

"OFFICIAL FAKES": THE CONSEQUENCES OF  
GOVERNMENTAL TREATMENT OF FORGED ANTIQUITIES AS  
GENUINE DURING SEIZURES, PROSECUTIONS, AND  
REPATRIATIONS

*Erin L. Thompson\**

I. INTRODUCTION

At the climactic moment of John Huston's 1941 film noir *The Maltese Falcon*, Sydney Greenstreet, playing the nefarious "Fat Man," caresses a sculpture of a falcon.<sup>1</sup> He has spent tens of thousands of dollars and ordered the murders of two men, as well as the burning of an entire freighter ship, in his search for it.<sup>2</sup> He believes that he is holding a jewel-encrusted golden sculpture, the 16<sup>th</sup> century gift of the Knights Templar of Malta to Charles V of Spain.<sup>3</sup>

But as he scrapes off the black coating with which the statue has been disguised, the Fat Man begins to shriek: "It's a phony – it's lead – it's lead – it's a fake!"<sup>4</sup> Instead of gold and jewels, the falcon he holds is made of worthless lead.<sup>5</sup>

*The Maltese Falcon* is, of course, exaggerated. Rarely are a few scrapes of a penknife sufficient to determine that an object is not a

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\* Associate Professor, John Jay College, City University of New York; JD, Columbia Law, 2010. I would like to thank the members of the 2017-18 Rice Seminar at the Rice University Humanities Research Center for their invaluable discussions of forgery in general and drafts of this article in particular.

<sup>1</sup> THE MALTESE FALCON (Warner Bros. 1941); THE MALTESE FALCON: FULL CAST & CREW, IMDB, [https://www.imdb.com/title/tt0033870/fullcredits/?ref\\_=tt\\_ov\\_st\\_sm](https://www.imdb.com/title/tt0033870/fullcredits/?ref_=tt_ov_st_sm) (last visited Nov. 9, 2018); THE MALTESE FALCON: PLOT, IMDB, <https://www.imdb.com/title/tt0033870/plotsummary> (last visited Nov. 9, 2018).

<sup>2</sup> See THE MALTESE FALCON: PLOT, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> THE MALTESE FALCON, *supra* note 1.

<sup>5</sup> *Id.* Worthless at least within the plot of the movie, but quite valuable for movie fans: one of the falcon statues that appeared in the movie sold for over \$4 million at auction in 2013. *The Iconic Lead Statuette of The Maltese Falcon* (2013), BOHNAMS, <https://www.bonhams.com/auctions/21427/lot/225/> (last visited Nov. 9, 2018). That is, the object that played the role of a forgery within the film was a genuine artwork made for the film. *Id.*

genuine antiquity.<sup>6</sup> But the core of the film’s story is all too real, in its insistence that even a laughably bad fake can cause the expenditure of great sums of money and lead to disputes, both civil and criminal, in which the government will have to be involved (generally with greater expenditure of time and effort than in this case, where Sam Spade reluctantly but dutifully turns in his love interest, the Fat Man’s beautiful, yet criminal accomplice).<sup>7</sup>

This article will argue that the *Maltese Falcon* problem is much more widespread than has previously been recognized. What I will call “official fakes”—fakes mistakenly treated as genuine antiquities by governmental authorities—are costly to many branches of government.<sup>8</sup> They waste authorities’ time, resources, cash, and credibility.<sup>9</sup> Fakes also lead to basic problems of justice: people who intend to sell looted antiquities are either under-prosecuted after it is discovered that they were unwittingly dealing in fakes,<sup>10</sup> or over-prosecuted if this discovery is not made, and the government continues to assume that the accused looter’s stock of fakes is actually genuine.<sup>11</sup>

This article begins with (II) a discussion of the factors leading to the current flood of fakes in the antiquities market, (III) an explanation of why it can be so difficult to tell when an artifact is fake, and (IV) a summary of the recognized harms caused by these fakes. I then (V) describe categories of “official fakes,” giving case studies and analysis of how they cause waste. The article then (VI) summarizes the current failure of the treatment of fakes in American law to reduce this waste and ends (VII) by proposing some policy changes necessary to stem the governmental losses caused by “official

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<sup>6</sup> See Grahame Johnston, *Being Aware of Fake Archaeological Artefacts*, ARCHAEOLOGY EXPERT, <http://www.archaeologyexpert.co.uk/fakes.html> (last updated October 13, 2018).

<sup>7</sup> See Stephanie G. Vyas, *Is There an Expert in the House? Thomson v. Christie’s: The Case of the Houghton Urns*, 12 INT’L J. CULTURAL PROP. 425, 425 (2005); Mark Jones, *Comment: Scholarly Research Is Flourishing but Curators’ Ability to Judge an Object’s Quality Is Not*, ART NEWSPAPER (Mar. 13, 2017), <https://www.theartnewspaper.com/news/comment-scholarly-research-is-flourishing-but-curators-ability-to-judge-an-objects-quality-is-not>; THE MALTESE FALCON: PLOT, *supra* note 1.

<sup>8</sup> See Jones, *supra* note 7.

<sup>9</sup> See Suzan Mazur, *A Fake? “America’s Souvenir to the Iranian People”*, SCOOP INDEP. NEWS (Oct. 9, 2013), <http://www.scoop.co.nz/stories/HL1310/S00063/a-fake-americas-souvenir-to-the-iranian-people.htm>.

<sup>10</sup> See Joseph C. Gioconda, *Can Intellectual Property Laws Stem the Rising Tide of Art Forgeries?*, 31 HASTINGS COMM. & ENT. L.J. 47, 49 (2008).

<sup>11</sup> Cf. Noah Charney, *How to Spot a Fake: Art Forgery’s Secrets Revealed*, SALON (Aug. 16, 2015), [https://www.salon.com/2015/08/16/how\\_to\\_spot\\_a\\_fake\\_art\\_forgerys\\_secrets\\_revealed/](https://www.salon.com/2015/08/16/how_to_spot_a_fake_art_forgerys_secrets_revealed/) (noting that Germany ordered the printing of 4 million postage stamps featuring a medieval fresco forged by Lothar Malskat).

fakes.”

First, a few notes on terminology and scope. I use the term “fake” to describe an object mistakenly regarded as a genuine antiquity, where a genuine antiquity is an object predominantly crafted in the ancient world.<sup>12</sup> (The caveat of “predominantly” is necessary to deal with the fact that many genuine antiquities have been restored in modern times, sometimes heavily, and that a fair number of fakes include pieces of actual ancient material, although elaborated in such a way as to render the whole object a production of the modern world.)<sup>13</sup> In this article, the person or persons who are mistaken as to the nature of a fake are governmental representatives, such as prosecutors. I leave open the cause of the mistake. In some cases, the fake has been created by someone who intends others to be fooled into regarding it as ancient.<sup>14</sup> In other cases, an object has come to be regarded as ancient by subsequent possessors or audiences, regardless of the intent of the creator.<sup>15</sup> The former case—the deliberate fake—is what we usually think of under the term “forgery,” although in most jurisdictions, the term forgery legally applies only to written documents.<sup>16</sup> But fakes can harm governmental interests regardless of the guilty or innocent intent of their creators.<sup>17</sup>

Second, my selection of case studied. I primarily choose case studies where the owner or government has reversed course and rejected the authenticity of the artifacts in question.<sup>18</sup> In a few cases,

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<sup>12</sup> *Antiquity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/antiquity> (last visited Nov. 9, 2018).

<sup>13</sup> See, e.g., *Dutch National Museum of Ethnology Says Ancient Mixtec Skull a Forgery*, ART DAILY, <http://artdaily.com/news/91965/Dutch-National-Museum-of-Ethnology-says-ancient-Mixtec-skull-a-forgery#.W8OVq5NKiu5> (last visited Nov. 9, 2018) (determining that a piece of Mixtec art was a forgery when the skull and the turquoise used in the piece was from the correct time period, but the glue was from the 20<sup>th</sup> century).

<sup>14</sup> See, e.g., Patrick Cockburn, *Fake Antiquities Flood Out of Syria as Smugglers Fail to Steal Masterpieces Amid the Chaos of War*, INDEPENDENT (Sept. 6, 2016), <https://www.independent.co.uk/news/world/middle-east/syria-isis-civil-war-antiquities-fakes-palmyra-a7228336.html>.

<sup>15</sup> See, e.g., Sam Whiting, *Most of a Mexican Museum Collection Fails Authentication*, SFGATE (July 7, 2017), <https://www.sfgate.com/living/article/Most-of-a-Mexican-Museum-collection-fails-11271345.php>.

<sup>16</sup> See Simon Mackenzie, *Fakes and Forgeries*, TRAFFICKING CULTURE (July 22, 2013), <https://traffickingculture.org/encyclopedia/terminology/fakes-2/>; *Forgery – American Law of Forgery*, JRANK, <http://law.jrank.org/pages/1235/Forgery-American-law-forgery.html> (last visited Oct. 11, 2018).

<sup>17</sup> See *infra* Part V.

<sup>18</sup> See, e.g., *Dutch National Museum of Ethnology Says Ancient Mixtec Skull a Forgery*, *supra* note 13; Kristen M. Romey & Mark Rose, *Special Report: Saga of the Persian Princess*, ARCHAEOLOGY INST. AM., Jan.–Feb. 2001, <https://archive.archaeology.org/0101/etc/persia.html>; Saing Soenthrith, *Sting Targeting Ancient Statue Dealers Winds Up with Fakes*, CAMBODIA DAILY (Dec. 30, 2015), <https://www.cambodiadaily.com/news/sting-targeting-ancient-statue->

I discuss artifacts whose owner or controlling government continues to believe are genuine, but which experts in the relevant field have convincingly flagged as fake.<sup>19</sup> The major case study in all but one of my identified categories of “official fakes” is American, and this article restricts its legal and policy analysis to the United States.<sup>20</sup> However, the article draws examples of “official fakes” from around the world.<sup>21</sup> This expanded scope allows for a deeper consideration of the types of waste caused by fakes, in that similar situations probably have, and certainly could, occur in the United States, but have not become publicly known.

Finally, although I focus on fake antiquities, the same lessons can be applied to faked art from all time periods.

## II. THE ROLE OF FAKES IN THE MARKET FOR ANTIQUITIES

Fake art has always existed—the ancient Romans faked ancient Greek art<sup>22</sup>—but the amount of fakes seems to have greatly increased with the growth in the market for antiquities, beginning in the 1960s.<sup>23</sup> Since then, antiquities have set astonishing auction records, including \$57.2 million for a thumb-sized ancient Near Eastern statuette of a lioness at Sotheby’s in 2007.<sup>24</sup>

This growing demand for antiquities is supplied in part with legal sales, of antiquities whose export and sale were approved by the government of the country where they were excavated, or which left their country of origin before that country passed laws regulating or forbidding the export of antiquities. But the antiquities market is also supplied by looters and smugglers.<sup>25</sup> Encouraged by the prospect of high sale prices, looters have been devastating ancient sites around

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dealers-winds-up-with-fakes-104117/.

<sup>19</sup> See, e.g., Paul Barford, *Bulgarian Artefact Bust – Shumen*, BLOGSPOT (Mar. 29, 2015), <http://paul-barford.blogspot.com/2015/03/bulgarian-artefact-bust-shumen.html>; Mazur, *supra* note 9; David Meadows, *Goat Pen Kore?*, ROGUE CLASSICISM (Mar. 30, 2012), <https://rogueclassicism.com/2012/04/03/goat-pen-kore-followup/>.

<sup>20</sup> See *infra* Part V.

<sup>21</sup> See *id.*

<sup>22</sup> See *Roman Copies of Greek Statues*, METRO. MUSEUM ART, [https://www.metmuseum.org/tour/hd/rogr/hd\\_rogr.htm](https://www.metmuseum.org/tour/hd/rogr/hd_rogr.htm) (last visited Nov. 9, 2018).

<sup>23</sup> See Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 176 (2007).

<sup>24</sup> See Christopher Witmore & Omur Harmansah, *The Endangered Future of the Past*, N.Y. TIMES (Dec. 21, 2007), <https://www.nytimes.com/2007/12/21/opinion/21iht-edwhitmore.html>.

<sup>25</sup> See generally Erin Thompson, *The Relationship Between Tax Deductions and the Market for Unprovenanced Antiquities*, 33 COLUM. J.L. & ARTS 241, 246–51 (2010) (discussing looting and the workings of the antiquities marketplace).

the world.<sup>26</sup> Middlemen bring these illicitly acquired and exported antiquities to countries with active antiquities markets.<sup>27</sup> Sometimes, looted antiquities go directly into the collections of buyers willing to avoid asking too many questions.<sup>28</sup> More often, looted antiquities merge into the legal market by means of forged export permits or other provenance documents.<sup>29</sup>

Looting, smuggling, and selling stolen goods can be very profitable—but they are also serious crimes with stiff penalties.<sup>30</sup> For those with a modicum of artistic talent, a less risky means of profiting from the burgeoning antiquities market beckons: forgery.<sup>31</sup> Even if caught and convicted, forgers generally face far less serious penalties than looters and smugglers of genuine antiquities.<sup>32</sup> But they can achieve the same rewards—or even greater ones. Looters are limited to what they find, but forgers can create big, beautiful art objects precisely tailored to market demand.<sup>33</sup> And the resulting fakes easily enter a marketplace that does not demand rigorous provenance information.<sup>34</sup>

Bulgaria is currently notorious for its production of archeological fakes.<sup>35</sup> As Angel Papalezov of the Cultural and Historical Artifacts

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<sup>26</sup> See, e.g., Jane Arraf, *Record-Setting Sale of an Ancient Assyrian Stone Relief Sparks Looting Fears in Iraq*, NAT'L PUB. RADIO (Nov. 4, 2018), <https://www.npr.org/2018/11/04/663372633/record-setting-sale-of-an-ancient-assyrian-stone-relief-sparks-looting-fears-in-iraq>; Rasmī Schocongdej, *Destruction of Southeast Asia's Past Through Looting*, WORLD ARCHAEOLOGY CONG., <http://worldarch.org/world-archaeological-bulletin/destruction-of-southeast-asias-past-through-looting/> (last visited Nov. 9, 2018).

<sup>27</sup> See Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 IND. L. REV. 601, 615 (2012).

<sup>28</sup> See, e.g., Barford, *supra* note 19; Leo McNamee, *How the Illegal Trade of Afghan Antiquities Is Funding Terrorism*, SAVING ANTIQUITIES FOR EVERYONE (Feb. 25, 2010), <http://savingantiquities.org/how-the-illegal-trade-of-afghan-antiquities-is-funding-terrorism/>.

<sup>29</sup> See Alderman, *supra* note 27, at 616–18. See ERIN L. THOMPSON, *POSSESSION: THE CURIOUS HISTORY OF PRIVATE COLLECTORS FROM ANTIQUITY TO THE PRESENT* 149 (2016), for a discussion of the mechanisms of inserting illicit antiquities into the legal market, and the attitudes of their eventual buyers.

<sup>30</sup> See 16 U.S.C. § 470ee(d) (2012); Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 377–78 (1995).

<sup>31</sup> See Mackenzie, *supra* note 16.

<sup>32</sup> Compare Borodkin, *supra* note 30, at 394, 396 n.129 (noting that the crime of selling or receiving stolen goods worth \$5,000 or more in interstate or foreign commerce is punishable by a fine of \$10,000 and a maximum imprisonment of 10 years), with Gioconda, *supra* note 10, at 60–63 (noting that criminal prosecution of art forgeries are rare and that damages for art forgery are often pursued in individual civil suits).

<sup>33</sup> See Christopher Reed, *Wrong!*, HARV. MAG., Sept.–Oct. 2004, at 44.

<sup>34</sup> See *id.*

<sup>35</sup> See Ivan Dikov, *Bulgarian Antique Traffickers Flood Europe with Fake Archeological Artifacts, Forged Thracian Treasure on Sale for EUR 200,000*, ARCHAEOLOGY IN BULG. (July 20, 2015), <http://archaeologyinbulgaria.com/2015/07/20/bulgarian-antique-traffickers-flood-europe-with-fake-archaeological-artifacts-forged-thracian-treasure-on-sale-for-eur-200000/>.

Section of Bulgaria's National Police, explains:

The problem is that treasure hunting in Bulgaria is thriving but the uppermost archaeological layer, which is 30-40 cm deep, has already been fully ransacked. At the same time, there is a demand, and the antique dealers start compensating [the lack of supply] with fakes.<sup>36</sup>

Bulgarian police estimated that in 2015 there were between 20-50 skilled forgeries working on archeological fakes in Bulgaria, including fake coins, ceramics, and jewelry.<sup>37</sup> The profit motive is clear, since a fake coin will sell for around ten times what it costs to make it.<sup>38</sup> Making these fakes is not a criminal act.<sup>39</sup> Indeed, Bulgarian police are required to return any seized fakes, which are legally considered to be mere replicas.<sup>40</sup> But trading in archeological material is illegal—meaning that buyers who discover that they have been duped by fakes rarely complain to the Bulgarian authorities, since they would be guilty of attempting to buy antiquities.<sup>41</sup>

Syria provides another example of the coexistence of looting and the production of fakes. Reports and analysis of satellite imagery shows that thousands of Syria's ancient sites have been looted, honeycombed with looter's pits since the current conflict began in 2012.<sup>42</sup> But while looters have been busy with their shovels, forgers have been active with chisels and kilns.<sup>43</sup> The director of Syria's

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<sup>36</sup> *Id.* (alteration in original).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Alan Taylor, *The Looting of Syria's Archaeological Treasures*, ATLANTIC (Feb. 4, 2016), <https://www.theatlantic.com/photo/2016/02/the-looting-of-syrias-archaeological-treasures/459996/>. See Mike Giglio, & Munzer al-Awad, *This Is How Syrian Antiquities Are Being Smuggled and Sold*, BUZZFEED NEWS (July 30, 2015), <https://www.buzzfeed.com/mikegiglio/the-trade-in-stolen-syrian-artifacts>, for more on how the looted artifacts circulate on the market after they leave the ground.

<sup>43</sup> It might be objected that a key obstacle standing in the way of anyone wishing to take advantage of a situation that increases the salability of fakes is the difficulty of producing them, but I believe that it is not in fact very hard to learn how to make fake antiquities. Indeed, some categories of fakes are quite easy to produce, including coins and mold-made ceramics—in either case, the faker simply casts an unlimited number of copies. Such fakes are relatively easy to detect, but even the techniques of more sophisticated fakes can be taught. For example, archeological students with no carving experience produced ancient Cycladic-style figurines with the types of tools used in antiquities within a matter of weeks. See Yiannis Papadatos & Epaminondas Venieris, *An Experimental Approach to the Manufacture of Cycladic-Type Figurines with Folded Arms: Preliminary Observations*, in *EARLY CYCLADIC SCULPTURE IN CONTEXT*, 483, 489, 490 (Marisa Marthari et al. eds. 2017).

ministry of antiquities and museums has estimated that eighty percent of the objects that have been seized and returned to Syria as smuggled antiquities are, in fact, fakes.<sup>44</sup> The known rise in looting gives a convenient story for sellers of fakes to explain the source of an object to buyers.<sup>45</sup> And seizures show that antiquities smugglers often mix fakes into their shipments of looted Syrian antiquities.<sup>46</sup> This mixing serves to increase the smugglers' profits by allowing them to make more sales.<sup>47</sup>

It is impossible to know the number of fakes circulating as genuine on the antiquities market, but experts who have attempted to estimate the scope of the problem describe it as significant. Thomas Hoving, former curator and Director of the Metropolitan Museum, New York, wrote that forty percent of the thousands of works he examined in the museum's collections or on the art market when he considered potential acquisitions were either "phonies or so hypocritically restored" that they should be considered fake.<sup>48</sup> Sharon Flescher, Executive Director of the International Foundation for Art Research, found that almost eighty percent of the artworks submitted for the Foundation's art and provenance authentication services were eventually "deemed not to be by the artist to whom they were attributed at the time of submission."<sup>49</sup>

Meanwhile, the few scholars who have acquired the funds necessary to test the age of groups of artifacts, scientifically, have generally arrived at dispiriting results.<sup>50</sup> For example, forty-eight of

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<sup>44</sup> See Cockburn, *supra* note 14. See also Georgi Kantchev, *Buyer Beware: Looted Antiquities Flood Online Sites Like Amazon, Facebook*, WALL STREET J. (Nov. 1, 2017), <https://www.wsj.com/articles/the-online-bazaar-for-looted-antiquities-1509466087>, for estimates by Neil Brodie, senior Research fellow in Endangered Archaeology at Oxford University, of the number of looted or fake antiquities offered for sale online.

<sup>45</sup> See Samuel Hardy, *'Pretty Crude Fakes' that Were Advertised as Conflict Antiquities from Palmyra Museum*, CONFLICT ANTIQUITIES (Nov. 30, 2015), <https://conflictantiquities.wordpress.com/2015/11/30/pretty-crude-fakes-that-were-advertised-as-conflict-antiquities-from-palmyra-museum/>, for a particularly convoluted example of this type of cover story in action.

<sup>46</sup> See Paul Barford, *More on Seized Sculptures in Pakistan: No Surprise There*, BLOGSPOT (Aug. 14, 2012), <http://paul-barford.blogspot.com/2012/08/more-on-seized-sculptures-in-pakistan.html>.

<sup>47</sup> See, e.g., Paul Barford, *Portable Antiquity Collecting and Heritage Issues: Italian Archaeologist Turns Dodgy Dealer?*, BLOGSPOT (Feb. 22, 2012), <http://paul-barford.blogspot.com/2012/02/italian-archaeologist-turns-dodgy.html> (reporting that Italian authorities seize 2,000 genuine looted antiquities mixed with 3,000 fake antiquities during raids on two locations in 2011); Barford, *supra* note 46 (reporting that ninety percent of almost 400 antiquities seized in 2012 from a shipment through Pakistan were determined to be fakes).

<sup>48</sup> THOMAS HOVING, FALSE IMPRESSIONS: THE HUNT FOR BIG-TIME ART FAKES 17 (1996).

<sup>49</sup> Sharon Flescher, *The International Foundation for Art Research*, in THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS 95, 99 (Ronald D. Spencer ed., 2004).

<sup>50</sup> See M.J. Aitken et al., *The Authenticity of Vessels and Figurines in the Hacilar Style*, 13

a group of sixty-six terracotta objects thought to have been made at Hacilar, Turkey, before 5,000 BCE, were determined to have been “recently fired,” although they were so skillfully made that it was impossible to distinguish them from genuine antiquities on the basis of style or form alone.<sup>51</sup>

Very few governmental bodies issue information on the numbers of fakes they have seized, but when they do, the numbers are high.<sup>52</sup> Officials from the Italian Comando Carabinieri per la Tutela del Patrimonio Culturale (Carabinieri Command for the Protection of Cultural Heritage) declared that they had seized over 250,000 fake artworks from 1970 to 2008, and 78 million Euro worth of fake art in 2013 alone (although this included fakes from all eras).<sup>53</sup>

### III. FAKE ANTIQUITIES ARE DIFFICULT TO DISCOVER

It can be extremely difficult to distinguish fake from genuine artifacts. The only reliable way to determine if an object was made by a particular ancient culture at a particular time is via controlled and recorded excavation from an ancient site.<sup>54</sup> All other means of

ARCHAEOLOGY 89, 109 (1971); Stefan Simon & Stefan Röhrs, *Between Fakes, Forgeries, and Illicit Artifacts—Authenticity Studies in a Heritage Science Laboratory*, 7 ARTS, no. 20, 2018, at 2, 3 (2018).

<sup>51</sup> Aitken et al., *supra* note 50, at 109.

<sup>52</sup> See, e.g., Tim Cornwell, *Almost 70% of Smuggled Objects Seized in Syria and Lebanon are Fakes, Antiquities Chief Says*, ART NEWSPAPER (Aug. 24, 2016), <http://old.theartnewspaper.com/news/archeology/almost-70-of-smuggled-objects-seized-in-syria-and-lebanon-are-fakes-antiquities-chief-says/>; Louise Jury, *Art Market Scandal: British Museum Expert Highlights Growing Problem of Fake Antiquities*, INDEP. (May 24, 2005), <https://www.independent.co.uk/news/uk/this-britain/art-market-scandal-british-museum-expert-highlights-growing-problem-of-fake-antiquities-222955.html>.

<sup>53</sup> See *Agenzie uscite sul Convegno I Falsi nell'Arte tenutosi a Roma*, CIVITAS ARTE (Nov. 20, 2008), <http://www.civita.it/Sala-stampa/I-falsi-nell-arte/Agenzie-di-stampa-uscite-il-20.11.08> (statement by Carrado Catesi - Carabiniere TPC); *Carabiniere, Meno Furti D'Arte ma Più Falsi sul Mercato. Bilancio del Comando Tutela Patrimonio Culturale*, TVDAILY.IT (Apr. 24, 2013), <https://www.tvdaily.it/arte-cultura/carabinieri-meno-furti-darte-ma-piu-falsi-sul-mercato-bilancio-del-comando-tutela-patrimonio-culturale.php>.

<sup>54</sup> I am not claiming that all artifacts excavated during archeological work are genuine antiquities. Errors in excavation or record-keeping along with the vagaries of deposition can lead to mistakes in the date or identification of artifacts. Fakes can be planted in an excavation site by parties including mischievous graduate students (who usually confess their pranks, intended to confound their professors) to workers (e.g., many 19<sup>th</sup> century European excavations in the Middle East rewarded local hired diggers for each artifact discovered, and I suspect that many of the resulting discoveries of “eye idols” and other small artifacts made from local stone were manufactured on the spot rather than dug up). See, e.g., Morag M. Kersel, *The Changing Legal Landscape for Middle Eastern Archeology in the Colonial Era, 1800-1930*, in PIONEERS TO THE PAST: AMERICAN ARCHEOLOGISTS IN THE MIDDLE EAST 1919-1920, at 85, 86 (Geoff Emberling ed., 2010); Greg Little, *Former USGS Employee Admits Making & Planting Fake Artifacts Underwater at Bimini, Bahamas While Employed at the USGS*, AP MAG. (Mar. 2017), [http://www.apmagazine.info/index.php?option=com\\_content&view=article&id=956](http://www.apmagazine.info/index.php?option=com_content&view=article&id=956).



determining authenticity are subject to error, mistake, or corruption.<sup>55</sup> And an expert, no matter how deeply versed in connoisseurship, can simply be wrong about whether or not an artifact is genuine.<sup>56</sup>

Meanwhile, scientific methods of determining age work only on a limited set of materials.<sup>57</sup> The stone in ancient sculpture is just as old as the stone in contemporary sculpture, and we do not have reliable means of determining when the stone was carved.<sup>58</sup> There are substances whose age we can determine through tests such as carbon or thermoluminescence dating.<sup>59</sup> However, forgers have proven adept in developing ways to manipulate these test results.<sup>60</sup> A fake Renaissance painting or drawing can be created on a piece of re-used wood or paper dating to the period.<sup>61</sup> An ancient fragment of pottery can be inserted into a newly created statuette so that the sample taken for testing will come from the ancient material, not the modern.<sup>62</sup>

And, of course, scientific testing is of no use when it is not used, which is often the case. Many antiquities are sold for prices lower than the cost of scientific testing, which means that it makes little

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Esteemed archeologists themselves have been caught planting artifacts, including a Japanese archeologist who buried Paleolithic artifacts deeper into the soil of an archeological site so that he could "discover" that Japan was inhabited earlier than had been estimated. See Kristin M. Romey, *God's Hands' Did the Devil's Work*, ARCHEOLOGY, Jan.–Feb. 2001, at 16. But even given these cautions, the differences in the motivations and economics between the activities of archeologists and those seeking to sell antiquities mean that there is a much greater chance that an artifact recovered during an archeological excavation is genuine than one on the market. I should also note that not everything that calls itself an archeological excavation should be treated as one; for example, dealers in 18<sup>th</sup> century Rome excavated for antiquities to sell, but also often claimed that an artifact for sale had come from one of these excavations when it was actually a modern fake. See ILARIA BIGNAMINI & CLARE HORNSBY, DIGGING AND DEALING IN EIGHTEENTH-CENTURY ROME 205–06 (2010).

<sup>55</sup> See Michael Kimmelman, *ART; Absolutely Real? Absolutely Fake?*, N.Y. TIMES (Aug. 4, 1991), <https://www.nytimes.com/1991/08/04/arts/art-absolutely-real-absolutely-fake.html> ("Science may be no more certain than the connoisseur's eye in judging a work's authenticity.")

<sup>56</sup> As were, for example, the curators at the Metropolitan Museum, New York, when they purchased terracotta statues of warriors as ancient Etruscan which were revealed to be fake only after one of the forgers confessed. See *Tracking the Etruscan Warriors*, ARCHEOLOGY (2009), <https://archive.archaeology.org/online/features/hoaxes/warriors.html>. See *infra* Section V.B, for a discussion of the difference between the scholar assessment of authenticity and the scientific diagnosis of fakery in the Arnold-Peter Weiss case.

<sup>57</sup> See James Martin, *Testing Objects: Scientific Examination and Materials Analysis in Authenticity Studies*, in FAKES AND FORGERIES: THE ART OF DECEPTION 141 (2007).

<sup>58</sup> See NANCY L. KELKER & KAREN O. BRUHNS, FAKING ANCIENT MESOAMERICA 22–23 (2010).

<sup>59</sup> See *id.* at 27, 28.

<sup>60</sup> See *id.* at 28.

<sup>61</sup> See ERIC HEBBORN, DRAWN TO TROUBLE: CONFESSIONS OF A MASTER FORGER 214 (1991).

<sup>62</sup> See KELKER & BRUHNS, *supra* note 58, at 28.

sense economically to pay for testing.<sup>63</sup> Meanwhile, antiquities on the high end of the market tend to have impressive paperwork which assures buyers that they have been tested. However, the dealer may provide the results of only favorable or irrelevant tests, or simply assure the customer that the artifact has been tested, without specifying the results.<sup>64</sup>

Money is not the only barrier to using scientific tests to determine the authenticity of an artifact. There is also the problem of time.<sup>65</sup> Qualified investigators must devote years to learning the wide variety of skills needed to unravel the complex puzzle of skillful fakes.<sup>66</sup> For example, scholars at the National Museum of Ethnology in Leiden, Netherlands, recently analyzed a skull decorated with a mosaic of turquoise, which the museum had purchased in the 1960s as an 800-year-old product of the Mixtec culture of Mexico.<sup>67</sup> Tests showed that the turquoise originated in Mexico and that the skull dated to the Mixtec period.<sup>68</sup> Instead of resting satisfied with this data, the scholars also examined the connection between the skull and its decoration.<sup>69</sup> They found that someone had used a glue manufactured in the twentieth century to attach the turquoise to the skull.<sup>70</sup> A forger had taken an authentically ancient, but unsalable, skull and turned it into a desirable example of Mixtec funerary art, and it took more than four years of scholarly work to determine this.<sup>71</sup>

It is one thing for a scholar or an owner to make up their own minds about whether a particular artifact is fake. It is quite another thing to convince others, or to prove that an artifact is a fake in a court of law. For example, in 2004, an Israeli antiquities collector named Oded Golan was accused of fraud for faking biblical artifacts, most notably, the “James Ossuary,” a stone box with an Aramaic

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<sup>63</sup> See Neil Brodie, *The Internet Market in Antiquities*, in COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD’S HERITAGE 11, 15 (France Desmarais ed., 2015) (discussing the burgeoning market in cheap antiquities).

<sup>64</sup> See OSCAR WHITE MUSCARELLA, *THE LIE BECAME GREAT: THE FORGERY OF ANCIENT NEAR EASTERN CULTURES* 3 (2000).

<sup>65</sup> See Bob Pattern, *Artifact Evaluation*, STONE DAGGER PUBL’NS, <http://www.stonedagger.com/SDPevaluation.html> (last visited Nov. 11, 2018).

<sup>66</sup> See, e.g., Samantha Subramanian, *How to Spot a Perfect Fake: The World’s Top Art Forgery Detective*, GUARDIAN (June 15, 2018), <https://www.theguardian.com/news/2018/jun/15/how-to-spot-a-perfect-fake-the-worlds-top-art-forgery-detective> (profiling James Martin, an example of an expert with years of experience and a variety of skills in spotting forgeries).

<sup>67</sup> See *Dutch National Museum of Ethnology Says Ancient Mixtec Skull a Forgery*, *supra* note 13.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See id.*

inscription saying that it contained the bones of James, brother of Jesus.<sup>72</sup> His trial required more than 100 hearings over seven years, with testimony by experts in archaeology, history, photography, chemistry, geology, and linguistics – as the frustrated judge put it in his 475 page ruling, “[t]estimony was heard on subjects never before discussed or ruled on in court.”<sup>73</sup> In the end (and despite much scholarly support for the identification of the artifacts in question as fake),<sup>74</sup> Golan was acquitted, with the judge clarifying that this did not mean the artifacts were genuine, but merely that the prosecution had failed to prove beyond a reasonable doubt that Golan faked them.<sup>75</sup>

#### IV. THE RECOGNIZED HARMS CAUSED BY FAKE ANTIQUITIES

For centuries, scholars considered fake antiquities to be a problem only for the defrauded purchasers, who were considered to have thrown away their money by not looking closely enough at their purchase.<sup>76</sup> As one scholar put it, fakes, like sexually transmitted diseases, are “the punishment for excessive desire and bad judgment.”<sup>77</sup> In philosophy, too, the dominant trend has been to think that fakes are harmful only to aesthetic values, because those

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<sup>72</sup> See Matti Friedman, *After 7-Year Saga, a Surprising End to Antiquities Fraud Case*, TIMES ISR. (Mar. 14, 2012), <https://www.timesofisrael.com/8-years-after-trial-began-verdict-expected-in-biblical-antiquities-forgery-case/>.

<sup>73</sup> See *id.*

<sup>74</sup> See, e.g., Christopher Rollston, *The Israeli Forgery Trial: The Verdict Is Given*, ROLLSTON EPIGRAPHY (Mar. 14, 2012), <http://www.rollstonepigraphy.com/?p=417>; Christopher Rollston, *The James Ossuary (Ya'akov Ossuary): Bullent Point Synopsis About a Probable Modern Forgery*, ROLLSTON EPIGRAPHY (Mar. 22, 2015), <http://www.rollstonepigraphy.com/?p=699>.

<sup>75</sup> Friedman, *supra* note 72. Courts seem to be rarely good places for distinguishing between genuine and fake art, as shown in several striking cases, perhaps most notably when the artist Peter Doig was sued by the owner of a painting after Doig said that he did not paint it. See Graham Bowley, *Peter Doig Says He Didn't Paint This. Now He Has to Prove It*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/10/arts/design/peter-doig-painting-lawsuit.html>. Despite pointing out in his motion to dismiss that the painting was signed with a different name (“Doige”) and that Doig was not in the area at the time when the owner claimed to have purchased the painting, Doig was required to defend himself (successfully) at trial. See *id.*; Nicole Puglise, *Artist Peter Doig Victorious as Court Agrees ‘\$10’ Painting Is Not His Work*, GUARDIAN (Aug. 24, 2016), <https://www.theguardian.com/artanddesign/2016/aug/24/artist-peter-doig-landscape-painting-lawsuit>.

<sup>76</sup> Cf. Carol Helstosky, *Giovanni Bastianini, Art Forgery, and the Market in Nineteenth-Century Italy*, 81 J. MOD. HIST. 793, 819, 821 (2009) (noting that in the 19th century experts frequently warned buyers of the proliferation of fraud in the Italian antiquities market, but many refused to heed such warnings; such fraud was justified on the notion that these buyers were dishonest—they wanted antiquities but were not willing to pay what they were worth).

<sup>77</sup> KARL E. MEYER, *THE PLUNDERED PAST* 108 (1973).

that they fool might have a lesser opinion of the forged artist.<sup>78</sup> Thus, Alfred Lessing thought that the main problem with fakes was that they lack artistic integrity,<sup>79</sup> Mark Sagoff dismissed fake art from the category of aesthetic artifacts altogether,<sup>80</sup> and Denis Dutton claimed that forgeries cause harm by misrepresenting artistic achievement.<sup>81</sup>

These dismissive attitudes depend on the assumption that only non-experts will be fooled by fakes, while experts can determine which antiquities are genuine. More recently, scholars have recognized that it is difficult, and sometimes impossible, to determine whether an object on the antiquities market is fake or genuine.<sup>82</sup> Because this is true, fakes can be harmful on a broad level, not just a personal one, because of their impact on our ability to know the past.

Previously, some scholars might have been tempted to assume that they could determine if a new artifact appearing on the market was fake or genuine by comparing it to a corpus of other examples of that type of artifact known to be genuine.<sup>83</sup> However, Christopher Chippindale and David Gill pointed out that this type of reliance on a comparative corpus is possible only if a comparative corpus exists—and that the increased pace of looting means that in many situations only a small number of objects will have a secure, excavated provenance, while all the rest that appear on the market could be looted or could be fakes.<sup>84</sup> In this situation, the known corpus of genuine works is not large enough to discriminate between genuine and fake among the market artifacts.<sup>85</sup> Chippindale and Gill describe the effect on our ability to study ancient Cycladic figurines; by their reckoning, only ten percent of these prehistoric Greek sculptures were excavated.<sup>86</sup> They are made of marble and thus cannot be reliably scientifically dated.<sup>87</sup> Objects that could help us understand a fascinating period of the past—the third millennium BCE, a time of dramatic ecological and cultural changes on the islands of the

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<sup>78</sup> See Denis Dutton, *Forgery and Plagiarism*, in *ENCYCLOPEDIA OF APPLIED ETHICS* (Ruth Chadwick ed., 1998), [http://www.denisdutton.com/forgery\\_and\\_plagiarism.htm](http://www.denisdutton.com/forgery_and_plagiarism.htm).

<sup>79</sup> See Alfred Lessing, *What Is Wrong with a Forgery?*, 23 *J. AESTHETICS & ART CRITICISM*, 461, 465 (1965).

<sup>80</sup> See Mark Sagoff, *The Aesthetic Status of Forgeries*, 35 *J. AESTHETICS & ART CRITICISM* 169, 169 (1976).

<sup>81</sup> See Denis Dutton, *Artistic Crimes*, in *THE FORGER'S ART: FORGERY AND THE PHILOSOPHY OF ART* 172, 181 (Denis Dutton ed., 1983).

<sup>82</sup> See *id.*

<sup>83</sup> See David W.J. Gill & Christopher Chippindale, *Material and Intellectual Consequences of Esteem for Cycladic Figurines*, 97 *AM. J. ARCHEOLOGY* 601, 636, 639–40 (1993).

<sup>84</sup> See *id.* at 610–12, 631.

<sup>85</sup> See *id.* at 627–28.

<sup>86</sup> See *id.* at 627.

<sup>87</sup> See *id.* at 623.

Aegean Sea—have been looted and thus rendered valueless to archeologists, who cannot let their theories depend on artifacts of uncertain genuineness.<sup>88</sup>

This situation—where looting outpaces archeological excavation—is distressingly frequent.<sup>89</sup> For example, Ulrike Löw claims that only ten percent of the corpus of metal vessels published as from ancient north or northwestern Iran were excavated by archeologists, making it difficult to judge the authenticity of the rest.<sup>90</sup> Ulrike Löw estimates that at least fifty percent of the vessels sold by dealers are modern fakes.<sup>91</sup> Meanwhile, the Mexican Shaft Tomb Culture is known through the contents of a single unlooted tomb alongside a flood of either looted or faked artifacts.<sup>92</sup> Nor should we limit ourselves to thinking of fakes as a problem just for certain unlucky sets of heavily looted artifacts. Sherri Irvin has convincingly argued that all fakes are harmful because they corrupt the ability of viewers to learn more about all art, in general, by providing false data along the path to aesthetic understanding.<sup>93</sup>

Not everyone who understands how fakes can corrupt the archeological corpus believes that fake antiquities are harmful overall.<sup>94</sup> Many archeologists study only artifacts recovered in excavations or legally exported from their countries of origin.<sup>95</sup> They do this to avoid both being fooled by fakes and participating in the market for looted antiquities, since a scholarly discussion of an artifact can raise its value.<sup>96</sup> Confident that they are dealing with

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<sup>88</sup> See *id.* at 629, 647; *Early Cycladic Art and Culture*, METRO. MUSEUM ART, [https://www.metmuseum.org/toah/hd/ecyc/hd\\_ecyc.htm](https://www.metmuseum.org/toah/hd/ecyc/hd_ecyc.htm).

<sup>89</sup> See Neil Brodie & Colin Renfrew, *Looting and the World's Archeological Heritage: The Inadequate Response*, 34 ANN. REV. ANTHROPOLOGY 343, 346–47 (2005).

<sup>90</sup> MUSCARELLA, *supra* note 64, at 32.

<sup>91</sup> See *id.*

<sup>92</sup> See Lorenza López Mestas C. & Jorge Ramos de la Vega, *Some Interpretations of the Hutzilapa Shaft Tomb*, 17 ANCIENT MESOAMERICA 271, 275, 276 (2006). See KELKER & BRUHNS, *supra* note 58, 149–50, for a discussion about the faked antiquities purporting to be from this culture.

<sup>93</sup> Sherri Irvin, *Forgery and the Corruption of Aesthetic Understanding*, 37 CANADIAN J. PHIL. 283, 299–300 (2007).

<sup>94</sup> See Paul Barford, *Mark Durney: Archaeological Looting Is the Most Common Art Crime*, BLOGSPOT (June 13, 2010), <http://paul-barford.blogspot.com/2010/06/mark-durney-archaeological-looting-is.html>.

<sup>95</sup> See *Can You Dig It?*, ECONOMIST (Mar. 28, 2002), <https://www.economist.com/science-and-technology/2002/03/28/can-you-dig-it>.

<sup>96</sup> See *id.* One influential policy is that of the Archaeological Institute of America:

A publication of the Archaeological Institute of America will not serve for the announcement or initial scholarly presentation of any object in a private or public collection acquired after December 30, 1973, unless its existence is documented before that date, or it was legally exported from the country of origin. An exception may be made if,

genuine antiquities only, these scholars abandon the market to its own devices, regarding it as an unsavory mix of fakes and looted antiquities.<sup>97</sup>

But we should not be so ready to tolerate the circulation of fakes on the antiquities market. Fakes encourage looting by ramping up activity and demand in the antiquities market.<sup>98</sup> Especially in the online market, fakes encourage potential looters by leaving records of sales prices for the type of artifact that the looter could obtain and sell—since either the looter cannot tell that the listed object is a fake, or will believe that the genuine version will sell for even more.<sup>99</sup> Indeed, from the proliferation of both looting and faking in Syria, it does not appear that the ease of producing and selling fake antiquities would divert effort from looting genuine ones.<sup>100</sup>

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in the view of the Editor, the aim of publication is to emphasize the loss of archaeological context.

*AIA Publications Policy*, ARCHEOLOGICAL INST. OF AM., <https://www.archaeological.org/about/ubpolicy> (last visited Nov. 12, 2018).

<sup>97</sup> Mark Durney of Art Theft Central and the ARCA noted:

Personally I am not so concerned about the fake-peddling con-men. If people are so stupid and greedy as to buy something without ascertaining precisely where they came from, then they deserve to be caught out by those that exploit precisely the no-questions-asking that facilitates other types of illicit trade in antiquities. These people hope to buy real looted artefacts, so they deserve to be caught out by their own greed and carelessness.

Barford, *supra* note 94; see also Charles Stanish, *Forging Ahead: Or, How I Learned to Stop Worrying and Love eBay*, ARCHAEOLOGY, May–June 2009, at 18, 65 (“[A]nyone who buys an ‘Assyrian alabaster stone Mask 700 B.C.’ or ‘Ancient Chinese Jade Carvings-Frog Arrowhead’ thinking that they are real antiquities is, in my opinion, a thoroughly naive fool.”).

<sup>98</sup> See Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 173 (2007).

<sup>99</sup> See Neil Brodie, *How to Control the Internet Market in Antiquities? The Need for Regulation and Monitoring*, ANTIQUITIES COALITION 2, 4, 5 (July 2017), <http://thinktank.theantiquitiescoalition.org/wp-content/uploads/2017/07/Policy-Brief-3-2017-07-20.pdf>.

<sup>100</sup> It should be emphasized, for the sake of those eager to seize any mention of fakes on the antiquities marketplace as a reason to claim that archeological looting is not taking place, that the evidence of widespread looting in conflict areas in Syria and Iraq since 2012 is indisputable. See MICHAEL D. DANTI ET AL., ASOR CULTURAL HERITAGE INITIATIVES (CHI): PLANNING FOR SAFEGUARDING HERITAGE SITES IN SYRIA AND IRAQ 2 (Mar. 2018); MICHAEL D. DANTI ET AL., ASOR CULTURAL HERITAGE INITIATIVES (CHI): PLANNING FOR SAFEGUARDING HERITAGE SITES IN SYRIA AND IRAQ 3 (Apr. 2018); see also *Weekly Reports*, ASOR CULTURAL HERITAGE INITIATIVES, <http://www.asor-syrianheritage.org/weekly-reports/> (last visited Nov. 16, 2018) (archiving the reports issued by the American School of Oriental Research’s Cultural Heritage Initiative, which documents the damage to heritage sites in Syria, northern Iraq, and Libya).

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## V. "OFFICIAL FAKES": EXAMPLES OF GOVERNMENTS TREATING FAKE ANTIQUITIES AS GENUINE

### A. *Fakes Waste Policing Resources*

Probably the most frequent drag on government resources offered by fakes occurs at the early stages of investigations, with police arresting suspected looters or customs authorities seizing suspected smuggled antiquities only to dismiss the cases when the objects are discovered to be fakes.<sup>101</sup>

In many cases, this discovery comes early in the process.<sup>102</sup> For example, travelers might be detained at an airport while customs officials determine whether objects in their luggage are genuine antiquities in the process of being smuggled.<sup>103</sup> Sometimes this determination is made by a trained customs official, sometimes an

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<sup>101</sup> See Paul Barford, *Portable Antiquity Collecting and Heritage Issues: Bangkok Corruption Case*, BLOGSPOT (Dec. 2, 2014), <http://paul-barford.blogspot.com/2014/12/bangkok-corruption-case.html>; Jonathan Brown, *British Couple Released as Priceless Artifacts They Were 'Smuggling' Out of Egypt Turn Out to Be Cheap Market Fakes*, INDEP. (Feb. 27, 2012), <https://www.independent.co.uk/news/world/africa/british-couple-released-as-priceless-artifacts-they-were-smuggling-out-of-egypt-turn-out-to-be-cheap-7447085.html>; Nabih Bulos, *After Islamic State Institutionalized Looting in Syria, the Market for Fake Antiquities Is Booming*, L.A. TIMES (Dec. 31, 2016), <http://www.latimes.com/world/middleeast/la-fg-syria-fake-antiquities-2016-story.html>; Meadows, *supra* note 19; 'Priceless' Ancient Greek Statue Snatched from Smugglers Is a Fake, EKATHIMERINI.COM (Mar. 4, 2012), <http://www.ekathimerini.com/140560/article/ekathimerini/news/priceless-ancient-greek-statue-snatched-from-smugglers-is-a-fake>. In this section and the following ones, my identification of case studies of fake antiquities treated as genuine was greatly aided by the experts interested in the antiquities market who run blogs, some of which analyze seemingly every news story involving antiquities, in an impressive variety of languages. I am especially indebted to David Meadows of Rogueclassicism (<https://rogueclassicism.com/>), Paul Barford of Portable Antiquity Collecting & Heritage Issues (<http://paul-barford.blogspot.com/>), and Samuel Hardy of Conflict Antiquities (<https://conflictantiquities.wordpress.com/>). They and other archeologists have identified many more objects involved in governmental processes as probable fakes than the ones I have selected for discussion in this paper. I generally concur with these identifications but have attempted to concentrate on cases where the authorities have eventually admitted that the objects in question are forgeries.

<sup>102</sup> See Brown, *supra* note 101; Melissa Klein, *Rogue's Gallery – the Queens Warehouse that Holds a Fortune in Stolen Art*, N.Y. POST (June 6, 2010), <https://nypost.com/2010/06/06/rogues-gallery-the-queens-warehouse-that-holds-a-fortune-in-stolen-art/>.

<sup>103</sup> See *An Attempt to Smuggle Hundreds of Stolen Antiquities from Israel Was Thwarted*, ARTDAILY.ORG, <http://artdaily.com/news/47504/An-Attempt-to-Smuggle-Hundreds-of-Stolen-Antiquities-from-Israel-was-Thwarted#.W8CpexNKi1t> (last visited Nov. 16, 2018); *US Tourist Faces Jail in Turkey for Collecting Beach 'Stones'*, FOX NEWS (Apr. 18, 2013), <https://www.foxnews.com/travel/us-tourist-faces-jail-in-turkey-for-collecting-beach-stones>. James McAndrew, U.S. Immigrations and Customs Enforcement senior special agent in charge of cultural property, stated in 2010 that his group of seven specialized agents examined 200 artifacts a day in New York City, after they have been flagged as suspicious by other customs officers. See Klein, *supra* note 102.

archeologist is called in to give an opinion,<sup>104</sup> and sometimes, human nature being what it is, there are unexpected complications in what should be a straightforward process. For example, in 2012 a British woman was arrested after she began smashing objects pulled from her luggage by officials at the Luxor International Airport.<sup>105</sup> This (temporarily) convinced officials that she was smuggling genuine antiquities, even though the objects were souvenirs, purchased at a tourist bazaar.<sup>106</sup>

But the determination that artifacts are fakes is not always so rapid. Sometimes, a large investment in undercover work is wasted when an investigation of suspected looters ends up netting only fakes.<sup>107</sup> In 2015, Cambodian police spent two weeks on a sting operation, arresting three men who sold them seven ancient statues—which upon examination were revealed to be modern lead and copper copies.<sup>108</sup> The chief of the Cambodian heritage bureau optimistically spun the admission that the statues were fakes by saying that their confiscation could help authorities study how fakes are produced.<sup>109</sup>

It is difficult to imagine a process that would avoid an initial effort to distinguish between fake and genuine antiquities during the beginning of any investigation into antiquities looting or smuggling. But although necessary, this process is not easy. Fakes are often mixed together with genuine, looted artifacts in the holdings of collectors or smugglers.<sup>110</sup> For example, in late 2014, over 20,000 ancient artifacts were seized from the homes of a former Thai high official.<sup>111</sup> The curator in charge of authenticating the materials told the press that, on first glance, about half of the objects might be fakes, but that the genuine artworks originated not only in Thailand, but also Cambodia, Myanmar, and Laos.<sup>112</sup> That meant that Thai officials not only had the monumental task of picking out the fakes, but that they also had to distinguish between various styles of art well enough to repatriate looted and smuggled artworks to their

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<sup>104</sup> See Klein, *supra* note 102; Stanish, *supra* note 97, at 60.

<sup>105</sup> Brown, *supra* note 101.

<sup>106</sup> See *id.*

<sup>107</sup> See Soenthrith, *supra* note 18.

<sup>108</sup> *Id.*

<sup>109</sup> See *id.*

<sup>110</sup> See, e.g., Barford, *supra* note 101.

<sup>111</sup> See *id.*

<sup>112</sup> See Lamphai Intathep, *Half of Pongpat's Seized Art 'Fake'*, BANGKOK POST (Dec. 3, 2014), <https://www.bangkokpost.com/news/general/446855/half-of-pongpat-seized-art-fake>.



various countries of origin.<sup>113</sup> The range of expertise called for by this exercise is rare—as is shown by the rather ungrateful response of the director of the Cambodian National Museum, who told the *Phnom Penh Post*, “I don’t know why they think the statues might be real,” upon receiving a number of the seized statues, which Thai officials thought were created in Cambodia in the 15<sup>th</sup> century CE.<sup>114</sup>

And the process of catching fakes, even at an early stage of an investigation, can take an overwhelming amount of time.<sup>115</sup> The director of Syria’s national museum was interviewed in 2016 about his role in identifying fakes among artifacts seized by police trying to crack down on the recent explosion in looting in Syria. He said that “[t]here are so many fakes to examine, it keeps us from finishing our real work on preservation of the real items.”<sup>116</sup> And the scholars who have studied the production of fake antiquities demonstrate that simply keeping up with fakers’ techniques can be a full-time pursuit.<sup>117</sup>

Investigations sometimes proceed for a surprisingly long time before the objects are discovered to be fakes.<sup>118</sup> Nor does it take a masterful fake to raise official suspicions. For example, in 2012, Greek police announced that they had seized a statue from 520 BCE, worth €12 million, from a goat pen near Athens, and arrested a goat herder and his accomplice who were allegedly trying to sell the statue for €500,000.<sup>119</sup> Archeologists swiftly pointed out that the object in question was actually a plaster copy of a very well-known ancient statue in the Acropolis Museum, Athens.<sup>120</sup> The situation is analogous to an Italian restaurant owner with an ambitious taste in decoration being accused of stealing Michelangelo’s *David*.<sup>121</sup>

<sup>113</sup> See Barford, *supra* note 101.

<sup>114</sup> See Laignee Barron, *Statues Are ‘Treasures’*, PHNOM PENH POST (Jan. 23, 2015), <http://www.phnompenhpost.com/national/statues-are-treasures>.

<sup>115</sup> See Bulos, *supra* note 101.

<sup>116</sup> *Id.*

<sup>117</sup> See, e.g., Martin Polkinghorne, *Angkor Replicated: How Cambodian Workshops Produce Fake Masterpieces, and Get Away with It*, CONVERSATION (Nov. 23, 2016), <https://theconversation.com/angkor-replicated-how-cambodian-workshops-produce-fake-masterpieces-and-get-away-with-it-68173>; Jim Sanborn, *Without Provenance, The Making of Contemporary Antiquity*, JIM SANBORN, [http://jimсанborn.net/main.html#recent\\_work](http://jimсанborn.net/main.html#recent_work) (last visited Nov. 16, 2018).

<sup>118</sup> See Bulos, *supra* note 101.

<sup>119</sup> See *Ancient Greek Statue Found in Goat Pen*, GUARDIAN (Mar. 28, 2012), <https://www.theguardian.com/world/2012/mar/28/greek-statue-found-goat-pen>.

<sup>120</sup> ‘Priceless’ Ancient Greek Statue Snatched from Smugglers Is a Fake, *supra* note 101.

<sup>121</sup> See Tom Kington, *David Poised for Another Giant Fight as Florence Battles to Keep Statue: Nine-page Draft Says State Owns Michelangelo Works Fuming City Mayor Tells Rome to Back Off*, GUARDIAN, Aug. 16, 2010, at 14, 2010 WLNR 16273525 (noting that *David* is an Italian masterpiece).

Many seizures of fake antiquities take the form of raids.<sup>122</sup> Planning and executing a raid requires a great deal of police time, and also carries the risk of harm to suspects, law enforcement, and even bystanders, such as the other inhabitants of a raided house.<sup>123</sup>

A final, and hopefully unparalleled, case illustrates how treating fake antiquities as genuine distracts police from using their resources where they are more urgently needed.<sup>124</sup> In 2000, Pakistani police arrested two men and seized a mummy they were trying to sell.<sup>125</sup> At a press conference at the National Museum in Karachi, it was announced that the mummy was that of an ancient Persian princess dating to around 600 CE, as shown by an inscription on its gold breastplate (it was also accompanied by a carved wooden sarcophagus, a stone covering, and a gold mask and crown).<sup>126</sup> Iran promptly began a diplomatic battle with Pakistan over control of the mummy.<sup>127</sup> Only months into the investigation was it determined that the body showed traces of modern detergents in which it had been washed.<sup>128</sup> Radiocarbon dating then showed that the mummified woman had been alive only a few years previously.<sup>129</sup> Since the mummification process needs to begin less than twenty-four hours after death, and the woman's neck had been broken with a blow from a blunt object, it seems that she had been killed for the purpose of producing a fake mummy.<sup>130</sup> Pakistani police opened a murder investigation but, probably because of the delays caused by the failure to doubt the mummy's genuineness, there have been no arrests as of the latest report.<sup>131</sup>

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<sup>122</sup> See, e.g., *Syrian Artifacts Smuggled to Gaziantep*, ASS'N FOR PROTECTION SYRIAN ARCHAEOLOGY (May 5, 2015), <http://apsa2011.com/apsanew/turkey-gaziantep-syrian-artifacts-smuggled-to-gaziantep-168-objects-05-05-2015/>.

<sup>123</sup> See Neil Brodie, *The Antiquities Trade: Four Case Studies*, in CONTEMPORARY PERSPECTIVES ON THE DETECTION, INVESTIGATION AND PROSECUTION OF ART CRIME, 15, 27 (Duncan Chappell & Saskia Hufnagel eds., 2014); Joe Mazinga, *A Sting in the Desert*, L.A. TIMES, Sept. 24, 2014, at 1, 2014 WLNR 26200250.

<sup>124</sup> See Brodie, *supra* note 123, at 31–32.

<sup>125</sup> See *id.* at 31; Romey & Rose, *supra* note 18.

<sup>126</sup> See Romey & Rose, *supra* note 18.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

<sup>130</sup> See Brodie, *supra* note 123, at 32; Victor K. Dahl, *Findings Associated with Intermediate Postmortem Intervals*, in 6 ATTORNEYS TEXTBOOK OF MEDICINE ¶¶ 29.81, 29.82 (3rd ed. 2018).

<sup>131</sup> See Abbas Naqvi, *Fake 'Mummy' Still Awaits Burial*, BBC NEWS (Jan. 24, 2008) [http://news.bbc.co.uk/1/hi/world/south\\_asia/7206526.stm](http://news.bbc.co.uk/1/hi/world/south_asia/7206526.stm).

*B. Fakes Waste Prosecutorial Resources*

Prosecutions of antiquities smugglers can be extraordinarily complex. Proving illegal export or import requires prosecutors to provide evidence about where the antiquities in question came from, which often calls for expert testimony by archeologists.<sup>132</sup> Prosecutors must also present evidence about the law of the source country, to show that export was in fact prohibited at the time it happened, as well as any transit countries whose customs laws may also have been violated.<sup>133</sup> It is a massive undertaking to understand and present this complex evidence, which often arrives in a variety of languages (of which the language of archeology is among the most daunting).<sup>134</sup> All of this effort, as well as the policing and investigative effort that proceeds it,<sup>135</sup> can come to naught when fakes are involved.

In January 2012, Arnold-Peter Weiss, a Brown University professor of surgery and former treasurer of the American Numismatic Society, was arrested in New York and charged with criminal possession of stolen property valued at over \$50,000.<sup>136</sup> An undercover officer posing as an interested buyer had spoken with Weiss, inquiring about a coin in the auction Weiss was conducting during the International Numismatic Convention at the Waldorf-

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<sup>132</sup> See *United States v. 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600 (GBD), 2013 U.S. Dist. LEXIS 45903, at \*21 (S.D.N.Y. Mar. 28, 2013) (quoting *United States v. Schultz*, 333 F.3d 393, 403 (2d Cir. 2003); David L. Hall, *Cultural Property Prosecutions*, ATT'Y GEN. CULTURAL PROP. L., Mar. 2016, at 17, 21.

<sup>133</sup> See Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, ATT'Y GEN. CULTURAL PROP. L., Mar. 2016, at 5, 9–10; Kelly Hill, *The Problem of Auction Houses and Illicit Antiquities: A Call for a Holistic Solution*, 51 TEX. INT'L L.J. 337, 351, 351 n.138 (2016).

<sup>134</sup> See *Gov't of Peru v. Johnson*, 720 F. Supp. 810, 815 (C.D. Cal. 1989), for an example of what happens when this type of evidence is not marshaled convincingly. See SIDNEY KIRKPATRICK, *LORDS OF SIPAN: A TRUE STORY OF PRE-INCA TOMBS, ARCHAEOLOGY, AND CRIME* 188, 190 (1st ed. 1992), for analysis of the gap between what happened and what was presented in court in *Gov't of Peru v. Johnson*.

<sup>135</sup> See, e.g., Dikov, *supra* note 35; Soenthrith, *supra* note 18.

<sup>136</sup> See Rick St. Hilaire, *Ancient Greek Coins from Italy Reportedly Seized in New York - Arrest Made*, CULTURAL HERITAGE LAW. (Jan. 11, 2012), <http://culturalheritagelawyer.blogspot.com/2012/01/ancient-greek-coins-reportedly-seized.html>; *Prominent Coin Dealer and Hand Surgeon Thought He Was Selling Real Stolen Coins*, SAVING ANTIQUITIES FOR EVERYONE (July 3, 2012), <http://savingantiquities.org/prominent-coin-collector-and-hand-surgeon-thought-he-was-selling-real-stolen-coins/>; *The Case of the Dodgy Drachmas: Arnold Peter Weiss, Prominent Rhode Island Surgeon, Pleads Guilty; "Looted" Coins Prove Forgeries*, CHASING APHRODITE (July 3, 2012), <https://chasingaphrodite.com/2012/07/03/dodgy-drachmas-arnold-peter-weiss-prominent-rhode-island-surgeon-pleads-guilty-looted-coins-proved-forgeries/> [hereinafter *Dodgy Drachmas*].

Astoria Hotel.<sup>137</sup> The coin, an ancient Greek silver tetradrachm from the 4<sup>th</sup> century BCE, was valued in the auction catalogue at \$300,000.<sup>138</sup> The officer recorded Weiss bragging about the coin’s illicit origins, saying “there’s no paperwork, I know this is a fresh coin, this was dug up a few years ago.”<sup>139</sup> The chatty Weiss further specified that he knew that the coin had been looted from Sicily, Italy, and that he had purchased it in 2010, for \$250,000.<sup>140</sup> He also identified two of his other ancient Greek coins as having been looted from Sicily.<sup>141</sup> One of these, a dekadrachm from ancient Akragas, dating to 409-406 BCE, he valued at over \$2.5 million.<sup>142</sup> These three coins were seized when he was arrested, along with twenty others in his possession at the time.<sup>143</sup>

Criminal prosecutions for dealing in smuggled antiquities are rare in the United States, since convictions require evidence that the dealer knew that the antiquities were stolen property (that is, that they were stolen from their country of origin by being exported contrary to national ownership laws).<sup>144</sup> Civil forfeiture actions are the current favored tool of American prosecutors fighting the trade in illicit antiquities, since they do not require proof of the dealer’s guilty knowledge.<sup>145</sup> However, a successful forfeiture action deprives a dealer or collector of a few antiquities, but leaves them free to continue their dealing in the future.<sup>146</sup>

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<sup>137</sup> *Prominent Coin Dealer and Hand Surgeon Thought He Was Selling Real Stolen Coins*, *supra* note 136. The investigation was initiated by Immigration and Customs Enforcement (Department of Homeland Security); how Weiss came under suspicion is not public knowledge. *See Federal Investigators Behind Criminal Case Against Coin Dealer Arnold Peter Weiss*, CHASING APHRODITE (Mar. 21, 2012), <https://chasingaphrodite.com/2012/03/21/federal-investigators-behind-criminal-case-against-coin-dealer-arnold-peter-weiss/>.

<sup>138</sup> *See* Compl., *People v. Arnold-Pete Weiss* (N.Y. Crim. Ct. Jan. 3, 2012), <https://www.documentcloud.org/documents/283116-nyc-vs-weiss.html> [hereinafter *Criminal Complaint*].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See Prominent Coin Dealer and Hand Surgeon Thought He Was Selling Real Stolen Coins*, *supra* note 136.

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> *See* Gerstenblith, *supra* note 133, at 7; Rick St. Hilaire, *The Weiss Ancient Coin Prosecution and What to Watch For*, CULTURAL HERITAGE LAW (Mar. 22, 2012), <http://culturalheritagelawyer.blogspot.com/2012/03/weiss-ancient-coin-prosecution-and-what.html>.

<sup>145</sup> *See* Michael van den Berg, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 869–70 (2015); Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT’L L. 1199, 1204–05, 1232 (2005).

<sup>146</sup> *Cf. Asset Forfeiture*, FBI, <https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture> (last visited Oct. 25, 2018) (“[C]ivil . . . forfeiture . . . does not require a criminal conviction and is a legal tool that allows law enforcement to seize property that is involved in a crime.”).

Dealers in dodgy antiquities can avoid criminal prosecution merely by avoiding asking too many questions from the people they buy from and refraining from making confessions to potential buyers.<sup>147</sup> Weiss did not follow these simple precautions.<sup>148</sup> He faced up to fifteen years in prison as well as the loss of a multi-million dollar investment in looted coins.<sup>149</sup> But seven months after his arrest, he pleaded guilty to a much reduced charge: three misdemeanor counts of attempted criminal possession of stolen property.<sup>150</sup> At the plea hearing, the lead prosecutor for the case, Assistant District Attorney Matthew Bogdanos, told the court that the three coins Weiss had believed were looted from Sicily were “exquisite, extraordinary, but forgeries.”<sup>151</sup>

Weiss was unlucky in his purchases, having wasted millions by buying fake coins, but was lucky in that Bogdanos was assigned to the case. Bogdanos, author of *The Thieves of Baghdad*, a memoir of his time as a Marine working to investigate the looting of antiquities from the Iraq Museum during the aftermath of the 2003 invasion of Bagdad, has a rare level of understanding of the illicit antiquities trade.<sup>152</sup> Accordingly, even though scholars who examined the three Weiss coins pronounced them genuine, Bogdanos additionally had the coins analyzed under a scanning electron microscope, which showed them to be fakes.<sup>153</sup> Most prosecutors would not have even considered the possibility that the antiquities at the heart of a criminal trial were fakes, much less sought out additional testing after being reassured by scholars.<sup>154</sup>

Weiss was arrested for possessing stolen ancient coins, but he pled guilty to the attempt crime of possessing fake coins he believed to

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<sup>147</sup> See e.g., N.Y. PENAL LAW § 165.52 (McKinney 2018) (criminalizing possession of stolen property when the person is guilty knowingly obtain stolen property; therefore, one can avoid conviction through ignorance).

<sup>148</sup> See *Criminal Complaint*, *supra* note 138.

<sup>149</sup> St. Hilaire, *supra* note 144; *Prominent Coin Dealer and Hand Surgeon Thought He Was Selling Real Stolen Coins*, *supra* note 136. Under New York Penal Law 165.52, Criminal Possession of Stolen Property valued at over \$50,000 is a class “C” felony punishable by a maximum of 15 years imprisonment. St. Hilaire, *supra* note 144.

<sup>150</sup> See *Prominent Coin Dealer and Hand Surgeon Thought He Was Selling Real Stolen Coins*, *supra* note 136.

<sup>151</sup> *Id.*

<sup>152</sup> See *Colonel Matthew Bogdanos Was Honored for His Book Theives of Baghdad*, SAVING ANTIQUITIES FOR EVERYONE, <http://savingantiquities.org/our-work/beacon-awards/2005-bogdanos/> (last visited Oct. 25, 2018).

<sup>153</sup> See *Prominent Coin Dealer and Hand Surgeon Thought He Was Selling Real Stolen Coins*, *supra* note 136.

<sup>154</sup> *Cf.* Hall, *supra* note 132, at 22 (noting that while prosecutors tend to favor either provenance, connoisseurship, or forensics—all are important for authentication).

have been genuine and stolen.<sup>155</sup> All that investigative and prosecutorial time and effort resulted not in jail time, but in Weiss being sentenced to seventy hours of community service, a fine of \$3,000, and creatively, the assignment of writing an essay warning others not to buy coins with unclear provenances for the American Numismatic Society’s magazine.<sup>156</sup>

Even if the artifacts at the heart of a smuggling prosecution are never conclusively shown to be fake, the suspicion that they are can have a major effect on the outcome of the case. For example, Bulgarian police seized nineteen statues from a garage in the town of Shumen in 2015.<sup>157</sup> Most were in a Greco-Roman style, but one was quite different: a square tablet carved with a procession that, in the cautious phrasing of the *New York Times*, “if authentic, is 5,000 years old and was apparently smuggled out of Iraq through Turkey.”<sup>158</sup> Bulgarian authorities declared that all of the artifacts seized from the garage were genuine looted antiquities.<sup>159</sup> Other experts were much more skeptical of the tablet, pointing out that it is carved with motifs that seem to be drawn from other ancient Iraqi square reliefs in various museums, and that the hole in the center appears to have been cut with a modern drilling tool, and, unlike the surface and outer edges of the relief, shows no wear.<sup>160</sup>

Two years after their arrest, both the garage owner and the man identified as the owner of the artifacts struck plea deals.<sup>161</sup> The

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<sup>155</sup> See James C. McKinley Jr., *Ancient Coins Returned to Greece, Ending U.S. Ordeal*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/nyregion/ancient-coins-returned-to-greece-ending-us-ordeal.html>.

<sup>156</sup> See *Prominent Coin Dealer and Hand Surgeon Thought He Was Selling Real Stolen Coins*, *supra* note 136. The resulting essay, “Caveat Emptor,” is a masterpiece in composition, managing to fulfill the prosecutorial assignment while still vigorously defending the trade in antiquities. See Arnold-Peter Weiss, *Caveat Emptor: A Guide to Responsible Coin Collecting*, ANS MAG., Fall 2012, at 35.

<sup>157</sup> See Steven Lee Myers & Nicholas Kulish, *‘Broken System’ Allows ISIS to Profit from Looted Antiquities*, N.Y. TIMES (Jan. 9, 2016), <https://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html>.

<sup>158</sup> See *id.*

<sup>159</sup> See Ivan Dikov, *Bulgarian Archaeologist Concludes Roman Artifacts Seized from Smugglers Authentic, Originated in Asia Minor and the Middle East*, ARCHAEOLOGY BULG. (Aug. 12, 2015), <http://archaeologyinbulgaria.com/2015/08/12/bulgarian-archaeologist-conclude-s-roman-artifacts-seized-from-smugglers-authentic-originated-in-asia-minor-and-the-middle-east/>; Ivan Dikov, *Bulgarian Archaeologist Finds 5000-Year-Old Relief from Ancient Mesopotamia Among Artifacts Seized from Treasure Hunters*, ARCHAEOLOGY BULG. (Mar. 27, 2015), <http://archaeologyinbulgaria.com/2015/03/27/bulgarian-archaeologist-finds-5000-year-old-relief-from-ancient-mesopotamia-among-artifacts-seized-from-treasure-hunters/>.

<sup>160</sup> See e.g., Barford, *supra* note 19.

<sup>161</sup> See Ivan Dikov, *Bulgarian, Turkish Man Sentenced in Shumen for Trafficking Roman Artifacts from Middle East*, ARCHAEOLOGY BULG. (Jan. 8, 2017), <http://archaeologyinbulgaria.com/2017/01/08/bulgarian-turkish-man-sentenced-in-shumen-for-trafficking-roman-artifacts->

garage owner received a year of probation and agreed to pay the equivalent of a few hundred dollars in court costs, while the owner of the artifacts received a two-year suspended sentence and was assessed fines of approximately \$2,000.<sup>162</sup> This far-from-harsh outcome, after years of governmental effort, is strange if the authorities were indeed convinced that the seized artifacts were genuine.

Since the artifacts in question were all stone, there cannot have been a late-breaking definitive test of their status.<sup>163</sup> But, given that faking is not illegal in Bulgaria, while dealing in genuine antiquities is, it seems likely that canny fakers would keep evidence that their wares were actually fakes, such as photographs of them in the process of being made.<sup>164</sup> Perhaps, given the international press attention on the case, which was linked to the issue of the Islamic State looting antiquities in Iraq,<sup>165</sup> the Bulgarian authorities were unwilling to face the potential embarrassment of admitting that they had held so many press conferences about a bunch of fakes, and thus struck the plea bargains instead of dropping the case (which would be a direct admission that the artifacts were fake) or proceeding with a trial (which would have allowed the accused to prove that the artifacts were fake).<sup>166</sup> Nor should it be strange that forgers would accept this light punishment instead of proving their innocence, since their suspended sentences serve as official proof to future buyers that they are dealing in genuine antiquities instead of fakes.<sup>167</sup>

Whatever the explanation for the gap between the claimed misdeed and the actual punishment in the Shumen case, it is another example of the convoluted and wasteful role that fakes play in smuggling prosecutions.<sup>168</sup>

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from-middle-east/.

<sup>162</sup> *See id.*

<sup>163</sup> *See, e.g.,* C. Claiborne Ray, *Dating Stone Tools*, N.Y. TIMES (Sept. 12, 2011), <https://www.nytimes.com/2011/09/13/science/13qna.html>.

<sup>164</sup> *See* Dikov, *supra* note 35.

<sup>165</sup> *See* Myers & Kulish, *supra* note 157.

<sup>166</sup> *Cf.* Dikov, *supra* note 35 (faking is not illegal in Bulgaria, thus at trial, the accused most likely would try to prove the artifacts were fake to avoid conviction).

<sup>167</sup> *See* OSCAR WHITE MUSCARELLA, *An Unholy Quartet: Museum Trustees, Antiquity Dealers, Scientific Experts, and Government Agents*, in NAMVARNAMEH: PAPERS IN HONOUR OF MASSOUD AZARNOUSH, 186, 189 (Hamid Fahimi & Karim Alizadeh eds., 2012), <http://asorblog.org/2013/10/17/an-unholy-quartet-museum-trustees-antiquity-dealers-scientific-experts-and-government-agents/>.

<sup>168</sup> As part of his plea agreement, Dr. Arnold-Peter Weiss forfeited twenty additional ancient coins seized at the time of his arrest. *See* McKinley, *supra* note 155. Five of these coins were subsequently repatriated to Greece, and the fate of the others is not publicly known. *See id.* At first glance, it might seem that, as in the Shumen case, Weiss escaped prosecution for the

### C. *Repatriation of Fakes Costs Governmental Credibility*

In 2013, the American President Barack Obama called the Iranian President Hassan Rouhani.<sup>169</sup> It was the first time since 1979 that an American president had spoken to his Iranian counterpart.<sup>170</sup> The

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possession of these coins because the three coins the prosecution initially focused on were fakes. *See id.* However, I do not think this is the correct analysis; rather, the motivations underlying the proposal and acceptance of this part of the plea deal have to do with the differences in American and Bulgarian law. If Weiss had been arrested in Bulgaria, he would have been guilty of dealing in antiquities, without prosecutors needing to prove that he knew they were looted (if the coins were genuine – and presumably, at least the ones repatriated to Greece were not laughable fakes, although we do not know what level of scrutiny they have received). *See* Dikov, *supra* note 35. However, in the United States, prosecutors would need to show that Weiss believed they were looted to obtain a criminal conviction, and the recorded conversation in which Weiss was so candid about his beliefs that the three fake coins were looted did not extend to these other coins. *See* N.Y. PENAL LAW § 165.52 (McKinney 2018); *Prominent Coin Dealer and Hand Surgeon Thought He Was Selling Real Stolen Coins*, *supra* note 136. The alternative would have been to bring a civil forfeiture action, where Weiss would have lost the coins if the government could show significant misstatements in their import paperwork. *See* 18 U.S.C. § 542 (2012). Stating the country of origin of an imported antiquity as a transit country, such as Switzerland, instead of the true country of origin in order to deter closer investigation, is a common technique that can lead to forfeiture. *See* *United States v. An Antique Platter of Gold*, 184 F.3d 131, 137 (2d. Cir. 1999). Or, perhaps Weiss imported the coins after the United States placed additional restrictions on the import of antiquities from Greece (in 2010) or Italy (in 2001), which would have required him to provide paperwork proving legal export in order to import them. *See* *Import Restrictions Imposed on Certain Archaeological and Ethnological Material from Greece*, 76 Fed. Reg. 74691 (Dec. 1, 2011); *Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods*, 66 Fed. Reg. 7,399 (Jan. 23, 2001); *Greece*, U.S. DEP'T STATE: BUREAU EDUC. & CULTURAL AFFAIRS, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/greece>; *Italy*, U.S. DEP'T STATE: BUREAU EDUC. & CULTURAL AFFAIRS, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/italy>. While negotiating the plea deal, prosecutors probably convinced Weiss to surrender the 20 coins simply by saying that, if he refused, they would bring a civil forfeiture action. *See* McKinley, *supra* note 155. If he believed he did not have the paperwork to win this action, it would have made sense to surrender the coins during the plea agreement, if only to avoid additional legal fees for defending the civil action. Of course, one imagines that the prosecutors would have hesitated to allow Weiss to surrender the coins instead of trying to uncover evidence that he believed that they, too, were looted. His willingness to chat to the undercover investigator about his belief that he was committing felonies would have been an indication that he was probably equally as chatty to others in the past about other purchases. *See* *Prominent Coin Dealer and Hand Surgeon Thought He Was Selling Real Stolen Coins*, *supra* note 136. However, finding that evidence would take immense effort, and would likely have resulted only in relatively weak witness testimony without recordings or other collaborative evidence (if that would even have been possible to obtain, in the close-knit numismatics sales world). But Weiss' fear that evidence of felonies might surface, perhaps even with records, would have been a powerful motivator to convince him to surrender the coins during the plea deal, even if he thought that his possession could survive a civil forfeiture suit.

<sup>169</sup> *See* Tara Kangarlou & Ben Brumfield, *2,700-year-old Persian Artifact a Gift of U.S. Diplomacy to Iran?*, CNN (Sept. 28, 2013), <https://www.cnn.com/2013/09/28/world/meast/2700-year-old-persian-artifact-iran-cultural-diplomacy/index.html>.

<sup>170</sup> *See* Kangarlou & Brumfield, *supra* note 169.



purpose of the call was to arrange the return to Iran of a sculpture, a hollow silver winged griffin, made in Iran c. 700 BCE and seized by the U.S. Department of Customs in New York in 2003.<sup>171</sup> The Iranian Antiquities Director who received the repatriated griffin called it an important instance of cultural diplomacy, which he claimed was “the thing that could improve relations between US and Iran after the years and softens the harshness of this relationship . . . .”<sup>172</sup>

Yet, both before and after the repatriation, several experts on the art of ancient Iran identified the piece as a fake.<sup>173</sup> Oscar White Muscarella argues that its “head is frozen mute, its eyes stare, the head, wing and leg patterns are awkward and meaningless, and the leg rivets are modern,” and, most convincingly, notes that the “surely uncomfortable” manner in which one funnel is inserted into the griffin’s anus leaves little doubt that the object is a fake.<sup>174</sup> Muscarella argues that the object was made to resemble the distinctive artifacts known to have been looted from the Kalmakarra Cave in western Iran in the early 1990’s.<sup>175</sup>

The true history of the griffin remains unknown before 1999, when the art collector Paula Cussi saw it in Geneva, Switzerland, and was told that it came from Iran.<sup>176</sup> Cussi purchased the griffin in New York in 2002 for \$950,000 from Phoenix Ancient Art.<sup>177</sup> Hicham Aboutaam, one of Phoenix’s proprietors, had imported the griffin from Switzerland to the United States in 2000, filling out a customs declaration that stated that the griffin originated in Syria, not, as had told Cussi, Iran.<sup>178</sup> In 2003, Aboutaam was arrested for making this false claim of origin to Customs.<sup>179</sup> Aboutaam pled guilty and was sentenced to a year’s probation and a fine of \$5,000.<sup>180</sup> The

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<sup>171</sup> See *id.*; Mazur, *supra* note 9.

<sup>172</sup> *Id.*

<sup>173</sup> See MUSCARELLA, *supra* note 167, at 187.

<sup>174</sup> *Id.* at 186. Similarly, Paul Barford calls the griffin “decidedly improbable”: Paul Barford, *Portable Antiquity Collecting and Heritage Issues: Is the Kalmakara (Western Cave) Griffin a Fake?*, BLOGSPOT (June 12, 2010), <http://paul-barford.blogspot.com/2010/06/is-kalmakara-western-cave-gryphon-fake.html>. Muscarella also describes the identification of the griffin as a fake by a European scholar, who is named as Wouter Henkelman in Suzan Mazur, *supra* note 9.

<sup>175</sup> See MUSCARELLA, *supra* note 167, at 186.

<sup>176</sup> See Mazur, *supra* note 9; MUSCARELLA, *supra* note 167, at 186.

<sup>177</sup> Before her purchase, Cussi had asked for and received authenticity reports from three experts. See MUSCARELLA, *supra* note 167, at 186. Given that the experts were selected and paid by Phoenix, it is probably not surprisingly that they all declared the object to be genuine. See *id.*

<sup>178</sup> See *id.* at 186, 187. This was probably to avoid sanctions on dealing in goods from Iran.

<sup>179</sup> See Mazur, *supra* note 9; MUSCARELLA, *supra* note 167, at 187.

<sup>180</sup> See Mazur, *supra* note 9; MUSCARELLA, *supra* note 167, at 187.

griffin was confiscated (and Cussi was refunded by Phoenix).<sup>181</sup>

According to Muscarella, at least two scholars subsequently informed the Customs authorities who were holding the griffin, that it was a fake.<sup>182</sup> But still, the uncomfortable griffin was trotted out to play its role in the thawing of American-Iranian relations.<sup>183</sup>

Nor is the griffin the only fake to have played a role in high-profile repatriations.<sup>184</sup> As we have seen, those dealing in genuine looted and smuggled antiquities frequently increase their profit margins by mixing in fakes.<sup>185</sup> Thus, any authority that seizes looted antiquities will seize some fakes as well.<sup>186</sup> Seizing authorities might well decide to give everything to a recipient country, letting them bear the expense of sorting out the fakes.<sup>187</sup> This is not in itself objectionable behavior—unless fake artifacts are paraded before the press in elaborate repatriation ceremonies, wasting the credibility of all authorities involved.<sup>188</sup>

Sometimes, these ceremonies celebrating fakes are useful, no matter how convincing the fakes may or may not be, as when in 2011 a delegation of Palestinian officials delivered two clearly modern statues to Egypt.<sup>189</sup> The statues, tourist souvenirs, had been seized in Gaza.<sup>190</sup> But the timing of the visit, after a change in the Egyptian

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<sup>181</sup> See Malcolm Curtis, *'Fake' Iranian Gift from US Tied to Geneva Gallery*, LOCAL (Oct. 16, 2013), <https://www.thelocal.ch/20131016/fake-iranian-gift-from-us-tied-to-geneva>.

<sup>182</sup> See Mazur, *supra* note 9; MUSCARELLA, *supra* note 170, at 187.

<sup>183</sup> See Alex Joffe, *Persian Artefact Returned to Iran Found to Be Fake*, ARCHAEOLOGY NEWS NETWORK (Oct. 12, 2013), <https://archaeologynewsnetwork.blogspot.com/2013/10/persian-artefact-returned-to-iran-found.html#8Yv0ovdC9mfCGX6O.97>.

<sup>184</sup> See, e.g., Paul Barford, *Portable Antiquity Collecting and Heritage Issues: How Does this Sort of Thing Happen*, BLOGSPOT (Apr. 28, 2011), <http://paul-barford.blogspot.com/2011/04/how-does-this-sort-of-thing-happen.html> (criticizing Palestinian return of two fake statues to Egypt); Alanna Martinez, *US Returns Looted Artifacts to Iraq—But Are Some Fakes?*, OBSERVER (July 17, 2015), <https://observer.com/2015/07/us-returns-looted-artifacts-to-iraq-discovered-in-military-raid/> (discussing repatriation of 400 Iraqi artifacts, some of which were fake).

<sup>185</sup> See Konstantinos-Orfeas Sotiriou, *The F Words: Frauds, Forgeries, and Fakes in Antiquities Smuggling and the Role of Organized Crime*, 25 INT'L J. CULTURAL PROP. 223, 223–236 (2018).

<sup>186</sup> See, e.g., William G. Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 CARDOZO ARTS & ENT. L.J. 561, 633 n.179 (2014) (“U.S. Customs seizures of large numbers of Chinese artifacts . . . included a proportionate amount of fakes and forgeries.”).

<sup>187</sup> See Martinez, *supra* note 184.

<sup>188</sup> See, e.g., Barford, *supra* note 184 (“But surely the Palestinians have archaeologists who should have been consulted before a diplomatic mission made a bit of [a] fool of itself . . . but of course the intended gesture was indeed praiseworthy.”).

<sup>189</sup> See *id.*; Nevine ElAref, *Palestine Handed Over to Egypt Two Objects Thought to Be Antiquities*, AHAM (Apr. 28, 2011), <http://english.ahram.org.eg/~NewsContent/9/40/10980/Heritage/Ancient-Egypt/Palestine-handed-over-to-Egypt-two-objects-thought-.aspx>.

<sup>190</sup> See Barford, *supra* note 184.

regime, suggests that the delivery of the claimed antiquities could have been an excuse to re-open diplomatic relations between Egypt and Palestine.<sup>191</sup>

It is not always harmless to attempt to create goodwill through fakes, since credibility has a wider importance. For example, in 2015, the United States repatriated around 400 artifacts to Iraq.<sup>192</sup> These artifacts had been seized during a Special Operations raid on the house of an Islamic State leader, within Islamic State-controlled territory in Syria, and the State Department subsequently claimed that the raid had revealed important details about how the Islamic State profits from the trade in looted antiquities.<sup>193</sup> However, as the extensively-photographed repatriation ceremony made clear, a number of obvious fakes were included among the artifacts given to Iraq.<sup>194</sup> Most striking is a miniature copy of the famous portrait of the Egyptian Queen Nefertiti in the Neues Museum, Berlin; the object, repatriated to Iraq with grand ceremony, seems to be a tourist souvenir with the paint knocked off.<sup>195</sup>

The obvious fakes indicate that archeologists were not involved in the investigation of a source of information deeply important to the preservation of antiquities. Or perhaps, the Iraqi Department of Antiquities was indeed involved at some point prior to showing up for the photo shoot, but its archeologists were not listened to – or did not dare to speak.<sup>196</sup>

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<sup>191</sup> See *id.* (noting that the delegation occurred in April 2011); Chris McGreal & Jack Shenker, Hosni Mubarak Resigns—and Egypt Celebrates a New Dawn, *GUARDIAN* (Feb. 11, 2011), <https://www.theguardian.com/world/2011/feb/11/hosni-mubarak-resigns-egypt-cairo> (reporting that Hosni Mubarak, the President of Egypt, resigned in February 2011).

<sup>192</sup> See Martinez, *supra* note 184.

<sup>193</sup> See *id.*; Ben Taub, *The Real Value of the ISIS Antiquities Trade*, *NEW YORKER* (Dec. 4, 2015), <https://www.newyorker.com/news/news-desk/the-real-value-of-the-isis-antiquities-trade>.

<sup>194</sup> See Paul Barford, *ISIL Antiquities: Looking at that "Smoking Gun"*, *BLOGSPOT* (July 15, 2015), <http://paul-barford.blogspot.com/2015/07/isil-antiquities-looking-at-that.html>.

<sup>195</sup> See *id.*; *Neues Museum*, *BERLIN.DE*, <https://www.berlin.de/en/museums/3109123-3104050-neues-museum.en.html> (last visited Nov. 18, 2018).

<sup>196</sup> In another example of this disjunction during repatriation between the beliefs of U.S. authorities and the Iraqi experts receiving the artifacts, an archeologist at the Iraq State Board Antiquities and Heritage has been quite vocal online (although I will maintain anonymity here) about thinking that the stone head of Assyrian King Sargon II, repatriated to Iraq in 2015 during in an elaborate ceremony, where it was displayed draped in blue satin, is in fact a modern forgery. See *Ancient Antiquities and Saddam Hussein-Era Objects Returned to Iraq*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Mar. 16, 2015), <https://www.ice.gov/news/releases/ancient-antiquities-and-saddam-husseini-era-objects-returned-iraq>. The head was seized by U.S. Immigration and Customs Enforcement in 2008. See *id.*

*D. Fakes Cost Taxpayer Money When Donated or Acquired Under National Purchase Schemes*

Museums that buy antiquities (as opposed to obtaining them through excavation) are as susceptible to purchasing fakes as any other type of collector.<sup>197</sup> For example, the Brooklyn Museum held an exhibit exploring its collection of Egyptian Coptic sculptures, admitting that a third of them were outright fakes, while many more were so re-carved that they contain very little that is originally ancient.<sup>198</sup> Museums should be applauded for reexamining their collections—but we also need to think about how museum acquisitions of fakes waste taxpayer money.

Sometimes the waste is readily apparent. In 2002, the Bolton Museum, in the United Kingdom, spent £439,767 to purchase a sensuous alabaster sculpture of a female torso.<sup>199</sup> Dubbed the “Amarna Princess,” the museum thought that the sculpture was created in Egypt in the 14<sup>th</sup> century BCE, and obtained grants from the National Heritage Memorial Fund and the National Art Collections Fund to purchase it.<sup>200</sup>

In reality, Shaun Greenhalgh, a Bolton resident, had carved the sculpture in his garden shed using a mallet and chisel, “stain[ing] it with clay and tea to make it look old” and forging letters to demonstrate that the sculpture had come into his family’s possession after his grandfather purchased it from the estate of a noted British antiquities collector in the late 19<sup>th</sup> century.<sup>201</sup>

Nor was this Greenhalgh’s only successful fake—he made and sold an astonishing variety of fakes, from sculptures to paintings and drawings to a Medieval reliquary.<sup>202</sup> But he was not caught until he used the same provenance story to explain the origins of three supposedly ancient Assyrian reliefs taken for authentication to the British Museum, where experts noted mistakes in the carved inscriptions and notified the police – who found two more “Amarna

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<sup>197</sup> See, e.g., Martin Bailey, *Revealed: One Third of Brooklyn Museum’s Coptic Collection Is Fake*, ART NEWSPAPER, July–Aug. 2008, at 2.

<sup>198</sup> See *id.*; *Unearthing the Truth: Egypt’s Pagan and Coptic Sculpture*, BROOKLYN MUSEUM, <http://www.brooklynmuseum.org/exhibitions/coptic/> (last visited Nov. 18, 2018).

<sup>199</sup> See Mark Jones, *Comment: Scholarly Research Is Flourishing but Curators’ Ability to Judge an Object’s Quality Is Not*, ART NEWSPAPER (Mar. 13, 2017), <https://www.theartnewspaper.com/news/comment-scholarly-research-is-flourishing-but-curators-ability-to-judge-an-objects-quality-is-not>.

<sup>200</sup> See Brodie, *supra* note 123, at 34; Jones, *supra* note 199.

<sup>201</sup> See Jones, *supra* note 199; James Kelly, *Fraudsters Who Resented the Art Market*, BBC NEWS (Nov. 16, 2007), [http://news.bbc.co.uk/2/hi/uk\\_news/7091435.stm](http://news.bbc.co.uk/2/hi/uk_news/7091435.stm).

<sup>202</sup> See Jones, *supra* note 199.

Princesses" in a bedroom wardrobe when they raided Greenhalgh's house.<sup>203</sup>

Museums that purchase artifacts that turn out to be valueless fakes waste taxpayer money directly, whether through using their own publicly-funded budget or grant awards, or through the solicitation of cash donations to purchase a desired fake.<sup>204</sup> The Bolton Museum's unwise purchase of a fake princess is only one example among many other museum purchases of fakes.<sup>205</sup> The damage varies by the amount of public funding the purchasing museum has and whether or not it can obtain a refund.<sup>206</sup>

Museums can also waste taxpayer money indirectly by accepting donations of fake artifacts and allowing the donors to obtain a tax deduction.<sup>207</sup> Of course, the donation cannot be given as a known fake, since this would have a low value and thus lead to a low tax deduction.<sup>208</sup> Nor, in theory, can a museum accept an obvious fake, because the donor of artwork worth more than \$5,000 must obtain an appraisal from "a qualified appraiser in accordance with generally accepted appraisal standards."<sup>209</sup> However, since the determination of fake from genuine is sometimes truly difficult, and because the appraisers generally know what the donor is hoping for on the appraisal (a high valuation), it is not surprising that even bad fakes are sometimes appraised as valuable genuine antiquities.<sup>210</sup> A museum eager to expand its collections or to cultivate good donor relations may be motivated to accept some fakes along with genuine

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<sup>203</sup> See Kelly, *supra* note 201.

<sup>204</sup> See, e.g., Jones, *supra* note 199.

<sup>205</sup> See *id.*

<sup>206</sup> See, e.g., *Antique Dealer Admits Museum Artifact Is a Fake: Report*, NBC CONN. (Feb. 28, 2018), <https://www.nbcconnecticut.com/news/local/Antique-Dealer-Admits-Museum-Artifact-Is-a-Fake-Report-475430383.html>.

<sup>207</sup> See Erin Thompson, Note, *The Relationship Between Tax Deductions and the Market for Unprovenanced Antiquities*, 33 COLUM. J.L. & ARTS 241, 242–45 (2010), for an overview of tax deductions for donations of artworks to museums or other charitable institutions.

<sup>208</sup> *Cf. id.* at 245 ("The [related use] rule's relation to valuation is clear . . . the value of a work which does not continue to provide value to the donee institution is lowered, since it is the charitable value which is of concern to the IRS.")

<sup>209</sup> 26 U.S.C. § 170(f)(11)(C), (E)(i)(II) (2012).

<sup>210</sup> A fake can be the source of several wasteful tax deductions, if a museum quietly deaccessions an artifact having decided—but not stated—that it is a fake, and then the artifact is eventually donated to another museum. See KELKER & BRUHNS, *supra* note 58, at 54. This was the case for the "Maddox mask," a fake Mixtec turquoise mosaic mask donated to Dumbarton Oaks, then deaccessioned in the 1960's and placed with a dealer for resale, then sold to a private collector who donated it to the San Antonio Museum of Art (apparently after a long courtship, which involved the museum director and several other staffers combing through the contents of a central vacuum system to find pieces of the mask's turquoise inlays, after the owner's maid knocked them off the mask and then vacuumed them up). See *id.*

antiquities as donations – especially if the cost is born by taxpayers.

“Sometimes” is perhaps an underestimation, if we take the case of the Mexican Museum of San Francisco (U.S.).<sup>211</sup> In 2012, when the Museum became an affiliate of the Smithsonian Institution, it was required to undergo an institution-wide authenticity evaluation.<sup>212</sup> Outside experts found that only 83 of the Museum’s 2,000 pre-Columbian artifacts were of definite “museum quality.”<sup>213</sup> The experts suggested that another twenty-four pieces might be of museum quality, if their authenticity could be shown by thermoluminescence dating.<sup>214</sup> But all the others should be considered “decorative,” that is, either fake or merely insignificant.<sup>215</sup> The experts noted in their report that the Museum’s collection contained “a good number of modern workshop ceramics, imitating the archaeological ones.... including some good and high-end forgeries.”<sup>216</sup> All of these artifacts came to the Museum as donations.<sup>217</sup> The chairman of the Museum’s board explained that “[i]t happens all the time that museums accept things that are not real,”<sup>218</sup> especially since, at the time the Museum accepted these donations, it “was accepting everything.”<sup>219</sup>

The case of the Mexican Museum is rare—not in that it collected forgeries, but in that it acknowledged it had done so.<sup>220</sup> Few museums find themselves compelled to make a determination of authenticity about donated objects.<sup>221</sup>

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<sup>211</sup> See Lydia Chavez, *Much of Mexican Museum’s Pre-Hispanic Collection Insignificant or Fake*, MISSION LOCAL (July 3, 2017), <https://missionlocal.org/2017/07/much-of-mexican-museum-ms-pre-hispanic-collection-insignificant-or-fake/>; Benjamin Sutton, *Shocking Study of 2,000 Objects in SF’s Mexican Museum Finds 1,917 Are Fake*, HYPERALLERGIC (July 7, 2017), <https://hyperallergic.com/389488/shocking-study-of-2000-objects-in-sfs-mexican-museum-finds-1917-are-fake/>; Whiting, *supra* note 15.

<sup>212</sup> For good reasons—even if the results are not as embarrassing as they were here, the cost is still high. The Mexican Museum was reported to have spent \$80,000, and only the first phase of the evaluation for one portion of its collections was complete by 2017. See Sutton, *supra* note 211.

<sup>213</sup> See *id.*; Whiting, *supra* note 15.

<sup>214</sup> See Chavez, *supra* note 211; Mabel Jiménez, *Mexican Museum Defends its Legitimacy, Corrects Journalists’ Inaccurate Reporting*, EL TECOLOTE (July 27, 2017), <http://eltecolote.org/content/en/features/mexican-museum-defends-its-legitimacy-corrects-journalists-inaccurate-reporting/>.

<sup>215</sup> See Chavez, *supra* note 211; Whiting, *supra* note 15.

<sup>216</sup> Chavez, *supra* note 211.

<sup>217</sup> See Sutton, *supra* note 211.

<sup>218</sup> See Whiting, *supra* note 15.

<sup>219</sup> Sutton, *supra* note 211; Whiting, *supra* note 15.

<sup>220</sup> See, e.g., Peter Landesman, *A Crisis of Fakes: The Getty Forgeries*, N.Y. TIMES (Mar. 18, 2001), [http://www.law.harvard.edu/faculty/martin/art\\_law/crises\\_of\\_fakes.htm](http://www.law.harvard.edu/faculty/martin/art_law/crises_of_fakes.htm) (describing the Getty’s suppression of its expert who believed he had unearthed a forgery).

<sup>221</sup> See, e.g., *id.* (detailing examples of museums disregarding expert advice in authenticating

## VI. CURRENT TREATMENT OF FAKES IN U.S. LAW

Creating a fake antiquity is not illegal in the United States.<sup>222</sup> Creators are free to make whatever artworks they desire, even if their art looks like or is a direct copy of an original artwork.<sup>223</sup> Thus, Mark Landis created copies of artworks and donated them to fifty-six museums across the United States over a period of thirty years,<sup>224</sup> but did not commit any crime, because he never accepted anything of value in return or claimed tax deductions (rather, it seems that he, a lonely man, enjoyed the fuss that small museums make over people they think are giving them a Picasso).<sup>225</sup>

It is not the fake itself, but activity around selling a fake that exposes a person to civil and criminal liability for fraud.<sup>226</sup> The most commonly-prosecuted type of fraud for sellers of fakes is for forging paperwork that purports to show the provenance or authenticity of a work for sale, such as receipts from prior sales or letters describing the work at some time in the past.<sup>227</sup> This type of fraud is relatively easy to prove if the seller is the one forging the documents, since there is no innocent reason for making and providing such documents.<sup>228</sup>

Sellers can also be liable for fraud if they make a false statement of material fact while selling an artifact by claiming it is genuine.<sup>229</sup> However, it must be shown that the seller knew that the artifact was actually a fake.<sup>230</sup> Sellers can defend themselves from charges of fraud by demonstrating that they were deceived and thought that the

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pieces).

<sup>222</sup> See Elizabeth Blair, 'Art & Craft' Explores How One Forger Duped More Than 45 Museums, NAT'L PUB. RADIO (Sept. 27, 2014), <https://www.npr.org/2014/09/27/351738720/art-craft-explores-how-one-forger-duped-more-than-45-museums>.

<sup>223</sup> See *id.*; see also 17 U.S.C. § 107 (2012) (outlining elements necessary for copying to become criminal).

<sup>224</sup> See Adam Wernick, *When Is Art Forgery Not a Crime? When the Forger Is a Philanthropist*, PUB. RADIO INT'L (Sept. 11, 2014), <https://www.pri.org/stories/2014-09-11/when-art-forgery-not-crime-when-forger-philanthropist>.

<sup>225</sup> See Blair, *supra* note 222.

<sup>226</sup> See Leila A. Amineddoleh, *Are You Faux Real? An Examination of Art Forgery and the Legal Tools Protecting Art Collectors*, 34 CARDOZO ARTS & ENT. L.J. 59, 101 (2016).

<sup>227</sup> The 2017 conviction of Eric Ian Hornak Spoutz for wire fraud for forging documents including receipts, bills of sale, and letters from attorneys in support of his sales of fake art. See *Forging Papers to Sell Fake Art*, FBI (Apr. 6, 2017), <https://www.fbi.gov/news/stories/forging-papers-to-sell-fake-art>.

<sup>228</sup> See, e.g., *id.*

<sup>229</sup> See, e.g., *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 313 (S.D.N.Y. 2013); *Krahmer v. Christie's, Inc.*, 911 A.2d 399, 405 (Del. Ch. 2006).

<sup>230</sup> See, e.g., *Krahmer*, 911 A.2d at 405, 406.

work in question was genuine.<sup>231</sup> The same requirement exists for civil suits for fraud brought by purchasers of fakes.<sup>232</sup>

Another possible criminal punishment for those selling fake antiquities is, as we saw in the Weiss case, a charge of attempted possession of stolen property.<sup>233</sup> Weiss seems to have been a novel application of state law to combat antiquities looting.<sup>234</sup> Yet, all fifty states have laws criminalizing the attempted possession of stolen property, and there seems to be no reason why other prosecutions could not use this charge.<sup>235</sup>

In the Weiss case, the charge of attempted possession of stolen property was a fallback position, since the original charge would not stand if the coins were not, in fact, stolen from Italy.<sup>236</sup> But the charge of attempted possession of stolen property could be the original charge in a case, if a prosecutor wanted to pursue those dealing in fakes.<sup>237</sup> The difficulty of successfully bringing this charge is that the prosecutor would need to prove that the accused believed that the fakes were genuine and looted.<sup>238</sup> Yet, if we consider why Weiss was talking about the origin of his coins to the undercover investigator in the first place, we can posit that it would not be impossible to capture evidence of such statements in other cases.<sup>239</sup> Weiss said that his coins were looted as a selling point to someone he believed was interested in buying them.<sup>240</sup> Various undercover journalists posing as buyers have similarly recorded dealers claiming that artifacts on sale in their shops were freshly looted.<sup>241</sup> To claim that something was looted is to a buyer a type of provenance history—a story to explain how the artifact is here, for sale, and is more likely

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<sup>231</sup> Amineddoleh, *supra* note 226, at 101.

<sup>232</sup> See *Krahmer*, 911 A.2d at 405.

<sup>233</sup> See Rick St. Hilaire, *Weiss Pleads Guilty to Attempted Possession Charges in New York – State Criminal Law Applied Successfully in Cultural Property Case*, CULTURAL HERITAGE LAW. (July 3, 2012), <http://culturalheritagelawyer.blogspot.com/2012/03/weiss-ancient-coin-prosecution-and-what.html>.

<sup>234</sup> See *id.*

<sup>235</sup> See *id.*

<sup>236</sup> See *id.*

<sup>237</sup> See *id.*

<sup>238</sup> See *United States v. Schultz*, 333 F.3d 393, 411 (2d Cir. 2003) (first quoting 18 U.S.C. § 2315 (2000); and then quoting *Godwin v. United States*, 687 F.2d 585, 588 (2d Cir. 1982)) (citing *United States v. Rosa*, 17 F.3d 1531, 1546 (2d Cir. 1994); St. Hilaire, *supra* note 144).

<sup>239</sup> See *Castor and Pollux, Forgeries and Loot: Reflections on the Arnold Peter Weiss Case*, CHASING APHRODITE (July 19, 2012), <https://chasingaphrodite.com/2012/07/19/castor-and-pollux-forgeries-and-loot-reflections-on-the-arnold-peter-weiss-case/> [hereinafter *Castor and Pollux*]; *Dodgy Drachmas*, *supra* note 136.

<sup>240</sup> See *Castor and Pollux*, *supra* note 239.

<sup>241</sup> See *BLOOD ANTIQUES* (Journeyman Productions 2009).



to be genuine than fake.<sup>242</sup> These types of statements could be used as evidence to prove the intent to sell stolen property, if the artifact was indeed genuine, or attempted possession of stolen property, if the artifact is fake.<sup>243</sup>

This consideration of existing laws applicable to fake antiquities demonstrates a larger issue. The American laws that deal with fakes all presume that authorities know or can determine if an artifact is fake or not.<sup>244</sup> What I want to focus on is not the legal treatment of known fakes, but what happens when authorities fail, either initially or totally, to determine that an artifact is fake.

## VII. POLICY PROPOSALS

I have discussed four categories of waste caused by fake antiquities being taken as genuine by the police, by prosecutors, by repatriating authorities, and by the IRS.<sup>245</sup> I have also argued that existing American law does not address these categories of waste.<sup>246</sup> This last section of the paper proposes some policy suggestions to reduce this waste.

We must recognize that governments face the same difficulty when trying to determine the authenticity of artifacts without a secure provenance as anyone else. This difficulty of distinguishing between fakes and genuine antiquities means that some temptingly simple policy proposals simply will not work, since any benefit they might convey is swallowed up by the cost of proving fakeness. For example, it would be simple to criminalize dealing in fakes.<sup>247</sup> But it would be extremely costly to enforce such a law, which would require the government to prove that artifacts are fake through extensive scientific testing and expert testimony.<sup>248</sup> And such a law would also likely lead to unfair results if, due to the difficulty of distinguishing

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<sup>242</sup> See *Castor and Pollux*, *supra* note 239.

<sup>243</sup> See, e.g., *Schultz*, 333 F.3d at 398, 412; *Dodgy Drachmas*, *supra* note 136.

<sup>244</sup> Cf. Michael Bennett, *Some Scholar's Opinions*, INT'L ASS'N DEALERS ANCIENT ART, <https://iadaa.org/some-scholars-opinions/#Unprovenanced> (last visited Oct. 14, 2018) (stating that the prosecutor must establish guilt of the accused for a charge, meaning, for example, the prosecutor must be able to prove that something is looted); St. Hilaire, *supra* note 233 (stating that laws exist to protect individuals from fake artifacts, which assumes prosecutors can prove the artifacts are fake).

<sup>245</sup> See *supra* Part V.

<sup>246</sup> See *supra* Part VI.

<sup>247</sup> See Anne Horn Baroody, *Real Problems with Fake Antiquities and How Geographical Indications May Help* 1, 20 (Oct. 22, 2012) (unpublished manuscript) (on file with Lawyers' Committee for Cultural Heritage Preservation), <https://www.culturalheritagelaw.org/Resources/Documents/Anne%20H%20Paper.pdf>.

<sup>248</sup> See *id.* at 12; Ameddoleh, *supra* note 226, at 73.

between genuine and fake antiquities, people dealing in unprovable fakes would be acquitted.<sup>249</sup>

Another seemingly simple proposal would be requiring that all reproductions, pastiches, or other newly-made pieces that could be confused with genuine antiquities be marked as such and criminalize the failure to do so. But imposing a marking requirement would not stop the importation of fakes or help deal with the problems posed by the circulation of existing fakes.<sup>250</sup> Unscrupulous sellers could always remove the marks.<sup>251</sup> And it would probably be impossible to draw a satisfactory line between objects designed to be sold as genuine and creations whose artists could plausibly argue are merely inspired by antiquity.

Before we consider how best to reduce the waste caused by fakes, we have to think about what, exactly, is being wasted. We might think that the waste is of governmental resources writ large. For example, we might think that a prosecutor is more efficient and useful when pursuing murderers rather than wasting time with cases involving antiquities that turn out to be fake. If we prioritize in this manner, antiquities as a whole begin to seem rather unimportant compared to the other claims on governmental resources. We might then propose simply that the government wash its hands of antiquities altogether, and neither investigate, prosecute, repatriate, or offer tax deductions for them.

If, by contrast, we do place value on governmental involvement with genuine antiquities, we should specify this value, because it is this that is being wasted when governments mistakenly devote resources to fake antiquities.<sup>252</sup> I identify this value as the ability of governments to preserve antiquities, which includes protecting them from being looted; treating looted antiquities in a manner that preserves any remaining value while discouraging future looting; and enabling the display of antiquities for the benefit of the public. Thus, for each of the categories of waste I have identified, I am seeking to propose changes that will ensure that governmental resources go as little as possible towards dealing with fake antiquities, and as much as possible toward preserving genuine antiquities. Moreover, we

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<sup>249</sup> See Amineddoleh, *supra* note 226, at 100.

<sup>250</sup> See Patricia Cohen, *Fake Art May Keep Popping Up for Sale*, N.Y. TIMES (Nov. 5, 2012), <https://www.nytimes.com/2012/11/06/arts/design/murky-laws-give-fake-artworks-a-future-as-real-ones.html>.

<sup>251</sup> *Cf. id.* (noting that collectors who were informed they had fake works later quietly sold these piece as genuine).

<sup>252</sup> See Hill, *supra* note 133, at 344–45; Baroody, *supra* note 247, at 13.

must find policy suggestions that are not, like existing laws and policies, premised on the assumption that authorities can easily tell fake from genuine antiquities.<sup>253</sup>

*A. Authorities Should Consider Authenticity as Early as Possible During Investigations*

As the saying goes, “[t]he surest means to identify a forgery is to wait a century”—when any anachronistic use of contemporary style will be visible to future eyes.<sup>254</sup> Unfortunately, governments do not have that long to wait before deciding whether or not to expend time and money on investigating an antiquity that may or may not be a forgery.<sup>255</sup>

The surest way to waste investigative resources on fakes is for investigators to ignore the possibility that the artifacts they are investigating might be fake, allowing any discovery of their true nature be accidental.<sup>256</sup> Investigators should be trained about the widespread nature of fakes and should make a preliminary determination about authenticity early in the investigation—at the very least before any press conferences are held.

Such a determination might well remain preliminary, given the difficulty and costs of telling fakes from genuine antiquities,<sup>257</sup> but it should be as rigorous as possible and be made in consultation with archeological experts.<sup>258</sup> This would require a close working relationship between authorities and scholars. There should be transparency in explaining how authorities reached their decision about whether an artifact is genuine or fake. This transparency might necessitate offering indemnity to experts, who might otherwise be vulnerable, as authenticators have recently been, to civil suits brought by an owner aggravated by the statement that their artifact is a worthless fake.<sup>259</sup>

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<sup>253</sup> See *supra* Part VI.

<sup>254</sup> See KELKER & BRUHNS, *supra* note 58, at 221.

<sup>255</sup> See, e.g., Klein, *supra* note 102 (explaining that U.S. Immigration and Customs Enforcement (ICE) agents must scrutinize about 200 suspect pieces a day in order to determine their provenance and legitimacy).

<sup>256</sup> See, e.g., Soenthrith, *supra* note 18 (after two weeks of an undercover operation and after arresting three suspects, the police in Kompong Thom province discovered that the looted statues were actually worthless copies of Buddhist artifacts).

<sup>257</sup> See Bulos, *supra* note 101; Michael J. Clark, *The Perfect Fake: Creativity, Forgery, Art and the Law*, 15 DEPAUL J. ART & INTELL. PROP. L. 1, 25 (2004); Patty Gerstenblith, *Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works*, 35 COLUM. J.L. & ARTS 321, 338 (2012); Polkinghorne, *supra* note 117.

<sup>258</sup> See Gerstenblith, *supra* note 257, at 339.

<sup>259</sup> See Amineddoleh, *supra* note 226, at 80–86, for these lawsuits and attempted statutory

Police forces should also change their policy about the treatment of a case once it is determined that the seized antiquities are fake. Rather than quietly dropping the case, authorities should trumpet that they have seized fakes. The market for looted antiquities depends on buyers who are willing to buy antiquities without asking too many questions about their provenance.<sup>260</sup> Potential buyers who hear about people being criminally prosecuted for dealing in looted antiquities might be dissuaded from entering the market—or they might allow the low chance of being caught add a piquant spice to their purchases.<sup>261</sup> There is no such piquancy in being fooled by a fake. Alerting the public to the fact that even sophisticated connoisseurs are losing substantial investments through the purchase of antiquities they did not ask enough questions about seems a more reliable way to dissuade potential collectors than prosecutions for possession of stolen goods. Some people do not mind a low chance of going to jail, but nobody wants the world to know that they are a fool.

*B. Prosecutors Should Inform the Accused of the Possibility of  
Defending Themselves by Proving Fakes*

Prosecutors should inform those accused of dealing in looted antiquities of their right to defend themselves by showing that the artifacts are fake. This should be done as soon as possible—even as an accompaniment to the initial indictment. Prosecutors should also make the seized antiquities available for the defendant’s experts. Doing so will encourage defendants to do testing or try to get convincing expert reports at an early stage, before the government has invested in a trial.

There would be an incentive for a defendant to obtain expert opinions that holds that an artifact is fake in order to avoid prosecution, but then later to sell the restored artifact as genuine.<sup>262</sup> Thus, if the prosecutor is persuaded by the defense’s experts that the

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fixes.

<sup>260</sup> See note 27 and accompanying text.

<sup>261</sup> See McKinley, *supra* note 155; Abby Seiff, *How Countries Are Successfully Using the Law to Get Looted Cultural Treasures Back*, Am. B. Ass’n J. (July 2014), [http://www.abajournal.com/magazine/article/how\\_countries\\_are\\_successfully\\_using\\_the\\_law\\_to\\_get\\_looted\\_cultural\\_treasures](http://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_law_to_get_looted_cultural_treasures).

<sup>262</sup> See, e.g., Ulrich Boser, *Insider: Sky Disk on Trial*, ARCHAEOLOGY (Nov./Dec. 2005), <https://archive.archaeology.org/0511/newsbriefs/insider.html> (noting that in Germany, a defense attorney of two amateur archeologists was trying to appeal his clients’ conviction of illegally trafficking cultural artifacts by having an expert testify that the artifact was fake, but one of the defendants was still presenting the artifact on her website as authentic).

artifacts are indeed fake, a condition for dismissal of the charges, or for a plea bargain to a lesser charge, should be the forfeiture of the artifacts in question. They could be destroyed, retained for study, or even offered to a country of origin that is not persuaded they are fake.

It might be objected that this way of proceeding might incentivize defendants to “prove” that genuine looted antiquities are fake in order to escape prosecution and that, given the difficulty of determining if an artifact is genuine or not, some genuine antiquities would be labeled as fakes.<sup>263</sup> But, as I argued above, there are large potential gains in the fight against the trafficking of looted antiquities in convincing the public that they will probably buy a fake if they enter the market.<sup>264</sup> Perversely, seizures and prosecutions of major ancient artworks might have the opposite effect—of encouraging potential buyers to enter the market for looted antiquities, since the press around such events shows that beautiful, collectible artifacts can be had.<sup>265</sup>

This way of thinking about the counterintuitive benefit of proving that artifacts are fake during looting prosecutions also can help us think about whether it is worth it for prosecutors to bring initial charges of attempted possession of stolen property when they determine in the early stages of an investigation that a suspect is in fact dealing in fakes, but believes them to be genuine and looted (or, at least, makes statements about their looted history to potential buyers).<sup>266</sup> Alone, the relatively low available sentences and fines for attempted possession of stolen property do not seem to be worth the cost of prosecutorial time and resources to investigate such cases, which are just as complicated as investigations of genuine looted antiquities.<sup>267</sup> But the balance of values is changed when we add the benefit of publicizing the rampant availability of fakes.

### *C. Repatriations Should Be Approved by Archeologists from the Recipient Country*

If governments are serious about preserving antiquities and stopping looting, archeologists need to have a voice in every part of the process. This includes the process of repatriation.<sup>268</sup>

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<sup>263</sup> See Gerstenblith, *supra* note 257, at 340.

<sup>264</sup> See *supra* note 97.

<sup>265</sup> See Amineddoleh, *supra* note 226, at 67–68.

<sup>266</sup> See *supra* note 136–56.

<sup>267</sup> See, e.g., *People v. Aharonowicz*, 518 N.Y.S. 2d 653, 654 (App. Div. 1987).

<sup>268</sup> See *Should Works of Art Be Repatriated to Their Places of Origin?*, JOSIC (Apr. 25, 2017), <https://www.josic.com/should-works-of-art-be-repatriated-to-their-places-of-origin/>.

Repatriating countries should ask recipient countries if they prefer to have all artifacts returned to them without a determination of authenticity or would like the repatriating country to do a first round of determinations. Most importantly, repatriating and recipient countries should agree on which repatriated objects should be displayed during repatriation ceremonies. There is no need to spread all the artifacts out before the press, since there's a good chance that some of them will be identifiable as fakes. Better to focus on the more certainly authentic pieces. In that way, repatriating countries will not strain the goodwill of recipient countries or their experts. Nor will they convey an impression of incompetence to potential looters, smugglers, and purchasers of looted antiquities. Who will fear the investigative force of a country that can't tell a tourist souvenir from a masterpiece of ancient art?

*D. The IRS Should Require Evidence of Authenticity Before Approving Valuations of Donated Antiquities*

A key difficulty with reducing the amount of tax deductions given for donated forgeries is that the IRS measures valuation at the time of donation, “not what a court at a later time may think a purchaser would have been wise to give” when other factors become known.<sup>269</sup> Under current tax laws and regulations, a donor cannot increase the amount of a tax deduction if the museum later declares that the anonymous painting she donated is in fact by Michelangelo; but neither can the government take away a tax deduction if the museum later decides that a donated Michelangelo is in fact a fake.<sup>270</sup>

Thus, we have to think of ways to prevent the donation of fakes in the first place. One potential technique would be for the government to require, via new IRS regulations, the submission of laboratory reports on the results of specified tests for antiquities. Terracotta

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<sup>269</sup> *W.T. Grant Co. v. Duggan*, 18 F. Supp. 724, 726 (S.D.N.Y. 1937) (citing *City of New York v. Sage*, 239 U.S. 57, 61 (2015)). See also Wendy C. Gerzog, *McCord and Post-Gift Events*, 113 TAX NOTES 349, 350 (2006) (comparing different valuations of gifts); Wendy C. Gerzog, *McCord: Value of Gifts Must Be “Tax Affected”*, 113 TAX NOTES 913, 914 (2006) (listing other considerations in valuations).

<sup>270</sup> For the valuation of donated artifacts in general, see JAMES BONBRIGHT, *THE VALUATION OF PROPERTY* (1937); JACK BOGDANSKI, *FEDERAL TAX VALUATION* (1996); JOHN BISHOP & MORTON LEE, *FEDERAL TAX VALUATION DIGEST* (1983); INTERNAL REVENUE SERV., *VALUATION GUIDE FOR INCOME, ESTATE AND GIFT TAXES* (1985) (manual used by IRS in Appeals Officer Valuation Training Program); Emanuel L. Gordon, *What Is Fair Market Value?*, 8 TAX L. REV. 35, 49 (1952); Ralph Lerner, *Valuing Works of Art for Tax Purposes*, 28 REAL PROP. PROB. & TR. J. 593 (1993); John G. Steinkamp, *Fair Market Value, Blockage, and the Valuation of Art*, 71 DENV. U. L. REV. 335, 355 (1994).

artifacts would need thermoluminescence dating; wooden ones dendrochronological analysis, and so on.<sup>271</sup> Since scientific testing is subject to abuse, e.g. through forging testing paperwork, using only compliant labs, or using only non-determinative tests, perhaps the IRS could mandate the use of certain tests at certain approved labs.<sup>272</sup>

This requirement would by no means entirely stop the donation of forgeries, given the uncertainties of testing. But it would have the salutary effect of putting collectors on notice that there are fake antiquities on the market and that they might lose any benefits of their investment if they purchase a fake without asking for scientific testing. This proposal would also benefit museums, in that it lessens their incentive to accept forgeries merely to placate donors, because they don't have to be the ones to raise the issue of forgery.

Of course, no scientific testing is available for large categories of antiquities.<sup>273</sup> It is perhaps possible to decrease the probability of granting tax deductions for donated forgeries by instituting a claw-back period for deductions for all donated antiquities, in case information comes out that a donation is fake. Perhaps whistleblower rewards could be established, to encourage people who know about fakes to reveal them (to disincentivize a museum from merely keeping quiet once a curator decides that a donated antiquity is fake).

## VIII. CONCLUSION: BEAUTIFUL FAKES

Power cuts during the chaos following the Coalition invasion of Baghdad in 2003 meant that there was no light or climate control in the storerooms of the Iraq National Museum.<sup>274</sup> In this hot, dangerous dark, thieves worked selectively. They ignored shelves full of fragments from archeological excavations.<sup>275</sup> But they entirely cleared the shelves that contained the Museum's collection of fakes,

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<sup>271</sup> See *Dendrochronology and Provenance*, DENDRO.DK, <http://www.dendro.dk/index.php/dendrochronological-analysis> (last visited Nov. 19, 2018); *Thermoluminescence Dating*, JOUKOWSKY INST. FOR ARCHAEOLOGY & THE ANCIENT WORLD, [https://www.brown.edu/Departments/Joukowsky\\_Institute/courses/greekpast/4929.html](https://www.brown.edu/Departments/Joukowsky_Institute/courses/greekpast/4929.html) (last visited Nov. 19, 2018).

<sup>272</sup> See Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 168–70, 219 (2007).

<sup>273</sup> See *supra* notes 56–61 and accompanying text (discussing the difficulties in ascertaining the age of certain materials).

<sup>274</sup> See MATTHEW BOGDANOS & WILLIAM PATRICK, THIEVES OF BAGHDAD: ONE MARINE'S PASSION TO RECOVER THE WORLD'S GREATEST STOLEN TREASURES 1, 5 (2005); *Lacking Water and Power, Iraqis Run Out of Patience in the Searing Summer Heat*, GUARDIAN (Aug. 15, 2003), <https://www.theguardian.com/world/2003/aug/16/iraq>.

<sup>275</sup> See BOGDANOS & PATRICK, *supra* note 274, at 215.

seized and studied by archeologists over the years.<sup>276</sup>

Why steal fakes? Perhaps the thieves themselves were fooled. Or perhaps they recognized that they could fool others. In any case, the contrast was clear. On the one side were ugly but authentic antiquities, pieces of clay and wood and bone that would have little value on the marketplace for antiquities, but hold immense value to archeologists trying to understand the world of the past.<sup>277</sup> And on the other were the beautiful fakes: exquisitely carved statues, jewelry, and painted vases, all of which conformed to our modern understanding of the aesthetically pleasing and the artistic masterpiece.<sup>278</sup>

Genuine antiquities were not created with us in mind, but fakes are made to attract us. The attractiveness of fakes harms the preservation of genuine antiquities, since beautiful fakes encourage potential looters and collectors to think that major pieces are still out there to be found, and thus lead to ongoing looting.<sup>279</sup>

Another harm of fakes, which seems not to have been previously recognized, is that they impede efforts to fight the trade in looted antiquities. Fakes divert governmental resources from the investigation and prosecution of genuine, looted antiquities.<sup>280</sup> More perniciously, fakes influence the public idea of what type of antiquities are worthy of protection against looting.<sup>281</sup> This position as “fauxster children” is a distraction from the protection of unglamorous but information-rich genuine antiquities. Governmental focus on aesthetically pleasing art objects means we are not devoting resources to preventing loss of unmarketable archeological artifacts. That is the true waste of the fanfare over the repatriation of the pseudo-Iranian griffin.<sup>282</sup>

And so, my final proposal is to archeologists. Many of us keep silent when we suspect that authorities have seized or are repatriating or

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<sup>276</sup> See *id.*

<sup>277</sup> See David Randall, *Revealed: The Real Story Behind the Great Iraq Museum Thefts*, INDEP. (Nov. 13, 2005), <https://www.independent.co.uk/news/world/middle-east/revealed-the-real-story-behind-the-great-iraq-museum-thefts-515067.html>.

<sup>278</sup> See *2003 Looting of the Iraq National Museum*, CULTURAL HERITAGE RES., <https://web.stanford.edu/group/chr/drupal/ref/the-2003-looting-of-the-iraq-national-museum> (last updated Oct. 20, 2008, 3:53 PM).

<sup>279</sup> See Baroody, *supra* note 247, at 6.

<sup>280</sup> See *id.* at 12.

<sup>281</sup> See, e.g., Dirk Philippus Conradie, *Unknown Provenance: The Forgery, Illicit Trade and Looting of Ancient Near Eastern Artifacts and Antiques 1*, 29 (May 21, 2016) (unpublished Master of Arts dissertation, University of South Africa) (on file with the University of South Africa) (“Yet history shows it is the seducing object that may be false; a fake is made with the intention to seduce the contemporary eye.”).

<sup>282</sup> See Kangarlou & Brumfield, *supra* note 169.



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are granting a tax deduction for a fake. We perhaps think that protesting this will dissuade governments from caring about antiquities looting. But letting fakes attract attention and resources means that genuine antiquities will be less protected.<sup>283</sup> If we want to fight for them, we must identify and protest the acceptance of "official fakes."

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<sup>283</sup> See Baroody, *supra* note 247, at 39.