NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW

Volume 45 | Number 2 Article 7

4-1-2020

Provenience and Provenance Intersecting with International Law in the Market for Antiquities

Patty G. Gerstenblith

Provenience and Provenance Intersecting with International Law in the Market for Antiquities

Patty Gerstenblith†

I. Introduction 457
II. Provenance and Provenience 461
III. The International Legal Framework for Controlling the Market in Antiquities 469
A. The 1970 UNESCO Convention and its Domestic Implementation by Market States 470
B. State Ownership 475
IV. Legal Roles of Provenience and Provenance.....476
A. Where is Legality? The Problem of Location.....477
B. When is Legality? The Problem of Time.....487
C. What is Legality? Objects in Transit 490
V. Conclusion 495

I. Introduction

International trade in archaeological artifacts has become increasingly fraught, as armed conflict and political instability have spread since 2003 throughout the archaeologically rich regions of the Middle East and North Africa, accompanied by destruction of historic and religious structures, looting of archaeological sites, and thefts from cultural and religious repositories.[1] As a result, the

† Patty Gerstenblith is a Distinguished Research Professor at DePaul University College of Law.

1 Fiona Greenland et al., *We're Just Beginning to Grasp the Toll of the Islamic State's Archaeological Looting in Syria*, THE RAND BLOG (May 15, 2019), https://www.rand.org/blog/2019/05/were-just-beginning-to-grasp-the-toll-of-the-islamic.html [https://perma.cc/7TEG-HAEQ]; Megan Gannon, *"Space Archaeologists" Show Spike in Looting at Egypt's Ancient Sites*, SCIENTIFIC AMERICAN (Feb. 29, 2016), https://www.scientificamerican.com/article/space-archaeologists-show-spike-in-looting-at-egypt-s-ancient-sites/ [https://perma.cc/2CMV-3CFA]; Brigit Katz, *New Online Database Catalogues 20,000 Threatened Archeological Sites*, SMITHSONIAN (June 1, 2017), https://www.smithsonianmag.com/smart-news/new-online-database-catalogues-20000-threatened-archaeological-sites-180963451/ [https://perma.cc/4GBK-6FV9].

intersection of the antiquities trade with international law and the domestic law of individual market states has expanded significantly.[2] The trade in undocumented or poorly documented antiquities incentivizes looting[3] of archaeological sites to supply the market,[4] resulting in detrimental effects and negative consequences for our ability to reconstruct and understand the past.[5] The artifact is decontextualized and what it can tell us about the past is limited to the information intrinsic within the object itself, rather than what might have been learned from the object's full associated context.[6] Because of the negative externalities imposed on society through the looting of archaeological sites, a body of international and domestic law has developed to reduce the economic incentive to loot archaeological sites and to trade in such artifacts.[7] Because

---

2 *See* Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 174–77 (2007) (discussing the progression of international law in an attempt to stem the sale and trafficking of looted archaeological artifacts).

3 A looted antiquity is one recovered from the ground in an unscientific manner and may be characterized as illegal depending on applicable legal provisions. Siobhan M. Hart & Elizabeth S. Chilton, *Digging and Destruction: Artifact Collecting as Meaningful Social Practice*, 21 INT'L J. HERITAGE STUD. 1, 2 (2014) ("[Looting is] the act of digging up artifacts for private collection or sale without the concomitant record of excavation, context and lab work associated with scientific archaeology.").

4 *See* Morag M. Kersel, *From the Ground to the Buyer: A Market Analysis of the Trade in Illegal Antiquities*, *in* ARCHAEOLOGY, CULTURAL HERITAGE, & THE ANTIQUITIES TRADE 188, 188 (Neil Brodie et al. eds., 2006) (describing the role of the international art market and the demand for artifacts from Western collectors in incentivizing the looting of sites).

5 *See* Gerstenblith, *supra* note 2, at 170–74 (discussing information lost through looting of archaeological sites); *see also* Laetitia La Follette, *The Trial of Marion True and Changing Policies for Classical Antiquities in American Museums*, *in* NEGOTIATING CULTURE: HERITAGE, OWNERSHIP, AND INTELLECTUAL PROPERTY 38, 42–44, 51–54 (Laetitia La Follette ed., 2013) [hereinafter La Follette, *The Trial of Marion True*] (discussing the information lost through looting of the Euphronios krater and what is learned from scientifically excavated objects).

6 *See* Gerstenblith, *supra* note 2, at 172; *see also* Alex W. Barker, *Provenience, Provenance and Context(s)*, *in* THE FUTURES OF OUR PASTS: ETHICAL IMPLICATIONS OF COLLECTING ANTIQUITIES IN THE TWENTY-FIRST CENTURY 19, 20 (Michael A. Adler & Susan Benton Bruning eds., 2012) ("[C]ontext . . . refers to the association of an object that allows its importance or significance to be assessed.").

7 *See* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property arts. 2–3, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention] (recognizing the harms of selling looted artifacts and declaring that it shall be illegal to do so); Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2602–2603 (2018) (providing a

such objects are, by definition, previously undocumented, they are particularly suited to the illegal trade and also pose a particular challenge to law and law enforcement.[8] For these reasons, this Article is limited to discussing looted artifacts that were not documented in a public or private collection before their illegal removal and entry into the market.

While a body of general international and national law and *lex specialis* has developed to regulate this trade and thereby reduce demand for artifacts, not as much attention has been paid to the specific applications of and compliance with this body of law.[9] This Article aims to address this lacuna by examining the law and its enforcement through the lens of the concepts of provenience and provenance—both of which are crucial to understanding the international market and efforts to control its illegal aspects.[10] This area of the law is inherently interdisciplinary, intersecting with the scholarly disciplines of art history, archaeology, and anthropology.[11] As a result, the law has borrowed terms, including

---

mechanism by which the United States can impose restrictions on the import of undocumented archaeological materials).

8 *See* Celestine Bohlen, *Escalating the War on Looting*, N.Y. TIMES (Mar. 11, 2016), https://www.nytimes.com/2016/03/12/arts/international/escalating-the-war-on-looting.html [https://perma.cc/DWB6-TDAB] ("But investigations rarely produce arrests because of the difficulty in proving the provenance of antiquities, often produced by civilizations that stretched across the ancient world.").

9 *See generally* Gerstenblith, *supra* note 2, at 172–74 (analyzing the market for looted artifacts and what course of action would be best, from a legal perspective, to help reign in the demand for and trade in looted materials).

10 This article specifically deals with issues of provenance and provenience as related to looted archaeological artifacts. For a discussion of other legal issues implicated in the black market antiquities trade, see generally Karin Orenstein, *Risking Criminal Liability in Cultural Property Transactions*, 45 N.C. J. INT'L L. 527 (2020) (discussing the intersection of laws governing looted art and U.S. criminal law); Leila Amineddoleh, *The Politicizing of Cultural Heritage*, 45 N.C. J. INT'L L. 333 (2020) (discussing the repatriation of cultural heritage and the political calculations involved); Stefan Cassella, *Recovering Stolen Art & Antiquities Under the Forfeiture Laws: Who Is Entitled to the Property When There Are Conflicting Claims*, 45 N.C. J. INT'L L. 393 (2020) (providing an overview of civil asset forfeiture laws and how they work to assist in the recovery of looted cultural patrimony). For a discussion of the comparative considerations involved in repatriating looted artifacts and Nazi-looted art, see generally Marc Masurovsky, *A Comparative Look at Nazi Plundered Art, Looted Antiquities, & Stolen Indigenous Objects*, 45 N.C. J. INT'L L. 497 (2020) (discussing looted indigenous art, looted archaeological artifacts, and Nazi plunder, as well as the sociological implications thereof).

11 *See infra* notes 21–51 and accompanying text.

provenience and provenance, from these disciplines.[12] Despite the essential role that these terms play in both the policy and practicalities of the legal framework for controlling the market in antiquities, these terms do not have clear legal definitions.[13] Rather, the law has adopted these terms and their definitions from the academic disciplines of art history, archaeology, and anthropology, but, in doing so, the law has at times hampered rather than facilitated effective law enforcement efforts.[14] As the terms serve different purposes in these different contexts, it is not surprising that they should also have different meanings.[15]

By examining the origins of these terms in their art historical, archaeological, and anthropological milieus, and the roles that these concepts should play in the legal framework, this Article will propose legal definitions for the terms "provenience" and "provenance" and will consider how these definitions make the law more effective in controlling the trade in previously unknown and undocumented archaeological artifacts.[16] This Article begins with a discussion of the terms "provenance" and "provenience" as they originated and are understood in the art historical, archaeological, and anthropological literature.[17] The Article then turns to a brief overview of the international legal framework and domestic implementation of that framework, whose purpose is to control the

---

12 *See* Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1513 (11th Cir. 1985) (explicitly relying on the way "provenience" is used in the field of archaeology).

13 *See* Carrie Betts, *Enforcement of Foreign Cultural Patrimony Laws in U.S. Courts: Lessons for Museums from the Getty Trial and Cultural Partnership Agreements of 2006*, 4 S.C. J. INT'L L. & BUS. 73, 74–75 (2007) ("Despite its centrality in the art world, no uniform rule or custom, or usage of the trade, exists to codify either the precise elements of provenance or a standard for how provenance research should be conducted . . . .").

14 *See* Gerstenblith, *supra* note 2, at 178–80 (establishing that it is likely most market participants are unconcerned about lack of sufficient provenance information, and that a lack of sufficient provenance information makes it difficult for law enforcement actions to establish that an artifact was stolen). *See also* Jane Levine, *The Importance of Provenance Documentation in the Market For Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past*, 16 DEPAUL J. ART, TECH. & INTELL. PROP. L. 219, 229–32 (sellers' and museums' standards to establish appropriate provenance were often lacking at best, and there were issues with confidentiality or missing documents, which made it relatively easy for stolen or looted articles to be acquired and sold).

15 *See infra* notes 21–51 and accompanying text.

16 *See infra* notes 100–200 and accompanying text.

17 *See infra* notes 21–51 and accompanying text.

market in antiquities.[18] Third, the Article will offer definitions of "provenience" and "provenance" that are more suitable to the legal context and will present examples and justifications for why these different definitions are necessary.[19] The Article proposes that while the concepts of provenience and provenance are useful in determining legality and in effectuating law enforcement efforts,[20] the law also needs to adapt these definitions appropriately to their legal context in order to accomplish these goals.

II. Provenance and Provenience

The anthropologist Rosemary Joyce has focused on the use of provenance and provenience in the determination of whether an archaeological object is authentic.[21] Joyce looked at these terms as representing the concepts of place (where is authenticity),[22] time (when is authenticity),[23] and a fluid understanding of the meaning of an object's authenticity as it moves from its origin to its current resting place (what is authenticity).[24] Particularly for this last

---

18 *See infra* notes 52–99 and accompanying text.

19 *See infra* notes 100–200 and accompanying text.

20 *See id*.

21 Rosemary A. Joyce, *When is Authentic? Situating Authenticity in Itineraries of Objects*, *in* CREATING AUTHENTICITY: AUTHENTICATION PROCESSES IN ETHNOGRAPHIC MUSEUMS 39, 44 (Alex Geurds & Laura van Broekhaven eds., 2013) [hereinafter Joyce, *When is Authentic?*]. Joyce commented that "authenticity is embroiled in a nexus of place and time that . . . underlies intertwined archaeological and art historical concepts used to secure knowledge: provenience and provenance." *Id*. at 44.

22 *Id.* at 44–48.

23 Joyce described the concept of when an object is authentic as "[t]he networks composed by circulating objects at a given time are transformed into itineraries unfolding in time. Authenticity becomes, like provenience and provenance, a way to characterize an object during its transit, rather than being something inherent in it as a kind of essence, lent by some particular circumstances of production or use." *Id.* at 51–54.

24 *Id*. at 48–51. Kersel identifies three stages in the trafficking of antiquities from the ground to the buyer: the archaeologically rich market or country of origin; transit markets; and destination markets. Kersel, *supra* note 4, at 189–94. She notes that all three stages may exist within a single country, such as in Israel. *Id*. at 190–91. However, in the paradigm used in this Article, which addresses international law, the various stages are located in different countries. Campbell identified four stages: looter stage; early-stage intermediary; late-stage intermediary; and collector. Peter B. Campbell, *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, 20 INT'L J. CULTURAL PROP. 113, 116 (2013). Both authors recognize that numerous actors could be involved at each stage while the same actor can fulfill more than one role. In their study of the looting of Cambodian antiquities during the Khmer Rouge period, Simon Mackenzie and Tess Davis found that "antiquities

element, the concept of object itineraries is useful in describing the movement of objects through time and space.[25] Joyce emphasized that through the concept of object itineraries, we can see the mobility of objects, "the routes by which things circulate in and out of places where they come to rest or are active. . . . Treating things as active in transit puts even partial and collective object histories into context as segments of potentially unending itineraries that shape space and enable action."[26] This Article will apply these

---

trafficking 'networks' might be thought of as more stable, hierarchical and repetitively functioning supply chains rather than the highly fluid picture that has been developed both in the general organized crime literature and in recent papers in the illicit antiquities sub-field." Simon Mackenzie & Tess Davis, *Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network*, 54 BRIT. J. CRIMINOLOGY 722, 737 (2014). Yates and Smith, in contrast to many other authors, examined the middle stage—the trafficking networks that move an object from its discovery to current location. Donna Yates & Emiline Smith, *Antiquities Trafficking and the Provenance Problem*, *in* COLLECTING AND PROVENANCE: A MULTIDISCIPLINARY APPROACH 385, 387 (Jane Milosch and Nick Pearce eds., 2019).

25 *See* Rosemary A. Joyce, *Things in Motion: Itineraries of Ulua Marble Vases*, *in* THINGS IN MOTION: OBJECT ITINERARIES IN ANTHROPOLOGICAL PRACTICE 21, 29 (Rosemary A. Joyce & Susan D. Gillespie eds., 2015) [hereinafter Joyce, *Things in Motion*].

26 *Id.* Some scholars refer to an object's biography and see three phases or "lives": first, the history of the object in antiquity before it is buried in the ground; second, the burial of the object in the ground with its associated stratigraphic context; and, third, the history of the object after its removal from the ground. *See, e.g.*, Christopher Chippindale & David W. Gill, *Material Consequences of Contemporary Classical Collecting*, 104 AM. J. ARCHAEOLOGY 463, 468 (2000). *Compare with* Laetitia La Follette, *The Impact of the 1970 UNESCO Convention on Unprovenanced Etruscan Antiquities in the United States*, *in* COLLECTING AND COLLECTORS FROM ANTIQUITY TO MODERNITY 75, 76 (Alexandra Carpina et al. eds., 2018) [hereinafter La Follette, *The Impact of the 1970 UNESCO Convention*] (phrasing these lives slightly differently in that she characterizes the first "life" as only the moment of its creation and its immediate milieu; the second as the object's history until its deposition; and the third its post-removal in modern times); *see also* La Follette, *The Trial of Marion True*, *supra* note 5, at 44 (noting that art museums privilege the first life, whereas the second and third lives are equally important and are often more interesting and with greater educational value). Many scholars prefer the concept of object itineraries, rather than biographies, because the former is less static and encompasses a broader range of social and other networks for the object. *See, e.g.*, Rosemary A. Joyce & Susan D. Gillespie, *Making Things Out of Objects that Move*, *in* THINGS IN MOTION: OBJECT ITINERARIES IN ANTHROPOLOGICAL PRACTICE 3, 11–14 (Rosemary A. Joyce & Susan D. Gillespie eds., 2015); Alexander A. Bauer, *The Kula of Long Term Loans: Cultural Object Itineraries and the Promise of the Postcolonial "Universal" Museum*, *in* THINGS IN MOTION: OBJECT ITINERARIES IN ANTHROPOLOGICAL PRACTICE 147, 148–49 (Rosemary A. Joyce & Susan D. Gillespie eds., 2015) (describing how the concept of "object itineraries" is useful in understanding the movement of objects and correcting for misperceptions around repatriation of artifacts); Morag M. Kersel, *Itinerant Objects: The Legal Lives of Levantine Artifacts*, *in* THE SOCIAL ARCHAEOLOGY

concepts to an exploration of determining the legal status of an archaeological object and, more specifically, to proposing legal definitions for the terms provenience and provenance. The same concepts of time, place, and quality or meaning of legality may be brought to bear in the determination of compliance with international and domestic law.

The terms provenance and provenience have at times been considered interchangeable,[27] while some scholars viewed provenience as referring only to the ownership history of archaeological objects, in contrast to the term provenance referring to the history of ownership of works of (non-archaeological) fine art.[28] In the art historical world, the term provenance typically indicates the history of the ownership of a work of art from the time of its creation.[29] The ideal provenance would trace that ownership history back to the hands of the artist to establish the twin principles

---

OF THE LEVANT FROM PREHISTORY TO THE PRESENT 594, 595 (Assaf Yasur-Landau et al. eds., 2018).

27 According to Joyce, in the late nineteenth century, the term "provenance" was used to identify the "stylistic assignment of objects to origins that were not known securely, and provenience to identify known find sites, which could be relatively imprecise by modern standards . . . .". Joyce, *When is Authentic?*, *supra* note 21, at 44. *See, e.g.*, Dennis Mizzi & Jodi Magness, *Provenance vs. Authenticity: An Archaeological Perspective on the Post-2002 "Dead Sea Scrolls-Like" Fragments*, 26 DEAD SEA DISCOVERIES 135, 137 n.5 (2019) (defining the term "provenance" as referring to *both* an object's archaeological context and its post-discovery history of acquisition and ownership, although acknowledging that sometimes these concepts are distinguished through use of the terms "provenience" and "provenance," respectively; to avoid confusion, the authors opted to use only the terms provenance and unprovenanced, "in their all-encompassing sense.").

28 *See* Rosemary A. Joyce, *From Place to Place: Provenience, Provenance, and Archaeology*, *in* PROVENANCE: AN ALTERNATE HISTORY OF ART 48, 49–51 (Gail Feigenbaum & Inge Reist eds., 2012) [hereinafter Joyce, *From Place to Place*] (setting out the history of the two terms and explaining their different uses in archaeology and art history, as well as geographical differences in how the terms are used). Some of the distinction is also based on the different etymologies of the two words, although both have the same meaning as the place of origin. *Id.* Chippindale and Gill identify "provenience" as an American English usage and "provenance" as a British English usage. Chippindale & Gill, *supra* note 26, at 467. Clemency Coggins commented that "[t]he differences [between anthropological and aesthetic interests] are exemplified by the difference between the stark English *provenience*, meaning the original context of an object, and the more melodious French *provenance*, used by the art world, which may include the original source but is primarily concerned with a history of ownership." Clemency C. Coggins, *United States Cultural Property Legislation: Observations of a Combatant*, 7 INT'L J. CULTURAL PROP. 52, 57 (1998).

29 Joyce, *When is Authentic?*, *supra* note 21, at 39.

of authenticity and legality, both of which are integral to the functioning of the art market and to achieving a full and accurate understanding of the art historical record.[30]

The first publication to analyze in detail the role of provenance (or lack thereof) in the archaeological literature was a study, authored by David Gill and Christopher Chippindale, of several large collections of classical antiquities.[31] The authors created a rubric for determining the relative reliability of the provenance information included in exhibit catalogues of these collections, although they acknowledged that it is difficult to evaluate whether phrases such as "said to be from," "probably," "possibly," or "allegedly" indicate any differences in reliability.[32] Both in these earlier articles and more recently, Gill has advocated for different terminology with respect to archaeological material and suggests that the terms "collecting histories" and "archaeology" be used, respectively, in place of provenance and provenience.[33]

> Archaeology identifies the deposition of an object in the ground or on a monument. The collecting history maps the trail of the object once it has left the archaeological deposit and then passes through the hands of individuals or enters public collections. Indeed it is this documented and authenticated collecting history that will ensure that the owner, seller, or potential buyer on the market will avoid those scandals that have now shadowed classical collecting since the mid-1990s.[34]

---

30 Gail Feigenbaum & Inge Reist, *Introduction*, *in* PROVENANCE: AN ALTERNATE HISTORY OF ART 1, 1–2 (Gail Feigenbaum & Inge Reist eds., 2012) (pointing out that until recently provenance was considered a relatively unimportant aspect of a work of art, in comparison with the milieu in which the work was created).

31 Chippindale & Gill, *supra* note 26. In an earlier study, Chippindale and Gill linked the appearance of previously undocumented Cycladic figurines of the third millennium BCE to the large-scale looting of Cycladic sites. David W.J. Gill & Christopher Chippindale, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 97 AM. J. ARCHAEOLOGY 601, 608–15 (1993).

32 Chippindale & Gill, *supra* note 26, at 469. *But see* Elizabeth Marlowe, *What We Talk About When We Talk About Provenance: A Response to Chippindale and Gill*, 23 INT'L J. CULTURAL PROP. 217, 218 (2016) (criticizing this "provenance scale" as detracting from the more significant question of whether it is possible to determine the authenticity of a decontextualized object).

33 David W.J. Gill, *Thinking About Collecting Histories: A Response to Marlowe,* 23 INT'L J. CULTURAL PROP. 237, 237 (2016).

34 *Id. See generally* La Follette, *The Trial of Marion True*, *supra* note 5 (discussing

Other scholars have advocated for different terms in the hope of capturing the significance of an object's modern history with the goal, primarily, of establishing authenticity but also of establishing legality.[35] Elizabeth Marlowe has rejected use of the terms "provenanced" and "unprovenanced."[36] She suggests that the terms "grounded" and "ungrounded" should be used to indicate whether an object can be traced back to its archaeological find spot in order to know conclusively whether it is authentic, regardless of the method of its recovery from the ground.[37] In Marlowe's view, "[w]e

---

the referenced scandals); PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUM (Public Affairs 2007).

35 *See* Elizabeth Marlowe, *What We Talk About When We Talk About Provenance: A Response to Chippindale and Gill*, 23 INT'L J. CULTURAL PROP. 217 (2016).

36 An undocumented, "unprovenanced," or poorly provenanced antiquity is one that has poor or only recent evidence of its ownership history and how it was obtained. La Follette, *The Trial of Marion True*, *supra* note 5, at 58 (stating that these terms are often used to indicate an artifact that was not recovered through systematic archaeological excavation or one that lacks "information about both provenance and provenience, that is, works that did not come out of an official excavation or a long-established private collection."). The concept, even if not the exact terminology, is often used more specifically in voluntary codes and guidelines of professional organizations. Such codes include those of museum associations, e.g. ASS'N OF ART MUSEUM DIRECTORS, GUIDELINES ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIAL AND ANCIENT ART (Jan. 29, 2013), https://aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf [https://perma.cc/MD39-NGG3]; *see also* Laetitia La Follette, *Looted Antiquities, Art Museums and Restitution in the United States since 1970*, 52 J. CONTEMPORARY HISTORY 669, 673–74 (2017) (discussing the exceptions to the 1970 standard adopted by the Association of Art Museum Directors). Professional associations, such as the Archaeological Institute of America, also use these terms to indicate an antiquity whose existence outside of the modern country of discovery is not documented before 1970, the date of adoption of the 1970 UNESCO Convention. *See* 1970 UNESCO Convention, *supra* note 7. *See, e.g.*, Naomi Norman, *Editorial Policy on the Publication of Recently Acquired Antiquities*, 109 AM. J. ARCHAEOLOGY 135, 135 (2005). This is often referred to as the "1970 rule" or "1970 standard." *See also* Neil Brodie & Colin Renfrew, *Looting and the World's Archaeological Heritage: The Inadequate Response*, 34 ANN. REV. ANTHROPOLOGY 343, 351 (2005); Patty Gerstenblith, *Do Restrictions on Publication of Undocumented Texts Promote Legitimacy?*, *in* ARCHAEOLOGIES OF TEXT: ARCHAEOLOGY, TECHNOLOGY, AND ETHICS 214 (Matthew T. Rutz & Morag M. Kersel eds., 2014); La Follette, *The Impact of the 1970 UNESCO Convention*, *supra* note 26, at 76–78. For the editorial practices of different scholarly journals, see John F. Cherry, *Publishing Undocumented Texts: Editorial Perspectives*, *in* ARCHAEOLOGIES OF TEXT: ARCHAEOLOGY, TECHNOLOGY, AND ETHICS 227, 231–40 (Matthew T. Rutz & Morag M. Kersel eds., 2014).

37 Marlowe, *supra* note 35, at 224–25.

can never be certain that [artworks without a recorded findspot] are what they seem to be, regardless of when they surfaced, their fame, the number of decades or centuries they have spent in prestigious collections, or the renown of the scholars who have studied them."[38]

The concept of the history of a work of art, when applied to an archaeological artifact, is more complex.[39] The provenance of an archaeological artifact should similarly refer to its history from the time of its creation, thereby including the object's pre-deposition history, from the time of its creation to its burial in the ground, its deposition, its excavation and its post-discovery history.[40] However, it is very difficult to trace an archaeological object or a work of ancient art to the original artist and the moment of its creation. There are some exceptions, including art works that are part of immovable monuments, such as the Parthenon in Athens.[41] But such works are traceable only if they have not been dismembered and dispersed over time, with their original context now lost. The artist may be known, as in the case of the Euphronios krater, if the artist's name appears on the object itself, but its pre-deposition history may not be fully known.[42] Joyce points out that the provenance of Ulua Marble vases should be viewed as beginning at the site of Travesia in Honduras, where the vases were produced, before their use and subsequent deposition in what became an archaeological site.[43] On the other hand, the post-deposition or post-recovery history of an object tells us about modern society—patterns of looting, archaeological excavation practices, history of

---

38 ELIZABETH MARLOWE, SHAKY GROUND: CONTEXT, CONNOISSEURSHIP AND THE HISTORY OF ROMAN ART 4 (2013) (criticizing the use of the parallel terms "provenanced" and "unprovenanced" because she asserts that the distinction between ownership history and findspot is blurred); *see also* Marlowe, *supra* note 35, at 218–19. The potential for this confusion is illustrated by the way Mizzi and Magness use the term provenance, *see* Mizzi & Magness, *supra* note 27; *see also* La Follette, *The Impact of the 1970 UNESCO Convention*, *supra* note 26, at 75 (using the term "unprovenanced" to indicate an object that was not systematically recovered from the ground). *But see* Joyce, *When is Authentic?*, *supra* note 21, at 41–43 (accepting the authenticity of objects, in this case, marble Ulua vases from Honduras, that were acquired for collections before this category of object received scholarly publication and became popular on the art market).

39 *Id.* at 49–50.

40 *See id.*

41 *See*, *e.g.*, WILLIAM ST. CLAIR, LORD ELGIN & THE MARBLES: THE CONTROVERSIAL HISTORY OF THE PARTHENON SCULPTURES (Oxford University Press 1998).

42 Barker, *supra* note 6, at 26.

43 Joyce, *When is Authentic?*, *supra* note 21, at 45–46.

collecting and aesthetics, and legal changes, among other aspects of knowledge.[44]

Rosemary Joyce has defined the terms provenance and provenience as:

> This distinction illuminates the reason these two concepts promote such different understandings: provenience is a fixed point, while provenance can be considered an itinerary that an object follows as it moves from hand to hand. Where the two concepts intersect is the place that the archaeological provenience singles out as the only important location in this itinerary, the find site.[45]

Joyce further commented that while provenience gives archaeological objects a "secure, interpretable context, . . . their cultural interpretation rests on knowledge of their provenance[.]"[46] So with the legal understanding of archaeological artifacts, one might posit that, from a legal perspective, provenience determines what law is initially applicable, while provenance is crucial to compliance with the law and to law enforcement efforts as an object moves through the market across international borders and to its current location.[47] Thus, provenience gives a single fixed spot from which to begin an analysis of legality, but it is provenance that tells the object's full story from both a legal and contemporary cultural perspective beginning in antiquity to the present.[48]

This Article will maintain the relatively traditional uses of these

---

44 *Id.* at 46.

45 Joyce, *From Place to Place*, *supra* note 28, at 48. Joyce further defines provenience in the archaeological context as "a three-dimensional location in space." *Id.* at 49. Barker includes the materials found in association with an object and "the post-deposition processes that may affect the location and association of objects, deposits or their juxtaposition" in that object's provenience. *See* Barker, *supra* note 6, at 19–20 (stating that "context refers to the association of an object that allows its importance or significance to be assessed . . . [and] nearly always refers to the significance of the object within one or more cultural-historical or theoretical constructs based upon provenience.").

46 Joyce, *When is Authentic?*, *supra* note 21, at 46.

47 Megan Winget, *The Archival Principle of Provenance and Its Application to Image Content Management Systems*, U. TEX. LIBRARIES 1, 3–5 (Aug. 26, 2008), https://repositories.lib.utexas.edu/bitstream/handle/2152/412/Winget_ProvenanceImageMgmt.pdf [https://perma.cc/3BHW-9TS6].

48 Bauer, *supra* note 26, at 148–49 (extending the object itinerary and thus, by extension, its provenance to include subsequent circulation that is not limited to transfers of ownership but also transfers of physical possession through loans, such as among museums).

terms, while suggesting modifications for legal purposes. The legal definition of provenance should be limited to indicating the history of the ownership of an archaeological object only from the time of its modern discovery. While the pre-deposition history of an object is significant from an archaeological, art historical, and anthropological perspective, this is not relevant to the legal status of an artifact. In contrast to the art historical milieu, for legal purposes in the case of archaeological artifacts, the history of ownership and disposition of an object and, hence, its provenance, should be viewed as beginning at the time of its "removal . . . from its context of archaeological recovery,"[49] rather than from the time of its creation.[50] The term provenience, as adapted for legal purposes, is used to indicate the archaeological findspot and therefore depositional or stratigraphic context of an archaeological object, *but* findspot should be defined only as the country within whose borders the object was discovered. Although provenance and its documentation are often considered of primary importance for establishing the authenticity of a work of art,[51] this Article focuses

---

49 Joyce, *From Place to Place*, *supra* note 28, at 48; *see also* Joyce, *When is Authentic?*, *supra* note 21, at 45 (noting that the findspot is the intersection of location and provenance).

50 La Follette, *The Impact of the 1970 UNESCO Convention*, *supra* note 26, at 80–81 (arguing that provenience is significant for information about both an object's second life—how it was used in antiquity and whether it moved from point of creation to other locations—and the object's third life).

51 Provenance documentation is considered by the art world and, especially the art market, as key to establishing the authenticity of a work of art. Fake provenance documentation is typically used in the attempt to make inauthentic works of art appear to be authentic. However, fake provenance documentation may also be used to establish the appearance of legality of an authentic but illegal archaeological artifact. *See* United States v. Schultz, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393, 416 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004) (illustrating perhaps the best-known example of forged provenance documentation used to establish the legality of an authentic antiquity); Peter Watson, *The Investigation of Frederick Schultz*, 10 CULTURE WITHOUT CONTEXT: NEWSL. ILLICIT ANTIQUITIES RES. CTR. 21, 25 (2002) (discussing Schultz's smuggling of artifacts out of Egypt). In *Schultz*, a British conservator, Jonathan Tokeley-Parry, and a prominent New York antiquities dealer, Frederick Schultz, conspired to smuggle artifacts out of Egypt by disguising them as modern tourist trinkets. Tokeley-Parry established a fake old collection, dubbed the Thomas Alcock collection, purportedly created by a relative in the 1920s, and assigned several of the smuggled artifacts to this collection. In furtherance of this deception, Tokeley-Parry created old labels, using old typewriters, and discolored them, again, to make them look old. *See also* Patty Gerstenblith, *Provenances: Real, Fake and Questionable*, 26 INT'L J. CULTURAL PROP. 285, 288–91 (2019) (discussing the question of authenticity of art works and the use of forged or unreliable documentation).

on the roles that provenance and provenience play in establishing the legal status of an archaeological artifact, particularly in terms of the international legal framework that attempts to regulate the market in archaeological artifacts.

III. The International Legal Framework for Controlling the Market in Antiquities

The international legal framework for regulating the market in antiquities consists primarily of two elements.[52] The first is the broad international conventions, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),[53] and the 1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (the 1995 UNIDROIT Convention),[54] as well as the domestic laws of the States Parties that implement the provisions of the conventions into domestic law. The second element of international law pertaining to the trade in archaeological artifacts is the recognition granted to statutes vesting ownership of undiscovered archaeological artifacts in the State.[55] When such artifacts are looted and removed from the country of discovery without permission, the artifacts are characterized as stolen property, as case law in the major market countries of the

---

In 2019, the Metropolitan Museum of Art returned a coffin to Egypt that had been looted in 2011. The Metropolitan purchased the coffin on the basis of a forged export license, which indicated the coffin had been exported in 1971. Nancy Kenney, *Looted Coffin Acquired by Metropolitan Museum is Headed Back to Egypt*, THE ART NEWSPAPER (Sept. 26, 2019), https://www.theartnewspaper.com/news/looted-coffin-acquired-by-metropolitan-museum-is-headed-back-to-egypt [https://perma.cc/KMY2-MFD9].

52 *See* CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 133 (Routledge 2010).

53 1970 UNESCO Convention, *supra* note 7; *see also* PATRICK J. O'KEEFE, PROTECTING CULTURAL OBJECTS: BEFORE AND AFTER 1970 (Institute of Art and Law 2017) (providing a comprehensive review of the Convention).

54 Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention]; *see also* LYNDEL V. PROTT, COMMENTARY ON THE UNIDROIT CONVENTION (Institute of Art and Law 1997) (providing a comprehensive review of the Convention).

55 FORREST, *supra* note 52, at 150–53.

United States[56] and the United Kingdom has established.[57]

A. The 1970 UNESCO Convention and its Domestic Implementation by Market States

Both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention regulate the international trade in illegally obtained archaeological objects, as well as other forms of cultural property.[58] However, the 1970 UNESCO Convention has received broader ratification, particularly among market countries, and it has therefore had a greater impact on the international trade in antiquities.[59] The 1970 UNESCO Convention, which as a part of public international law operates on a State-to-State basis, permits considerable variation in the method of implementation adopted by the different States Parties with a corresponding significant variation in effectiveness.[60]

On the other hand, the UNIDROIT Convention is a part of private international law, and implementing legislation creates private rights of action for recovery of stolen and illegally exported cultural objects.[61] It was drafted to appeal to the States that had adopted some form of the good faith purchaser doctrine, which mandates that a good faith purchaser can acquire title to stolen property or is, at the least, entitled to compensation if the purchaser is required to

---

56 *See* United States v. Schultz*,* 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003); United States v. McClain, 545 F.2d 988 (5th Cir. 1977) (recognizing the principle of foreign State ownership); United States v. McClain*,* 593 F.2d 658 (5th Cir. 1979).

57 Iran v. Barakat Galleries Ltd, [2007] EWHC (QB) 705, *rev'd*, [2007] EWCA (Civ) 1374, [2008] 1 All ER 1177 (UK).

58 *See* 1970 UNESCO Convention, *supra* note 7; *see also* UNIDROIT Convention, *supra* note 54.

59 *See* 1970 UNESCO Convention, *supra* note 7 (documenting 140 current States Parties to the 1970 UNESCO Convention, including the market countries of Austria, Belgium, Canada, China, France, Germany, Netherlands, Switzerland, United Kingdom, and United States); UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995) – Status, UNIDROIT, https://www.unidroit.org/status-cp [https://perma.cc/K2HX-EVNE] (last updated Dec. 2, 2019) (documenting 47 States Parties, but the only market countries to have ratified it are Italy and China).

60 *See* O'KEEFE, *supra* note 53, at 56.

61 *See* UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995) – Status, UNIDROIT (Dec. 2, 2019), https://www.unidroit.org/status-cp [https://perma.cc/K2HX-EVNE].

return a stolen object to its original owner.[62] The UNIDROIT Convention requires full implementation of its provisions with little variation,[63] which has proven to be an obstacle to wider State ratification.[64]

Most States Parties to the 1970 UNESCO Convention implement Article 3,[65] which states that "[t]he import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit."[66] In contrast, U.S. implementation focuses on Article 9,[67] which applies only to archaeological and ethnological materials.[68] Among market countries, one may discern four models

---

62 O'KEEFE, *supra* note 53, at 56–57.

63 UNIDROIT Convention, *supra* note 54, art. 18 (not permitting any reservations to the Convention other than those expressly authorized by the Convention).

64 *See* UNIDROIT, UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995) – Status (July 16, 2019), https://www.unidroit.org/status-cp [https://perma.cc/K2HX-EVNE].

65 *See* O'KEEFE, *supra* note 53, at 135–38.

66 1970 UNESCO Convention, *supra* note 7, art. 3. The term "cultural property" is defined in Article 1 of the Convention and applies to a broad range of objects of artistic, historical, archaeological, ethnological and scientific interest. *Id.*

67 Article 9 of the 1970 UNESCO Convention states:

> Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

Id. art. 9.

68 Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2602–2603 (2018). The import of undocumented archaeological and ethnological materials into the United States is restricted under the U.S. implementing legislation, the Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613, only pursuant to either a bilateral or multilateral agreement (Memorandum of Understanding) or an emergency action. While the 1970 UNESCO Convention defines neither term, the CPIA adopts the following definitions:

> The term "archaeological or ethnological material of the State Party" means —
>
> (A) any object of archaeological interest;
>
> (B) any object of ethnological interest; or

of implementation:[69] (1) reciprocal import restrictions, which implement Article 3;[70] (2) bilateral agreements implementing Article 3 (Switzerland)[71] or Article 9 (United States);[72] (3) hybrid approaches incorporating principles of the 1995 UNIDROIT Convention;[73] and (4) reliance on an inventory or list principle or a requirement of documentation.[74]

> (C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph —
>
> (i) no object may be considered to be an object of archaeological interest unless such object —
>
> (I) is of cultural significance;
> (II) is at least two hundred and fifty years old; and
> (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water; and
>
> (ii) no object may be considered to be an object of ethnological interest unless such object is —
>
> (I) the product of a tribal or nonindustrial society, and
> (II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.

Id. § 2601(2). The United States implements other provisions, including Article 7(b)(i) and parts of Articles 1, 5 and 6. Article 7(b)(i) calls on States Parties to prohibit the import of stolen cultural property that was documented in the inventory of a "museum or a religious or secular public monument or similar institution." 19 U.S.C. § 2607 (2019).

69 *See* Patty Gerstenblith, *Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations*, *in* THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 70, 71–72, 78–86 (Jane Anderson & Haidy Geismar eds., 2017).

70 Examples include: Canada, Cultural Property Export and Import Act, R.S.C. 1985, c C-51 § 37(2) (Can.); Australia, Protection of Movable Cultural Heritage Act, pt II div 2 s 14 sub 1 (as amended in 2011) (Austl.); Germany, Kulturgutschutzgesetz vom 31 [Act on the Protection of Cultural Property], July 20, 2016, BGBL 1 at 1914 (Ger.). I had previously referred to this model of implementation as "across-the-board" import restrictions. Gerstenblith, *supra* note 69, at 79.

71 Bundesgesetz über den internationalen Kulturgütertransfer [KGTG][Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act)] June 20, 2003, SR 444.1, art 7 (Switz.).

72 Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2602–2603 (2018).

73 *See infra* notes 75–86.

74 The only country to adopt this last approach is Japan, but its implementing law is not useful in preventing the import or trade in looted archaeological artifacts as it applies only to stolen artifacts that were documented in a public collection. O'KEEFE, *supra* note 53, at 204–05. For this reason, Japan's implementation of the convention will not be

The third model of implementation, adopting a hybrid approach, requires additional explanation. Without ratifying it, these States Parties incorporate principles from the 1995 UNIDROIT Convention. Article 3(2) of the UNIDROIT Convention states that "a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place."[75] The Netherlands is an example of a hybrid approach.[76] It follows the reciprocal model of implementation of Article 3 of the 1970 UNESCO Convention in that it prohibits the import of any

> cultural property which: has been removed from the territory of a State Party and is in breach of the provisions adopted by that State Party, in accordance with the objectives of the 1970 UNESCO Convention in respect of the export of cultural property from that State Party or the transfer of ownership of cultural property.[77]

However, the legislation goes a step further in also prohibiting the import of cultural property that "has been unlawfully appropriated in a State Party."[78] The Explanatory Memorandum that accompanied the legislation clarifies that unlawful appropriation includes "unlawful excavation at archaeological sites" and explicitly references the 1995 UNIDROIT Convention's equation of unlawful excavation with theft.[79] Furthermore, this provision applies even without establishing that an export control has been violated.[80]

The United Kingdom has arguably taken a hybrid approach; although, unlike the Netherlands, it does not explicitly state this.[81]

---

further considered here.

75 UNIDROIT Convention, *supra* note 54, art. 3(2).

76 The Explanatory Memorandum that accompanied enactment of the Netherlands' legislation makes clear that it was influenced by various aspects of the 1995 UNIDROIT Convention. Explanatory Memorandum to the Implementing Act 1970 UNESCO Convention, Parliamentary Documents II 2007/08, 31 255, No. 3, 2–4 [hereinafter Explanatory Memorandum].

77 Wet van 9 december 2015, houdende bundeling en aanpassing van regels op het terrain van cultureel erfgoed (Erfgoedwet) [Act of 9 December 2015, Relating to the Combining and Amendment of Rules Regarding Cultural Heritage (Heritage Act)] § 6.3(a).

78 *Id.* § 6.3(b).

79 Explanatory Memorandum, *supra* note 76, at 24.

80 *Id*.

81 Dealing in Cultural Objects (Offences) Act 2003, c. 27 (UK).

The United Kingdom did not enact specific implementing legislation for the 1970 UNESCO Convention, although soon after ratifying the Convention, it enacted a criminal statute, the Dealing in Cultural Objects (Offences) Act 2003, which has served as a means of seizing "tainted objects" upon import[82] and incorporates provisions that are clearly based on Article 3(2) of the 1995 UNIDROIT Convention.[83] The legislation defines a "tainted object" as one that is removed from "a building or structure of historical, architectural or archaeological interest" or from an excavation.[84] The offense is committed "if . . . (a) a person removes the object in a case falling within subsection (4) or he excavates the object, and (b) the removal or excavation constitutes an offence."[85] It does not matter whether the excavation or removal took place in the United Kingdom or in another country or whether the law violated is a domestic or foreign law.[86]

Other States that have ratified both conventions, such as Italy, have incorporated a similar system of import controls based on the export controls adopted by other countries through the 1970 UNESCO Convention and the equation of illegal excavation with theft based on the UNIDROIT Convention.[87] While not an implementation of either the 1970 UNESCO Convention or the 1995 UNIDROIT Convention, the European Union has had internal controls on the import and export of cultural goods since 1992.[88] In 2019, the European Commission adopted a regulation to control the import of cultural objects from all non-EU Member States.[89]

---

82 *Id.* One commits the offense of dealing in tainted cultural objects by "dishonestly deal[ing] in a cultural object that is tainted, knowing or believing that the object is tainted." *Id*. § 1(1).

83 *Id.*

84 *Id.* § 2(4)–(5).

85 *Id*. § 2(2).

86 *Id*. § 2(3).

87 Decreto n.42: codice dei beni culturali e del paesaggio [Code of the Cultural and Landscape Heritage], D.Lgs. n.42, Jan. 22, 2004, G.U. Supp. n.45, Feb. 24, 2004, art. 87 (It.) (implementing the UNIDROIT Convention).

88 *See* Council Regulation 116/2009, O.J. (L 39) 1 (EC); Council Directive 2014/60/EU, O.J. (L 159) 1 (EU).

89 Regulation 2019/880 of the European Parliament and of the Council of 17 April 2019 on the Introduction and the Import of Cultural Goods, 2019 O.J. (L 151) para. 5. The European Union had previously imposed import restrictions on cultural goods illegally removed from the non-Member States of Iraq, Council Regulation (EC) 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with

B. State Ownership

The second primary legal mechanism for dealing with the problem of looted and undocumented archaeological artifacts is State ownership.[90] Many nations rich in archaeological resources have vested ownership of undiscovered archaeological artifacts in the State, as a means both of protecting sites from looting and of imposing consequences on those who engage in looting, intermediaries and final purchasers.[91] Objects that are subject to national ownership are characterized as stolen property when they are removed without permission of the State. In *United States v. Schultz*[92] the Second Circuit recognized the effectiveness of foreign vesting laws and, in affirming the conviction of the dealer Frederick Schultz, held that the laws of the country of discovery determined ownership of the object, but that dealing in and transporting such objects in the United States constituted a violation of U.S. law, including the National Stolen Property Act.[93]

In a comparable, but civil rather than criminal action, the Court of Appeal in the United Kingdom similarly held that Iran's national ownership law established a sufficient right of immediate possession that Iran could sue a London dealer to recover artifacts

---

Iraq and repealing Regulation [2003] OJ L169/ 6, and Syria, Council Regulation (EU) 1332/2013 of 13 December 2013 concerning restrictive measures in view of the situation in Syria and amending Regulation (EU) 36/2012 concerning restrictive measures in view of the situation in Syria, OJ L335, 14.12.2–13, p. 3.

90 *See, e.g.*, FORREST, *supra* note 52, at 150–53.

91 Free market proponents, such as James Cuno, have argued that the modern State has no right to claim artifacts based solely on the fact that the artifacts were excavated within their modern territorial borders. James Cuno, *Art Museums, Archaeology, and Antiquities in an Age of Sectarian Violence and Nationalist Politics*, *in* THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES: PROFESSIONAL, LEGAL AND ETHICAL PERSPECTIVES 9, 23–24 (Robin F. Rhodes ed., 2007). *See* also Bauer, *supra* note 26, at 151; Dennis P. Doordan, *Response to Malcolm Bell*, *in* THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES: PROFESSIONAL, LEGAL, AND ETHICAL PERSPECTIVES 43, 44 (Robin F. Rhodes ed., 2007).

92 United States v. Schultz*,* 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003). The Fifth Circuit had previously recognized the principle of foreign State ownership in United States v. McClain, 545 F.2d 988 (5th Cir. 1977); United States v. McClain, 593 F.2d 658 (5th Cir. 1979).

93 *Schultz*, 333 F.3d at 402–03; National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2019) (prohibiting the transport or transfer "in interstate or foreign commerce [of] any goods . . . for the value of $5,000 or more" as well as receiving, possessing, storing, selling, or disposing of such goods with knowledge that they were stolen).

looted from Iran.[94] While arguably applying a less stringent analysis in its evaluation of the Iranian law than the Second Circuit applied to the Egyptian vesting law in *Schultz*, the Court of Appeal distinguished vesting laws from export controls.[95] It acknowledged that such vesting laws were an effective means of protecting archaeological heritage and congruent with British public policy, stating that "[i]n our judgment, there are positive reasons of policy why a claim by a state to recover antiquities which form part of its national heritage and which otherwise complies with the requirements of private international law should not be shut out."[96]

The *McClain* and *Schultz* decisions set out four elements required for a U.S. court to recognize that an undocumented archaeological object is owned by a foreign State: (1) the vesting law must be clearly an ownership law on its face;[97] (2) the State's ownership rights must be enforced domestically and not only upon illegal export or attempted illegal export; (3) the object must have been discovered within the territorial boundaries of the country claiming ownership; and (4) the object must have been located within the country at the time the law was enacted.[98] The purpose of the third requirement is to ensure that the ownership law is not given extraterritorial effect and the purpose of the fourth requirement is to ensure that the ownership law is not given retroactive effect.[99] The legal roles of provenience and provenance are particularly relevant in determining whether the third and fourth requirements are satisfied.

IV. Legal Roles of Provenience and Provenance

The two prongs of the international legal regime establish the legal definitions of provenance and provenience and their roles in regulating the market in antiquities. These concepts complement each other, and both are crucial to proper application of the 1970

---

94 Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd [2007] EWHC 705 (QB), *rev'd*, [2007] EWCA Civ 1374; [2008] 1 All ER 1177.

95 *Id.*

96 *Barakat Galleries Ltd* [2007] EWCA Civ 1374; [2008] 1 All ER 1177, ¶¶ 154–55.

97 *Schultz*, 178 F. Supp. 2d at 447; *McClain*, 545 F.2d at 997–1002. As these elements are deduced from two criminal prosecutions, it is not certain whether the same standard of clarity would be required in non-criminal litigation, such as a civil replevin action or a civil forfeiture action.

98 *McClain*, 545 F.2d at 997–1002.

99 *See id.*

UNESCO and 1995 UNIDROIT Conventions and the principle of State ownership in the interdiction and recovery of looted archaeological artifacts. While the provenience of an archaeological object or at least the country of modern discovery is the first step in determining the initial applicable law, the provenance of an object further informs the legal status of the object at the time of its interdiction by law enforcement.

A. Where is Legality? The Problem of Location

In the first three models of implementation of the 1970 UNESCO Convention, reciprocal restrictions, bilateral agreements, and hybrid models,[100] knowing the provenience—that is, the place of modern discovery or at least the country of modern discovery—is a necessary element in effectuating the 1970 UNESCO Convention.[101] The examples of Germany, which utilizes reciprocal import restrictions implementing Article 3,[102] and the United States, which relies on bilateral agreements in implementing Article 9,[103] illustrate this point. Those countries utilizing reciprocal import restrictions prohibit the import of any cultural property that is subject to export restriction from the country of origin.[104] Germany's implementing legislation requires an importer to present documentation that the cultural property was legally exported if it left another State Party to the 1970 UNESCO Convention after 2007, the date of Germany's ratification of the Convention.[105] The importer bears the burden to present such documentation and, in the absence of such documentation, the cultural property is presumed to have been unlawfully removed from the relevant State Party after 2007.[106]

---

100 *See* Gerstenblith, *supra* note 69.

101 *Id.*

102 *Id.* at 81–83.

103 *Id.* at 73.

104 *Id.* at 79–81.

105 FED. GOV'T COMM'R FOR CULTURE & THE MEDIA, KEY ASPECTS OF THE NEW ACT ON THE PROTECTION OF CULTURAL PROPERTY IN GERMANY 7 (Sept. 2016). Under earlier legislation, Germany prohibited the import of only those illegally exported cultural objects that had been individually classified in an accessible inventory by the country of origin at least one year prior to removal (termed the "list principle"). O'KEEFE, *supra* note 53, at 195.

106 *Key Aspects of the New Act on the Protection of Cultural Property in Germany*, *supra* note 105.

The United States implements Article 9 of the 1970 UNESCO Convention through a series of bilateral agreements that restrict the import of archaeological and, in some cases, ethnological materials[107] that fall into a designated category of such materials and that left the country of modern discovery without an export license after the date the import restriction went into effect.[108] Because the import of objects is restricted only if the United States has a bilateral agreement with the country of discovery or has imposed import restrictions pursuant to an emergency action, it is crucial to know the provenience of an archaeological object in order to know whether the import restriction applies to it.[109] The United States currently (as of early 2020) has bilateral agreements with 20 countries, an emergency action for cultural materials from Yemen, and emergency import restrictions pursuant to special legislation for cultural materials from Iraq and Syria.[110]

The difficulty of establishing the country of discovery is exacerbated by the fact that artifacts may have moved in antiquity as part of their history before their deposition[111] and that the boundaries of modern countries are not necessarily congruent with ancient cultures.[112] For example, the United States currently restricts the import of archaeological materials from ten modern countries that at one time were part of the Roman Empire,[113] while the Roman Empire at various times spanned the borders of approximately 40 modern countries.[114] Differences in style,

---

107 *See supra* note 68 (defining archaeological and ethnological materials).

108 19 U.S.C. § 2606 (1983).

109 19 U.S.C. § 2601(2)(C) (1983) (defining archaeological or ethnological material in part as "any fragment or part of any object . . . which was first discovered within, and is subject to export control by, the State Party").

110 *See* U.S. DEP'T OF STATE, CULTURAL PROPERTY AGREEMENTS, https://eca.state.gov/files/bureau/cultural_property_agreements.pdf [https://perma.cc/3QDG-4D46]. Requests for bilateral agreements to impose import restrictions are currently pending from Chile, Morocco, Yemen, Tunisia and Turkey.

111 *See, e.g.*, *infra* note 117–18.

112 *See, e.g.*, *infra* notes 114–15.

113 *Current Import Restrictions*, BUREAU OF EDUC. & CULTURAL AFF., U.S. DEP'T OF STATE, https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions [https://perma.cc/WZT8-WA67].

114 Donald L. Wasson, *The Extent of the Roman Empire*, *in* ANCIENT HISTORY ENCYCLOPEDIA (Jan. 5, 2016), https://www.ancient.eu/article/851/the-extent-of-the-roman-empire/ [https://perma.cc/FP9Z-A7XY].

material composition[115] and other factors among the cultural objects produced in different parts of the Roman Empire may allow determination of the location of discovery if the object did not "travel" in antiquity.[116] Knowing the provenience (and therefore the country of modern discovery) of an object is crucial to knowing whether import of the object is restricted under the CPIA. In addition, objects frequently moved in antiquity through territory that is now part of different modern countries. For example, Attic black and red-figured pottery of the sixth and fifth centuries BCE was produced in the region of Athens that is today in the modern country of Greece.[117] However, the best preserved and the most aesthetically admired examples are, for the most part, found in Etruria in modern Italy.[118]

The question then becomes how to establish the provenience of an artifact. It is important to note that the archaeological or anthropological definition of provenience depends on the exact findspot of an artifact.[119] In contrast, the legal definition of provenience is the country within whose modern borders the object in question was discovered. Use of the archaeological or

---

115 Technical analyses of the material of an artifact may be of significant help in determining the country of origin. However, it is not always possible to determine whether a particular deposit of clay or type of stone occurs within the boundaries of only one country and, on the other hand, a high degree of specificity is not necessarily required as to the precise provenience. Finally, to the extent that technical analysis of composition may indicate the place where the raw materials originated, this may not be the same as the place of manufacture or, more important for legal purposes, the place of discovery (that is, the provenience).

116 *See generally* Richard Neer, *Connoisseurship and the Stakes of Style*, 23 U. CHI. CRITICAL INQUIRY J. 1, 3–5 (Autumn 2005) (discussing the role of connoisseurship and stylistic analysis in attributions of archaeological artifacts).

117 Department of Greek and Roman Art, *Athenian Vase Painting: Black- and Red-Figure Techniques*, *in* HEILBRUNN TIMELINE OF ART HISTORY, NEW YORK: THE METROPOLITAN MUSEUM OF ART (Oct. 2002), http://www.metmuseum.org/toah/hd/vase/hd_vase.htm [https://perma.cc/XPL4-35FH].

118 Barker, *supra* note 6, at 26 (discussing the Euphronios krater). Vessels of these types appear on the designated lists for the bilateral agreements between the United States and both Greece and Italy. Import Restrictions Imposed on Certain Archaeological and Ethnological Material from Greece, 76 Fed. Reg. 231, 74691, 74694 (Dec. 1, 2011); Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods (Italy), 76 Fed. Reg. 12, 3012, 3014 (Jan. 19, 2011). *See also* Nathan T. Elkins, *Ancient Coins, Find Spots, and Import Restrictions: A Critique of Arguments Made in the Ancient Coin Collectors Guild's "Test Case*," 40 J. FIELD ARCHAEOLOGY 236, 240 (2015).

119 *See* Joyce, *From Place to Place*, *supra* note 28 and accompanying text.

anthropological definition of exact findspot is not necessary[120] and may defeat effective law enforcement efforts if the U.S. government were to refuse to pursue a case because the exact find spot is not known. In some cases, the determination of the country of discovery may be relatively straightforward, if some distinctive feature, perhaps an inscription, ties the object directly to a site,[121] if a fragment of the same object is discovered at the site,[122] or if a witness observed the looting or there is other direct evidence indicating or illustrating the object in the process of being looted.[123] While this determination must often be made based on indirect or

---

120 *See* Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, 801 F. Supp. 2d 383, 408–09 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012) (noting that the law does not require the precise find spot to be determined), *cert. denied*, 568 U.S. 1251 (2013); United States v. 3 Knife-shaped Coins, 246 F. Supp. 3d 1102 (D. Md. 2017), *aff'd sub nom.*, United States v. Ancient Coin Collectors Guild, 899 F.3d 295 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1191 (2019).

121 Writing on artifacts may indicate the provenience of an object. Depending on their type or function, cuneiform tablets may have been buried where they were written and so finding the name of a city mentioned in a text would indicate where it was found. For example, the tablets acquired by Hobby Lobby dealt with mundane subjects such as recording food allocations for palace officials and land allocations. Such tablets would have been written and buried within the same city. Owen Jarus, *Lost City of Irisagrig Comes to Life in Ancient Stolen Tablets*, LIVE SCIENCE (May 30, 2018), https://www.livescience.com/62688-lost-city-of-irisagrig-ancient-tablets.html [https://perma.cc/UR7L-9D2J]. However, other types of cuneiform tablets were part of the trade in goods in antiquity and so, while a city name may be mentioned in a text, this may not be the place where the tablet was discovered. For example, an extensive trade was carried on in the early second millennium BCE between the Old Assyrian trading colonies, such as Karum Kanesh, located in central Turkey, and Mari, located in the eastern part of what is today Syria, and other cities in northern Mesopotamia. A looted tablet could be identifiable as belonging to this time period and genre, but it may not be possible to discern from its contents whether it was found in Turkey, Syria or Iraq. UNESCO, *Archaeological Site of Kültepe-Kanesh*, https://whc.unesco.org/en/tentativelists/5905/ [https://perma.cc/6464-UA2D] (last visited Oct. 1, 2019).

122 The lower half of a Roman sculpture of the "Weary Herakles" type was excavated at the site of Perge in southwestern Turkey, while the upper half had been looted, purchased by New York collectors Shelby White and Leon Levy, and eventually displayed at the Museum of Fine Arts, Boston. It took over ten years from the time of the acquisition of the looted half in 1981 before a comparison of a plaster cast of the portion in Turkey with the part in Boston established that the site of Perge was the findspot of the Boston piece. This part of the sculpture was returned to Turkey in 2011. Suzie Thomas, *Weary Herakles*, TRAFFICKING CULTURE, https://traffickingculture.org/encyclopedia/case-studies/weary-herakles/ [https://perma.cc/7MWK-EEPA**]** (last modified Dec. 31, 2012).

123 THOMAS HOVING, MAKING THE MUMMIES DANCE 217 (1994) (explaining that a Metropolitan Museum of Art junior curator was present at the looting of the Lydian Hoard from tombs in Western Turkey).

circumstantial evidence, both direct and indirect evidence are admissible in court proceedings.[124]

The burden of establishing country of origin in the case of an archaeological artifact is mitigated through the types of evidentiary burden and the shifting of that burden applicable in civil forfeitures under both the CPIA and under the more generic Customs statute.[125] In civil forfeiture actions under the Customs statute (found in Title 19), the generally-applicable burden-shifting statute provides that, in all forfeiture actions brought against "any . . . merchandise[] or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage . . . the burden of proof shall lie upon [the] claimant," although the government must first demonstrate probable cause that the property is subject to forfeiture.[126]

---

124 *See* COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR., PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 12 (2012 ed., rev. 2018), http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_criminal_jury_instr.pdf [https://perma.cc/M685-QDSQ] (last visited Sept. 26, 2019) ("Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact . . . [t]he law does not say that one is better than the other."). Direct evidence is something that the observer saw; indirect evidence is evidence of a fact that may be inferred from direct evidence. *See* United States v. $99,990.00 in U.S. Currency, 69 F. App'x 757, 763 (6th Cir. 2003) (the amount of money being carried at the time of seizure, as well as the manner in which it was packed, sufficed to meet the evidentiary requirements placed upon the government to justify a forfeiture). Unlike direct evidence, circumstantial evidence allows courts to evaluate the "totality of the circumstances." *Id.* In civil forfeiture cases, courts use circumstantial evidence to determine whether the government has met its burden. *Id.* The types of and amount of weight given to circumstantial evidence varies. *Id*.

125 Stefan D. Cassella, *Using the Forfeiture Laws to Protect Archaeological Resources*, 41 IDAHO L. REV. 129, 135–36 (2004). Forfeiture actions are *in rem* proceedings in which the defendant is the property and the claimant is anyone who asserts an interest in the property at issue, such as an importer or purchaser. *Id.* at 132–33.

126 19 U.S.C. § 1615 (2019). *See* United States v. Davis, 648 F.3d 84, 88 (2d Cir. 2011) (applying the burden shifting framework of 19 U.S.C. § 1615 to a stolen painting). The Civil Asset Forfeiture Reform Act changed several aspects of civil forfeiture law. Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 97 (2001). CAFRA changed the government's burden of proof to the preponderance of the evidence standard and added an innocent owner defense. *Id.* However, CAFRA, 18 U.S.C. §983(i), excludes from these requirements forfeiture proceedings brought under the Customs statute (Title 19), including forfeitures under the CPIA. *Id.* at 104. *See also* Cassella, *Recovering Stolen Art & Antiquities Under the Forfeiture Laws: Who Is Entitled to the Property When There Are Conflicting Claims*, *supra* note 10 (discussing the role of civil asset forfeiture in recovering looted art and artifacts).

In CPIA forfeitures,[127] the government has the initial burden to establish that the material subject to import restriction has been listed in accordance with 19 U.S.C. § 2604.[128] In *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*,[129] the Fourth Circuit elaborated that this means that the government must establish that the seized material has been (1) listed by type or other appropriate classification on the Designated List, and (2) listed in a manner that gives fair notice to importers of those materials that cannot be imported.[130] Once the government has met its initial burden of proof to the probable cause standard, the burden shifts to the importer to prove that one of the exceptions under 19 U.S.C. § 2606 applies.[131] The importer must prove that the objects are importable to a preponderance of the evidence standard.[132]

Courts have considered the extent of the burden to establish the precise findspot or even the country of discovery of an archaeological artifact when the U.S. government pursues a civil forfeiture action under the CPIA. In *United States v. Eighteenth Century Peruvian Oil on Canvas Painting*,[133] involving illegally exported Colonial period paintings, there was a question as to whether the paintings originated from Bolivia or from Peru.[134] However, as the same categories of ethnological objects were covered by the bilateral agreements with both countries,[135] the court

---

127 *See* 19 U.S.C. § 2606 (2018) (import restrictions on archaeological and ethnological materials); 19 U.S.C. § 2610 (2018) (evidentiary requirements governing § 2606).

128 United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad," 597 F. Supp. 2d 618, 623 (E.D. Va. 2009).

129 Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, 698 F.3d 171 (4th Cir. 2012).

130 *Id*. at 181; United States v. Ancient Coin Collectors Guild, 899 F.3d 295, 314–15 (4th Cir. 2018). *See also Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad*," 597 F. Supp. 2d at 623. The *ACCG* case is discussed in Elkins, *supra* note 118.

131 *Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad*," 597 F. Supp. 2d at 622.

132 *Id.* at 622–23; Ancient Coin Collectors Guild, 698 F.3d at 181–83. The CPIA allows objects to be imported under several affirmative defenses. 19 U.S.C. § 2606 (2018).

133 *Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad*," 597 F. Supp. 2d at 618.

134 *Id.* at 624–25.

135 19 C.F.R. § 12.104–12.104(i) (2019); Import Restrictions Imposed on Archaeological and Ethnological Materials from Bolivia, 66 Fed. Reg. 63,490 (notice of

did not find it necessary to determine which country was the country of origin.[136] This approach is limited, however, to the circumstance in which all of the likely modern countries of origin have a bilateral agreement with the United States that covers the same categories of objects.[137]

In *Ancient Coin Collectors Guild*, which involved coins subject to import restriction pursuant to U.S. bilateral agreements with China and with Cyprus, the district court further elaborated on the government's burden to establish provenience, stating:

> For each designated type of coin . . . , coins could fall into one of three categories depending on whether there is documentation of where a coin was discovered, known as its "find spot": (1) coins that are proven to have been discovered in modern-day China or Cyprus, (2) coins that are proven to have been discovered somewhere other than China or Cyprus, and (3) coins for which the "find spot" is unknown. ACCG concedes that the State Department has authority to prohibit the importation of coins in the first category. The government concedes that it does not have authority to prohibit coins in the second category. The parties' dispute is limited to whether the State Department has authority under the CPIA to prohibit the importation of coins with unknown "find spots" . . . . [I]f there is no record of when and where the coin was discovered, or of when it was exported from Cyprus, then importation of the coin is prohibited. This result, ACCG argues, violates the "first discovered" requirement in the CPIA.
>
> ACCG's argument misses the mark . . . . [T]he CPIA anticipates that there may be some archeological objects without precisely documented provenance and export records and prohibits the importation of those objects . . . . Thus for objects without documentation of where and when they were discovered, the CPIA expressly places the burden on importers to prove that they are importable, and prohibits the importation of those objects if they cannot meet that burden.

---

final rule Dec. 7, 2001) (codified at 19 C.F.R. pt. 12); Extension of Import Restrictions Imposed on Archaeological and Ethnological Materials from Peru, 82 Fed. Reg. 26340 (notice of final rule June 7, 2017) (codified at 19 C.F.R. pt. 12).

136 United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad," 597 F. Supp. 2d 618, 624–25 (E.D. Va. 2009).

137 For this reason, the designated lists that accompany the various Memoranda of Understanding should be written to be congruent to the extent that similarities in material culture permit.

* * *

> [I]nterpreting the "first discovered in" requirement to preclude the State Department from barring the importation of archaeological objects with unknown find spots would undermine the core purpose of the CPIA, namely, to deter looting of cultural property . . . . Looted objects are, presumably, extremely unlikely to carry documentation, or at least accurate documentation, of when and where they are discovered and when they were exported from the country in which they were discovered. Congress is therefore unlikely to have intended to limit import restrictions to objects with a documented find spot.[138]

It is worth noting that the court adopted the definition of find spot (that is, provenience) as the country of discovery and not a specific archaeological site.[139]

In the *Ancient Collectors Guild* litigation, the ACCG argued that the government had imposed import restrictions on types of ancient coins based on their place of production rather than on their place of discovery.[140] However, this argument ignored three points. First, certain types of coins tended not to circulate from their place of production.[141] Second, the archaeological evidence demonstrates the high probability that the designated types of coins produced in Cyprus would be discovered in Cyprus, and that coins minted outside of Cyprus but likely to be discovered in Cyprus were included on the designated list for Cyprus.[142] This point needs to be understood in light of the government's low evidentiary burden, which requires less than a fifty percent likelihood under the probable cause standard.[143] Third, as the number of countries within which the same types of coins circulated in antiquity increases, the government does not need to establish exactly which of those

---

138 Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, 801 F. Supp. 2d 383, 408–09 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012).

139 *See id.* (referring to find spots as the countries where coins came from and not the specific archaeological sites).

140 801 F. Supp. 2d at 406–07.

141 Elkins, *supra* note 118, at 238.

142 *Id.* at 238–41 (discussing the listing of ancient coins in the U.S. agreements with Cyprus, Italy, Greece and Bulgaria). Elkins points out that the analysis of the import restrictions on ancient coins should parallel that of the restriction on import of ancient vessels that may be discovered in either Greece or Italy. *Id.*

143 *Ancient Coin Collectors Guild*, 801 F. Supp. 2d at 399 n.11. *See also* 19 U.S.C. § 1615 (2018) (laying out the burden of proof for this type of forfeiture proceeding).

countries is the country of discovery.[144]

In light of this analysis, it is clear that under the CPIA the government does not have the burden to prove the exact find spot of an archaeological object.[145] Further, to the extent that the government needs to establish the country of discovery, it needs to meet only the probable cause evidentiary standard.[146] Finally, if the country of discovery is unknown, the burden falls on the importer to prove that the provenience of the object at issue is *not* the country with which the United States has a bilateral agreement.[147]

Characterizing an archaeological object as stolen property pursuant to State ownership also requires knowledge of the provenience of the object. The object must have been discovered within the borders of the country claiming ownership at the time the vesting statute was enacted, so as to avoid extraterritorial application of the statute.[148] Therefore, the government has the same challenge to establish the country of discovery.[149] A country could bring a claim as a private litigant to recover such archaeological artifacts on the ground that they are stolen property but then has the initial burden of establishing the country of discovery to the preponderance of the evidence standard.[150] While

---

144 *See* United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad," 597 F. Supp. 2d 618, 625–26 (E.D. Va. 2009) (finding that it did not matter if the paintings that the government sought to forfeit came from Bolivia or Peru).

145 Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, 801 F. Supp. 383, 408–09 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012).

146 *See supra* note 143.

147 *See Ancient Coin Collectors Guild*, 801 F. Supp. at 408–09 ("Thus for objects without documentation of where and when they were discovered, the CPIA expressly places the burden on importers to prove that they are importable, and prohibits the importation of those objects if they cannot meet that burden."). To some extent, this shifting of the burden of proof onto the importer to prove (or disprove) the country of discovery is parallel to the shifting of the burden of proof under the German law implementing the 1970 UNESCO Convention. *See Key Aspects of the New Act on the Protection of Cultural Property in Germany*, *supra* note 105.

148 *McClain*, 545 F.2d at 1001–03; Peru v. Johnson, 720 F. Supp. 810, 812 (C.D. Cal. 1989), *aff'd sub nom*., Peru v. Wendt, 1991 U.S. App. LEXIS 10385, *4–*5 (9th Cir. 1991).

149 *See Schultz*, 178 F. Supp. 2d at 447; *McClain*, 545 F.2d at 997–1003.

150 Republic of Turkey v. OKS Partners, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994) (bringing suit to recover hoard of rare ancient coins, known as the "Elmali Hoard"); Republic of Turkey v. Metro. Museum, 762 F. Supp. 44 (S.D.N.Y. 1990) (suit to recover group of 360 antiquities, known as the "Lydian hoard"). Both cases settled with virtually all objects returned to Turkey after preliminary litigation. For restitution of the Lydian

countries have brought such claims in the past, at this time, in what may be termed "second generation" cultural property cases, the U.S. government undertakes most such cases in the form of civil forfeitures on behalf of the foreign owner in which the government must prove the elements of its claim only to the probable cause standard.[151] Such forfeiture cases are typically pursued under the "contrary to law" provision of the Customs statute,[152] but the

---

hoard, *see* Lawrence M. Kaye & Carla T. Main, *The Saga of the Lydian Hoard: from Usak to New York and Back Again*, *in* ANTIQUITIES: TRADE OR BETRAYED—LEGAL, ETHICAL AND CONSERVATION ISSUES 150–51 (Kathryn W. Tubb ed. 1995). A civil forfeiture action should be distinguished from a civil replevin action. In the latter case, the country as plaintiff must establish its right of ownership, which means it would have the initial burden of proving by the preponderance of the evidence standard the provenience of the artifact or at least the country of modern discovery. Patty Gerstenblith, *Criminal Law and Forfeiture in the Recovery of Cultural Objects*, *in* ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 150, 160–62 (Francesco Francioni & James Gordley eds. 2013).

151 *Id*. at 167–71. A civil forfeiture claim is less likely to be barred by a statute of limitation or laches defense in comparison to a private replevin action. *Id.*; 19 U.S.C. §§ 1615, 1621 (2018) (barring civil forfeiture and other actions under the customs laws five years after the time when the alleged offense was discovered or, in the case of forfeiture, within two years after the time when the involvement of the property in the alleged offense was discovered, whichever is later). A suit to recover stolen property in a private replevin action is generally subject to the statute of limitation enacted by the forum state in which the suit is brought; while the time period is highly variable, it ranges typically from two to six years but is also subject to judicial determination of the accrual of the cause of action. For a summary of relevant court decisions in the context of works of art and cultural property, *see generally* Patty Gerstenblith, *Statutes of Limitation and Other Legal Challenges to the Recovery of Stolen Art*, *in* THE PALGRAVE HANDBOOK OF ART CRIME 271, 274–79 (Saskia Maria Hufnagel & Duncan Chappell eds. 2019).

152 19 U.S.C. § 1595a(c)(1)(A) (2018). *See also infra* note 186. The import of stolen property is prohibited under the National Stolen Property Act (NSPA), 18 U.S.C. §§ 2314–2315 (2018) (prohibiting, *inter alia*, the transport across an international boundary of stolen goods valued at $5000 or more with knowledge that the goods were stolen). The proceeds of a violation of the NSPA are directly forfeitable under CAFRA, 18 U.S.C. § 981(a)(1)(C). However, because of the less favorable burden of proof and the availability of an innocent owner defense under CAFRA, forfeitures of stolen property would likely be pursued under 19 U.S.C. § 1595a(c)(1)(A) in which the law in the "contrary to law" element would be the NSPA. The government would still need to show that the importer knew that the property was stolen but would only need to establish knowledge to the probable cause standard rather than to the criminal standard. For discussion of CAFRA, *see supra* note 126. The CPIA does not require any knowledge or scienter on the part of the importer and, like all forfeiture actions under Title 19, has no innocent owner defense. While CAFRA poses a problem for forfeiture of antiquities and other cultural objects that originate in and are transported only interstate, all antiquities discussed in this article were discovered in other countries and therefore entered the United States at some point. Therefore, in such cases, the provisions of the Customs statute will always be a potential avenue for the government to pursue civil forfeiture.

handling of stolen property can also be the basis for criminal prosecutions.[153]

B. When is Legality? The Problem of Time

It is a basic principle of international law that laws and treaties are not retroactive in nature—in other words, they have no legal effect until after a particular country has ratified the treaty and, in some cases, enacted domestic implementing legislation.[154] This is true not only of the 1970 UNESCO Convention, the 1995 UNIDROIT Convention and the various statutes by which these conventions are implemented into domestic law, but it is also true of States' ownership statutes.[155] The latter means that the archaeological artifact has to have been located within the country of discovery at the time the vesting law was enacted.[156] Thus is posed not only the problem of determining the provenience, but also the provenance of the object. While archaeologists and anthropologists consider the pre-deposition history of an artifact as part of its history,[157] from a

---

153 *See*, *e.g.*, United States v. McClain, 545 F. 2d 988 (5th Cir. 1977), *appeal after remand*, 593 F. 2d 658 (5th Cir. 1979); United States v. Schultz, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003).

154 The Vienna Convention on the Law of Treaties states:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

art. 28, May 23, 1969, 1155 U.N.T.S. 331. Domestic implementing legislation is required for the terms of a treaty to be enforceable domestically in the case of non-self-executing (executory) treaties. It is more likely that multilateral treaties will be interpreted as non-self-executing, while bilateral treaties are more likely to be treated as self-executing. Medellín v. Texas, 552 U.S. 491, 505–14 (2008); *see also* Jean Galbraith, *Making Treaty Implementation More Like Statutory Implementation*, 115 MICH. L. REV. 1309, 1316–20 (2017); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695–97 (1995).

155 O'KEEFE, *supra* note 53, at 101 (explaining that the 1970 UNESCO Convention has no provision on retroactivity because this was understood not to be necessary); UNIDROIT Convention, art. 10 (1)–(2) (stating that the Convention applies only to cultural objects that were stolen or illegally exported after the entry into force of the Convention); United States v. McClain, 545 F.2d 988, 1000–03 (5th Cir. 1977) (holding that only artifacts exported after Mexico's enactment of a national vesting law were owned by Mexico).

156 *Schultz*, 333 F.3d at 398 (describing Egypt's vesting law as applying to artifacts discovered after 1983).

157 Kersel and others have considered at length the pre-deposition history of an archaeological object as part of its itinerary and provenance. Kersel, *Itinerant Objects*,

legal perspective, the pre-deposition history of an artifact is not relevant. The legal definition of provenance is the history of ownership of an object from the time of its modern discovery. In most cases, only by knowing the chain of ownership and the different steps by which the object moved can one determine the time at which the object left the country of discovery and therefore what laws are applicable as it moves through the market and across borders.[158]

Establishing when an artifact left its country of discovery is, if anything, even more difficult than establishing the country of discovery. A *terminus post quem* (that is, a time after which) for the discovery of the artifact may place the object securely within the country of discovery up to a certain point in time. Often this date can be determined only by tracing the provenance of the object back to at least its time of export. A verified, documented provenance would be direct evidence of this time of removal. For example, in *United States v. An Antique Platter of Gold*,[159] the government was able to establish the provenance of the *phiale* and its movement from the time of its discovery in Sicily, through the hands of various looters, smugglers and dealers, to the time it was removed illegally from Italy and imported into the United States.[160] Such evidence is not always available, but circumstantial evidence may fill the gap.

An example of circumstantial evidence is the study done by Ricardo Elia of Apulian red-figure vases.[161] Apulian red-figure vases were produced in southern Italy during the fourth century BCE.[162] Two researchers, A.D. Trendall and Alexander Cambitoglou, published lists of over 14,000 Apulian vases known

---

supra note 26, at 596–99.

158 *See* United States v. An Antique Platter of Gold, known as a Gold Phiale Mesomphalos c. 400 B.C., 991 F. Supp. 222, 224–27 (S.D.N.Y. 1997), *aff'd*, 184 F.3d 131, 133 (2d Cir. 1999), *cert. denied sub nom.* Steinhardt v. United States, 528 U.S. 1136 (2000).

159 *Id.*

160 *Id.*, 991 F. Supp. at 224–27, 184 F.3d at 133.

161 Ricardo J. Elia, *Analysis of the Looting, Selling and Collecting of Apulian Red-Figure Vases: a Quantitative Approach*, *in* TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE 145 (Neil Brodie, Jennifer Doole & Colin Renfrew eds., 2001). La Follette discusses the possibility of reconstructing provenance for Attic pottery based on the work of J.D. Beazley. La Follette, *The Trial of Marion True*, *supra* note 5, at 56.

162 Elia, *supra* note 161, at 146.

as of the year 1979, along with their then current locations and owner, previous owners, and findspot.[163] Subsequent publications covered additional vases that surfaced between 1980 and 1992.[164] Elia's study of these publications indicated that 99.4 percent of the vases with a definitive findspot were found within Italy.[165] While Apulian vases have been collected for over 200 years and have been widely dispersed to collections throughout the world, the Trendall and Cambitoglou publications allow the inference to be drawn that any vase not present in these publications first appeared after 1992.[166] These publications provide a *terminus post quem* for time of discovery of any vase that does not appear in these publications.[167] Italy has vested ownership of archaeological artifacts in the State since at least 1939;[168] those vases first appearing after 1980 would therefore be considered State property and would be characterized as stolen.[169] On the other hand, the U.S.-Italy Memorandum of Understanding under the CPIA dates only to January 2001.[170] Knowing whether an artifact left Italy before or after 2001 would be crucial in determining the MOU could be used by the United States to recover and return the object.

In a few instances, a looted object may be recontextualized, thereby giving both the exact findspot and the time at which the artifact was discovered.[171] Malcolm Bell was able to recontextualize the "Morgantina treasure," a group of fifteen silver objects of Hellenistic date looted in 1980-1981 from the site of Morgantina in central Sicily and purchased by the Metropolitan Museum of Art soon after.[172] Re-excavation of the area where the treasure was looted allowed identification of the exact findspot and

---

163 *Id.* at 145.

164 *Id*. at 146.

165 Only 945 of the vases had definitive findspots; of these, only five were found outside of Italy. *Id*. at 146–47.

166 *Id.* at 146.

167 *Id.* at 150–52.

168 United States v. An Antique Platter of Gold, known as a Gold Phiale Mesomphalos c. 400 B.C., 991 F. Supp. 222, 231 (S.D.N.Y. 1997), *aff'd*, 184 F.3d 131, 134 (2d Cir. 1999).

169 *Id*.

170 Memorandum of Understanding, It.-U.S., Jan. 19, 2001, T.I.A.S. No. 11-119.

171 Malcolm Bell III, *Italian Antiquities in America*, 7 ART ANTIQUITY & L. 195, 202–03 (2002).

172 *Id. See also* La Follette, *The Trial of Marion True*, *supra* note 5, at 40.

a more accurate dating of the original deposit of the objects, as well as a determination of when the objects were looted.[173]

C. What is Legality? Objects in Transit

An illegal antiquity is one whose history or handling involves some violation of law. As has previously been discussed, an antiquity may be characterized as stolen property if it is removed from its country of modern discovery in violation of a national law vesting ownership of antiquities in the State[174] or it may be subject to export or import restriction or both.[175] In line with Joyce's third paradigm for determining authenticity,[176] we must also consider how an object's legal status may change as it moves internationally and crosses the final border of the country where it is located at the time of its interception. Thus, an object that was illegally excavated or one that was legally obtained but illegally exported may be legal in a transit or destination country whose laws have not been violated by such conduct. Even a stolen object may be considered legally obtained in a country that recognizes the good faith purchaser doctrine.[177] A legal object may become illegal if it is improperly

---

173 *See* Bell III, *supra* note 171, at 202–03; La Follette, *Looted Antiquities, Art Museums and Restitution*, *supra* note 36, at 685.

174 *Supra* notes 91–93 and accompanying text.

175 *Supra* notes 68–89 and accompanying text.

176 As Joyce wrote, "[W]hat we consider authentic is fluid, because things themselves were and continue to be in motion, both literally (as ownership changes, as physical storage location changes, and as things move about for exhibition) and metaphorically, as things are debated, published, challenged, interrogated, and even, prosaically, merely catalogued." Joyce, *When Is Authentic?*, *supra* note 21, at 54.

177 The continental European countries have adopted the good faith purchaser doctrine, under which a good faith purchaser may be able to acquire title to stolen property, in contrast to the rule of common law countries, such as the United States, where a thief can never convey title. Charles A. Palmer, *Recovering Stolen Art: Avoiding Pitfalls*, 82 MICH. B. J. 20, 22 (June 2003) (discussing how common law and civil law differ in their approach to good faith purchasers). Transferring stolen property to a good faith purchaser in a country that follows the good faith purchaser doctrine allows title to be laundered. *Id*. Courts in common law countries use a choice of law or conflicts of law analysis to decide whether to apply the good faith purchaser doctrine. *See generally* Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L. J. 955 (2001). European courts typically use the *lex situs* rule—that is, they apply the law of the jurisdiction where movable property was located at the time of the transaction by which the current possessor claims to have acquired title. *Id*. at 1014. In two cases involving cultural objects, British courts chose to apply the law of a foreign jurisdiction, Islamic Republic of Iran v. Berend, [2007] EWHC 132 (QB), [2007] 2 All ER (Comm) 132 (applying French law), and Winkworth v. Christie,

imported into the country where it is currently located.[178] Or, conversely, an object that is illegally exported from one country is not illegal in an importing country in the absence of adherence to an agreement, such as the 1970 UNESCO Convention, by which the importing country makes illegal export from another country a violation of the law of the importing country.[179] This variation in applicable laws allows title to objects, particularly to antiquities, to be laundered if they are passed through or are ultimately located in countries whose laws do not regard them as illegal.[180]

An understanding of an object's post-discovery provenance will elucidate an object's trajectory as it changes legal status while crossing international borders. However, for practical purposes, the relevant status is the status of the object in the country where it is intercepted by law enforcement or where a claimant brings suit to

---

Manson & Woods Ltd [1980] 1 Ch 496 1 All E.R. 1121, [1980] 2 WLR 7 (applying Italian law). However, in City of Gotha v. Sotheby's, [1998] 1 WLR 114 (Q.B. 1998), the court refused to apply German law under the exceptions to the *lex situs* rule where the current possessor is the thief or has acted in bad faith or where applying the law of a foreign jurisdiction would be contrary to English public policy. In the United States, courts typically choose to apply the law of the jurisdiction where the property is located at the time of suit or the jurisdiction that is considered to have the most significant contacts with the gravamen of the suit. *See, e.g.*, Bakalar v. Vavra, 619 F.3d 136, 143–45 (2d Cir. 2010). In some cases, U.S. courts have considered the law of a foreign jurisdiction in an alternative analysis. *See, e.g.*, Autocephalous Greek-Orthodox Church of Cyprus v. Goldman & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1393–95 (S. Ind. 1989) (applying Indiana law but also discussing Swiss law), *aff'd*, 917 F.2d 278 (7th Cir. 1990), and Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., No. 98 CIV. 7664 (KMW), 1999 WL 673347, at *1 (S.D.N.Y. 1999) (applying New York law but also discussing French law). In *Cassirer v. Thyssen-Bornemisza Collection Found*., where jurisdiction was based on the Foreign Sovereign Immunities Act, the court applied the substantive law of Spain pursuant to federal common law. 862 F.3d 951, 960–64 (9th Cir. 2017).

178 Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, 64 U.S. ATT'YS BULL. 5, 8 (2016).

179 Robert K. Paterson, *The Legal Dynamics of Cultural Property Export Controls: Ortiz Revisited*, U.B.C. L. REV. (Special Issue) 241, 247–50 (1995); *see also* Paul M. Bator, *An Essay on the International Trade in Art*, 34 STANFORD L. REV. 275, 287 (1982) ("The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States; illegal export does not itself render the importer (or one who took from him) in any way actionable in a US. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country").

180 Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 VA. J. INT'L L. 1, 1 (1990) ("Stolen works are generally 'laundered' through a series of sales to buyers with progressively less knowledge of the work's taint.").

recover the object as that is the jurisdiction with physical control of the object. For this purpose, the manner in which a cultural object enters a country plays a significant role in the ultimate determination of whether an object may be recovered and returned to the country of origin.[181]

Countries typically require the declaration upon import of commercial goods or goods with a value above a certain amount.[182] While the details vary considerably by country, the requirements for a declaration include the country of origin, the value of the goods, and what the goods are.[183] These declarations determine whether the goods are importable and the amount of customs duty or tariff that the importer must pay.[184] In the case of typical commercial goods, "country of origin" usually refers to the place of manufacture or a place where substantial changes were made to the goods.[185] While a false declaration may be made to mislead a Customs agent, the false declaration is itself another violation of the law and may constitute a distinct basis for forfeiture.[186]

Several cases demonstrate the use of false declarations directly related to the importation of artifacts into the United States.[187] Case

---

181 *See* Palmer, *supra* note 177.

182 *See, e.g.*, 19 U.S.C. §1484 (a) (1) (2019).

183 *See, e.g.*, U.S. CUSTOMS & BORDER PROTECTION, IMPORTING INTO THE UNITED STATES: A GUIDE FOR COMMERCIAL IMPORTERS (last revised 2006), https://www.cbp.gov/sites/default/files/documents/Importing%20into%20the%20U.S.pdf [https://perma.cc/SE2U-MDVC].

184 DAMON V. PIKE & LAWRENCE M. FRIEDMAN, CUSTOMS LAW 25, 71 (2012). The United States exempts works of art from the payment of tariffs. Payne-Aldrich Tariff Act of 1909, ch. 6, 36 Stat. 11 §§ 714–717.

185 PIKE & FRIEDMAN, *supra* note 184, at 281.

186 18 U.S.C. § 542 (2019) ("Whoever enters or introduces . . . into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration . . . or by means of any false statement . . . or makes any false statement in any declaration without reasonable cause to believe the truth of such statement . . . [shall be guilty of a crime]."). A false declaration constitutes an importation contrary to law and may be a violation of either 18 U.S.C. § 545 (2019) ("Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law . . . [shall be subject to criminal penalties]. . . . Merchandise introduced into the United States in violation of this section . . . shall be forfeited to the United States") or 19 U.S.C. § 1595a(c) (2019) ("Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows: (1) The merchandise shall be seized and forfeited if it—(A) is stolen, smuggled or clandestinely imported or introduced."). The former is a criminal provision while the latter authorizes civil forfeiture.

187 *See, e.g.*, United States v. An Antique Platter of Gold, known as a Gold Phiale

law clearly indicates that the country of origin is the provenience or country of modern discovery, rather than the place of manufacture or production in antiquity.[188] In one of the earlier modern cultural property cases, a gold phiale discovered in Sicily was imported into the United States through the use of false declarations as to country of origin, which was stated to be Switzerland, through which the phiale was transported, rather than Italy, where the bowl was discovered, and as to value, which was declared as $250,000, although the dealer had purchased it for $1.2 million.[189] The bowl was forfeited and returned to Italy.[190]

In a more recent case, the Hobby Lobby Corporation forfeited to the U.S. government approximately 3,450 ancient cuneiform tablets and clay bullae acquired for its Museum of the Bible, as well as an additional 144 cylinder seals and $3 million.[191] In this case, the archaeological artifacts, which originated in Iraq, were falsely declared as to what they were (declared to be ceramic tiles), their country of origin (falsely stated to be Turkey and Israel), and their value, which was stated to be significantly lower in order to utilize an informal entry process thereby attempting to evade Customs scrutiny.[192] Citing to the false declarations, as well as other legal violations,[193] the U.S. government forfeited these artifacts as imported contrary to law.[194] The resolution of this case provides further support for the legal definition of provenience as the country of discovery, as suggested here, and not necessarily the specific findspot. It is known, based on the textual information in the tablets, that the tablets originated from an ancient city called "Irisaĝrig" and that Irisaĝrig is located in southern Iraq. However, the exact location and therefore the exact findspot of these tablets are not

---

Mesomphalos c. 400 B.C., 184 F.3d 131, 133 (2d Cir. 1999).

188 *Id.* at 135.

189 *Id.* at 133.

190 *Id.*

191 United States v. Approximately Four Hundred Fifty (450) Cuneiform Tablets, 17CV03980 (E.D.N.Y. 2016).

192 *Id.* at ¶¶ 33–42.

193 *Id.* at ¶¶ 7–10, 50–52. These other violations included export in violation of Iraq's national ownership laws and import in violation of U.S. import restrictions under the CPIA.

194 *Id.* The forfeiture of $3 million was as substitute res in place of "dissipated" property or merchandise imported or attempted to be imported between 2009 and 2011. *Id.* ¶ 11.

known.[195] Because Irisagrig can be located in southern Iraq, the legal conclusion can be drawn that the artifacts originated in Iraq, thereby subjecting the artifacts to the legal rules based on Iraq's national ownership law and the restrictions on import of antiquities from Iraq.

Two similar smuggling attempts of ancient artifacts were interdicted in the United Kingdom. One also involved a group of cuneiform tablets, which were falsely declared upon entry at Heathrow Airport.[196] Their country of origin was declared to be the United Arab Emirates, they were described as handmade miniature clay tiles, and they were given an implausible valuation.[197] Scholars at the British Museum subsequently identified them as originating at the sites of Umma, Larsa, and the unknown site of Irisaĝrig, all of which are located within modern Iraq.[198] In another example, U.K. customs authorities seized and returned an ancient Greek sculpture that was found at the site of Cyrene in Libya.[199] Upon import into the United Kingdom, its country of origin was declared to be Turkey and its value to be £72,000, rather than its actual worth that was later estimated to be £1.5 million.[200]

---

195 MARCEL SIGRIST AND TOHRU OZAKI, TABLETS FROM THE IRISAĜRIG ARCHIVE (Eisenbrauns 2020); Owen Jarus, *1,400 Ancient Cuneiform Tablets Identified from Lost City of Irisagrig in Iraq. Were they Stolen?*, LIVE SCIENCE (Jan. 6, 2020), https://www.livescience.com/lost-city-in-iraq-cuneiform-tablets.html?fbclid=IwAR1F4hwm4PyAIUyy0M_lkw34qsVacVynhxKDgzUBnho77Ww4UirpXi4Uli0 [https://perma.cc/EV36-FDA2]. This additional cache of 1,400 tablets from Irisagrig are said to be owned by Hobby Lobby but were not among the artifacts returned to Iraq pursuant to the forfeiture action. United States v. Approximately Four Hundred Fifty (450) Cuneiform Tablets, et al., 17CV03980 (E.D.N.Y. 2016).

196 Jonathan Taylor (@JonTaylor_BM), TWITTER (Aug. 30, 2019, 4:57 AM), https://twitter.com/JonTaylor_BM/status/1167405875168010240 [https://perma.cc/SEM4-7YRT]. The tablets are likely to be associated with the Hobby Lobby tablets.

197 *Id*.

198 *Id*.

199 Agency*, Ancient Greek Relic Looted from Libya to be Returned*, THE TELEGRAPH (Sept. 1, 2015) https://www.telegraph.co.uk/news/earth/environment/archaeology/11837886/Ancient-Greek-relic-looted-from-Libya-to-be-returned.html [https://perma.cc/P6FU-PQSA].

200 HM Revenue & Customs v. Al Qassas, unpublished, Westminster Magistrates Court (Sept. 1, 2015); Neil Brodie, *The Role of Conservators in Facilitating the Theft and Trafficking of Cultural Objects: the Case of a Seized Libyan Statue*, 48 LIBYAN STUD. 117, 118 (2017); *Ancient Greek Relic Looted from Libya to be Returned*, THE TELEGRAPH (Sept. 1, 2015), https://www.telegraph.co.uk/news/earth/environment/archaeology/11837886/Ancient-

V. Conclusion

The terms provenience and provenance appear frequently in both the legal literature and case law and in the scholarly literature of the disciplines of art history, archaeology, and anthropology. To understand the role that these concepts play in the latter context when applied specifically to previously unknown archaeological artifacts that were looted from the ground, the definition of provenience as the find spot and of provenance from the time of the creation of the object to its time of deposition and then its post-deposition history is appropriate. However, in order to apply these concepts in the legal realm the definitions of these terms must be altered.

This Article has proposed that the legal definition of provenience, while still technically applying to the precise find spot, indicates the modern country within whose borders the object was discovered, whether through excavation or through looting. The legal definition of the term provenance is the history of the ownership and custody of the artifact from the time of its modern discovery to its present location, thus omitting its ancient, pre-deposition history. In this way, these terms that derive from the disciplines of art history, anthropology, and archaeology, on the one hand, and are used in the discipline of law, on the other, can be clarified and better understood. These definitional terms reflect the dimensions of time, space and movement that form an object's legal itinerary and allow these concepts to be better understood in their legal context and application. This is the first step in achieving an accepted legal definition for these terms so that laws can be more effectively devised and enforced, in order to promote the preservation of the world's archaeological heritage.

Greek-relic-looted-from-Libya-to-be-returned.html [https://perma.cc/P6FU-PQSA]. As in the case of forfeitures in the United States, the forfeited property becomes owned by the Crown and then, in the case of the ancient sculpture and the cuneiform tablets, returned to the rightful owners, in these cases Libya and Iraq respectively.