes incorrectly that RMST had full title to the artifacts.

On another argument, RMST asserts correctly that its expression of business plans cannot form the basis for application of the doctrine of judicial estoppel. See generally King v. Herbert J. Thomas Mem'l Hosp., 159 F.3d 192, 196-97 (4th Cir.1998); Lowery v. Stovall, 92 F.3d 219, 223-24 (4th Cir.1996). In making this argument, however, RMST assumed that it owned the artifacts and that judicial estoppel should not improperly be applied to deny it ownership. Again, this position is only hypothetical in the context of this case.

Finally, RMST argues that restrictions now in place that prohibit the sale and distribution of the artifacts are substantively "inappropriate." But this argument is also made in the context of RMST's position that it owned the artifacts. When it is acknowledged that the district court had not yet determined RMST's reward and had not yet executed RMST's salvor's lien, it must also be recognized that the property at this stage was *in custodia legis*, pending further proceedings, even though RMST had physical possession of the property. If the court in its discretion had determined that it would await completion of RMST's salvage services before determining an award, the court would not have acted inappropriately. Maintaining the artifacts in a single

collection accommodates the possibility that their value in any subsequent sale might be greater in a collection than in pieces. On the other hand, the court would not need to await **\*210** completion of RMST's salvage services as it could determine awards on a periodic basis. See, e.g., Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F.Supp. 540, 561 (S.D.Fla.1982) (retaining jurisdiction in ongoing salvage effort "[t]o adjudicate the plaintiff's claim to a salvage award on a periodic basis" and requiring the salvor to file periodic reports that "catalogu[e] the artifacts saved in the previous calendar year" in order to determine each individual award). At the most recent hearing conducted by the district court in this case, the court expressed a willingness to consider a proposal to sell the artifacts, objecting only to deciding this question in the abstract. It invited RMST to submit an appropriate proposal. But, as of now, pending further decisions by the district court, RMST has not demonstrated that maintaining the artifacts as a collection is inappropriate or illegal. Indeed, in the end, RMST's lien might become more readily satisfiable by maintaining the artifacts as a collection at this time.

The Titanic was a historic ship, and the artifacts recovered from its wreckage therefore have enhanced value. RMST currently has a unique role as the Titanic's exclusive salvor, and, having performed salvage services, it has a lien in the artifacts and is entitled to a reward enforceable against those artifacts. At this stage of the proceedings, however, we cannot conclude that RMST has title to any artifacts. We also cannot conclude that the course that the district court is pursuing violates the law of salvage or amounts to an abuse of discretion. Accordingly, the orders of the district court, dated September 26, 2001, and October 19, 2001, are affirmed.

**\*\*16 AFFIRMED.**

286 F.3d 194, 2002 WL 548765 (4th Cir.(Va.))

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(Cite as: 2002 WL 1354686 (7th Cir.(Wis.)))

**H**

Only the Westlaw citation is currently available.

United States Court of Appeals, Seventh Circuit.

Paul L. EHORN, Plaintiff-Appellee,  
 v.  
 SUNKEN VESSEL KNOWN AS the "ROSINCO,"  
 her tackle, appurtenances, furnishings,  
 and cargo, Defendant.  
 Appeal of: State of Wisconsin, Intervening  
 Defendant.

Nos. 01-3882, 01-4326.

Argued May 20, 2002.

Decided June 21, 2002.

Appeals from the United States District Court for the  
 Eastern District of Wisconsin, No. 00-C-1086--  
 William E. Callahan, Jr., Magistrate Judge.

BEFORE: EASTERBROOK, ROVNER, and  
EVANS, Circuit Judges.

EASTERBROOK, Circuit J.

\*1 Between 1916 and 1928 the *Rosinco* --the first diesel--electric vessel berthed in Chicago--was one of the largest (at 95 feet and 82 gross tons) and most opulent yachts on the Great Lakes. While en route from Milwaukee to Chicago early on September 19, 1928, the *Rosinco* struck something and sank in 185 feet of water about 12 miles off Kenosha, Wisconsin. Paul Ehorn was arrested in October 1998 after he retrieved one of its portholes. Wisconsin commenced a criminal prosecution, charging Ehorn with looting from a vessel that (the state believes) belongs to it under the Abandoned Shipwreck Act of 1987, 43 U.S.C. § § 2101-06. Ehorn countered that he discovered the wreck and thus became its owner under admiralty law, because (he asserts) the state's claim does not satisfy the statutory requirements. States own two categories of vessels: those that have become "embedded" (a defined term, see 43 U.S.C. § 2102(a)) and those "included in or determined eligible for inclusion in the National Register" of Historic Places. 43 U.S.C. § 2105(a)(3). After the criminal prosecution had been pending for about

eight months, Ehorn filed this federal admiralty action, seeking a declaration good against the world that he is the wreck's owner.

TABULAR OR GRAPHIC MATERIAL SET AT  
 THIS POINT IS NOT DISPLAYABLE

In lieu of serving any documents on the Attorney General of Wisconsin, Ehorn had notice published in two newspapers and posted in the federal courthouse. Publication is essential in an *in rem* proceeding, in case someone has a previously unsuspected interest in the vessel. But why not notify Wisconsin? Ehorn's only explanation is that his lawyer had told the criminal prosecutor that he would file an admiralty action eventually. The prosecutor was the wrong person to inform; what is more, notice that an action *will be* filed differs from notice that an action *has been* filed--for it is the latter deed that starts the procedural clock. No one representing Wisconsin in any capacity learned that an admiralty action was under way until October 31, 2000, when the prosecutor in Kenosha received a gloating letter from Ehorn's attorney, informing her that the time to file a claim had expired, that the wreck now belonged to Ehorn, and that the criminal prosecution therefore must be dismissed. (It has been stayed, not dismissed, pending the outcome of the federal action.)

Counsel miscalculated, counting time from the action's filing rather than from the notice's appearance in the newspaper. The letter backfired by alerting the prosecutor to the proceeding just in time to file a claim--which she did on November 3, the last possible date. But she did not file an answer within the 20 additional days specified by the published notice. The prosecutor alerted the Attorney General's office in mid-December 2000, and counsel there understood Admiralty Supp.R. C(6)(b) to dispense with formal answers for proceedings *in rem* until the claimant receives a copy of the complaint. Ehorn then moved for judgment, contending among other things that lack of an answer entitled him to prevail. This motion prompted the Attorney General to file on February 9, 2001, an answer, together with a request to accept it out of time. The answer alleged that the *Rosinco* had been determined to be eligible for inclusion on the National Register of Historic Places and thus belongs to the state under 43 U.S.C. § 2105(a)(3). See 66 Fed.Reg. 33,555 (June 22, 2001); see also the nomination,† [FN] which includes much interesting information about the vessel and its history. The district court, acting through a magistrate judge on the parties' consent, see 28 U.S.C. § 636(c), denied this motion and awarded Ehorn ownership of

the *Rosinco* without further ado. *Ehorn v. Abandoned Shipwreck known as the Rosinco*, 185 F.Supp.2d 965 (E.D.Wis.2001). The court first concluded that an action against the vessel itself is proper, even though the Marshal had not arrested the ship (normally essential to a proceeding *in rem*, see Admiralty Supp.R. C(3)(a)). The court wrote that posting of notice in the courthouse is a satisfactory substitute to posting on the vessel--indeed preferable when it is submerged. Then it held that counsel's error in failing to answer within the time specified by the notice did not supply good cause for a belated filing. Because this left Ehorn as the only claimant, he prevailed by default.

\*2 The district court's assumption that only "good" cause permits an untimely answer in an admiralty case is incorrect, as we have held recently (though after the district court's decision). "Cause" is enough, and in admiralty an attorney's mistake can be "cause." See *Alter Barge Line, Inc. v. Consolidated Grain & Barge Co.*, 272 F.3d 396, 397 (7th Cir.2001). Error is understandable in a case such as this, where the filing deadline appears in a notice that was never served on the only rival claimant. Criminal prosecutors, who do not represent the state in civil cases, let alone in admiralty litigation--a body of law whose arcane rules sometimes befuddle even grizzled veterans--cannot be expected to handle these matters flawlessly. Not until well after the deadline for the answer (set by the notice at 20 days from the claim) did the proceeding first come to the attention of a lawyer authorized to represent the State of Wisconsin in civil litigation, and even then the state lacked the benefit of service. That the state managed to file an answer within two months of (some) notice to the Attorney General's office is a sign of its good faith, not of the sort of truculence that might justify a judgment against a party otherwise entitled to win--for recall that the answer, when filed, showed that the wreck belongs to the state under the statutory criteria.

True, the Department of the Interior did not list the *Rosinco* as eligible for the National Register until February 8, 2001, the day before Wisconsin filed its answer. Ehorn speculates that, if the state had answered by the end of November 2000, the court might have decided in his favor before the wreck was listed as eligible. That seems unlikely; the state *also* contends that the wreck is "embedded" in the lake bottom, and a court could not have come to a responsible conclusion on that question before February 2001. All that an earlier answer would have precipitated was discovery about the status of the wreck, and before the discovery process could have

run its course the declaration of eligibility for listing would have handed victory to the state on a silver platter. (The *Rosinco* was finally listed on July 18, 2001. As far as we know, there was no opposition to the nomination.)

We need not determine whether the district court abused its discretion in declining to accept an untimely answer--a subject on which *Alter Barge* may be a ticket good for one ride only, see 272 F.3d at 398 ("[w]e limit our holding to the facts of this case")--because the state was entitled to withhold an answer until it had been served. Let us assume without deciding that a vessel may be "arrested" without a visit from the Marshal. (That question remains open for decision when the answer matters.) Still, even in an *in rem* proceeding personal service may be essential. Admiralty Supp.R. C requires publication but does not *forbid* personal service, nor would a prohibition make sense. Usually the arrest and posting on the vessel affords notice to the vessel's owner. The normal admiralty *in rem* proceeding follows a collision, allision, or other accident of which the owner is bound to be aware. As this case shows, though, arrest in admiralty does not always ensure that the principal competing claimant has actual knowledge of the contest. There was no accident or equivalent event, no notice that was likely to come to the attention of Wisconsin--which Ehorn knew from the criminal prosecution to be his major, if not only, rival for ownership. These circumstances make it impossible to excuse Ehorn from sending written notice of the pending action. Even in an *in rem* action, the initiator must give notice reasonably calculated to alert any known competing claimant. See *Dusenbery v. United States*, 534 U.S. 161 (2002). The due process clause of the fifth amendment requires no less. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (publication is inadequate when you know who the interested parties are and how to contact them). See also, e.g., *Greene v. Lindsey*, 456 U.S. 444 (1982) (posting a notice on affected property not necessarily adequate); *Schroeder v. New York City*, 371 U.S. 208 (1962) (riparian rights; publication inadequate); *Walker v. Hutchinson*, 352 U.S. 112 (1956) (eminent domain; publication inadequate); *New York City v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953) (bankruptcy; publication inadequate).

\*3 Ehorn readily could have served the persons authorized to represent Wisconsin in admiralty proceedings. Yet he has not done so to this day. Wisconsin's time to file an answer thus has not started to run, see Admiralty Supp.R. B(3)(b)

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(Cite as: 2002 WL 1354686 (7th Cir.(Wis.)))

("defendant shall serve an answer within 30 days after process has been executed"), and the district court was not entitled to enter a default judgment for lack of a timely answer.

REVERSED AND REMANDED

†FN.

<http://www.seagrant.wisc.edu/shipwrecks/michigan/Rosinco/Rosinco1.html>

2002 WL 1354686 (7th Cir.(Wis.))

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**H**

Supreme Court of Utah.

STATE of Utah, Plaintiff and Appellant,  
v.  
James REDD and Jeanne Redd, Defendants and  
Appellees.

No. 20000556.

Dec. 28, 2001.

The Seventh District Court, Monticello Department, Lyle R. Anderson, J., dismissed informations that alleged defendants abused or desecrated dead human bodies by disinterring dead bodies at dig site known to have Anasazi ruins. The Court of Appeals, 954 P.2d 230, held that informations were properly dismissed in absence of evidence that bones or bone fragments removed by defendants had been interred. Defendants were recharged with original offense and with removal, concealment, or failure to report finding of dead body or destruction of dead body. Following preliminary hearing, the Seventh District Court, San Juan County, Lyle R. Anderson, J., dismissed new charges and issued bindover on original charges. State took interlocutory appeal. The Court of Appeals certified case. The Supreme Court, 992 P.2d 986, reversed and remanded. On remand, the Seventh District, San Juan County, Mary L. Manley, J., granted defendants' motion to dismiss both counts of the information. State appealed. The Supreme Court, Howe, C.J., held that: (1) State failed to justify refiling charges against defendants under statute prohibiting disinterring a buried or otherwise interred dead body, without authority of a court order, but (2) defendants' due process rights were not implicated by refiling charges under statute prohibiting destruction of a dead body or any part of it.

Affirmed in part, reversed in part, and remanded with directions.

West Headnotes

[1] Constitutional Law  259  
92k259 Most Cited Cases

[1] Constitutional Law  265  
92k265 Most Cited Cases

[1] Constitutional Law  268(5)  
92k268(5) Most Cited Cases

Fundamental fairness, the touchstone of due process, precludes, without limitation, a prosecutor from seeking an unfair advantage over a defendant through forum shopping, repeated filings of groundless and improvident charges, or from withholding evidence. U.S.C.A. Const.Amend. 14.

[2] Dead Bodies  7  
116k7 Most Cited Cases

State failed to provide a scintilla of evidence on element of interment and provided no new or previously unavailable evidence or other good cause to justify refiling charges against defendants, who allegedly removed or desecrated ancient human bones at an archeological site, for violating statute prohibiting disinterring a buried or otherwise interred dead body, without authority of a court order. U.C.A.1953, 76-9-704(1)(b) (1998).

[3] Constitutional Law  265  
92k265 Most Cited Cases

[3] Criminal Law  303.45  
110k303.45 Most Cited Cases

A potentially abusive practice exists where the State refiles a charge when it has been dismissed for the State's failure to provide any evidence on a clear element of the relevant criminal statute; accordingly, the presumption is that the State has violated the due process rights of defendant and is barred from refiling in such an instance excepting new or previously unavailable evidence or other good cause. U.S.C.A. Const.Amend. 14.

[4] Criminal Law  303.45  
110k303.45 Most Cited Cases

As with the other potentially abusive practices, the presumption against refiling charges can be overcome by showing that new or previously unavailable evidence or other good cause justifies refiling.

[5] Constitutional Law  48(4.1)  
92k48(4.1) Most Cited Cases

Supreme Court would presume that due process rights of defendants, who allegedly removed or desecrated ancient human bones at an archeological

site, were not implicated by refileing charges under statute prohibiting the removal, concealment, failure to report finding of a dead body to a local law enforcement agency, or destruction of a dead body or any part of it, where State did not employ any abusive practices relating to charges filed. Rules Crim.Proc., Rule 7(h)(3); U.C.A.1953, 76-9-704(1)(a) (1998).

\*1161 Jan Graham, Att'y Gen., Joanne C. Slotnik, Asst. Att'y Gen., Salt Lake City, William L. Bengé, Moab, for plaintiff.

Rod W. Snow, Denver, CO, and Walter F. Bugden, Jr., Salt Lake City, for defendants.

HOWE, Chief Justice.

## INTRODUCTION

¶ 1 The State refiled an information against defendants for violating section 76-9-704(1)(b) of the Utah Code (1995), and filed for the first time charges under section 76-9-704(1)(a), arising from defendants' alleged removal or desecration of ancient human bones at an archeological site. Dismissing both charges, the magistrate held that State v. Brickey, 714 P.2d 644 (Utah 1986), combined with the magistrate's interpretation of a Utah Court of Appeals case, State v. Morgan, 2000 UT App. 48, 997 P.2d 910, barred refileing of the previously dismissed charge.

## BACKGROUND

¶ 2 In 1996, defendants were charged with one count of abuse or desecration of a dead human body for allegedly disinterring human bones from an ancient Native American burial site near Bluff, Utah. The section under which defendants were charged provides:

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

...;

(b) disinters a buried or otherwise interred body, without authority of a court order.

Utah Code Ann. § 76-9-704(1)(b)(1995). [FN1]

FN1. Revisions to this section effective May 1999 do not affect this appeal. See Utah Code Ann. § 76-9-704 (1999).

¶ 3 Following a preliminary hearing in March 1997, the magistrate dismissed the \*1162 charge, reasoning that ancient human remains did not constitute a "dead human body" within the meaning of the statute. The State appealed.

¶ 4 Interpreting the statute, the court of appeals affirmed the dismissal on an alternative ground. See State v. Redd, 954 P.2d 230, 233-34 (Utah Ct.App.1998). Focusing on the statute's reference to dead bodies "buried or otherwise interred," the court held that this phrase required proof that the body had been intentionally deposited "into a place designated for its repose." Redd, 954 P.2d at 234. The court concluded that the State had not adduced evidence that the human remains had been "previously buried or otherwise interred." Id. at 236. Based on its interpretation of the statutory elements, the court affirmed the magistrate's dismissal of the charge. [FN2] Id.

FN2. The State filed a petition for rehearing, focusing on a single narrow legal issue. Although the resolution of that issue has no bearing at this juncture, the court of appeals included a footnote in its order denying the petition, which stated, "No party to this action should construe our opinion or this order to preclude the State from refileing the charges under the same or a more appropriate subsection of the statute."

¶ 5 In June 1998, the State refiled charges against defendants under subsection (1)(b) and then added an additional charge under subsection (1)(a) that specifically referred to "a dead body or any part of it." Utah Code Ann. § 76-704(1)(a), (b) (1995). The two charges tracked the statutory subsections as follows:

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully;

(a) removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it;

(b) disinters a buried or otherwise interred dead body, without authority of a court order.

Id. § 76-9-704(1)(a),(b).

¶ 6 Defendants moved to dismiss the case, alleging due process violations under State v. Brickey, 714 P.2d 644 (Utah 1986). They argued that refileing

should not be permitted because the charges were the same and no new evidence had been discovered. Defendants contended that where the State had failed to adduce evidence necessary to establish probable cause for a bindover, good cause for refiling had not been established. The parties stipulated that the ruling on this motion would be reserved until after the preliminary hearing.

¶ 7 In October 1998, at the preliminary hearing on the refiled charges, the State adduced evidence addressing "inter[ment]," the element that the court of appeals had earlier defined and found the evidence supporting the element lacking. The magistrate then bound defendants over on the original charge of disinterring a buried or otherwise interred body. See Utah Code Ann. § 76-9-704(1)(b) (1995). In so doing, the magistrate stated:

Were this magistrate to rule on the *Brickey* issue solely on the basis of the language in *Brickey*, he would consider himself compelled to prohibit further prosecution of defendants. However, the language of footnote 2 of the Utah court of appeals [sic] order on the state's petition for rehearing strongly suggests the creation of an additional *Brickey* exception where the prosecutor failed to recognize the need for proof of an element of the offense. This court takes that language as announcing an intention to create such an exception under the "other good cause" prong of *Brickey* and accordingly denies defendants' motion to dismiss.

¶ 8 However, the magistrate did dismiss the new charge of "remov[ing], conceal [ing] ... or destroy[ing] a dead body or any part of it." *Id.* § 76-9-704(1)(a). In so doing, the magistrate wrote:

There is no evidence that [defendants] destroyed, concealed or removed a body or even a bone. The most that can be said is that they may have moved as many as seventeen bones a few feet. This is not removal, concealment or destruction. Count I is accordingly dismissed.

¶ 9 In response to the dismissal of the "removal" charge, the State filed a petition for permission to file an interlocutory appeal. \*1163 The single issue presented was whether the magistrate erred in determining that moving human bones from their place of interment could not, as a matter of law, establish probable cause to believe the bones had been "removed," as that term is used in section 76-9-704(1)(a). The court of appeals granted the petition and then immediately certified the case to this court. We held that the State had shown probable cause to

believe the bones had been "removed," as that term is commonly used, and that, consequently, defendants should have been bound over on the charge. *State v. Redd*, 1999 UT 108, ¶ 11, 992 P.2d 986. Accordingly, we reversed and remanded the case back to the magistrate. *Id.* at ¶ 16, 992 P.2d 986. We expressly reserved judgment on whether the State was permitted to refile the [FN3] information under section 76-9-704(1)(b) as that issue was not properly before us. *Id.* at ¶ 9, 992 P.2d 986. We refer the reader to *State v. Redd*, 1999 UT 108, 992 P.2d 986, for a more particular account of the underlying facts of this case.

FN3. We refer the reader to *State v. Redd*, 1999 UT 108, 992 P.2d 986, for a more particular account of the underlying facts of this case.

¶ 10 Back before the magistrate, defendants moved to dismiss the bindover based on *Brickey*. They argued that the evidence of interment presented by the State at the second preliminary hearing was not new or previously unavailable and did not provide good cause for refiling. Defendants contended that a decision issued by the court of appeals in *State v. Morgan*, 2000 UT App. 48, 997 P.2d 910, effectively precluded interpreting good cause to include an innocent miscalculation of the quantum of evidence necessary to obtain a bindover.

¶ 11 The magistrate agreed with defendants and granted the motion to dismiss both counts of the information. The court stated:

Lack of new evidence and innocent miscalculation as to the evidence required to obtain a bindover are the two areas that *Brickey* and *Morgan* together set forth as insufficient grounds to permit a refiling of charges after dismissal. It is those very claims that the state sets forth in this case. While the practical application of these cases may be unduly restrictive on the prosecution, in light of *Brickey* and *Morgan*, this court is compelled to grant the Defendants' Motion.

¶ 12 We noted in *Redd* that there was not a *Brickey* question before us at that time. *Redd*, 1999 UT 108 at ¶ 9, 992 P.2d 986. We now address this legal issue.

#### ANALYSIS

[1] ¶ 13 We must determine whether the magistrate

correctly dismissed the two charges against defendants under the *Brickey* rule. In *Brickey* we held that for due process considerations, unless the State offered new or previously unavailable evidence or demonstrated other good cause, charges could not be refiled after a dismissal at a preliminary hearing. *State v. Brickey*, 714 P.2d 644, 647 (Utah 1986). We revisited and refined the *Brickey* rule in *State v. Morgan*, 2001 UT 87, 34 P.3d 767. [FN4] In *Morgan* we determined that when potential abusive practices are involved, the presumption is that due process will bar refiling. *Id.* at ¶ 16, 34 P.3d 767. Therefore, " 'fundamental fairness,' the touchstone of due process, precludes, without limitation, a prosecutor from seeking an unfair advantage over a defendant through forum shopping, repeated filings of groundless and improvident charges, or from withholding evidence." *Id.* at ¶ 15, 34 P.3d 767. However, we determined that when a prosecutor innocently miscalculates the quantum of evidence necessary to bind over a defendant, due process violations are not necessarily implicated when charges are refiled. *Id.* at ¶ 19, 34 P.3d 767. We therefore held that an innocent miscalculation is a subset of "other good cause" under the *Brickey* rule, allowing refiling, while emphasizing that the miscalculation must be innocent and not used for purposes which would violate due process rights of the defendant. *Id.* In light of this interpretation, we turn to the case before us and address each charge in turn. A proper interpretation of case law is a question of law which we review for correctness, according no deference to the magistrate's legal conclusion. \*1164 See *State v. Morgan*, 2001 UT 87 at ¶ ---, 34 P.3d 767.

[FN4. We granted certiorari to review the court of appeals' decision in *State v. Morgan*, 2000 UT App. 48, 997 P.2d 910.

#### I. UTAH CODE § 76-9-704(1)(b)

[2] ¶ 14 Defendants were initially charged with the violation of section 76-9-704(1)(b), which provides:

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

...;

(b) disinters a buried or otherwise interred dead body, without authority of a court order.

Utah Code Ann. § 76-9-704(1)(b) (1995).

The magistrate dismissed the charge on the basis that

the ancient bones were not a dead body under the statute. The State appealed, and the court of appeals outlined the clear elements of a prima facie case based on the statute. First, the State must show that the dead body was "buried or otherwise interred." *Redd*, 954 P.2d at 234. Second, the State must show that the defendant disinterred the body. *Id.* Third, the State must establish the mens rea that the defendant acted intentionally when he or she disinterred the interred dead body. *Id.* Although not labeled first through third in the statute, the State's experienced legal counsel should have been able to extrapolate these three simple elements and provide evidence sufficient for a bindover.

¶ 15 The court of appeals rebuffed the State's contention that the first element cannot be separate from the second, stating:

We presume that when the Legislature chose the terms "disinter" and "inter" in its prohibitions, it intended to use both terms as they are normally understood. Accordingly, we must conclude that the Legislature intended this subsection to prohibit the disinterment only of dead bodies shown to have been intentionally deposited in a place of repose. Further, any interpretation that would eliminate the interment requirement would render the language of subsection 76-9-704(1)(a), which specifically prohibits the removal or destruction of any dead body, mere surplusage. See Utah Code Ann. § 76-9-704(1)(a)(1995) (prohibiting "intentionally and unlawfully ... remov[ing] ... or destroy[ing] a dead body or any part of it").

*Id.* at 235.

¶ 16 The court continued that "even viewing the evidence in the light most favorable to the prosecution, there was *no evidence* presented at the preliminary hearing which would support the first required element that the bones ... had been interred." *Id.* at 235-36 (emphasis added). Moreover, the court also held that "the State called no witnesses, expert or otherwise, to establish that these bones were intentionally deposited in the earth in a place of repose." *Id.* at 236. The court concluded that the "State failed to present a quantum of evidence sufficient to submit the case to a trier of fact on an essential element of the crime charged." *Id.*

[3] ¶ 17 While we agree with the court of appeals that the State failed to present evidence on an essential element of the crime, we disagree with the court's conclusion that this is an instance where the State innocently miscalculated the quantum of evidence necessary for a bindover. Indeed, the State

failed to provide a scintilla of evidence on the element of interment. We hold that a potentially abusive practice exists where the State refiles a charge when it has been dismissed for the State's failure to provide any evidence on a clear element of the relevant criminal statute, as the record bears out in this instance. Accordingly, the presumption is that the State has violated the due process rights of defendant and is barred from refiling in such an instance excepting new or previously unavailable evidence or other good cause. The State has provided no new or previously unavailable evidence or other good cause to justify refiling section 76-9-704(1)(b) in this case. Our holding is consistent with our decision in Brickey where the prosecutor failed to introduce any evidence of an element of forcible sexual assault, and we held that due process rights of the defendant were therefore violated when the prosecutor refiled the charge. Brickey, 714 P.2d at 645, 647-48. We affirm the dismissal of this charge.

**\*1165 II. UTAH CODE § 76-9-704(1)(a)**

¶ 18 In State v. Redd, 1999 UT 108, 992 P.2d 986, the only issue before us on appeal was the interpretation of section 76-9-704(1)(a), which provides:

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

(a) removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it.

Utah Code Ann. § 76-9-704(1)(a) (1995).

¶ 19 As we noted in Redd, this subsection is subject to two different readings.

First, it can be read as prohibiting only (i) the removal, concealment, or failure to report the finding of an intact body, or (ii) the destruction of an intact body or any part of it... Alternatively, the statute could be read as prohibiting (i) the removal, concealment, failure to report the finding of, or the destruction of (ii) a dead body or any part of it.

Redd, 1999 UT 108 at ¶ 12, 992 P.2d 986. For public policy reasons, we concluded that the legislature must have intended the second alternative. By so doing, we determined that the statute "will protect partial remains of many people buried long ago in crude graves such as pioneers, war dead, or victims of horrendous accidents or crimes." Id. at ¶ 14, 992 P.2d 986. Reviewing the ample evidence in the record, we concluded that defendants had "removed" parts of a "dead body" and held that the magistrate erred in not binding over defendants for

trial under section 76-9-704(1)(a).

[4] ¶ 20 As referenced above, in Morgan we determined that when potential abusive practices are involved, the presumption is that due process will bar refiling. Morgan, 2001 UT 87 at ¶ 16, 34 P.3d 767. These potential abusive practices include forum shopping, repeated filings of groundless and improvident charges for the purpose to harass, or withholding evidence. Id. at ¶ 15, 34 P.3d 767. Earlier in this opinion, see ¶ 17 supra, we added to the list another potentially abusive practice that would prevent refiling because of due process concerns: A presumptively abusive practice occurs when a prosecutor refiles a charge after providing no evidence for an essential and clear element of a crime at a preliminary hearing. As with the other potentially abusive practices, the presumption against refiling can be overcome by showing that new or previously unavailable evidence or other good cause justifies refiling.

[5] ¶ 21 Turning to the present case, the State has not employed any of these abusive practices relating to the charges filed under section 76-9-104(1)(a). We held in the previous Redd case that the State provided sufficient evidence for a bindover on section 76-9-704(1)(a), and we do not need to reanalyze that issue here. Redd, 1999 UT 108 at ¶ 11 15, 992 P.2d 986. Therefore, we presume that the due process rights of defendants were not implicated by refiling where the State did not employ an abusive practice because "[t]he dismissal and discharge do not preclude the State from instituting a subsequent prosecution for the same offense." Utah R.Crim. P. 7(h)(3). We conclude that the magistrate erred in not binding over defendants on this charge.

**CONCLUSION**

¶ 22 We affirm the dismissal of the charge in the information based on section 76-9-704(1)(b). We reverse the dismissal of the charge based on section 76-9-704(1)(a) and direct the magistrate to bind over defendants on this charge.

¶ 23 Associate Chief Justice RUSSON, Justice DURHAM, Justice DURRANT, and Judge MOWER concur in Chief Justice HOWE's opinion.

¶ 24 Having disqualified himself, Justice WILKINS does not participate herein; District Judge DAVID L. MOWER sat.

# STEALING HISTORY:

THE ILLICIT TRADE IN CULTURAL MATERIAL

*Neil Brodie, Jenny Doole and Peter Watson*

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The McDonald Institute for Archaeological Research  
Downing St  
Cambridge CB2 3ER  
Tel: 01223 333538 Fax: 01223 333536

ICOM UK  
SEMS Office  
The Garden Room  
Historic Dockyard, Chatham  
Kent ME4 4TE  
Tel 01634 405031 Fax 01634 840795

Museums Association  
42 Clerkenwell Close, London EC1R 0PA  
Tel 020 7250 1789 Fax 020 7250 1929  
E-mail [info@museumsassociation.org](mailto:info@museumsassociation.org)

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*The report was overseen by a steering group made up as follows:*

*Patrick Boylan, Gaynor Kavanagh  
Max Hebditch (chair), Louise Smith, Mary Yule*

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# STEALING HISTORY:

## THE ILLICIT TRADE IN CULTURAL MATERIAL

Neil Brodie, Jenny Doole and Peter Watson

This report reveals the illicit exploitation of the world's cultural resources - a destructive and often criminal enterprise. Modern day looting is greater in scale than any carried out in the past, with results that are usually beyond repair. The damage caused to the heritage of humanity and to the history and traditions of living communities is appalling. Action is needed now to stop this plunder.

The report is concerned with items that are being illicitly removed from their original contexts. The focus is on archaeological material, but examples are included from areas as diverse as palaeontology, architectural sculpture and the material heritage of communities throughout the world.

The report does not attempt to discuss the illicit trade in fine art, nor the related issue of the repatriation of items that have been in museum collections for decades, nor Nazi war loot, nor indeed current cases of theft from museum and private collections. The trade in stolen fine art is also now of such a scale, and is so enmeshed with other criminal activities such as money laundering, that like the trade in cultural material, its full investigation would require a separate report.

This report starts with a description of the illicit trade in cultural material, its organisation, the destruction it causes and the role of the art trade in the UK. Legal deterrents and loopholes and the roles of government are discussed next. Finally, consideration is given to what measures might be taken by museums to protect themselves from unwitting participation in the trade and what role they might play in impeding it.

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(NB. Throughout this report the term 'provenance' is used to mean the 'original findspot' of an item, in its usual archaeological or geological sense. This is distinct from the normal fine-art usage of the term 'provenance', where it is used to mean 'ownership history'.)

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# FOREWORD

This is a very good report. It is good, because it relentlessly calls attention to one of the most destructive attacks on human heritage. Gradually, inch by inch, we are realising that much of our cultural heritage is being lost as a result of greed or wilful destruction. And slowly but surely we are starting to care.

We hear about a mosque, set on fire in Bosnia and about a bomb attack on an orthodox church in Kosovo. And we are indignant at the brutality. But when we pass by a gallery displaying orthodox icons we do not immediately realise that some, or even many, of them may well have been stolen from churches in Eastern Europe.

We don't hear so much about the temple of Banteay Chmar in Cambodia, cut to pieces with power tools and sold in antique shops all over the world. Outright destruction in war enrages us, but looting and theft are equally destructive and are a real threat to the culture of humankind, exactly as the killing and commercialisation of rare living beings are a threat to the natural environment. It is not a new phenomenon: down the ages warriors have destroyed many monuments and sites and thieves have robbed many tombs. But the scale on which the destruction now takes place is unprecedented.

There is no reason to remain diplomatic. And this report isn't. It gives us all the details and it tells us who is to blame. *'Nobody has to collect illicit material'* is one of its key sentences. It is a shame that all kinds of false arguments are still used to justify buying cultural material that is obviously or probably illicit. Collectors have claimed that the trade in cultural material helps promote a universal appreciation of human creativity, but, as the report clearly states, it is a one-way trade. There are not many Malinese or Cambodian collections with high-quality Tudor furniture or French 18th-century statues.

The solution to the illicit trade in cultural material is not a simple one. Protection of sites, churches and museums; good documentation; a well functioning national and international legal framework; codes of ethics; and education and awareness-raising are all important.

The solution lies ultimately in the hands of the customer, or collector, as the report says. As long as objects are being bought without indication of provenance, they will continue to be offered that way. However, many collectors are still not even vaguely aware of the damage done. A tourist buying a small piece of stone, coming from a vast archaeological site, may think that this one small piece doesn't matter that much. The seller may be of the same opinion. Thus education is important, education in the countries of origin and education in the countries where the buyers come from. Education is not the whole answer, but it is a powerful tool in the struggle.

Museums and museum organisations could do more in this area. Today, museums are much more careful with collecting and buying than they were in the past. There are many examples of guidelines, like the ICOM Code of Ethics, to which they generally adhere. But museums could do more to raise people's awareness of the destructive power of the illicit trade.

This report does just that. And that is why it is exemplary.

**Manus Brinkman, Secretary General, International Council of Museums**

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# SUMMARY OF RECOMMENDATIONS

## **1 Recommendations to Her Majesty's Government**

- 1.1. HM Government should proceed to ratify both the 1970 UNESCO and 1995 Unidroit Conventions forthwith. This would:
  - prevent the United Kingdom being used as a market place for material which was, in the first instance, obtained illegally (by, for example, controlling its import). By failing to ratify it can be argued that the United Kingdom condones criminal behaviour abroad.
  - provide a means for reclaiming material exported illegally from the United Kingdom much of which, at the present time, is lost.
- 1.2. HM Government should take steps to make the system for licensing exports of cultural material fully comprehensive, and to improve compliance and data collection. No new legislation is needed. This would:
  - establish the value and pattern of the international trade in cultural material, and so help guide government policy
  - encourage the development of an open market
  - help to protect material originating within the United Kingdom
  - circumvent the need for a list of important cultural property to be maintained as a requirement of implementing the 1970 UNESCO Convention
- 1.3. HM Government should encourage 'transparency' in the trade by requiring that auction houses and dealers record and, when it is in the public interest, disclose the names of individuals or organisations from whom they purchase material.
- 1.4. HM Government should review whether tax benefits should be allowed to accrue to individuals in respect of unprovenanced material, for instance in the Acceptance in Lieu scheme for inheritance tax and the Conditional Exemption scheme.
- 1.5. HM Government should review whether it is appropriate for the Government Indemnity Scheme to continue to cover loans of unprovenanced material to UK museums.
- 1.6. HM Government should proceed to ratify the 1954 Hague Convention, along with the 1999 Second Protocol.
- 1.7. HM Government should resist US pressure at future meetings of the WTO for the abolition of trade controls on cultural material.

## **2 Recommendations to UK museum organisations**

- 2.1. A central advisory point should be set up to advise museums about the necessary export documentation needed to establish that an item has not been exported illegally and to make available the export legislation of all countries. (UNESCO holds copies of relevant legislations from all states party to the 1970 Convention but, in general, such information and advice on its interpretation is difficult to come by.)
- 2.2. Within the museum community there are informal networks of communication. However, these are of limited benefit as many curators are unaware of them. It

would be helpful if a central register of advisers could be established so that, for instance, if information was needed about a particular palaeontological specimen a curator could approach the geology adviser, who could then direct the query to the most suitable authority.

- 2.3 The 'museum of last resort' argument (see Section 4.2) seems to impose a responsibility without at the same time providing clear guidance. The Museums Association, or Society of Museum Archaeologists, should formulate a set of guidelines to be used by museums with small acquisition budgets that are faced with large quantities of unprovenanced material brought to their attention by treasure hunters.

### **3 Recommendations for museums**

The ICOM and Museums Association codes of ethics require that museums should not accept on loan, acquire, exhibit, or assist the current possessor of, any object that has been acquired in, or exported from, its country of origin (or any intermediate country in which it may have been legally owned) in contravention of that country's laws. This is also a requirement of the guidelines for the Registration Scheme for museums in the UK. In practice this means that museums should observe the following (and address appropriate points in their acquisition policies):

- 3.1 Museums should not acquire provenanced items whose accompanying documentation fails to comply with the export regulations of their country of origin, unless there is reliable documentation to show that they were exported from their country of origin before 1970.
- 3.2 Museums should not acquire unprovenanced items because of the strong risk that they have been looted, unless they are following the 'last resort' argument outlined in Section 4.2 or there is reliable documentation to show that they were exported from their country of origin before 1970.
- 3.3 Museums should follow the guidelines on due diligence set out in this report, which should be addressed in their acquisition policies.
- 3.4 Museums should apply the same strict rules to gifts and bequests and loans as they do to purchases.
- 3.5 Museums should avoid appearing to promote or tolerate the sale of unprovenanced material through inappropriate or compromising collaborations with dealers.
- 3.6 Museums should decline to offer expertise on, or otherwise assist the current possessor of, unprovenanced items because of the risk that they may have been looted.
- 3.7 Museums should inform the appropriate authorities if they have reason to suspect an item has been illicitly obtained.
- 3.8 Museums should comply with the 1970 UNESCO and 1995 Unidroit conventions, if legally free to do so.
- 3.9 Museums should seize opportunities to raise public awareness of the scale and destructive impact of the illicit trade.

# 1. THE ILLICIT TRADE

## 1.1 THE END OF THE AGE OF PIRACY?

In May 1969, during an acquisitions meeting at the Metropolitan Museum of Art in New York, the then president of the Board of Trustees quickly gained approval for the purchase of a batch of antiquities, later known as the Lydian Treasure, thought to be from a site in Turkey. The meeting may well have questioned the purchase as there was reason to believe that the antiquities had been smuggled out of western Turkey and their acquisition would break Turkish law, although not US law. In the event, however, the purchase went through unopposed. And, indeed, why not? It was not particularly controversial. Only a couple of years earlier the Boston Museum of Fine Arts had bought a collection of gold jewellery, also thought to be from Turkey, and in the modern world this was how museums, particularly in the United States, built up their collections. If it was legal it was ethical. It was the material that counted, not the manner of its first acquisition. Yet in 1993, after a prolonged lawsuit, the Metropolitan was forced to hand back the material to Turkey and received no compensation in return. What had happened in the meantime? Why did such an unremarkable purchase become the subject of controversy and object of shame - an expensive and embarrassing mistake?



**Gold spool from the Lydian Treasure**

### The background

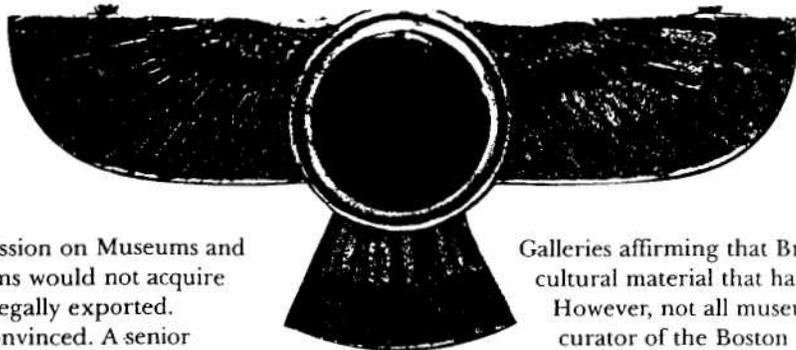
During the late 1960s frustration was mounting as archaeologists tried to make sense of the material then pouring into museums. 'Treasures' such as those bought by Boston and the Metropolitan raised more questions than they answered. Were the objects in the Lydian Treasure really all found together, or were they assembled by a dealer and passed off as a coherent find solely to increase their value? Just where exactly had they been found anyway? Was it really Turkey, really the west? Where had they been deposited? One grave? Two? Half a dozen? A sanctuary, a house or a hole in the ground? What else had been present with the valuables now in the museums, but not precious enough to be retained? What pots, stones and bones? There was a growing realisation that unprovenanced museum acquisitions provided fertile ground for unverifiable and thus sterile speculation, but were of little use for productive research.

Archaeologists were also becoming concerned about the increasing amounts of damage being caused to archaeological sites by looting aimed at recovering valuable antiquities for sale to museums and collectors in Europe and North America. They began to question the role played by western museums in supporting the market and thus, even if only indirectly, in contributing to the ongoing destruction.

At the same time there was a growing awareness in countries around the world that their cultural heritage was being plundered at an ever quickening rate. The laws of many countries were being broken or ignored, and there was no redress. The Metropolitan might find it convenient not to question the source of the Lydian Treasure, but to the Turkish government its illegal excavation and export was an attack on the history and sovereignty of the state.

### The ethical revolution begins

In 1970 everything changed. The International Council of Museums (ICOM) issued an influential statement on the ethics of museum acquisitions and in April of that year the Museum of the University of Pennsylvania announced, in what has since come to be known as the Pennsylvania declaration, that it would no longer acquire an antiquity without convincing documentation of its legitimate pedigree. The Harvard University museums followed suit in 1971 and the Chicago Field Museum of Natural History in 1972. In the same year John D Cooney, curator of ancient art at the Cleveland Museum, announced publicly his belief that 95% of all antiquities in the United States had been smuggled, while in the United Kingdom a joint declaration was issued by the Museums Association, the British Academy, the British Museum and the Standing



*Pectoral necklace of gold and cloisonné from the Lydian Treasure*

Commission on Museums and museums would not acquire been illegally exported. were convinced. A senior Museum of Fine Arts, which to of unrestricted collecting, argued that it was all very well for Pennsylvania, with its active programmes of field research, to withdraw from the market, but for Boston, with no tradition of fieldwork, acquisitions on the open market were essential for its further development.

Galleries affirming that British cultural material that had However, not all museums curator of the Boston this day continues with its policy

The Pennsylvania declaration was followed in November 1970 by the adoption by UNESCO of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, the title of which is self-explanatory. Sadly, the government of the United Kingdom refused to ratify the convention, and continues to refuse to do so (see Section 3.3).

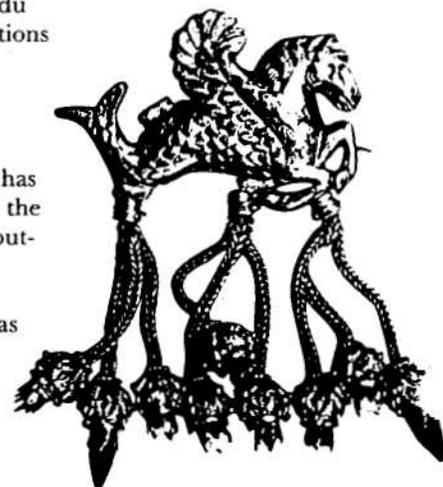
Although the UNESCO Convention does not place any legal obligations on museums in countries which are not signatories, its provisions have been incorporated into the ethical codes of relevant professional organisations, including those of the Museums Association in the United Kingdom and the International Council of Museums. Thus museums are now under an ethical obligation to act in accordance with the convention and its provisions. Crucially, museums must not acquire material illegally exported since UNESCO adopted the convention in 1970. Whatever its status in law, the 1970 UNESCO Convention changed forever the ethical landscape of the museum world. Thomas Hoving, director of the Metropolitan at the time of the Lydian purchase preferred a more colourful analogy: 'the age of piracy has ended'.<sup>1</sup>

#### **The situation now**

Or had it? Since 1970, although the morality of the black market in cultural material has been questioned by most and condemned by some, it continues to thrive. Museum customers may be fewer in number but they persist, and they have been joined by a new breed of private collector – the speculator – interested in monetary rather than historic value. The increasing numbers of 'culture consumers' and the reduced barriers to communication and transport have combined to open up new markets, and cause more destruction. In recent years the illicit trade has been marked by:

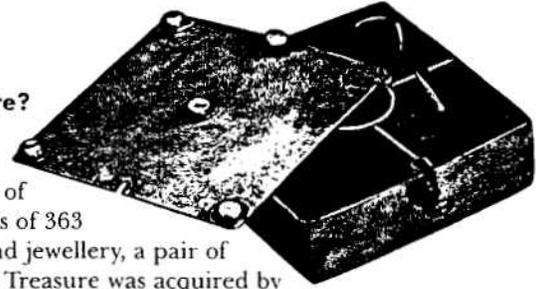
- The opening up of Asia and Africa, and the appearance on the market of large quantities of material from these areas.
- A greater interest in ethnographic material.
- The targeting of previously immune religious monuments. Buddhist and Hindu temples of Asia are vandalised while in Europe Christian churches and institutions are stripped of their icons and frescoes.
- The reappearance of a trade in palaeontological material.
- The use of improved means of detection and destruction. The metal detector has found its place alongside the long probing rod of the Italian tomb robber and the car aerial of the American pot-hunter. Bulldozers, dynamite and power tools out-perform picks and shovels.
- The appearance of new ways of marketing and selling cultural material, such as mail-order catalogues and Internet auctions. Internet sales in particular have opened the market to millions of potential new customers and are virtually impossible to police.

*Gold pin with acorn tassles from the Lydian Treasure*



**Right: Silver cosmetic box with gold studs, and silver spoon**

**Below: Silver alabastron from the Lydian Treasure**



### **But what happened to the Lydian Treasure?**

The Lydian Treasure had been looted early in 1966 from several Iron Age burial mounds in western Turkey. Thought to date from the age of the legendary King Croesus of Lydia, it consists of 363 objects which include gold and silver vessels and jewellery, a pair of marble sphinxes and some wall paintings. The Treasure was acquired by the Metropolitan Museum over the period 1966-70 from John Klejman of Madison Avenue and the Swiss dealer George Zacos. The Metropolitan knew at the time of its purchase that the material had been looted and exported illegally - a junior curator had been to Turkey and visited the looted site, and had managed to identify the matching parts of a pair of sphinxes held by the museum - and did not mount a display until 1984, when the material was exhibited without provenance under the misleading title of the East Greek Treasure. Its hesitation was in part prompted by the international outcry which had greeted the Boston museum's inclusion of their own illegally exported Turkish gold in an anniversary exhibition of 1970. The Metropolitan didn't exhibit its hoard until things cooled down - the climate of opinion as much as its purchase.

In the meantime the Turkish authorities, who were aware that a large quantity of material had been moved out of their country, had arrested and interrogated the looters. From descriptions provided during the interrogation they were able to recognise some of the material illustrated in the Metropolitan's 1984 display catalogue. In 1986 Turkey formally demanded the return of the Treasure, and in 1987 filed a lawsuit against the Metropolitan.

The Metropolitan failed to do the decent thing. Although caught red-handed and with deeply incriminating documentation in the museum's files, it went to court in an attempt to change the State of New York's rules about the period of time in which a claim for stolen property is allowed to proceed, hoping to keep possession. But in 1990 its case was dismissed. A team of Turkish and American archaeologists was allowed to examine relevant material and documentation in the Metropolitan. In 1993 the museum finally agreed to return the Treasure and the lawsuit was dropped. The Metropolitan had bought the Treasure for about \$1.5 million, the cost of their court case has not been disclosed. It was an irresponsible waste of money. If such a situation was to arise in the UK then the trustees who authorised the purchase might find themselves personally liable for the financial loss incurred by the museum.

### **1.2 CONTEXT, CONTEXT, CONTEXT!**

Throughout the 19th and even much of the 20th century, amateur and commercial collectors and dealers helped stimulate the development of the modern disciplines of anthropology, archaeology and geology. But it was with the recognition of the importance of context - the social or stratigraphical relationships of the collected objects - that these disciplines moved beyond connoisseurship to reach their present state of development. The interests of scholars and the market began to diverge, although it might be argued that it has taken several decades for the consequences of this divergence to fully manifest themselves.

An object and its context together, when properly recorded and interpreted, can reveal much more than either one in isolation. An apparently unimportant antiquity, for instance, might acquire great significance if it can date associated material or features, or is found far removed from its usual area of distribution. Thus sherds of mass-produced Roman pottery are, by themselves, of

little interest, but when they are found *in situ* during an archaeological dig in India they cause a great deal of excitement. They help to date the site and at the same time cast light on its trade relationships.

Even the original findspot of a piece, its provenance, can be important, provided that it is reliable. It is a minimal context. Attributions such as 'said to be from...' are worse than useless. They engender a feeling of certainty, a feeling that something is known about a piece when, in reality, it is not. 'Provenance undisclosed' would be a more accurate, and rather more telling, qualifier.

### **Context means information**

It is also possible to extract information about past climates and environments from properly contextualised palaeontological and archaeological specimens, which have become a valuable resource as concerns grow over global warming and increasing levels of pollution. For example, oxygen isotope levels in the shells of stratified foraminifera microfossils reflect past levels of ocean salinity and thus degree of glaciation. In York, pollution of the River Ouse over the past 1,900 years can be demonstrated from changes in the species of fish and molluscs found in dated archaeological contexts.

Improving scientific techniques continue to increase the importance of context. For centuries pots have been rigorously cleaned to reveal their shape or decoration – their aesthetic qualities – which determine their price on the market. But now chemical and microscopic analyses of their residual contents can reveal much about their past contents – ancient food or trade goods. A recent cover of the scientific journal *Nature* carried the headline 'Feasting on Midas's Riches' and inside reported chemical analyses of residues preserved in bronze bowls from an eighth-century BC tomb in Gordion, central Turkey – the time of the legendary King Midas.<sup>2</sup> The analyses revealed the remains of a great funerary feast – a spicy meal of sheep or goat washed down with a potent brew of barley beer, wine and mead. How many illicitly-traded pots or metal vessels are so examined? When the adhering soil is washed off a looted pot to reveal its financially valuable surface, how much information about ancient society is lost?

Ethnographic material too has a context: the function and meaning that an object has in the society from which it is acquired. During colonial times, when many ethnographic collections were assembled, such details were rarely recorded; objects were collected for the quality of their craftsmanship or for their beauty. In consequence, these collections often reveal more about the collectors themselves – their tastes and prejudices – than the people and societies from which they collected. It is clear now that the significance of an ethnographic item is enhanced greatly when it is accompanied by oral or written testimony concerning its use or meaning. Indeed, today, sound and video recording are often an essential part of an object's documentation.

### **The human right to heritage**

An ethnographic object without contextual information is an object stripped of meaning – it reflects back at us our own conceptions of beauty but tells us little of other people and other places. It leaves us ignorant of its original social value and purpose or, worse, puts us at risk of misunderstanding them. For the society that produced such an object – removed from its traditional setting of worship and care – it might be an act of desecration. The fundamental right of a people to their cultural heritage has been denied.

Archaeological remains are often vital for the rediscovery of a people's history while 'ethnographic' material provides a visible and easily accessible reminder of a people's

**An ethnographic object without contextual information is an object stripped of meaning**

**The destruction  
of cultural  
heritage should  
be treated as a  
violation of  
human rights**

traditions and accomplishments. Their removal steals from a people part of their identity, part of their collective psyche. In view of this some have argued persuasively that the right to a cultural heritage is a fundamental, human right. Consequently, the destruction of cultural heritage should be treated as a violation of human rights.

**1.3 A JUSTIFIABLE TRADE?**

The illegal removal of objects from their country of origin, and the damage caused by their removal from their original contexts cannot be defended. However, some persist in trying to justify the illicit trade. US antiquities dealer Torkom Demirjian for instance was recently reported as saying 'Archaeological considerations are no longer paramount; now there is increasing emphasis on aesthetics over rarity'<sup>3</sup> Here are some of the arguments used to support statements such as that attributed to Demirjian.

- Some collectors have claimed that the trade in cultural material helps promote a universal appreciation of human creativity, and in so doing engenders mutual respect in our diverse and often divided world. The trade, it is argued, is thus a force for good.

But it is a one-way trade. Cultural objects are illicitly moved from south to north, from east to west, from the third and fourth worlds to the first, and from poor to rich. There is no countervailing flow. As the collections and museums of Europe and North America begin to accumulate looted Djenné terracottas from Mali for instance or Khmer sculpture stripped from the temples of Cambodia, their counterparts in those countries do not benefit from acquisitions of the treasures of, say, Ancient Greece or Rome. The illicit trade in cultural material is not a force for international harmony and understanding, it promotes division and resentment.

- Most, if not all, collectors (and some academics and curators too) regard antiquities as works of art. They argue that regardless of their origin they should be put on display for all to see and appreciate – a celebration of human artistic genius that transcends time and space. 'Isn't there a dimension to art that is much more worthwhile than the pursuit of context?' asks George Ortiz, a major collector of antiquities.<sup>4</sup> Ethnographic material, too, is often seen in this light (although interestingly no African language contains a word, or group of words, which equate to the western concept of art) – and so-called 'decor fossils' are collected because they delight the eye.

**Lorry of Cambodian  
sculpture looted from  
the Khmer temple of  
Banteay Chmar  
impounded at the Thai  
border, 1999  
Photo: R Thosarat**



Of course, art is in the eye of the beholder, but claims of art cannot be allowed to justify destruction and illegal looting. Many objects marketed as works of art have been ripped from historical buildings or monuments. The method of their acquisition has often entailed the *destruction* of artistic or architectural masterpieces.

In Cambodia decorative friezes and sculptures are being sawn off Khmer period temples. A single lorry stopped on the Cambodian-Thai border was found to contain 117 sandstone carvings from the 12th-century AD temple of Banteay Chmar. One Bangkok dealer was offering a loot-to-order service for parts of this temple. During the sustained looting raid, so much material was chainsawed from the walls that the temple is now on the brink of collapse. Paradoxically, at the remote temple of Banteay Srei, described as a 'jewel of Khmer art', the faces have been hacked from most of the outstanding carvings to supply collectors who argue they *appreciate* art.



**KANAKARIA MOSAIC**

The church of the Panagia Kanakaria at Lethiokomi in northern Cyprus was built in the sixth century AD when Cyprus was still part of the Byzantine Empire. The ceiling of its eastern apse was decorated with a brightly coloured mosaic depicting the Virgin holding the Christ child, flanked by two archangels, and bordered by the heads of the Apostles. Down through the centuries the mosaic survived earthquakes and invasions until sometime in the late 1970s when it was unceremoniously packed out, figure by figure, and smuggled off an island. Two pieces were recovered in 1984 but nothing was heard of the remainder until 1988 when in Geneva airport two archbishops containing one million dollars in \$100 notes were handed over in exchange for four further fragments, including the top half of the Christ child, now cut in two. Once back in the United States however when their new owner, the art dealer, Peo Goldberg tried to sell them, the provenance of the pieces was exposed and in 1989 the Cypriot church sued successfully for their return.

The Kanakaria mosaic was composed using numerous small tesserae of coloured glass and stone, some capped with silver and gold, which were set slightly out of alignment so as to catch and reflect the light at different angles. This clever technique imbued the mosaic with a semblance of life. In the shadowy candle lit church it would glint and shimmer, the expressions on the faces portrayed would shift and seem to come alive. When they were torn from the church ceiling, however, they were pressed flat for easy transport and further damaged in transit. On arrival in the United States attempts to restore the mosaics destroyed the original setting of the tesserae and the brilliance of the colours was dimmed by a thin film of adhesive and filler. The damage caused is such that the mosaics will never again be seen in life on the ceiling of the damaged Kanakaria. They rest now in a Cypriot museum. It seems ironic that to supply the art market, the artistic genius of the mosaic was destroyed forever.



Photo: Department of Antiquities, Cyprus

*Saint figure from the Kanakaria mosaic before looting and dimmed and damaged after looting*



**1.4 THE ECONOMICS OF LOOTING**

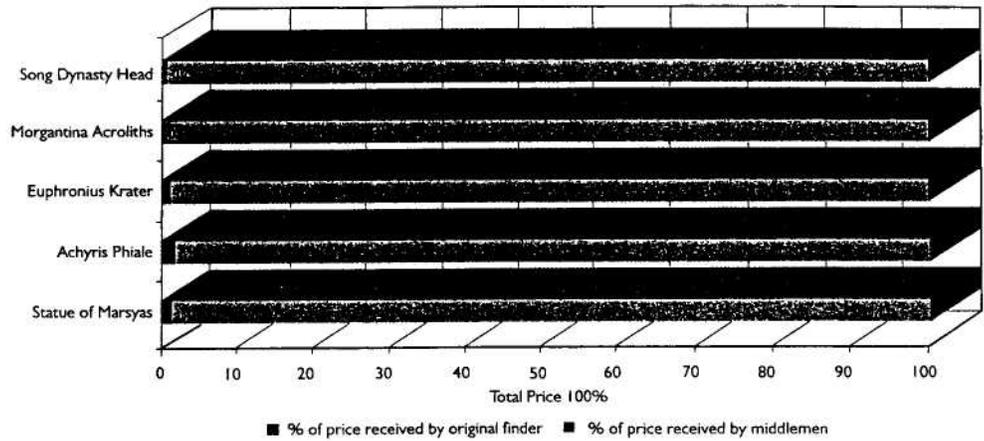
The illicit trade has also been justified on the grounds that it brings economic benefit, that the purchase of cultural material injects hard currency into hard-pressed local economies. But local people usually receive very little in return for destroying their cultural inheritance. Furthermore, asset-stripping the finite resource of cultural heritage is, by definition, unsustainable in economic terms.

**Profit margins**

Over the years a number of cases of illicit trading have been investigated, usually when a valuable 'treasure' has been reclaimed or its status questioned, and several exchange chains have now been revealed. They provide some information about the sums of money that change hands and the profit margins involved, and for that reason they are collected together here and summarised in Figure I, which shows what percentage of the final market price was received by the original finder/excavator/thief. It is clear that in all cases over 98% of the final price was destined to end up in the pockets of the middlemen; the original finder received very little and the final buyer can hardly claim to have obtained a bargain. These percentages are not unusual; it has been estimated, for instance, that in the Petén region of central America looters receive about \$200-\$500 each for vessels which might ultimately be sold for \$100,000.

The introduction to a catalogue of Nigerian Nok and Sokoto terracottas exhibited in Luxembourg pointed to the investment opportunities offered by Africa's rich cultural traditions. The situation with palaeontological specimens is no better. A fossil turtle

	% of price	% of price received by middlemen
Stature of Marsyas	1.4	98.6
Achyris Phiale	1.7	98.3
Euphronius Krater	0.9	99.1
Morgantina Acroliths	0.1	99.9
Song Dynasty Head	0.7	99.3



**Figure 1**  
**The percentage of the final market price of an antiquity received by the original finder**

bought from its finder in Brazil for \$10 fetched \$16,000 when sold in Europe while a landowner in the United States accepted \$2,000 for a late Cretaceous Ankylosaur which was subsequently sold for \$440,000.

#### **Exploiting non-renewable cultural resources**

These figures reveal the simple truth of the illicit trade – there are large sums of money to be made, very little of which ever reaches the original finders. But the story does not end there. Once commodified on the western market, objects continue to circulate, for years, even centuries perhaps, and to generate money in transaction after transaction. None of this money goes to the original finders or owners, or their descendants, who might continue to live and work in poverty, with their initial money long spent and their resource worked out. And this latter point is critical. Sometimes it is pointed out, with some justification, that what is considered a small sum in the west might be a substantial amount in a hard-pressed subsistence economy, and no-one could complain of people selling pots or fossils if it helped feed their families. But if culture or environment is regarded as an economic resource then selling it abroad is a poor strategy of exploitation. Cultural heritage is, after all, a non-renewable resource.

**In the long-term, looting undermines the economic base of a community**

On the Kenyan coast the situation is quite different. Looters are less active and archaeological remains are carefully curated. In the year 1988-89, of the nearly 250,000 people who visited coastal museums and monuments at least half were tourists, with foreign currency to spend. And the tourists come year after year. The development of cultural tourism has been, and continues to be, of significant benefit to the Kenyan economy. A similar picture emerges at the badly looted but now carefully excavated site of Sipán, in Peru. In 1987, prior to the excavation, tourists were virtually unknown in the local town of Chiclayo, but as a result of the fabulous archaeology now displayed there, tens of thousands visit every year, injecting an estimated \$14 million into the local economy – every year. Long-term cultural tourism is bringing far more benefit than the one-off payment the looters (a single family) are reported to have earned from their find (see box).

The purchase of looted antiquities is not a humanitarian act. In the long-term, looting undermines the economic base of a community just as surely as it depletes its heritage.

## SIPÁN

In 1987, experienced looters tunneled into a massive mud-brick pyramid near Sipán, north-western Peru, and happened upon a magnificently rich burial, dating to the pre-Inca Moche period (800-200BC). They set in chain a series of events which would culminate in the biggest ever seizure of illicit antiquities in the USA.

By the time archaeologists arrived at the site, sacks of grave goods had already been removed. Under armed guard, archaeologist Walter Alva began a rescue excavation. He faced intense hostility from the local population who saw the riches in the pyramid as their birthright, left to them by their ancestors in wealthier times. The excavation uncovered a further series of royal tombs and for the first time ever archaeologists had the opportunity to examine unlooted royal Moche burials. This one opportunity improved our understanding of the culture, galvanised Peruvian archaeology and attracted world attention. Gradually, through a series of bold educational campaigns the local population were won over. The ancient 'Lords of Sipán', as they are now known, *have* proved a rich birthright for the whole community, bringing tourists in ever greater numbers to the site and the innovative museum created nearby. Educational programmes in the museum and local communities use diverse means such as CD-ROMs, comic books, television and community projects to spread the message of the value of archaeology and the damage caused by looting.

As well as the marvellous finds from the scientific excavation of the Sipán, a few of the grave goods tipped from the looted tomb are displayed in the museum. These were voluntarily returned to Peru by eminent American collectors and museums, having been originally confiscated by US authorities purportedly under the terms of a bilateral agreement implemented specifically to protect the Sipán material. But court actions were unsuccessful in securing the return of the rest of the material seized. It is believed that 90% of what was taken remains in private collections around the world. Objects were smuggled out via a variety of routes and continue to surface in places as diverse as Sotheby's New York saleroom, museums and the parking lot of a Philadelphia hotel.

Hundreds of objects from Sipán were smuggled to London, then re-exported to the USA as personal effects inherited from a fictitious, recently deceased explorer/collector, which meant the smugglers need not declare what was being imported to US customs authorities. With this dubious provenance they were sold to collectors and museums, some of whom had reportedly already placed advance orders before the material was imported into the USA.

In 1998, a spectacular gold back flap, ceremonial armour ripped from the body of the warrior-priest in the looted tomb, then hidden in Peru for years, was seized by the FBI in Philadelphia after undercover agents offered \$1.6 million for it. Two Miami men were convicted and a Panamanian consul general was charged with smuggling the piece to New York in a diplomat's pouch.

Again in 1998, a group of ten objects from Sipán were returned to Peru. They had been found among 200 other artefacts at Miami International Airport in a crate labelled 'Peruvian handicrafts' during a routine search for illegal drugs. The shipment contained only the highest quality artefacts, representing nine different Peruvian cultures and clearly was the result of organised, systematic looting. They were en route to Zurich, Swiss police declined to take action and Peruvian authorities never located the person in Lima whose return address was on the crate.

Sipán is an important case study because it enables archaeologists and law enforcement officers to reconstruct in detail the looting process and subsequent smuggling routes. It demonstrates both the effectiveness and shortcomings of bilateral agreements in stemming the illicit trade. We can also see the impact that educational programmes and tourism can have on local communities where looting is a way of life, and get an idea of how much archaeological information has been and is still being lost.



Gold head with eyes of lapis lazuli looted from Tomb 1 at Sipán and reportedly offered on the black market for \$60,000

Photo: Proyecto Tumbas Reales de Sipán

The area around the modern village of Sipán, pitted with thousands of looters' holes

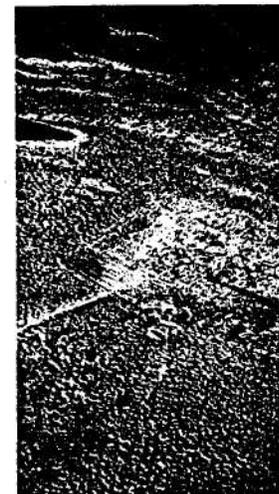


Photo: National Geographic

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## 1.5 CRIMINAL ASPECTS OF THE ILLICIT TRADE

### Drugs and dirty money

Another aspect of the illicit trade in cultural material is its relationship with the market for illegal drugs. Beginning two or three years ago, reports started to appear that the gangs dealing in drug smuggling, and money laundering, were also dealing in antiquities. This information has come from all over the world:

**The emergence of drug gangs and the link between money laundering and antiquities is a sinister development and the situation is gradually deteriorating**

- In January 1999, Spanish police broke up a smuggling ring that had been planning to trade stolen art and antiquities for cocaine.
- A smuggler's plane, arriving in Colorado from Mexico, carried 350lbs of marijuana from Western Chiapas and many thousands of dollars-worth of Pre-Columbian antiquities.
- Heroin, arms and antiquities are now regularly seized along one of the more well-known routes by which Gandharan sculptures leave Afghanistan for Russia and the West.
- In Guatemala and Belize, secret airstrips in the rain forest have been discovered from where cocaine and Mayan stelae are flown to Miami and other US cities.
- Miami has become a crossroad for illicit antiquities — from Ireland, Peru, Guatemala, Mexico and Greece — precisely because, according to US Customs, there is so much 'dirty money' swirling around in the city.<sup>5</sup> Drug profits pay for the antiquities, which are sent for auction so as to obtain a good pedigree for the cash.

### Violence

The emergence of drug gangs and the link between money laundering and antiquities is a sinister development and the situation is gradually deteriorating.

- A British graduate, Ian Graham, now of the Peabody Museum at Harvard in the United States, has been photographing Mayan sculptures *in situ* in Central America for the past 30 years, mindful of the fact that, at some stage, it might be necessary to prove from where these objects — so easily stolen — had been removed. Beginning in 1998, Graham came up against violent gangs who were so intent on taking Mayan objects that they posted look-outs, in make-shift observation posts at the top of palm trees, to scare away anyone who was too inquisitive.
- In 1998 two guards at Guatemalan sites were killed at their posts.
- In one attack on the Angkor storehouse in the early 1990s a guard was shot dead by rocket-wielding bandits.

### Corruption

The police of many countries are also concerned about the illicit trade because the large but undeclared sums of money that change hands during transactions can foster corruption in what are often impoverished bureaucracies. Yet in the bizarre logic of the illicit trade this corruption is often used to excuse further criminal behaviour. If government officials or employees can be bribed, so that the law is disregarded by those responsible for its administration and enforcement, why should a foreigner be expected to behave any differently? But this argument confuses cause and effect. It is the large sums of money introduced by the illicit trade that corrupt.

It is not only the poorly paid, and often outgunned, officials of the market countries

who turn a blind eye. It has been reported on more than one occasion that antiquities are moving out of Jordan, Peru, Iran and Nigeria with the personnel of western embassies, sometimes as souvenirs, sometimes in diplomatic bags. And diplomatic 'bags' can be large. A dealer in India using such a method shipped out a container load of antiquities when a diplomat was moving house.

### 1.6 FAKES AND REPLICAS

Fakes are a hazard of the illicit trade. With no recorded findspot it is left to the eye of the buyer (or the hired help) to decide what is fake and what is not. Yet the Getty kouros (see box) shows that even the most discerning of eyes cannot be relied on. Fakes are designed to fool the expert and clever forgers have many techniques at their disposal – from simulating the accretions of grime and soot that may build up on an object stored for decades in the rafters of a smoky village hut, to smearing pots with mud from genuine archaeological sites. One Mexican forger was so successful that he was arrested and accused of looting Pre-Columbian sites. He was released only after a demonstration of his craft.

In many parts of the world accurate replicas are produced for legitimate export, complete with carefully applied signs of age, but they then enter circulation as genuine artefacts. When Chinese archaeologists visited the United Kingdom in 1998 to reclaim stolen archaeological material that had been seized by British Customs five years earlier they rejected about 20% as fakes or modern replicas. This suggests that perhaps a similar proportion of unprovenanced Chinese material currently entering the market is also fake.

- In the middle 1960s doubts were voiced about the authenticity of the large number of 'Hacilar style' vessels and figurines from south-west Turkey that were appearing on the market. It was pointed out that stylistically they could be distinguished from material known to have been excavated from the site of Hacilar, and thermoluminescence testing then went on to show that 48 out of a sample of 66 figurines tested were recent forgeries. The reliability of interpretations based on a largely faked corpus was called into question.
- Similar doubts have been voiced about the authenticity of early Bronze Age marble Cycladic figurines, which again are largely without provenance. For the past 15 years there has been a strong fashion among collectors for these figurines, the austere, clean lines of which accord very much with contemporary taste. There is not much Cycladic material available but, of those figurines that have been legally excavated by professional archaeologists, most are female and nearly all are of modest size, up to 15-18 inches. On the other hand, many very much larger figurines appear on the market without any published provenance, and along with these are 'special' figurines including males and seated figures which are exceedingly rare from proper archaeological contexts. The real question is whether or not these large and 'special' figurines without provenance are genuine. There is no scientific way of testing the marble of Cycladic figurines, so we are reliant on the traditional skills of connoisseurship. But the possibility cannot be excluded that most or even all the large figurines which have appeared on the market over the past 50 years, and most or all of the 'special' figurines and the males appearing over the same period are fakes. But although in scholarly circles doubts remain, buyers and sellers seem unconcerned and the market remains buoyant.
- In February 1999 a Chinese 'bird' fossil was bought for \$80,000 at a show in Tucson, Arizona for the Dinosaur Museum of Blanding, Utah. It was hailed as a new species – christened *Archaeoraptor liaoningensis* – but computerised tomography later revealed it to be an elaborate fake. The tail of a primitive bird had been

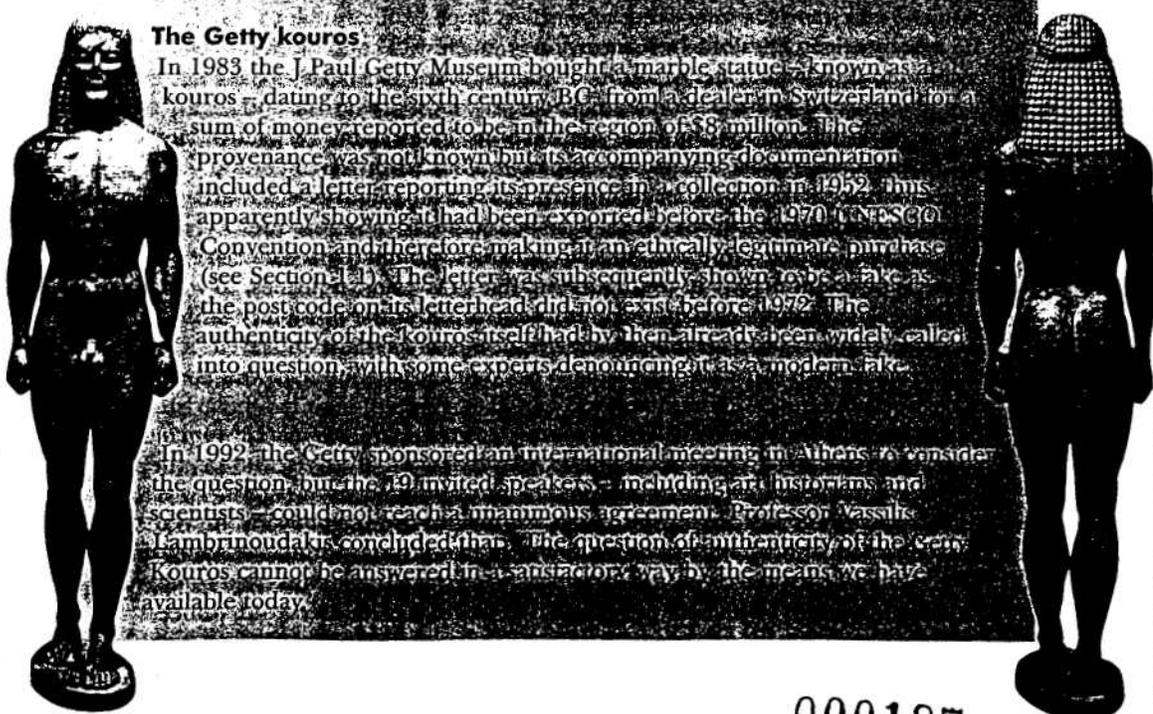
added to the body of a dinosaur in order to fabricate a 'missing link' early in the evolution of birds from dinosaurs. It is now thought that the fossil was smuggled out of the Liaoning area of north-east China. Museum trustees insist that it was exported legally, but have failed to produce any documentary evidence in support of their claim. Nevertheless, the museum has announced its intention to return the fossil to China in summer 2000.

### Professional collusion

In the absence of a verifiable provenance, which comes only from a properly recorded context, authentication takes place by expert opinion or scientific test. This generally means that a recognised authority or laboratory is consulted, for a fee. And such individuals or facilities are usually to be found in museums or universities. The Research laboratory for Archaeology and the History of Art at the University of Oxford was roundly condemned in the early 1990s for using thermoluminescence dating to authenticate illegally-exported Malian ceramics. The money so obtained was used to support legitimate research. This is an often repeated reason for undertaking work on illicit objects but only demonstrates the distorting influence that the market has, when individuals or institutions are motivated by money to make a decision which might not be in their best interests and which, on reflection, they might regret. The Oxford laboratory was publicly embarrassed and has now stopped commercial thermoluminescence testing. Perhaps other institutions continue? It would certainly be possible to name academic figures who have recently authenticated unprovenanced material – they have, in effect, hired out the authority of their name. The entry of illicit material on to the market should not be facilitated by 'experts' who sell their authority or expertise to screen out the fakes and maintain market confidence. Indirectly, whatever their motives, they would be condoning the looting.

As long ago as 1971 at the annual meeting of the Society of American Archaeology Professor Clemency Coggins stood up and pointed out that '...the money now involved in what used to be a relatively innocuous trade has turned the scholar... into an accomplice.'<sup>6</sup> So when, in the catalogue of his collection, George Ortiz castigates archaeologists Colin Renfrew and Lauren Talalay for refusing to describe his unprovenanced Neolithic Greek material<sup>7</sup>, and accuses them of taking an ideological stance, he is confusing ideology with morality. They had simply refused to be complicit.

Photo: The J Paul Getty Museum, Malibu, California



### The Getty kouros

In 1983 the J. Paul Getty Museum bought a marble statue – known as a kouros – dating to the sixth century BC from a dealer in Switzerland for a sum of money reported to be in the region of \$8 million. The provenance was not known but its accompanying documentation included a letter reporting its presence in a collection in 1952, thus apparently showing it had been exported before the 1970 UNESCO Convention and therefore making it an ethically legitimate purchase (see Section 1.1). The letter was subsequently shown to be a fake as the post code on its letterhead did not exist before 1972. The authenticity of the Kouros itself had by then already been widely called into question, with some experts denouncing it as a modern fake.

In 1992 the Getty sponsored an international meeting in Athens to consider the question, but the 19 invited speakers – including art historians and scientists – could not reach a unanimous agreement. Professor Vassilios Lambrinoudakis concluded that 'The question of authenticity of the Getty Kouros cannot be answered in a satisfactory way by the means we have available today.'

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## 1.7 THE SCALE OF THE DESTRUCTION

The illicit trade in cultural material is clandestine, it is hidden from view. It is, in consequence, difficult to quantify the damage caused worldwide by theft, despoliation and illegal excavation, or to assign value or structure to the market. There are very few facts and figures; discussions often rely on anecdote and assertion and, as a result, concerns expressed about commercial looting may be dismissed as scaremongering by collectors or dealers. But the opacity of the trade is not a predetermined or natural condition, it is maintained artificially by dealers and traders for what might be the usual commercial reasons (their position in the market depends on maintaining a distance between buyers and sellers), or perhaps even to obscure the distinction between legitimate and illegitimate material.

*Nevertheless, there are some facts and even, occasionally, some figures. These are presented here:*

- In Italy, archaeological sites are being destroyed at an alarming rate. As early as 1962 a survey of a single Etruscan cemetery at Cerveteri showed that 400 out of 550 tombs had been looted since the end of world war two. Between 1970 and 1996 the Italian police recovered more than 300,000 antiquities from clandestine excavations; these must constitute only a portion of the total. In January 1997 Swiss police sealed four warehouses in Geneva Freeport which were found to contain approximately 10,000 antiquities from sites all over Italy. They were valued at about £25 million. Then, late in 1998, a police raid on a villa in Sicily revealed more than 30,000 Phoenician, Greek and Roman antiquities, worth more than £20 million, thought to have been taken from the ruins of Morgantina, in central Sicily.
- In Latin America during the 1960s Mayan monuments in Mexico, Guatemala and Belize were being cut up and sold, often to museums in the United States. During the 1970s the looters turned to graves for pottery and other grave goods. The illicit trade in grave goods has continued through to today and it is thought that about 1,000 pieces of fine pottery, worth about \$10 million, are smuggled out of the Mayan region of Central America each month. One site – Site Q – is known only from looted sculptures in various museums and private collections, its location remains a mystery. In the early 1970s a single Italian dealer somehow managed to remove illegally from Ecuador nearly 12,000 antiquities, where hundreds of sites had been damaged. From a study of abandoned looters' camps in Belize during the 1980s it was estimated that at any one time there might be as many as 200 looters at work in the country compared to only 50 archaeologists. The Mexican

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Photo: Michel Brent

**Looting in Mali**

**Bulldozed ancient cemetery at Slack Farm, Kentucky, late 1980s**



government has announced that 1998 alone saw over 10,000 looted artefacts recovered by the authorities, many from abroad.

- The situation in Turkey is no better. Between 1993 and 1995 there were over 17,500 official police investigations into stolen antiquities. A recent document released by the Turkish government lists antiquities smuggling as the fourth largest source of illicit income, after arms and drug smuggling and fraud.
- Raids on an antiquities dealer carried out by German police in Munich during 1997 recovered 50-60 crates full of material ripped from the walls of north Cypriot churches, containing 139 icons, 61 frescoes and four mosaics.
- Churches are also under attack in Bulgaria where 5,000 icons disappeared in a single year (1992).
- A survey in the Charsadda D strict of northern Pakistan showed that nearly half of Buddhist shrines, stupas and monasteries had been badly damaged or destroyed by illegal excavations for saleable antiquities. Some were bulldozed. In other areas of north Pakistan the story is the same.
- In Nigeria during the 1990s more than 400 cultural objects were stolen from museums and other cultural institutions. But it didn't stop there. The continuing pillage of the country's archaeological heritage reached such a scale that the market price of the two-millennia-old Nok terracottas plummeted.

- Looting in Mali has become an international scandal. Mali has more archaeological sites than anywhere else in Africa outside of Egypt, but only a handful have been properly investigated. A recent survey of 125 square miles discovered 834 sites but also showed that 45% have been looted, 17% badly. Particularly renowned are medieval terracotta statues, but of the hundreds presently in museums and private collections, only 30 come from properly recorded excavations. The history of Mali is quite literally disappearing from under the feet of its inhabitants.

- Since 1975, hundreds of Buddhas in the vicinity of Angkor Wat in Cambodia have been decapitated or otherwise mutilated. UNESCO estimates that at the present time sculptures and reliefs and other architectural fragments are being removed at the rate of one a day. The storage warehouses at Angkor once contained the largest collection of Khmer art in the world, but over the years they have been ransacked. Temples and other monuments are also being mutilated. Witnesses report several hundred renegade soldiers working for several weeks at Banteay Chmar using heavy machinery to remove 500 square feet of bas-reliefs. The temple is now on the brink of collapse.

- In the United States a survey carried out in 1991 of sites of special importance in the Oglala National Grassland area of Nebraska found that 28% had been damaged by illegal fossil digging. Even in the Gobi desert, important palaeontological sites are attacked with increasing frequency.

- At Slack Farm in Kentucky pot-hunters used bulldozers

to plough through 700 burial mounds in a 500-year-old cemetery leaving broken human bones, pieces of ancient artefacts and modern beer cans in their wake.

- At the present time over 1,600 marble figurines are known from early Bronze Age graves of the Cyclades, but only about 150 were recovered in archaeological excavations. Many may be fakes but the remainder can only have been obtained through the looting of cemeteries and it has been estimated that over 12,000 graves have been ransacked. Christopher Chippindale and David Gill doubt 'if an understanding of Cycladic prehistory is now possible'.

During times of war or civil unrest, the grasping hand of the black market is never far away.

- By the end of the Bangladeshi war of independence in 1971 2,000 Hindu temples had been destroyed or damaged. Most of the damage was caused by plunder rather than military action and 6,000 pieces of sculpture had been smuggled abroad. It seems that foreign-aid workers were eager buyers.
- During a military coup in 1997 when the storehouse of the *Institut des Musées Nationaux du Zaïre* in Kinshasha was raided only the best pieces were removed, evidently for sale (fortunately, they were inventoried and quite well known and will prove difficult to sell).
- In 1993, when Kabul Museum was sacked in the fighting that followed the Soviet withdrawal from Afghanistan, the looters looked for the most valuable pieces, using books from the museum's own library to guide them.
- In the wake of the 1991 Gulf War, looting in Iraq has escalated out of all control. Over 3,000 antiquities are known to have disappeared after the looting of nine regional museums; it is estimated that thousands more unrecorded antiquities have been removed from archaeological sites. At the same time the number of Iraqi antiquities on sale in London and New York has increased dramatically. The despoliation of Sennacherib's palace at Nineveh has been particularly well documented, and looted relief sculpture has been broken up and dispersed for easier transport and sale.

These are only snapshots of the illicit trade. They increase in number day by day, and together they create a shocking picture of devastation and destruction.

## **1.8 LOOTING IN THE UNITED KINGDOM**

Looting to feed the illicit trade is usually thought to be something that goes on in foreign countries, not something that happens at home. However, it can happen in the UK, and it does. The rise of fossil hunting and metal detecting in particular over the past 30 years has been associated with increasing levels of destruction as the commercial potential of cultural heritage has been exploited more and more.

### **Ownership**

In Scotland and Northern Ireland all antiquities whose owner cannot be identified are the property of the Crown. In England and Wales, by and large they belong to the landowner, unless they are Treasure, while fossils are included in the mineral rights, which are themselves often owned by the landowner. Thus fossil or treasure hunting with the permission of the landowner is a fully legal activity. The full context of much of this material has now been lost and a consensus has emerged that archaeological objects in the ploughsoil and fossils on a shore, fallen from an eroding area, are now considered fair game for amateur and commercial collectors. However, their

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provenance is still of interest and voluntary recording schemes have been set up and publicity campaigns mounted to encourage the reporting of finds.

- In England and Wales, for metal-detecting and casual finds the Portable Antiquities Recording Scheme has just ended its second successful year of operation, sponsored by the Department for Culture, Media and Sport.
- In Dorset, in 1998, a pilot Code of Conduct for fossil collectors was launched.

Both of these schemes emphasise that collectors will not be deprived of their finds, but that it is important to register them and report their findspot. However, horror stories continue to emerge as rogue elements – the 'nighthawks' – keep up their attacks, from the dynamiting of Lesmahagow for its fossils in the north, to the sack of Wanborough for its coins in the south (see box).

### Our lost heritage

In his book *The Salisbury Hoard* Ian Stead presents a sad catalogue of destruction and deception involving UK archaeological material, including:

- The Batheaston hoard or hoards, 301 bronze artefacts probably found in south Wiltshire and removed without the landowner's permission, perhaps from a scheduled ancient monument.
- The possible Iron Age temple in Lincolnshire rumoured to have been ransacked after discovery by a metal detectorist.
- The Snettisham Bowl Hoard, possibly the most important hoard of Celtic coins found this century, illegally excavated and dispersed on the market.

The Icklingham Bronzes have become something of a *cause célèbre* due to the efforts of the indefatigable John Browning, the farmer from whose land they were taken, to recover them. Fifteen or more masks, beasts and figures in bronze, possibly from a Roman temple, were removed illegally from his farm sometime in the early 1980s. By 1989 they were on offer at the Ariadne Galleries of New York. They are now in the possession of Leon Levy and Shelby White who have agreed, with Browning, to bequeath the bronzes to the British Museum on the occasion of their deaths.

A large part of this looted material disappears so the damage is compounded. Not only are contexts destroyed, the objects themselves are lost to serious study.

**Wanborough**  
After the discovery, in early 1987, of some Iron Age and Roman coins at Wanborough near Guildford, Surrey, hoards of treasure hunters descended on the site looking for loot. Working mainly at night it is estimated that they removed some 5,000 coins, worth about £2 million, and destroyed an area of about 300 square metres (together with the covering crop). Many of the coins were dispersed abroad and subsequently spotted at fairs in Europe and the United States. Surrey Archaeological Society responded with a campaign of rescue excavation through the autumn and winter of the same year and uncovered an important second-century AD Romano-British temple, although evidence related to the coin deposits was lost, and the reasons for their burial are not clear. The looting continued, however, and by 1997 the temple itself was under attack as, again by night, deep holes were dug through its foundations. Local residents reported seeing a lorry with no lights driving past full of soil, apparently to be more thoroughly searched elsewhere. The Surrey Archaeological Society took to the field again, with the help of the local metal-detecting club who were themselves disgusted at the looting, and in 1999 a first-century AD precursor temple was discovered. This was possibly contemporaneous with the looted coin deposits, although the nature of their relationship has by now been destroyed.

Photo: Surrey Archaeological Society

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## 1.9 THE FINANCIAL VALUE OF THE ILLICIT TRADE

Geraldine Norman has estimated that the illicit trade in antiquities, world-wide, may be as much as \$2 billion a year<sup>10</sup>; other estimates have ranged down to \$150 million. As already pointed out, because the trade is clandestine, reliable data is hard to find.

### UK Trade statistics

In Britain the trade in cultural material is carried on by dealers and by auction houses. Where dealers are concerned, the trade is fairly secretive and there is no real way of calculating how many objects are bought and sold every year. Facts and figures are sadly lacking. The art trade organisations, British Antique Dealers' Association (BADA) and the London and Provincial Antique Dealers Association (LAPADA), do not keep separate lists of antiquities dealers, so it is not possible to separate out, in their membership lists, furniture or picture dealers, say, from antiquities dealers. However, the International Association of Dealers in Antique Art (IADAA), which comprises the most important *international* antiquities dealers, numbers between 20 and 30 members.

At present, Christie's (South Kensington) and Bonhams hold regular sales of antiquities. Each holds three sales a year, in late spring, October and December. Roughly speaking, in an average antiquities sale between 300 and 500 lots are sold with a total value between £400,000 and £600,000. In other words, roughly £3 million-worth of antiquities are traded in the London auction houses every year. Two sets of South East Asian auctions may be added to this picture. There are also Chinese Art sales which contain archaeological material.

A more accurate figure can perhaps be calculated from figures provided by the antiquities trade who, in 1993, stated that upwards of half a million antiquities of low monetary value are exported from the United Kingdom every year<sup>11</sup>. Just what the average price of a 'low-value antiquity' would be is difficult to say, and how many high-value antiquities are exported is anybody's guess, but if it is assumed that each antiquity exported is priced at only £100, then the total value of all exports still adds up to quite a considerable sum – £50 million is probably a reasonable estimate.

How many of these antiquities were originally excavated or exported illegally is difficult to say. The majority of antiquities in the major, published, private collections do not have a provenance, neither do those in auction catalogues.

### Government statistics

There are official government statistics, but they are confused. The Department of Trade and Industry allows public access to trade statistics which are compiled according to the internationally agreed Standard International Trade Classification (SITC).

For cultural material, however, this classification is far from ideal as the recording categories are too broad and imprecise. Thus antiquities might be found hidden in SITC category 896.60 (antiques of any age exceeding 100 years) or perhaps 896.30 (original sculptures and statuary) or even 896.50 (collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest), together with other types of material (including, in the latter category, natural science and ethnographic material). Ethnographic material may be recorded in handicraft categories. Nevertheless, figures provided for category 896.50, which consists entirely of material germane to this report, are revealing:

Imports from outside EU	1996	1997	1998	Exports outside EU	1996	1997	1998
Total value (£000)	41,205	42,496	87,015	Total value (£000)	48,794	42,515	35
Weight (kg)	359,714	401,235	1,031,497	Weight (kg)	125,772	392,733	1, 34

**The majority of antiquities in the major, published, private collections do not have a provenance, neither do those in auction catalogues**

This is in line with the figure of £50 million, obtained above from statistics provided by the dealers themselves. However, this is only a minimum. The value of material which might be contained in the many other relevant categories remains unknown.

A further breakdown of these figures provided for category 896.50 may be found in official US trade statistics, which further distinguish within the category between coins and other types of collection:

**Antiquities  
leaving the  
United Kingdom  
might be  
redescribed  
before entering  
the US so as to  
circumvent US  
import controls**

Imports from UK	1996	1997	1998
Total value (\$000)	9,100	13,700	13,700
Value coins (\$000)	5,600	7,800	8,800
Value remainder (\$000)	3,400	5,900	4,900

On the face of it these statistics seem to suggest that the value of the trade in cultural material is in fact much lower than first estimated, with the major part being due to the sale of coins. Unfortunately, however, the official US statistics do not agree with the equivalent figures provided by the DTI for British exports of the same category to the United States:

Exports to US	1996	1997	1998
Total value (£000)	22,320	18,214	33,172

Clearly there is a huge discrepancy between the figures provided for US imports from the United Kingdom, and those for UK exports to the United States. UK exports are valued at something like two to three times more than US imports. The DTI can list 13 reasons for discrepancies such as these, which include reporting timelags, differences in SITC categorisation and fraudulent declarations. The cause of the discrepancy in this particular case is not immediately clear.

Australian authorities are also concerned about official figures which show that the value of art imported into the UK from Australia is far higher than that recorded in Australia for exports. This is thought to indicate the large-scale smuggling of art out of Australia. This cannot explain the US/UK discrepancy, however, where there is a drop in value between exporter and importer, not an increase. Perhaps it might be due more to fraudulent declarations: Antiquities leaving the United Kingdom might be redescribed before entering the US so as to circumvent US import controls.

The Department for Culture, Media and Sport keeps records of cultural material licensed for export, but does not allow public access to them and will not provide detailed analyses of them. The Annual Reports of the Reviewing Committee for the Export of Works of Art give some summary statistics, from which the total value of all cultural material licensed for export can be calculated, but there is little correlation between the DTI and DCMS figures:

	DTI	DCMS
1993-94 £(000)	1,347,071	1,856,678
1994-95 £(000)	1,269,057	3,133,834
1995-96 £(000)	1,298,144	3,371,448

The DTI figures published in the Annual Report are taken from the SITC Category 896 (works of art, collectors' pieces and antiques) which encompasses most cultural material licensed for export (including paintings etc), so there should be a broad measure of agreement. If anything the value of material licensed should be lower than the value of material exported, as not all material exported is licensed. It should not be almost three times as high, as it is in the figures for 1994-95 and 1995-96.

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The DCMS is unable to account for the discrepancy in the figures in a satisfactory manner. The department suggests that objects between 50 and 100 years of age are excluded from the DTI figures, and perhaps aeroplanes and motor cars too. Other classes of material recorded by DCMS but not listed in SITC Category 896 might also be suggested: books; scientific drawings, manuscripts; photographs; scientific material. But still, over the years in question here (1993-6), these classes together only accounted for about 5-8% of the total value of material of British origin licensed for export, which is not enough to explain the discrepancy.

Official statistics look impressive but do not withstand a close examination. They do demonstrate that it is important for the HM Government to produce more reliable statistics to give usable information on the size of the trade.

### 1.10 CONCLUSION

Historically the antiquities trade has fed the demand for antiquities generated by the museums and private collectors of Europe and North America. As museums have often been the final repositories of private collections it might be argued that, in the final analysis, it has been the museums that have underwritten the trade.

But the negative publicity generated by cases such as the Lydian Treasure has caused museums to take a more ethical stance, and many museums have now adopted policies that forbid the acquisition or display of material of unknown origin, and which cannot therefore be shown to be licit. In other words, if it cannot be demonstrated with any degree of certainty that cultural material is not looted, then a museum will not want to be associated with it. But some museums still continue to turn a blind eye (see also Section 4).

Associated with the recent growth of the art and antiquities market has been a new breed of collectors, sometimes collecting purely for monetary profit. Furthermore several large, recently assembled collections of 'ancient and tribal art' have been displayed and published, and their owners make no secret of the fact that the majority of the pieces have no verifiable provenance, yet fervently deny that they might be looted. Indeed some collectors adopt a selective and limited definition of the concept of theft tailored to exclude certain forms of excavation.

In his book *The Plundered Past* Karl Meyer characterised tomb robbing as the second-oldest profession. And today, like the oldest profession, moral censure is shifting away from the practitioners and on to the customers, from those with few real options on a livelihood to those who could choose otherwise. Nobody has to collect illicit material. Ultimately, the looting of cultural material will only stop when collectors, museums and dealers refuse to buy unprovenanced objects. No matter what protective measures are put in place, whether draconian or liberal, they will be circumvented if a demand is created by a purchaser with few scruples or principles. In years to come collecting illicit antiquities will be as socially unacceptable as collecting rare birds eggs is now. But by then it will be too late. The cultural heritage of some areas is already at the point of extinction.



Photo: J Schick, Orchid Press, Bangkok

16<sup>th</sup>-century statu  
Sarasvati, Nepal,  
before and after  
damage by looters

## 2. THE ROLE PLAYED BY COMMERCIAL ORGANISATIONS IN THE UNITED KINGDOM

### 2.1 EXAMINING THE TRADE

#### **Provenance**

Whatever the actual dimensions of the trade in cultural material, the central problem involves what are known as 'unprovenanced' objects, objects that 'surface' on the market and are sold without any information attaching to them in regard to where they have been found, in what circumstances, and under whose auspices. As shown in Section 1, without contextual information, objects can be meaningless to those who want to study them. This situation reflects the central dilemma, the conflict between the trade and scholars. The best way to marry the two interests would be to have a trade which deals only in properly provenanced material.

#### **Provenance withheld**

'Unprovenanced objects' is a shorthand of sorts. When these objects come to market, *someone* knows where they originated, but isn't saying. As far as antiquities are concerned, archaeologically important information is being deliberately withheld. A more accurate phrase here would be 'antiquities with an undisclosed provenance'.

There can be little doubt that the great majority of the London trade in antiquities is in unprovenanced objects. No details about private dealers are available, but inspection of the main auction house catalogues shows a surprising – and distressing – consistency in the picture. Generally speaking, over the last 20 years at least, somewhere between 65% and 90% of the antiquities offered for sale on the London auction market have no published provenance, with the figure usually at the higher end of that range.

*Traditionally, the auction houses have argued that the bulk of these unprovenanced antiquities have come from small private collections or were discovered in 'attics'. This is inherently implausible, a picture that is not mirrored in other sectors of the art market but until recently it was difficult to do more than quote this implausibility. All that changed in 1997 with an exposé (published as Sotheby's: Inside Story, by Peter Watson) which, for the first and only time, provided a revealing glimpse behind the scenes at an auction house.*

### 2.2 SOTHEBY'S IN ITALY

The basic material which gave rise to the book and two Channel 4 television programmes consisted of many original Sotheby's documents leaked to Watson by an erstwhile employee of Sotheby's, James Hodges, who in the course of a long career with the auction house had worked in several departments including antiquities. Hodges had his own reasons for taking these documents but so far as antiquities were concerned, the documents provided an unparalleled picture of the illicit antiquities market.

Most importantly, they showed that very many of the antiquities sold at Sotheby's without a published provenance had come from one dealer in Switzerland. This man went by the name of Christian Boursaud. Inquiries prompted by the Hodges documents proved that Boursaud was in fact a 'front' for another individual, one Giacomo Medici, with residences in Rome and Santa Marinella in Italy, and who was well known to the art squad of the Italian *carabinieri*. It became clear from the investigation that Medici smuggled the illegally excavated objects from Italy to Switzerland (where it is perfectly legal to import and export antiquities without any documentation) in bulk. From there, they were sent to Sotheby's in London. This subterfuge enabled Sotheby's to claim that the objects had arrived on its premises from Switzerland perfectly legally.

The size of this traffic was considerable. For example, between December 1983 and December 1986, Boursaud and another colleague consigned 248 objects to six sales with a total value of at least £640,880. Separate documents showed that in 1986, 1987 and 1988 Boursaud had traded other goods worth around a quarter of a million pounds. In Sotheby's December 1987 sale, another company owned by Medici consigned 101 lots,

out of a total of 360 in the auction. In May 1988 the same company consigned 76 lots and in December 1988 46 lots.

Nor was this all. The documents provided by Hodges included computer printouts of Sotheby's sales and these showed that among the sellers at the company's auctions were several dealers from Munich, whose names were well-known to police for their involvement in the sale of looted antiquities. The documents also showed that Medici shared an office address in Geneva with a London dealer, who traded in Switzerland under a different name, and also consigned to Sotheby's a broadly similar range of unprovenanced antiquities.

Various other documents showed that, in individual cases, regarding more valuable pieces, Sotheby's personnel had either been aware that objects sold on their premises had been illegally exported from Italy, or had themselves had a hand in the arrangements.

Following the publication of Watson's book, Italian police began an inquiry and, at the time of writing, Medici awaits trial in Rome. The *carabinieri*, aided by Swiss police, found that he had four warehouses in the Geneva Freeport, where there were 10,000 unprovenanced antiquities valued at £25 million. Some of these objects had Sotheby's labels on them, raising the possibility (not yet proven) that they were sold at the London saleroom by Medici and then bought back, as a way of 'laundering' them, making it appear that they had been bought on the 'open' market.

Medici was also in the news in the spring of 1999 after he came to an agreement with the Italian *carabinieri* to return three fragments of a bowl made by the well-known ancient potter Euphronios. The other fragments of this bowl were in the J Paul Getty Museum in Los Angeles, and on learning of the appearance of the fragments in Medici's possession, the museum voluntarily returned what it possessed to Italy.

### 2.3 APULIAN VASES

The entire corpus of Apulian vases has now been surveyed by archaeologist Rick Elia, of Boston University. They are a very useful barometer for studying the illegal trade in antiquities because they were only produced in a relatively small area of Italy — Apulia, what is now Puglia — and were not traded outside that area. As a result, archaeologists can be fairly certain that all objects known to scholars have come out of the ground there. In addition, the corpus has been extensively studied and there are easily available comprehensive catalogues.

It was found that 13,718 Apulian vases are known to scholars. Of these, only 753 (5.5%) were legally excavated by professional archaeologists. Analysis of 250 Sotheby's auctions between 1960 and 1997, found that 6,000 south Italian vases had been sold through the saleroom, of which 1,881 were Apulian vases. Of these, *not one* had a published provenance. This seems to imply that every single Apulian vase sold at Sotheby's over a 37-year period might have been illegally excavated or at least illegally exported from Italy.

Elia's final tabulation was to study legal excavations, where he discovered that one vase was found, on average, for every nine tombs excavated. From this it follows that the 12,965 unprovenanced objects (ie, 13,718 minus 753) might have occasioned the despoliation of more than 100,000 tombs. If there should still be any doubt about the damage to cultural heritage that this traffic is doing, it is surely dispelled by the grainy footage of the Channel 4 exposé, where a gang of Italian *tombbaroli* (tomb robbers) was captured on film at night, using a mechanical digger to break into the roofs of tombs.



**Warehouse of illicit antiquities sealed by police at Geneva Freeport, 1997**

## 2.4 SOTHEBY'S IN INDIA

The Hodges documents leaked to Watson (see above) also related to antiquities that had been illegally excavated and smuggled out of India. Here too specific dealers were mentioned in the Sotheby's papers, who had by that stage been consigning material to auction in London for at least ten years. In Bombay the investigators were shown both the front shop of the dealers, and taken to the warehouse where more bulky material was on display, plus objects that it was not safe to display in the front shop.

On camera, the Bombay dealers identified items among their property that were coming up for sale shortly in a London auction at Sotheby's. They admitted that material came out of India by the 'container-load'. Subsequently, they identified a London address where the material was warehoused and this was visited by the investigators, carrying a hidden camera. There, objects consigned by the Bombay dealers, and identified by them in the Sotheby's catalogue, were filmed secretly.

According to the documents made available by Hodges, material was consigned to Sotheby's by dealers in Bombay, Calcutta, Delhi and Islamabad in Pakistan. On occasions, the addresses given by the London contacts of these dealers were false. The dealers consigned between 20 and 93 items to any one sale and the combined value of these objects could reach £60,000 in any one auction.

The documents also confirmed that the then director of the Archaeological Survey of India, Dr L K Srinivasan, had written to Sotheby's at one point, asking if they could indicate to him the provenance of 156 Indian antiquities coming up at auction (this was in 1986). Interviewed by the journalists making the Channel 4 programme, he said he never got any reply from Sotheby's.

In a separate episode, Dr Dilip Chakrabarti, an Indian scholar in the Department of Oriental Studies of Cambridge University, drew attention to three items in a Sotheby's catalogue for a sale of Asian antiquities, that were labelled 'Probably Chandraketugarh, West Bengal, 2nd/1st century BC.' Dr Chakrabarti explained that this site, north of Calcutta, has never been professionally excavated and was not discovered until the mid-1950s, by which time India's law forbidding the export of archaeological material was already in place. *Any* material from Chandraketugarh has by definition been illegally excavated and illegally exported. Unfortunately, this material is now quite often seen on the market, especially in the USA.

The most notable incident involving India concerned a sandstone stela showing a goat-headed goddess. Hodges' documents showed that the statue had arrived at Sotheby's but prior to sale an academic paper had been noticed (written by Vidya Dehejla, a well-known Indian scholar) showing that the stela came from a village in the Banda area of Uttar Pradesh, known as Lokhari. On this occasion, Sotheby's had declined to auction the object but, well aware of what had happened, and where the sandstone stela had originated, failed to alert the appropriate authorities. As a result, this irreplaceable piece is still missing.

The television crew visited Lokhari where the villagers immediately recognised the stolen stela. It then turned out that the goat-headed goddess was not the only one that had gone missing. Originally, in the temple outside the village there had been 20 gods, but 11 had been smashed by thieves and the rest stolen.

## 2.5 SOTHEBY'S RESPONSE

In the wake of the Watson exposé Sotheby's stopped their Antiquities auctions in London and now hold them only in New York. After an internal enquiry, in December 1997 they announced a new Code of Conduct and established a Compliance Department to oversee its implementation and operation. An important feature of the

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new code is a pledge not to sell an object if it is known to have been exported illegally from its country of origin, regardless of its status under EC or US law.

## 2.6 THE SALISBURY HOARD

An example of an illicit trading chain in Britain of the type revealed by Watson in Italy and India has recently been exposed in a remarkable study carried out by Ian Stead at the British Museum. He investigated the Salisbury Hoard, which had been excavated illegally in southern England in 1985. It is a unique find in British archaeology and contains over 500 bronze objects of various ages ranging over 2,000 years, which had apparently all been buried together sometime around 200BC. However, after its excavation the hoard was broken up and sold piecemeal so that its true nature was not revealed until 1988 when some of the objects were brought to the attention of Stead, then a deputy keeper in the British Museum.



Photo: © copyright The British Museum

*Part of Salisbury Hoard  
packed in socks, 1993*

Stead and his colleagues set out to investigate the provenance of the pieces, and the involvement of the police in what became a criminal investigation opened up the record books of auction houses and dealers. The true nature of the trade stood revealed. What had originally been a single, stolen hoard was broken up into smaller lots and passed piecemeal through the salerooms of Britain. Many dealers and auction houses - including Sotheby's, Christie's and Spinks - at one time or other sold objects from this hoard, not knowing them to be stolen of course.

## 2.7 CONCLUSIONS

Thanks to the investigations of Watson and Stead the organisation of the illicit trade is now reasonably well understood. As a general rule material is excavated and passed on to local middlemen, who, if necessary, are then able to arrange for the material to be smuggled out of the country, whereupon it may be bought by one or more dealers for ultimate sale to collectors or museums.

This pattern of movement and dispersal through a chain of dealers is a regular practice and details of provenance are lost in the process. Vendor anonymity is a fundamental feature of the trade and it is even promoted as a professional principle. The identities of buyers and sellers are kept secret, it is argued, so as not to attract the attention of potential thieves. Records may be kept, and indeed it is a requirement of the 1999 Council for the Prevention of Art Theft (CoPAT) voluntary Codes of Due Diligence, designed to impede the flow of stolen material through the art market (see Section 4.5), that the identity of vendors (but not purchasers) be recorded. But details of these records are kept secret. There is no requirement to reveal a record of ownership history, or the original findspot, so that there is no published information which can be used to trace an antiquity back to its original source. It is simply not possible for a potential good-faith buyer to establish whether an antiquity was originally obtained by honest, or dishonest, means. Licit and illicit antiquities become hopelessly mixed and the response of the trade is to judge them all licit, 'innocent until proven guilty' as one leading dealer has implied<sup>12</sup>. Looted antiquities then acquire a patina of legitimacy when ultimately they are sold, without provenance, by dealers and auction houses. There is little chance they will be recognised as looted. Thus, because of this secrecy, it is not possible to document or demonstrate a consistent link between the widespread looting of sites and museums, and the continuing appearance on the market of large quantities of unprovenanced material.

Auction houses regard their first duty as being to their clients, by which they mean the people who sell through them. Since art has become so valuable, and crime rife, it is

easy for collectors and auction houses to hide a multitude of insalubrious practices behind the argument that client security comes first, so nothing must be said. This is an unsatisfactory state of affairs.

**An open trade is an honest trade**

It will only prove possible to combat the widespread destruction of archaeological sites when the trade in antiquities is fully transparent so that clear chains of ownership can be established, and it is possible to distinguish between licit and illicit material. The same holds true for the trade in ethnographic and palaeontological material.

The solution ultimately is in the hands of the customers, or collectors. Good-faith customers, or collectors, should demand documentary evidence of every item's provenance. While other collectors remain happy to buy objects with only the flimsiest indication of provenance, that is what they will be offered. It will continue to be expedient for the trade to market looted material, whether knowingly or unknowingly, by turning a conveniently blind eye.

*5<sup>th</sup>-century statue of Vishnu, Nepal. In 1983, above, and in 1986 after looting, below*



Photo: J Schick, Orchid Press, Bangkok



# 3. THE LAW AND THE ILLICIT TRADE

## 3.1 NATIONAL LAWS

### Export controls

Most countries control the export of cultural material (a notable exception being the United States). This control can take the form of a total embargo on the export of all objects, or a system of screening, or licensing, whereby the majority of objects are allowed to leave the country but more important pieces are retained.

There are legal and economic limits to export control. As the volume of international travel continues to grow the trend is to relax border controls rather than tighten them. Only the most authoritarian of regimes is willing to alienate tourists and disrupt trade by making routine searches of all luggage and cargoes leaving its jurisdiction. Thus stringent export regimes are not always as effective in practice as they might be in theory, although this is no argument for abandoning export control.

The legal position is complicated by the fact that it is generally accepted that a country should police its own export laws – the job should not fall to another country whose laws might reflect a different philosophy. Thus the United Kingdom's customs authorities are not at present required to intercept and return all material illegally exported from a foreign country. In fact, material looted from the Moche royal tomb at Sipán, and smuggled out of Peru packed in brown paper and peanuts, was routed through the United Kingdom, 'Because England [sic.] was not a signatory to any of the international agreements protecting the cultural heritage of countries like Peru, the only delay... encountered in clearing customs was the inability of agents to decide whether to categorise the Moche artefacts as "ethnic art" or "cultural antiquities"'.<sup>13</sup>

It is sometimes argued that an illicit trade is the natural outcome of a total export embargo, as objects will be smuggled out of a country to meet an international demand. Thus, the argument continues, a more lenient export regime would encourage legitimate commerce in an open market, and the volume of the illicit trade would dwindle accordingly. In practice, however, the validity of this argument remains to be demonstrated and it can be countered that, as in some other sectors of the economy, a thriving legitimate market might act only to stimulate its black counterpart. The United States and the United Kingdom continue to suffer from looting despite their liberal export regimes.

The 1947 *General Agreement on Tariffs and Trade* (GATT) is intended to encourage free trade by removing impediments to the import and export of goods but Article XX (f) of the Agreement makes an exception for export controls which are 'imposed for the protection of national treasures of artistic, historic or archaeological value'. In 1995 the GATT signatories organised themselves into the World Trade Organisation (WTO) which has since been under pressure from the United States to withdraw this cultural exception. Clearly, if the US was to succeed, the illicit trade would explode.

### Proof of ownership

Some countries have taken certain categories of material, most notably antiquities and palaeontological material, into state ownership. Illegal export of this state property is then considered theft. As theft is a generally recognised criminal offence it is in the interests of all countries to act against it, so the police of one country may take action to recover material stolen from another, and expect their efforts to be reciprocated in return.

Inevitably, there are problems here also. A government might take its country's cultural heritage into state ownership by passing a patrimony statute, but such a statute will not be recognised internationally as having a retrospective effect. Thus material removed from a state before the passing of a statute cannot be claimed as stolen. As the majority of material traded illicitly is removed illegally, and therefore secretly, it is very difficult to show that it was removed after the enactment of a patrimony statute, and didn't in fact leave the country some time long ago.



Photo: Ö Acar

**The 'Weary Herakles';  
half is in Turkey, half is  
in the Boston Museum  
of Fine Arts**

This can lead to extraordinary situations like the case of the 'Weary Herakles' - a sculpture of the Greek god Herakles, dating to the second century AD.

- The upper half of the statue was first seen in the United States in the early 1980s and is currently to be found in the Boston Museum of Fine Arts, although it is part-owned by the American collectors Leon Levy and Shelby White. The lower half was excavated near to the Turkish town of Antalya in 1980, and is now on display in Antalya Museum along with a photograph of the top half. In 1992 plaster casts of both halves were brought together and shown to be a good match, proving that the two pieces were indeed parts of the same statue. But despite this the Boston museum argues that there is no evidence to show that the upper half was stolen as it may well have been removed from Turkey long ago. Turkish antiquities have been state property since Ottoman times (1906) but without the evidence to show that the piece was removed after that date it is not possible to prove otherwise and the Turkish government has not pressed its claim.

However, some claims do succeed.

- Such was the case with the so-called 'Aidonia Treasure', a collection of Bronze Age jewellery from Greece offered for sale in April 1993 by the Michael Ward Gallery of New York. Once it was on display it was soon noticed that there were many similarities of iconography and technique with material recovered in the late 1970s during a rescue excavation by the Greek Archaeological Service of a previously looted cemetery - so much so that the Greek government claimed it as stolen property and sued for its return. The two sides settled out of court and the Aidonia Treasure has now been returned to Greece.

Even material in cultural or religious institutions is at risk if it is not properly documented and recorded on an inventory. Similarly, if buildings or monuments are not properly described they too can lose the more decorous parts of their architecture which will then turn up on the market as 'fine pieces of sculpture'.

- The storehouse at Angkor Wat was robbed of its contents sometime after 1970 but in 1993 ICOM was able to advertise many of the stolen pieces which were recorded in the collection's inventory. Six were recognised in private and museum collections, including a head in the possession of the Metropolitan Museum of Art in New York, which was subsequently returned to Cambodia. The pieces had all been sold by western dealers, including three at Sotheby's New York and one at Sotheby's London.

Sometimes it is not enough for a government merely to declare ownership, it must act in such a way as to exert ownership.

- In 1989 a US court rejected a Peruvian claim for the return of 89 Pre-Columbian antiquities on the grounds that, among other things, the Peruvian government allowed private ownership of antiquities within Peru, and that therefore the Peruvian patrimony law was in practice enforced only as an export control.

#### **The 'international loophole'**

The job of combating the theft and illicit trade in cultural material is made more difficult by what one senior police officer has called the 'international loophole'<sup>14</sup>. This loophole is caused by different conceptions of who is the rightful owner of property which is purchased legally but subsequently identified as stolen. The Common Law of England and Wales, and the United States, has traditionally favoured the original owner. Thus if a thief or an accomplice sells stolen material to an innocent third party and the material is subsequently recognised as stolen, then it is returned to its original owner and the purchaser, even if innocent of any crime, may well lose the money paid

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out. However, the situation is different in most other European countries with a Civil Law code, which favours the innocent buyer. Thus if a third party buys stolen material from a thief or an accomplice and the material is subsequently shown to be stolen, then the material stays with its new owner, provided the purchase was made in good faith. The original owner is dispossessed.

It is a principle of international law that the question of title to stolen goods should be decided according to the law of the country in which the transaction took place, not the country in which the goods were recovered. This means in practice that any cultural material that was originally stolen, but bought in good faith in continental Europe, can then be legally exhibited or sold in the United Kingdom or USA even if its illicit origin is discovered and made public.

### **The Swiss card**

It is suspected that this loophole allows large quantities of stolen material to be 'laundered' by means of a good faith purchase in continental Europe. Switzerland, in particular, has a thriving market in cultural material and objects bought there can be sold legitimately in the UK or US. It is common to read in catalogues or advertisements that a piece is from a collection long established in Switzerland. This emphasises that the material will not be reclaimed, even if it is subsequently shown to be stolen. In fact the attribution 'property of a Swiss gentleman' is regarded by some as a euphemism for 'illicit material'.

But playing the 'Swiss card' is not always well-advised:

- In Geneva the American art dealer Peg Goldberg bought four fragments of the Kanakariá mosaic, stolen from an early Christian church in Cyprus; but in 1989 an Indiana court ruled that her purchase was not in good faith. (See box feature)
- In 1997 the British dealer Jonathan Tokeley Parry was convicted of smuggling antiquities out of Egypt into the UK. He tried to claim that he had in fact bought them in Switzerland but the true nature of their acquisition was exposed by the testimony of his accomplice.

### **Costs**

However, these are not the only problems faced when mounting a legal action for recovery of a stolen object. The high cost of mounting a law suit can deter even governments, except in cases of exceptionally important, or high value, material. The resources are simply not available to sue for the return of large numbers of objects, even if their status as stolen property could be proven in court.

## **3.2 UNITED KINGDOM**

In theory, handling stolen goods (wherever they were stolen) is a criminal offence in the United Kingdom and dishonest dealers or purchasers may be prosecuted accordingly. Dishonest dealers are few and far between but even an honest dealer, or collector or museum, may lose money if caught inadvertently in possession of stolen goods.

However, in practice it is difficult to follow through a case of theft when the material involved has crossed several jurisdictions. The problems posed by the 'international loophole' have already been discussed and legal complications multiply with the number of borders crossed. UK legislation has in the past been shown to be ineffective in dealing with international crime, and its failure to deal with drugs trafficking has prompted a thorough revision of the law. Since the late 1980s, Parliament has approved a series of acts aimed at discouraging crime, wherever it occurs, by depriving criminals of its proceeds and the new laws have been co-ordinated and given better focus by the Money Laundering Regulations of 1993. This new raft of laws offers a much better means of combating the illicit trade and in this context has been described by one senior police officer as 'a godsend'.<sup>15</sup>

**There is no mechanism in place to check that much European archaeological material exported from the UK was first exported legally from its country of origin**

### **Suspicion or belief?**

Under the Theft Act of 1968 a dealer can be found guilty of handling stolen goods provided it can be established that there was reasonable cause to believe that they were stolen. Mere suspicion of theft is not strong enough for a successful conviction under the Theft Act. But now, it seems that under the 1988 Criminal Justice Act and the 1994 Drug Trafficking Act, a middleman acting as an intermediary to arrange a transaction can be convicted of assisting another person to retain the proceeds of a crime, wherever it occurred, provided there was good reason to *suspect* that one of the parties to the transaction has engaged in or benefited from a criminal action. Suspicion, of course, implies a greater state of uncertainty than belief.

Thus, in the past, when an auction house had arranged the sale of an object subsequently shown to have been stolen, it had been able to plead innocence on the grounds that it had no good reason to believe that the object was, in fact, stolen. Now, mere suspicion seems to be enough grounds for prosecution.

Furthermore, without a full and properly documented ownership history, it would seem prudent to treat any object from one of the major drug producing areas of central and south-eastern Asia or Latin America as suspect; failure to do so could result in a criminal prosecution for money laundering. This interpretation remains to be established in a court of law but there is good reason to hope that the threat of prosecution under these new laws will act as a major deterrent to those companies or individuals who deal in unprovenanced material, and may go some way towards cleaning up the market.

### **Export licensing**

The United Kingdom operates a system of export control which is designed to stop the export of what are termed 'national treasures' without at the same time obstructing the free trade of other cultural material. The system is based on recommendations first made in the Waverley Report of 1952 and was modified in 1993 with the implementation into UK law of EC Regulation No. 3911/92 on the export of cultural goods. It is administered by the Export Licensing Unit of the Department for Culture Media and Sport. Guidelines are set out in the department's 1997 booklet *Export Licensing for Cultural Goods*. The system is complex and the requirements are different for exports to destinations inside or outside the EU (although the majority are directed outside the EU). An EC licence is required for the following categories of material which are of interest to this report when they are exported to destinations outside the EU:

4. *Archaeological material or any object more than 50 years old found in UK soil or its territorial waters, other than any object buried or concealed for less than 50 years;*
- 5b. *Archaeological material or any object more than 100 years old found in soil or waters outside the UK and its territorial waters (unless they are of limited archaeological or scientific interest and provided that they are not the direct product of excavations, finds and archaeological sites within a member state).*
- 6b. *Elements forming an integral part of artistic, historical or religious monuments, which have been dismembered, and which are more than 100 years old*
33. *Collections and specimens from zoological, botanical, mineralogical or anatomical collections more than 50 years old, and valued at more than £39,600*
34. *Collections of historical, palaeontological, ethnographic or numismatic interest more than 50 years old and valued at more than £39,600.*

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It is difficult to know to what extent these rules are complied with. Statistics are not available for public inspection. There are certainly well documented cases of material from category (4) being exported without a licence, the Icklingham Bronzes for instance, but the situation with category (5b) is more serious. This category is designed to prevent the unlicensed export of material that originated in other EU member states, as the issue in the United Kingdom of an EC licence for an object to be exported is dependent on the submission of proper export documentation from its country of origin, if that country is within the EU. Yet a recent study has shown that about 90% of objects of non-UK origin sold in auction houses are exempted from licensing requirements, presumably on the grounds of limited importance, many of them from EC countries – especially Greece and Italy. Once they are exempt from licensing requirements then no check is made by the Export Licensing Unit on their original documentation, or the legality of their initial acquisition. The UK's weak implementation of the EC regulation therefore fails to achieve its aim of regulating the flow through Britain of material exported from other member states. There is no mechanism in place to check that much European archaeological material exported from the UK was first exported legally from its country of origin.

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Any cultural object which has come to the United Kingdom from another EU Member State since 1993 must have valid export documentation from its country of origin before the DCMS will issue an EC licence for its export from UK. This requirement was put in place by EC Regulation No. 3911/92 to stop material from parts of Europe with a stringent export regime being exported from those (particularly the UK) with a more liberal regime. In practice, however, there seem to be few checks on original documentation as most material is excluded from EC licensing requirements, presumably on the grounds of limited importance.

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At public viewings held before major auctions lists are made available to identify which lots would require an EC licence for export. If a lot does not require a licence then it can be exported without any check being made on its original documentation. A study of Classical Greek and Italian pottery offered for sale at two recent auctions (Bonhams: 25 November 1998 and 22 April 1999) showed that out of a total of 61 lots only six had any kind of a provenance and of the remaining 55 only one required an EC licence for export. Thus 54 lots (106 pots) could have been exported without being passed through the licensing procedure, and with no check being made on their recent history. This seems to undermine the purpose of the EC Licensing System which is to prevent the illegal export of cultural material from one member state to another, and can only facilitate the movement of illicit material through the market.

The position as regards palaeontological material is not altogether clear, although it was brought to everyone's attention by the case of 'Lizzie', the oldest known fossil reptile.

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- In 1989 a small fossil reptile, about 340 million years old, was found in Bathgate, Scotland and offered for sale by the finder to the Staatliches Museum für Naturkunde in Stuttgart. An application for an export licence was submitted to the Department of Trade and Industry, which at that time administered the licensing system, but the application was turned down on the grounds of scientific importance (including the fact that it was one of the very few fossils of its type found in a stratigraphical context). It was subsequently ruled, however, that fossils were not subject to export control and that, in fact, a licence was not required for export. The Secretary of State for Trade and Industry refused to bring natural heritage items under control although Lizzie was in fact saved for the nation when it was sold by its finder for £170,000 to the National Museum of Scotland. The situation as regards palaeontological specimens has now changed, however, with the introduction of the EC licensing rules, which require a licence for collections valued at more than £39,600.

The export licensing system was never intended to restrict the movement through the United Kingdom of material of foreign origin, therefore it would be wrong to portray it as a mechanism of control. However, given the present murky state of the trade, the licensing system could function as a useful, indeed necessary, means of information acquisition.

- It is in the public's interest for the trade in cultural material to be properly monitored and for useable statistics to be compiled and made readily available – as pointed out in Section 1.9, there are at present no reliable statistics available with which to describe the market.
- The increasing concern about the abuse of the art trade generally for the purposes of money laundering means that the trade might come within the scope of the extended money laundering regulations presently being drafted by the European Commission. Central features of any regulatory code, whether statutory or voluntary, are the creation of 'paper trails' and the operation of a transparent market. A comprehensive and easily accessible export licensing system would offer both and thus would seem to be an essential part of any such regulation. Indeed, the Financial Action Task Force (an inter-governmental body established by the 1989 G7 summit to combat money laundering) recommended this in 1998: that an effective export licensing system for cultural objects is a key component of any strategy designed to defend against international crime.

The EC Licence application form requires that descriptions of the object to be exported be provided, which for objects originating outside the UK goes some way towards providing a provenance. Thus the information collected would allow material flows to be identified and quantified. It would require only greater compliance for the existing system to achieve a better coverage of exports. Changes in legislation are not necessary. The arguments against instituting a full licensing system are primarily economic – the financial burden is too great. But, given the arguments set out above, the extra cost would seem to be justified.

### **3.3 INTERNATIONAL CONVENTIONS AND THE UK RESPONSE**

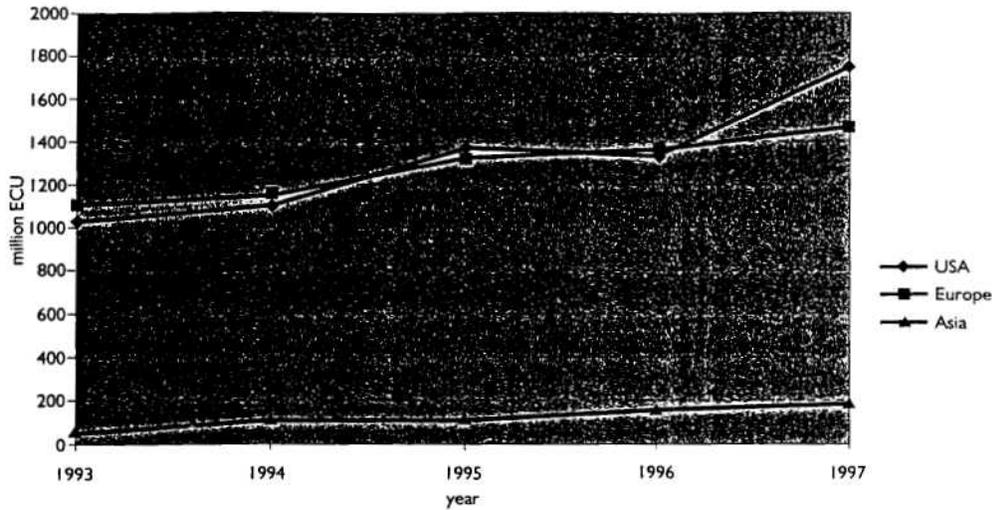
No government can police every archaeological and palaeontological site in its country in an attempt to keep off looters, nor can it monitor every border crossing to enforce export controls. The resources are, quite simply, not available. As shown above, the illicit trade is also facilitated by differences in law between jurisdictions, so that it is difficult for a government to reclaim material once it has been exported illegally from its territory. Not only that, it is also expensive. To overcome these problems international conventions have been devised over the years, with the aim of allowing an internationally-unified response to what is an international problem.

#### **1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property**

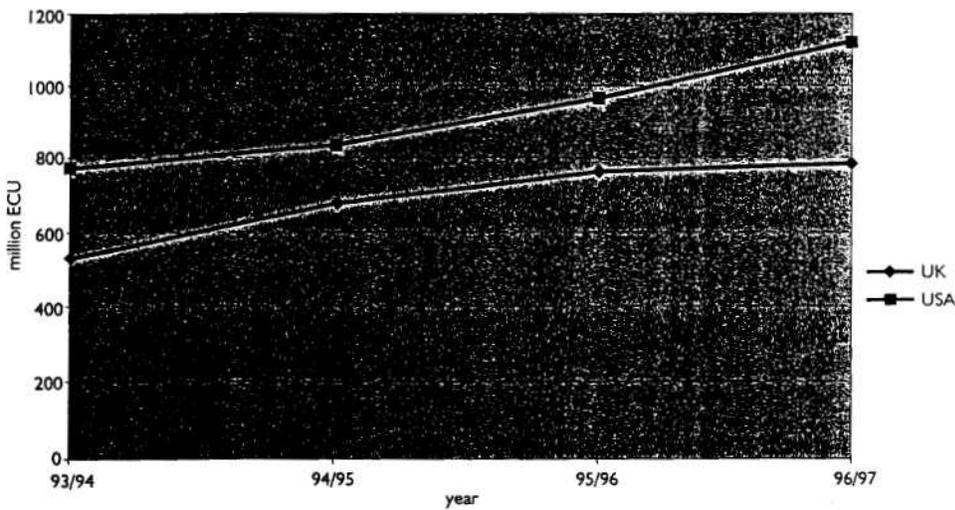
The 1970 UNESCO Convention establishes a legal framework within which governments can have the opportunity to co-operate to fight the illicit trade in cultural property. Cultural property is broadly defined, and as well as works of art it includes mineral and palaeontological specimens as well as antiquities, objects of ethnographic interest and elements of historic buildings and monuments which have been dismembered.

The convention makes provision for a state party to request the return of an object stolen within its own jurisdiction but located within the jurisdiction of another. It also makes provision for a state party to request another to impose import restrictions on specific classes of material. There are also recommendations for education and training.

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*Value of total auction sales (combined Sotheby's and Christie's, all material)*



*Value of total dealer sales (fine art only)*

A state can implement any or all of the articles of the convention but it is not retroactive. This means that claims for restitution can only proceed for an object that was removed from the territory of a claimant state after the date of ratification by the state party from which the object is to be recovered. Private and public collections established within a state before it becomes party to the convention are not open to claims for restitution. Its main faults are that it is a diplomatic rather than a legal instrument so that requests for action have to proceed at the inter-governmental level. It also fails to allow for differences in property law so that the 'international loophole' described earlier remains open.

At the present time there are 91 states parties to the convention around the world. Of the major market states, the US (see below) and France have ratified the convention and Switzerland is currently drafting implementing legislation.

However, in sharp contrast, in the UK the government has consistently refused to ratify the convention and has, over the years, given many reasons for this. Thus it has been claimed that, owing to the need to prepare a national inventory and enact legislation, implementation of the convention would place a large burden of bureaucracy on the British taxpayer; that it is unnecessary as the trade is self-regulated; and that its implementation might damage the multimillion pound art trade.

The requirement for a national inventory is set out in Article 5 of the convention:

'...the States Parties to this Convention undertake, as appropriate, for each country, to set up within their territories one or more national services... with a qualified staff sufficient in number for the effective carrying out of the following functions...'

These functions include:

'(b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage.'

The list of important public and private cultural property is intended to impose a limit on the types of material or objects to which the UNESCO provisions would apply.

The assembly of a list of important public and private property is seen by HM Government to be a time-consuming and expensive procedure – one best avoided. However, UNESCO points out that it does not have to be a list of individual objects, but can be comprised of categories, much as already exists in the United Kingdom for purposes of export control. Thus there is in fact little or no cost attached to the preparation of a list if these pre-existing categories are used.

The hope for a self-regulating trade has now been shown to be a vain one. As pointed out in Section 2.7, members of the trade take the approach 'innocent until proven guilty' as far as provenance is concerned, and continue to maintain that it is not possible to establish the provenance of most objects bought and sold. Nor in fact do they think it desirable to do so. During the development of the 'Object ID' international standard for describing cultural objects, a questionnaire was circulated (answered by 181 dealers' associations and individual dealers in 13 countries) asking what information was thought useful for the identification of an object. It is significant that only 48% of respondents thought that the means by which an object was acquired and the date of its acquisition were worth recording<sup>16</sup>. This would seem to imply that, in general, over half of the art trade (including antiquities dealers) has no interest in the provenance of an object, in either its broad, fine art sense or its narrower, archaeological/geological usage. In view of this inability or unwillingness to ascertain provenance, it seems that clauses in ethical codes produced by art trade organisations (such as the IADAA) that supposedly regulate the dealing community and forbid the sale of stolen or illegally exported material cannot be adhered to, and are merely cosmetic.

Criticisms of ethical codes are not limited to the antiquities trade. In February 2000 Christie's and Sotheby's were accused of price-fixing across the board. A leading London art dealer reported their collusion to British trade associations but no action was taken.

Finally, the argument that ratification of the UNESCO Convention might adversely affect the multimillion pound art trade is difficult to sustain. In the first place, cultural material accounts for less than 15% of the total art market. The convention would not affect the higher volume legitimate trade in fine art and antiques. Secondly, there is no evidence that the ratification of the UNESCO Convention by the United States has diminished that country's share of the world art market, which has in fact continued to grow faster than Europe's over the past decade (see diagrams on p.37). Nor did US ratification deter Sotheby's from moving their antiquities business from London to New York in the wake of the Watson exposé (see Section 2). Art market shares generally seem to respond more to fluctuations in exchange rates or differences in tax regimes. Ratification of the 1970 UNESCO Convention by HM Government would be unlikely to inflict any noticeable damage on the UK art trade. In fact, the opposite might be true. Colin Renfrew has made the point that the sleazy trade in illicit antiquities gives a bad name to the entire commercial art world<sup>17</sup>.

**Ethical codes produced by art trade organisations that supposedly regulate the dealing community and forbid the sale of stolen or illegally exported material cannot be adhered to, and are merely cosmetic**

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### The US approach

In the United States the Cultural Property Implementation Act of 1983, in effect, implements Article 9 of the UNESCO Convention which allows the US government to respond to requests from other state parties to impose import restrictions on certain classes of archaeological or ethnographic material by bilateral agreement. Import restrictions apply to material even if it is imported from a country other than that of origin. The CPIA is not retrospective as restrictions will apply only to material still in the ground or in its societal context at the time of the agreement. Thus its emphasis is on the protection of material with a still undisturbed context rather than on the return of material whose context is lost.

The US has now reached bilateral agreements with eight states (Bolivia, Cambodia, Canada, Cyprus, El Salvador, Guatemala, Mali and Peru) and is currently considering requests from two more (Italy and a more extensive agreement with Bolivia). Sometimes the category of material restricted is quite specific, sometimes it is quite broad.

- In Bolivia ceremonial textiles were being illicitly removed from the small Andean village of Coroma and marketed in the US. Some were even displayed in a travelling exhibition supported by a major museum. It is now illegal to import these textiles into the US.
- Import restrictions on Canadian material, on the other hand, are wide ranging and encompass all archaeological and ethnographic material from the native peoples of Canada.

To help Customs Officers recognise restricted material a web site is maintained by the United States Information Agency<sup>18</sup> which carries images of typical restricted objects so that they can be quickly and easily identified at border checkpoints.

Photo: Michel Brent

In the late 1960s and 1970s terracotta statuettes from the inland Niger delta region of Mali became the latest fad among collectors of 'tribal art'. Hundreds or even thousands had been dug up and smuggled out of Mali before the first one in context was found during an archaeological excavation in 1977. Between 1989-91 a Dutch team surveyed an area of 125 square miles and found that 45% of the 834 sites they discovered had been damaged by looting. The statuettes may command anything up to \$275,000 at auction and most end up in private collections although some have found their way into museums including the Boston Museum of Fine Arts and the Tervuren Museum of Belgium.

The inland delta region of Mali has a rich cultural heritage which stretches back to the Stone Age. A thousand years ago it was home to a great urban civilisation which had trading links to all parts of Africa and even as far as Asia. Yet the history of Mali is known only from archaeology, and if the archaeology disappears then the history will too. In 1993 the Malian government established three cultural missions including one at Djenné with a view to raising public awareness of the importance of the archaeological heritage and then in 1998 at Djenné work commenced on the construction of a local museum. In 1997 Mali reached agreement with the United States under the terms of the UNESCO Convention whereby the US government undertook to place import restrictions on archaeological material coming from the Niger River valley region and the Tellem caves. These import restrictions in conjunction with educational and police work on the part of the Malian authorities, have been so successful that looting in the area of Djenné is now virtually a thing of the past.

Looters' hole in Thial, Mali



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The United States implementation of the UNESCO Convention offers protection to *in situ* material, thereby preserving context, it is accompanied by minimum bureaucracy, and it does not impede the legitimate art trade. The Swiss government seems to be moving towards a similar implementation. It is currently drafting the necessary legislation and a final decision will be made in the year 2001.

#### **The UK loophole**

The failure of the United Kingdom to ratify UNESCO is deplorable in itself, but the position is worsened as, in effect, the United Kingdom is undermining American efforts. As has been described in Section 3.1, and as Lord Inglewood told the House of Lords in 1997: 'It is not an offence to import into this country antiquities which have been illegally excavated in and exported from their countries of origin'<sup>19</sup>. In the wake of import restrictions placed on Pre-Columbian material by the United States, reports suggest that such material is now moving through London before entering the United States – through the 'back door', so to speak. To counter this possible contingency the US State department at the time of ratification issued a statement expressing its desire to see a multilateral response to appeals from states whose heritage is under threat. But still, it was reported in 1997 that the London market was glutted with smuggled Pre-Columbian antiquities, with 60% of the sales revenue coming from Americans.

On 9 February 2000 HM Government announced that it had decided not to sign the 1970 UNESCO Convention because 'significant practical difficulties remain in implementing its provisions into UK law'<sup>20</sup>. What these practical difficulties are was not made clear.

#### **1995 Unidroit Convention on Stolen and Illegally Exported Cultural Objects**

The 1970 UNESCO Convention is an instrument of inter-governmental co-operation and makes no provision for private individuals or institutions to reclaim stolen material through the courts of a foreign country. Furthermore, claims for restitution made under the UNESCO Convention have been interpreted as applying only to stolen material – material previously known and inventoried. The 1995 Unidroit Convention is designed to rectify these deficiencies by providing a legal framework within which private actions for restitution can proceed, and by defining that an object which has been illegally excavated, and so not inventoried, should in any case be considered as stolen.

The 1995 Convention is a good legal compromise as it follows the Common Law practice of favouring the dispossessed owner of an object over a good-faith purchaser, thus closing the 'international loophole', but in accordance with the principles of Civil Law it allows a good-faith purchaser to claim compensation should the object be reclaimed. To claim good faith, however, the buyer must be able to show that a certain standard of diligence was adhered to at time of purchase. This latter provision is considered by some commentators to be perhaps the most significant feature of the convention as it will encourage the development of a more honest market. Buyers will be encouraged to enquire more rigorously into the origin and past history of an object before committing themselves to a purchase. The definition of due diligence might also provide a model for future domestic or international legislation and a point of reference for future law suits (see Section 4.5).

Like UNESCO, the Unidroit Convention is not retroactive. Unlike UNESCO, Unidroit must be fully implemented. Twenty two states have signed the Unidroit Convention, but only eight states have ratified it. Most seem to be following the lead of the USA, which is not at present considering ratification.

#### **The UK position**

On 7 February 2000 HM Government announced that it would not sign the Unidroit Convention due to conflicts with current UK law. It put forward two legal objections in support of this decision. In the first place it is argued that the limitation periods are different to those which apply in the 1994 Return of Cultural Objects Regulations (see

below), which are in turn different to those which normally apply for stolen property. This would cause confusion in the courts. Secondly it is argued that the principle of compensation is alien to established common law practice.

The limitation periods allowed for by Unidroit are certainly more generous than is usual in the UK, but this is deemed necessary by the very nature of the material under consideration. Unlike objects with built-in obsolescence, televisions for instance, there is no need to sell a cultural object shortly after its theft in order to achieve a maximum return. It can be kept hidden away – where it will appreciate in value – until it can be brought to market after the limitation period has expired. Thus in the realm of cultural material even stringent legislation can be undermined by short limitation periods. Those responsible for drafting the Unidroit Convention were far-sighted enough to avoid this eventuality.

HM Government's objection to the payment of compensation is difficult to understand. Article 9(1) of the convention allows Common Law countries to ignore requirements for compensation, and thus represents an advance over the 1994 Return of Cultural Objects Regulations, where compensation is payable in cases of illegal export, and which have already been accepted into British Law.

### **1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)**

This convention was designed to protect the world's cultural heritage in times of war. It provides for the protection of monuments, cultural institutions and repositories, as well as moveable objects. A Protocol (First Protocol), drafted at the same time as the convention, deals specifically with moveable objects, forbidding the export of cultural material from occupied territories and providing a legal framework to enable the return of material so removed. The war may be international or internal.

- Two Khmer stone heads were recently seized by French police from an antiquities dealer and returned to the Cambodian embassy but to date no state party to the protocol has issued a general order for seizure of all Cambodian material. Such an initiative cannot be expected to be taken by nationals of countries involved in conflict who are in no position to petition the governments of neutral states

The UK and US did not sign the Hague Convention until 1965 but failed to ratify it. The US started the necessary ratification procedure in 1999 but the UK government has remained silent.

The 1954 Convention was drawn up with world wars one and two in mind, but since then there has been an increase in internecine strife, often along ethnic or religious divides, and the obliteration of an enemy's identity by destruction of its cultural heritage has become a frequent war aim. This failure of the convention to prevent the loss or destruction of cultural material during times of war led to the formulation of a Second Protocol in 1999. Among its many provisions it establishes that the destruction or appropriation of cultural material is a war crime, and includes a chapter that deals specifically with civil wars.

### **EC Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member state**

This passed into British Law as the Return of Cultural Objects Regulations 1994. It confers on each member state of the EU the right to reclaim cultural objects which have been illegally exported from the territory of one member state to another. It is not retroactive. Again, like the UNESCO Convention, it is an instrument of inter-governmental co-operation and it contains provision for the compensation of a good-faith purchaser. No case has yet been brought in Britain and it is thought by some experts that the procedure to be followed is overly cumbersome and that this might discourage its use.

**The obliteration of an enemy's identity by destruction of its cultural heritage has become a frequent war aim**

### 3.4 RECOMMENDATIONS TO HER MAJESTY'S GOVERNMENT

1. HM Government should proceed to ratify both the 1970 UNESCO and 1995 Unidroit Conventions forthwith. This would:

- prevent the United Kingdom being used as a market place for material which was, in the first instance, obtained illegally (by, for example, controlling its import). By failing to ratify it can be argued that the United Kingdom condones criminal behaviour abroad.
- provide a means for reclaiming material exported illegally from the United Kingdom much of which, at the present time, is lost.

2. HM Government should take steps to make the system for licensing exports of cultural material fully comprehensive, and to improve compliance and data collection. No new legislation is needed. This would:

- establish the value and pattern of the international trade in cultural material, and so help guide government policy
- encourage the development of an open market
- help to protect material originating within the United Kingdom
- circumvent the need for a list of important cultural property to be maintained as a requirement of implementing the 1970 UNESCO Convention.

3. HM Government should encourage 'transparency' in the trade by requiring that auction houses and dealers record and, when it is in the public interest, disclose the names of individuals or organisations from whom they purchase material.

4. HM Government should review whether tax benefits should be allowed to accrue to individuals in respect of unprovenanced material, for instance in the Acceptance in Lieu scheme for inheritance tax and the Conditional Exemption scheme.

5. HM Government should review whether it is appropriate for the Government Indemnity Scheme to continue to cover loans of unprovenanced material to UK museums.

6. HM Government should proceed to ratify the 1954 Hague Convention, along with the 1999 Second Protocol.

7. HM Government should resist US pressure at future meetings of the WTO for the abolition of trade controls on cultural material.

**Pakistani  
archaeologists,  
members of the  
Provincial Department  
of Archaeology,  
Government of NWFP  
halting an illegal dig at  
Shaikhan Dheri,  
Charsadda**



Photo: Coningham 1993

# 4. MUSEUMS AND THE ILLICIT TRADE

## 4.1 CODES OF ETHICS

### Ethical evolution

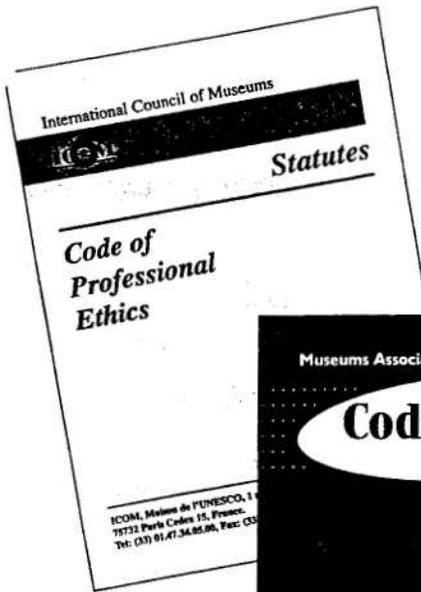
Well-founded museums uphold a number of codes of ethics and guidelines prepared by national or international bodies. Over the years, as museum priorities and attitudes have changed, ethical codes, regularly revised, have evolved. During the 1970s as cultural theft became more of an issue and, especially following the 1970 UNESCO Convention, museum ethics 'statements' started to address issues surrounding the acquisition and exhibition of illicit, or potentially illicit, objects. In the early 1970s various American museums, the Archaeological Institute of America, and the American Association of Museums issued a series of declarations deploring the growing 'black market' and committing themselves and their members to abstain from buying material without satisfactory pedigree. The decision of the UK government to refuse to ratify the 1970 UNESCO Convention prompted the British Academy, the Standing Commission on Museums and Galleries, the British Museum and the Museums Association to issue a joint declaration in 1972. This emphasised the importance of preventing archaeological destruction, and the importance of the study and interchange of cultural material. The declaration reaffirmed that museums in the UK did not and would not acquire any cultural material believed to have been exported in contravention of the laws of the country of origin. Museum authorities, notably Leicestershire County Council, published ethical acquisition policies and by 1977 the Museums Association Code of Practice for Museum Authorities and interim Guidelines for Professional Conduct were adopted.

Adherence to relevant codes of ethics is a condition of membership of most professional museum organisations. 'Serious reasons relating to professional ethics' can provide grounds for termination of membership for institutional and individual members of ICOM, but voluntary codes of ethics are notoriously difficult to enforce. Nevertheless, a Swiss museum is currently in negotiation about the return of a stolen African artefact partly because of the threat of expulsion from ICOM.

In the UK when an ethical dilemma is encountered, members of the Museums Association are encouraged to raise the matter, in confidence, with the Ethics Committee which discusses it in confidence. The Museums Association may investigate allegations further. A museum could be expelled from membership of the Museums Association by the Museums Association Council, but this has not yet happened in a case involving illicit acquisition. The Museums Association's preferred approach is to work with offending members to improve future practices. Any individual or museum can consult the Ethics Committee for advice.

Museum professionals welcome clear guidelines from professional organisations, especially for dealing with issues like the illicit trade, which involves negotiating legal and ethical minefields. In January 1999, the Association of Art Museum Directors in the USA decided to revise its code of ethics to close loopholes, address the 1970 UNESCO Convention and clarify the complicated legal situation surrounding the acquisition of objects illegally exported from their country of origin but not stolen. The prospect of clearer guidelines was well-received. In fact Alan Shestack, now deputy director of the National Gallery of Art in Washington DC went further in a 1986 speech calling for higher ethical standards. He said that, during his tenure as director of the Boston Museum of Fine Arts, he 'cried out for stringent laws that would give museum directors a reason for not doing the evil thing'.<sup>21</sup>

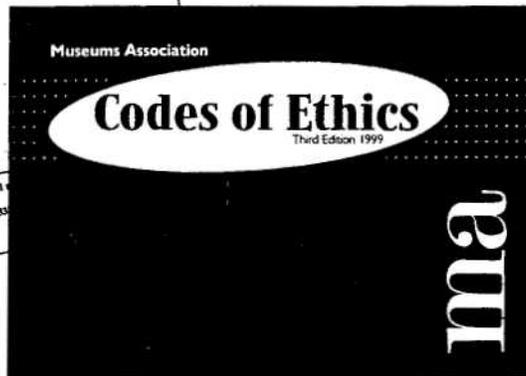
Two codes (ICOM and MA) are particularly relevant to UK museums. They carry guidelines for due diligence procedures, interaction with the market, and prudent, lawful spending of museum funds.



### The ICOM Code of Professional Ethics

The ICOM Code of Professional Ethics addresses the rights and wrongs of acquisition of illicit material in Section 3.2. It begins with a denouncement of the illicit trade, and continues:

'Museums should recognise the relationship between the market place and the initial and often destructive taking of an object for the commercial market, and must recognise that it is highly unethical for a museum to support in any way, whether directly or indirectly, that illicit market.'



A museum should not acquire, whether by purchase, gift, bequest or exchange, any object unless the governing body and responsible officer are satisfied that the museum can acquire a valid title to the specimen or object in question and that in particular it has not been acquired in, or exported from, its country of origin and/or any intermediate country in which it may have been legally owned (including the museum's own country), in violation of that country's laws...

So far as excavated material is concerned, in addition to the safeguards set out above, the museum should not acquire by purchase objects in any case where the

governing body or responsible officer has reasonable cause to believe that their recovery involved the recent unscientific or international destruction or damage of ancient monuments or archaeological sites, or involved a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities.'

Section 3.6 states that the same principles should apply when considering loans for exhibitions.

Section 4.4 rules that should a country request the return from a museum of an object which can be demonstrated to have left its territory in violation of the principles of the UNESCO Convention then, if legally free to do so, the museum should do everything possible to ensure its return.

Section 8.5 states that museum professionals should not identify, authenticate or value any object suspected to have been illegally acquired, transferred, imported or exported or act in any way that could be regarded as benefiting illicit trade. The appropriate authorities should be informed when such suspicions arise.

### The UK Museums Association Code of Conduct for People who Work in Museums and Code of Practice for Governing Bodies

Designed to complement each other, these two codes are supplemented by additional sets of Ethical Guidelines.

Article A.5 of the Code of Conduct for People who Work in Museums states that:

'Museums should not accept on loan, acquire, exhibit, or assist the current possessor of, any object that has been acquired in, or exported from, its country of origin (or any intermediate country in which it may have been legally owned) in violation of that country's laws.'

When considering acquiring an object, museum professionals are expected to obey the law and take account of the principles of the 1970 UNESCO Convention, the 1995 Unidroit Convention and regulations of the country or locality from which the object originated. If necessary, suspicions that an object has been illicitly obtained should be reported to the appropriate authorities.

The Code of Practice for Museum Governing Bodies also cites statute law and the principles of the 1970 UNESCO Convention as a standard by which to judge whether an item should be acquired.

### **The UK Museum Registration Scheme**

The UK Museum Registration Scheme, originally established by the Museums and Galleries Commission, requires that statements regarding illicitly removed material be incorporated into the acquisition policy of every registered museum in the UK. These statements are based on the MA Code of Practice. In addition procedures must be in place to try and establish, as far as possible, title and provenance.

## **4.2 ACQUISITIONS**

Museums acquisitions might be active or passive. Passive collecting is when museums acquire material by gift or bequest; they acquire more actively through purchase or fieldwork. No matter what the method of acquisition it should conform to guidelines laid down in the acquisitions policy which, in registered museums in the UK, must include ethical statements with regard to collecting unprovenanced material (see above). Enquiries made during the preparation of this report suggest that many UK museums do turn down potential acquisitions because of the ethical guidelines described above. Reasons range from dissatisfaction with the documentation, to suspicions of illegal exportation, or 'it just didn't feel right'.

- One museum, for instance, has reported an object presently on offer in the United Kingdom, with an export licence from an intermediary country, but not from the country of origin. The museum has refrained from buying the object for the time being and is trying to ascertain (with great difficulty) the export rules of the country of origin. This is obviously a correct ethical position, even though the museum stands to lose an important acquisition.
- Another museum has drawn attention to the problem of fake documentation. Specifically, it had declined to purchase a terracotta object, accompanied by what appeared to be a genuine export licence, because the licence in question had been issued in contravention of the export laws of the country in question.

### **Acquisition policies: necessary loopholes**

However, the case for or against acquisition is not always clear cut. Acquisition policies contain areas of uncertainty – 'necessary loopholes' – to allow curators to use their experience and personal judgement in difficult cases.

The Policy Statement on the Acquisition of Antiquities by the Trustees of the British Museum (1998), for instance, states that the British Museum deplores the looting of antiquities for the market, and refuses to acquire objects that have been illegally excavated and/or exported:

'Wherever 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.'

But it goes on to say: 'The Trustees recognise, however, that in practice many minor antiquities that are legitimately on the market are not accompanied by detailed documentary history or proof of origin and they reserve the right for the museum's curators to use their best judgement as to whether such antiquities should be recommended for acquisition. In doing so the staff of the British Museum will at all times abide by the spirit of the Codes of Ethics of the International Council of Museums and the Museums Association'.

In addition the Trustees: 'recognise the principle that regional and national museums must sometimes act as repositories of last resort for antiquities originating within their areas of responsibility, and they will on occasion approve the acquisition of antiquities without documented provenance where it can reliably be inferred that they originated within the United Kingdom, and where such payment as may be made is not likely to encourage illicit excavation'.

### Museums of Last Resort

The argument that a museum must be the repository of last resort was used to justify the purchase by the British Museum of the Salisbury Hoard (see Section 2.6), when pieces first began to appear on the market, but before its provenance or true nature was known. It was obviously an important collection and the overriding wish was to preserve it intact (as far as possible) so as to make it available for study and public display, and to prevent its dispersal and loss abroad. Thus the British Museum moved to buy it.

When smaller museums try to follow suit they may soon run into difficulties. Their acquisition policies give them the responsibility to collect archaeological material from a specific area, but their acquisition budgets are often very limited. With the present popularity of treasure hunting as a hobby they may be faced with an enormous range of material, much of which might have no secure provenance, yet is seen to be of regional or local significance. The museum then has to choose whether to buy the best pieces and let associated material go, or to buy nothing. If the former course of action is chosen then the museum risks being criticised for encouraging illicit excavation and 'cherry-picking' yet, in principle, the policy is the same as that of the British Museum.

There is a conflict here between principle and practice and there is a danger that smaller museums may be criticised for adopting an acquisition policy which is identical to that of larger museums, but which cannot be properly implemented because of limited resources. Clearly, the argument of 'last resort' is in need of some clarification.

### Minor Acquisitions

The British Museum's acquisition policy also makes provision for the purchase of undocumented or unprovenanced minor antiquities at the curator's discretion. Again, there is a need for some clarification here. What is a 'minor antiquity'? What type of objects suitable for purchase by the British Museum are in fact without any known history? How many objects of this type are likely to surface? Where do they come from? This exemption might need to be reviewed as its implementation becomes clearer in practice.

#### The Rosetta Stone Dilemma

The primary objection to the illicit trade is that it encourages looting, which destroys contextual information and in so doing causes a loss of knowledge. But sometimes it can be argued that an object with no provenance is important in itself, and that there would be a loss of knowledge if a museum failed to acquire it so that it was instead lost to view in a private collection. Such an argument has recently been put forward to justify the purchase by a US museum of unprovenanced Attic vases – that they are important works of art. An extreme example of this type of argument has been characterised by archaeologists as the Rosetta Stone dilemma.

The Rosetta Stone holds a bilingual inscription and was discovered during Napoleon's campaign in Egypt. It is now in the British Museum. The languages are Egyptian and Greek and their coincidence on the stone enabled Champollion to decipher the Egyptian hieroglyphic script. A pivotal moment in the annals of Egyptology. Now imagine a curator in a museum confronted with a rather shady dealer offering a similar opportunity: a stone with two languages, one known and one unknown. The provenance is impeccable of course – an old Swiss collection. What should the curator do: buy the piece and in so doing break all ethical codes and encourage further looting; or send the dealer away so that the piece is lost from scholarly view?

A similar dilemma has recently arisen with the discovery of fossilised dinosaur eggs in southern China, some of which still contain embryos. Chinese law prohibits the export of such material and as the eggs were only discovered in 1957, any egg now in the west is an illegal export, and as such would constitute an unethical museum purchase. Should these eggs be ignored and left to the vagaries of the private market? Or should they be bought and studied?

One possible resolution of this dilemma might lie in distinguishing between qualitative and quantitative additions to a presently established body of knowledge. Thus the Rosetta Stone opened up a whole new field of study; it provided the basis for a qualitative extension of historical knowledge. Perhaps the dinosaur eggs might do the same. An Attic vase does not. It is an addition to the corpus, one more pot, it does not open up a new field of study.

The Rosetta Stone dilemma is interesting but not one of great practical import. The number of Rosetta Stones can be counted on one finger, and the number of equivalent items on the fingers of one hand. The vast majority of unprovenanced objects are just not in this class. They appeal to the collecting instinct – the missing piece – but their acquisition cannot be justified on the grounds of intrinsic importance.

### 4.3 BREAKING THE CODES

Brent Benjamin, deputy director for curatorial affairs at the Boston Museum of Fine Arts, has acknowledged that museum acquisition of unprovenanced artefacts 'is potentially a contributing factor' to looting.<sup>22</sup> So, why do some museums still acquire objects in contravention of these codes of ethics? Martin Sullivan, chairman of the U S State Department's Cultural Property Advisory Committee says, 'There is still a prevailing feeling in the museum world that museums need to make spectacular additions, no matter how much they already own. This is a very competitive industry and spectacular new things mean more visitors.'<sup>23</sup>

#### Disregard

It is clear that some museums continue to disregard codes of professional ethics:

- The Boston Museum of Fine Arts was recently accused of acquiring looted artefacts after having committed itself in 1983 to an ethical acquisitions policy. Among the 71 objects identified were numerous Apulian vessels, marble busts, a Greek vase from Tuscany and a rare Mycenaean terracotta figurine.
- In 1997 the Miho Museum in Japan opened its doors to the public. Funded by the Shinji Shumeikai religious organisation, the museum's collection is largely of Japanese origin although there is a substantial holding of objects from other East Asian countries, as well as from the Middle Eastern and Mediterranean areas. These latter antiquities have been acquired over the last seven years and are largely without provenance. Inevitably, the authenticity of certain objects has been called into question.

#### Bequests and donations

Ethical codes state that the same standards should be applied to bequests and donations, as to purchased acquisitions. But as one museum director commented recently, 'It is much harder to resist... temptation when you are presented with an object that might transform your collection or, in the case of the MFA [Boston Museum of Fine Arts], when it comes from one of your major benefactors.'<sup>24</sup> However, bequests and donations of unprovenanced material can prove to be very expensive acquisitions in public relations and financial terms:

- In 1996 a collection of allegedly looted Mayan pottery was given to the Boston Museum of Fine Arts by trustee Landon T Clay. The museum paid an estimated

£30,000 for a legal review of the Pre-Columbian collection which concluded that there was no reason for the MFA not to take it. The MFA turned aside a public demand from the government of Guatemala to return the objects. In 1998 the Guatemalan government hired two attorneys with a successful track record in similar cases to seek restitution of their property. A similar storm is brewing over the acquisition of undocumented Italian pieces including some seventh-century BC cups from burial grounds near Rome that 'raised suspicions at the MFA, but were nonetheless accepted in 1996 – a gift from a long-time overseer'.<sup>25</sup>

- In the United States, dealers seeking tax deductions often donate artefacts to museums they sell objects to. The MFA's list of donor-dealers, according to the *Boston Globe*, 'amounts to a "who's-who" of dealers, and some collectors, who have been involved in controversy over the origin of some of their acquisitions.'<sup>26</sup> There is increasing unease that collectors and dealers should obtain tax relief on the basis of 'charitable donations' of unprovenanced antiquities, and pertinent questions are being asked as to why American tax-payers dollars should be used to reward a dealer or collector in such artefacts. This may not seem directly relevant to the British situation, but is well worth noting in relation to the tax-in-lieu scheme for inheritance tax (see Recommendations for HM Government).
- 316 rare Native American artefacts were recently donated to the Nevada State Museum in Carson City, by the mother of collector Stephan Mueller (now deceased). It emerged that they were apparently removed illegally from federal lands in remote areas of Utah and Nevada. Mueller's mother vanished and the museum was left holding the material.
- In 1990 the Metropolitan Museum of Fine Art, New York mounted an exhibition of Andean four-cornered hats from a private collection. In the catalogue museum director Philippe de Montebello acknowledged that these objects 'covered new territory in the field' and, to the dismay of Peruvian archaeologists, expressed deep appreciation for their promised donation to the museum.

#### 4.4 MUSEUMS AND THE MARKET

Museums need the market. As the Boston Museum of Fine Arts argued back in the 1970s, it was not equipped to carry through its own field projects and thus was reliant on the market for the continuing expansion of its collections. A similar point was recently made in the United Kingdom when it was argued that museum geologists are often poorly equipped for fieldwork, and perhaps not even trained for it, so that they are dependent on commercial sources for new specimens.

British museums continue to maintain a presence in the market, although their purchasing power cannot rival that of their American and Japanese counterparts, or indeed the wealthy private collectors.

Dealers and auction houses, when questioned, cannot reveal any hard figures, but research for this report suggests that sales to British museums account for only a very small proportion of their total turnover. Museums agree. Cuts in purchasing budgets have had their effect. The annual reports of the major funding organisations again confirm the picture of low-level activity.

*Nevertheless, it is clear from the material presented in this report that there are both legal and ethical issues for museums to bear in mind when buying any object on the open market.*

- They are unlikely to face prosecution for the inadvertent purchase of stolen material, but they might have to give it up and lose the purchase price. The Salisbury Hoard (see Section 2.6) cost the British Museum £55,000.

- Members of governing bodies could find themselves personally responsible for any financial loss to the museum.
- There are also ethical considerations. It is clear that although much of the material appearing on the market with reputable dealers is legally traded under English law, the method of its first acquisition may well have been destructive and quite probably illegal in the country of origin.
- There is a fair chance that material without a verifiable provenance might be fake.

#### 4.5 DUE DILIGENCE

One problem with codes of ethics is that they do not lay down clear procedures that museums should follow when investigating the status of a potential acquisition. Colin Renfrew has argued that 'many museums take the weakest possible interpretation, avoiding only acquisitions which can positively be shown to be looted'.<sup>27</sup>

The British Museum's policy requiring that objects should have 'documentation to show that they were exported from their country of origin before 1970' is, in this regard, less open to weak interpretation by museums than the equivalent statement in the ICOM code that a museum must be 'satisfied' that an object 'has not been acquired in, or exported from, its country of origin... in violation of that country's laws'.

Apparently weak interpretations include:

- In 1996, only months after announcing that they would only acquire classical antiquities 'with a well-documented provenance' the J Paul Getty acquired, through gift and purchase, the \$80 million Fleischman Collection. Most of the pieces in the collection are of unknown origin. Yet, according to Marion True, the museum's curator of antiquities, this acquisition was fully in accordance with the new ethical acquisition policy since the museum interprets 'well-established provenance' to mean an established record of possession *documented* before November 1995. Ironically this published record was a catalogue written when the collection was exhibited by the J Paul Getty Museum itself and the Cleveland Museum of Art in 1994 and 1995. The museum apparently refused pieces that the Fleischmans had bought since then but has already felt obliged to return one of the Fleischman pieces to Italy when it was shown to have been stolen (see Section 4.7).

'Due diligence' is a term now entering common currency to describe the measures that an individual or institution can reasonably be expected to take when checking the pedigree of a potential purchase.

- Is it legally on the market?
- Was its original acquisition illegal or in any way destructive?

The somewhat hazy concept of due diligence has slowly evolved over the past ten years and acquired better definition after the judgement in Indiana on the return of the Kanakariá mosaic fragments to Cyprus (see box feature), the drafting of the 1995 Unidroit Convention (where demonstration of due diligence at time of purchase is a necessary prerequisite of compensation should a stolen object be reclaimed), and the EU Money Laundering Directive of 1991 which imposed statutory regulation on the financial sector, but which has influenced the voluntary codes of due diligence for art dealers and auctioneers launched in 1999 by the Council for the Prevention of Art Theft (CoPAT).

### **Unidroit**

The set of recommendations for the exercise of due diligence in transactions involving cultural material made in Article 4(4) of the 1995 Unidroit Convention have been particularly influential:

'In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any step that a reasonable person would have taken in the circumstances.'

Lyndel Prott of UNESCO has discussed this article in some detail<sup>28</sup>. When considering the circumstances of the acquisition regard should be paid to the place and time of transfer (midnight on the waterfront is obviously suspect) and the type of packaging (straw and old socks in a disintegrating cardboard box are more suspicious than a professionally packed parcel). Objects from areas known to have recently been heavily looted (eg. Cambodia, Mali, Afghan/Pakistan border, Latin America, etc), must be suspect, and more rigorous investigation of their original acquisition is called for. Newly surfaced examples of some classes of material can be presumed to be illicit (eg. Cycladic figurines, Nigerian Nok terracottas, Chinese dinosaur eggs, Apulian vases, etc).

It is safer to buy from a dealer or, better still, a dealer with whom a regular relationship is maintained but, even then, as Elisabeth des Portes, former secretary general of ICOM, has said: 'It is evident that one can no longer rely on the fame of certain salerooms or dealers for assurance of the provenance of objects.'<sup>29</sup>

Simple checks with registers or databases of stolen art (such as the Art Loss Register) are useful and should always be undertaken. However, illegally removed, and therefore previously unknown material quite obviously cannot be listed. It is encouraging that some museums now write to the authorities of putative countries of origin. But again this is not enough, since there is no guarantee that the request will reach the right person and again, in any case, experts often cannot identify with any degree of certainty previously unseen material. It is certainly worth checking an object with the Art Loss Register, and the probable country of origin, but museums should be aware that this does not give an object 'a clean bill of health'.

### **Dealers and Auctioneers**

The two 1999 Council for the Prevention of Art Theft (CoPAT) codes of due diligence were introduced to protect honest dealers and auctioneers from the activities of thieves and their accomplices, and to impede the free flow of stolen material through the market. They are also of relevance to museums. The dealers' code recommends that dealers endeavour to:

- Request a vendor to provide their name and address and to sign a form identifying the item for sale and confirming that it is the unencumbered property of the vendor and they are authorised to sell it, and this form will be dated.
- Verify the identity and address of new vendors and record the details.
- Be suspicious of any item whose asking price does not equate to its market value.
- If there is reason to believe an item may be stolen:
  - a) Attempt to retain the item while enquiries are made.
  - b) Contact the officer with responsibility for art and antiques within the local police force area.

- c) Check with relevant stolen property registers.
  - d) Pass to the police any information which may help to identify the person(s) in possession of such items.
  - e) If still uncertain, refuse to buy, sell or value it.
- If requested, submit catalogues to the officer with responsibility for art and antiques within the local police force area.
  - Look critically at any instance when requested to pay in cash and avoid doing so unless there is a strong and reputable reason to the contrary. In the absence of such a reason, pay by cheque or other method that provides an audit trail.
  - Be aware of money laundering regulations.
  - Appoint a senior member of staff to whom employees can report suspicious activities.
  - Ensure that all staff are aware of their responsibilities in respect of the above.

The codes draw attention to money laundering regulations, in particular the requirement to record and verify vendors, and the need to create an audit trail which may be followed by investigating police officers. It is a weakness of the codes, however, that there is no requirement to record and verify the identity of buyers, so that the trail is lost at point of purchase.

#### **Museums**

Increasingly museums are expected to be diligent when enquiring into the origin of a potential acquisition. The Museums Association publishes *Buying in the Market: a Checklist for Museums*, which sets out procedures to be followed when making a purchase and usefully emphasises the advice *caveat emptor* – buyer beware. Further guidance for museums on due diligence is included in this report (see below).

Museums buy from private owners, dealers and auction houses. As regards dealers, the situation seems clear. Any purchase should be accompanied by full and proper documentation, including, critically, any relevant export licences from the country of origin. The situation as regards auction houses is more problematical. It should, by now, be clear that the appearance of an object in the saleroom of a major auction house is no guarantee of its good pedigree. It may be on the market legally, but if there is not an easily verifiable provenance it should be regarded as suspect. Museums generally seem to be aware of the need not to purchase unprovenanced material when it is recognised as archaeological, but attitudes are less secure when pieces are labelled as art. Most British material purchased through auction seems to be metal detector finds, often ones that have passed through a Treasure inquest. There is little or no evidence to suggest that the manner of their acquisition was illegal, although the case of the Salisbury Hoard should warn against complacency. But Asian antiquities without published provenances continue to be bought by some UK museums. Unless good evidence of the history and means of first acquisition of an object is forthcoming it should be avoided. It could be fake, or stolen, or illegally exported, and might contravene ICOM and MA codes of ethics.

Due diligence is an indispensable procedure to be followed for any acquisition. Attaining and maintaining an acceptable standard of diligence are time consuming activities, and expensive, and it is tempting to take short cuts. But failure to adequately check the provenance of an acquisition could result in an embarrassing and expensive mistake. The cost of diligence procedures is effectively a hidden cost of the trade, entailed by their unethical practices, and one passed on to museums.

**Museums generally seem to be aware of the need not to purchase unprovenanced material when it is recognised as archaeological, but attitudes are less secure when pieces are labelled as art**

# DUE DILIGENCE GUIDELINES FOR MUSEUMS

When considering acquiring an object, there several precautions that a museum should take to avoid acquiring looted material.

Museums are, in general, advised to avoid acquiring any object which has no secure ownership history, unless there is reliable documentation to show that it was exported from its country of origin before 1970.

The following steps can be useful in establishing a provenance or reconstructing an ownership history. However in some cases it will prove impossible to establish a secure provenance, in which case acquisition should be avoided unless specific written permission is officially granted by the authorities in the country of origin.

- Ask for proof of the means of original acquisition, preferably an export licence from the country of origin.
- If it seems likely that the object was removed from its country of origin a long time ago, ask for documentary evidence of its ownership history, or of any publication in a reputable source.
- Write to appropriate authorities in the country of origin to ask for further information and advice.
- Contact colleagues who are likely to have a reliable and informed opinion about the status of the object or the character of the vendor.
- Beware fake documentation.
- Be cautious. Do not proceed with an acquisition unless you are sure it is legitimate and can prove to others that it is so.

## Specialist resources

Various resources have been compiled to list known illicit items. These might help a museum reject a potential acquisition. However, they are of limited value for the types of material considered in this report, since illegally excavated or undocumented objects cannot be listed.

- The Art Loss Register and equivalent databases of stolen material
- The duplicate catalogue for the Kabul Museum held at Musée Guimet and that of the Angkor Conservation Centre held at the Ecole Française de l'Extrême Orient
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- US State Department web site International Cultural Property Protection at <http://exchanges.state.gov/education/culprop/>
- Museum Security Network at <http://www.museum-security.org/>
- ICOM publishes three books which catalogue material known to be stolen from Cambodia, Latin America and Africa. Titled respectively: *Looting in Angkor*, *Looting in Latin America* and *Looting in Africa*, each book contains descriptions of only 100 objects so obviously they are not comprehensive, but nevertheless the publication of the first edition of *Looting in Angkor* led to the identification of six pieces, two in the collections of US museums. Further books are in preparation.
- For Nepal there is Jürgen Schick's *The Gods are Leaving the Country*, which contains a photographic record of the country's Buddhist and Hindu sculpture which has now largely disappeared.

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## 4.6 EXHIBITIONS AND LOANS

Just as MFA curator Brent Benjamin acknowledged that acquiring illicit antiquities may be a contributory factor to looting (see above), Boubé Gado, head of art and antiquities at the University of Niamey, Niger has argued that exhibiting fashionably collectable material also 'whets the appetite and greed of international art traffickers'<sup>30</sup>. He noticed that during the showing of the long-running *Vallées du Niger* exhibition in Paris, a wider public became aware of the aesthetic appeal and value of Bura statues and unauthorised excavations occurred in Niger at an unprecedented rate. A survey in *The Art Newspaper* recently revealed antiquities dealers' unanimous belief that museum exhibitions play an important role in raising visibility and sparking interest in specific classes of object and also in nurturing private collections.<sup>31</sup>

### Exhibiting

Exhibiting illicit material can generate as much bad publicity and professional ill will as acquiring it.

- In 1994 The Royal Academy displayed the antiquities collection of George Ortiz, defending its decision to do so on the grounds that their responsibility was to display great art. Since most of the beautiful works on show were without a verifiable provenance the exhibition generated controversy. Eminent archaeologist Colin Renfrew, in an article in *the Guardian*<sup>32</sup>, commented that while the exhibition delighted the eye, it also raised troubling questions for the visitor: 'Perhaps it should for the Royal Academy as well.' Indeed, should the Department of National Heritage (now the Department for Culture, Media and Sport) underwrite the insurance for such an exhibition through the government indemnity system?
- In 1995, also at the Royal Academy, the exhibition '*Africa: the art of a continent*' ran into unexpected difficulties when the British Museum, other institutions and scholars questioned the Royal Academy's decision to borrow from private collectors and show illegally exported terracotta figurines from Mali and Nigeria. A number of museums decided to withhold objects they planned to lend for the exhibition unless the African governments concerned consented to the display of the looted pieces. Although the Royal Academy subsequently undertook to exclude from display any items that would contravene the 1970 UNESCO Convention or relevant national legislations, the scholarly community was dismayed when the looted terracottas were shown as back-lit images in the gallery, and included without qualification in the catalogue. The only unattributed captions in the exhibition related to the disputed material. After the exhibition opened and following negative publicity regarding the looted pieces, a photo display and video with information about looting were added to the exhibition (see Section 4.9).

### Lending

Lending illicit material can also bring problems:

- 1999: The major exhibition, *The Maya*, transferred from Venice's Palazzo Grassi to Mexico without some of its exhibits. The artefacts, originally removed illegally from Mexico, were reportedly withdrawn by European museum curators who believed the Mexican government could stop them leaving Mexico again.

## 4.7 NEW APPROACHES

Museums have bypassed many of the problems discussed above by experimenting with new ways of adding to their collections or displays, usually most successful when they

develop partnerships with people whose histories and cultures they represent. These new approaches often represent a move away from outright ownership, and there is 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. However, as Martin Sullivan said recently: "Too 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."<sup>33</sup>

- The British Museum is funding the conservation of several statues from 'Ain Ghazal, in Jordan in exchange for which, at the end of the project, the museum will be allocated one large figure and one small bust. Selection of the two pieces will be by negotiation between the British Museum and the Jordanian Department of Antiquities.
- University of Cambridge Museum of Archaeology and Anthropology relies on the assistance of indigenous people in field-based research. In 1994 they worked in collaboration with Gurung shaman Yarjung Kromchhain Tamu to collect Nepalese items for the museum, including costumes and ritual objects. Yarjung made the final decision on objects to be collected and he advised on their display. For spiritual reasons it was important for the objects to be kept together and anti-pest treatments were taboo, so the museum departed from its usual classification, treatment and storage systems and did not formally accession all of the objects.
- The J Paul Getty Museum has instigated an exchange of skills for exhibition pieces. In return for conserving sculptures from the Pergamon Museum in Berlin, they are able to retain them for two years on loan for display before returning them home.

**2<sup>nd</sup>-century AD copy of a head of Diadoumenos returned to Italy by the J Paul Getty Museum in 1999**

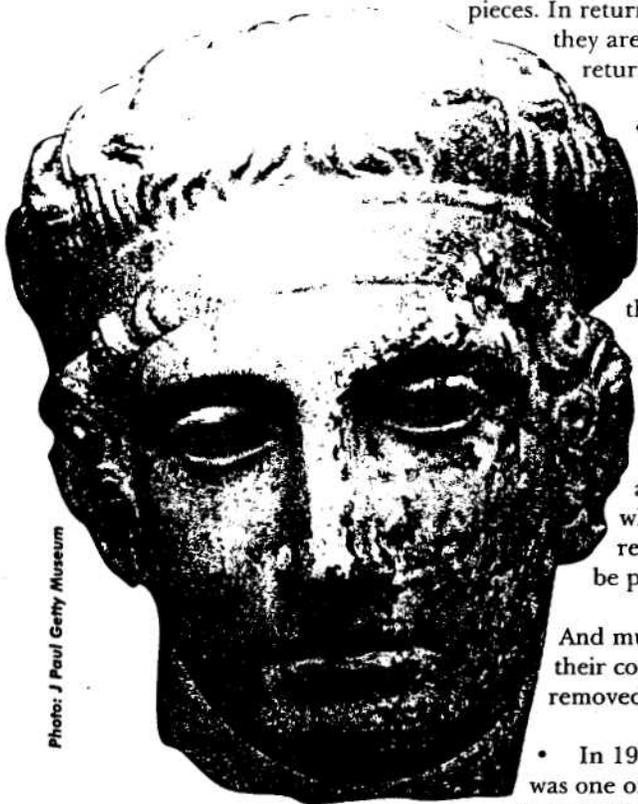


Photo: J Paul Getty Museum

- In 1993 an unprovenanced Roman sarcophagus, of a type made in Athens, was offered to the J Paul Getty Museum by a private collector in New York. Following their stated due diligence policy, the museum circulated photographs and requests for information about the piece to the governments of Greece, Italy and Turkey. The Turkish government objected to the acquisition on the ground that the sarcophagus may have been illicitly exported from Turkey. Two years' investigation failed to throw any light on its origin, so in the interests of keeping this important object accessible to the public and scholars, the Turkish authorities and the museum struck an unusual deal which was written into the acquisition terms in 1995. The museum bought and displays the piece but, should any evidence emerge in future which proves it was illegally removed from Turkey, it will be returned immediately at the Getty's expense. This deal would not be possible under the museum's new, self-imposed acquisition rules.
- And museums are going further. Objects are steadily being returned to their countries of origin when it is proven that they were illegally removed.
- In 1999 a piece from the controversial Fleischman collection (see above) was one of three objects that the J Paul Getty Museum returned voluntarily to Italy. It had been stolen from an excavation storeroom.
  - Denver Art Museum recently gave back to Guatemala a carved wooden lintel stolen from a Mayan pyramid temple in the Petén between 1966-68, even though it was purchased by the museum before US legislation prohibiting the importation of Pre-Columbian art.

#### 4.8 PR, SPONSORSHIP AND MARKETING

In an increasingly market-driven world, museums can sometimes appear to tolerate the trade of unprovenanced objects through inappropriate or compromising collaborations with dealers or collectors. Thus PR, sponsorship and marketing enterprises can also blur ethical boundaries:

- In 1998 the St Louis Art Museum planned to hold a sale of ancient jewellery in conjunction with an exhibition of ancient gold from Thrace. Some of the pieces for sale were described by the fashion editor of the *St Louis Post-Dispatch* as very wearable. They ranged in price up to \$50,000 and the sale proceeds would have been shared by the museum. It was clear that the provenance documentation was inadequate to demonstrate compliance with 1970 UNESCO Convention standards. Claire Lyons of the Archaeological Institute of America initiated a campaign which halted the sale, and the museum was complimented by the AIA for its swift and considerate – and ethical – response.
- The journal of the British Museum Society has been criticised for accepting advertisements from dealers featuring unprovenanced Gandharan antiquities.
- Asian Art Week London, designed to celebrate the city's ample offerings for the Asian art collector and enthusiast, is described by the promotional literature as 'a collaboration' between London's major auction houses and several museums. Some objects in the sales were promoted as 'fresh to the market'.

#### 4.9 EDUCATION

In his Keynote speech at the Museums Association Conference in 1998<sup>34</sup> Manus Brinkman, secretary general of ICOM, identified lack of public awareness of the illicit trade in cultural property as a key issue (see also the Foreword to this report). Museums are ideally placed to help raise levels of public awareness.

##### **Tourist tales**

There is certainly a very practical need for public education. Very few people in the United Kingdom, for instance, realise that it is usually illegal to export cultural objects from their country of origin without a licence, or at all. Culture-hungry tourists, just the type that visit museums and galleries, are increasingly exposed to the illicit trade:

- In Mexico a young Canadian bought 20 small figurines from a local man, unaware that he had broken Mexican law. After asking agents at a police road block whether they thought the hoard genuine he was charged with theft and jailed for more than six months, only to be freed after a hunger strike protest.
- Also in Mexico, when tourists alerted authorities after having been offered artefacts for sale at the roadside, the police were able to rescue 39 antiquities looted from the famous site of Teotihuacan.
- Three German tourists were arrested in Sienna, Italy, given six-month suspended sentences and fined £150 each for taking bricks stamped with heraldic emblems from a Renaissance palazzo undergoing restoration.
- The anti-looting exhibition *Archaeology: Reality and Concerns* mounted in Jordan (see below), included a collection returned to the Antiquities Department by an American who had purchased them unknowingly from an illegal source.

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**The excavators of Sipán use educational materials like this children's comic book to tackle looting issues**

**Museum education programmes in source countries**

There are many examples of museum-based educational programmes designed to educate museum visitors in source countries about the scale and effects of the illicit trade. Here are just a few examples:

- The 'Lord of Sipán' exhibition, which toured internationally and recently relocated from Lima to Lambayeque in Peru, tells not only the story of the excavation of the fabulously rich tombs (originally found by looters) but also the problems and loss to knowledge caused by looting. In the museum shop comic books, CD-ROMs and other educational material is available which explains the issues to children, tourists and the general public and encourages them to preserve their archaeological heritage.



**An archaeologist explains to Malian villagers the importance of context**

Photo: Dr Kevin MacDonald

- The National Museum of Mali, among other initiatives has run a poster campaign with the strapline: 'protect archaeological sites; and you thereby save your history'.
- The Antiquities Department in Jordan in 1998 staged a touring exhibition 'Archaeology: Reality and Concerns' informing the public about the extent of the problem, exhibiting stolen artefacts and letting visitors know their role in preventing such crimes in the future.
- An exhibition is currently touring museums in Italy, highlighting the theft of ancient vases and the archaeological destruction it causes.

**Museum education programmes in the UK**

In the United Kingdom, higher degrees and diplomas in Museum Studies in particular have made an impact by raising staff awareness of the problems caused by the illicit trade and of the relevant legislation, conventions and ethical codes. But there are virtually no examples of these issues being explained to the general public.

- In 1995 The Royal Academy did display a series of photo-panels showing the advantages of archaeology as opposed to looting at Djenné-Djeno in Mali alongside *Africa: Art of a Continent*, and also ran the anti-looting video *The African King*. But these panels were only added to the exhibition after the controversy described above (see Section 4.6).
- The Illicit Antiquities Research Centre, Cambridge with support from the Leventis Foundation have produced a portable display. The exhibit explains the basic issues and highlights famous case studies from around the world. It is available on loan, free of charge to museums, libraries and suitable institutions.

In his 1998 speech, Manus Brinkman suggested that 'museums could pay more attention to the illicit traffic in their communication and educational programmes.'<sup>35</sup> Unlike museums in source countries, UK museums seem unwilling to do that. This is partly because they do not feel it is relevant and often because they perceive looting as too negative a story to tell unless there is a reason to do so, as in the case of the Royal Academy exhibition. However, members of the public are usually shocked when they learn about the illicit trade and the epidemic proportions that looting has reached. They ask what is being done to stop it. There is perhaps a public concern that is not being properly addressed.

Photo: Proyecto Tumbas Reales de Sipán

### Museum displays

Section 2.8 of the ICOM Code of Professional Ethics states that: *'The museum should seek to ensure that information in displays and exhibitions is honest and objective and does not perpetuate myths or stereotypes.'*

- How many displays of Cycladic figurines around the country tell the story of looting and the possibility of a faked corpus?
- How many displays at museum exhibitions promoting Asian Art Week (see above) told the parallel story of epidemic looting and destruction?

There is clearly a need for museums to rethink their policies and practices on the display of unprovenanced material.

Everyone concerned about the illicit trade in cultural material emphasises that it is crucial to get across the importance of *context, context, context*. Museum collections are the ideal vehicle to transmit this message and the importance of context should be emphasised wherever possible.

- A recent exhibition of ancient and not so ancient fakes at the Fitzwilliam Museum, Cambridge discussed various methods of establishing whether an object is real – from science to connoisseurship – but omitted to mention that if the findspot of an object is known with certainty its authenticity is not in doubt and scientific tests are unnecessary.

## 4.10 RECOMMENDATIONS FOR MUSEUM ORGANISATIONS

### Codes of practice in practice

Museum workers in the United Kingdom are increasingly aware of the illicit trade in cultural material and most attempt to maintain an ethical position. But adhering to the guidelines set out in the various codes of practice and ethics is not simple. The opacity and complications of the illicit trade can frustrate even the most conscientious curator. Restraints on time and money can make the implementation of thorough due diligence procedures seem a costly luxury, although the cost of making a mistake may be far higher in terms of both money and public relations. Often the expertise needed to distinguish between licit or illicit material is not available and advice or information is not readily accessible. An isolated curator is no match for the trade.

### Recommendations

Museum organisations have a role to play here in supporting museums. In particular:

1. A central advisory point should be set up to advise museums about the necessary export documentation needed to establish that an item has not been exported illegally and to make available the export legislation of all countries. (UNESCO holds copies of relevant legislations from all states party to the 1970 Convention but, in general, such information and advice on its interpretation is difficult to come by.)
2. Within the museum community there are informal networks of communication. However, these are of limited benefit as many curators are unaware of them. It would be helpful if a central register of advisers could be established so that, for instance, if information was needed about a particular palaeontological specimen a curator could approach the geology adviser, who could then direct the query to the most suitable authority.
3. The 'museum of last resort' argument (see Section 4.2) seems to impose a responsibility without at the same time providing clear guidance. The Museums Association, or Society of Museum Archaeologists, should formulate a set of guidelines

to be used by museums with small acquisitions budgets that are faced with large quantities of unprovenanced material brought to their attention by treasure hunters.

#### **4.11 RECOMMENDATIONS FOR MUSEUMS**

The ICOM and Museums Association codes of ethics require that museums should not accept on loan, acquire, exhibit, or assist the current possessor of, any object that has been acquired in, or exported from, its country of origin (or any intermediate country in which it may have been legally owned) in contravention of that country's laws. This is also a requirement of the guidelines for the Registration Scheme for museums in the UK. In practice this means that museums should observe the following (and address appropriate points in their acquisition policies):

1. Museums should not acquire provenanced items whose accompanying documentation fails to comply with the export regulations of their country of origin, unless there is reliable documentation to show that they were exported from their country of origin before 1970.
2. Museums should not acquire unprovenanced items because of the strong risk that they have been looted, unless they are following the 'last resort' argument outlined in Section 4.2 or there is reliable documentation to show that they were exported from their country of origin before 1970.
3. Museums should follow the guidelines on due diligence set out in this report, which should be addressed in their acquisition policies.
4. Museums should apply the same strict rules to gifts and bequests and loans as they do to purchases.
5. Museums should avoid appearing to promote or tolerate the sale of unprovenanced material through inappropriate or compromising collaborations with dealers.
6. Museums should decline to offer expertise on, or otherwise assist the current possessor of, unprovenanced items because of the risk that they may have been looted.
7. Museums should inform the appropriate authorities if they have reason to suspect an item has been illicitly obtained.
8. Museums should comply with the 1970 UNESCO and 1995 Unidroit conventions, if legally free to do so.
9. Museums should seize opportunities to raise public awareness of the scale and destructive impact of the illicit trade.

# Afterword

*Although museums may not be acquiring on the scale that they once were, the market for cultural material has exploded during the last 20 years. Most items are now sold to a growing number of private collectors and spectacular collections containing unprovenanced material have been amassed all over the world. For many of these collectors, having their collection displayed in a museum, or even having it become a museum, is seen as the ultimate validation of their achievement.*

*In the absence of evidence to the contrary, museums must assume that such collections of unprovenanced items might contain illicit material or even fakes because the collector was no match for the secretive trade.*

*One day one of these fabulous private collections will be offered to a museum. What is that museum going to do?*



*Guardian figure at the temple of Banteay Srei, Cambodia. The looters may not have known that the figure is a copy made by the French archaeologists in the 1960s.*

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The International Journal of Cultural Property

For further references and links to other websites visit: <http://www-mcdonald.arch.cam.ac.uk/IARC/home.htm>

# DUE DILIGENCE GUIDELINES FOR MUSEUMS

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