

DIG A BIT DEEPER

Law, Regulation and the Illicit Antiquities Market

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The UK market in antiquities is the site of trade of an unknown number of illicit artefacts. These illicit antiquities are often the product of looting in underdeveloped nations. The UK has recently passed a new statute criminalizing the knowing purchase of a looted cultural object. The statute, however, is likely to have little effect on the trading practices of London's antiquity dealers, due to peculiarities of their style of transacting, which will be examined here. This paper is therefore (a) a study of an illicit market which is still in the early stages of a slow move from non-criminal to criminal, as its destructive tendencies are increasingly brought to public and official recognition and (b) yet another note of warning to regulators who feel that, on the implementation of a token criminal prohibition, markets will sanitize themselves.

Introduction

The study on which this paper is based documented and examined UK and international laws governing the movement of antiquities, and coupled this legal exercise with a qualitative study of buyers in Western markets. The data showed the marriage of legal governance with market response in this particular trading forum to be rather an ineffective coupling.¹ Many of the market traders interviewed had little or no real understanding of the terms of the laws which governed their business practice. This is not unusual in the art market (see further Kenyon and Mackenzie 2002). More concerning than this, however, the interviewees projected a strong sense of entitlement to buy looted antiquities. This entitlement was manufactured through the implementation of techniques of neutralization, drawn by the interviewees from a self-protective discourse propagated by, and itself sustaining, the market.

The main aim of this paper is to highlight one aspect of the social nature of market practice which informs action and appears, in the case of the antiquities market at least, capable of creating and defending a boundary against regulatory initiative. That aspect is discourse, in the form of a web of meaning-creating communications. We shall also examine the latest UK development in this regulatory initiative. It is argued that this new law is quite obviously defective in its terms; and further, that a successful approach to the regulation of the antiquities market would require a diligently

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¹ The data were generated from a core sample of 29 interviewees in the antiquities market, a subset of the wider art market, supplemented by a further sample of 12 interviewees from the larger sample population of the art market. One of the core interviews was conducted with two respondents simultaneously. Thus, a total of 40 interviews were conducted in Melbourne, Sydney, New York, London, Geneva, Bangkok, Chiang Mai and Hong Kong between September 2001 and January 2003. Many of those interviewed fall into the category of 'key informants': access was obtained to some of the world's most important and successful dealers. My focus was on South-East Asian antiquities. The interviewees' words are reproduced here without grammatical edit.

researched, sophisticated understanding of the day-to-day practices, opinions and desires of its constituents—the traders.

The question of the regulation of the antiquities market will be addressed by alluding in turn to the questions: ‘how does a buyer know where an object has come from?’; ‘how do buyers operate in cases where they cannot be sure where an object has come from?’; ‘what criminal laws apply to buyers who operate without knowledge of where an object has come from?’; and ‘what is the prospect for success of these criminal laws in regulating the market?’. In the final sections, I shall draw on Matza’s theoretical framework (Sykes and Matza 1957; Matza and Sykes 1961; Matza 1964; 1969), in support of my argument that law—through its privileging of the concepts of rights and entitlement—is centrally implicated in the creation of psychological states of denial and justification of harmful action, when its concepts are put to use in social, rather than legal, discourse.

Looting in Context

The establishment of an international trade in antiquities is not a recent phenomenon. The same can be said for looting. Looting, of course, is a cultural construction: the definition of the action depends upon prevailing sentiment. Lord Elgin, who brought back the ‘marbles’ from the Parthenon between 1801 and 1810; Sir E. A. Wallis Budge, curator of Egyptian and Assyrian antiquities at the British Museum between 1894 and 1924, translator of the *Book of the Dead*, and excavator and collector of a great number of other papyri from Egypt and beyond; Sir Flinders Petrie, excavator of the Great Pyramid of Giza between 1880 and 1883: these British adventurers are rescuers of relics from the unreliable care of native populations to some, and culturally insensitive looters to others (on Elgin, see Merryman 1985; on Budge, see Fagan 1976; and for Petrie, Drower 1985). It is safe to say that more people view them as the latter in 2004 than did so in their day. Somewhat ironically, it is Petrie who is now credited with setting the exacting standards of methodology—including a regard for the intellectual worth of even the smallest and apparently most insignificant object—unknown to his archaeological predecessors whom we now see to have caused catastrophic destruction. A looter with a legacy?

The debate on the ethics of trading in looted objects is therefore not without its history. Today’s antiquities dealers and collectors are the product of a once noble line in colonial exploration; the export of Western European science and the import of the objects it brought home when it returned are the proud and regal string accompaniment to a contemporary market distressingly unconcerned with the rapacious consequences of continuing the tradition of trading in archaeological material, albeit suffocatingly beautiful archaeological material. Contemporary looting is considerably less glamorous, being performed most often by local opportunists who see in their country’s art-rich soil a means to improve their impoverished circumstances, rather than ‘cultural pioneers’ or army generals with a sideline in art enthusiasm.² A well documented, if under-researched, chain of supply exists between local finders, international

² Although events consequent upon the 2003 invasion of Iraq may give one cause for further thought about that statement: see <http://icom.museum/redlist/> for an emergency list of Iraqi objects at risk as a result of the war, compiled by the International Council of Museums.

dealers and destination markets (e.g. Paredes Maury 1996; Brodie *et al.* 2001), but the feeling that the market saves and preserves objects for future generations still runs in a strong current through its dealership. The ethics of the unsavoury beginnings of objects in the chain of supply are accordingly submerged beneath waves of historical, political and cultural sentiment concerning, quite literally and always emotionally, the future of the past (Greenfield 1996; Hoving 1975).

The history of legal attempts to control the international market in looted antiquities begins considerably more recently than the history of looting itself. Indeed, the inadequacy of the two main treaties governing the international movement of stolen cultural heritage—the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property 1970 and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995³—coupled with the rarity of noteworthy cases where art and antiquities dealers have been convicted for smuggling-related offences,⁴ reflects the fact that we are now in the early formative stages of the development of suitable control mechanisms.

Situating the statement in its proper cultural and historical context, then, for modern legal purposes, we can define looted antiquities as those taken illicitly from the ground, or from their place as an integral part of, or attachment to, a temple or other ancient structure (Meyer 1973; Bator 1983; Renfrew 1999). This looting happens routinely throughout the world (Conklin 1994; Thosarat 2001; Pastore 2001). Looters, while digging, often destroy objects that they perceive to be of lesser value than the gold, silver and jewels that they prize. More serious, perhaps, is their destruction of stratified context (Burnham 1975; Renfrew 1993; 1999). This refers to the placement of artefacts in a tomb, or the particular layer of the earth in which they are found: information valuable to a trained excavator that can add greatly to our knowledge about the human past. Archaeology is dedicated to the collection of such knowledge and its publication (Coggins 1969; 1970).

A further detrimental effect of looting is in the loss to a country of its cultural assets as they travel to overseas markets. However, this loss is theoretically remediable if looted and smuggled objects are traced and returned to their country of origin. In practice, cases of return are few. Given the irremediable nature of the loss caused to the archaeological record by looting—once context is destroyed, the knowledge that it can offer can never be reclaimed (Chippindale and Gill 2000; Gill and Chippindale 1993)—it seems sensible to take as a starting point of regulatory principle the premise that any solution to the problem of the international market in looted antiquities must revolve around stopping the looting rather than increasing incidents of reclaimed objects. The market structure of the global movement of antiquities leads us to see the reduction of demand for the purchase of looted antiquities as a productive avenue to the reduction of looting itself (O’Keefe 1997; Polk 2000).

³ A wide variety of commentary on the conventions is available. Although many of these commentaries are fleetingly optimistic about their potential to encourage restraint on illicit trade, there is much in the drafting and implementation of the texts to be criticized (examples are Bator 1983; Prott 1997; O’Keefe 2000; Mackenzie 2002).

⁴ A trilogy of cases in the US has established the possibility of convicting dealers in terms of the National Stolen Property Act, 18 U.S.C., s. 2314, for possession of cultural property stolen from the ground in certain overseas states. They are: *United States v Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *United States v McClain*, 593 F.2d 658 (5th Cir.), cert. denied, 444 U.S. 918, 100 S.Ct 234, 62 L.Ed.2d 173 (1979); and most recently *US v Schultz*, 178 F.Supp.2d 445 [S.D.N.Y. 2002]. In the UK, we have had one comparable case of note: *R v Tokeley-Parry* [1999] Crim.L.R. 578.

A useful geographic framework within which to examine the global trade is that of 'source' and 'market' states:

. . . the world divides itself into source nations and market nations. In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artefacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples. Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property. (Merryman 1986)

Although omitted from Merryman's list of market nations, the United Kingdom is home to one of the world's largest market centres, in terms of volume of trade, for the sale of antiquities. Antiquities looted from source countries routinely travel here to be sold by international dealers and auction houses to other dealers, private collectors and museums. The other main international centre for the purchase of high-end antiquities is New York. Different classes of material have their own geographic market signature in terms of their flow—the United Kingdom and New York have strong markets in South-East Asian and Chinese material for example, Paris remains a centre for the sale of traditional Cambodian material, and much African material moves through Paris and Brussels:

When you look at the true money for all of this, the big money is in America and in Europe. And that's where it's going, that's where the really big work's going. The pieces that are being ripped out of the ground, or off the temple, that's where it's going. And it's frightening. (Melbourne Dealer 2)

Legal attempts at protection of local cultural heritage in source countries take two broad forms: the creation of state ownership rights and the implementation of border controls. Many source countries have legislated to vest undiscovered antiquities in the state, making their looting a theft from the state (Protts and O'Keefe 1984). The export of cultural property without a licence is also usually the subject of some restriction (Protts and O'Keefe 1989; O'Keefe 1997). It therefore appears proper to refer to looted antiquities as 'illicit', since irrespective of the leniency of market states towards their entry and purchase within those jurisdictions, they do carry with them into the market an historical breach of a legal provision.

Market nations have traditionally failed adequately to control the circulation of looted antiquities within their borders (Palmer *et al.* 2000; O'Keefe 2000; Polk 2002); exotic objects have for centuries found favour among buyers in the United Kingdom. Police and customs have shown little interest in the issue which, compounded with their quite understandable lack of art history expertise and concomitant confusion over the powers available to them to interrupt import or trade through the seizure of artefacts (HM Customs and Excise 2000; House of Commons Culture Media and Sport Committee 2000), makes for a commercial climate in the United Kingdom approaching that of a free trade forum, even in the face of treaties (UNESCO 1970; UNIDROIT 1995, both above-mentioned), legal regulations (Protts and O'Keefe 1989; Mackenzie forthcoming) and ethical codes of conduct (UNESCO 1999; ICOM 2001, amongst others), internationally and domestically designed to restrain market enthusiasm for stolen goods. The focus of this paper will be regulatory deficiencies at this market end

of the chain of supply, for it is here that the United Kingdom has recently legislated for change in the form of a new criminal offence of knowingly dealing in ‘tainted’ cultural objects, introduced by the Dealing in Cultural Objects (Offences) Act 2003.

The 2003 Act, although superficially impressive, has the ineffectual constitution unfortunately found to be rather common among legislative progeny born of compromise. It creates a single offence, which, as originally worded, was recommended by the Ministerial Advisory Panel on the Illicit Trade in Cultural Objects (Palmer *et al.* 2000). The Act is part of the Government’s package of reforms designed to complement the United Kingdom’s accession on 31 October 2002 to the 1970 UNESCO Convention (Home Office Department for Culture Media and Sport 2004).

Three points of observation relevant to the history of the new criminal offence will serve to put its creation in context: the UNESCO Convention is a notoriously weak statement of vague and largely unenforceable norms for the governance of the international movement of cultural heritage (Mackenzie 2002); the government’s chief legal advisor in relation to its accession to the Convention concluded that no changes to the United Kingdom’s laws were necessary for the United Kingdom to meet what new obligations it might create (Chamberlain 2002); and the Ministerial Advisory Panel which recommended the new criminal offence was split in its composition, with a healthy number of trade figures on board. The hollow law that has emerged as the 2003 Act should therefore not come as a surprise.

In the sections that follow, I shall draw on the discourse of the antiquities market to make a case for its importance in designing regulation to govern the market. For reasons which only become apparent after a detailed investigation of the trading methods favoured by the market, and the motives of those who trade in it, the *ex facie* sensible and important new piece of criminal legislation in fact seems doomed to fail in its project. Criminal legislation used to try to lever a market into a position where it effectively self-regulates is a measure of dubious merit where the actors in that market have constructed, normalized and routinized shared paths to an impression of entitlement to perform the prohibited act.

Privacy and Provenance

Provenance details—in other words, documentary evidence of a past chain of ownership—are notable in their absence from most transactions in the antiquities market, and therefore it is, in many cases, impossible for purchasers to tell whether the object that they buy has been recently looted, or has been circulating in the market for many years:

I bought a wonderful piece of sculpture in Paris from an old dealer. He told me it came from an old collection. Fine. How do I prove it? This is the madness of provenance. It’s just impossible to prove. (London Dealer 2)

It’s very rare to get something with a provenance, with an actual collection name. Usually it’s entirely anonymous, especially in the London and New York trade, just objects for sale in a shop . . .

[So what percentage of the stuff that you buy comes with provenance, would you say?]

Ooh, a very, very small percent.

[Percentage of acquisitions of yours that come with archaeological information?]

Just tiny. 1%. Absolutely miniscule, yeah.

[And that come with some sort of ownership history?]

That would be a little bit higher. Of course, any pieces purchased from a dealer, they don't pass on any details of where they purchased it from—that's just part of a dealer's policy. Unless it's a famous collection. But if they've bought it from somebody, they won't pass on any of the details. It's the same with anything in the shop here, like 19th century ceramics, we don't pass on who we purchased it from unless it's a well-known family, you know; a celebrity or something. It's the same with the archaeological pieces and any auction rooms won't advise that either, unless it's from something like the Petrie collection or the Elgin; once again, the celebrity factor.

[If you asked what would they say?]

An auction room would point blank refuse—it's part of their policy I think . . . (Melbourne Dealer 1)

Historically, the antiquities market functioned without the transmission of information relating to the provenance of purchases, and without giving any consideration to that omission. This is perfectly understandable, both on grounds of seller privacy and buyer apathy. Why, in the absence of a celebrity provenance, would a buyer care where an object had come from? The climate until the first writings on the subject of looting in the late 1960s (beginning with Coggins 1969) was generally supportive of the trading and collecting of antiquities, whatever their origin. Provenance was simply not an issue:

The issue of provenance has become something that people are more aware of in the last 5–10 years. (London Dealer 7)

The whole issue has become so emotional. We've got on the one hand archaeologists saying 'all dealers are thieves' and on the other hand you've got dealers saying 'well this is ridiculous, everything should be for sale and who the hell cares about any of it'. Now not many dealers say that these days. They used to. Things have changed a great deal in the last 10 years . . . I can tell you that I've been dealing in antiquities since the 70s, and in the 70s the world was a completely different place. Guys were turning up in London with suitcases full of stuff every week. Nobody knew that there was a problem with selling antiquities that were illegally excavated. It was not regarded as being a problem in this country. (London Dealer 8)

To be clear about the historical association between lack of provenance in the market and the presence of looted antiquities, provenance was not seen as an issue because looting was not seen as an issue. The purchase of objects dug up by inhabitants of source countries was the norm:

Let me start somewhere around 1965–1970. No one had any complaints whatsoever when it came to stealing and to plunder of artefacts. The criminology was actually created during that time. Before, it was a perfectly legitimate way to acquire objects wherever you wanted and to bring them wherever you wanted and keep them or sell them or whatever. And a few archaeologists had here and there some complaints, but only if their own work was disturbed. Which did happen then, still happens—some cowboys jumping over fences and digging at night while the archaeologists coming back in the daytime and it's always empty. That kind of chasing the treasure is hundreds of years old, and nobody seemed to make an issue out of it . . . (London Dealer 5)

Much has changed over the past 30 years, but the historical indifference of the market to provenance still casts a shadow over attitudes in the trade. There is more provenance

information in the market now than ever before, but objects with provenance still form a small fraction of all the objects on the market. And with a continuing strong market for unprovenanced pieces, there is not much impetus for change:

There's more reluctance nowadays for better material without provenance. There's more reluctance now. I don't think that the market has changed that drastically. There are always collectors that have insisted on provenance. There are collectors that thrive on no provenance. I can think of two major collectors in the US that are absolutely thrilled to find a piece that's just come out of the ground illegally. It's something exciting. They're cheating. . . . And they're known for it. (New York Dealer 4)

[How do you feel as a dealer in terms of your practice? Has it changed recently?]

No. No sort of concrete changes at all. However, obviously I'm aware of these sort of moves off-stage. So you know, one's casting around trying to maybe deal in things which have more obvious provenance and so on. But I haven't done very much about it. (London Dealer 3)

For most dealers, the absence of provenance is a norm which they purport to accept without question:

[You won't get findspot information when you buy an object?]

No, no . . . I think you just have to keep a clear head and make your own decisions. (London Dealer 1)

What little provenance information as is passed in transactions tends to take the form of verbal assurance:

Material gets lost, unfortunately. And a lot of it is apocryphal, a lot of it is 'so and so told me that such and such came from somewhere, and he got it from their grandfather' and that's very often the only kind of documentation you have. (New York Dealer 5)

Rarely, there will be some paper documentation to accompany the piece. This might be as little as a sticker with the name of a past collector on it.

You may get a label, like I was saying before, that's nice, or an ink inscription, but otherwise, yeah, a lot of it is verbal. (Melbourne Dealer 1)

I just bought a head from a colleague in Geneva for \$340,000. An Egyptian head, with an old auction, the remnant of an auction sheet underneath it, with the name of the original owner; part of the famous family. (New York Dealer 4)

How seriously can such provenance documentation be taken? It seems that while it is *de facto* accepted by dealers as better than nothing, they generally agree that it should be accorded little weight. Provenance documentation can easily be faked, and genuine documentation can just as easily be lost. Sighting documentation is therefore not an end to the issue of legitimacy, nor is its absence seen in any way as fatal.

Risk and Trust in the Antiquities Market

The preferred method of self-protection in this market, where looted objects are known to circulate, is to do business only with sources that the dealer trusts. This leads to a market comprising many small circles of dealing in which relationships are formed based on trust. Through a course of dealing, that trust is established and cultivated.

Reputations are formed which sustain trade. To a dealer, the maintenance of a reputation and the goodwill that it brings are of the utmost importance:

There is an awful lot of illicit stuff . . . and you know, the answer is one doesn't know, one can only suspect. And being involved in the marketplace I know a vast swathe of people, and I think off the top of my head I have or will do business with less than 10% of them. Purely because I regard the rest as untrustworthy, to put it mildly. You just don't know where you are with them. You don't know whether there's any integrity there, whether you have title when you buy, and all these things. So it's a sort of crazy world. (London Dealer 4)

However, highly desirable objects are sometimes offered by sources which are not accorded such trust, and at that stage the dealer must decide whether to buy or to turn the seller away. The still very slim chance of criminal conviction in relation to illicit trading—perceived now to be only marginally higher than the wholly unregulated pre-1970s market—must be balanced against the desire to own and profit from objects of ancient art:

I try these days to take less and less risks. I try to deal with people who I consider to be reliable, responsible and reputable. But then again if somebody walks in and offers me a great treasure, I'll probably get tempted . . . especially if it's not too expensive. (Bangkok Dealer 1)

You can make a hell of a lot of money in this business playing it straight, but it's also so easy to be tempted. (New York Dealer 4)

Doing business with 'established trade sources' is often used as an example of transacting with people who can be trusted, in contrast with strangers who approach a dealer 'off the street' and might be seen as being more suspicious:

If we buy from reliable suppliers, if we can then demonstrate to them later on that it was a mistake (i.e. a fake), they will take it back and go and fight with the guy they bought it from. But if you're dealing with some guy who runs in from the jungle with a bag over his shoulder, you're hardly likely to ever see him again and so you have to take your own risks. (Bangkok Dealer 1)

That established traders can be trusted is seen as a legitimate assumption in the face of all the investigation which would be necessary were these trade sources not accorded such trust. 'Trust' in this market therefore equates to faith and expediency:

If I'm on my way back to the subway and somebody offers me something who I've never met, I'm not going to say that's acting in good faith. But we deal with established businesses and dealers in Europe and, you know, I think that can be construed as good faith . . . I don't think it's possible for you to do some kind of background check on people and find out everything you can about them. (New York Dealer 3)

If you buy an object from a reputable dealer in one of the major countries of Europe, you assume that that person has title to the object because this business is based a lot on trust. (New York Dealer 5)

In fact, however, when pressed on the issue of trust, the dealers admit that there is a general assumption of goodwill in respect of most sellers. Faith, it seems, is liberally granted:

I like to believe that most people are straight and that you shouldn't be required to prove that you are. That somebody should be required to prove that you aren't. (London Dealer 8)

The same process of vetting the seller by exception is undertaken by auction houses in deciding which objects to accept in their sales:

So assuming the client is one that we know and have had a good long relationship with, and one that we know haven't played games or anything in the past, then we would be inclined to ask the standard question, you know, does this come from anywhere strange, is there a problem with it? And we would generally accept their answers. (Hong Kong Auction House 1)

Even if suspicious circumstances exist, the dealer may still choose to transact. He might at that stage ask for documentation, but in the absence of available provenance information, this will probably take the form of a legal assurance of title given by the seller. Dealers are not so naive as to ignore the possibility that the signature with which the seller vouches her title may be applied fraudulently. However, their concern being to protect themselves in any subsequent legal inquiry into the transaction rather than actually to attempt to verify the seller's title, they are not much concerned with such fraudulent possibilities:

Whether they have a good story or not, I get a document which is a bill of sale in which they state, they sign a piece of paper which says 'I have full and clear ownership, no liens or encumbrances, and I agree to sell this to you'. It's a very simple, boilerplate kind of thing that they sign off on, and frankly it's if and only if there's a great deal of value or any reason to think there's something funny going on would I go beyond that exercise. (New York Dealer 1)

There is much in the data to support this observed practice of obtaining a signature on a document of title as one way of allaying fears of repercussions when proceeding in a transaction with a suspicious seller.

The issue underlying all checks into the seller and her title is that of provenance. Has the object been recently looted? While dealers feel that the warranties they obtain from the seller as to his or her title protect them in a future inquiry into the transaction, they know that in truth they are not checking the seller's title—and therefore the provenance of the object—with any degree of rigour or certainty:

We require that they tell us the truth; in every transaction that we do, we want complete and full information, and therefore contractually speaking they have no right to withhold from us. Having said that, we have no way of actually verifying that the information given is the full and open and complete information. So this is a dilemma we face. (New York Dealer 6)

The sensible and balanced view that *some* unprovenanced objects on the market are probably looted and therefore *all* objects without provenance should be treated with at least a base level of suspicion does not figure in the thinking of dealers:

The thing that I really do take issue with is this idea that something is hot unless it's proved to be cold. I won't buy that, at all, under any circumstances. I feel very strongly about that. Guilty until proven innocent is not acceptable. (London Dealer 8)

One does not have to go so far as to suggest that, given the difficulties of telling unprovenanced-and-looted and unprovenanced-but-licit objects apart, dealers should close shop. The ethical middle ground between an end to the market and an unrestrained market begins with a commitment from dealers to investigate provenance with a degree of diligence. Opting to treat all objects as 'innocent until proven guilty' when contemplating purchase works as a rather effective expedient to a completed

transaction, for who among an interested buyer and a willing seller will have an interest in proving the subject of sale 'guilty'?

The adaptations of this market to the issue of risk in relation to adverse consequences perceived as possible repercussions of an illicit purchase may be summarized as follows. In view of the dearth of reliable provenance information attached to objects for sale, dealers purport to deal only with sources that they trust. When probed on the issue, they admit that they do in fact deal rather often with unknown sellers, and, in this case, they often request written assurances of title from the seller. These adaptations to risk are superficial in that the dealers interviewed were aware that neither the established status of a trading source nor a possibly fraudulent signature from an individual seller giving an assurance of legitimacy bore any verifiable relationship to the likelihood of a given object offered for sale's being looted. Superficial rather than real responses to risk are sufficient given the inadequacy of legal attention focused on the market. Due to regulatory deficiencies, the likelihood of adverse consequences' being visited upon dealers who make illicit purchases is generally perceived to be low.

Regulation of the Purchase of Antiquities

That law does not adequately reach and control those it purports to govern in this field can be demonstrated by examples from both the source and the market end of the chain of supply. Thailand is a source country which has passed laws vesting undiscovered antiquities in the state and restricting their export, as mentioned above. These provisions are enacted as ss. 22 and 24 of the Act on Ancient Monuments, Antiques, Objects of Art and National Museums, B.E. 2504 (1961), as last amended by the Act on Ancient Monuments, Antiques, Objects of Art and National Museums (No. 2), B.E. 2535 (1992). There is much suggestion in the literature, however, that the economic attractions of illicit excavation and export to Western markets provide an often irresistible incentive to disobey the law (Renfrew 1993; Elia 1994). Corruption of official enforcement officers, both in the police and the Thai government's Fine Arts Department, has become commonplace. This is supported by the data:

[Do you foresee a time where there might be a crackdown by the Fine Arts Department?]

No. Because all the top, top people in government would have artefacts which are illegal.

[Really?]

Oh, yeah.

[So everybody's a collector to some extent?]

They collect Buddhas, mostly.

[Why do they do that?]

It's just the Thai way . . .

[They collect Buddhas for religious importance?]

Yes.

[So we've got a system of law which is incredibly restrictive on the books, but which doesn't actually do anything?]

Doesn't work at all.

[And even the people who are supposed to be responsible for drafting and enforcing those laws are themselves breaking them by collecting objects?]

Yes. The officials of the Fine Arts Department, some of them have been buying and selling . . .

[What about the police? Are they interested in this at all?]

Oh, they were very interested. They were arresting the people coming out of these burial sites, confiscating the goods and then re-selling them. They get a low salary. (Chiang Mai Collector 1)

The second example of legal failure relates to its disappointing record in controlling the purchasing decisions of Western dealers, and it is on this issue of law in the marketplace that I wish to focus here.

Handling stolen property is an offence in England, Wales and Northern Ireland under s. 22(1) of the Theft Act 1968. The section reads:

s. 22(1): A person handles stolen goods if (otherwise than in the course of the stealing), knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.

Under s. 24, 'stolen goods' can include thefts outside England, Wales and Northern Ireland. Therefore, in so far as import of a foreign stolen object involves possession within this jurisdiction, it would seem to be covered by the second half of the s. 22(1) offence, provided the import is for the benefit of someone other than the importer him or herself. Import of stolen property for one's own benefit does not constitute handling (Chamberlain 2002), although receiving does.

The new offence was introduced on 30 December 2003 by the Dealing in Cultural Objects (Offences) Act 2003, in part to close this import loophole in the handling offence, and in part to provide an outright statement of disapproval of the purchase of looted antiquities. The Act, in s. 1, provides for a sentence on conviction on indictment of up to seven years' imprisonment and/or a fine, where a person:

. . . dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted.

Under s. 2 of the Act, a cultural object is 'tainted' if it is excavated, or removed from a monument or other building or structure of historical, architectural or archaeological interest, and such excavation or removal constitutes an offence. It is stated to be immaterial whether the excavation or removal took place here or elsewhere. The intended effect of this legislation is therefore to criminalize (and, by implication, deter) the knowing possession or trade in the United Kingdom⁵ of antiquities looted either here or abroad. What, however, of a buyer who harbours a *reasonable suspicion* that the subject of purchase was looted? The offence would not be triggered: in relation to the 'knowing or believing' test for handling under the Theft Act, the courts

⁵ Parallel legislation is expected in Scotland.

have held that neither suspicion nor wilful blindness—a considered recklessness—is enough to constitute *mens rea*.⁶

Here lies the continuing loophole for antiquities dealers who operate in a market where provenance information is rare, making any suspicions about the origins of a piece relatively simple to dismiss as unsubstantiated. Indeed, the government acknowledges the loophole—such is the result of the peculiarly conflicted approach through which it has introduced criminal legislation in order to be seen to be addressing archaeological and public concern about the destructive aspects of the trade, while at the same time treading carefully to avoid direct confrontation with those it seeks to ‘control’. In its guidance notes on the effect of the Act, the Cultural Property Unit of the Department for Culture, Media and Sport says that: ‘the Act does not necessarily oblige dealers to take steps to ascertain provenance or to exercise due diligence to avoid committing the offence’ (Home Office Department for Culture Media and Sport 2004: 1). That is, it does not require the one thing that market buyers could do to produce a real effect on the looting problem; or the one thing that all buyers of goods should be encouraged to do in order to reduce the opportunities for, and rewards of, fencing (Klockars 1974; Sutton 1998).

Formal justice initiatives risk producing further formal, but not substantive, adaptations by the market. Even before the introduction of the 2003 Act, dealers had become accustomed to deflecting criticism of their trade in unprovenanced objects by asking for details of provenance in the knowledge that there was little chance of getting them. Thus, they purport to have ‘investigated’ the provenance of the piece as much as possible before purchasing it regardless. This practice seems likely to continue. Importantly, they have no more knowledge or belief in the good origins of the artefact after this superficial exercise than before:

I’m in the trade, I’ve seen how things have changed. Even when I’m dealing with friends of mine, I’ll say to them ‘that’s nice, you know, how about provenance?’ Everybody says that now. ‘Got your provenance?’ Because if it has a demonstrable good provenance, that helps. It helps with the selling of it. And very often they’ll say to me, ‘well, not really, you know, I bought it from a dealer’ and that to me is okay. Because I trust them to buy in the way that I buy. And I’ll say the same thing to them. (London Dealer 8)

This Weberian discrepancy between formal and substantive justice runs through the adaptations of all of the institutions in the market to the new levels of scrutiny that they face in their purchases (on the Weberian divide, and its consequences for the punish/persuade debate, see Haines 1997). Even museums, which might have been thought to be reputable public institutions beyond reproach, are implicated in the ‘style over substance’ approach to the looting issue when buying from dealers:

Now museums are in a total quandary; they don’t know what to do. Some don’t care. Some just ask us, I mean this is very confidential, they ask us for paperwork. And I say look, sometimes I can’t do this. But I’m sure there are plenty of dealers who come up with the provenance.

[So they ask you to make up paperwork yourself to try to trace where it might have come from?]

Yes. To invent paperwork.

⁶ *Hall* (1985) 81 Cr.App.R. 260; *Grainge* (1974) 59 Cr.App.R. 3; *Pethick* [1980] Crim.L.R. 242; *Reader* (1977) 66 Cr.App.R. 33; *Griffiths* (1974) 60 Cr.App.R. 14; *Moys* (1984) 79 Cr.App.R. 72.

[Oh, I see. To cover them?]

To cover them. Because they desperately want the object. (London Dealer 2)

White-Collar Criminals, Routinization and Entitlement

Sutherland's early definition of the constitutive elements of white-collar crime has been refined substantially over time. He stated that: 'White-collar crime may be defined approximately as a crime committed by a person of respectability and high status in the course of his occupation' (Sutherland 1949: 9). Later studies have proposed, for example, that white-collar crime should include 'economic offences committed through the use of some combination of fraud, deception or collusion' (Wheeler *et al.* 1982: 642). The term 'white-collar crime' therefore applies to a wide variety of types of wrongdoing, but generally involves either offenders of middle to high status, or offences committed in the course of trade, or both (Freiberg 1992). Often, these offences involve some abuse of trust—the trust that we principals place in our agents to act on our behalf, not their own. Abuse of this trust is often not amenable to surveillance by traditional institutions and methods of social control which tend to rely on public reporting of legal infringements and so focus disproportionately on more visible forms of wrongdoing (Shapiro 1990).

Whether an act is criminal depends sometimes upon minutiae of legislative or common-law definition and whether an individual will be officially labelled a criminal turns also on evidentiary issues: has the defendant contravened a law and is there enough evidence to prove it? The market lobby argues that most antiquities dealers and collectors should not be seen as white-collar criminals, as they are committing no crime in their countries of residence (Pearlstein 2002), and this is for the most part correct. In the United States and the United Kingdom, the act of purchase of an unprovenanced antiquity might not amount to criminality for want of knowledge or belief that the object has been looted, or if such knowledge or belief does exist, for want of the prosecutor's ability to prove it. Nevertheless, questions of law aside (cf. Levi 1987: xxiv), it is still instructive to view the market interviewees as white-collar criminals, since it appears that they do *in fact* buy looted antiquities, and there is *in fact* a relationship between the purchase of looted antiquities in the market and the destruction of context at source.

Thus, the purchase of illicit antiquities can be described as a wrongful, and harmful, act performed in the course of trade, often by dealers of relatively high socio-economic status. An abuse of trust might be perceived between dealers and the public who invest in them the standard faith of the naive: that traders will be socially (and, in this case, culturally) responsible in their practices. In return, the dealers present fronts which claim expertise in assessing the origin of antiquities, but, in their private buying decisions, then decline to discriminate between the acceptable purchase of licit objects and the unacceptable purchase of illicit ones. Both Sutherland's and Freiberg's conditions are therefore met, as well as Shapiro's notion of 'business abuses not amenable to surveillance', and it seems appropriate to label antiquities dealers as 'classic' white-collar criminals, without overstating the matter.

The application of this label is rendered problematic in relation to white-collar 'criminals' who fall below the level of conscious avoidance of legal or ethical standards:

Levi has made this point well (Levi 1981). Many white-collar actors simply do not consider the tenor or the consequences of their daily practice, and in that regard, the regulatory effect of legal dictate, absent a targeted campaign to raise and sustain the attention of the businessmen and women in question, is considerably weakened. Such unthinking routine characterized purchase decisions in the antiquities market until recently, but public and legal sensitivity has now been raised to a level that resonates in trade discourse. Routine still has its part to play, as we shall see, but one must increasingly nowadays work quite hard to devise ways not to think about the consequences—environmental, historical and, to a lesser extent, legal—of illicit purchase. The market is under pressure, and must adapt.

Aubert, in his research into violation of rationing regulations by Swedish businessmen, concluded that white-collar criminals belong to groups which have an elaborate and widely accepted ideological rationalization for their offences (Aubert 1952). Here, we can observe a linking of what Sykes and Matza would come to call techniques of neutralization (Sykes and Matza 1957) with Sutherland's theory of differential association (Sutherland and Cressey 1978). The subculture in which the business offender plies his trade surrounds him with normative values, supportive of some classes of law-breaking. And those normative values are transmitted via a communication structure which offers ways for the offender to justify his offending behaviour to himself and to others.

Neutralization enables a drift into wrongdoing by working around legal and moral norms rather than rejecting them outright. Matza's delinquents were not committed to their illegal acts—indeed, the overwhelming majority of his respondents in the study which formed the basis of his *Delinquency and Drift* expressed disapproval of illegal acts shown to them in picture form on cards—acts which, often, they themselves had committed (Matza 1964: 49). Deviance is not a full-time occupation for delinquents (Matza and Sykes 1961).

Just as Matza's delinquent sample were, for the most part, committed to conventional norms from which they occasionally dislocated themselves in a temporary drift into deviance, so our subjects in the core sample in this research are not committed to the pursuit of illicit activities to the exclusion of all law-abiding conduct. Most antiquities dealers, collectors and museum representatives do not enter the field because they harbour a burning desire to perform illegal or unethical acts. Most of them trade openly and many of their transactions, even of unprovenanced antiquities, are doubtless licit. Yet, because of the structure of the antiquities system—because of the mechanisms of trading which obscure the origin and past ownership history of objects for sale—at regular points in their careers, dealers, collectors and museum curators will be presented with the opportunity to do wrong, i.e. to buy illicit material. They may very well not be *sure* that the object that they are offered at this time is illicit. Suspicions must exist, but are routinely ignored:

Certainly with the Chinese pieces, for example this pot (picks up pot off desk), you've got dirt in the crevices. That hasn't been out of the ground for long, so that's a recent, you know within the last 5 years I'd say that one's been dug up. (Points to striped indentation on the pot) You can see that that's where the spade hit when they dug it.

[So they don't even clean it? They just give you it covered in dirt?]

That's right! Yep, they just pass it on and pass it on. Some farmer's dug that up, somewhere in remote China and it's funnelled down through Hong Kong and into the marketplace. (Melbourne Dealer 1)

For buyers who operate on a day-to-day basis with many licit objects which have been circulating on the market for a considerable time, and who appear in most other areas of their lives to behave lawfully and properly, the act of purchase of an illicit antiquity can be seen as a drift into wrongdoing.⁷ The individual is free to drift because the deviance seems normal and unremarkable. It seems normal and unremarkable in part because it has been repeated again and again.

Routinization is an established concept in social theory. Cohen, following Kelman and Hamilton's (1989) statement of the conditions under which crimes of obedience will occur, defines the idea:

Routinization: The first step is often difficult, but when you pass the initial moral and psychological barrier, then the pressure to continue is powerful. You become involved without considering the implications; it's all in a day's work. This tendency is re-inforced by special vocabularies and euphemisms . . . or a simple sense of routine. (Cohen 1993)

Matza identifies a similar progression to routinization in the final chapter of *Delinquency and Drift*, where he states that one of the manifestations of will is 'behavioural'. By this, he means that the first step into wrongdoing is the greatest—too great for many of us to make:

The ordinary consequence of having been exposed to the 'causes' of deviant phenomena is not in reality *doing* the thing. Instead, it is picturing or seeing oneself, *literally*, as the kind of person who might possibly do the thing. (Matza 1969: 112, his emphasis)

Once that step has been taken, the relevant criminal act becomes one that our protagonist can repeat. He knows he can do it, and probably get away with it; it becomes part of his repertoire of action. The drift may therefore recur and, in these recurrences, the wrongful act becomes seen as relatively unremarkable. It is clear from the interview data that subjects saw their purchase of unprovenanced antiquities as unremarkable. In some cases, they saw their knowing purchase of looted antiquities as unremarkable. This is likely to stem, of course, from the fact that when many of the interviewees entered the trade, dealing in looted antiquities *was* unremarkable. Having been able to establish a business routine before the ethic, let alone the legality, of that routine was called into question, a large proportion of those in the market have negotiated their entry into this newly problematized field without incident. What is now becoming increasingly unsavoury to public sensibilities (UNESCO 1970; Schwartz 1996; ICOM 2001) is considered perfectly normal to dealers, collectors and museums who have

⁷ There are two senses in which Matza's term 'drift' is relevant here. The first is drift as a *temporal* break from a normally law-abiding routine towards a deviant act either considered by the subject morally acceptable in its abstract form, or performed on the level of routine and below conscious advertence. Antiquities dealers drift temporally in the sense that the mechanism of their illicit purchases is in essence the same as the mechanism of their licit purchases: a minimal level of inquiry into provenance, followed by the exchange of goods and money. Purchase can therefore be seen as the performance of a routine which at times—when the object is illicit—the law attributes with the character 'illegal'. The other sense in which Matza's 'drift' applies is as a *situational* break from law, and a law-abiding disposition, resulting in the commission of a deviant act considered by the subject immoral or otherwise wrong in the abstract, but acceptable at the current social juncture. This is the question of the redefinition of the legal or moral quality of an act due to the perceived, or manufactured, prevailing characteristics of the moment—a temporarily constructed drift away from law, rather than a temporarily performed action representing a continuing detachment from law. Both sides of drift apply to the interview subjects, some of whom ('temporally') both buy looted antiquities *and* think that this action is justifiable when questioned about the issue in the abstract (i.e. when considering the actions of others), and others who ('situationally') define transactions which are known or suspected to be illicit so as to bring them within the ambit of suitable action for law-abiding citizens.

cemented that deviance as a repetitive form throughout the years when it was seen as a legitimate business enterprise.

No doubt, also, the fact that the market routinely presents dealers with the opportunity to buy looted, or at least unprovenanced, objects, while perceptions of the likelihood of detection and penalty for making such purchases remain close to zero, makes for an easier 'first step' for new entrants to the trade than would be the case if sanction were perceived as likely. It also contributes to the failure of legal intervention to encourage desistance in the market.

There is more to the interview data than routinization, however, for, as has been noted, the psychologically protective capacities of the traditional routines of the old dealership are being gradually eroded by a change in the moral climate underwriting the international movement of cultural heritage. As the guiding hand of historical repetition begins to loosen its grip, mechanisms develop to rationalize what the law has come to define as wrongful trading. In this regard, a theme that emerged in the data, so strong that it could not be ignored, was a feeling among the interviewees of *entitlement* to make illicit purchases. Techniques of neutralization were used by the interviewees not only in a negative way—such as in Cohen's 'spiral of denial' (Cohen 1993) or in Matza's view of drift as a domain of moral freedom which still requires the causative impetus of 'will' to produce a deviant result (Matza 1964: 181 *et seq.*)—but also in a positive manner, as building blocks in the construction of a perception of entitlement to purchase illicit antiquities. From arguments about the free movement of goods, through a view of the market as a preserver of culture which might otherwise be destroyed, to arguments about the freedom of local looters to ply their trade and make a living without state interference, the interviewees took a tour of discursive strategies, in every case remarkably similar in narrative and destination: their purpose was to persuade of their entitlement to buy unprovenanced and in some cases illicit artefacts:

. . . the three things that I bought in Hong Kong in the last ten years was a Tang Horse, a Han dog and a large Han horse, all of which come from some grave which has been underground, smashed, put together. So it doesn't occur to one, I don't know if you understand that. They're in some grave, smashed, we're all going to be dead in 30 years, so I have no interest that they're there—I've enjoyed them and I couldn't give a hoot if they've been on the list (of objects which China does not wish to be exported) or not. I've sort of enjoyed the objects and I think one has to realise that. . . . Why not, you know? I don't think it's the end of the world compared to what we have to deal with in every day life. (London Dealer 6)

In the 'periodic breaking of the moral bind to law arising from neutralization and resulting in drift' (Matza 1964: 181), the moral bind to law is displaced by the interviewees with reference to another moral scale—one that is managed by the prevailing market discourse which supports perceptions of entitlement to make illicit purchases. The concept of entitlement, enshrined in law and with its importance thus greatly magnified, filters into the social domain and is there, with the use of neutralizations, manipulated. This manipulated entitlement provides moral and social alternatives to legal entitlement.

The view of offenders as feeling that they are entitled to commit their crimes problematizes the restraining effects of the law in its traditional prohibitive form. Entitlement takes offenders outwith the scope of legal prohibitions, in their minds. We can see that in circular fashion, feelings of entitlement to perform an act may lead to the

routinization of that act; and routine performance of an act may itself lead to perceptions of entitlement to continue.

Conclusion: Two Paradoxes, and the Prospect of Regulatory Success

What hope, in conclusion, for the effectiveness of the new offence introduced by the Dealing in Cultural Objects (Offences) Act 2003? Given the routine forms of private and uninformed trading which have become the norm in the antiquities market, it would only be the grossest cases of smuggling and profiteering which would attract criminal liability in terms of s. 1. Current indications from informants in the UK market are that the Act is not perceived to raise the risks of unresearched trading. Further, this does not appear to be a case where a small number of high-profile prosecutions, Inland Revenue-style, can heighten consciousness of the risk, since current perceptions that the Act does not substantially increase the risk appear correct in law—even according to the Home Office guidance document mentioned earlier! An appeal to the lack of provenance information in the market generally, coupled with a signature from the seller—perhaps a ‘reputable, trusted source’—attesting her title to the piece, would likely be enough to sustain an appeal by a buyer, accused in terms of s. 1, that he had no knowledge or belief that the object was looted. This is either useless legislation, and bad governance, or it is *lex imperfecta* (Reisman 1979): a deliberately flawed Act, implemented by a government itself more concerned with stylistic responses (and, of course, the economic repercussions of *lex perfecta* on London as a centre for trading ancient art) than practical measures likely to induce change.

Engaging with market routines by means of the threat of criminal sanction demands as its point of departure that the threat be real in its connection to the market. Levi, opting against the idea of *lex imperfecta* in his study of white-collar fraud, highlighted this chasm between law and effective regulation:

The occupational disease of many lawyers is to assume that a problem is solved once one has set up an appropriate legal framework: this is a delusion. (Levi 1987: 292)

The first paradox of the current market approach to provenance is this: while an absence of provenance does not necessarily detract from the value of an object, no provenance being the norm, the rare occurrence of a demonstrably unimpeachable provenance accompanying a piece adds to its value:

Ten years ago I never thought of a provenance. Now I’ll actually pay more if there’s a provenance for the piece . . . I think that it’s fair to say that the prices are higher if something has a provenance—it seems to be reflected in the price that people are willing to pay. (London Dealer 6)

This, therefore, is the paradox of unintended consequence: the effect of the focusing of current legal attention on the international market in antiquities has not been to eradicate dealing in unprovenanced objects. It has simply increased the asking price for the minority of pieces which can be proven to have been in licit circulation prior to being sold. In some cases, this has dramatically added value to an object:

There’s not a lot coming from private collections, other than things like the Newby Venus, which you’ve probably heard about, which made 7.9 (million pounds). As the underbidder, who is an old friend of mine, said to me ruefully a couple of weeks later over a glass of wine, he said ‘yeah, well

about 300,000 for the piece and 7½ million for the provenance'. I think it's worth a little more than 300,000, but the gist was right! (London Dealer 4)

The final word, however, goes to the second paradox of the antiquities market, which has perhaps much more fundamental importance for regulators generally. Matza implicated the legal system in the aetiology of deviance, positing that some of the techniques of neutralization used by delinquents had their origins in legal discourse: he explained the concept of neutralization as extending into the language of everyday experience excuses for the performance of the *actus reus* of a crime permissible within the structure of the criminal law (Matza 1964: 61). This research suggests that the liability of the legal system for the creation of wrongful and harmful action runs deeper still. The rights-based discourse of law creates and structures the concept of entitlement for the Western market-driven world. This concept of entitlement, when interpreted and used by that world outwith the remit of the law's decisions, insulates users from top-down prescriptions. Law creates entitlement, and entitlement neuters law.

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