
Volume 49 | Issue 1

2017

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Recommended Citation

Margaret M. Miles, *War and Passion: Who Keeps the Art?*, 49 Case W. Res. J. Int'l L. 5 (2017)

Available at: <http://scholarlycommons.law.case.edu/jil/vol49/iss1/4>

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WAR AND PASSION: WHO KEEPS THE ART?

*Margaret M. Miles**

The summer of 2016 saw significant new legislation passed or proposed that affects restitution and repatriation, and sets new limits on the antiquities market. On July 8, the Bundesrat in Germany ratified new, wide-ranging legislation on the sale of art that (among various provisions) limits the sale of antiquities by requiring export licenses from the country of origin, and a 20-year history of provenance.¹ In the U.S., on June 7, the Senate Judiciary Committee considered bipartisan legislation that would set a federal statute of limitation on restitution claims over Nazi-looted works of art.² The impact of these new German and American laws, passed and proposed, is under debate, but both are remarkable for extending controls on ownership of art well beyond existing legislation in each country, resulting in a greater ethical awareness.

Here, I would like to recall how and where ideas about repatriation, restitution, and proper ownership of art got started, a subject I have explored in detail elsewhere.³ The long experience of Classical antiquity in dealing with ownership of art, and ancient reaction and reflection about ownership, remain potent and applicable today, and deserve continuing discussion. What is striking about the history of these issues is how little the questions and arguments have changed: should all

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1 Catherine Hickley, *German Parliament passes controversial law to protect cultural heritage*, ART NEWSPAPER (Jul. 8, 2016), <http://theartnewspaper.com/news/german-parliament-passes-controversial-law-to-protect-culture/> [<http://perma.cc/KJB6-TQRZ>].

2. *S. 2763 (114th): Holocaust Expropriated Art Recovery Act of 2016*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s2763> [<http://perma.cc/JNF5-2EVS>] (last visited Jan. 17, 2017); See also CHARLES GRASSLEY, HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016, S. DOC. NO. 114-394 (detailing the content of the Senate Report).

3. MARGARET M. MILES, ART AS PLUNDER (2008); Margaret M. Miles, *Still in the Aftermath of Waterloo: A Brief History of Decisions about Restitution*, in CULTURAL HERITAGE, ETHICS, AND THE MILITARY 29, 29-42 (Peter G. Stone ed., 2011); Margaret M. Miles, *Greek and Roman Art and the Debate about Cultural Property*, in OXFORD HANDBOOK OF GREEK AND ROMAN ART AND ARCHITECTURE 499, 499-516 (Clemente Marconi ed., 2014).

spoils of war go to the victor? Does art have a national or religious identity that should keep it in one place? Are there circumstances in which the victors in war would find their own advantage in allowing the defeated to keep their art? In more recent years we must also ask, does art have global (or “cosmopolitan”) significance that should transcend local claims? Is there a right to destruction of privately or publicly owned artistic property?⁴ How does the sale and purchase of art encourage looting of antiquities? Illicit acquisition of antiquities, by war or commerce, is an urgent, ongoing problem, on every continent, that contributes to forgery, fraud and most importantly, loss of historical context.⁵ Archaeological sites are not renewable resources.

Ethical concerns about taking what belongs to someone else begins with what happened to humans in warfare: in the Mediterranean, Egypt, and ancient Near East, human captives were typically either killed, sold into slavery, or ransomed. Ancient accounts single out for special comment instances when a conqueror exhibited magnanimity—noble generosity and loftiness of spirit—when dealing with captive opponents. Cyrus the Great of Persia, active in the mid-sixth century BCE, is remembered in the Hebrew Bible for allowing the return of captive Jews, brought to Babylon by Nebuchadnezzar II, back to Jerusalem, and he even sent along 5,400 gold and silver vessels from the original Temple.⁶

Two centuries later, history remembers Alexander the Great for his humane treatment of the family of the defeated Darius III of Persia, particularly Darius’s mother Sisygambis.⁷ Darius had fled the

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4. *See generally*, JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES (1999).
 5. *See* MAXWELL L. ANDERSON, ANTIQUITIES: WHAT EVERYONE NEEDS TO KNOW xx (2017) (describing how the destruction of art erases heritage and history); *see also* COLIN RENFREW, LOOT, LEGITIMACY AND OWNERSHIP: THE ETHICAL CRISIS IN ARCHAEOLOGY 9 (2000) (describing how the illicit acquisition of antiquities destroys critical information about the past); *see also* Christopher Chippindale & David Gill, *Material Consequences of Contemporary Classical Collecting*, 104 AM. J. OF ARCHAEOLOGY 463, 464–65 (2000) (describing the exploration of the moral and legal status of cultural property); *see also* Neil Brodie, Jennifer Doole, and Colin Renfrew, eds., *Trade in Illicit Antiquities: The Destruction of the World’s Archaeological Heritage*, Cambridge, 2001 (presenting case studies in illegal excavations and the illicit antiquities trade).
 6. *See* 2 Kings 25:8–13 (describing the invasion and destruction of Jerusalem by Nebuchadnezzar II); *see also* Ezra 1:2–11 (describing Cuyrus’s decision to return to Jerusalem along with the inventory which contained gold and silver); *see also* Ezra 5:13-14 (detailing the return of gold and silver to Jerusalem).
 7. ALEXANDER THE GREAT: A NEW HISTORY 303 (Waldemar Heckel & Lawrence A. Tritle, eds., 2009).

battlefield at Issus, abandoning his family there, but Alexander addressed Sisygambis as “mother” and treated her well.⁸ The personal magnanimity of a conqueror was best illustrated by his humane treatment of captives, not only because of the implicit renunciation of revenge, but also because the human captives were the most valuable part of the booty, both materially, if they were to be sold or ransomed, and psychologically, if defeated opponents were to be exhibited to the public.⁹ Examples in antiquity of magnanimity toward a defeated enemy are rare. Augustus had hoped to show to the people of Rome the defeated Cleopatra in his Triumphal procession after the battle of Actium in 31 BCE, but she forestalled this by committing suicide, and he had to be content with exhibiting her waxen image instead.¹⁰

Taking defeated peoples’ property, as well as the people themselves, was the norm in antiquity, and the norm until quite recently. In an essay on the education of Cyrus the Great, Xenophon has him exhort his men before battle with the following assertion:

[T]he law among all people is eternal, that when a city is captured by enemies, both the bodies of those in the city and their goods belong to those who capture it. Therefore it is not by injustice that you will acquire whatever you may get, but it will be out of humanity [*philanthropeia*] that you do not take something away, if you allow them to keep anything.¹¹

Ancient authors discuss the stupendous amount of gold, silver and artistic items Alexander’s army eventually captured at Persepolis, stored there since the time of Cyrus, but then released into circulation.¹²

Alexander is said to have repatriated to Athens cherished, iconic statuary that Xerxes’s army had plundered during the Persian invasions of Greece in 480/479 BCE.¹³ The statues were a pair, probably marble, representing the Tyrannicides Harmodios and Aristogeiton, the men who killed the Peisistratid tyrant Hipparchos, thus making way

8. *Id.*

9. See PETER TEMIN, *THE ROMAN MARKET ECONOMY* 135 (2013) (describing the economic value of slaves taken as booty).

10. See, e.g., CASSIUS DIO, *ROMAN HISTORY*, LI: 21, available at http://penelope.uchicago.edu/Thayer/e/roman/texts/cassius_dio/51*.html [https://perma.cc/L5KY-KXS2] (last visited Apr. 1, 2017).

11. CYROPAEDIA 7.5.73, PERSEUS DIGITAL LIBRARY, <http://data.perseus.org/citations/urn:cts:greekLit:tlg0032.tlg007.perseus-eng1:7.5.73> [http://perma.cc/GM7C-2EPJ] (last visited Feb. 12, 2017).

12. See FRANK L. HOLT, *THE TREASURES OF ALEXANDER THE GREAT: HOW ONE MAN’S WEALTH SHAPED THE WORLD*, 85 (2016) (exploring the economic impact of Alexander’s looting and transfers of spoils).

13. CAROL C. MATTUSCH, *GREEK BRONZE STATUARY: FROM THE BEGINNINGS THROUGH THE FIFTH CENTURY B.C.* 88 (1988).

for the establishment of Athenian democracy.¹⁴ They were so significant to the Athenians that they had a substitute pair made soon after Xerxes plundered the first pair.¹⁵

From the beginning of ancient discussions about what we call cultural property, or “art” as a sort of shorthand, comes the ancient assumption that much, if not all of what was highly valued in antiquity, and typically looted in wars, was originally created, dedicated or used within a religious context.¹⁶ This is generally true of cultural artistic production until the early modern period, although “art” even in a religious context could also convey political values, including symbolic value as a trophy.¹⁷ The humane idea that something religious should be kept and used by those for whom it is a significantly religious item is ultimately based on ancient Greek understanding of what constitutes “art.”¹⁸ What is valued today in museums and on the antiquities market includes the much broader category of “artifacts,” such as pottery, coins, weapons, or any relic of everyday ancient life, usually intended to be portable unless offered in a sanctuary or tomb.

After Alexander’s death, his competing successors laid claim to what became an array of kingdoms, which were small relative to his enormous empire. Alexander and his Macedonian father before him had already pioneered the use of “art,” including religious dedications, to proclaim achievements, and to demonstrate social superiority in palaces.¹⁹ The Classical Greek social norm that surplus income (both personal and communal) should go to the gods in the form of public temples and dedications had shifted to a greater emphasis on private consumption and display.²⁰ The competing would-be princes and kings,

14. *Id.*

15. See PAUSANIAS, DESCRIPTION OF GREECE 1.8.5, PERSEUS DIGITAL LIBRARY, <http://data.perseus.org/citations/urn:cts:greekLit:tlg0525.tlg001.perseus-eng1:1.8.5> [<http://perma.cc/J3K5-3T7D>] (last visited Feb. 12, 2017) (describing how the statues were restored to Athens).

16. Marden Nichols, *Contexts for the Display of Statues in Classical Antiquity*, METROPOLITAN MUSEUM OF ART (Oct. 2003), http://www.metmuseum.org/toah/hd/disp/hd_disp.htm [<http://perma.cc/TWK7-EB7P>].

17. *Id.*

18. *Id.*

19. Colette Hemingway & Sean Hemingway, *The Art of Classical Greece (ca. 480–323 B.C.)*, METROPOLITAN MUSEUM OF ART (Jan. 2008), http://www.metmuseum.org/toah/hd/tacg/hd_tacg.htm [<http://perma.cc/UN98-TTA8>].

20. Colette Hemingway & Sean Hemingway, *Art of the Hellenistic Age and the Hellenistic Tradition*, METROPOLITAN MUSEUM OF ART (Apr. 2007),

now elevated from generalship into rulers, who saw the potential of art and architecture to communicate their ambitions, modeled this new social pattern.²¹

This is how “collecting” in the modern sense began in the Western world, with Hellenistic royalty competing with each other to buy up antiques and books, and to commission the best artists and architects for ever-more impressive new art. It was an age of tremendous production of art and architecture, fueled by the vast sums of gold and silver released into circulation through war, and new mining operations in Thrace.²² Besides the shift to private uses of art, the Hellenistic monarchs also encouraged and sponsored scholarship and research, on everything including art, which now became a topic for historical discussion, and inspired literary production and notions of connoisseurship.²³

Two turning points for the fate of “art” in war took place in 146 BCE: the Romans sacked and thoroughly destroyed Corinth and Carthage, both of them ancient and wealthy cities.²⁴ Lucius Mummius, sacker of Corinth, kept nothing for himself, but re-dedicated statuary and other plunder in cities in Greece that had supported Roman policy, and in towns in Italy where he wanted to make a splash with friends and relatives: some 17 inscriptions have been found so far that commemorate his recycled dedications.²⁵ Even more interesting is how Scipio Aemilianus handled the politically fraught issue of war booty after the destruction of Carthage. He too kept nothing for himself, and forbade his household even to purchase any booty. He gave away Punic libraries to local chieftains, and purportedly released the captured young nephew of an opponent, and sent him home.²⁶ Among the mass of booty were many works of art that Carthaginians had plundered

http://www.metmuseum.org/toah/hd/haht/hd_haht.htm
[<http://perma.cc/U6T4-KSD9>].

21. *Id.*

22. *Id.*

23. Margaret M. Miles, *Collecting the Past, Creating the Future: Art Displays in the Hellenistic Mediterranean*, in MUSEUM ARCHETYPES AND COLLECTING IN THE ANCIENT WORLD 42 (Maia Gahtan & Donatella Pegazzano eds., 2014).

24. Ben Kiernan, *The First Genocide: Carthage 146 BC*, 203 *DIOGENES* 27, 33 (2004), available at http://gsp.yale.edu/sites/default/files/first_genocide.pdf [<http://perma.cc/C9US-ASXS>].

25. STEVEN RUTLEDGE, ANCIENT ROME AS A MUSEUM: POWER, IDENTITY, AND THE CULTURE OF COLLECTING 42 (2012).

26. Joshua J. Mark, *Carthage*, ANCIENT HISTORY ENCYCLOPEDIA (2011).

from cities and sanctuaries in Greek Sicily.²⁷ Scipio arranged for these to be returned to their original locations, and set up inscriptions commemorating their re-dedication, of which three are preserved.²⁸ This is the first historical example of repatriation of art on a large scale. Such wartime repatriation did not occur again until Arthur Wellesley, the Duke of Wellington, commanded it after Waterloo.²⁹

Scipio Aemilianus's actions in war—his weeping at the fall of Carthage and his daring to imagine the future fall of Rome—as well as an analysis of Roman behavior surrounding war booty were all recorded by his contemporary and friend, the historian Polybius.³⁰ As a Greek held hostage by Rome, Polybius had an outsider's view of Romans, but a view tempered by some admiration for what he saw accomplished by Roman rule.³¹ He disapproved of Roman avidity for war booty, and pointed out its disadvantages, primarily that plundering defeated people and makes it harder to rule them, since they will mourn and resent the loss of their own art, hallowed by time and revered by local tradition.³² He advocated restraint and adherence to the “laws of war,” an early articulation of that concept.³³ It is Polybius who first articulates the idea that art has a location in which it is best seen and appreciated, to which it belongs.³⁴

Cicero took up and expanded Polybius's commentary on Roman behavior in war in a different context two generations later. Still near the beginning of his career as a lawyer and politician, Cicero agreed to prosecute an unusual and notorious extortion case, brought by Sicilians against Gaius Verres, who served as the Roman governor of Sicily from 73–70 BCE.³⁵ This was two years longer than the usual one-year term because ongoing problems with pirates and the slave uprising led by

27. Miles, *Still in the Aftermath of Waterloo*, *supra* note 3, at 31.

28. *Id.*

29. Katharine Eustace, *Fruits of War: How Napoleon's Looted Art Found its Way Home*, ART NEWSPAPER (2015), available at <http://theartnewspaper.com/features/the-fruits-of-war-how-napoleon-s-looted-art-found-its-way-home/> [<https://perma.cc/3W84-CYD6>].

30. POLYBIUS, THE HISTORIES OF POLYBIUS, BOOK X, available at http://penelope.uchicago.edu/Thayer/e/roman/texts/polybius/10*.html [<https://perma.cc/3S8J-MC6M>] (last visited Apr. 17, 2017).

31. BRIAN CAMPBELL, THE ROMANS AND THEIR WORLD: A SHORT INTRODUCTION 20–21 (2011).

32. MILES, ART AS PLUNDER, *supra* note 3, at 82–5.

33. *Id.* at 85.

34. *Id.* at 326.

35. Douglas O. Linder, *The Trial of Gaius Verres: An Account* (2017), <http://www.famous-trials.com/gaius-verres/57-home> [<https://perma.cc/XNZ9-H5DG>].

Spartacus had kept his potential successors in office busy.³⁶ Verres had bragged openly that the first year's profit was for himself; the second for his advocates; the third and richest year's profit for his judges and jurors.³⁷ Cicero made this case relevant and urgent to the immediate audience in the Roman Forum by focusing on Verres' theft, plundering and looting of art of all kinds including cult statues, held publicly and privately.³⁸

The speeches provide considerable insight into how Romans viewed Greek art, how they appreciated it and what it meant to them, and to its Greek owners. Cicero used the fundamentally religious purpose behind the creation of artistic objects as the basis for his assertion that by profaning its purpose, Verres was guilty of impiety, and because he acted on behalf of Rome, that impiety extended to the whole Roman people (and if he were not found guilty and punished, the whole of the Roman people would suffer).³⁹ These actions were taken by a Roman governor in time of peace, not war, but in fact Verres took even dedicated items in temples left in place by the Roman general Marcellus, who had sacked Syracuse more than a hundred years earlier, for his own private use.⁴⁰ Cicero also argued that works of art may have a specific location, a context in which they belong, and that statuary from temples should not be used privately. He anticipated Verres's defensive claim that items were "purchased" (at absurdly low prices) with the firm assertion that the integrity of a local culture should not be torn apart by a superior force, either by commerce, or the authority of the Roman Empire.⁴¹ These arguments worked: Cicero was able to provide extraordinary detail and many boxes of documentation to back up his assertions, and he marshaled an array of arguments based on

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36. THERESA URBANICZYK, *SLAVE REVOLTS IN ANTIQUITY* 65 (2008).
37. CICERO, IN VERREM, 1.1.40, PERSEUS DIGITAL LIBRARY, <http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=PerseusLatinTexts&getid=1&query=Cic.%20Ver.%201.1.40> [https://perma.cc/6US8-U9NV] (last visited Apr. 17, 2017).
38. Linder, *Trial of Gaius Verres*, *supra* note 35.
39. CICERO, IN VERREM, 2.4, PERSEUS DIGITAL LIBRARY, <http://www.perseus.tufts.edu/hopper/text?doc=Cic.%20Ver.%202.4> [https://perma.cc/258J-ECVL] (last visited Apr. 17, 2017).
40. CICERO, IN VERREM, 2.1.11, PERSEUS DIGITAL LIBRARY, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.02.0018:text=Ver.:actio=2:book=1:section=11&highlight=marcellus> [https://perma.cc/2WUQ-U9QJ] (last visited Apr. 17, 2017).
41. CICERO, IN VERREM, 1.1.14–1.1.16, PERSEUS DIGITAL LIBRARY, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0018%3Atext%3DVer.%3Aactio%3D1%3Abook%3D1%3Asection%3D14> [https://perma.cc/R63X-YU5N] (last visited Apr. 17, 2017).

ethical ideals, which, he urged, should be the foundation of Roman government.⁴²

Verres left for permanent exile in Massalia (Marseilles) before the trial was over, presumably with his art collection in tow.⁴³ Cicero's career was now established, and he published his speeches.⁴⁴ One interesting side effect of this case was that collecting Greek art now became rather unfashionable among the Roman elite—no one wanted to be like Verres—and conspicuous consumption shifted to fancy architecture, elaborate fish ponds for exotic species, costly new furniture, and an intense interest in hard-to-obtain food.⁴⁵ The idea of repatriation of beloved statues is a theme constantly stressed by Cicero, who made much of Scipio Aemilianus's return of Carthaginian booty, and of the emotional attachment that communities felt to their statues.⁴⁶ Repatriation as a noble action emerged again not long after: Augustus specifically notes in his *Res Gestae*, an account of his accomplishments written by him and published throughout the Roman Empire in the form of preserved inscriptions, that besides paying for new temples out of his war booty, he repatriated statues taken by his opponent Marc Antony to cities in Asia Minor.⁴⁷

The lust for looted statuary from Greek cities and sanctuaries tapered off somewhat as the Roman Empire became more established; Caligula is said to have taken quite a bit, some of it repatriated by Claudius, but then Nero took even more from Delphi and other sanctuaries.⁴⁸ By the time of emperor Hadrian in 117–138 CE, the Roman elite regularly dedicated and donated new statues and buildings.⁴⁹ Some two-hundred years later, however, when Constantine built up Constantinople in 330 CE, his agents scoured the empire for choice antique pieces to decorate the new city, to make it look like a new Rome.⁵⁰ One choice item was the Serpent Column, originally designed to support a gold tripod dedicated by 31 Greek cities to Apollo at Delphi as a thank-offering after the Battle of Plataia, won against

42. Linder, *Trial of Gaius Verres*, *supra* note 35.

43. Linder, *Trial of Gaius Verres*, *supra* note 35.

44. MILES, ART AS PLUNDER, *supra* note 3, at 140.

45. H. ANNE WEIS, GAIUS VERRES AND THE ROMAN ART MARKET 396–97 (2003).

46. MILES, ART AS PLUNDER, *supra* note 3, at 182.

47. MILES, ART AS PLUNDER, *supra* note 3, at 102.

48. RUTLEDGE, *supra* note 25, at 55.

49. MILES, ART AS PLUNDER, *supra* note 3, at 255–56.

50. Sarah Brooks, *Byzantium (ca. 330–1453)*, METROPOLITAN MUSEUM OF ART (Oct. 2009), http://www.metmuseum.org/toah/hd/byza/hd_byza.htm [<https://perma.cc/8KNS-969P>].

the Persian invaders in 479 BCE.⁵¹ The Serpent Column (*Figure 1*) still stands in the Hippodrome of Istanbul after 2,500 years since its original dedication at Delphi, by now a trophy with many accumulated layers of significance.⁵²

In the early modern era, Polybius, Cicero, and many other Greek and Roman authors are cited by Hugo Grotius in his famous essay *Mare liberum*, in which he argues for freedom of the seas, on the basis of “natural laws” and natural justice.⁵³ The core of this essay was a response to a case concerning a Portuguese ship, laden with fabulously costly goods that a Dutch ship seized in the straits of Singapore.⁵⁴ A Mennonite member of the company that now owned the property worried about the legality of the seizure, and later the event did indeed become controversial; Grotius argues that the seizure was correct, because of the circumstances, but in the course of his arguments he established several principles that became foundational for international law, including the asserted right to trade by sea, and creating distinctions between various kinds of goods and property.⁵⁵ His essay is an enduring contribution, for Grotius argues that international law has a universal application that transcends the state, a concept he expands from some of Cicero’s philosophical essays.⁵⁶ Thus we see that as the concept of cultural property evolves through the centuries, it grows through philosophical and ethical discussion concerning legal issues, but when applied, it is still applied by fiat.

Interest in the physical remains of antiquity increased in the eighteenth century, when wealthy people from northern Europe, and some from North America, could go on “the Grand Tour” of Italy.⁵⁷ Such grand tourists were well educated in the classics, and wanted to see remains of ancient Roman culture—the discovery of Herculaneum and Pompeii brought even more visitors.⁵⁸ The grand tourists purchased antiquities (with no apparent resistance) and hired artists to make drawings and paintings that could be used as souvenirs, in lieu of the ubiquitous photography we have today. Such eighteenth-century

51. PAUL STEPHENSON, SERPENT COLUMN: A CULTURAL BIOGRAPHY 241 (2016).

52. *Id.* at 241.

53. HUGO GROTIUS, FREE SEA xiii (David Armitage ed., 2004).

54. *Id.* at xii.

55. *Id.* at xiii–xiv.

56. MILES, ART AS PLUNDER, *supra* note 3, at 299.

57. Jean Sorabella, *The Grand Tour*, METROPOLITAN MUSEUM OF ART (Oct. 2003), http://www.metmuseum.org/toah/hd/grtr/hd_grtr.htm [<https://perma.cc/XGH9-UZ9J>].

58. *Id.*

collections eventually became the center of several museums, such as the Townley collection for the British Museum.⁵⁹

In the early modern period, the most remarkable instances of repatriation and restitution occurred in the aftermath of Waterloo. Preceding that battle, as the French rose to power under Napoleon's expansion of his empire, art and antiquities were once again plundered on a Roman-like scale. As is well known, Napoleon ventured into Egypt (1798) and gathered up many antiquities that were then taken by the British after they defeated his navy, and later the remnant of his army, so that today the Rosetta Stone and the rest of the early French collection is in the British Museum.⁶⁰ Apart from the annoyed French researchers who had been brought to Egypt by Napoleon to gather the material, there was little outcry over this plundering; instead, the Egyptian material set new fashions (and inspired the new field of Egyptology).⁶¹ But in his campaigns in Western Europe, Napoleon went on to cut out altar paintings from churches, seize panel paintings and sculpture from private and civic collections, geological specimens, and even the Papal archives, and this caused huge, widespread controversy.⁶² Raphael's *Transfiguration*, the altarpiece of San Pietro in Montorio, Rome, was one of many large, painted altarpieces looted from Italian churches and moved to Paris.⁶³ At the time of the invasion, the *Laocoön* (*Figure 2*) was considered the most beautiful of all ancient artwork, and that was taken by Napoleon from the Papal collections, where it had been since its rediscovery in 1506 under the Baths of Trajan.⁶⁴ Napoleon also took the Bronze Horses from the top of San Marco in Venice, where they had been lodged since the Venetians had taken them from Constantiople in 1204.⁶⁵

Among the French, many artists and writers opposed this wholesale plundering, Antoine Quatremere de Quincy among them, who quoted

59. *History of the Collection*, BRITISH MUSEUM https://www.britishmuseum.org/about_us/departments/greece_and_rome/history_of_the_collection.aspx [<https://perma.cc/XZJ9-TK3T>] (last visited Feb. 12, 2017).

60. Eustace, *Fruits of War*, *supra* note 29.

61. MILES, ART AS PLUNDER, *supra* note 3, at 328.

62. MILES, ART AS PLUNDER, *supra* note 3, at 323.

63. *Raffaello Sanzio, The Transfiguration*, MUSEI VATICANI, <http://www.museivaticani.va/content/museivaticani/en/collezioni/musei/la-pinacoteca/sala-viii---secolo-xvi/raffaello-sanzio--trasfigurazione.html> [<https://perma.cc/E2RT-KX9B>] (last visited April 17, 2017); *see generally* Martin Rosenberg, *Raphael's Transfiguration and Napoleon's Cultural Politics*, 19 *EIGHTEENTH-CENTURY STUDIES* 180–205 (1985–86).

64. Rosenberg, *Raphael's Transfiguration*, *supra* note 63, at 182.

65. MILES, ART AS PLUNDER, *supra* note 3, at 321.

Cicero's *Verrines* as support for arguing that art has a natural location where it should stay, the point first made by Polybius.⁶⁶ This essential point about context is still a central argument articulated today: looted mosaics should be returned to the church in Cyprus where they were originally mortared on the walls; the Parthenon sculpture in the U.K. should be rejoined with the rest of it in Athens—let the British have the casts.

Napoleon, however, had grand plans for a “universal museum,” to be named after himself, which would include the best the world had to offer, as an inspiration to French artists and the French people, who would best appreciate the art.⁶⁷ He deliberately modeled Roman attitudes about war booty, by staging a “Triumph” in which 25 wagons of sculpture and other artistic spoils were paraded and brought into Paris, on July 27–28, 1798, a Roman-style event commemorated in several media.⁶⁸ The commemoration took a more permanent form as the Arc de Triomphe du Carrousel, modeled on the Arch of Constantine in Rome and begun in 1806 after the French victory at Austerlitz.⁶⁹

After Waterloo, the victorious Prussians and the King of the Netherlands wanted their pictures back, and the Pope sent the renowned sculptor Antonio Canova to argue that the Horses of San Marco in Venice, and the Papal collections, including the *Laocoön*, should be returned to Italy.⁷⁰ This was one of many issues—including the fate of Napoleon—the Duke of Wellington had to deal with in occupied Paris in September, 1815.⁷¹ In consultation with the British foreign secretary, Robert Stewart (Viscount Castlereagh) and the British Prime Minister, Robert Banks Jenkinson (Earl of Liverpool),

66. ANTOINE QUATREMERE DE QUINCY, LETTRES SUR LE PREJUDICE QU'OCCASIONNERAIENT AUX ARTS E A SCIENCE. LE DEPLACEMENT DES MONUMENTS DE L'ART DE L'ITALIE, LE DEMEMBREMENT DE SES ÉCOLES, ET LA SPOILIATION DE SES COLLECTIONS, GALERIES, MUSEES, &C., Paris, (Translation : LETTERS TO MIRANDA AND CANOVA ON THE ABDUCTION OF ANTIQUITIES FROM ROME AND ATHENS), 1793–1807 (Dominique Poulot, ed., 2012).

67. This rationalization about “appreciation” still lies behind much of the defense of the collecting practices of some modern museums. See, e.g., WHOSE CULTURE? THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES (James Cuno ed., 2009). See also MILES, ART AS PLUNDER, *supra* note 3, at 320.

68. Miles, *Still in the Aftermath of Waterloo*, *supra* note 3, at 32; see also Rosenberg, *Raphael's Transfiguration*, *supra* note 63, at 191.

69. DIANA ROWELL, PARIS: THE 'NEW ROME' OF NAPOLEON I 147–55 (2012).

70. Miles, *Still in the Aftermath of Waterloo*, *supra* note 3, at 37; Eustace, *Fruits of War*, *supra* note 29.

71. Eustace, *Fruits of War*, *supra* note 29.

the Duke decided to initiate the repatriation of as much as possible of Napoleon's artistic plunder.⁷²

The basic principles the British trio hammered out were that the right of conquest does not give the right of new possession of new plunder (hence the British and Prussians did not plunder France anew); that unequal treaties signed by force in wartime (such as the Treaty of Tolentino) are not legitimate; that art belongs in its "ancient seat;" that cultural property (art, books, archival documents, scientific specimens, etc.) does belong to a special, protected category to be treated apart from other kinds of possessions (such as land or gold).⁷³ At the time, the Parisian public resented these conclusions.⁷⁴ The Duke of Wellington needed cohorts of his Army of Occupation to keep order among the French populace at the start of the evacuation of the Bronze Horses—then atop the Arc de Triomphe—and the removal of plundered paintings from the Louvre.⁷⁵ This was repatriation by fiat, and current estimates are that only about 55% of what Napoleon took was returned, for much of the art had been squirreled off to provincial cities in France where it was hard to retrieve them, and some of it was considered too fragile for further transport.⁷⁶

But the race was on. Within western Europe generally, as well as Britain, the plundering of Egypt, Belgium, the Netherlands, Italy, and Prussia had opened up the possibilities of collecting, of "universal museums" which could be justified with nationalistic and educational aims, ideas rooted in the mid-eighteenth century but now underway in full force.⁷⁷ In a letter dated June 16, 1815, the very eve of Waterloo, Lord Elgin offered the sculpture he had taken from the Parthenon for sale to the British Museum.⁷⁸ War news and its urgent aftermath caused everything to be postponed, but a year later the Trustees grudgingly agreed to purchase the sculpture and architecture he had removed from Greece.⁷⁹

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72. Miles, *Still in the Aftermath of Waterloo*, *supra* note 3, at 29, 35–39.
73. Duke of Wellington, *Letter from the Duke of Wellington to Lord Castlereagh: Paris, Sept. 23, 1815*, in *THE DISPATCHES OF FIELD MARSHAL THE DUKE OF WELLINGTON DURING HIS VARIOUS CAMPAIGNS, 1799 TO 1815 641–48* (John Murray ed., 1837).
74. Eustace, *Fruits of War*, *supra* note 29.
75. Miles, *Still in the Aftermath of Waterloo*, *supra* note 3, at 39.
76. Peter Brooks, *Napoleon's Eye*, N.Y. REVIEW OF BOOKS (Nov. 19, 2009), <http://www.nybooks.com/articles/2009/11/19/napoleons-eye/> [<https://perma.cc/5DT5-WHMG>].
77. Miles, *Still in the Aftermath of Waterloo*, *supra* note 3, at 34.
78. WILLIAM ST. CLAIR, *LORD ELGIN & THE MARBLES: THE CONTROVERSIAL HISTORY OF THE PARTHENON SCULPTURES 220–226* (1998).
79. *Id.*; see also *The Parthenon Sculptures: Facts and Figures*, BRITISH MUSEUM (2017),

Meanwhile, an intense international competition was already underway in Greece (still under Ottoman rule), Turkey, and the Near East for further acquisition, by purchase, plunder, or unequal division after excavation.⁸⁰ Thus, from the late eighteenth century onward, wartime plundering or appropriation of cultural property through commerce or unequal treaty by a stronger power intertwined itself with the interests of museums and collectors. In the later nineteenth century, even “scientific” excavators were often opposed to best interests of the “source” countries in their eagerness to keep what they found for their own museums.⁸¹

The Lieber Code was formulated at President Abraham Lincoln’s request by Francis Lieber, who as a sixteen-year-old had fought at Waterloo in the Prussian army and would have been aware of the tumult in Paris over plundered art.⁸² Lieber had emigrated to the U.S. and had become a distinguished professor of political science. His Code, *General Orders No. 100*, provides rules of engagement for soldiers and instructs them about how to treat the enemy’s property.⁸³ The Lieber Code in turn was a model for subsequent international Conventions on cultural property, including the important Hague Convention of 1907.⁸⁴

The history of the fate of art in the two World Wars, especially the second, does not provide optimism about self-restraint or humane behavior, what Xenophon called *philanthropeia* and attributed to Cyrus.⁸⁵ Yet the very formulation of the Monuments Men by the Allies, even if they could not restore or protect everything, was a remarkable step forward, the first ever establishment of an official group in time of war for the protection of cultural property, even on “enemy” soil.⁸⁶ The

http://britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures/facts_and_figures.aspx [https://perma.cc/T6VX-YN7Q] (describing the acquisition timeline).

80. Miles, *Still in the Aftermath of Waterloo*, *supra* note 3, at 34.
81. Miles, *Still in the Aftermath of Waterloo*, *supra* note 3, at 34.
82. Patryk Labuda, *Lieber Code*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2014).
83. *Id.*
84. *Id.*; the text of the Lieber Code and subsequent treaties and conventions are reprinted in ELIZABETH SIMPSON, *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 272–311 (1997).
85. IVAN LINDSAY, *THE HISTORY OF LOOT AND STOLEN ART FROM ANTIQUITY UNTIL THE PRESENT DAY* 22 (2014).
86. The best overall account of looting during World War II is LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1995). For the best account of the Monuments Men in particular, see ROBERT M. EDSEL,

actions taken since World War II to restore and repair the damage gives cause for optimism, including the new legislation now before the U.S. Senate Judiciary Committee.⁸⁷

Looting of archaeological sites, and even museums in recent wartime conditions, is a modern extension of the ancient issue of ownership of art. According to newspaper reports, one motive for the new German legislation on the sale of antiquities is to thwart the practice of ISIL, who systematically loot sites in Syria and elsewhere to sell artifacts in an effort to finance their terrorist activities.⁸⁸ ISIL planted mines, damaged and looted Palmyra, and used the Palmyrene Theater to film their executions of prisoners.⁸⁹ As with the deliberate destruction of the Bamiyan Buddhas by the Taliban in 2001,⁹⁰ we are in a new situation, with newly escalated atrocities.

Meanwhile, apart from such warfare in Syria, looting of antiquities continues around the globe, because it still feeds a voracious appetite among collectors and some museums. The record among American museums is mixed but improving: some, such as the University of Pennsylvania Museum, stopped buying antiquities without extensive documentation in 1970, in accordance with the UNESCO agreement of that year; the Getty Museum declared its respect for the agreement in 2006.⁹¹ Others, such as New York's Metropolitan Museum of Art,

MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES AND THE GREATEST TREASURE HUNT IN HISTORY (2010).

87. Doreen Carvajal, *Bill to Shield International Art Loans Gain in Senate*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/arts/design/bill-to-shield-international-art-loans-gains-in-senate.html> [https://perma.cc/QHD5-GA9F] (stating the legislation “would extend added protections to shield works from seizure while on loan for exhibitions in the United States”).
88. *Germany Introduces Legislation to Curb Sale of Stolen Antiques from Mosul*, INT'L BUS. TIMES (Aug. 2, 2015), <http://www.ibtimes.co.in/germany-introduces-legislation-curb-sale-stolen-antiques-mosul-641337> [http://perma.cc/XV62-RA5G].
89. Kimberly Hutcherson, *ISIS video shows execution of 25 men in ruins of Syria amphitheater*, CNN (Jul. 4, 2015), <http://www.cnn.com/2015/07/04/middleeast/isis-execution-palmyra-syria/> [https://perma.cc/P9KH-ETT6].
90. Barbara Crossette, *Taliban Explains Buddha Demolition*, N.Y. TIMES (Mar. 19, 2001), <http://www.nytimes.com/2001/03/19/world/taliban-explains-buddha-demolition.html> [https://perma.cc/L379-6B8L].
91. *Cultural Heritage (1970 UNESCO Convention)*, PENN MUSEUM (2017), <https://www.penn.museum/about-collections/1970-s-unesco-convention> [https://perma.cc/V65Q-764B]; Secretariat for U.N. Educational, Scientific and Cultural Organization, *Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation*, U.N. Doc. CLT-2007/CONF.211/COM.14/2 (Jun. 2007).

continue to acquire new antiquities.⁹² In the last decade, investigative journalists have exposed the criminal background of the chains of acquisition, from the *tombaroli* and *clandestini* in Italy and other “source” countries to museum curators and collectors, and brought to public attention this disreputable museum collecting.⁹³ Nonetheless, at least one director now has tried to revive outmoded claims that the “encyclopedic” museums’ needs should override the claims of nations to retain their heritage, based on assertions of the superiority of a “cosmopolitan” appreciation of art as art.⁹⁴

What we lose from the looting that feeds contemporary collecting is unique historical context. For the sake of protecting archaeological sites, which are unique and cannot be renewed, it would be best simply to end the marketing and collecting of antiquities. The new German legislation purportedly will “shut down” the trade in antiquities, at least in that country, which is a start.⁹⁵ As an archaeologist, I applaud it.

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92. See *Collections Management Policy*, METROPOLITAN MUSEUM OF ART (Sept. 8, 2015), <http://www.metmuseum.org/about-the-met/policies-and-documents/collections-management-policy> [<https://perma.cc/ZC7B-5PXV>] (outlining museum procedures for acquiring ancient art).
93. See Kimberly Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 IND. LAW REV. 601, 608-624 (2012) (examining the “connection between organized crime and the illicit antiquities trade”); see also Malcolm Bell, *The Beautiful and the True*, WALL ST. J. (Jul. 2, 2011), <https://www.wsj.com/articles/SB10001424052702303339904576405983959162302> (discussing how reporters uncovered evidence of illicitly obtained antiquities); see also PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES FROM ITALY’S TOMB RAIDERS TO THE WORLD’S GREATEST MUSEUMS* (2006); see also SHARON WAXMAN, *LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD* (2009); see also JASON FELCH & RALPH FRAMMOLINO, *CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD’S RICHEST MUSEUM* (2011).
94. JAMES CUNO, *MUSEUMS MATTER: IN PRAISE OF THE ENCYCLOPEDIA MUSEUM* (2013). For a more balanced account of the role of the museum, see ANDERSON, *ANTIQUITIES*, *supra* note 5, at 4, 47–56, 172–179.
95. See Hickey, *German Parliament*, *supra* note 1 (stating the German parliament passed a law requiring “any cultural goods above a certain value and age . . . can only be exported with permission from authorities in the 16 German states . . . [any sale must] be accompanied by an export licence [sic] from the country of origin . . . [and t]he law also eases the repatriation of looted articles to the country of origin”).



Figure 1: The Serpent Column, Istanbul, Turkey



Figure 2: Laocoön, Vatican Museums, Rome