

## Looking at the Law

# Object Lessons: The Law of Cultural Property

James H. Landman

**Objects in museums tell many stories.** An object may depict scenes from a legend or myth. It may commemorate a historical event or honor an important historical figure. It may be particularly representative of a major phase in an artist's life or give special insights into an ancient civilization and its values and beliefs.

Museum objects tell another story that may not be as apparent to visitors or even fully known to the museum itself. This is the story of an object's provenance. Provenance is the story of where an object came from and who has owned it, from the time the object was created or discovered to the present day.

Major museums in Europe and the United States have histories that can stretch back hundreds of years. The provenance of objects in their collections can tell stories that reflect values, political systems, and sensitivities very different from the world today. Some objects were acquired during the era of Western colonialism; others were seized as part of a military conquest. Some were acquired during archaeological excavations in the early twentieth century under "sharing agreements" that resulted in the removal of prime artifacts from their country of origin to museums and universities in Europe and America. Within the United States, artifacts of Native American tribes were excavated and acquired with little regard to any claims that the tribes might have to the objects.

Many objects in museum collections were not, of course, acquired under such problematic circumstances. And

the collections that have been assembled by institutions that have earned the title of "universal museums"—museums that allow visitors to experience under one roof the finest work of human cultures from around the globe and across time—have become cultural achievements in their own right. Within the United States, examples of universal museums include the Metropolitan Museum of Art in New York, the Art Institute of Chicago, and the J. Paul Getty Museum in Los Angeles. Their collections and resources are held in public trust to benefit the many local, national, and international visitors they host each year. They have become an important part of the cultural heritage of the cities and nations in which they are located.

In recent years, the goals of the universal museum have increasingly come into conflict with the demands of nations, indigenous peoples, and individuals claiming rights to objects in museum collections. This article explores conflicts over cultural property through examination of three recent cases, one involving classical antiquities, the second involving Native American claims to ancient human remains found in the Pacific Northwest, and the third involving the

legal claim of a Holocaust survivor to art confiscated by the Nazis. These cases illustrate the many interests at stake in cultural property disputes. They also raise a number of difficult issues that remain unanswered in the changing law of cultural property. How effectively can the law regulate trafficking in cultural artifacts? What role do, or should, museums play in preserving the heritage of different cultures and nations? When should the private interests of an individual or group outweigh the benefits of public access to great works of art? When do private interests outweigh the value of academic research in science and the humanities? To whom, ultimately, should cultural property and the stories it tells belong?

### The Story of the Euphronios Krater

For centuries, the region surrounding the Mediterranean Sea has been a rich source of antiquities from the ancient civilizations of the Greeks and the Romans. Classical antiquities are eagerly sought after by both private collectors and museums, and an extensive international market exists for the purchase and sale of these objects.

The international market in antiquities was a primary target of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of

Ownership of Cultural Property (the UNESCO Convention). The UNESCO Convention addressed a concern that trade in “cultural property”—tangible objects ranging from botanical collections and archaeological remains, to works of art—was leading to the impoverishment of the cultural heritage of countries from which cultural property was being taken. It allows nations that join the convention to identify objects that “on religious or secular grounds . . . [are] of importance for archaeology, prehistory, history, literature, art or science.” Among the requirements for nations joining the treaty are implementation of “necessary measures . . . to prevent museums and similar institutions within their territories from acquiring cultural property originating in another [nation] which has been illegally exported after entry into force of this Convention.”

In 1983, the United States ratified the UNESCO Convention and, in 1987, passed legislation that implemented the treaty in U.S. law. This legislation, the Convention on Cultural Property Implementation Act, provides that the executive branch can, at the request of another nation, negotiate an agreement with the requesting nation that temporarily bans the import of designated cultural property into the United States. The U.S. Department of State is the agency charged with negotiating and overseeing these agreements. Since 1987, the United States has reached agreements with 13 nations to place bans on cultural property imports. Since 2001, the United States has agreed with Italy to restrict imports of archaeological material originating in Italy that “represents the pre-classical, classical, and imperial Roman periods.”

The agreement with Italy was triggered in part by Italy’s desire to stop illegal excavations at the many archaeological sites—known and unknown—that dot the Italian landscape. Such excavations are of serious concern to archaeologists, who argue that much information about an artifact is lost when it is removed from its original context. But the agreement also reflected a tougher stance by the Italian

government regarding objects that it argues are part of Italy’s cultural heritage. In recent years, Italy has asserted rights—in court and in the media—to important objects in the collections of American museums, including the Museum of Fine Arts in Boston, the J. Paul Getty Museum in Los Angeles, and the Metropolitan Museum of Art in New York.

One of these objects is the Euphronios Krater. A krater is a bowl that was used by the ancient Greeks for mixing water and wine. The Euphronios Krater, which dates from the sixth century B.C.E., is one of the finest examples in existence. It is named after Euphronios, a famous painter of Greek vases, whose signature is on the krater, and was acquired by the Metropolitan Museum of Art from a private antiquities dealer in 1972 at a cost of \$1 million.

The dealer who sold the Euphronios Krater to the Metropolitan Museum, Robert Hecht, Jr., has been put on trial by the Italian government for illegal trafficking in looted antiquities. For years, rumors had circulated that the Euphronios Krater had been illegally removed from an Etruscan tomb in Italy (the Etruscans were an ancient Italian civilization that flourished before the rise of Roman civilization). Evidence gathered in the prosecution of Hecht and other antiquities dealers suggested that the krater might have come from the tomb. But the Metropolitan Museum had taken pains to ensure that, when it acquired and imported the krater in 1972, it had done so legally, with assurances that the provenance of the krater was legitimate.

The timing of the krater’s acquisition presented further difficulties in determining the legitimacy of the competing claims. If the krater was illegally excavated from an Italian archaeological site, this occurred around the time when the UNESCO Convention was being finalized, when few nations had yet ratified the treaty. The krater was acquired in 1972 by a museum in the United States (which did not ratify the UNESCO Convention until 1983, and did not pass implementing legislation

until 1987). The UNESCO Convention clearly marked a significant change in the international law of cultural property, but when exactly did the standards defined by the Convention become an accepted part of international law, and when was that law recognized by the United States? These questions are important for interpreting the treaty’s standards. Article 2, for example, calls upon ratifying nations to help “make the necessary reparations” for cultural property that was illicitly exported, but Article 7 states that a nation requesting return of cultural property should “pay just compensation” to a person who was an innocent purchaser or had valid title to the property. By whose laws, and at what time, should the questions of illicit export or valid title be determined? Is it possible that an object could have been both illicitly exported from one country and acquired with valid title in another if the countries in question ratified the treaty at different times?

American museums face an additional problem when dealing with claims by the Italian government. Italy is one of the world’s richest sources of art—from the classical age, from the Middle Ages, and from the Renaissance. Museums in the United States need to maintain good relations with Italian cultural organizations and museums to ensure loans and exchanges for exhibitions.

Under the leadership of the Metropolitan Museum’s director, Philippe de Montebello, the museum negotiated a groundbreaking agreement in 2006 for return of the Euphronios Krater to Italy. The krater, along with several other disputed antiquities in the Metropolitan’s collection, will be returned to Italy. In return, the Italian government has agreed to provide the Metropolitan with loans of objects from Italian collections “of equivalent beauty and importance” to those that have been returned.

Resolution of the conflict surrounding the Euphronios Krater has not resolved all of the issues surrounding the trade in antiquities. Some argue that the UNESCO Convention has simply had

the effect of driving the trade in antiquities underground, creating a black market where museums seeking to acquire objects for public benefit are excluded but private collectors remain active. Others argue that, while it is perfectly legitimate for nations to claim the finest examples of their cultural heritage, there is also a danger that overly restrictive limits on the export of cultural property will encourage nations to hoard objects that could (and should) be shared more widely with international audiences. Some point to the recent looting of antiquities in Iraq as an example of why the cultural artifacts of ancient civilizations should be dispersed in collections around the globe, rather than concentrated in a single museum or country.

Antiquities from classical civilizations pose another question. Should the modern Italian nation-state, which dates back only about 150 years, have a significantly greater claim to the heritage of ancient Rome or, for that matter, ancient Greece? Few would dispute its right to regulate and maintain oversight of archaeological excavations within its territory. But the artifacts produced by those excavations are the products of civilizations whose influence extended far beyond the national boundaries of modern Italy. Are there limits on how far back claims to cultural heritage should extend? Within the United States, this same question has been recently posed with respect to Native American tribes in the case of Kennewick Man.

### The Story of Kennewick Man

For much of U.S. history, the human remains and artifacts of Native American tribes were excavated and collected with little regard to the tribes' concerns or claims. Much of this material has gone into private collections, but many museums in the United States also have significant collections of Native American artifacts. For decades Native American tribes made efforts to reclaim items of importance to their cultures, with little success.

Beginning in 1979, with passage of the Archaeological Resources Protection



Several hundred ancient artifacts stolen from the Iraqi Museum after the fall of Saddam Hussein have been returned. Among the most important relics is this 4,300-year-old copper Bassetki Statue that shows the lower part of a man with cuneiform inscriptions commemorating the victories achieved by an Akkadian king. (AP Photo/Anja Niedringhaus)

Act, Congress signaled a new sensitivity to Native Americans' claims to their cultural heritage. Then, in 1990, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA). This act required museums across the country to make inventories of human remains and various funerary and sacred objects in their collections and, in most instances, to repatriate (or return) those items to the lineal descendants or Indian tribes most closely related to the Native American whose remains or funerary objects had been identified. Museums could retain items only if they could establish a legitimate right of possession. NAGPRA also defined a category of "cultural patrimony," which includes objects "having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself." These objects are by definition not property owned by individual Native Americans and thus are classified by NAGPRA as "inalienable." Objects of cultural patrimony, in other words, could

never have been legitimately separated from their group or culture and there is no defense against their repatriation.

In July 1996, a group of teenagers on their way to a boat race discovered a human skull and bones near the shore of the Columbia River outside Kennewick, Washington. These remains became known as "Kennewick Man" or, to some Native Americans, "the Ancient One." The remains, estimated to be approximately 9,000 years old, were found on a federal land managed by the U.S. Army Corps of Engineers. Initial analysis of the remains indicated that they dated from before the arrival of Europeans and also had characteristics inconsistent with any American Indian remains that had been discovered in the region. Under the terms of NAGPRA, however, such remains discovered on federal land would be covered by the act if they could be reasonably traced—historically or prehistorically—to a present day Indian tribe.

The Smithsonian Institution's National Museum of Natural History made

arrangements to bring the remains to Washington, D.C., for further study. These arrangements were opposed by a group of Indian tribes from the Columbia River area, who demanded return of the remains for immediate burial. The Army Corps of Engineers sided with the Indian claimants and halted removal of the remains as well as further DNA testing of them. A group of scientists, joined by the Smithsonian Institution, petitioned for further study of the remains, but did not convince the Corps. The scientists then brought suit in federal district court.

In the meantime, the Army Corps of Engineers assigned responsibility for the matter to the U.S. Secretary of the Interior. The Department of the Interior convened a group of experts who examined the remains in detail (using non-destructive means of examination only) and concluded that Kennewick Man could have lived up to 9,000 years ago. The experts also concluded that the remains were unlike those of any known present-day populations, but did not rule out the possibility that there could be an ancestral biological link to modern American Indians. Based on these findings, the Secretary of the Interior ruled that Kennewick Man's remains were "Native American" within the meaning of NAGPRA and were "culturally affiliated" with present-day Indian tribes.

The U.S. district court disagreed with the Secretary of the Interior, siding instead with the plaintiff scientists. In 2004, the U.S. Court of Appeals for the Ninth Circuit upheld the lower court's ruling in *Bonnichsen v. United States*, 367 F.3d 864. NAGPRA, the Ninth Circuit ruled, requires a two-part analysis. First is an inquiry into whether the remains are "Native American" within the meaning of the statute's language. If they are not, NAGPRA does not apply. If they are, the second part of the analysis is determining which persons or tribes are most closely affiliated with the remains.

In its analysis of NAGPRA, the Ninth Circuit found that the statute "unam-

biguously requires that human remains bear some relationship to a presently existing tribe, people, or culture to be considered Native American." This requirement complements the statute's two main goals: respect for the burial traditions of modern-day Indian tribes and protection against the indignity of having ancestral remains displayed on public view. These goals, the court argued, would not be served by a requirement that human remains with no relationship to a modern-day tribe be returned to tribal hands. Study of remains unrelated to modern-day tribes was not precluded by NAGPRA, and "human remains that are 8,340 to 9,200 years old and that bear only incidental genetic resemblance to modern-day American Indians, along with incidental genetic resemblance to other peoples, cannot be said to be the Indians' 'ancestors' within Congress's meaning." By establishing limits on how far back a modern-day tribe's ancestral claims could reach, the Ninth Circuit found within NAGPRA a balance between the statute's goals of protecting the cultural heritage of Native American tribes and the dignity of their ancestral remains, on the one hand, and scientific and historic interest in the origins and early history of North American human populations, on the other. NAGPRA was a necessary corrective to an often unsavory, even brutal, history of disregard for Native American heritage and beliefs. But the Ninth Circuit also recognized that blanket protection of any remains found within the United States would effectively stifle academic study of prehistoric North America and its peoples.

The balance established by the Ninth Circuit does not please everyone. While the case of Kennewick Man was being litigated, the U.S. Army Corps of Engineers buried the discovery site of his remains beneath more than one million pounds of soil and fill, preventing further study of the site. Following the Ninth Circuit's decision, Senator John McCain of Arizona proposed an amendment to NAGPRA that would automatically

qualify any ancient remains as Native American.

The struggle over Kennewick Man and the effort to balance the claims of Native American tribes against those of academic researchers are complicated by our national history of mistreatment and disregard of Native Americans and their cultural heritage. Such a history of disregard similarly informs the story of Portrait of Adele Bloch-Bauer (I) and Nazi-era looted art.

### **The Story of Portrait of Adele Bloch-Bauer (I)**

From 1933, when the Nazi party rose to power in Germany, to 1945, when the Second World War ended, the art of Europe was subjected to an unprecedented campaign of looting by the Nazis. A major source of looted art was the private collections of European Jews who were transported to concentration camps or fled German-occupied territory.

Ferdinand Bloch-Bauer was a sugar magnate who lived in Vienna, Austria. His wife, Adele Bloch-Bauer, was a patron of the arts whose portrait was painted twice by the famous Austrian painter, Gustav Klimt. Adele Bloch-Bauer died at an early age and requested that her husband, upon his death, donate her two portraits and several other Klimt paintings to the Austrian Gallery. In 1938, the Germans invaded and annexed Austria in what became known as the Anschluss. Ferdinand Bloch-Bauer fled to Zurich, Switzerland, leaving his art collection behind in Vienna. The collection, along with the Bloch-Bauer's Viennese mansion, was confiscated by the Nazis. Ferdinand died in Zurich in 1945.

Six of the Bloch-Bauer's Klimt paintings passed into the possession of a Nazi lawyer, who sold several to the Austrian Gallery and the Museum of the City of Vienna from 1941 to 1943. After the war, the Austrian government passed a law declaring transactions motivated by Nazi ideology null and void. Another provision of Austrian law, however, provided that artworks considered important to Austria's cultural heritage could not be exported, and that anyone wishing to

## WEB RESOURCES

### *ABA Students in Action*

[www.abanet.org/publiced/youth/sia/main.html](http://www.abanet.org/publiced/youth/sia/main.html)

This section of the ABA Division for Public Education website includes the feature "Making Your Voice Heard," about the conventions of the tried-and-true political advocacy technique of letter writing.

### *American Association of Museums*

[www.aam-us.org](http://www.aam-us.org)

This site posts such items as news about cultural property disputes, articles from its magazine (*Museum News*) on topics such as looting of Iraq's antiquities, a section on Nazi-era provenance, and guidelines for collections management.

### *International Cultural Property Protection, U.S. State Department exchanges.state.gov/culprop/index.html*

Includes information about U.S. Customs import restrictions on cultural property, pages for each country with which the United States has agreements, pending requests, links to applicable U.S. and international laws, including UNESCO Conventions, and the UNESCO Tangible and Intangible Heritage pages.

### *National NAGPRA*

[www.cr.nps.gov/nagpra/INDEX.HTM](http://www.cr.nps.gov/nagpra/INDEX.HTM)  
Maintained by the U.S. Department of the Interior, this extensive site devoted solely to NAGPRA includes information about the law for tribes, museums, and the public, and includes several databases, such as a database of inventory completion.

### *Nazi Era Provenance Internet Portal Project*

[www.nepip.org](http://www.nepip.org)

This Internet portal provides a searchable registry of objects in U.S. museum collections that changed hands in continental Europe during the Nazi era (1933–1945).



A visitor at the Los Angeles County Museum of Art views a painting titled "Adele Bloch-Bauer (I)," on April 4, 2006, one of several paintings by Gustav Klimt seized by the Nazis in 1938. (AP Photo/Ric Francis)

export art had to obtain a certificate from the Austrian government. It is alleged that the government and Austrian Gallery representatives used these requirements to force donations or trades of valuable art to the Gallery in exchange for export permissions. In 1948, a lawyer working for one of the Bloch-Bauer heirs signed a document acknowledging that the Klimt paintings in the Austrian Gallery had been donated in accordance with Adele Bloch-Bauer's wishes. The Austrian government permitted the export of other art from Ferdinand Bloch-Bauer's collection.

Fifty years later, in 1998, a journalist examining the Gallery's records found evidence that neither Adele nor Ferdinand Bloch-Bauer had donated the Klimt paintings to the Gallery, and that Klimt's first portrait of Adele had been passed to the Gallery in 1941 by the Nazi lawyer with a letter signed "Heil Hitler."<sup>1</sup>

Based on this information, Maria Altmann, the niece and sole surviving heir of Ferdinand Bloch-Bauer, brought suit against the Austrian government in U.S. district court (Altmann had fled to the

United States after the German invasion of Austria and became a U.S. citizen in 1945). The Austrian government argued that in 1948, by which time most of the alleged wrongdoing had occurred, it would have enjoyed absolute sovereign immunity under U.S. law as a foreign state. The case was appealed up to the U.S. Supreme Court, which ruled in favor of Altmann, allowing her suit against Austria to proceed. Austria then agreed to enter binding arbitration in Austria to determine the fate of the paintings. In 2006, upon the decision of the arbitrators in favor of Altmann, the Austrian Gallery agreed to return five Klimt paintings. Later that year, Altmann sold Portrait of Adele Bloch-Bauer (I) to the Neue Galerie Museum for German and Austrian Art, based in New York, for a record-breaking reported price of \$135 million.

Maria Altmann's case was ultimately successful, but only after eight years of litigation and arbitration in both United States and Austrian courts. Thousands of other works of art looted during the Second World War and Holocaust

# Is China's Cultural Heritage in Jeopardy?

Michelle Parrini

## TEACHING ACTIVITY

As mentioned in the article, under the Convention on Cultural Property Act, other nations can request that the United States impose import restrictions on specific cultural property. A requesting nation must show that pillaging of the cultural property is jeopardizing the nation's cultural heritage. In making its decision, the executive branch considers the recommendation of a Cultural Property Advisory Committee, established under the Act. The committee is composed of 11 private citizens appointed by the president who have expertise in archaeology, anthropology, and the international sale of cultural property, and represent the public and private sector, local and regional institutions, including museums, and the public. As of March 2007, a request for an import ban from China is pending. In its request, the Chinese government has asked the United States to ban imports of any Chinese artifact made before 1912. During this activity, students will research and evaluate China's request and write a letter to the Cultural Property Advisory Committee supporting or opposing China's request.

Begin by reviewing examples of advocacy letters with students to identify their general characteristics. Examples can be found on the website of the Lawyers' Committee for Cultural Heritage Preservation. (See the "Current Issues," section at [www.culturalheritagelaw.org](http://www.culturalheritagelaw.org).) You will find a letter about China's request; however, you will want students to come to their own conclusions, so choose from among the other letters available on the site. Note in your review of examples that these advocacy letters adhere to formal letter-writing conventions; demonstrate knowledge of applicable laws and existing conditions relevant to the actions being requested in the letters; and present facts to support the positions being advocated by the letter writers.

Have students individually research China's request. One place to begin is the "Public Summary" on the U.S. Department of State's International Cultural Property website. (See the "What's New" section at [exchanges.state.gov/culprop/index.html](http://exchanges.state.gov/culprop/index.html).) Assign students to find a minimum of two additional credible sources from which they can collect facts to inform their decision making about their positions. Students should complete their research, reflect on it, and only then take a position on China's request. You will want students to take informed positions.

If students support China's request, their letters should present arguments and provide evidence demonstrating that the following conditions exist; if they oppose China's request, their letters should argue and provide evidence that the following conditions do not exist:

- Pillaging of the cultural property specified in China's request jeopardizes China's cultural heritage.
- China has already taken other measures to try to protect the specified cultural property; they have not adequately deterred pillage.
- The proposed import restrictions would substantially deter pillage, and new, less restrictive remedies would be insufficient.
- China's request is "consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes." (Public Law 97-466, Sec. 303 (a) (1)).

After students complete their letters, assign small groups of three students to read and discuss their letters. Make sure different positions are represented within the groups. Ask students to note similarities and differences in the arguments made in their letters.

As a whole group activity, discuss similarities and differences in student arguments within small groups, noting and capturing them on the board. Give students a few minutes to reflect individually on their original positions. Discuss the extent to which student positions may have changed after reading classmates' letters, discussing arguments in small groups, or, discussing arguments as a whole class.

Conclude by asking students if they believe well-crafted advocacy letters can influence policy decisions. Do they believe that individuals making policy decisions in isolation make different decisions than people who come together collectively to consider policy options as a group or "committee"? Why? Or, why not? 🗣️


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presumably remain in private collections and museums around the world. Within the United States, the American Association of Museums and Association of Art Museum Directors have called upon the museum community to research items in their collections that changed hands in Europe between the years of 1933 and 1945. To date, 155 museums have identified more than 25,000 such items in their collection, and have posted information about these items on the Nazi-Era Provenance Internet Portal ([www.nepip.org](http://www.nepip.org)).

The story of the Portrait of Adele Bloch-Bauer (I) illustrates another dimension of the cultural property debate. Following her sale of the Portrait to the Neue Galerie, Altmann put the remaining four paintings up for auction at Christie's, a prominent art auction house, in the fall of 2006. This April, another collection of Nazi-seized art, recently returned to the heirs of a Dutch dealer who had to flee Amsterdam in 1940, will also be auctioned at Christie's, with sale estimates ranging from \$25 million to \$35 million. Most of the paintings to be sold in the April sale had, like the Klimt paintings in the Austrian Gallery, been displayed in public museums.

Some critics have argued that heirs who recover Holocaust art that had been on public display should donate the art to museums or at least sell it to museums at reduced prices so it can remain accessible to the public. But cultural property is often private property as well. Much privately owned art will eventually find its way to museums; the Association of Art Museum Directors estimates that more than 90 percent of the art in America's public museums was donated by private collectors. In the case of art looted by the Nazis, however, the choice of if, or when, to donate art was denied to its rightful owners, often for decades. Should the heirs of Holocaust victims be asked to make choices that other private collectors are not asked to make?

The outcomes of the three cases discussed in this article suggest that resolution of cultural property disputes need

not be "winner takes all." A museum's return of one object may facilitate loans of other objects; a painting that is returned by a museum to its rightful owner may soon find its way back to public view. But the stakes that surround cultural property are high, and include more than the monetary stakes at issue when a masterpiece is the subject of dispute. Objects can inspire intense personal emotions, speak of lost civilizations and histories, and inspire strong feelings of national pride. As the law of cultural property changes to better (or differently) reflect the interests of the many parties whose interests may be involved, courts in both the United States and abroad can anticipate more high-profile disputes. And museums, which are often at the center of these disputes, will be paying close attention to the stories of provenance told by the objects in their collections. 

#### Note

1. The story of how the Klimt paintings arrived at the Austrian Gallery is described in the summary of facts in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

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*The views expressed in this article are those of the author and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.*



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