Comment on "Irreconcilable Differences?"

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The possibility that antiquities may be stolen or that there may be questions about their "provenance" naturally affects the marketability of such items. Therefore, as Kathy Tubb points out in her article, conservators must be on the look-out for looted or suspiciously unprovenanced objects, i.e. where the absence of provenance cannot be explained, since conserving these objects may make them more marketable and help to 'white wash' them of their suspect origins. As a result, conservators must understand the legal issues surrounding the theft, smuggling, and looting of cultural property, particularly to ascertain whether there is a question as to good title. This understanding must, however, be bolstered by clear guidelines for the profession which delineate the legal and ethical duties of conservators when they are faced with the possibility of conserving or restoring looted or unprovenanced objects.

There are essentially two different kinds of stolen cultural property. The first are objects that are clearly identifiable as having been taken from a documented or catalogued public or private collection. In such cases, it is often relatively easy to trace the ownership or ascertain whether they have been stolen. The theft of an object from a documented collection (either public or private) will likely have been reported. The Art Loss Register (ALR) maintains a large database of items that have been reported as stolen. Checking objects against the database may instantly reveal that they were stolen and, consequently, that the current possessor is not the true owner.

The second type of stolen cultural property - objects that have been pillaged from unexcavated archaeological or sacred sites and thus removed from the country of origin before archaeologists or museum officials have viewed, inventoried, or documented them - poses greater problems. As Ms. Tubb points out, a great number of dealers and collectors take the 'don't ask, don't tell' approach to buying antiquities and other cultural objects; therefore, it is this second type of object that conservators are most likely to come across.

The American Institute for Conservation (AIC) and the European Confederation of Conservator-Restorers' Organizations (ECCO) both have codes of ethics and guidelines for practice that they have adopted in order to guide conservators in the ethical practice of their profession. While the AIC Code of Ethics and Guidelines For Practice state that "the conservation professional should be cognizant of laws and regulations that may have a bearing on professional activity" (AIC 2007, Article III) the ECCO code goes a bit further, stating that "the Conservator-Restorer should never support the illicit trade in cultural heritage and must work actively to oppose it" and "where legal

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ownership is in doubt, the Conservator-Restorer must check all available sources of information before any work is undertaken." (ECCO 2007, Article 19).

While these guidelines are a good start, neither truly educates conservators as to their duties and obligations when faced with the possibility of conserving or restoring looted or unprovenanced objects. Therefore, it is imperative that conservators' organizations, like the AIC and the ECCO, adopt more specific guidelines that truly guide conservators and make them aware of their legal duties and responsibilities. These guidelines should incorporate fundamental concepts of due diligence including, as Professor Patty Gerstenblith explained in other contexts, "demanding documentation from the owner of the object, independent research into the background of the object and previous publications, and checking with the computerized databases that now compile records of stolen works of art" (Gestenblith 2003: 460-461). In addition, particular scrutiny should be given to "objects that come from areas known to have been the victim of war and civil unrest" (Gestenblith 2003: 461). The guidelines adopted by The American Association of Appraisers (AAA) are also instructive. The AAA gives its members very specific instructions about what to do if faced with a possibly looted, stolen or unprovenanced object (AAA 1987). Members are required to make a "reasonable inquiry" and forego an engagement if it is "readily apparent" that the item(s) to be appraised may have been improperly acquired. Members are further admonished to contact the "appropriate authorities" if they have "clear and convincing evidence" that they may be dealing with stolen property.

This type of approach is somewhat different from that proposed by Ms. Tubb or conservator Catherine Sease in her many scholarly papers on this topic. While they propose an outright ban on conserving or restoring unprovenanced objects, I believe that a more balanced approach is called for. The fact that an object is unprovenanced does not automatically mean that the object is looted or stolen. There may be a valid explanation for the lack of provenance. Moreover, given the varying national patrimony laws in place in art rich countries, the fact that an object was surreptitiously dug out of the ground does not in and of itself mean that the country it was removed from has ownership rights to the piece. Therefore, to institute a blanket ban against conserving unprovenanced items seems overly protective. Although many if not most unprovenanced objects have looted origins, a "reasonable inquiry" into the object's provenance should be sufficient to allow the conservator to determine if they should work on the object in question or not. Conservators should therefore do their homework about the object they are considering working on, and if they have any doubts about the object or if it is "readily apparent" that the object was looted or stolen, they should not conserve the piece and should promptly call the authorities.

There are effectively two different questions that follow from these industry standards. One is whether the object might be stolen or of "doubtful provenance"; the other is what constitutes "sufficient diligence" or making a "reasonable inquiry" into an object's provenance. The two questions are inextricably intertwined. Within the context of cultural property, however, the first question appears deceptively simple, so a detailed examination of it is required.

Pieces of cultural property may be – and often are – stolen in the same manner as any other object might be. At the same time, they are also unique objects with long, often complicated histories that are imbued with a cultural significance that other, more mundane objects lack. Many countries have consequently given cultural property distinctive legal protections and objects are sometimes counted as stolen in circumstances that those unfamiliar with the law and practice in this area might find unexpected. Sometimes pieces of cultural property may be stolen if they were merely taken out of the country of origin after having been discovered there – even if they were dug up out of the ground on private property.

As a New York lawyer, I will frame this discussion within the context of US law. The courts in the United States have long held that claims for the recovery of artworks or antiquities arising under national laws that vest ownership of previously undiscovered antiquities in the State – so-called patrimony laws – will be honoured, just as private ownership rights are (United States of America v. Patty McClain, et. al., 545 F.2d 988 (5th Cir. 1977). A basic tenet of international law is that recognition should be given to a sovereign nation's laws governing interests in property found within its territory. Hence, once a government decrees that it owns all cultural property found in or under the ground, then that government is the owner and its ownership rights will be given the same protection in American courts as the private owner of any other property. This is true even though, for the most part, private property rights in the United States dictate the opposite result and anything found in or under privately owned real estate belongs to the owner of the real estate, not the government.

On the other hand, even if an object were illegally excavated, the original owner may not have a claim to it because of legal technicalities. I am not suggesting that conservators hire lawyers every time they come across an object that is unprovenanced or that they suspect may be stolen. Nevertheless, for the conservator, the principles of law discussed above must form the foundation of any inquiry into the question of whether a piece of cultural property is stolen. The challenge is to determine how these principles interact with a conservator's responsibility to the client and to the object in question, which may be in a profound, even critical state of disrepair. I understand that this pragmatic approach may be in direct contradiction to the training conservators receive which stresses the preservation of cultural objects as a means of conserving cultural heritage, but if future objects are to be protected from looting, conservators have to take a hard look at what they are conserving and face the fact that they may have to refuse to conserve certain objects for the greater good of the profession.

Is the conservator really in a position to evaluate provenance? Lack of provenance raises other concerns. This dilemma is illustrated by the recent US case, *U.S. v. Schultz* (178 F. Supp 2d 445 (SDNY 2002). Schultz and his co-conspirators were accused of implementing a scheme to smuggle antiquities out of Egypt to England and then on to the US. In England, the objects were then restored and provided with high-quality forged documents and labels suggesting they were from a private English collection dating to the 1920s. The circumstances under which the pieces were offered for sale

illustrate the difficulties that conservators might face when working with cultural property. A "sufficiently diligent" inquiry into the provenance of the pieces sold would likely have yielded no incriminating information. A conservator could very well have asked the right questions and proceeded according to a stringent interpretation of the rules, and nonetheless gone on to restore or conserve the looted objects.

On the other hand, the rarity or condition of a piece of cultural property may, by itself, make it "readily apparent" that it was stolen. For example, a conservator who is asked to work on a life size statue of the Greek God Apollo that has fresh dirt on it should be alerted to a possible problem. Similarly, in one recent case I was involved in, the mere fact that thirteen exceedingly rare coins (with no provenance) had come on the market when only a similar number has been discovered through history, suggested a recent and likely illegal excavation.

Conserving and restoring artworks is always a difficult task, but additional problems are introduced by the rampant, illicit trade in cultural property and antiquities and the complexity of the laws surrounding these objects. The answer, however, is not a blanket refusal to work on any object that has no apparent provenance. Rather, conservators' organizations must implement detailed guidelines that provide an ethical and legal framework to inform conservators of both their ethical obligations and their legal duties when faced with the possibility of conserving or restoring looted or unprovenanced objects. In some cases, making that determination may be a simple task, but that will not always be true. The *Schultz* case is a prime example of a situation in which a "sufficiently diligent" investigation might not turn up all the relevant information, but with a reasoned approach there is a greater chance that illicit material will not be conserved and that objects that are not tainted will receive the care they deserve.

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