

2017

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Recommended Citation

Luis Li & Amelia L. Sargent, *The Getty Bronze and the Limits of Restitution*, 20 CHAP. L. REV. 25 (2016).

Available at: <http://digitalcommons.chapman.edu/chapman-law-review/vol20/iss1/2>

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CHAPMAN LAW REVIEW

Citation: Luis Li & Amelia L.B. Sargent, *The Getty Bronze and the Limits of Restitution*, 20 CHAP. L. REV. 25 (2017).

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The Getty Bronze and the Limits of Restitution

*Luis Li and Amelia L.B. Sargent**

In 1977, the Getty Museum acquired the ancient Greek statue known as the Victorious Youth, or the Getty Bronze (“the Bronze”). The Bronze had been hauled up by chance from the bottom of the Adriatic Sea by fishermen working out of the port of Fano, on Italy’s northeastern coast, in 1964. By 1970, Italian courts had concluded there was no evidence that the object was found in Italian territorial waters, and it was therefore not a part of the Italian patrimony. The statue has been displayed at the Getty Villa since 1978, decades longer than it purportedly was on Italian soil, and is an anchor of the Museum’s antiquities collection. During this time, the Italian government has been aware that the Getty has had the Bronze.

Yet for over a decade, the Getty has been embroiled in legal proceedings in Pesaro, Italy, litigating the Italian government’s demand that the Getty “return” the statue through a procedurally dubious forfeiture action, a remnant of a criminal charge dismissed because, among other reasons, all the criminal defendants are dead. As the Italian legal process drags on, it is worth stepping back to consider the broader justifications for restitution. What right does Italy have to a Greek statue, likely looted by Romans, shipwrecked at sea, and found by chance in international waters? While restitution is appropriate in some cases—whether for legal or ethical reasons—in other circumstances the demands go too far. This Article reviews the legal boundaries of restitution as applied to the Getty Bronze by questioning the fundamental reasons behind cultural property laws.

In Part I, this Article reviews the history of the Bronze and what is known—or at least what is assumed—of its discovery. Part II describes the early legal proceedings and investigations during the 1960s through the 1970s that preceded the Getty’s

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1977 purchase of the statue. Part III describes Italy's new demand for the statue in 2006, and outlines the ongoing legal proceedings in Pesaro. Part IV addresses broader questions of the justifications for restitution, reviewing the typical justifications in cases of injustice, and discussing the rise of national patrimony laws as a way to confer cultural ownership to a national state. It proposes that the Bronze illustrates the limits of and philosophical tensions in the current typology.

I. PART ONE

A. The Discovery of the Bronze

In June of 1964, fishermen from the town of Fano on the northeast Italian coast were fishing in the Adriatic well beyond Italian territorial waters on the trawler *Ferruccio Ferri* after a rough storm.¹ When the fishermen hauled up their nets, they brought up a heavy man-shaped object covered in shells and marine encrustations.² As it was brought aboard, one of the crew apparently cried "*C'e un morto!*"—There's a dead man!³—but it was not a body; they had instead recovered an ancient Greek statue that had been lost at sea two thousand years before.

The sculpture, a life-sized bronze figure of an athlete or "victorious youth," dated from the second or third century B.C.⁴ Greek art was much admired in the Roman Empire, and Greek art was looted for display on the Italian peninsula.⁵ In all

¹ The factual history of the Bronze must be pieced together from evidence dating nearly fifty years ago. All of the Italian witnesses are long dead, as are, likely, the original investigators whose conclusions cannot now be cross-examined. This Article relies on the findings of the Pesaro court in its 2010 order, the findings of the Italian courts of the 1960s and 1970s, and other accounts that have been publicly published. Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, 02 ottobre 2010, n.2042/07 R.G.N.R. n.3357/07 R.G.I.P. (It.), <http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387> [hereinafter 2010 Ordinanza] [<http://perma.cc/592E-2B7E>]. For colorful accounts of the discovery of the Bronze, albeit with their own biases, see JASON FELCH & RALPH FRAMMOLINO, CHASING APHRODITE 9 (2011). See also Jason Felch, *The Amazing Catch They Let Slip Away*, L.A. TIMES (May 11, 2006), articles.latimes.com/2006/may/11/local/me-bronze11 [hereinafter Felch, *The Amazing Catch*] [<http://perma.cc/SGP3-8CMW>].

² FELCH & FRAMMOLINO, *supra* note 1, at 10.

³ *Id.*

⁴ The statue was originally attributed to the master Greek sculptor Lysippos, the fourth century B.C. court sculptor of Alexander the Great. However, based on recent art historical, technical, and scientific evidence, scholars now believe the statue was sculpted by a later Greek sculptor working in the second or third century B.C. See CAROL A. MATTUSCH, THE VICTORIOUS YOUTH 91 (Getty Publications 1997); Jerry Podany & David Scott, *The Getty Victorious Youth Reconsidered*, in 1 FROM THE PARTS TO THE WHOLE, J. ROMAN ARCHAEOLOGY SUPP. SERIES NO. 39 179 (Carol C. Mattusch, Amy Brauer & Sandra E. Knudsen eds., 2000).

⁵ See Cicero, *Against Verres*, in I THE VERRINE ORATIONS PART II BOOK I, 17 § 44–46,

likelihood, the statue was taken from Greece in the first century B.C. or A.D.—the golden age of Roman art collecting⁶—its feet and ankles broken off when it was removed from its original stone base.⁷ It never reached its destination, however, and had been lost at sea two thousand years earlier. Only because the object never reached its destination is it still preserved today; the delicate bronze likely would not have survived to modern times had it made it to land. Hardly any ancient bronze works survive today, having been lost to corrosion or historical circumstance, or melted down to reuse the valuable metal.⁸

After returning to port with their lucky find, the fisherman allegedly decided to sell it. The fishermen brought the sculpture ashore at night, hiding it under a pile of fishing nets before moving it to the home of the captain's friend, Felici Dario.⁹ Word of the remarkable find spread quickly through the small town, so the fisherman moved the statue inland, and buried it in a cabbage field.¹⁰

Two months later, in August of 1964, the fishermen sold the Bronze to Giacomo Barbetti, an antiquarian from nearby Gubbio.¹¹ Excited by the discovery, and no doubt by the chance to make a quick profit, Giacomo Barbetti borrowed 3,500,000 lire (\$43,500 2016 U.S. dollars¹²) from his cousin Pietro Barbetti to buy the statue.¹³ Several days later, the Barbettis and their friend Piero

169 (L.H.G. Greenwood trans., 1966) (discussing the multitudes of works of art the Roman Gaius Verres removed from Greece for his personal benefit, as well as earlier plunder of Greek sites by Roman generals for the benefit of the state); BRUNILDE RIDGWAY, *ROMAN COPIES OF GREEK SCULPTURE: THE PROBLEM OF THE ORIGINALS* 10–11 (1984) (“All authors, ancient and modern, agree that [the fall of Syracuse] opened up the flow of Greek works into Rome and determined subsequent interest and corresponding depredation,” including Nero’s robberies of the sanctuaries of Delphi and Olympia); JANET B. GROSSMAN, *ATHLETES IN ANTIQUITY: WORKS FROM THE COLLECTION OF THE J. PAUL GETTY MUSEUM* 6 (Univ. of Utah 2002).

⁶ See, e.g., MARY BEARD, *SPQR A HISTORY OF ANCIENT ROME* 211 (2015) (noting the close “link in the Roman imagination between art and conquest”); *id.* at 213 (noting 146 B.C.E. to 44 A.D. was a “high point of Roman literature, art, and culture”).

⁷ MATTUSCH, *supra* note 4, at 23.

⁸ See POWER AND PATHOS: *BRONZE SCULPTURE OF THE HELLENISTIC WORLD* 10, 12 (2015).

⁹ 2010 Ordinanza, *supra* note 1, N.2042/07 R.G.N.R. (It.) at 4; FELCH & FRAMMOLINO, *supra* note 1, at 11.

¹⁰ 2010 Ordinanza, *supra* note 1, N.2042/07 R.G.N.R. (It.) at 4; FELCH & FRAMMOLINO, *supra* note 1, at 11.

¹¹ 2010 Ordinanza, *supra* note 1, N.2042/07 R.G.N.R. (It.) at 4; FELCH & FRAMMOLINO, *supra* note 1, at 11–12.

¹² Conversion of prices to 2016 dollars was done by first applying the Bretton Woods exchange rate of U.S. \$1 to 625 lire and then using the Bureau of Labor Statistics. *CPI Inflation Calculator*, BUREAU OF LABOR STAT., http://www.bls.gov/data/inflation_calculator.htm [<http://perma.cc/H5LM-HZJ4>].

¹³ Trib. di Perugia, 18 maggio 1966, No. 181, 2 (It.) [hereinafter Trib. di Perugia];

Menichetti drove to Fano to see the statue; they were told it had been found in Yugoslavian waters.¹⁴ The Barbettis purchased the Bronze and brought it back to Gubbio. It remained there while Giacomo tried in vain to find a buyer. Eventually, Giacomo, Pietro, and Pietro's brother Fabio took the Bronze for safekeeping to a Father Giovanni Nagni.¹⁵ Father Nagni became annoyed by the visitors who came to see it and in May of 1965 demanded that the Barbettis take it back.¹⁶ They obliged. The Bronze was eventually sold to, as Giacomo represented at his 1966 trial, "unknown persons."¹⁷ Following an anonymous tip, the Italian carabinieri obtained a search warrant for Father Nagni's house, but by the time they arrived, the statue was gone.¹⁸

B. Prosecutions of the Purchasers of the Statue

In 1965, the three Barbettis and Father Nagni were charged with purchasing and concealing stolen property under Article 49 of Italian Law No. 1089 (1939), a patrimony law providing that protected archaeological objects found from excavations or by chance within Italian territory belong to the Italian State, and Article 67 of the same law, which provides that one who takes possession of such archaeological objects is guilty of theft.¹⁹

Following a trial, in a decision dated May 18, 1966, the Magistrate Court of Perugia found insufficient evidence on which to convict the men.²⁰ The court concluded that the charges suffered from two primary defects. First, the prosecution had failed to prove that the statue was of historic and artistic value, the first element for the charged crime. But second and more importantly, the court concluded that the other necessary element of the crime was completely lacking: namely, proof that the statue had been found in Italian territorial waters. As the court reasoned:

[W]hen in Article 49 of the said law it is specified that "things (of value, etc.) casually discovered belong to the State" reference is obviously made to things found in the territory of the very State

FELCH & FRAMMOLINO, *supra* note 1, at 12.

¹⁴ Trib. di Perugia, *supra* note 13, at 2; FELCH & FRAMMOLINO, *supra* note 1, at 11.

¹⁵ Trib. di Perugia, *supra* note 13, at 2; FELCH & FRAMMOLINO, *supra* note 1, at 12.

¹⁶ Trib. di Perugia, *supra* note 13, at 2-3.

¹⁷ *Id.*; see FELCH & FRAMMOLINO, *supra* note 1, at 13 for speculative possibilities.

¹⁸ 2010 Ordinanza, *supra* note 1, at 4; FELCH & FRAMMOLINO, *supra* note 1, at 12.

¹⁹ FELCH & FRAMMOLINO, *supra* note 1, at 13; Legge 1 Giugno, 8 Agosto 1939, N. 1089 G.U. Aug. 8, 1939, n.184 (It.), http://www.unesco.org/culture/natlaws/media/pdf/italy/it_law1089_39_itorof [<http://perma.cc/466Z-2YWF>]; 2010 Ordinanza, *supra* note 1, at 5.

²⁰ Trib. di Perugia, *supra* note 13, at 8.

where the law has been enacted, as only over them is it possible to exercise State authority (potestà).²¹

Because the only testimony offered at trial was that the statue was allegedly found in Yugoslavian waters, the court concluded the evidence was insufficient to sustain the criminal charges.²² Notably, the Italian national government did not intervene in the case to establish a claim to the statue.

Both the prosecution and the defendants appealed the decision, the defendants apparently seeking a more affirmative finding of their innocence. On January 27, 1967, the Court of Appeals of Perugia reversed the lower court's decision, finding that the elements of the crime were satisfied.²³ First, the Court of Appeals reckoned that the Bronze was of sufficient archeological value under the Patrimony Law because it was purchased for a not insignificant sum, and a well-known dealer named Elie Borowski had shown interest in the statue (though he had pronounced it a Roman copy). Regarding the question of its location within Italian territory, the court reasoned that the Barbettis would not have taken such steps to conceal the statue had it been lawful, and therefore they must be guilty of the crime charged. As the court stated, "this Court is also of the opinion that the first judges [of the lower court] would not have been uncertain about the place of discovery of the statue, had they considered the justifications supplied by the Barbettis in connection therewith in the light of their behavior."²⁴ The court sentenced the three Barbettis to four months' imprisonment and a 50,000 lire fine, and sentenced Father Nagni to two months in prison.²⁵

On May 22, 1968, the Supreme Court of Cassation annulled the decision of the Court of Appeals of Perugia on the ground that the lower court used inadequate legal reasoning, specifically holding that the facts introduced at trial did not resolve the question of the Bronze's "origin from excavations or chance discovery on national territory"—a necessary element of the crime.²⁶ The Supreme Court held, "[t]he origin of the statue from

²¹ *Id.* ("Infatti allorchè nell'art. 49 della richiamata legge si specificò che "le cose (di valore ecc.) scoperte fortuitamente appartengono allo Stato" ci si riferisce ovviamente a cose inventate nell'ambito territorial dello Stato stesso da cui la legge promana, solo su esse potendo esercitarsi la relativa potestà.").

²² *Id.* at 8.

²³ Corte di App. di Perugia, 27 gennaio 1967, No. 15, 10 (It.).

²⁴ *Id.* at 8.

²⁵ *Id.* at 10.

²⁶ Supreme Court of Cassation No. 1291, May 22, 1968, 8 (It.).

excavation or chance discovery has not been, in any way, demonstrated to the Court of Appeals in Perugia. Therefore, the verdict must be annulled”²⁷ It transmitted the case to the Court of Appeals of Rome, which on November 18, 1970 confirmed that the convictions would not stand.²⁸

II. THE GETTY ACQUIRES THE BRONZE

A. J. Paul Getty’s Negotiations for the Bronze Falter on Price

By 1971, the Bronze had apparently been exported to Brazil where it was held in a private collection. In 1971, Artemis S.A., a European art consortium, purchased the statue for \$700,000 (\$4.2 million in 2016 dollars), and one of the partners of the consortium, Heinz Herzer, brought the statue to Munich where it underwent extensive renovations.²⁹ The consortium quickly put the restored bronze up for sale. In 1972, the *New York Times* reported Artemis offered the Bronze to Mr. J. Paul Getty for \$5 million (\$31.7 million in 2016 dollars),³⁰ though by the time negotiations were serious, the price was \$3.5 million (\$20.2 million in 2016 dollars).³¹

Mr. Getty was an avid collector of art and antiquities; he had established the Getty Museum in his own ranch house in Malibu, California, and was in the process of building a separate villa to house his collection based on the Villa dei Papiri of Herculaneum, which would open in 1974.³² But even this reduced price was a record for any piece of classical sculpture at the time.

Although now disputed in Pesaro, at this early stage, the legal questions surrounding the title of the piece appeared settled. In early October of 1972, Italian counsel for Artemis provided a legal opinion to Getty’s counsel advising that the Italian government had no basis for a claim to the Bronze.³³ A

²⁷ *Id.*

²⁸ Court of Appeals of Rome No. 2089, November 18, 1970, 6 (It.).

²⁹ David L. Shirey, *Greek Bronze on Sale for 3.5-Million*, *N.Y. TIMES*, Mar. 10, 1973, at 1, 37.

³⁰ *Id.*

³¹ *See, e.g.*, 2010 Ordinanza, *supra* note 1, at 9–10 (referencing an offer of the Bronze to the Metropolitan Museum).

³² For a journalistic account of the evolution of the Getty Museum, see Suzanne Muchnic, *A Getty Chronicle: The Malibu Years*, *L.A. TIMES* (July 6, 1997), <http://articles.latimes.com/1997/jul/06/entertainment/ca-9998/> [<http://perma.cc/Y5HP-V9YY>].

³³ 2010 Ordinanza, *supra* note 1, at 9. There was an opinion dated October 4, 1972, by well-reputed lawyers Gianni Manca and Vittorio Grimaldi from the law firm Studio Graziadei. The opinion assured that the prior final judgment and Herzer’s subsequent purchase of the object lawfully, in good faith, would assure that Mr. Getty could obtain good title. *Id.* at 12.

front page article in the New York Times reported, “the fisherman were completely absolved of the crime. The court decided that the bronze had been found in extraterritorial waters. . . . The sculpture was legally exported from Italy in 1970 with a clear title.”³⁴

Mr. Getty’s negotiations for the Bronze, however, foundered on price. Aside from being breathtakingly expensive in its own right, the price of the Bronze fluctuated because, among other reasons, the German economy was booming while America slipped into recession and struggled with unemployment and high inflation following the Arab oil embargo. As a result, the value of the dollar faded quickly against the Deutsche Mark, losing half its value during the 1970s.³⁵

Notably, in August of 1973, Herzer concluded a letter to Dr. Jiri Frel, the Getty curator with whom he had been negotiating, that despite the faltering negotiations, and “whether or not the deal comes off,” “even the Italian government admits that we do have clear title to the bronze.”³⁶

Price, it seemed, was the only issue to be resolved, but as was clear by the end of 1973, Getty would not budge.

B. The Trustees Purchase the Bronze in 1977

Mr. Getty died in 1976. With his death, the Getty Museum found itself the beneficiary of his vast estate, which was converted into a \$700 million (\$2 billion in 2016 dollars) endowment.³⁷ From Mr. Getty’s relatively frugal oversight, the Museum found itself in a new reality.

Negotiations resumed for the Bronze and the Trustees engaged in due diligence to reexamine the propriety of the acquisition.³⁸ As the evidence before the Pesaro court shows, in

³⁴ Shirey, *supra* note 29, at 1.

³⁵ See Lawrence H. Officer, *Exchange Rates Between the United States Dollar and Forty-one Currencies*, MEASURING WORTH (2016), <http://www.measuringworth.com/exchangeglobal> (permitting a website visitor to calculate historical exchange rates). One dollar in 1970 was worth 3.6460 Deutsche Marks (“DM”). By 1975, this had slid to 2.2550 DM. In 1977, when the Trustees purchased the Bronze, it was 2.3210 DM. In 1980, it was 1.8180 DM. As noted by the Pesaro Court, by August 1973, Herzer refused Mr. Getty’s offer of \$3.5 million, which had only the year before seemed acceptable, and raised the price to \$4 million because of the devaluation of the dollar. 2010 Ordinanza, *supra* note 1, at 10.

³⁶ 2010 Ordinanza, *supra* note 1, at 13.

³⁷ Muchnic, *supra* note 32; FELCH & FRAMMOLINO, *supra* note 1, at 25.

³⁸ In 2006, the Los Angeles Times reported that, according to Thomas Hoving, Mr. Getty had put certain legal conditions on the sale of the Bronze that were not met. FELCH & FRAMMOLINO, *supra* note 1. This has led subsequent scholars to speculate that the

July of 1977, Herzer sent the Getty “the complete documentation with regard to the legal aspects” concerning the Bronze.³⁹ The three enclosed files contained over one hundred pages of documentation, including details about two investigations by German authorities at the Italian government’s request, both of which were quickly closed with the result that, as the Pesaro court cited, “[Herzer] could freely dispose of the object.”⁴⁰ The investigations were prompted by an Italian court in Gubbio; in 1974, an action was entered at the Magistrate’s Court of Gubbio for illegal export of the Bronze against unidentified persons, regarding which the court had unsuccessfully requested international judicial assistance.⁴¹

That court also unsuccessfully requested assistance from Interpol in 1977, and from the State Department in 1978. United States Customs officials interviewed the registrar for the Getty Museum about the Bronze on March 21, 1978, and took no further action.⁴² The State Department declined to assist the Italian authorities further on June 21, 1978.⁴³ In November 1978, the Gubbio proceedings ended with a nonsuit as the alleged defendants were not identified within the statutory period.⁴⁴ Eventually, in 1984, Interpol informed Italy that it would conduct no further investigation without evidence demonstrating Italian ownership of the Bronze. Italy never supplied such evidence.

At the end of July of 1977, the Getty Trustees agreed to buy the statue for \$3.95 million.⁴⁵ In tribute to Mr. Getty, the Bronze was christened the “Getty Bronze.” After this tempestuous

Trustees simply declined to consider the question of legal title of the Bronze when they voted to purchase it. See Derek Fincham, *Transnational Purchase of the Getty Bronze*, 32 CARDOZO ARTS & ENT. L.J. 471, 480 (2014). This is not true, as even the Pesaro court acknowledged (although that court found the Trustees’ efforts inadequate). See generally 2009 Ordinanza, *infra* note 54; 2010 Ordinanza, *supra* note 1. Notably, Mr. Hoving himself was quite dismissive of the Trustees of the Getty and may not be the most trustworthy source. After his dismissal from the Met in 1977 for “ever-increasing publicity stunts” and disregard of Museum procedures, Mr. Hoving turned on the institutions he once built up, pursuing personal vendettas against art museums, particularly the Getty, in various media outlets. Lee Sorensen, *Hoving, Thomas*, DICTIONARY OF ART HISTORIANS, <https://dictionaryofarthistorians.org/hovingt.htm> [http://perma.cc/HD99-BXBB]. He joined ABC’s 20/20 as an art correspondent and produced a sensationalistic piece on the Bronze in 1979. He also wrote various “tell-all” books about the Met described as “one-sided and at times fictitious accounts . . . of the art world by a genuine insider.” *Id.*

³⁹ 2010 Ordinanza, *supra* note 1, at 14.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 15.

⁴² *Id.* at 8.

⁴³ *Id.* at 9.

⁴⁴ *Id.*

⁴⁵ *Id.* at 8.

journey, the Bronze would rest, undisturbed, for the next three decades at its home in Malibu overlooking the Pacific Ocean.⁴⁶

III. PESARO

In the mid-1990s, Interpol conducted a raid on a warehouse in Geneva belonging to Italian art dealer Giacomo Medici. Among the evidence discovered were polaroids of Italian antiquities in an unrestored state—apparently having been illegally looted. The photos included recognizable antiquities from the collections of numerous museums and individuals worldwide. Medici was arrested in 1997 and sentenced in 2004.⁴⁷ In 2005, the Italian government indicted Robert Hecht, an American antiquities dealer, and Marion True, the Getty Museum's former curator of antiquities, for conspiracy to traffic in illegal antiquities.⁴⁸ The charges were eventually dismissed on limitations grounds in 2012 (Hecht) and 2010 (True). But the investigation shone a harsh light on the Getty's collections and, by association, the Bronze, which saw renewed attention of the press.⁴⁹ In January 2006, the Italian authorities demanded the return of fifty-two artifacts, including the Bronze. The Getty eventually agreed to the return of forty objects in August 2008.⁵⁰

But not the Bronze. The Bronze, of course, was not among the items implicated in the Medici scandal—not having been looted from an Italian archeological site and, indeed, not being Italian at all. The Getty and the Italian Ministry agreed that the question of the Bronze would be set aside pending disposition of new proceedings that had begun in 2007, in Pesaro, just north of Fano. Fanned by the media coverage, local fervor in Fano about the Bronze had become inflamed.

A. The Pesaro Court Dismisses the Action As a Pretext

In 2007, a local activist group, “Le Cento Città,” filed a petition with the Public Prosecutor's Office to seek “return” of the

⁴⁶ Rather, almost three decades; in 1989, the Director General of the Ministry of Cultural Heritage and Activities sent a letter to the Director of the Getty requesting the Bronze be “returned” to Italy, which the Getty declined, as the statue is Greek. Felch, *The Amazing Catch*, *supra* note 1.

⁴⁷ See, e.g., David Itzkoff, *Conviction for Dealer of Stolen Antiquities is Upheld*, N.Y. TIMES: ARTSBEAT (July 16, 2009, 11:01 AM), <http://artsbeat.blogs.nytimes.com/2009/07/16/conviction-for-dealer-of-stolen-antiquities-is-upheld/> [<http://perma.cc/WF2B-W8FJJ>].

⁴⁸ *Id.*

⁴⁹ Among the many contemporaneous news articles appearing in the L.A. Times was Felch, *The Amazing Catch*, *supra* note 1.

⁵⁰ Jason Felch & Ari B. Bloomekatz, *Getty's Accord Removes Shadow*, L.A. TIMES (Aug. 3, 2007), <http://articles.latimes.com/2007/aug/03/local/me-getty3> [<http://perma.cc/85VF-TYV4>].

Bronze to Fano. In response, the public prosecutor brought a criminal proceeding against the fishermen who raised the Bronze and the Barbettis, again—at least some of whom were by this time deceased. The prosecutor then immediately requested dismissal of the criminal charges because they were “extinguished as they have become statute-barred and because of the death of some of the investigated persons.”⁵¹ But simultaneously, the prosecutor requested a judgment forfeiting the Getty Bronze to Italy as an accessory object in a criminal proceeding. In November of 2007, the judge recognized the criminal proceedings as a pretense on the part of “Le Cento Città” to obtain a confiscation order for the Bronze, and dismissed both the criminal and forfeiture proceedings, noting that:

[I]t is unquestionable that the criminal offenses envisaged and that can be envisaged have long become statute-barred as the events date back to the sixties and the seventies. What evidently led the Chairman of the “Le Cento Città” association to file a petition is the possibility of obtaining a confiscation order for the afore-mentioned statue.⁵²

The judge further found, on the merits, that the Getty Museum was a good faith purchaser of the Bronze, rendering forfeiture unavailable under the Italian Constitution.⁵³

B. A Second Judge Reverses, Recounts Long-ago “Facts” of the Bronze’s Discovery and Acquisition, and Orders Forfeiture

The prosecutor filed an opposition to the order and, following a hearing at which the Getty appeared as a third party in interest and objected on various procedural and substantive grounds, a second judge, Judge Mussoni, reversed the first in a series of decisions in 2009 and 2010.⁵⁴

Although the judge acknowledged the statue was “probably found in international waters,”⁵⁵ she ruled that Italy nevertheless owned the statue *ab initio* under Italian patrimony laws—a premise considered by the Italian courts in the 1960s and rejected. But the new theory of Italian ownership focused on the fishing trawler itself: namely, the court reasoned, under Article 4 of the Italian Navigation Code, the trawler (said to be

⁵¹ 2007 “Dismissal Order,” Office of the Judge In charge of the Preliminary Investigations, No. 2042/07, 3357/07.

⁵² *Id.*

⁵³ *Id.* (citing Art. 27 Costituzione [Cost.] (It.)).

⁵⁴ Trib. Ordinario di Pesaro, Ufficio del Giudice per le indagini preliminary in funzione di Giudice dell’esecuzione, Ordinanza del 12 può 2009, n.2042/07 R.G.N.R. 3357/07 R.G.I.P. (It.) [hereinafter 2009 Ordinanza].

⁵⁵ *Id.*

an Italian-flagged ship) should be considered part of the territory of Italy. And as part of the territory of Italy, when the Bronze became entangled in the trawlers' nets, it was equally ensnared by the Italian patrimony law that any "found" object of historical or artistic value belongs to the State. Following the precedent of a single case from 1963 (before the Bronze cases in 1966–70), the judge reasoned that "as soon as a movable object lying on the sea floor is caught up in the nets it is to be deemed that it has entered Italian territory and is therefore subject to Italian law."⁵⁶ This principle "affirms the existence of the immediate ownership [of the Bronze] by the Italian State[.]"⁵⁷

The court further accepted in the alternative that either the importation of the Bronze into Fano without the appropriate declarations, or its export without authorization in violation of the patrimony law, would also result in the "nationalization" of the Bronze through an "acquisition of a right of ownership . . . by the State . . . deriv[ing] from the restrictive regulations that govern all objects of artistic, archeological, and/or historical value."⁵⁸

The judge concluded by ordering the forfeiture of the Bronze, "wherever it may be."⁵⁹ Since that order, the case has continued to be the subject of numerous proceedings and appeals through the present day.

IV. WHY RESTITUTION?

It merits at this point taking a step back from the legal arguments and assessing the question: why should Italy own the Bronze, a Greek statue found by chance in international waters that has now spent decades longer in Malibu than it ever did in Fano?

Restitution is a legal remedy that "implies return of the object to the legal owner in accordance with what the law prescribes."⁶⁰ In the case of cultural property, however, the meaning of restitution now extends to the "overcoming of legal obstacles *standing in the way of* return"⁶¹—that is, restitution *in*

⁵⁶ *Id.* at 15.

⁵⁷ *Id.* (*aff'd* in 2010 *Ordinanza*, *supra* note 1).

⁵⁸ *Id.*

⁵⁹ 2010 *Ordinanza*, *supra* note 1, at 35.

⁶⁰ Christa Roodt, *Restitution of Art and Cultural Objects and its Limits*, XLVI COMP. INT'L L. J. S. AFR. 300 (2013).

⁶¹ *Id.* at 301 (citing THE POST-WAR RESTITUTION OF PROPERTY RIGHTS IN EUROPE (Veraart & Winkel, eds., 2011)) (emphasis added).

spite of what the law prescribes—and instead to further certain policy goals based on ethical or moral grounds.

As recognized by Dr. Christa Roodt, in such a regime of restitution in spite of the law rather than pursuant to it, so-called:

Technical defences [*sic*] based on jurisdiction, choice of law, conceptual devices in choice of law, *legal title* or de-accessioning provisions, and even the good faith defence [*sic*], may be applied less strictly in the light of the historic background and special circumstances of a case. The demand for restitution may also be strong enough to suspend statutory limitations in the light of the extreme injustice of the past.⁶²

Recognizing this unique, multivalent meaning of restitution in the cultural property context, Section IV.A will briefly recount the different traditional philosophical underpinnings of restitution. Section IV.B will then discuss the concept of what the authors term “acquisitive patrimony” in the case of Italy’s claim for restitution of the Bronze.

A. Traditional Justifications for Restitution

This section sketches out a spectrum of categories in which restitution may be considered a common remedy. This spectrum begins with cases whose justifications for restitution are the strongest, and moves through cases with more complexity or nuanced issues.

Actual Prior Ownership. The classic paradigm for restitution is to make a wronged person whole. When a person has deprived another, restitution is appropriate to “restore” the wronged party “to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.”⁶³ In these cases, actual ownership is previously documented by a legally cognizable title—for example, a painting owned by a national museum or a statue owned by a private collector. In cases of deprivation of the physical object (theft, conversion, damage, or otherwise), the owner is entitled to restitution by operation of law. In a case of clear prior title, the overlay of additional cultural heritage protections or ethical considerations (such as patrimony laws or suspension of traditional defenses) is not needed—and in fact, traditional defenses would likely apply.⁶⁴

⁶² *Id.* (emphasis added).

⁶³ RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. (a) (June 2016).

⁶⁴ These would include for example unclean hands, laches, and statutes of limitations. See generally *id.* at §§ 139–49 for general principles of defenses.

Extreme Injustice of the Past. Dr. Christa Roodt's useful dichotomy of restitution quoted above notes the difference between restitution as the law prescribes and restitution *in spite of* what the law prescribes in cases of "extreme injustice of the past."⁶⁵ We adopt this rubric to refer to State or individual acts illegal under international law, or acts of aggression and art appropriation in service of aggressive colonialism or cultural destruction that are considered repugnant to modern society.

Nazi-looted art. The paradigmatic cases of "extreme injustice of the past" involve a State action or program that deliberately deprive individuals or subjugate nations of cultural property and/or heritage. The restitution of Nazi-looted or "Holocaust" art falls squarely here. The Nazis' systematic seizure of art before and during World War II began with the wholesale appropriation and destruction of so-called "degenerate" or "depraved" art within Germany, but quickly expanded to the indiscriminate seizure of art and cultural artifacts—either to enrich individual Nazis or the Nazi German state, or to achieve the annihilation of so-called "lesser" cultures.⁶⁶ This program violated an explicit international law prohibition on the confiscation of private property by aggressive occupying powers under Article 46 of the 1907 Hague Convention.⁶⁷ Alfred Rosenberg, the Nazi official who directed the German *Einsatzstab Rosenberg* that was responsible for the vast majority of art looting, was tried at Nuremberg for war crimes, crimes against peace, and crimes against humanity, and was hanged.⁶⁸ Hermann Goering, in addition to being the high-ranking Nazi *Reichsmarschall*, was a noted looter of property and artwork from the Holocaust's Jewish victims and was convicted and

⁶⁵ Roodt, *supra* note 60, at 301.

⁶⁶ Lynn H. Nichols, *World War II and the Displacement of Art and Cultural Property*, in *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 39 (Elizabeth Simpson ed., 1997); JOHN HENRY MERRYMAN, ALBERT E. ELSÉN & STEPHEN K. URICE, *LAW, ETHICS, AND THE VISUAL ARTS* 16–17 (5th ed. 2007).

⁶⁷ John Henry Merryman, *Introduction*, in *IMPERIALISM, ART AND RESTITUTION* 1, 7–9 (John Henry Merryman ed., 2006) [hereinafter Merryman, *Introduction*]; George Winfield Scott, *Hague Convention Restricting the Use of Force to Recover on Contract Claims*, 2 AM. J. INT'L L. 78, 90 (1908).

⁶⁸ *Trial of the Major War Criminals Before the International Military Tribunal Nuremberg 14 November 1945 – 1 October 1946*, in 22 INT'L MILITARY TRIBUNAL 539–41 (BLUE SERIES, 1948), http://loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf [<http://perma.cc/3ULZ-LUBK>]. See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 125 (1994).

sentenced to death at Nuremberg, although he committed suicide before the sentence could be carried out.⁶⁹

International Colonialism. Other campaigns of aggressive colonialist art appropriation also fall in this category. Acts of national plunder, such as the triumphalist plunder of Europe by Napoleon in the eighteenth century, plunder of Chinese artifacts after the Boxer rebellion, or the British Punitive Expedition against Benin in 1897 can constitute aggressive colonialist appropriation even though not specifically in violation of international law norms at the time, and were contemporaneously recognized as such and hotly debated among intellectuals.⁷⁰

Another example of this is Mussolini's brutal World War II campaign in Ethiopia, which resulted in the looting of numerous objects by Italian forces. Styling himself as following the Romans' ancient tradition of looting cultural treasures to add to the capitol's landscape, in 1937 Mussolini hauled away Ethiopia's most ancient archeological artifacts to commemorate his "new Roman empire."⁷¹ One of these treasures was the Axum Obelisk, dating from fourth century A.D., which Mussolini carted off and erected in front of Rome's new colonial office, the Ministry for Italian Africa.⁷² Three times over the last sixty years Italy promised to return the Obelisk, and each time it reneged on its word. Interestingly, as late as 2002, the Italian undersecretary of the Ministry of Culture held the view that the Obelisk had become integral to the Roman landscape, and further questioned whether Ethiopians were "cultured" enough to appreciate its restitution, saying in an interview:

Are we really supposed to believe that there is an Ethiopian out there—a cultured Ethiopian—who attaches a symbolic political or ethical significance to the restitution of that stone? . . . The Ethiopian people . . . should consider themselves fortunate to have a window on the Eternal City of the rich Western world.⁷³

Italy finally returned the Obelisk under intense political pressure in 2005, sixty-eight years after the fact, although numerous other objects remain in Italian storerooms.⁷⁴

69 NICHOLAS, *supra* note 68, at 23, 36, 38–39, 342–43.

70 Merryman, *Introduction*, *supra* note 67, at 5–6.

71 See, e.g., Richard Parkhurst, "Old Stones" – *The Loot of Ethiopian Antiquities during the Italian Invasion of 1935–6*, DIALOGUE, Mar. 1970, at 31–44.

72 *Id.*; Tom Hundley, "Ethiopia Again Demands Return of Obelisk," CHICAGO TRIBUNE (Mar. 10, 2002), http://articles.chicagotribune.com/2002-03-10/news/0203100403_1_obelisk-ethiopian-people-ethiopian-embassy [<http://perma.cc/RDX4-MFEW>].

73 Hundley, *supra* note 72.

74 *Obelisk returned to Ethiopia after 68 years*, THE GUARDIAN (Apr. 20, 2005), <https://www.theguardian.com/world/2005/apr/20/italy.ethiopia> [<http://perma.cc/23QQ-5DK8>].

Trophy art. An interesting variation on this is the widespread state appropriation of artworks after World War II by Soviet “trophy brigades,” which were set up to exact “equivalent” artwork from Germany as reparations for Nazi looting and destruction.⁷⁵ Nazi art looting on the Eastern front was particularly brutal; Slavic culture, deemed inferior, was to be eliminated completely. Hundreds of museums and over two thousand churches and synagogues were simply destroyed.⁷⁶ Western powers collected Nazi art after World War II’s end with the eventual goal of returning it to the nations from which it had been taken, but Soviet trophy brigades considered such art “compensatory restitution” for the U.S.S.R.’s losses.⁷⁷ While some of the art taken by the U.S.S.R. had belonged to private collections or museums in Germany prior to World War II, many items had been plundered or coercively acquired by the Nazi looting machine. Setting aside the legal proscriptions on the destruction and taking of art, morally, Russia views this art as appropriate and equivalent compensation for its enormous World War II losses. But many of those who initially owned such works dispute Russia’s claim and consider them plundered anew. In 2000, Russia passed a Federal Law on Displaced Cultural Valuables justifying the retention of this art under a theory of compensatory restitution, and nationalizing art and cultural property within Russia that formerly belonged to Germany or its World War II allies.⁷⁸ These works continue to exist in legal limbo, as litigation and diplomacy have yielded little results.⁷⁹

These justifications in cases of “extreme injustice” are not purely ownership based in terms of involving a recognizable legal title which can be given straightforward effect under the law. In many of these cases, there is no cognizable legal remedy, and thus, restitution “in spite of” what the law prescribes can be appropriate.

Protection of Archeological and Cultural Context. Along the spectrum of justifications for restitution, this category recognizes that restitution can also be appropriate as a deterrent to discourage the pillage or looting of archeological sites, or to

⁷⁵ Amelia Borrego Sargent, *New Jurisdictional Tools for Displaced Cultural Property in Russia: From “Twice Saved” to “Twice Taken,”* 10 Y.B. CULTURAL PROP. L. 167, 170–71 (2010).

⁷⁶ *Id.* at 169.

⁷⁷ *Id.* at 170–72.

⁷⁸ *See id.* at 189–91.

⁷⁹ *See, e.g.,* the outcome in *Agudas Chasidei Chabad of United States v. Russian Federation, et al.*, 128 F. Supp. 3d 242 (D.D.C. 2015), in which the court has awarded sanctions in the amount of \$50,000 per day against Russia for its refusal to comply with an order for the return of sacred texts to the Jewish organization Agudas Chasidei Chabad.

preserve and respect a cultural context. These types of goals were articulated in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 1970 (“1970 UNESCO”).⁸⁰

Pillage or individual acts of looting. Restitution can deter archeological destruction of cultural sites, buildings, burials, and monuments by looters. Destruction of the archeological record results in a loss for all.⁸¹

Intercultural reparations under NAGPRA. The Native American Graves Protection and Repatriation Act (“NAGPRA”), enacted in the United States in 1990, requires federal agencies and public and private institutions that receive federal funding to return Native American cultural items to lineal descendants or prior owners, and establishes procedures for new discoveries of Native American cultural items on federal or tribal lands.⁸² John Henry Merryman has described NAGPRA as “what may be the greatest art restitution project in history.”⁸³ NAGPRA’s premise is what some scholars have termed “intercultural reparations,” “grounded in recognition that alienation of human remains and items of cultural patrimony violated Native religious traditions and common-law rights to protect the dead.”⁸⁴ The justification for NAGPRA could easily be contextualized within the history of American continental expansion; it is set apart from the examples above, in part because it does not implicate international law norms, but involves restitution between a government and a living culture within a single political boundary.

Constructive Ownership. At the far end of the spectrum, private purchase and ownership of cultural objects itself is suspect under a strict interpretation of the 1970 UNESCO Convention and subsequent treaties, which encourage the national retention of cultural objects and discourage any private trade ostensibly to discourage clandestine excavation and export.⁸⁵ Beyond remedying actual title, extreme injustice, or

⁸⁰ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property 1970, art. 13, 15, *adopted on* Nov. 14, 1970, 823 U.N.T.S. 232, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/> [<http://perma.cc/46PH-PD7J>].

⁸¹ *See, e.g.*, Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT’L L. 197 (2001).

⁸² *Id.* at 231 n.149.

⁸³ Merryman, *Introduction*, *supra* note 67, at 1, 10.

⁸⁴ Michael F. Brown & Margaret M. Bruchac, *NAGPRA from the Middle Distance: Legal Puzzles and Unintended Consequences*, in IMPERIALISM, ART AND RESTITUTION 193, 194 (John Henry Merryman ed., 2006).

⁸⁵ John Henry Merryman, *Art Systems and Cultural Policy* 24–30 (Stanford Pub.

present looting, what we term “constructive ownership” is an argument deployed by a nation to demand restitution of cultural objects based on a particular set of principles or enactments that it is the object’s rightful “country of origin” rather than actual prior possession or title.

As Dr. Roodt recognized, the term “country of origin” can have quite a few meanings, and it is not always, or not even primarily, the country consisting of the culture in which an object was created. Rather, in the current cultural heritage regime, “[t]he ‘country of origin’ refers to the country that designates the object as part of its cultural heritage, or that classifies it as national treasure, or includes it in a record on an ad hoc basis.”⁸⁶ That is, the modern designation creates the “origin” country for the purposes of cultural nationalization.

A “country of origin” argument arises when an object that “originated” in a particular country is legally outside of that country (and not through an act of aggression, as discussed above), but a nation nevertheless calls for its return. The Elgin Marbles are a prime example: John Henry Merryman examined the legal basis for ownership and concluded the acquisition was legal and “by the standards applicable in that time and place, ethical.”⁸⁷ As Merryman later noted, Greece has since made the argument that “whatever one might think about whether the Elgin Marbles belong *to* Greece, they belong *in* Greece.”⁸⁸ As another scholar articulates, “[c]ertain objects are of signal importance to national identity: the Crown of St. Stephen to Hungary, the Declaration of Independence to the United States, the Stone of Scone to Scotland, and the Imperial regalia to Japan.”⁸⁹ These are cases where an item is said to “belong’ to a people, essentially or inherently connected to them in some inalienable way.”⁹⁰

Other examples of a “country of origin” argument arise in cases of acquisition of works through *partage*, an arrangement

Law Working Paper, No. 1489612, 2010), <http://ssrn.com/abstract=1489612>.

⁸⁶ Roodt, *supra* note 60, at 290–91 (advocating for a comprehensive *lex culturis*, a body of law that would be applied to cultural property disputes other than the *lex situs* or *lex originis*).

⁸⁷ John Henry Merryman, *Whither the Elgin Marbles?*, in *IMPERIALISM, ART AND RESTITUTION* 98, 99 (John Henry Merryman ed., 2006). Merryman’s original article is John Henry Merryman, *Thinking about the Elgin Marbles*, 83 *MICH. L. REV.* 1881 (1985).

⁸⁸ Merryman, *Whither the Elgin Marbles?*, *supra* note 87, at 98, 100.

⁸⁹ Stephen K. Urice, *The Beautiful One Has Come – to Stay*, in *IMPERIALISM, ART AND RESTITUTION* 135, 152 (John Henry Merryman ed., 2006).

⁹⁰ Daniel Shapiro, *Repatriation: A Modest Proposal*, 31 *N.Y.U. J. INT’L L. & POL’Y* 95, 96 (1998).

common in the early twentieth century whereby a foreign-funded archeological team and a source nation would equally divide objects found during excavations.⁹¹ A portrait bust of Nefertiti, currently in Berlin, was acquired by *partage* from Egypt in 1912 in accordance with all applicable laws at the time.⁹² Nevertheless, Egypt has called for its return because it is “Egyptian.”⁹³ This concept is more complicated than Egypt suggests; the cultural connection between Nefertiti’s Egypt (1350–1333 B.C.E.) and contemporary Egypt is, as one scholar noted, far more nuanced.⁹⁴ Separating the two are conquest by Alexander the Great, numerous Islamic caliphates, Ottoman, and then British rule. Instead, the modern state considers the territory encompassed by its current political boundary to define its cultural boundaries.

Finally, this category invariably involves individual nations’ patrimony laws, which to varying degrees provide for nationalization of objects of artistic, ethnographic, or archeological value found within a country’s territory (deemed the “country of origin”) and limit the export and circulation of such material.⁹⁵

The concept of territory is key here, because national patrimony laws equate current national political borders with a past cultural identity based on territory—eliding the historical nuances that bring cultural property to the present day. The patrimony law regime generally forbids privatization and free circulation of such objects in the present, but ratifies whatever circulation—through commerce, war, or otherwise—may have brought the object to the territory in the first place. So, for example, under Italy’s patrimony law, ancient Egyptian artifacts found in Etruscan tombs in the current political nation of Italy belong to Italy, not Egypt, despite the fact that no one doubts a golden scarab’s true “country of origin.”⁹⁶ Of even greater moral

⁹¹ Merryman, *Introduction*, *supra* note 67, at 1, 9.

⁹² Urice, *supra* note 89, at 143.

⁹³ *Id.*; *German Foundation Refuses to Return Nefertiti Bust*, REUTERS (Jan. 24, 2011), <http://www.reuters.com/article/us-germany-egypt-nefertiti-idUSTRE70N6N220110124> [<http://perma.cc/3YTW-NYUE>].

⁹⁴ Urice, *supra* note 89, at 153.

⁹⁵ A thorough database of such laws can be found at the UNESCO DATABASE FOR NATIONAL CULTURAL HERITAGE LAWS, <http://www.unesco.org/culture/natlaws/> [<http://perma.cc/92Z7-SGK4>].

⁹⁶ Italy’s current Patrimony Law is Law No. 42/2004, D.Lgs. 22 gennaio 2004, n.42, in G.U. Feb. 2, 2004, n.28 (It.), *translated in* CODE OF CULTURAL AND LANDSCAPE HERITAGE (U.N. Educ., Scientific & Cultural Org. et al. eds., 2016). For an example of such a find, see *Rich Tomb of an Etruscan Princess Discovered in Italy*, ANCIENT ORIGINS (Mar. 9, 2016, 9:43 PM), <http://www.ancient-origins.net/news-history-archaeology/rich-tomb-etruscan-princess-discovered-italy-005499> [<http://perma.cc/Q8TR-YCBA>]; *Tomb Excavations Uncover Treasures of an Etruscan Princess*, ANSA (Mar. 11, 2016, 2:52 PM), <http://www.ansa.it>

complexity are objects seized from other cultures—whether by Imperial Rome or by Mussolini’s Nuova Roma—since under Italian patrimony law, such objects purport to belong to Italy.

This can be problematic. First, the current patrimony law regime pits cultural nationalists against cultural internationalists, and causes harm to those both within the nation and abroad. Seeking to maximize State authority over its territorial treasures, States frequently designate *all* cultural objects, not just those of major importance, as “national treasures,” a problem oft-recognized by Merryman.⁹⁷ Cultural objects can be restricted from being seen, displayed, and understood by any cultures other than the “national” one, because their ability to travel internationally or be sold in commerce is restricted. This in turn results in a dangerous parochialism that denies the multiethnic diversity that creates and influences an ever-changing culture. When cultural property laws claim antiquities to be “the manifestation of the ‘collective genius of nationals of the State,’” eliding the contours of history and culture in favor of modern political boundaries, it implies “some collective genius that distinguishes [citizens of that state] from everyone else in the world.”⁹⁸ This attitude is easily co-opted from cultural into political spheres, feeding political nationalist narratives.

Second, and particularly relevant with respect to the Bronze, is that the idea of single “country of origin” is a far too simplistic one, and can lead to conflicting results for objects of particular significance or with a complex history.

[A]n object of indisputable significance may not be so designated [as having one “country of origin”]; there may also be overlapping claims by more than one state; and a genuine cultural link could exist between country and object, independent of any formal designation. Such a link may also be forged with an “adoptive” state or a community that attributes value to the object.⁹⁹

The difficult cases with restitution arise particularly where an object’s “country of origin” is not a simple answer.¹⁰⁰

english/news/2016/03/08/tomb-excavations-uncover-treasures-of-an-etruscan-princess_a3ac25e9-3168-4c59-9bbc-8024716011e2.html [http://perma.cc/UM8Y-2ENT].

⁹⁷ Merryman, *supra* note 85 (manuscript at 26).

⁹⁸ See JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 145 (2010).

⁹⁹ Roodt, *supra* note 60, at 290–91.

¹⁰⁰ For example, the ownership of the Sevso treasure, a hoard of fourth century Roman silver, has been contested by several countries: Hungary, Croatia, and Lebanon have all claimed that the treasure was illegally excavated from their countries. While Hungary recently purchased some of the pieces, the remaining continue to reside in a

These two problems are only compounded when countries use patrimony laws as a sword rather than a shield—to acquire new objects into the national patrimony rather than protect existing but undiscovered objects within the territory.

B. Acquisitive Patrimony and the Getty Bronze

We return to the question: why should Italy own the Bronze, a Greek statue found by chance in international waters that has now spent decades longer in Malibu than it ever did in Fano, Italy?

The Italian government argues that it owns the Bronze and that it belongs in Fano.¹⁰¹ This is an argument that Italy constructively owns the Bronze, not based on prior possession or actual title, but through operation of Italy's patrimony laws. Italy has no preexisting title to the Bronze under an "actual ownership" regime. The Bronze was not owned or exhibited in a state museum from which it was stolen or taken. Nor would restitution of the Bronze to Italy, from whence it historically never originated, right some "extreme injustice of the past." No state or individual action appropriated the Bronze in a way that somehow damaged Italy's cultural heritage. Further, the Bronze was not deliberately looted from an archeological site that was irreparably damaged.¹⁰² Indeed, in ancient times the Bronze had already been removed from its original context somewhere in Greece by—in all likelihood—Roman looters, and was being taken by boat to Italy. The Bronze's "country of origin," as discussed in the above taxonomy, is not Italy at all; the Bronze is Greek, and has no historical connection to Italian soil. It was not discovered in Italian territory, and it never made it there in antiquity, and so was never incorporated into that country's historical cultural landscape.¹⁰³

private collection in the U.K. Dalya Alberge, *Sevso treasure items repatriated by Hungarian government after UK sale*, THE GUARDIAN (Mar. 27, 2014, 1:51 PM), <https://www.theguardian.com/world/2014/mar/27/sevso-treasure-items-repatriated-hungarian-government-roman-silver> [http://perma.cc/Z4PK-EK73]; Neil Brodie, *Sevso Treasure*, TRAFFICKING CULTURE (Mar. 28, 2014), <http://traffickingculture.org/encyclopedia/case-studies/sevso-treasure/> [http://perma.cc/2YKS-9JBF].

¹⁰¹ See, e.g., 2009 *Ordinanza supra* note 54; 2010 *Ordinanza supra* note 1.

¹⁰² See, e.g., Gerstenblith, *supra* note 81, at 201; see also Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 277, 301 (1982).

¹⁰³ Despite this, the mayor of Fano has articulated the city's claim to the Bronze in precisely these terms, stating in an interview that "[t]he statue and its discovery has become part of our culture and folklore . . . It's clear we have a claim to it." Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES (Jan. 15, 2010), <http://www.nytimes.com/2010/01/16/arts/design/16bronze.html>. But why? The Bronze's fleeting passage through Fano underscores the plain factual and historical differences between it and an artifact like the Elgin Marbles—a difference not just in degree but in kind.

In such cases, the seeming justification behind territorial patrimony laws breaks down. Indeed, this is not a “country of origin” argument but rather acquisitive patrimony, an expansionist use of its patrimony law as a sword to obtain cultural property beyond that originally “found” in Italian territory. Thus, the Pesaro Court held that under Italian law, any Italian vessel, including flagged boats and aircraft, are Italian “territory” for the purposes of applying its Patrimony Law.¹⁰⁴ The Bronze, which was located in international waters, supposedly entered Italian territory when it was first entangled in the fishing trawlers’ nets before it was “discovered”; it was therefore discovered in Italian territory.¹⁰⁵

Consider the implications if the law were so. Would a painting shipped on an Alitalia flight between London and Munich need to comply with Italian Patrimony Law’s export and import provisions, or be forfeit to the Italian state? Could Italy simply nationalize such a transiting object and designate it part of its patrimony? What if an Italian-flagged ship pulled up some pre-Colombian artifact off the Pacific Coast of South America?¹⁰⁶ Would that be part of the Italian patrimony? Acquisitive patrimony reflects a disconnect of territorial patrimony laws from a State’s actual *territory*—that is, ancient artifacts found within a State’s soil—and expands it instead to art and artifacts that transit a nation’s political borders. This is a novel and potentially disruptive expansion of nationalized, political control over cultural heritage.

Further, although acquisitive patrimony does not seem to comport with the ethical and moral reasons ordinarily invoked when arguing for restitution in cases of, for example, “extreme injustice of the past,”¹⁰⁷ the rhetoric of traditional restitution is

¹⁰⁴ 2009 Ordinanza, *supra* note 54.

¹⁰⁵ 2010 Ordinanza, *supra* note 1.

¹⁰⁶ Among other things, Italy’s claim of title to such an object today would violate the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage* (“CPUCH”). See U.N. Educ., Sci. and Cultural Org., *Text of the 2001 Convention, UNDERWATER CULTURAL HERITAGE*, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/> [<http://perma.cc/M6HU-BE6T>]. The Convention generally requires Italy to “preserve underwater cultural heritage for the benefit of humanity.” *Id.* art. 2. To the extent Italy purported to “seiz[e]” any non-Italian work under the Convention, it would be required to notify “any other State with a verifiable link, especially of a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure . . . that it has made under this Convention” *Id.* art. 18. It would need to “ensure that its disposition be for the public benefit,” specifically “taking into account the . . . interests of any State with a verifiable link, especially a cultural, historical or archaeological link.” *Id.*

¹⁰⁷ Roodt, *supra* note 60, at 301.

still used to dismantle or disregard the “technical defenses” provided under ordinary legal procedure that would otherwise be available, including choice of law, jurisdiction, good faith, and the principle that newly enacted laws do not operate retroactively—i.e. procedural due process.¹⁰⁸ That is, in the case of the Bronze, Italy seeks restitution “in spite of” the law, but lacking the ethical and moral grounds ordinarily attendant under traditional restitutionary categories. This tactic is deliberate; according to one Italian scholar, Judge Mussoni’s arguments to justify the application of substantive Italian law to the Bronze, and thereby obtain ownership, “demonstrate[] the seriousness of Italy’s commitment to retaining *by any possible means* what it considers to be its national heritage.”¹⁰⁹

Acquisitive patrimony is not unique to the Bronze. Consider, too, the Peggy Guggenheim Collection located in Venice, Italy. Peggy Guggenheim, an American art patron and collector, lived part of her life in Italy and had a collection there of numerous American Abstract Expressionists, including Jackson Pollock and Mark Rothko.¹¹⁰ Beginning in 1951, Guggenheim opened her Venice palazzo and her collection to the public in the summer months.¹¹¹ She left her collection to the Guggenheim Foundation. The Peggy Guggenheim Collection—including American art made by Americans—was subsequently designated part of the *Italian* patrimony and strict limitations were placed on its export.¹¹²

As the reach of the Italian patrimony law extends to contemporary artists, the consequences of acquisitive patrimony are becoming more acute. The Italian patrimony law requires an export license for any work over fifty years old made by an artist who has died, even if it has only been in Italy for a short time.¹¹³ The bureaucratic backlog threatens to stifle the circulation of

¹⁰⁸ See Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the “Getty Bronze”*, in CULTURAL HERITAGE, CULTURAL DIVERSITY: NEW DEV. IN INT’L L. 301, 303–26 (Silvia Borelli & Federico Lenzerini eds., 2012).

¹⁰⁹ *Id.* at 303 (emphasis added).

¹¹⁰ See *Peggy Guggenheim, Biography*, PEGGY GUGGENHEIM COLLECTION, <http://www.guggenheim-venice.it/inglese/museum/peggy.html> [<http://perma.cc/ZJM5-AMVX>].

¹¹¹ *Id.*

¹¹² See Roderick Conway Morris, *Italy Tightens Rules on Lending of Art*, N.Y. TIMES (Oct. 24, 1998), <http://www.nytimes.com/1998/10/24/news/italy-tightens-rules-on-lending-of-art.html>.

¹¹³ Julia Halperin & Ermanno Rivetti, *Time for Italy to Reverse its Art Export Laws?*, THE ART NEWSPAPER (Oct. 2014), <http://www.cbmlaw.it/media/News-Arte-Povera.pdf> [<http://perma.cc/VD9Z-74JL>]; Ermanno Rivetti, *Are Italy’s Export Laws About to Change?*, THE ART NEWSPAPER (Sept. 25, 2015), <http://theartnewspaper.com/market/are-italy-s-export-laws-about-to-change/> [<http://perma.cc/U2ZD-REN7>].

Italian post-war art, affecting the market as well as research, conservation, and museum lending.¹¹⁴

Thus, while national patrimony laws embody a way of thinking of cultural property as part of a national heritage, giving “nations a special interest, impl[ying] the attribution of national character to objects, independently of their location or ownership, and legitimiz[ing] national export controls and demands for the ‘repatriation’ of cultural property,”¹¹⁵ they also go further. In cases such as the Peggy Guggenheim collection, or any art incidentally transiting Italy that has the misfortune of being more than fifty years old made by an artist who has died, through acquisitive patrimony, the patrimony law achieves the expansion of the national patrimony to items not related to the nation by culture, origination, or national character, but by mere presence on Italian territory.

In a way, aggressive acquisition of artworks has come full circle, and with the same unbridled nationalist fervor. Following the early twentieth century’s cultural looting by conquest, such as Mussolini’s invasion of Ethiopia in 1937, and Nazi looting of art and artifacts before and during World War II, the expansion of national cultural patrimony through physical conquest (or the destruction of others’) was explicitly prohibited by the 1954 Convention on the Protection of Cultural Property in Wartime.¹¹⁶ Thus prohibited from expanding their national patrimony through conquest, countries aggressively use and interpret their patrimony laws to accomplish the same objective—even when an artwork or artifact has only a tenuous, but physical, connection with the claimant State.¹¹⁷

¹¹⁴ Halperin & Rivetti, *Are Italy’s Export Laws About to Change?*, *supra* note 113.

¹¹⁵ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 832 (1986).

¹¹⁶ See U.N. Educ., Sci. and Cultural Org., *Text of the Convention and its 1st Protocol, THE HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT*, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-hague-convention/text-of-the-convention-and-its-1st-protocol/#c284179> [<http://perma.cc/UT65-A3T7>]. Italy’s repatriation or restitution of looted works from conquest within its own borders lags somewhat behind its prosecution of its own patrimony. Graham Bowley, *Nations Called Lax in Returning Art Looted From Jews*, N.Y. TIMES (Sept. 10, 2014), http://www.nytimes.com/2014/09/11/arts/design/lax-efforts-on-wartime-looted-art-criticized-in-new-report.html?_r=0; see also Sarah Cascone, *Italy Dragging Its Feet on Nazi Loot Restitution*, ARTNET NEWS (Sept. 10, 2014), <https://news.artnet.com/art-world/italy-dragging-its-feet-on-nazi-loot-restitution-98169> [<http://perma.cc/U8CX-3GTK>]. Indeed, it took 68 years for Italy to return the famed Axum Obelisk to Ethiopia. *Obelisk returned to Ethiopia after 68 years*, *supra* note 74.

¹¹⁷ Italy is not the only nation to use its Patrimony Laws in this way. Spain recently nationalized a Picasso that had been privately owned by an art collector who purchased

This should be troubling. Now, the Authors do not take the position that every item should stay wherever it is today, particularly if it were taken by force. However, the Bronze case as an outer limit exposes how the far end of the restitution spectrum has been extended and co-opted into politically motivated territory.

Importantly, by contrast, countervailing considerations of, in Merryman's phrase, "cultural internationalism" resonate in favor of the Bronze remaining in California.¹¹⁸ The regime of patrimony laws lays claim to artworks and antiquities as the property and patrimony of particular nations on the basis of political lines—and often for political gain or legitimacy.¹¹⁹ Comparatively, universalism or cultural internationalism looks to the language of the Preamble of the Hague Convention of 1954, which holds that cultural heritage "is of great importance for *all* peoples of the world" and that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."¹²⁰

This latter ideal is borne out in the so-called "universal" or "encyclopedic" museum: museums whose collections draw from a wide variety of cultures and time periods. Universal or encyclopedic museums embody the principle of the universality of cultural heritage by displaying "collections meant to represent the world's diversity, and they organize that and classify that diversity for ready, public access."¹²¹ Adhering to the principle that art and antiquities belong to the cultural heritage of "all peoples of the world," encyclopedic museums present collections to broaden that understanding of a common yet diverse cultural heritage. As one former director of the British Museum stated, "the [British] Museum acted as though it were an encyclopaedia, or a dictionary based on historical principles, with sequences of rooms, their layout, and the juxtaposition of objects within them providing a means of understanding relationships within the three-dimensional world of objects and specimens."¹²² One must

the painting in London in 1977. See Doreen Carvajal, *Private Property or Patrimony? The Fight Over a Picasso*, N.Y. TIMES (Oct. 9, 2015), <http://www.nytimes.com/2015/10/10/arts/design/private-property-or-patrimony-the-fight-over-a-picasso.html>.

¹¹⁸ Merryman, *supra* note 115, at 831.

¹¹⁹ See generally CUNO, *supra* note 98.

¹²⁰ Merryman, *supra* note 115, at 836–37 (emphasis added) (citing the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, 249 UNTS 240).

¹²¹ CUNO, *supra* note 98, at 140.

¹²² *Id.*

acknowledge the value of such museums, including the Getty, in balancing the considerations of whether the Bronze should return to Italy.

The stated purpose of the J. Paul Getty Trust is the “diffusion of artistic and general knowledge.”¹²³ The Bronze is an integral cornerstone of the collection at the Getty Villa, part of the Getty Museum operated by the Trust. The Getty Villa, modeled after the Herculaneum’s Villa dei Papiri, is the only place in the United States dedicated solely to the study and display of ancient art.¹²⁴ The Villa brings Greek, Roman, and Etruscan art, displayed in an evocative context, to an audience of over 300,000 visitors per year.¹²⁵ The Bronze is part of the Getty Villa’s history—indeed, the acquisition of the *Getty Bronze* began a new chapter in the Museum’s legacy after the death of Mr. Getty. The Bronze has a strong “forged link” with the Villa and its home for four decades, the United States. This too has value that deserves recognition, and perhaps more so because of the role the Bronze has played in the origin of the Getty. As the L.A. Times remarked in an editorial, “The bronze spent the vast majority of its first 2000 years deep in the ocean. Its longest home since then has been the Getty. That is where it should stay.”¹²⁶

One might also consider Paul Bator’s first and primary value of “the preservation of works of art and the associated values of integrity and visibility.”¹²⁷ In Bator’s formulation, this value involves not only the literal preservation of artworks, but the value of “making art known, visible, and accessible”—and not just to the widest audience, but to the appropriate audience, “now or in the future.”¹²⁸ Italy, by comparison to California, has no shortage of opportunities for the visitor to engage in ancient

¹²³ *Indenture*, THE GETTY, <http://getty.edu/about/governance/indenture.html> (last visited Jan. 14, 2017) [<http://perma.cc/AF88-GCKE>].

¹²⁴ *Architecture: A Roman Villa Recreated – Early 1970s*, GETTY, <http://www.getty.edu/visit/villa/architecture.html> [<http://perma.cc/WXW8-X49J>]; Press Release, The Getty, Ten Years of Collecting at the J. Paul Getty Museum (Sept. 24, 2007), http://www.getty.edu/news/press/center/ten_years_of_collecting.html [<http://perma.cc/HN36-TNVS>].

¹²⁵ VISITORS FIGURES 2014, THE ART NEWSPAPER 15 (2014), http://www.museus.gov.br/wp-content/uploads/2015/04/TheArtNewspaper_Ranking2014.pdf [<http://perma.cc/6M7L-SNZB>].

¹²⁶ The Times Editorial Board, *Sorry, Italy, the ‘Getty Bronze’ belongs in L.A.*, L.A. TIMES (June 2, 2014, 6:42 PM), <http://www.latimes.com/opinion/editorials/la-ed-getty-bronze-20140603-story.html>.

¹²⁷ See generally Bator, *supra* note 102. Although Bator’s framework analyzes the international trade in art, it also applies to cultural property disputes where “no enforceable legal claim exists but ethical, moral, or practical considerations might nevertheless call for return of a disputed object to its country of origin.” Urice *supra* note 89, at 145.

¹²⁸ Bator, *supra* note 102, at 299–301.

art of the Mediterranean.¹²⁹ As one part of Italy's vast national patrimony, the Bronze would lose part of its universal character in becoming yet another trophy—this time in service to nationalistic politics. Surely the shared human artistic heritage deserves better.

V. CONCLUSION

As the above considerations show, the case for restitution of the Bronze is at best a dramatic expansion of the traditional justification for the return of cultural property—one that relies on “acquisitive patrimony” or the incidental transit through territory rather than “extreme injustice” or cultural identification of a “country of origin.”

As a boundary case that tests the applicability of expansionist interpretations of cultural property law, the specifics of the case of the Getty Bronze demonstrate and make clear that there must be logical limits to the reach of cultural patrimony laws. The case of the Bronze should instead fall squarely within the existing and known legal framework—where *res judicata*, statutes of limitations, choice of law, and good faith all operate to provide certainty and due process when analyzing long-ago transactions. While cultural patrimony laws are valuable protective tools under many circumstances, their reach is not infinite, and when used as a sword rather than a shield, the justification for nationalization breaks down. Here, a Greek bronze recovered by chance in international waters, purchased with due diligence through a standard process, and long the centerpiece of a notable American museum, the Italian patrimony law cannot—should not—reach.

¹²⁹ Similarly, at least one scholar has argued that, should the Bronze be “returned” anywhere, it should be to Greece—the Bronze’s true country of origin—but that Greece’s prolific collections of Greek artifacts counsel the Bronze to remain at the Getty. See Alexander MacKintosh Ritchie, *Victorious Youth Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 PEPP. DISP. RES. L.J. 325, 375 (2009).