THE ETHICAL TRADE IN CULTURAL PROPERTY: ETHICS AND LAW IN THE ANTIQUITY AUCTION INDUSTRY

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ABSTRACT:

This article considers from an ethical perspective the role that auction houses play as facilitators of the illicit antiquity trade. It reviews the laws that regulate the antiquity auction industry and explains why they fail to prevent the trade in illegally excavated and exported cultural property. This article argues that auction houses should develop policies focused on ethics

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instead of regulatory compliance, explains why this would better further cultural preservation interests and protect creator cultures, and looks at potential business benefits of an ethical model.

I. INTRODUCTION

For two decades, academic discussion and popular articles alike have argued for stricter government regulation of auctions to help curb the illicit trade in antiquities.[1] Despite government response and auction industry cooperation, the illicit trade in cultural property and archaeological remains thrives.[2] The auction houses try to comply with cultural property laws, and voluntarily implement internal policies to manage risk. Yet they simply cannot escape their reputation as the reigning perpetuators of the illicit trade in cultural property.[3] Despite the best efforts of the auction houses, the auction industry is still causally responsible for the cultural crisis of the flourishing black market in antiquities.[4]

Meanwhile, in the global business community, interest in business ethics has been steadily increasing.[5] This trend should inspire auction houses to reevaluate the strategies they employ to reduce facilitation of the illicit trade in cultural property. Solutions up to this point have focused almost exclusively on regulatory compliance. The focus on legal initiatives, however, has unnecessarily obscured the importance of ethical considerations arising out of the illicit antiquity trade. I argue that if auction houses develop internal policies motivated by ethical considerations, supplementing those focused on regulatory compliance, they will more effectively stem the illicit trade and receive incidental business benefits.

In advancing this thesis, I argue in Part II of this article that many proposed legal solutions are inherently flawed and ineffective because

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1. *See generally* Paige L. Margules, Note, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*, 15 SUFFOLK TRANSNAT'L L. REV. 609 (1992).

2. *See generally* PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS (2006).

3. *See generally* Stephen Farrell & Dalya Alberge, *Sotheby's Cuts Antiquity Sales Over "Smuggling,"* THE TIMES (LONDON), July 19, 1997, at 1. *See also* Julie Rickerd, *Revealing the Rot of a Venerable Auction House*, THE FINANCIAL POST, Feb. 21, 1998, § 3, at R5.

4. *See* Chauncey D. Steele IV, Note, *The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts*, 23 SUFFOLK TRANSNAT'L L. REV. 667, 683 (2000). *See generally* PETER WATSON, SOTHEBY'S: THE INSIDE STORY (Random House, Inc. 1997).

5. Consider the birth of Corporate Social Responsibility. Many leading corporations, from McDonalds to Coca-Cola, are now considering the impact of their business practices on society and the planet as a whole. Corporate Social Responsibility initiatives take forms from statements of policy to active programs to mitigate the damages of production.

compliance with foreign cultural property laws does not necessarily further the goal of cultural preservation and may, in some instances, work against protecting creator cultures. I provide a background about the law and the antiquity industry and present an overview of the laws designed to curb the illicit trade in cultural property. I then explain why these laws have failed to adequately address the cultural crises caused by the illicit trade.

In Part III, I argue that auction houses should develop ethical strategies which supplement legal strategies, because doing so would help manage the risks of liability and bad press, and restore their brand images. I explain why cultural preservation and protection of creator cultures are ethically worthy pursuits, and explore the emergence of ethical initiatives in the antiquity auction industry. The theme of Part III is the underlying tension between legal and ethical approaches.

Finally, in Part IV I conclude that for as long as the auction houses define their ethical behavior by way of their legal obligations, they will continue to facilitate the illicit trade in antiquities, failing to comprehendsively manage avoidable risks or improve their brand images.

II. BACKGROUND

In this section, I look at current regulatory efforts to stem the illicit trade in antiquities, including domestic and international laws. The auction houses hold the majority of their antiquity sales in the United States and the United Kingdom, and as such, special attention is given to these market nations.[6] I then explain why the current legal framework fails to stop the illicit trade in antiquities, or to adequately address injuries that creator cultures suffer because of the illicit trade.

A. Concern in the Antiquity Auction Industry Over the Illicit Trade

The late twentieth-century saw a surge in academic interest in the illicit trade in antiquities. Scholars demanded that auction houses, which had thus far operated largely unchecked, carry heavier burdens to help end the illicit trade in cultural property. Propositions put forth included a heightened standard of care for the investigation of object origins,[7] reporting requirements of the same level as those imposed on museums,[8]

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6. Market nations are those in which antiquities are sold. Source nations are where the cultural artifacts originate. *See* Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385 (1995).

7. *See* Julia A. McCord, Note, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 IND. L.J. 985, 1002–07 (1995); Brenna Adler, Comment, *The International Art Auction Industry: Has Competition Tarnished its Finish?*, 23 NW. J. INT'L L. & BUS. 433, 444 (2003) (quoting Dawson v. G. Malina, Inc., 463 F. Supp. 461, 467 (S.D.N.Y. 1978).

8. *See* McCord, *supra* note 7, at 1004.

and suspension of the ability for auction houses to require buyers to contractually disclaim rules of warranty under the UCC.[9] Each of these propositions demanded that the government enact legislation regulating the antiquity auction industry.

There were several high profile cases in the late twentieth-century that brought the illicit trade in cultural property to the forefront in the news and academic discussion. The controversy surrounding Greece's request for Britain to return the Elgin Marbles underscored nationalist concerns over cultural property issues.[10] The Greek Orthodox Church filed suit to prevent Christie's from auctioning off the Archimedes Palimpsest manuscript in 1998.[11] In 1995, Swiss police sealed four warehouses in Geneva owned by Giacomo Medici, the suspected mastermind behind an extensive operation which smuggled looted artifacts out of Italy.[12]

Meanwhile, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[13] responded to growing concerns in the international community about the illicit trade, and attempted to give force to foreign patrimony statutes.[14] Only a handful of states, however, have

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9. William W. Stuart, *Authenticity of Authorship and the Auction Market*, 54 ME. L. REV. 71, 74 (2002).

10. John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1908 (1985).

11. *See* Greek Orthodox Patriarchate v. Christie's, Inc., 1999 U.S. Dist. Ct. LEXIS 13257 (S.D.N.Y. 1999). *See also* Richard B. Cunningham, *The Archimedes Palimpsest*, *in* ARCHAEOLOGY, RELICS, AND THE LAW 506–20 (Richard B. Cunningham, 2d ed. 2005).

12. *See* WATSON, *supra* note 4, at 290–91.

13. *See generally* International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322.

14. *See* NEIL BRODIE ET AL., STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL 8, 31 (2000). On the subject of patrimony statutes, the authors explain:

> 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 recognized 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.

Id.

signed the Convention, and the marked increase in national patrimony statutes has diluted the general character of patrimony claims.

In 2000, a scandal about price-fixing in the auction industry shifted public scrutiny from the houses' involvement in the illicit antiquity trade to potential violations of antitrust laws.[15] Although pressure for reform of auction industry practices to stem the illicit trade has largely abated, illegal trafficking in cultural property remains a lucrative black market, earning an estimated $4.5 billion per year.[16] That makes it the second most profitable black market, following only drug trafficking.[17]

Auction houses, like realtors, are sales agents for their clients. This relationship often forecloses liability for facilitating the illicit trade.[18] Efforts to stem the illicit trade in market nations often focus on due diligence requirements,[19] but these requirements apply to buyers and sellers, not to their agents. When an auction house auctions an item, it is not offering the object for sale but, instead, whatever state of title that the current owner holds.[20] Sellers are often not forthcoming with information that will prevent the auction house from listing their item.[21] Auction houses are only legally responsible for trafficking in illicit antiquities if the house has knowledge that the title is defective (i.e., that the item is of disputed legitimacy).

B. The Current Model: International and Domestic Laws Designed to Curb the Illicit Trade in Antiquities

The first international convention on the subject of cultural property was the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted in 1954 as a response to Nazi looting of

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15. *See generally* CHRISTOPHER MASON, THE ART OF THE STEAL: INSIDE THE SOTHEBY'S—CHRISTIE'S AUCTION HOUSE SCANDAL (2004).

16. *See* Christine Adler & Kenneth Polk, *The Illicit Traffic in Asian Antiquities* (unpublished paper presented at the Australian Registrar's Committee Conference), *available at* http://www.savingantiquities.org/pdf/Asian.pdf (last visited Nov. 11, 2007).

17. *See id. See also* Aisha Labi & Simon Robinson, *Looting Africa: Theft, Illicit Sales, Poverty and War Are Conspiring to Rob a Continent of Its Rich Artistic Heritage*, 31 TIME PACIFIC, Aug. 6, 2001, *available at* http://www.time.com/time/pacific/magazine/20010806/art.html (last visited Oct. 17, 2007).

18. *See* Aaron M. Boyce, Note, *A Proposal to Combat the Illegal Trafficking of Pre-Columbian Artifacts*, 3 HISP. L.J. 91, 102–03 (1997).

19. *See generally* Stephen L. Foutty, *Recent Development, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 VAND. L. REV. 1839 (1990).

20. *See* Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 21 (1993).

21. Consider the discussion of the Roman bust in Part III of this article.

artwork.[22] This convention has garnered substantial international support, currently boasting 116 state parties.[23] Because neither the United States nor the United Kingdom has signed the Hague Convention, it does not affect the antiquity auction industry in these two primary market nations.

Another international agreement with limited applicability is the UNIDROIT Convention, which entered into effect in 1995.[24] This Convention attempts to give more force to the domestic patrimony laws of source nations.[25] However, it has failed to generate the support anticipated, and only twenty-eight state parties have contracted to the agreement.[26] The major market nations of the United States and United Kingdom have not, so the agreement has no impact on auction houses operating in those market nations.

Compare the broader success of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which was a more general attempt to curb the illicit trade in cultural property.[27] The United States and the United Kingdom are among the over 100 state parties to the treaty.[28] The language in the UNESCO Convention is broad and vague, and definitive language from implementation is required for effective legislation.

The U.S. Congress implemented the UNESCO Convention in 1983 by enacting the Convention on Cultural Property Implementation Act (CCPIA).[29] When foreign governments face urgent need to stop looting of archaeological sites in their home countries, the CCPIA enables the

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22. *See* U.N. Educ. Scientific & Cultural Org. [UNESCO], Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, The Hague, May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 215.

23. UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, May 14, 1954, http://erc.unesco.org/cp/convention.asp?KO=13637&languagce=E (last visited Sept. 19, 2007).

24. International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322.

25. *See* Adler, *supra* note 7, at 460.

26. International Institute for the Unification of Private Law, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, http://www.unidroit.org/english/implement/i-95.pdf (last visited Jun. 6, 2007).

27. UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, Apr. 24, 1972, 823 U.N.T.S. 231, art. 1.

28. UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and transfer of Ownership of Cultural Property, Paris, Nov. 14, 1970, *List of the 102 State Parties*, *available at* http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml (last visited June 6, 2007).

29. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, arts. 1, 11, Nov. 14, 1970, 806 U.N.T.S. 234–36.

government to make emergency bilateral agreements for import restrictions. Agreements made pursuant to the CCPIA oblige state parties to prevent the importation of artifacts stolen from other nations, and to aid in the return of looted cultural objects. It authorizes the U.S. government to seize stolen cultural property from potentially faultless private parties. If an auction house is offering a cultural object for sale, which a foreign party alleges is the subject of an agreement or restriction made under the CCPIA, then the state Attorney General's Office may compel the house to hold the item, until it is determined whether the object is subject to seizure.

The United States currently has active bilateral agreements[30] enacted pursuant to the CCPIA with Bolivia,[31] Cambodia,[32] Colombia,[33] Cyprus,[34] El Salvador,[35] Guatemala,[36] Honduras,[37] Italy,[38] Mali,[39] Nicaragua,[40] and Perú.[41] While the precise terms of each agreement differ, generally, they provide for emergency bans of particular classes of objects which have been

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30. For an up-to-date list of current and expired import restrictions, see U.S. State Department, Bureau of Educational and Cultural Affairs, *Chart of Emergency Actions and Bilateral Agreements*, *available at* http://exchanges.state.gov/culprop/chart.html (last visited June 11, 2006).

31. Archaeological and Ethnological Material from Bolivia, 66 Fed. Reg. 63,490–99 (Dec. 7, 2001).

32. Import Restrictions Imposed on Archaeological Materials From Cambodia, 19 C.F.R. § 12 (2003).

33. Memorandum of Understanding Between The Government of the United States of America and The Government of the Republic of Colombia Concerning the Imposition of Import Restrictions on Archaeological Materials From the Pre-Columbian Cultures and Certain Ecclesiastical Material from the Colonial Period of Colombia. *See* Import Restrictions Imposed on Certain Archaeological and Ethnological Materials From Colombia, 71 Fed. Reg. 13,757–66 (Mar. 17, 2006).

34. Import Restrictions Imposed on Pre-Classical and Classical Archaeological Material Originating in Cyprus, 67 Fed. Reg. 47,447–50 (July 19, 2002). *See also* Import Restrictions Imposed on Byzantine Ecclesiastical and Ritual Ethnological Material from Cyprus, 64 Fed. Reg. 17,529–31 (Apr. 12, 1999).

35. Pre-Hispanic Artifacts from El Salvador, 60 Fed. Reg. 13,352–61 (Mar. 10, 1995).

36. Import Restrictions Imposed on Archaeological Artifacts From Guatemala, 62 Fed. Reg. 51,771–74 (Oct. 3, 1997).

37. Import Restrictions Imposed on Archaeological Material Originating in Honduras, 69 Fed. Reg. 12,267–71 (Mar. 16, 2004).

38. Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7,399–02 (Jan. 23, 2001).

39. Import Restrictions Imposed on Archaeological Artifacts from Mali, 62 Fed. Reg. 49,594–97 (Sept. 23, 1997).

40. Import Restrictions Imposed on Archaeological Material From the Pre-Hispanic Cultures of the Republic of Nicaragua, 65 Fed. Reg. 64,140–42 (Oct. 26, 2000).

41. Archaeological and Ethnological Material From Peru, 62 Fed. Reg. 31,713–21 (June 11, 1997).

looted or illegally exported in bulk. Again, these bilateral agreements incidentally affect auction houses when property up for auction is recognized as subject to restriction.

The United States and México, for instance, entered into a bilateral agreement focusing on the protection of cultural property in 1970.[42] The agreement provides for the return of stolen artifacts of historic and national importance, and for each country to use all legal means to return a protected artifact upon request.[43] The primary aim of this treaty is to protect Mexican cultural property. The categories of objects protected are very broad, and include pre-Columbian as well as colonial artifacts.[44]

In this treaty, the United States and México agree to recognize each other's sovereign claims of ownership of certain cultural property. In *U.S. v. McClain*, the U.S. Court of Appeals for the Fifth Circuit recognized México's 1972 claim of ownership to all archaeological material as valid.[45] In *McClain*, the government prosecuted defendants under the National Stolen Property Act of 1934 (NSPA) for their unauthorized exportation of pre-Columbian artifacts which fell under México's broad claim of ownership. The *McClain* court held that authorities may prosecute smugglers for dealing in stolen goods under NSPA when they illegally export an artifact out of a source nation with a controlling patrimony law declaring the property to be government property.[46]

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42. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Mex., July 17, 1970, 22 U.S.T. 494 [hereinafter U.S.-México Treaty].

43. *See* Boyce, *supra* note 18, at 121.

44. For instance, Art. I of the treaty defines the property covered as:

(a) art objects and artifacts of the pre-Columbian cultures of the United States of America and the United Mexican States of outstanding importance to the national patrimony, including stelae and architectural features such as relief and wall art;

(b) art objects and religious artifacts of the colonial periods of the United States of America and the United Mexican States of outstanding importance to the national patrimony;

(c) documents from official archives for the period up to 1920 that are of outstanding historical importance: that are the property of federal, state, or municipal governments or their instrumentalities, including portions or fragments of such objects, artifacts, and archives.

See U.S.-México Treaty, *supra* note 42, art. 1; Compare the broad category of objects covered in the U.S.-México Treaty to the narrow category of protected artifacts from Mali. "Archaeological material from sites in the region of the Niger River Valley and the Bandiagara Escarpment (Cliff), Mali, dating from approximately the Neolithic period to approximately the 18th century. . . . " *See* Import Restrictions Imposed on Archaeological Artifacts from Mali, 62 Fed. Reg. 49,594–95 (Sept. 23, 1997).

45. U.S. v. McClain, 545 F.2d 988 (1977).

46. *Id.* at 996.

This holding was applied in the more recent case of *U.S. v. Schultz*.[47] In *Schultz*, the defendant dealer sold Egyptian antiquities which had been illegally exported. One deal involved an Egyptian head sculpture which he sold to a collector for $1.2 million. While Defendant knew that the head was illegally exported out of Egypt in 1991, he told the buyer it had been in a private collection since the 1920s.[48] Because Egypt passed a law in 1983 laying claim to all antiquities, at the time the head was exported without authorization in 1991, it was being stolen from the nation of Egypt.[49] Defendant was successfully prosecuted for dealing in stolen property under NSPA, and the U.S. Court of Appeals for the Second Circuit upheld the conviction citing *McClain*.[50] As a result, if auction house employees were to knowingly[51] deal in illegally exported or stolen antiquities, they could be criminally prosecuted under NSPA. Arguably, this may in fact have the opposite effect intended, motivating auction house employees not to make unnecessary inquiries which may give them knowledge of their involvement in an illicit sale.

In addition to the domestic laws enacted pursuant to the UNESCO convention, there are three laws Congress has enacted to address the cultural property crisis in the United States. Specifically, the Antiquities Act of 1906, the Archaeological Resources Protection Act of 1979 (ARPA) and the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).

In 1906 Congress enacted the Antiquities Act to protect archaeological resources on federal and tribal lands.[52] It permits up to a $500.00 fine and a maximum of ninety days imprisonment for anyone who attempts to "appropriate, excavate, injure, or destroy" any potential "object of antiquity."[53] Until ARPA, this was the primary mechanism protecting Native American cultural property, but it did not protect cultural property found on private lands.[54] ARPA increased the penalties from the Antiquities Act, and specifically dealt with human remains.[55] In NAGPRA, Congress explicitly recognized the property rights of Native Americans over cultural property

47. U.S. v. Schultz, 333 F.3d 393 (2003).

48. *Id.* at 396; Tales of previously unheard of private collections, grandmothers' attics, and dusty basements are common ones in antiquities dealing.

49. *See* U.S. v. Schultz, 333 F.3d at 398–99.

50. *Id.* at 403.

51. *See* The National Stolen Property Act, 18 U.S.C. § 2315 (1934) (includes a mens rea requirement of "knowing" the item to have been stolen).

52. *See* American Antiquities Act of 1906, 16 U.S.C. §§ 431–33 (1988).

53. *See* Stephanie Ann Ades, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. U. L. REV. 599, 604–05 (1995).

54. *Id.* at 604.

55. *See* Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 265 (2005).

found in burial sites on federal and tribal lands, and criminalized trafficking in Native American remains and cultural items.[56] These three domestic cultural property laws are narrow in scope, and protect only Native American cultural property and human remains found on federal lands or tribal lands. If a tribe makes a claim on an item that is up for auction, it can certainly be confiscated. Further, if a transaction is partially completed, the auction house may be required to reverse parts of it or refund price paid in order to facilitate proper resolution of a conflict.

The European Union's (EU) unique political system facilitates broader regulation of the illicit antiquity trade than those of the United States and United Kingdom. For instance, the European Union Directive on the Return of Cultural Objects[57] (Directive) provides for the return of archaeological objects which have been unlawfully removed from a member state of the EU. To qualify, objects must be "national treasures possessing artistic, historic or archaeological value."[58] They must fall in one of the listed categories of artifacts, or form an integral part of a public collection. The Directive defines unlawful removal as breach of the rules in force in the territory from which the object was removed, or in breach of the conditions of temporary authorization. The Directive applies to all countries in the EU, permitting broad, consistent regulation, and operates as an automatic international agreement amongst all the members of the EU.

In addition to the Directive, domestic laws governing the importation of art in the EU impose further restrictions on the trade of antiquities. Great Britain, for instance, adopted the Dealing in Cultural Objects Act in December 2003.[59] This act makes it illegal to knowingly handle an object which was illegally removed from its site after 2003, but does not require due diligence in discovering an object's origin.[60]

Thus far, domestic regulations and international agreements on cultural property have had only an incidental impact on the operations of auction houses. To the extent which possessors of cultural property are sometimes

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56. *See* Will R. Ripley, *You're Not Native American—You're Too Old!* Bonnichsen v. United States *Exposes the Native American Graves Protection and Repatriation Act*, 9 J. GENDER RACE & JUST. 137, 142 (2005).

57. *See* Council Directive 93/7/EEC, 1993 O.J. (L 74), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0007:EN:HTML (last visited Oct. 17, 2007).

58. *Id.* art. 1.

59. *See* Dealing in Cultural Objects Act, 2003, ch. 27 (Eng.), *available at* http://www.opsi.gov.uk/Acts/acts2003/ukpga_20030027_en_1 (last visited Mar. 22, 2008).

60. *See* John Windsor, *Ancient and Modern Make Perfect Match, Antiquities are Now Sought After by Interior Designers as Fashionable - and Affordable – Art*, THE OBSERVER, Jun. 6, 2004, *available at* http://observer.guardian.co.uk/cash/story/0,6903,1232178,00.html (last visited Oct. 3, 2007).

required to relinquish claim to items, only the titleholders suffer economic loss. An auction house may be inconvenienced by being required to hold an item subject to dispute resolution, or embarrassed if the press portrays it in a bad light. Otherwise, auction houses face little to no negative consequences for being the single largest facilitators of the illicit trade in cultural property.

C. *Weaknesses in the Current Model: Why Laws Fail to Prevent the Trade in Illicit Antiquities or to Adequately Address Injury to Creator Cultures*

As stated above, auction houses are sales agents for their clients, and do not hold title to the property they put up for auction.[61] Auction houses solicit potential buyers as a service to the sellers, and facilitate determination of a fair market price. This business model does not legally justify the imposition of a heightened standard of investigation regarding the legitimacy of consigned items. The sellers are obligated to tell the auction houses where the objects came from, but there is no legal requirement for the auction houses to do any external investigation to legitimize the claims.

Unlike in real estate, there is no prevailing title system for antiquities. Instead, auction houses devise categories of items which have a higher likelihood of having been illicitly obtained, or subject to import restrictions. The categories are based on the apparent origin of the objects. If an item falls within one of these categories, the house requires the seller to provide paperwork of provenance[62] to show the seller legally obtained the object. An export license from the source nation is satisfactory. The houses voluntarily impose these requirements for paperwork of provenance in order to minimize, first, the likelihood that they are facilitating an illegal trade, and second, potential claims of foreign governments or private third parties for items in their care.

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61. *See* Borodkin, *supra* note 6, at 386. *See generally* MASON, *supra* note 15 (providing an in-depth look at the inner-workings of the auction industry).

62. *See* Hans Kennon, *Take a Picture, it May Last Longer If Guggenheim Becomes the Law of the Land: The Repatriation of Fine Art*, 8 ST. THOMAS L. REV. 373, 382–83 n.45 (1996). In note 45, Mr. Kennon defines provenance as follows:

> One commentator noted that "provenance" is a term of art but has varying definitions. "In DICTIONARY OF THE ARTS (M. Wolf ed. 1951), provenance is 'documents, descriptions, bills, receipts . . . furnished by the artist when selling a painting . . . establishing that the work of art is genuine and not a copy or forgery. . . .' In HUDSON DICTIONARY OF ART TERMS (E. Lucie-Smith Thames ed. 1984), it is a 'record of all known previous ownership and locations of a work of art as given in a catalogue raisome.'" Jessica L. Darraby, *Current Developments in International Trade of Cultural Property: Duties of Collectors, Traders and Claimants*, *in* THE LAW AND BUSINESS OF ART (Practising Law Institute 1990).

Id.

For instance, auction houses require Egyptian items with a purchase date after 1973 (the year Egypt signed the UNESCO Convention) to have paperwork of acceptable provenance. If a seller can show the auction house that they purchased their Egyptian artifact before 1973, they are exempt from the requirement of showing provenance.

However, it is difficult for an auction house to know when purchase paperwork is forged or manipulated. This partially explains why studies repeatedly show that about ninety percent of antiquities auctioned through the houses are illegally excavated or exported.[63] However, despite these distressing figures, the reality is that even if an object was illegally excavated or exported, it may still be legal to sell it.

If an illegally exported artifact arrives in a market nation which does not have an international agreement with the source nation to reciprocally enforce one another's patrimony laws, local law would not prohibit sale of the item. To illustrate, assume that the fictional country of Nadus has a national patrimony statute laying claim to all cultural property discovered after a certain date (this type of law operates as a ban on antiquity exports). The Nadusean law has no force in the United States unless the two nations have entered into an international agreement to enforce each other's cultural property laws. When an illegally exported Nadusean artifact appears on the United States market, there is no legal prohibition on selling the item, since the United States has not agreed to enforce Nadus' patrimony laws.[64]

The Nadusean artifact hypothetical illustrates that the law exists only as a concept, to the extent that people believe it exists. By moving an illegally excavated artifact a few miles west, across country borders, its status as "illegal" can be cured. For every country in which a person can trade the item, a separate mechanism of legal enforcement is necessary. This illustrates one of the primary abstract problems with the movement to prevent the illicit trade in cultural property: people often conceptually attach an illegal status to the object itself, which is incorrect and adds confusion to the issue. In reality, the law can only proscribe conduct on the part of a person, not impose a permanent illegal status on an item.

A tainted item does not carry with it the appearance of having been illegally obtained or exported, so physical characteristics alone rarely reveal an object to be the fruit of past illegal acts. An illegally exported Nigerian terracotta head looks just the same as a legally exported Nigerian terracotta head. There are burdens on both the buyer and the seller to help address this challenge, but these require the sellers to be forthcoming, and buyers to be fastidious in research.

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63. *See* WATSON, *supra* note 4, at 304. *See also* Richardo J. Elia, *Digging Up Dirt, An Antiquities Case Unearths Corruption*, THE WALL STREET JOURNAL Jun. 20, 2002, *available at* http://www.opinionjournal.com/la/?id=110001867 (last visited Oct. 17, 2007).

64. *See generally* Boyce, *supra* note 18.

While the seller is obligated to disclose what he knows of the provenance of the item, this often does not happen (consider the story of the Roman bust later in Part III of this article). The buyer, on the other hand, is required to exercise due diligence, which requires she consult the major looted and stolen art registries.[65] The Art Loss Registry is widely used, but far from comprehensive, and illegally excavated objects are not listed because they are previously unknown.[66] These burdens on the buyer and seller are common to all property transactions and not tailored with the illicit antiquity market in mind.

In cases where it is legal to sell an object, and detecting whether it was illegally obtained is nearly impossible, and the burdens on the buyers and sellers are minimal, where does that leave the auction houses? They are still the bottleneck through which a substantial percentage of antiquities pass,[67] and the auction market may in fact be the most efficient place to try and catch the objects which have been stolen, illegally exported or looted. The response of the auction houses is that they do not have the resources to conduct thorough investigations into each consigned object to make sure the buyers have told them the truth. The duty which auction houses owe to their clients is merely to promote the consigned objects and care for them properly.

From a policy perspective, the logistical framework of imposing a heightened obligation on the auction houses does not conform to the notions of a property-oriented legal system. Whether auction houses are the only entities which have the ability to legitimize the market or not (an arguable notion, but often taken as a given in pro-regulation discussions), the duties which arise from being a sales agent do not correspond to the perceived needs of the illicit antiquity trade. While the current laws have proved inadequate to prevent the trade in illicit antiquities, or to adequately address injury to creator cultures, an alternative vehicle which can help address defects in the industry has emerged by way of ethics.

III. AUCTION HOUSE ETHICS

In recent years the concept of business ethics has received considerable attention. This notion requires companies become more cognizant of the impact of their business practices on society as a whole, and many businesses have made modifications to their operations in order to be more socially

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65. *See generally* Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631 (2000).

66. *See* BRODIE ET AL., *supra* note 14, at 52. This section of the article relies heavily on this publication.

67. Thirty to forty percent of all the world's antiquities pass through auction houses, making this the most public portion of the antiquities market. *See* WATSON, *supra* note 4, at 304.

responsible and ethical. Business ethics turn matters previously handled by the legal department into those precisely designed for public relations campaigns to address. This allows businesses to preemptively manage risks before they become real problems. Business ethics have become more international in scope and function, and pervasive throughout diverse industries. The auction industry, however, has not yet embraced the notion of business ethics. As a starting point it is necessary to define what ethical role auction houses should assume concerning the illicit antiquity trade.

A. Why Stemming the Illicit Trade is an Ethical Concern: Protecting Creator Cultures and Preserving Cultural Remains

Cultural preservation is ethically worthy because of the impact cultural loss has on individuals and communities. When a community loses its cultural resources to looting and illegal exportation, the cultural lives of its members suffer. Removal of archaeological remains from a creator culture robs individuals of their right to cultural heritage.[68] The Stockholm Declaration published by the International Council of Monuments and Sites (ICOMOS) recognizes the right to cultural heritage as a fundamental human right.[69] The Council of Europe Framework Convention on the Value of Cultural Heritage for Society[70] similarly recognizes the right of people to cultural heritage. The United Nations Draft Declaration on the Rights of Indigenous Peoples[71] goes even further and suggests that indigenous people should have autonomous control over cultural resources within their local territory.[72]

Discovery of cultural artifacts is not just about knowledge and objects, but also about a reassurance of roots.[73] In countries where people are commonly of mixed ethnographic ancestry, archaeology creates a common national pride. The past gives people "confidence and a sense of special

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68. According to the United Nations Universal Declaration of Human Rights, human rights are based in the inherent human dignity. The delineated right that is most relevant to the ethics of cultural property is the right to participate fully in cultural life. *See* Universal Declaration of Human Rights, G.A. Res. 217A, art. 27, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

69. *See* Declaration of ICOMOS, Universal Declaration of Human Rights (Sep. 11, 1998), *available at* http://www.international.icomos.org/e_stocdec.htm (last visited Oct. 16, 2007).

70. Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Oct. 27, 2005, arts. 1, 4, C.E.T.S. 199 [hereinafter Framework Convention].

71. Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2.1993/29/ AnnexI (Aug. 23, 1993) (*prepared by* Erica-Irene A. Daes).

72. *Id.* art. 3.

73. Karl Meyer, *The Plundered Past*, *in* ARCHAEOLOGY, RELICS, AND THE LAW 172 (Richard B. Cunningham, 2d ed. 2005).

virtue."[74] Further, cultural objects are tangible, easily accessible reminders of accomplishments.[75] For every artifact a creator culture loses to smuggling or theft, people are denied the pride, virtue, and confidence which would have resulted from caring for it.[76] Archaeologists have argued that taking away archaeological remains damages the collective psyche of a creator culture, and steals a part of their identity.[77]

In some cultures, removal of venerated objects from their traditional setting is an act of desecration (for example, when temples are defaced to remove carvings or when tombs are torn apart by looters searching for treasure). Historically, oppressive dominant cultures have destroyed the cultural relics of minority cultures to disempower them. One example is the 2001 destruction of the Bamiyan Buddha figures by puritanical Muslims in Afghanistan.[78] When sacred objects are taken away by exportation or deliberate destruction, in varying degrees, the right of a people to their cultural heritage is denied.

If people have a fundamental human right to cultural heritage,[79] they should also fairly benefit from their cultural resources. Looters receive small amounts of money for nonrenewable cultural objects which might ultimately sell for very high prices.[80] The objects are commodified on the Western market and circulate for many years generating money. None of this money makes its way back to creator cultures. In this way, the trade in looted objects undermines a community's economic base, taking away from the creator culture a nonrenewable resource and the opportunity for sustainable profit.

Illegal removal of cultural remains, whether by looting or unauthorized exportation, also takes away the chance to meaningfully study an artifact. If

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74. *Id.* at 171–72.

75. *See generally* BRODIE ET AL., *supra* note 14.

76. Admittedly, creator cultures or source nations are sometimes accused of not taking as good care of cultural objects as might the owner of an illicit antiquity in a market nation. The ethical concerns discussed herein outweigh the dangers of inadequate care, largely because it is possible to address this problem by better educating creator cultures on preservation methods. To permit the "haves" to continue stripping the "have nots" of cultural resources under the premise that source nations are not adequately caring for their cultural resources is offensively paternalistic (and reminiscent of the Manifest Destiny mentality that since the Native Americans were not "using" the land by European standards that they were not entitled to it).

77. *See* BRODIE ET AL., *supra* note 14, at 11–12.

78. *See* Kwame Anthony Appiah, *Whose Culture Is It?*, 53 THE NEW YORK REVIEW OF BOOKS 2 (Feb. 9, 2006), *available at* http://www.si.umich.edu/~rfrost/courses/MatCult/content/Appiah,%20Whose%20Culture.pdf (last visited Mar. 22, 2008).

79. Framework Convention, *supra* note 70, art. 6 (asserting that the right to a cultural heritage is a fundamental one).

80. *See* BRODIE ET AL., *supra* note 14, at 13–14 (citing the example of a fossil turtle purchased from its finder for $10 in Brazil, later fetching $16,000 when sold in Europe).

an artifact is inexpertly excavated, the archaeological record of context is usually damaged or destroyed, often irreparably eliminating the potential for scholarly learning from its excavation.[81] An object's original social value and purpose may be lost entirely, preventing anthropologists and archaeologists from adding to their historical knowledge base.[82] Further, when an artifact is removed from its natural surroundings, there is an increased risk of decay and destruction because of changes in the environment.

To preemptively excavate and export is to take away the chance for the people of a creator culture to rediscover their history by way of the lost context and meaning. In a world where globalization is slowly and systematically diluting cultural and ethnic differences between populations, sources of knowledge about a people's past become precious in retaining a sense of identity. The removal of sacred objects from the care of a creator culture damages morale because community members lose something psychologically precious. When the European colonists of North America wanted to demoralize indigenous people, they stripped them of their native clothes and cut off their hair. Taking away physical, tangible manifestations of cultural connections undermines a community's very identity. To facilitate the trade in objects whose loss demoralizes a people, is to trade in demoralization itself.

B. The Tension Between Legal and Ethical Frameworks

There is an inherent tension between the law and ethics in arguments advocating heightened regulation of the auction industry as a way to stem the illicit trade in cultural property. This tension is borne of the persistent failure of legal solutions to adequately address the ethical problems of the illicit antiquities crisis. Arguably, legal regulation may frustrate the ethical goals of cultural preservation and protection of creator cultures. In foreign law, culturally insensitive patrimony laws can conflict with the ethical goals of minority creator cultures. Domestically, the prevailing property model has proven itself inadequate to protect the interests of those creator cultures which lack a legally cognizable property interest.

Academic discussion on the illicit antiquity trade often reprimands parties to illegal transactions on moral grounds. However, the resulting correlation of legal initiatives with ethical concerns is ill conceived. Source nation patrimony laws, for instance, do not always protect creator cultures. Patrimony laws are property laws, and sometimes those laws benefit the government more than they benefit nationals. Governments sometimes

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81. *See* BRODIE ET AL., *supra* note 14, at 8, 11.

82. *See* Christopher Chippindale & David W. J. Gill, *Material Consequences of Contemporary Classical Collecting*, 104 AM. J. OF ARCHAEOLOGY 463, 504 (2000).

draw country borders without regard to the past and present territories of ethnic groups. Some administrations have no ties to the ethnic groups which incidentally fall within the country's borders. The interests of a creator culture can come in direct conflict with the government interests served by a national patrimony law.[83]

Viewed in the proper context, the illicit antiquity trade and the unethical antiquity trade become two distinct, partially overlapping categories. If a national government appropriates cultural property by way of a broad patrimony law, and the creator culture is not compensated for the taking, then a legal action may still be unethical. Consider the Holocaust, where the Nazis expropriated cultural property from Jewish nationals in what were, according to the reigning regime, legal actions.[84]

Current efforts to curb the illicit trade do not fully consider the interests of cultural property laws, and the ethics of preservation do not necessarily coincide. By distinguishing between the legal and ethical concerns of illicit trade, auction houses can better tailor remedies for both. Until the houses recognize this distinction, efforts to stem the trade will fail to adequately protect creator cultures or address the damage caused by the illicit trade in cultural property.

C. Practical and Business Benefits of a Supplementary Ethical Model

Risk management protects a company's brand name, and sometimes motivates businesses to develop ethical models for business operations. The leading auction houses have been working for over 200 years to build reputations which remain far too fragile in view of how important they are to business. One corruption scandal can severely mar a company's good reputation and brand image.[85]

A representative from one of the major auction houses told me the story of a Roman bust which was up for auction in the house's New York location. The seller gave the auction house paperwork indicating the item was of legitimate provenance. The day before the auction was scheduled to begin, the Attorney General (A.G.) came to the auction house and said Italy had filed a repatriation claim on the object. Together the auction house employees and the A.G. inspected the item. The object appeared to be the one in photos of a Roman bust stolen from an Italian museum, but there was paperwork of legitimate provenance on file. The auction house and A.G.

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83. *See generally* Appiah, *supra* note 78.

84. The art taken from Holocaust victims is today considered "stolen," but it was not stolen under the local standards of the time. *See generally* Alia Szopa, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIAMI BUS. L. REV. 55 (2004). *See also* Phelan, *supra* note 65.

85. *See generally* Appiah, *supra* note 78.

came to an agreement that the auction could proceed, but the house would not accept any funds toward the purchase of the item, and would not release it from their care until the dispute was settled.

When the seller was questioned in further detail as to the provenance of the bust, he explained he had inherited the item from his father. He revealed his father had purchased the bust, donated it to a museum, which was later robbed of the object, and somehow it came back into the father's possession. The seller surmised that maybe the paperwork showing legitimacy was from his father's first acquisition of the object. In that case the purchase paperwork was in fact legitimate, so, absent Italy's last-minute repatriation claim, the auction house could not have known about the sequence of events which rendered the paperwork of good provenance to be misleading.[86]

The auction house cooperated fully with the A.G. to help settle the dispute so the object could be returned to its rightful owner. The bust was shipped back to Italy, and the A.G. privately applauded the auction house for their cooperation. He promised that he would say good things about them in the press release. The representative confessed to me she was disappointed but not surprised to read the subsequent headline in the New York Times: "[Name of auction house] Tries to Sell Stolen Bust."

The auction house employees were disappointed that the A.G. and press painted them as villains despite their best efforts to conduct business in a legitimate manner, and to cooperate with authorities when a dispute came up. When the representative recounted the story, she even sounded hurt. Beyond injuring the morale of the employees, every inflammatory headline damages the reputation of a company, and mandates public relations repair the damage.

Auction houses currently focus, almost exclusively, on legal compliance. When I asked one house if they had any sort of corporate social responsibility policy, the representative was quick to respond, "Our company tries its very best to enforce the patrimony laws of all source nations."[87] In response to a question about the role of ethics in reducing the

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86. If the auction house had performed an external investigation, it may have turned up the bust in one of the stolen art registers. Such an investigation is the duty of the buyer, however. If auction houses conducted investigations to independently verify every claim made by their sellers, even when the claims are supported by proper documentation, it would undermine the nature of the agent-client relationship.

87. If there is no domestic treaty or law effectuating the laws of a source nation, then there is no legal duty for auction houses to enforce those foreign laws. Meanwhile, many of these patrimony laws are not tailored to ethical concerns, so it is illogical to comply with them in order to satisfy ethical demands. It is not entirely clear why auction houses try to enforce the patrimony laws of source nations when those laws have no legal effect. It is likely that the web of treaties, in effect and out of effect, combined with the evolving patrimony laws of source nations, make it difficult for auction house lawyers to track what laws have legal effect at a particular time, and what exactly that legal effect is.

illicit trade in cultural property, the attorney for a different house responded, "We comply with all of New York City's auction rules, and their substantial ethical rules and also the laws for consumer protection." These answers focus on legal considerations as a substitute for ethical ones, and fail entirely to acknowledge the difference between the two.

By stressing their devotion to legal compliance when asked about ethical matters, auction houses are legitimizing the notion that they believe legal solutions effectively address the social ills of the illicit trade. Even if an auction house obeys the cultural property laws of every source nation, including those which are overbroad, published in obscure foreign languages, or unenforceable in the United States, they may nonetheless facilitate the illicit trade in cultural property and the resulting social harms.

A strategy based on legal compliance further fails to mitigate the public perception that the business practices of auction houses are self-serving and unethical. The auction houses are, inarguably, facilitators of the illicit antiquity market.[88] But if the houses considered cultural preservation and the protection of creator cultures as important ethical goals, the public could perceive them as protectors of the public good instead of enablers of a self-serving, patrician market satisfied with legal compliance. Therefore, if the auction houses adopt a supplementary ethical framework, they may also experience the business benefits of a further reduced risk of liability and an improved brand image in the eyes of the public.

D. The Emergence of Ethical Strategies in the Antiquity Auction Industry

The major auction houses have responded to public criticism and growing risk of liability by revising their internal policies to go beyond local and national regulatory requirements.[89] They have recognized that

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88. Many companies, however, enable illicit activity and still evade or escape blame and public condemnation for it. (*E.g.*, companies that manufacture or distribute rolling papers, gun silencers, radar detectors, or alcohol.) These companies may, at times, actively flout the law in favor of some advertised public interest.

Consider the energy drink that was pulled from the market because of pressure from the FDA over the drink's inflammatory name—"Cocaine." When the drink went back on the shelves, it was under the name "Censored," poking fun of what they asserted was a violation of free speech rights. This company used the notion of free speech to align themselves with the public against the administration over excessive regulation.

The auction houses could create an image for themselves as protectors of the public good by pitting themselves against the social ills of the illicit market, even when the law is inadequate to protect the creator cultures or truly serve the interests of cultural preservation.

89. *See generally* Tony Thorncroft, *Art World Gives Tomb Raiders the Cold Shoulder*, THE FINANCIAL TIMES, May 9, 2003, at 21.

they are the primary facilitators of this quasi-black market.[90] Despite the desire of auction houses to go beyond mere compliance, the demands made of them by foreign governments are murky, fragmented, and sometimes impossible to effectuate because of overbreadth. This leaves the auction houses in a constant struggle to comply with regulations, despite not always knowing how to comply, and it leaves them at constant risk that any apparently innocuous transaction could result in unavoidable and damaging headlines, or even civil liability.[91]

There has been substantial debate as to what ethical duty the auction houses have in investigating beyond what their clients tell them.[92] However, it is difficult for them to do so because information on stolen and illegally exported artifacts is widely dispersed and not always easily accessible.[93] It is difficult for an auction house to discover the origin of a specific item even if they conduct a thorough investigation.[94] Further, the houses explain that they do not have the resources to run their own Interpol.[95] Despite high revenues, auction houses have thin profit margins. Given limited resources, the auction houses argue that the best they can do is to make thorough inquiries of sellers, require provenance paperwork for potentially protected items, and publish their catalogs to provide a way for private and governmental parties to search for specific objects.[96]

Although there is no legal requirement to do so, the houses publish catalogs which picture what items are coming up for auction. Christie's even sends hard copy catalogs to source nations before an auction begins. This gives the source nations the opportunity to examine photos and search for missing objects. Christie's also puts upcoming auctions on their website in a searchable database called LotFinder.[97] Similarly, Sotheby's and

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90. *See* Steele, *supra* note 4, at 668–69.

91. Consider the discussion of the Roman bust in Part III, Section D, of this text.

92. *See* Appiah, *supra* note 78.

93. There have been numerous arguments for creating a single, dominant international registry of stolen and illegally exported art and antiquities, but as of this point there are a lot of different registries, and the amount of resources required for a country to enter thoroughly searchable details for every missing object into databases is so substantial as to be impossible for many source nations. *See generally* Laura McFarland-Taylor, *Tracking Stolen Artworks on the Internet: A New Standard for Due Diligence*, 16 J. MARSHALL J. COMPUTER & INFO. L. 937 (1997).

94. *See* Tarquin Preziosi, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225, 243 (1997).

95. Interpol is an international police organization with 186 member countries. It specializes in crimes of an international nature, including property crimes (*i.e.*, tracking down stolen art and antiquities).

96. McFarland-Taylor, *supra* note 93, at 965–68. *See* Preziosi, *supra* note 94, at 243.

97. LotFinder, Christie's, http://www.christies.com/LotFinder/lfsearch_coa/Search.aspx?noresults=true (last visited Mar. 22, 2008).

Bonhams have freely accessible web pages where they publish photos of objects to be sold in upcoming auctions.[98]

Advance publication of catalogues is one of the many internal policies auction houses have implemented which go beyond strict legal compliance, and help manage risk. The houses also demand more documentation of sellers than is required under law. While much of this voluntary regulation is intended to avoid legal and public relations problems, a spirit of ethics has consequently started to emerge.

The Sotheby's Code of Business Conduct and Ethics (Sotheby's Code) is part of their Corporate Governance paperwork, and available to the public through the investor relations section of the Sotheby's website.[99] The Sotheby's Code purports to establish a culture of ethics for employee actions both internally and externally. With a business-oriented mindset, Sotheby's directs employees to do what is ethical by obeying all laws. It encourages "ethical conduct," upholding of "ethical standards," reporting of "unethical behavior," and the making of "ethical decisions," although it never defines the term "ethical." However, the Sotheby's Code does specifically include: compliance with the laws, fair dealing, confidentiality, conflicts of interest, insider trading, and reporting of illegal behaviors. The Sotheby's Code speaks of ethical behavior and legal obligations coextensively, but indicates, as of this point, Sotheby's interest in the former is largely borne of its responsibility under the latter.

The Sotheby's Code is a curative effort to address previous auction industry practices. For instance, in a 1997 scandal, news reports accused Sotheby's of London of knowingly facilitating the illegal looting and exporting of protected artifacts out of India, Italy, and Egypt.[100] The *Times of London* alleged Sotheby's was "actively engaged in flouting the laws of several countries."[101] As a result, Sotheby's has modified its antiquity collection, and only auctions off items of unquestionable provenance in London.[102] If an object does not have established provenance, Sotheby's will only auction the item out of their New York location.[103]

In speaking with the auction houses and in reviewing the material available to the public, I was unable to uncover much else in the way of conscious recognition of ethical obligation on the part of the auction

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98. Sotheby's, Catalogue Desk, http://www.sothebys.com/app/live/pub/PubLanding.jsp (last visited Jun. 11, 2007); Bonhams, Catalogue Subscriptions, http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=indexUSA (last visited Nov. 11, 2007).

99. Sotheby's, Sotheby's Code of Business Conduct & Ethics, http://www.sothebys.com/about/investorrelation/bus_ethics_conduct.html (last visited Jun. 11, 2007).

100. *See* Farrell & Alberge, *supra* note 3.

101. *Id.*

102. *Id.*

103. *Id.*

houses. The majority of what I did find concerning ethics, had to do with anti-trust concerns, in response to the Sotheby's-Christie's price-fixing scandal.[104] I asked one auction house representative what she thought her company's ethical obligation is, specifically, concerning the illicit trade. After some thought she responded, "Not to create or enhance a market of items improperly dug up." That is an excellent place to start.

IV. CONCLUSION

Despite increased legal regulation and cooperation on the part of the auction houses, the black market trade in antiquities continues unabated. Every year, new sites are opened up by looters, and the heritage of creator cultures is further eroded by every lost artifact. A looted Djenne-jeno terracotta figure slipping past Malian customs officials is not tragic because the state just lost an item of "national importance," but because in the wake of globalization and encroaching development, the Bozo people lose more of their cultural selves every year.[105] The terracotta figure goes to auction and ends up in an executive's curio cabinet, while the creator culture struggles, and starves, and forgets from where they came. Viewed in this light, the ethical concerns are bigger than a simple violation of foreign patrimony laws.

Legal solutions to the thriving black market in antiquities do little to address the social consequences of the trade, and sometimes work against other ethical concerns. For as long as the auction houses define their ethical behavior by way of their legal obligations, they will fail to comprehensively manage risk, and will forgo opportunities to improve their brand image. When auction houses implement ethical strategies supplementing those focused on regulatory compliance, there will be two results. First, cultural preservation interests will be furthered and creator cultures better protected, because ethical initiatives address social concerns while those focused on regulatory compliance do not. Second, auction houses will be better equipped to combat bad press, restore their brand images, and manage the risks associated with auctioning antiquities. In both ways, a supplementary ethical framework is a tailored response to the crises of cultural preservation, borne of the illicit trade in cultural property.

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104. *See generally* Appiah, *supra* note 78.

105. *See id.* (discussing Malian patrimony laws).