WHO IS ENTITLED TO OWN THE PAST?

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DAVID KORZENIK**
DAVID RUDENSTINE***

DAVID RUDENSTINE:

Good morning. I am a member of the Cardozo Law School faculty and, on behalf of my co-organizers, Ashton Hawkins and David Korzenik, and myself, I wish to welcome you all to this unusual event, which focuses on a number of cutting edge issues concerning who owns the past. A month ago, Cardozo sponsored a day-long conference entitled "Reports From the Front Lines of the Art and Cultural Property Wars."[1] Today's program is in the same vein, and brings together distinguished individuals from different disciplines to discuss difficult and important problems that concern disputes over cultural property and their consequences for museums, collectors and art source nations.

The topic today is important, and is bedeviled with disagreements and divisions that span a broad spectrum. At one end, there are those people who are strong proponents of a totally free market, a free art market, with no export restraint and no import restraint. At the other end of the spectrum are those people who support a very heavily regulated market, structured with strong export and national ownership laws enforced by criminal sanction. In between, there are numerous shades of other opinions.

One remarkable thing about this topic that strikes an outsider, and I consider myself a bit of an outsider in this field, is that the interested communities in this broad field have deep suspicions of each other and don't necessarily engage in collegial dialogue with one another to say the least. That condition allows universities to come forward and play one of the more constructive roles that universities can play in a society like ours. Universities can be kind of a neutral meeting ground where people with strongly opposed views can come together and exchange ideas. Cardozo hopes to be

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1 *See Reports From the Front Lines of the Art and Cultural Property Wars*, 19 CARDOZO ARTS & ENT. L.J. 1 (2001).

able, in the years ahead, to do more of that in this art rich city, which is not only a center of culture for the United States but, as many people think, for the world.

Today's panel would not have happened without Ashton Hawkins. He had the idea for the panel and he pulled together the panelists that are here before you. It's a remarkable group of individuals, and they are here because of the importance of this sensitive topic, and because Ashton is a co-moderator.

David Korzenik, who is a member of the panel, has also been very helpful in bringing this event about, and in constructing the hypotheticals that will be the basis of the conversation today. In addition to Ashton and David, Cynthia Church, in the Dean's Office, and Lynn Wishart, the director of the library, lent a considerable hand to make this event possible, as did the law students of the *Cardozo Arts & Entertainment Law Journal.*

The format today will be as follows: Mr. Hawkins and I are going to proceed to ask members of the panel to discuss a set of hypothetical facts with us. We're going to ask the panelists to give their reaction to the hypothetical facts—what would you do if confronted with this situation—and allow them to quiz one another as we proceed through different layers of complexity.

Let me just say a word about the panelists. Evan Barr is an Assistant U.S. Attorney. James Cuno is the director of the Harvard Museum. Richard Diehl is the director of the Alabama Museum of Natural History. Andre Emmerich is the Senior Advisor to Sotheby's. David Grace is an attorney from Washington, D.C. Marci Hamilton is a colleague of mine on the Cardozo faculty; she is the director of the Intellectual Property Program. David Korzenik is an attorney here in New York, and also an adjunct professor at Cardozo Law School. Arielle Kozloff is associated with the Edwin Merrin Gallery. Dr. Edmund Pillsbury is the former Director of the Kimbell Art Museum. Katherine Lee Reid is the current Director of the Cleveland Art Museum. Finally, Enid Schildkrout is the Chair of the Division of Anthropology and the curator of African Ethnology at the American Museum of Natural History.

With those brief introductions, let me turn things over to Mr. Hawkins for a moment. He's going to set the background for the first hypothetical and then we will proceed.

ASHTON HAWKINS:

I would like to begin by setting the stage. In 1970, 1972 and 1983, the groundwork was laid for this country's first major posi-

tion on the international movement of art.[2] Historically, the United States has been a completely free nation in terms of importing and exporting. It was in 1970 when the United Nations Educational Scientific and Cultural Organization ("UNESCO") Convention was initially promulgated to all the states.[3] States can receive a copy of it, weigh it, consider it, and if they like it, they can choose to adopt it. Many states do so with reservations, just as the United States did.

In 1972, the United States Senate adopted the Convention with certain reservations.[4] The primary reservation was that because of conflicts between the treaty and American law, they wanted to have implementing legislation passed by the Congress and the President to make the treaty come into effect.[5] Thereupon, an eleven-year discussion went forward. There were four separate markups in the Senate, and that's a lot of markups. Moreover, it was pressed continually by the State Department.

In the end, Senator Moynihan, and a few others, recognized this convention's importance and also the importance of the art trade and art collecting in America. Moynihan, helped by a certain number of other people—including Paul Bator from Harvard Law School and lawyers representing museums, art dealers and archeologists—fashioned a compromise whereby the treaty would be accepted by the United States, but the implementing legislation would set up a committee of experts from four different areas: the public area, archaeologists, dealers, and museum people.[6] These experts, chosen by the President, sit on a committee and review the applications from each country.[7] A country is entitled to apply, as Italy has done in October, for protection from pillaging of its sites.[8]

This evaluation is done by the committee, and within 180 days, they have to make a report to the President as to what they think of the application—how much of the application they would endorse, how much they would not endorse. Then it's accepted. Because it

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[2] *See* UNESCO Convention on the Means on Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention of 1970]; UNESCO Convention on World and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter UNESCO Convention of 1972]; Cultural Property Implementation Act of 1982, 19 U.S.C. § 2601-2613 (2000).

[3] *See* UNESCO Convention of 1970, 823 U.N.T.S. 231.

[4] *See* UNESCO Convention of 1972, 1037 U.N.T.S. 151.

[5] *See id.*

[6] *See* Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, § 306(b)(1)(A)-(D), 96 Stat. 2356 (1983) (codified at 19 U.S.C. § 2602) [hereinafter CCPIA].

[7] *See id.* § 306(g).

[8] *See id.* § 303(a).

is done by executive agreement, it does not go back to the Senate.[9] The treaty between Italy, and let's say hypothetically, the United States, is entered into, and it sets up a list of national patrimony from Italy, which is hereafter embargoed from entry into the United States. It is a five-year term, renewable for another five years.[10] I don't think we know whether it can be renewed beyond that without having a further set of hearings. There is also another part of this, which is emergency action, whereby a nation can say: "We're having active pillaging right now and it's something that can't wait for deliberations of the committee. Would you entertain a notion of setting an embargo on these categories and things that are being pillaged from our sites right now?" That kind of embargo is a five-year term, renewable for three years. This sets the background of our discussion today. Let's begin with our first hypothetical.

HYPOTHETICAL #1: THE OMNIUM MUSEUM

Aldrich Generoso is a collector who lives in Maryland; he has a special enthusiasm for pre-Columbian art. Between 1962 and 1985, he acquired a very significant collection of pre-Columbian works from most of the countries in Central America as well as Ecuador and Peru, among others. He acquired most of them through a dealer in Washington D.C. by the name of Laslo Discreet. Laslo is known as a reputable dealer.

After years of collecting, Aldrich has come to know Laslo and to trust him. Aldrich knows little about the provenance of his pre-Columbian collection; hut he was assured by Laslo that there were no difficulties with title or other such problems.

Between 1974 and 1995, Aldrich lent his collection to various museums in Europe and in the United States. Photographs of most of the works in the collection were reproduced and circulated widely in published books, museum catalogs and announcements. Some appeared in the press. The collection was well traveled. At no time were any challenges made to Aldrich's good title, nor did he receive any communications questioning that title.

Aldrich does not know the identity of the prior owners of the works in his pre-Columbian collection. He knows that the works came from various owners and collectors from different countries in Latin America. But he never asked Laslo about the prior owners and Laslo never disclosed them to him.

9 *See id.* § 303(g)(1)(A)-(B).
10 *See id.* § 303(b).

The Omnium Museum of Sundry Art in Washington D.C. has in its collection a few pieces of pre-Columbian art. But its collection in this area is seriously deficient. You are the Director of the Omnium Museum. Aldrich has recently approached you, seeking an exhibition for his pre-Columbian collection, which he would also make the subject of a "promised gift agreement" with the Museum. This is a common arrangement in which the donor commits to transferring title to the collection during his/her lifetime (or at death) with the timing of the gift (or fractional interest thereof) at the donor's discretion.

After his first meeting with you, Aldrich consulted his attorney, Arthur Tangle, Esq., who placed a call to Museum Counsel Leavett Alloning, Esq. Tangle explained to Alloning: "We don't have much in the way of documentation. Most of the works in the collection were acquired prior to 1972. We haven't investigated the provenance[11] of the works much; and when we have, we just hit an information wall and we just can't get past it." Apparently, according to Tangle, when he tried to contact the dealers from whom Aldrich had purchased, many were out of business and others had no helpful records. "We just can't do much for you on chain of title" he said. "But if this is going to he a problem, we should probably just save ourselves the time and end the discussion here. We would love to give you the collection, but you need to tell us what you want."

Tangle added that he was mindful of the policy of the Museum of the University of Pensacola not to make any purchase or accept any gift which lacks a clear provenance going back to the original excavation. He was concerned about this type of policy and wanted to know whether the Omnium and other museums subscribed to it.

PART A) As the Director of the Omnium Museum, how do you approach this offer and potential acquisition?

PART B) When you, as a curator at the Omnium, are consulted for guidance by the Director, what would you advise? What specific problems would concern you?

PART C) If Aldrich had proposed a gift–purchase arrangement, would that alter your view of the matter? Under a gift-purchase, a portion of the appraised value of the work is treated as a gift and the remainder is paid for by the museum to the donor.

11 The words "provenance" and "provenience" are often used interchangeably. But in the context of museum and archeological studies, they have different meanings: "Provenance" refers to the "history of ownership of a work;" while "provenience" refers to the "geographical or geological origin or source of an artifact."

Here, Aldrich's collection is valued at $15 million; with $10 million to be treated as a gift and $5 million to be paid to Aldrich by the Omnium. The Omnium has the required funds.

PART D) If you do intend to make the acquisition, what kind of indemnification would you expect from Aldrich or from Laslo? Would you ask for indemnification on both the purchase and the gift?

ASHTON HAWKINS:

We have for example the first one, as director of the Omnium Museum, how do you approach this offer and potential acquisition? Ms. Reid, would you like to begin?

KATHERINE LEE REID:

The first thing you would have to determine is exactly what countries are involved, and which works in the collection were acquired at which dates. The collection started in 1965. I think we have to know what the different laws in the different countries are. Also, I think we have to know what our colleagues know of the museums, and what they've done in relation to these countries if we don't have the center of gravity ourselves. Hopefully we do.

DAVID RUDENSTINE:

The questions you raise are fair and reasonable, but suppose we don't know the answers. The question that really is put before you is: If you can't get answers to all those important questions, how do you proceed as a museum director?

KATHERINE LEE REID:

Well, in this one, I would look at it with such caution that I might take up Mr. Tangle on his offer. If you have serious questions about all this, we don't need to go further. I think that there's so little information about Aldrich, his attorney and their collection, that from the standpoint of the Omnium Museum, which collects in many different fields, there are many things that could be done. I think one serious option would be to preserve the institutional energies and to explore other options, because this one looks difficult.

DAVID RUDENSTINE:

And, you would do that even though it is an outright gift?

KATHERINE LEE REID:

I don't think that matters in terms of the future of the potential of something like this.

ASHTON HAWKINS:

Could I comment on that, Ms. Reid? From your general knowledge and also your lawyer's advice, do you think that objects acquired prior to 1983 would be questioned in any court of law or in any forum?

KATHERINE LEE REID:

When we establish a date before which we would accept works from the collection—whether it would be 1972 or 1983, our attorneys would guide us. We could be guided by law, and by a certain date where we understand what our national policy is, follow that and accept only those works that were acquired by the collector before that date.

ASHTON HAWKINS:

Mr. Pillsbury, would you be as cautious?

EDMUND PILLSBURY:

I don't think so. I think the works were bought in good faith. They have been exposed to the public. They have been well published. They have been shown at reputable museums, not as listed works of art, smuggled works of art, but as fine examples of their cultures.

I think you could accept it. My only concern would be, not that there be a letter of intent, but there be at least a fractional gift and a very, very strong commitment to the outright gift. I think complications can arise if the works go on public view. Then a question arises: Who owns the work of art?

Is it the museum's responsibility, or the owner's responsibility, or a joint responsibility? I think that this is a gift that you can consider. If this collection included architectural fragments and other such things that would clearly have to have been hacked from a wall, I think there are serious questions about something like that. The policy of the museum that I used to work for was that if you couldn't establish whether it was in this country before 1972, you wouldn't touch that kind of material, like architectural material

from Guatemala coming in from Mexico. I think that would be my personal position.

ASHTON HAWKINS:

Richard Diehl?

RICHARD DIEHL:

Well, although Aldrich and his dealer cannot seem to establish a chain of ownership back to the point of which the object came out of the ground, I assume they can competently state when Aldrich purchased the material. And if it has been in his hands, in his ownership since a given date—let's say 1983 or even 1972, I believe it would be legitimate to pursue acquisitions of this material.

Several years ago, I was involved in a somewhat similar situation. In helping to organize an exhibition for the National Gallery of Art in which the organizing committee is composed of both Mexican and U.S. dollars, we wrestled with the whole issue of whether we should exhibit material from private collections, and if so, under what circumstances?

The Mexican scholars on the committee agreed that if we could demonstrate that the committee had evidence that the objects were, in this case, in the United States by 1972, that they would be willing to allow them to be exhibited. In fact, one of the pieces of evidence that we used was a term paper written by a student from Yale University, in which she described the objects and illustrated them. The term paper was written in 1972. That was sufficient evidence for the director of Mexico's Natural Museum of Anthropology to agree to exhibit those pieces. Although that's a somewhat different case, I think that's the kind of thing we should be looking at here.

ASHTON HAWKINS:

Let's discuss archaeological material in general, not specific material from a building. That's obviously in a special category. What about distinguished objects that don't have necessarily a location assigned to them, or that you couldn't research. How would you feel about that?

RICHARD DIEHL:

I'd probably feel differently as an archaeologist than I do as a museum director. I would have to reconcile this conflict. In my

mind, as an archaeologist, once an object is removed from its context, it has lost the vast majority of its historical significance. It hasn't lost its aesthetic significance, and there is still information that can be gained from it. Once that object is moved however, then it is sort of in a different situation than it was prior to that. My emphasis as an archaeologist is to try to prevent the looting or the removal of the object from its context in the first place.

I also believe, as an archaeologist, that there are many activities that destroy the archaeological record, but looting is one of the least prejudicial. For example, in modern Mexico where I've worked for the last forty years, looting is not nearly as prejudicial to the archaeological record as mechanized agriculture, road building, and urbanization—a whole series of processes that destroy entire sites rather than remove specific objects. Archaeology is much more than specific objects. It is all of the context and associations that we have, and as an archaeologist that's what is critical to me. As a museum director, I would have to look at those objects in a rather narrow context. I don't know what I would do then.

DAVID RUDENSTINE:

The idea is to try to stay within the confines of the hypothetical, although I very much welcome your comment. Mr. Emmerich, if you were asked by a museum director for your advice on the possibility of acquiring this collection, given your experience and your status in the field, what advice would you offer?

ANDRE EMMERICH:

Well, I would urge the museum director to consider his audience, his constituents, and his museum—the Omnium Museum in Washington D.C. These objects come from Central America, Ecuador, and Peru. There is a rather large population of Mexican, Central American, Peruvian, and Ecuadorian ancestry in this country. Don't people of that descent have a right to a fair share of their national archaeology ipso facto? I think there's a case to made for American exceptionalism. We are a country of immigrants. Like well-to-do Chinese are now doing, we have bought our heritage as such pieces come on the market. We have not removed them by force. We have not stolen them. We have not conquered them with military actions. It seems to me that is a fact often forgotten. The obligation of the museum, especially one whose constituency is so broad as that of the Omnium Museum, is to show materials of significance to the descendants from all corners of the world.

DAVID RUDENSTINE:

So you would accept the gift and run the risk of either civil liability, or criminal liability and deal with it when it arose?

ANDRE EMMERICH:

Absolutely, yes.

DAVID RUDENSTINE:

David Grace, you're an attorney in this field. You've heard these reactions. Assume, for example, the museum director is your client and calls you up to relate this story. What do you advise?

DAVID GRACE:

Well, I think that one thing that comes through clear here is that a purely passive approach to the issue—relying on the statements by the donor—is not enough. The museum needs to come up with a set of internal reasonable care standards, which identify the steps they will take when donors come forward. I would suggest that they institute those standards in advance and that they apply to all donors coming forward. The standards need to be transparent so that there is no question five years later, as to whether or not the museum in fact took reasonable steps.

It seems to me that the museum should consider at least independent confirmation that the trail does end where the donor says it ends, rather than simply rely on the assertion by Arthur Tangle that he cannot find out beyond the first step. Here, we have a case where there has been publication already, for a number of years. But, that would be an element of reasonable care when we look at a review of published literature to see if there are reports of theft or other reports out there on some of the computerized systems. These are judgment calls in terms of how conservative the museum wants to be. Obviously though, there is that possibility of contacting a foreign government in advance.

DAVID RUDENSTINE:

Alright. Let us suppose though that Mr. Emmerich is the museum director, and he wants to embrace this. You are a cautious lawyer, obviously with a lot of concern of liability in the back of your mind. Mr. Emmerich says to you, "Come on David, tell me exactly what you're worried about? It's nice to have all these procedures up front, but if I don't take the offer this week or next week, the collection may be offered to somebody else."

DAVID GRACE:

Well, let me begin by saying what I am not worried about. I am not worried about liability under the UNESCO Convention, or the Convention on Cultural Property Implementation Act ("CCPIA"), which has a 1983 effective date as passed in the Senate.[12] But, I am concerned, and we will discuss this issue in the next hypothetical, about whether these were stolen works and/or were smuggled into the country. I think there is potential liability on this point that needs to be examined.

Whether or not the advisory committee makes a finding of ongoing looting, a work that is stolen is subject to seizure or forfeiture under the CCPIA.[13] Furthermore, there are criminal laws in place dealing with stolen property.[14] Therefore, at a minimum, I believe you try to take reasonable steps to insure that you are not dealing in works actually stolen from a museum or other source in a foreign country.

DAVID RUDENSTINE:

Why? Are you telling Mr. Pillsbury and Mr. Emmerich that if they accept these works in their capacity as a museum director, they would run the risk of criminal liability? Is that what you just said?

DAVID GRACE:

I am not going say that they run the risk of criminal liability. But, they run the risk that there will be action to recover the goods.

DAVID RUDENSTINE:

Well, that is the basis of the hypothetical though. I mean as I understand the hypothetical, these items come free. Ms. Reid says she won't touch it without knowing a lot more. Mr. Pillsbury says he would take it. Mr. Emmerich says he would take it. Mr. Diehl says maybe he'll take it if he's wearing his museum hat, maybe he

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12 *See* CCPIA, Pub. L. No. 97-446, § 315, 96 Stat. 2362 (1983) (codified at 19 U.S.C. § 2611).

13 *See id.* § 310.

14 *See generally* The National Stolen Property Act, 18 U.S.C § 2314 (2000) [hereinafter NSPA].

won't if he's wearing his anthropology hat, but then he'll think about it again tomorrow. That may not be quite fair, but . . . .

ANDRE EMMERICH:

That's close enough.

DAVID RUDENSTINE:

Alright.

DAVID GRACE:

I would guess and I'd be interested in the comments with the folks from museums that the public relations impact of this is as significant if not more significant than the strict legal liability or the risk of legal liability. And, I think that is certainly driving some of the questions I have in expressing the notion of a reasonable care checklist. The adverse fallout from having a foreign government coming forward and saying the museum has looted objects in its collection, even if they never get the objects back, is terribly significant.

ASHTON HAWKINS:

Could I interject something here? There is a very well-known museum on the West Coast, which has in recent years entered into a bargain sale agreement for the acquisition of a very fine collection of Greek vases and sculptures. I am told that a high percentage of those objects were obtained without permission. Almost all of them have been acquired in the last ten years. Yet, this museum went ahead with the acquisition. Does that change your thinking? I am also told that they probably have negotiated the return of certain items. Is this something that a museum director should be prepared to do? Can he take the risk that he'll accept the collection; there might be some problems down the line; and he'll negotiate with those problems as time comes up. How do people feel about that, Ms. Reid?

KATHERINE LEE REID:

I see it from the standpoint not only of serving a community. I think if you can, you obviously need to serve the community. But, I also think the climate of today gets you into a public relations problem that can drain the institution of energies unless you are prepared with the amount of legal advice and experience at your

disposal to be able to take on an issue like that. This well-known institution may well have those resources. You also have to consider whether you are totally independent—without members, without a constituency, or do you have the concern about the community, about your trustees, and the support of future donors?

I think that after getting into a public controversy it won't go away. It takes a year or two to resolve, and you end up having to suffer what happens in the press irrespective of what happens in the solution. You may end up with the collection, but you may have suffered. As an institution, I think you have to weigh whether it's worth it at the forefront.

ARIELLE KOZLOFF:

I just wanted to take up points from what David Grace was saying. First, the word "stolen" is a very broad term. Sometimes it means that the object was stolen from a museum or from an owner. Other times it simply means that, in the broadest sense, the object is thought to have come from a specific site and seems to have left the country of origin without permission.

I have found that what my colleagues in archaeological rich countries of origin do not want to have happen is this: they don't want to be embarrassed. I was a curator for twenty-eight years before I became a dealer, and I worked quite a bit, and still do work, with colleagues in archaeologically rich countries. They do not want to be embarrassed. They do not want to see something that is terribly important that could have come from nowhere else but their site, suddenly show up and meet with huge media attention and "Aha, we've acquired this, ten million, twenty million dollar object." These countries are then publicly humiliated. A good curator keeps this from happening.

On one hand, if the object truly is a treasure, if it is the most important thing that could have come from a particular site, then they should not buy it. If, on the other hand, it is an important object that could have come from a number of different sites, then the best thing a curator could do is get in touch with her foreign colleagues, as David Grace has suggested, in order to communicate with the foreign country.

These colleagues I refer to are people we meet frequently at international conferences. We talk to them on the phone. We write letters back and forth. We ask them for help with research. We bring them to the United States to give lectures. Because we are in constant communication with these colleagues, when one is

contemplating an important acquisition that could possibly raise sensitive issues, I suggest contacting your liaison immediately.

What do you tell them? Explain that you are aware of, and doing research on, a certain acquisition, and then proceed to ask them their opinion. This type of communication will allow you to test the waters. Eventually, if you acquire the piece, and your foreign colleague is contacted separately on the matter, he or she will already be informed and not surprised or embarrassed at the news.

ASHTON HAWKINS:

I think in the hypothetical we have postulated it is not typically the least significant treasure that would have come to the attention of the country of origin. The object being considered is a highly significant archaeological object that, in the prior thirty years, was publicly exhibited around the world. So, I think that issue is another kind of problem.

Mr. Cuno you have read the first hypothetical, and you have heard some of the discussion. Based on the offer of a gift coupled with an exhibition, how would you, as a museum director, respond to that offer?

JAMES CUNO:

I think the first thing to do is assess the measure of risk involved; that is, whether or not the museum is comfortable with assuming that risk. The risk level could be determined by a number of things, including public relations, as Ms. Reid suggested. Assuming that the risk is worth taking, I think the institution ought to go forward with the acquisition, ought to go forward with the exhibition, ought to go forward with subsequent publication and study, in order to steward that object or that collection through a public process by which people benefit for a variety of reasons from access to that work of art or collection.

DAVID RUDENSTINE:

Suppose that the terms were not an outright gift, but a gift purchase, as proposed in Part C of the first hypothetical. In that case, the museum is going to actually put up five million dollars. What impact does that, if any, have on your view Mr. Cuno?

JAMES CUNO:

That would be one of the factors one assesses before accepting the risk. However, this would not be, in and of itself, a discouraging factor. Museums are in the business of taking risks with five million dollars from time to time. For instance, we might acquire a painting that for the same price turns out to be of less importance than we originally thought. It might not have been painted by the artist we originally thought painted it. Equally, one might hire a person who over the course of twenty-five years turns out to have been a bad hire; and over the years, it cost you five million dollars. There are all kinds of reasons for taking risks with the resources of the museum. One has to calculate the risk and decide whether it is worth taking. Five million dollars by itself should not discourage one from taking that risk.

DAVID RUDENSTINE:

You do not sound terribly worried about civil liability or having to give up the five million?

JAMES CUNO:

To clarify, that would not prevent me from going forward, if I thought there was a good reason by which we should acquire a given object, such as that it makes a real contribution to the quality of the program or collection of the museum. Moreover, there might be a very good chance that the museum will be able to retain rightful ownership of this object, and on the other hand a very good chance that one will have to return the object. A museum simply has to weigh the risks involved in spending money for an object's acquisition, money that is, after all, the public's money (whether or not it was given privately, the money was meant to be spent for the benefit of the public).

DAVID RUDENSTINE:

Ms. Schildkrout, if you were asked by a museum director, given the gift purchase arrangement, what would you suggest?

ENID SCHILDKROUT:

The institution I work for maintains data about the object that is probably as important as the object itself. We have a fairly set standard of procedures for curatorial vetting of these things. In my opinion, I would most likely be bound to apply the rule of 1970.[15] If the museum's policy is to follow the guideline set by the Convention, then curatorial discretion would be limited. If we had no data

[15] *See* UNESCO Convention of 1970, *supra* note 2.

before 1970, then I would probably recommend not taking this object. Beyond that, I think that it is important to look ahead. Since museums presumably collect or purchase for the long term, that lack of information could come back and haunt you and here, the impact of negative publicity really does come into play.

Looking back under the Native American Graves and Repatriation Act ("NAGPRA"),[16] many objects were collected in good faith according to the ethics, if not the laws, of the time. It is not that the laws have to be ex post facto, but the lack of data hinders us in responding to claims in the way we would prefer to respond, in many instances. The more data we have about the origin of objects, the more effective we are in dealing with claims to the benefit of the institution itself.

DAVID RUDENSTINE:

Evan Barr, given your position in the U.S. Attorney's office, suppose you were consulted by one of the museum directors, let's say over dinner as a friend (because they are not going to call you at the U.S. Attorney's office). They say, "Evan, we have this offer. I find it almost irresistible, but I'm worried. As a government lawyer, what's the risk as you see it?"

EVAN BARR:

First, I must give the standard disclaimer. I am speaking here in my personal capacity, and not on behalf of the Justice Department or the U.S. Attorney's Office. I would probably go by the axiom "if it's too good to he true, it must not be." Obviously what grabs my attention here is the museum's lack of documentation and the apparent lack of any effort to provide that documentation or dig any deeper. This is troubling. The attitude of Laslo as to the original source of the items is troubling. On the other hand, I think the bright line rule of 1972 is helpful here, and I would counsel to go ahead with any item that pre-dates 1972.[17] The museum seems to be inoculated in that case from any claim under the CCPIA.[18] There is also a pre-Columbian statute in the customs laws that specifically deals with monumental items or stone art.[19] The triggering date is also 1972.

16 *See generally* 25 U.S.C. § 3001 *et. seq* (2000).

17 *See* UNESCO Convention of 1972, *supra* note 2.

18 *See* CCPIA, Pub. L. No. 97-446, §§ 301-315, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601-13).

19 *See* Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-95 (2000).

The best advice is not to be too greedy. Settle for just that portion of the collection that pre-dates 1972, and then you can have a certain comfort level.

DAVID RUDENSTINE:

If I can turn to Part D, David Korzenik and Marci Hamilton, if you were in-house counsel to the museum directors and were approached regarding this gift purchase agreement and were asked about whether indemnification agreements would be possible, what would you advise?

DAVID KORZENIK:

Our first instinct is to conduct a due diligence procedure in order to figure out what the level of risk is. That is the natural and appropriate thing to do. Due diligence will occasionally permit us to avoid a potentially dangerous acquisition. But once the acquisition is made, interestingly the museum's potential liability is not ultimately influenced by the due diligence effort.

There are three sources of exposure, one is criminal. The second is a civil claim that may come from owners who later discover that the works are theirs, or from countries that later determine or believe that the works are theirs. Finally, there is the threat of forfeiture, criminal and civil. It is interesting that the due diligence effort does not really erase any of these liabilities except criminal.

The due diligence effort may affect the civil claims to some degree in some states. Of course, this depends upon whether the state has laws that will protect bona fide purchasers. Some states do not. Most of the civil suits ultimately result in the return of the property even if the claimant's lawsuit and cause of action is weak. James Cuno pointed out the real issue. You cannot generally anticipate the civil outcome.

Moreover, you certainly cannot anticipate the forfeiture outcome. The forfeiture outcome, if the recent case law is correct, has almost nothing to do with the innocence of the final owner. Though new legislation that affects forfeiture may have something more to say about this.

The reality is, even if you do the due diligence you may still lose that object. However, you are still in the business of presenting important cultural works to the public. The risks that you have to assess are the risks you turn to your curators to evaluate. You try to look at what the possible provenance and provenience of these works might be. Are they likely to have come out of a particular

area of the world from where claims are likely to follow? Those are the bets that you make. Ultimately, your due diligence will not reverse or change your forfeiture or civil exposure. At best, it will only erase the criminal exposure. It may protect you to a limited extent from some civil claims in some states. That is what I think is the irony.

As far as indemnification is concerned, your donor is not really going to want to indemnify, and it is going to be very hard to ask the donor to indemnify you for a work that might later blow up in your face. Perhaps you can look to the dealer. The dealer is somebody who wants the sale. He wants the transaction to occur. He did, likely, certify the work's authenticity and correctness to the collector. It may be that you can turn to the dealer, Laslo. If he is involved in the transaction, then ask him for some kind of indemnification for your costs; an indemnification for costs is not going to be that severe if you are getting it for free. Again, the risks are just there. I really agree with James Cuno—that is just the unavoidable reality of a museum's proper business. You make your best bets, whatever difficulties may be presented over the long term.

DAVID RUDENSTINE:

Marci Hamilton?

MARCI HAMILTON:

The risks are there, but they are there because of Congress. What worries me about the discussion is that it sounds like we are moving more and more towards lawyer-driven acquisition, with the increase in copyright protection and the increase in the possibility of data protection now pending in the Congress. It sounds to me like collections are going to be more and more driven by lawyerly concerns, and my concern is whether Congress has set the right balance.

It is unfortunate that the threshold acquisition question has to go to the lawyers in that Ms. Reid's primary answer would be: "Well, it looks too risky, so I'm not going to take it," or that the answer would be: "If it's post 1970, I'm just not even going to consider it." I think that is a disaster for the availability of art works and cultural properties to a public that needs them. My advice would be to forget about the risk. Go to Congress.

DAVID RUDENSTINE:

We are going to move on to Part II, the second hypothetical.

HYPOTHETICAL #2: THE ENVOY

The Museum has acquired the Aldrich Generoso collection of pre-Columbian art. After two years, you are inaugurating three new galleries for their permanent display–which galleries have been funded for $4 million by Aldrich. Two weeks before the opening, you receive a visit from an envoy of the Ministry of Culture of a Latin American nation. The envoy explains: "The Ministry obtained an advance copy of your book *The Omnium's Pre-Columbian Treasures.* We found it by visiting your online museum gift shop at 'Omnium.org.' You have no idea of the profound cultural importance that these works have for our nation and our people. With all due respect, we must insist that you return them to our country from whence they were stolen. We are convinced that we can establish that these artifacts came from sites within our country and that their export was illegal. You should know that we adopted a patrimony law in 1980, which gives our nation 'superior title' to all works of significant cultural value. Anyone who transports such works out of our territory or receives, acquires or owns them outside our territory is dealing in stolen property–property owned by our government."

PART A)

A1. How do you respond?

A2. Should one nation's definition of "cultural or national patrimony" be enforceable in another country with different laws?

A3. Leaving aside questions of present law, how, ideally, in the best of all possible worlds, are the competing national versus international interests to be reconciled?

A4. What kinds of "misappropriations" should be reversed? Are Napoleon's seizures of works of art (two thirds of which have been retained by France and still there) to be redressed or do they go too far back for a "return" to make sense? Would France be entitled to subject such property to its export control laws, given how it was acquired?

PART B) The envoy sends a formal letter to the U.S. State Department with a copy to U.S. Customs asserting that these objects were stolen from his country. Under present case law this presents a risk of seizure/forfeiture. How should the Omnium Museum address this ?

PART C) Is there a possibility of criminal liability ?

PART D)

D1. The envoy has also taken his charges against the Museum

to *60 Minutes*, among other news outlets. How would you explain your position to the Trustees?

D2. How should the Museum respond in the public forum? As you develop the Museum's public response to the envoy's challenge, what policy arguments do you offer for retaining the collection? [Is it not worth noting, for example, that the Metropolitan's recent opening of the Cypriot Gallery, with the President of Cyprus present and in the face of serious press criticism in Cyprus, has enhanced the importance and public appreciation of Cypriot national patrimony?]

DAVID RUDENSTINE:

Now, Edmund Pillsbury and Andre Emmerich, you were very embracing of the gift. Let's suppose that you are the chairman of the board of this museum. What do you tell the gentleman at the other end of the phone?

EDMUND PILLSBURY:

You invite him to come by and discuss the issues very carefully. I think you open communication. I do not think you can be rude about it. I can only speak from my own experience.

I began working for an institution that acquired a number of pre-Columbian objects before 1972. During my eighteen-year tenure, I think I received three serious letters from the Guatemalan embassy that were very firm in stating that they wanted those objects to be returned. My answer was that we would be happy to discuss this issue, but we first needed to establish from where these objects had come, since it wasn't clear they had come from Guatemala or some other country. If in fact they had come from Guatemala, it could not be established.

You have to talk through these issues. And, you have to certainly be on the side of protecting cultural patrimony. There is a trust and a bond with the public and you have to position the museum properly. James Cuno is correct; there are risks in everything. If you expend money it has to be of great cultural significance. It has to have great tradition, great rarity, and great importance. If it has all these things, then the right thing that you as a museum director are doing is trying to educate the public about the importance of other people's cultural property. I think you simply have to fend for the museum's right to use this material for educational purposes, while being sensitive of others who feel

they have a claim to the ownership. If the question is about title, then you have to look at it very carefully.

DAVID RUDENSTINE:

Andre Emmerich, you invite the Minister of Culture in, and you're having tea. What do you tell him?

ANDRE EMMERICH:

I would tell him exactly what Mr. Pillsbury tells him. I would also point out to him that these objects he's talking about, these rare treasures, are relatively frequently duplicated. His national museum in the capital has dozens of such objects sitting if not moldering in a warehouse. It will do his country a great deal of good in terms of cultural interest and tourism to have these things displayed in the United States. They are out of context already anyway. Therefore, the context issue falls by the wayside. I would point out that a great many tourists go to Guatemala and Mexico and Egypt, but nobody goes to Libya or Nicaragua.

DAVID RUDENSTINE:

Ms. Reid, you wouldn't have accepted this object as I understand it. If Mr. Pillsbury and Mr. Emmerich gave you a call, told you about their predicament, and asked you for your advice, would you say, "I told you so" and hang up the phone? If not, what would you say to them?

KATHERINE LEE REID:

Well, I feel that I have gotten in a tradition of expressing a "one-note" opinion here. I also think that James Cuno's approach is the correct one. I would not be in this same position because I really do feel that public opinion is a key factor in today's world. I think that it's too bad that the lawyers drive us. But, I think in a general art museum, a community art museum, the public opinion must be a considered.

That said, I think that we do need to work together as a profession with our guidelines, with the kinds of ethics codes that the American Association of Museums ("AAM") and Association of Art Museum Directors ("AAMD") provide.[20] If they were to poll me, I would certainly want to work with them, and as a profession, hold

[20] *See* ASSOC. OF ART MUSEUM DIRECTORS, PROFESSIONAL PRACTICES IN ART MUSEUMS (1992).

the line in the manner that Mr. Cuno and Mr. Emmerich were speaking about.

JAMES CUNO:

If I understand the hypothetical, I would want to uncouple the two issues that are presented by the Minister making the phone call. One is whether or not this object is of profound cultural importance to his nation and people. And the other issue is whether or not he believes that he has evidence to prove that it was stolen, and therefore, that it is legally his country's property.

I would have a different conversation regarding each of those points. In the first instance, while acknowledging the cultural importance of the object to the history of the Minister's country, I would argue that importance is not dependent on its residing in the Minister's country, but that it is independent of location; and that its original location (if even the latter can be determined beyond a shadow of doubt) is less important than how over the years it has been preserved, exhibited, and published where it is. As to the legal aspect of this, I would say that there is a process in my country by which we can determine who legally owns the object. I would say that we are perfectly willing to work with him in this process, during which we would be extending an opportunity to a great number of people to come to our museum, not only from this country but from other countries as well, to learn from and to examine this profoundly important cultural object. But, I would try to uncouple these two issues. They're not the same thing.

DAVID RUDENSTINE:

Marci Hamilton, you took a position in sharp contrast to David Grace's advice. I would say that Mr. Emmerich, Mr. Pillsbury, and maybe Mr. Cuno would have been delighted to have your legal advice. You would have said, "Go ahead, take it." Well, they took it, and the Minister of Culture now makes the call. They have handled it with as much grace as they possibly can. The Minister has left. They both have small migraines as a result, because they are afraid of what the newspaper is going to say about them the next day. You are a lawyer; they call you and say, "How can we put the best legal, ethical, and moral spin on this? You helped get us into this." What do you tell them?

MARCI HAMILTON:

There has been a thread running through the conversation by

the museum directors about the public's interest and serving the public, and what the role is for the public. I wonder what public you're serving? There's the public that is your constituent, the ones who pay to come through your doors. There's the public that lives in your area. And, there's the public that is the world public. I think public is undefined in this discussion. Once you define the public you want to serve, then you can take the high ground. The best public relations is always taking the high ground as fast as possible. While the high ground is always defined in terms of the public's interest, until the director has defined what public they are appropriately serving, I don't think the question can even be answered.

ANDRE EMMERICH:

In terms of public relations and image, the use of the term "stolen" is a very strange one. In many cases like *Peru*,[21] things are stolen "without permission" only if you are exporting from the country.[22] Within the country, trade is quite free. Should we in this country honor such expropriations? Why should we honor their expropriations? Very simply, we should not. The hero of my adolescence was the Scarlet Pimpernel; maybe we need him today to save not French aristocrats on their way to the guillotine but works of art from neglect. Lawyers can pursue this better than I can, but it's an important issue that what's stolen be properly defined. Stolen cannot mean just any violation of export control.

ASHTON HAWKINS:

I think it's important to expand a little bit on that point. For the most part, art source nations define "stolen" as objects that have been exported from their country without an export permit. Most of these countries have two kinds of cultural patrimony statutes. One kind vests the ownership in the state automatically. Whenever an object is found, it belongs to the state, even though in that country it can be bought and sold freely and collected freely and exhibited freely.[23] The other typical statute states that if some-

[21] Peru v. Johnson, 740 F. Supp. 810 (C.D. Cal. 1989).

[22] Some statutes, enacted by source nations, state that all objects of a certain class are property of "the State" or of "the People." Peru has such a statute. If read literally, the language of Peru's statute (and others like it) implies that an object removed from the country without government permission may be treated as "stolen." Accordingly, the source nation can recover the property in a civil action. By virtue of the language in the statute, the source nation becomes an owner seeking return of stolen property. *See* JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 167 (3d ed. 1998).

[23] These statutes are common in Spanish America. *See id.* at 166-67.

thing is found in the ground, the state has the right to exercise its dominion over it and to say that this is part of our cultural patrimony, as France, Germany, England, and others do.[24]

Laws in this country regard property in the common law sense of the word.[25] When you own something, it means you have title, possession, use, benefit, and control. How does this standard apply to ownership statutes, or patrimony statutes, from other nations? One of the questions in this hypothetical is how does one view those laws? How much respect do you give to them? Of course, the law in the United States is moving in the direction of treating those foreign statutes as deserving the same rights as United States property rights statutes.[26] A lot of people deplore this, but it is happening. It should also be said that the U.S. Customs Service has taken the view that if something is claimed as stolen by a foreign nation and it enters this country, the Customs Service feels that they have the right to seize it because of the *McClain* decision.[27] David Korzenik, you might explain how that works.

DAVID KORZENIK:

McClain is an important story. And, incidentally, if you are looking for a good screenplay, you should read that case because there is something very comedic about the criminality it describes. It's an interesting story. That aside, what I want to give you are the principles behind *McClain*, how it works, and why we reached this juncture where a criminal sword of Damocles, a forfeiture sword of Damocles appears now to hang over many museum acquisitions.

First, understand this basic rule of law, which is honored in most nations: it's not the practice of any nation that I know of to enforce the criminal laws of another nation. And, it's generally not the practice of any nation to enforce the export regulations or the export control laws of another nation. Those are the basic rules that have operated in this area until some of the treaties and the *McClain* case came into play.

What happened in *McClain* is this: we have in our laws something called the National Stolen Property Act.[28] The National Stolen Property Act makes it a crime for any person to transport in

[24] *See id.* at 70.
[25] *See generally* CCPIA, Pub. L. No. 97-446, §§ 301-315, 96 Stat. 2356 (1983).
[26] *See generally* NSPA, 18 U.S.C § 2314 (2000); United States v. An Antique Platter of Gold, 991 F. Supp. 222 (S.D.N.Y. 1997).
[27] United States v. McClain, 593 F.2d 658 (5th Cir. 1979) (challenging the second round of convictions for having received, concealed and/or sold stolen goods in interstate or foreign commerce and also for conspiracy to do the same).
[28] 18 U.S.C. § 2314 (2000).

interstate or foreign commerce goods known to have been "stolen."[29] It also requires, of course, that the party must know at the time they possess and receive this property that it is stolen.[30] Now we understand how this applies in the case of stolen cars, property stolen from someone's home, etc. That's the first law that you want to understand. The second law that's important to understand in the *McClain* context is the law of the art "exporting" nation such as Mexico. Mexico has a series of different laws. Under one of the laws enacted in 1972, the nation claims to own, or to have superior title to, works of cultural significance like pre-Colombian art.[31] There were some earlier statutes, but they seem to be more fuzzy and to make a less clear assertion of superior title. This is not a criminal law. If it were a criminal law that said, "It is illegal to export this object," then the United States would not enforce it. We might extradite someone who violated it and send them back to Mexico to be prosecuted, but we would not enforce it here in our courts. The Mexican law of 1972 is not an export law either, and indeed if it were, we would not enforce that either. But, what happened in *McClain* is that those two laws were put together in an unusual but important way that altered instantly how we understand art acquisitions.

In the *McClain* case, the export of the work of art into the United States and possession of a work that "belonged" to the state of, let's say Mexico, even if it was purchased from an owner in Mexico, was the acquisition and possession of "stolen property."[32] This confluence of laws, this expanded definition of "stolen property" then triggered the whole arsenal of law enforcement mechanisms in this country and, in essence, permits a foreign country to enact laws that would trigger and deploy our criminal statutes to protect their cultural property interests. *McClain* did another thing that was very significant, and that was not only to trigger criminal law, but also to trigger another important weapon in the prosecutorial arsenal, and that is the weapon of forfeiture.[33] Forfeiture is an unusual type of proceeding because it's not an action against a person for a criminal wrong, nor an action against a person for a civil wrong. It is an action against an object and an object's status.[34] It typically occurs as a separate proceeding adjunct criminal cases

[29] *See id.*
[30] *See id.* (listing unlawful or fraudulent intent as one of the requirements for criminal prosecution).
[31] *See, e.g.*, MERRYMAN & ELSEN, *supra* note 22, at 166-67, 182-85.
[32] *See* United States v. McClain, 593 F.2d 658, 664-65 (5th Cir. 1979).
[33] *See id.* at 663-64 (citing the provision for forfeiture in 19 U.S.C. § 2093).
[34] *See, e.g.*, Republic Nat'l Bank of Miami v. United States, 506 U.S. 80 (1992).

under the caption "The United States of America versus one Mercedes Benz" or "The United States of America versus a roll of $100 bills." It's a device that is very important and extremely valuable for law enforcement in drug crimes and so on. It's an extraordinarily useful weapon for prosecutors. It also has very ancient precedent that pre-dates the Constitution. The idea behind forfeiture is that the knife that kills the king "escheats" to state; any proceed of crime, or any implement of crime belongs to the state.[35] Therefore, the Constitutional problems have not been taken too seriously because the device pre-dates constitutional norms. Now you have this weapon by which the art object may be seized because it is "stolen" under the National Stolen Property Act.[36] The United States government institutes the action, and the owner now can appear as a "claimant." But, the burden of proof is not on the government to show beyond a reasonable doubt that a crime was committed. The burden of proof is not on a prior owner to prove, by preponderance of the evidence, that the thing is theirs and that they own it and that there are no statute of limitations problems. Rather, the burden is now on the "claimant," the current owner, to show that, in fact, the property was not stolen under this definition, to show that, perhaps depending upon how the law is applied, they were innocent of any knowledge of the wrongdoing.[37] Now, that defense may not even apply in that the new legislation may make it inapplicable.

One thing that's unfortunate about the *McClain* "switch," once it got turned on, and activated the whole panoply of prosecutorial devices, was that it also shaped the whole art-importing debate as a question about how the criminal law works, and how forfeiture law works. It thus took that debate far afield of cultural property policy. That's probably not where that debate should be taking place. Unfortunately that is where the debate is. That is *McClain*, and that is the machinery that we are worrying about. That is the sword that hangs over us.

DAVID RUDENSTINE:

Let's turn to the possibility of seizure. Suppose that you're general counsel to the Customs Service. Let's further suppose that

35 *See* MERRYMAN & ELSEN, *supra* note 22, at 170; *see also* United States v. Bonnfield, 16 F.3d. 1123, 1133 (10th Cir. 1998).

36 *See* 18 U.S.C. § 2314 (2000).

37 The history of forfeiture laws do not provide for an innocent owner defense. See United States v. An Antique Platter of Gold, 991 F. Supp 222, 230 (S.D.N.Y. 1997). Showing lack of knowledge is not enough. *See id.*

the Minister of Culture sends a letter to the Department of State and to the Customs Service informing them of this collection, of their legal claims, and actually asking that the government seize the collection two weeks before this gala opening. The director of the government agency asks you as the government lawyer, "Is there a possibility of seizure under American law? If so, what is that possibility?" What would you advise?

EVAN BARR:

There are actually a number of different possible avenues here to address the Minister's concerns. It's worth pointing out that there's a lot of room for compromise at the beginning because his country's patrimony law only went into effect in 1980. We are only dealing with the items that were acquired between 1980 and 1985 presumably. Therefore, I think you can narrow it down.

In fact, the way these things usually play out, the foreign country approaches the State Department, the matter is referred to the Justice Department, or they approach Customs and the matter is referred to the Justice Department. A formal request, which is known as a letters rogatory is made for our assistance.[38] It would be my inclination to try to narrow this request. Apparently, the minister is asking for the whole collection to be surrendered. Before I step in and get involved on behalf of the United States government, I would want him to narrow his request to those items that fall into the relevant time period and also to those items for which he can produce solid proof that the items were looted from a particular site or were actually stolen from a museum or similar institution.

DAVID RUDENSTINE:

Suppose he did that, and we now have evidence with regard to some of the items that they were looted from sites between 1980 and 1985? Now, you have got let's say fifteen to twenty pieces identified for which there is at least some documentary evidence, and you're convinced it is a reasonable claim. The agency wants to know, "Should we go in and seize it while the cocktail party is going on?"

EVAN BARR:

Well, there are a few legal niceties that have to be attended to

38 *See id.* at 226.

first. We would have to obtain a warrant from a federal magistrate that would lay out a predicate offense justifying forfeiture. For example, before we jump in at that early stage, we would try to pull the Customs documents that were used to import the items and see if there's anything funny or strange about those documents. If there were the possibility that a false statement was made, or their documents simply weren't submitted, that would be a basis for possible seizure. We would not be in any hurry to act immediately, unless there was a risk that the items were not going to be in place, that they were going to be spirited away. Short of that kind of exigent circumstance, there'd be no particular rush.

I think a third-party custodial arrangement would also be productive, whereby the museum agrees that during the pendency of controversy it will surrender the items to a third party to be held while any litigation occurs. This option might give some comfort to the envoy from the other country.

Just looking at the facts here there is a number of possible statutes that could apply. The cultural property act that we've talked about might apply.[39] The *McClain* theory that David Korzenik laid out might apply as well.

I would also like to speak for a minute to the issue of whether we should be enforcing the laws of other countries, because I may be in the distinct minority on this matter. It is my feeling that embodied in the legal principle of comity between nations is a strong presumption in favor of applying other countries' laws as long as they are not morally repugnant or totally inconsistent with our laws. The laws that we're talking about are a specialized group of ownership laws. While they may seem alien to us, or unusual, the fact is that even in the United States we have laws that are similar. We have, for instance, the Archaeological Resources Protection Act,[40] which vests title in items found on federal land in the federal government. We have the Native American Graves Protection and Repatriation Act.[41] We have an act that grants title to the government in shipwrecks that are found off our coast.[42] Those are statutes and there are others out there that vest title in certain items in the government.

How would we feel if a copy of the Declaration of Independence ended up on display in Lima, Peru? If the government of Peru took actions to recover that item, would we find that surpris-

39 *See* NSPA, 18 U.S.C. § 2314 (2000).
40 16 U.S.C. §§ 470aa *et. seq.* (2000).
41 25 U.S.C. §§ 3001 *et. seq.* (2000).
42 *See* Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 *et. seq.* (2000).

ing? I don't think so. I think that enforcing this species of law is not morally repugnant. We're not talking about statutes such as the ones passed in Nazi Germany, expropriating property of an entire ethnic group.[43] We're talking about the statutes that are reasonably tailored to protect certain national interests that those countries have identified.

ASHTON HAWKINS:

Forfeiture is now the subject of a bill sitting before the President, to curb to some degree, the procedures under which Customs operates when it seizes drug-related property and other such property.[44] There's been a general feeling in the Congress and in the nation that the U.S. government and Customs have gone too far in this area. Otherwise, the bill wouldn't have passed both houses of Congress in two months, and it wouldn't be before the President for signature.[45] That lays the groundwork for another idea, which is that seizure without trial really is an extreme denial of due process in the area of property.

Traditionally, forfeiture was always there, as David Korzenik has said, to assist the government in seizing contraband. Developments since the *McClain* case tend to treat art as contraband, the same way drugs or weapons might be treated, or something that is clearly antithetical to the public interest in the United States. By equating art with contraband, you "dehumanize" it, and you turn it into just another thing that one seizes to protect the foreign law. Quite apart from whether we agree or not about this being consistent or inconsistent with U.S. policy, I happen to disagree. I have never met a patrimony statute that I thought really related to any property law in any jurisdiction in the United States.

DAVID GRACE:

I wanted to pick up on that point. The one time the Congress clearly looked at this issue was in drafting the implementing legislation for the UNESCO Convention.[46] Congress came down to a very clear conclusion that we would not automatically enforce export control rules or other laws of foreign nations, that the cultural advisory committee and the State Department or the United States Information Agency were to exercise independent judgment about

43 *See generally* LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994).
44 Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983 (2000).
45 *See id.*
46 *See* CCPIA, Pub. L. No. 97-446, §§ 301-315, 96 Stat. 2350 (1983).

whether they were going to impose import controls.[47] I agree there is this concept of comity. But, in this particular area, the one time that Congress has looked at it, it has drawn a line and said we will not automatically enforce the foreign law.[48]

JAMES CUNO:

It would be hard to imagine that the museum director would have arrived at this stage and be surprised by a phone call. I think that the director would have anticipated that this would be likely or not likely to happen. In the process of that anticipation, the museum director would have already determined the measure of risk. Part of that measure is to know with whom one is dealing and whether or not Mr. Generoso has the best interests of the museum in mind when offering his donation of objects as well as of money. A patient, confident institution and a patient, confident director should be able to determine whether Mr. Generoso has the best interest of the museum in mind, and whether a full level of trust has been achieved between museum and donor. If the museum is not impatient—has not rushed to judgment on this out of some desperate desire to acquire this collection—then I think the museum director would be in a very strong position to take the high road in answering the phone call from the Cultural Minister.

MARCI HAMILTON:

May I stress a point of information? Since 1983, have insurance policies developed that insure the museum against forfeiture or the loss?

ASHTON HAWKINS:

There have been attempts. There is a company in Washington that purports to do just that. However, it doesn't work very well because they send demanding letters to museums asking the museums to give information on which they will then base their insurance policy. As far as I know, there's been no satisfactory insurance. You can apply for federal immunity from seizure for international shows that are in the United States.[49] That is another matter we're not really discussing.

[47] *See id.* §§ 306-308.
[48] *See id.*
[49] Immunity From Seizure Act, 22 U.S.C. § 2459 (1994).

KATHERINE LEE REID:

I just want to add one thing. I think the positions of various museums are guided by where we stand in terms of our source of funding. Before working in the Cleveland Museum of Art, I was at the Virginia Museum of Fine Art, where sixty percent of the budget comes from the citizens of the town. Taxpayers' money pays sixty percent of a $15 to $17 million budget. If the endowment is so huge that the institution really does not have to concern itself with funding, the position might be more edgy.

ARIELLE KOZLOFF:

On the Declaration of Independence in Lima example, I would love to see it. I would love to see it in Havana and Tehran. There are many places I'd really love to see copies of that document. But, other countries don't want it. This is one of the few countries in the world that is so omnivorous of the world's culture that it really wants to educate itself and its children and wants to have pieces of our heritage from wherever we are. Libya doesn't want American art. Peru doesn't want American art. We do want these things, and we want to share what we have with the other people.

On another point, I think what James Cuno was saying is that many museum directors would never get to the point of receiving this call from the minister of culture. I think about the opening of the Cypriot Galleries at the Metropolitan Museum, the lengths the museum went to for months, perhaps years, ahead of time: having press conferences in Athens, meeting with ministers of culture, and meeting with ambassadors. I like to think that most museum directors have enough of an international view that they would have already communicated with the other countries and show sensitivity as to how these countries feel.

ASHTON HAWKINS:

It might be worth commenting that the Cypriot Gallery at the Metropolitan Museum of Art put on display 1,600 works of art, many of which had not been on display since the First World War. Some had never been on display. There had traditionally been a small gathering of sculpture that was on display in the main museum building itself—the Great Hall.

When the decision was made to renovate spaces and put this collection on view in a first-class way, all these questions arose. The first one was: How did we acquire the collection? It was acquired

over a twenty-year period through the excavations of the museum's subsequent first director Luigi Palma di Cesnola, who was the American consul in Cyprus. He had permission to do this, theoretically, from the Ottoman Empire that was administering Cyprus at that time. These issues have not gone away. They are still raised in the press. But, it was the decision of Cyprus to not only endorse the galleries and endorse the publication of a very comprehensive catalogue for the first time, which was written by their former minister of antiquities, but also to come and be present at the opening of the galleries and in effect to proclaim that Cyprus's heritage was now established in one of the foremost museums in the world as an important heritage.

The hypothetical example here postulates that the Omnium Museum has very little pre-Colombian art, and postulates, by implication, that it should be acquiring pre-Colombian art in order to round out its collection. This "internationalist" consideration seems to be absent from the discussion so far. Yet, that is part of every museum director's basic role if he's in a museum that is collecting in various areas.

DAVID RUDENSTINE:

Before we move on to the last hypothetical, given the issues that have been put on the table, it might be worth just canvassing views here. What has been put forward is not only the risk of forfeiture and seizure, but also potential criminal liability under federal statutes.[50] As Marci Hamilton said, it is a national tragedy, to some extent, to have museum acquisitions driven by lawyers as opposed to curators and collectors. Yet, you cannot help but feel that to some extent, museum directors and their curators and advisors must wonder whether or not they are about to trespass into criminal liability. I would like an expression of views on this issue.

Is [the notion of criminal liability] part of your consciousness as you work, day in and day out, especially in the wake of the *McClain* case and other matters?

EDMUND PILLSBURY:

We do have to be worried because I think the rules are changing and evolving. Due diligence is something that is absolutely built into you as a museum director, and due diligence involves all the research to establish that a work of art is what it is supposed to

[50] Criminal liability can be imposed under the National Stolen Property Act. See 18 U.S.C. § 2314 (2000).

be and is of great cultural significance. The new element is the title issue and how much information must a museum obtain about the history of a piece it acquires to ensure that it acquires good title.

I know cases from my own experience where I did not look into certain questions because I did not want to be given information that would implicate our institution. I had suspicions about gaps in information regarding where an object might have been. In one case, it was a very important Italian painting, which had been lost from public view for nearly 100 years. I had my suspicions about where the object might have been for those 100 years. However, I was offered the piece in Switzerland and was acquiring it from a Swiss company. I did not quite know what to do about my suspicions. I certainly didn't want to be told by the seller that the piece did not come from this company, because that would implicate me. But, I did take the step of talking to authorities in that country to find out if they knew of the object and whether they considered it part of their cultural property. The answer was they did not know the piece, and they did not consider it part of their cultural property. I felt clear to go ahead. But, these are the kinds of issues involved. If I had gotten the seller to say, "Yes, we have had permission and this piece was in a private collection in this country," then immediately as the acquirer, I would have to have said, "Well why didn't you go further and establish clear export from that country?"

KATHERINE LEE REID:

We are aware of this possibility when we acquire works in a number of different fields. I feel that we need to work as a profession, through organizations such as the AAMD, and with our colleagues to explore policies, which will guide us in the future. At the present time, I think there is a situation that would make me very cautious.

JAMES CUNO:

Art museum directors are not the only institutional leaders that have to be conscious of liability. Any CEO of a complex organization faces similar questions of liability. And this is not the only place a museum is liable: there are questions of liability regarding financial commercial matters, human resource, and public relations issues. I would again like to distinguish between the director's job and the museum counsel's job.

I think that the director's job is always to take the high road in these kinds of things, while informed by counsel of matters of liability. Directors must distinguish the principle of ownership from the principle of stewardship. The high road is that museums never really own or possess these things. We always only take care of things; we steward things through time. It is the general counsel's office that is involved in the difficult task of determining matters of title and ownership. Museum directors ought not to be brought publicly into that discussion. Museum directors ought to distinguish issues of stewardship from ownership more than they do.

ENID SCHILDKROUT:

In an international arena, museums have no option but to obey the law—however they are advised to interpret it—and balance that obligation with public opinion. But I don't think that the legal aspects and the public relations aspects are easy to separate for curators and museum directors and I agree with Jim that we really need to rely on counsel to help sort that out. But both laws and public opinion are constantly changing, and a collection that seems "safe" today may not be tomorrow. At the same time it's very difficult, really impossible, to make decisions on the basis of foresight and foreboding. In the end, what we are really doing is balancing the present law with public opinion. But we have to recognize that both are volatile. I come back to NAGPRA—while I think that law has in many ways been of great benefit to museums and to Indians, it is difficult law to apply because it is so retrospective.[51] On the one hand we have found that even though the law facilitates repatriation of many classes of objects, regardless of how they were acquired, objects are not flying out of the doors of museums; in many instances no one knows where they should go. When museums and Indians are able to work together and engage in productive dialogue, it often happens that Indians decide to keep objects in museums even if they could pursue a successful claim. They too are balancing internal pressures, arguing, for example, about whether they want to destroy them, preserve them, use them, or what.

One thing we haven't yet discussed, I think, is the balance of local and national identities in the areas from which the objects come. We have asked about who the museum's constituency is, but in a world of global media, this too is not simple. I can think of instances where the interests of sub-national groups in certain

[51] *See* 25 U.S.C. §§ 3001 *et. seq.* (2000).

countries, as in the USA, do not always coincide with those of the national state. Then what you really have to take account of is the nature of the political debate about ownership within that context. If the Asante in Ghana or the King of Benin in Nigeria, or some Maori in New Zealand, make claims for objects that were taken at the turn of the last century, it is not always simple to deal with this by responding solely to the claims of their national government because these claims may not be presented as national claims. Yet they may have great weight in the court of public opinion. This is something we haven't considered yet in our discussion, because we have assumed we are looking at relatively strong nation states like Greece or Mexico.

ASHTON HAWKINS:

Why don't we go to the third hypothetical?

HYPOTHETICAL #3: A MODEST PROPOSAL

There is new legislation before Congress introduced by Sen. Jesse Sterns and Sen. Patrick Moynafoot designed to protect American cultural patrimony. Patrimony is to be defined as any work of anthropological, archaeological or cultural significance to the U.S. that either: a) originated in the U.S. or b) has been owned and held within U.S. territory for over twenty-five years. Such works may not be exported without an export license approved by the "Bureau of Culture" (to be established within the Department of State). A non-American work will not qualify as being of "cultural significance to the Nation" if it has not also been "published" in appropriate museum catalogs or other scholarly publications; or placed on exhibition with a bona fide cultural institution for five of the requisite twenty-five years.

PART A)

A1. You have been asked to testify before the Senate Committee on Foreign Relations that is considering this legislation. How do you testify?

A2. Would such legislation provide U.S. cultural institutions with the kind of protection available to foreign nations?

Why don't we start with James Cuno.

JAMES CUNO:

Well, I think one would have to testify against the proposed legislation for all the reasons that one is critical of similar legislation in other countries. I think the answer is simple. If one takes

an international perspective and criticizes other nations' laws of this kind, then we will have to be equally critical of our own country's attempts to establish laws of this kind.

ANDRE EMMERICH:

I am against it for reasons of American self-interest. The flow of art, into and out of collections and on the market, always seeks freedom of movement and cherishes the ability to take art freely from one place and country to another. Restrictive laws would have an enormous chilling effect on the flow of art into this country. As such, I do not think it would be helpful in protecting cultural patrimony. We want to protect our patrimony, and the best way to do so is to have the market wide open.

ARIELLE KOZLOFF:

I completely agree with Andre Emmerich and James Cuno. I think that the best thing for works of cultural patrimony is for it to be in the hands of the people who love it and want to care for it the most. In any given century, those people may be located on one continent or another. We have no idea which continent those people will be living on five hundred years from now. If some time in the future people are located in China, rather than allow great works of art to rot here, I think it would be better to sell them to wealthy Chinese who love them, want them, and want to care for them.

ASHTON HAWKINS:

Let me just add another factor. As far as I know, the United States is the only nation in the world without an export control law.[52] Notably, everyone else believes that these export control laws are a good idea. This raises an interesting question as to why they think this is a good idea. Given all these other considerations, are you still of the view that we should not be protecting our patrimony?

JAMES CUNO:

I think a workable compromise, if one finds it difficult to de-

[52] There are no restrictions on the export of works of art in Switzerland or the United States. *See* MERRYMAN & ELSEN, *supra* note 22, at 70. "There are, however, growing limits on the export of 1) archaeological objects, and 2) Native American cultural objects." *Id.* There is only one United States statute that does contain a form of export control. *See* NAGPRA, 25 U.S.C. §§ 3002-3007 (2000).

fend the principle of protecting one's cultural patrimony, is to use the British model.[53]

ASHTON HAWKINS:

That's a given. The British model is the best in providing a reasonable way of functioning within the statute.

ARIELLE KOZLOFF:

My answer to your question of "why" is that in the twentieth century we saw two hugely divergent political trends taking place: Marxism on the one side and capitalism on the other. The United States and a few countries in Western Europe are now the major capitalists buying these cultural objects.

The archaeologically-rich countries tend to have very strong elements on the two wings, the left wing and right wing. The right wing is fascist in that everything that comes from their nation should belong to them and not to foreigners; the left wing feels that cultural patrimony should belong to everybody and that there should be no money attached to it. These two wings converge on this issue. Notably, the archaeologically-rich countries are the ones making the biggest noise on this issue. They want the objects for either of their divergent interests; they want the objects to remain in their countries. Whereas, the capitalists feel they ought to be able to buy everything they want. So in response to your question "why," I think the answer is political and legal in nature.

EDMUND PILLSBURY:

There is no question that this would be inadvisable legislation. There are so many better ways for the government to support the arts and to provide incentives for art to remain here other than creating this artificial mechanism. Furthermore, we do not have, nor can we attain, either the intelligence or the resources to keep our own patrimony here.

ASHTON HAWKINS:

Yet, the English have set up and continue to administer a very fine export control system. This system allows a certain amount of exports, but also allows the nation to come in and preempt.[54]

[53] *See* MERRYMAN & ELSEN, *supra* note 22, at 70 (noting that although needed in Great Britain, export permits are "routinely awarded without substantial expense, inconvenience, and delay.").

[54] *See id.* at 69-78.

Would you call that system unwise for the United States?

EDMUND PILLSBURY:

I think we may evolve into something of that sort, because that system at least sets up a review process for works of great cultural importance. It remains unclear, however, whether our government has the ability to set up and operate a system comparable to the efficient English system. Additionally, the English system has been open to abuse in the past.[55] It has been influenced politically and in other ways. Even though it has worked pretty well, it has not provided a perfect solution.

KATHERINE LEE REID:

I believe legislators must have created most of the proposed law. In other words, input was not taken from the profession. I cannot believe that Senator Moynafoot was involved with this proposed legislation. I also think that if the proposed legislation were to be enacted it would provide an easy solution, which only looks good from the outside.

RICHARD DIEHL:

I see no positive results coming from this legislation. I believe American culture would benefit from mass exportation. The United States would continue to have access to these objects whether or not we retained physical ownership of the works. Given modern media, I believe it is to our advantage that these things move freely around the world.

ENID SCHILDKROUT:

I agree with that. But I wonder if we have to worry about this issue that much, as it seems like the proposed legislation would contradict so many other laws that are already on our books.

ASHTON HAWKINS:

Wouldn't the proposed legislation preempt existing laws, not contradict them? That's the difference with a federal statute. In other words, it would be common international policy.

55 *See id.*

ENID SCHILDKROUT:

How does a law like the Native American Repatriation and Graves Protection Act[56] which does prohibit museums in particular from de-accessioning certain objects outside of its parameters—e.g. selling them across state or national boundaries—relate to this?

ASHTON HAWKINS:

Well, I think NAGPRA is a separate issue. There is a form of this sort of federal policy in NAGRPA. The property cannot be exported legally if found on government land or located in a public collection. In contrast, private collectors can do what they want under the statute.[57]

ENID SCHILDKROUT:

But, once it is de-accessioned and goes back to the tribe, it becomes the tribe's property.[58]

ASHTON HAWKINS:

Yes, the tribe can send it abroad, but a museum cannot. I think we are just pointing out the fact that we already have cultural policy on our books. The legislation dealing with publicly owned Native American art is illustrative. These laws are extremely difficult to enforce. I believe the museums have had considerable problems with these laws. Private collectors are still free to buy and sell. However, they are not motivated to give it to a public institution, because to do so would subject the art to tribal claims.[59]

DAVID KORZENIK:

I think that is an interesting observation; NAGPRA is a species of clawback legislation.[60] I tend to doubt that this is a good idea. I think it just complicates things. It may not even be as effective as some of the other nations' patrimony laws. I am not sure that our proposed legislation, if we ever adopted it, would trigger an

56 25 U.S.C. § 3001 *et. seq.* (2000)

57 *See id.* §§ 3005-3007 (subjecting public institutions and museums, but not private parties, to forfeiture and civil penalties).

58 *See id.* § 3005.

59 *See id.* §§ 3005-3007.

60 *See* Marcia A. Howard, *A Corporate Welfare Reform Agenda*, *at* http://www.afscme.org/pol-leg/corpwel.htm (June 1994) (providing that the term "'clawback' refers to provisions that allow the state to rescind financial assistance if the economic development fails to achieve stated objectives . . . .").

equivalent of the National Stolen Property in other countries. As such, it might have far less utility to us than Mexico's or Peru's equivalent cultural patrimony laws have for them.

MARCI HAMILTON:

To be somewhat lawyerly about it, the legislation is massively overbroad, as it would apply to anything with cultural significance. For example, this would prohibit Disney from exporting its films. The proposed legislation is not salvageable the way it is currently drafted. It is contrary to the spirit of the First Amendment[61] and the Copyright Clause,[62] which are intended to create diversity, movement, quality, and quantity in the marketplace. Thus, it violates certain constitutional norms.

The proposed legislation is also silly. It flies in the face of the globalization of culture. I am surprised that the Internet and the world wide web have not come up once in our discussions about defending or keeping cultural property, and being able to disseminate it worldwide. In any event, there is no way to stop the globalization of culture.

DAVID GRACE:

I agree with the comments stated earlier. The one aspect of this legislation that I think is worth considering further is whether there should be some kind of safe harbor for objects that have come into the United States and have been published or made publicly available for some period of time. In other words, there should be instances whereby a safe harbor would insulate objects from forfeiture or other actions. This portion of the legislation is something that I believe is worth pursuing. If I were testifying, that is an area I would try to hit.

ASHTON HAWKINS:

I think it is fair to say that we all believe in the internationalization of culture. But is it really happening? It strikes me that the legal movement in this country is going in the other direction. I think our discussion this morning points this out. Museum directors currently have to look over their shoulder every time they buy something, or even when they accept something as a gift. So is that

61 *See* U.S. CONST. amend. I.
62 *See* U.S. CONST. art. I, § 8, cl. 8.

the internationalization you are thinking of, or is there something else you have in mind?

MARCI HAMILTON:

I have in mind the creation of the worldwide web by multinational corporations. Territories and national governments are no longer necessarily king. We are controlled, to a large extent, by the lobbyists of these multinational corporations, which are changing the laws in the European Union and the United States. So, that is why I started out by saying that the answer here is talking to Congress. This policy, if implemented, would be rolled over by the internationalization of culture. It is inevitable that we will all be part of one world. The reason I say this is because the G7[63] meets annually for that very purpose; it is the topic of discussions at G7, namely, how to share the world's resources with one another. Therefore, I think it is a political movement that cannot be forestalled.

DAVID RUDENSTINE:

So far, there is no defense of this proposed statute.

EVAN BARR:

I would love to rise to the challenge but I have to agree that the statute, as proposed, is deeply flawed. What is most troubling is the breadth of the clause about origination in the United States. I will say that there are more workable definitions out there. Specifically, Article One of the UNESCO Treaty, which has been adopted in our cultural property act, lists specific categories.[64]

DAVID RUDENSTINE:

Let us assume the statute has a similar list. Now what would you say?

EVAN BARR:

We are already signatories to such a treaty. If an article, such as a sculpture, is stolen in the classical sense, say from the National Garden Museum, and falls within one of those categories and ends up in a country that is a signatory, then the item would be returned

63 The G7 are seven countries including the United States, Great Britain, France, Germany, Japan, Italy, and Canada.
64 *See* UNESCO Convention of 1970, *supra* note 2, at art. 1.

through the mechanism that is already in place. I believe that result to be a good thing. We are already a party to an international framework that allows for this process to work both in having art returned to the United States and in the other direction. Notably, most of these cases involve the United States returning artwork. The statute still has problems. Obviously I am worried about a so-called "Bureau of Culture" determining important issues like this. Therefore, I would not be in favor of something this broad.

JAMES CUNO:

An alternative to this proposed legislation would address the fact that prior to the last fifty years, many of our most important and significant American works of art were made outside the United States. They were made in London, Rome, Paris, or Germany by American artists. Therefore, one would be misguided in proposing to recall works of art simply on the basis of where they were originally made. Cultural patrimony is not dependent on the object having been made in the country for which it is important; for example, take the case of the Statue of Liberty, it was made in France.

ASHTON HAWKINS:

The statute could have the option of either an American-made object, or an object that has been in America that has subsequently become part of the nation's patrimony.

JAMES CUNO:

I was being facetious when I mentioned the Statue of Liberty. But, there are those objects that lie elsewhere, that were not made here, but that were made by Americans elsewhere. It seems this statute is protecting the wrong objects in trying to protect cultural patrimony, because cultural patrimony actually lies elsewhere in many respects.