

# FROM MUSEUM TO THE AUCTION BLOCK: REGULATING THE DEACCESSIONING OF ART

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## INTRODUCTION

In the fall of 2017, the Berkshire Museum in Pittsfield, Massachusetts roiled the art world when it announced that it planned

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to sell two important paintings by the beloved American artist Norman Rockwell in order to pay for a massive redesign of the museum.<sup>1</sup> The paintings, *Shuffleton's Barbershop* and *Blacksmith's Boy—Heel and Toe (Shaftsbury Blacksmith Shop)* were valued at a combined estimate of forty million dollars.<sup>2</sup> Rockwell's children, as well as members of the museum and a local artist, opposed the sale.<sup>3</sup> They argued that Rockwell—who was a Berkshire resident—gifted the paintings to the museum for the benefit of the Berkshire community, not to support the museum's improvements.<sup>4</sup>

Meanwhile, the museum contended that its dire financial situation and the evolving nature of the public's interest necessitated the sale.<sup>5</sup> The American Alliance of Museums (AAM) and the Association of Art Museum Directors (AAMD) both decried the Berkshire Museum's decision to sell the Rockwells as antithetical to the museum's role in society.<sup>6</sup> The organizations issued a statement that the sale of the paintings not only violated the ethical obligations of museums<sup>7</sup> but that the sale would also have a chilling effect on the willingness of museum patrons and collectors of art to support charitable institutions.<sup>8</sup>

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<sup>1</sup> Matt Stevens, *Rockwell's Children Sue Berkshire Museum to Stop Sale of His Works*, N.Y. TIMES (Oct. 21, 2017), <https://www.nytimes.com/2017/10/21/arts/berkshire-museum-norman-rockwell-lawsuit.html> [<https://perma.cc/5MA9-PTPM>].

<sup>2</sup> *Id.*

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

<sup>4</sup> *Id.* Rockwell “didn’t give [the paintings] to finance the museum’s renovation plans . . . . He gave it hoping the people of the Berkshires would see it and enjoy it. By auctioning off his gift, the Berkshire Museum risks the painting being lost to a private collector who won’t share the painting with the public.” *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Colin Moynihan, *Berkshire Museum's Planned Sale of Art Draws Opposition*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/2017/07/25/arts/design/berkshire-museum-art-auction-criticized.html?module=inline> [<https://perma.cc/7GQY-2ZS9>]. (“One of the most fundamental and longstanding principles of the museum field is that a collection is held in the public trust and must not be treated as a disposable financial asset.”).

<sup>7</sup> *Id.* The American Alliance of Museums’ code of ethics says that proceeds from the sale of collections shall not “be used for anything other than acquisition or direct care of collections.” *Id.* The Association of Art Museum Directors’ code includes an even narrower definition of when sales are permissible, stating: “A museum director shall not dispose of accessioned works of art in order to provide funds for purposes other than acquisitions of works of art for the collection.” *Id.*

While ethical standards are not legally enforceable, they are significant in that they highlight factors important to the profession. See MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 20 (2d ed. 1998).

<sup>8</sup> Moynihan, *supra* note 6.

The groups’ statement said that the type of sale planned by the Berkshire Museum “sends a message to existing and prospective donors that museums can raise funds by selling parts of their collection, thereby discouraging not only financial supporters, who may feel that their

Litigation over the legality of the sale drew significant attention from the media, non-profit institutions, and private organizations such as galleries.<sup>9</sup> Ultimately, the sale was allowed to go through.<sup>10</sup> One of the paintings was purchased by a museum on the West Coast. The other—fulfilling the predictions of the sale’s staunchest critics—most likely wound up in private hands.<sup>11</sup>

Deaccessioning is the practice by which a museum disposes of art from its collection.<sup>12</sup> It may involve the sale or exchange of works of art.<sup>13</sup> The practice is significantly more prevalent in the United States than in either Europe or Latin America, where alienation of cultural property is restricted.<sup>14</sup> Deaccessioning is often a healthy and useful way

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support isn’t needed, but also donors of artworks and artifacts, who may fear that their cherished objects could be sold at any time to the highest bidder to make up for a museum’s budget shortfalls.”

*Id.*

<sup>9</sup> See, e.g., Stevens, *supra* note 1; Moynihan, *supra* note 6.

<sup>10</sup> *Rockwell v. Trs. of Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932 (Mass. Super. Ct. Nov. 7, 2017).

<sup>11</sup> One of the paintings, *Shuffleton’s Barbershop*, was privately purchased by the Lucas Museum of Narrative Art before the auction took place. The private sale involved an agreement to display the painting at the Berkshire Museum for a period of time. See Eileen Kinsella & Caroline Goldstein, *George Lucas’s Museum Has Bought Norman Rockwell’s Beloved ‘Shuffleton’s Barbershop’ from the Berkshire Museum*, ARTNET NEWS (Apr. 11, 2018), <https://news.artnet.com/market/lucas-museum-bought-norman-rockwell-shuffleton-barbershop-1264154> [<https://perma.cc/28BF-KTS4>]; *Norman Rockwell’s ‘Shuffleton’s Barbershop’ Acquired by the Lucas Museum of Narrative Art*, SOTHEBY’S (Apr. 11, 2018), <https://www.sothebys.com/en/articles/norman-rockwells-shuffletons-barbershop-acquired-by-the-lucas-museum-of-narrative-art> [<https://perma.cc/2TNV-V3VS>]. The other painting was most likely sold to a private collector. This is inferred from the fact that had the painting gone to a museum, the acquisition would probably have been publicized. In general, auction houses such as Sotheby’s do not disclose the identities of their buyers. In fact, bidding often takes place anonymously, with an air of secrecy in the auction room. See Brian Boucher, *What’s It Like to Bid by Phone for Major Art Trophies at Auction? Three Bidders Tell All*, ARTNET NEWS (June 12, 2015), <https://news.artnet.com/market/bid-phone-art-trophies-auction-307444> [<https://perma.cc/G8BC-3BY8>] (“What’s more, buyers and sellers guard their privacy, and most of the multimillion-dollar bids are placed anonymously. . . . Pretty much every record-setting price you’ve read about at an auction in recent years has come in via an auction house staffer, taking a bid from the buyer—or the buyer’s dealer.”).

<sup>12</sup> JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 1134 (4th ed. 2002) (“The practice of selling or exchanging works for art from the permanent collections of museums is commonly referred to as ‘deaccessioning.’”).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1134 (“[Deaccessioning] is much more common in the United States than in Europe and Latin America, where most museums are governmental institutions administered by public officials and their inventories are classified as ‘inalienable cultural property.’”).

for museums to manage their collections.<sup>15</sup> Nevertheless, every few years a museum's decision to deaccession prominent works of art leads to intense criticism, debate, and scrutiny from the public and other cultural institutions alike.<sup>16</sup> The issue came to the forefront most recently during the past year, when the AAMD temporarily loosened its deaccessioning policy in response to the financial stress experienced by museums as a result of the pandemic.<sup>17</sup>

In 2010, New York Assemblyman Richard L. Brodsky proposed legislation that would prohibit museums from using proceeds from the sale of artwork to pay for operating expenses.<sup>18</sup> The bill was a response to the growing concern that museums were selling off valuable pieces from their collections in order to compensate for budget deficits as a result of the recession.<sup>19</sup> The goal of the bill was to prevent a crisis of museums selling art into private hands due to the financial downturn.<sup>20</sup> The bill ultimately failed to pass due to concerns that such a broad prohibition on sales of art would limit museums' ability to appropriately compensate for financial downturns.<sup>21</sup>

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<sup>15</sup> *Id.* at 1135 (“Museums with limited purchase funds have built their collections by trading works of art or by purchasing pieces with funds obtained from the sale of works from their collections. Some museums, such as the Museum of Modern Art in New York, have thus continually improved the quality of their collections.”).

<sup>16</sup> For example, in the 1970s the Metropolitan Museum of Art came under intense scrutiny for its trading and sales practices. Similarly, in the early 1980s the Fogg Museum at Harvard University was heavily criticized for planning to sell artworks in order to compensate for a budget deficit. *Id.* at 1135.

<sup>17</sup> Robin Pogrebin & Zachary Small, *Selling Art to Pay the Bills Divides the Nation's Museum Directors*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/arts/design/deaccession-museum-directors.html> [<https://perma.cc/Q9T9-WTBZ>] (“[F]acing the financial upheaval brought on by the pandemic, the association temporarily loosened the [deaccessioning] restrictions last year, allowing museums to sell art work to help pay for the care of their collections.”).

<sup>18</sup> Robin Pogrebin, *Museums and Lawmakers Mull Sales of Art*, N.Y. TIMES (Jan. 14, 2010), <https://www.nytimes.com/2010/01/15/arts/design/15deaccession.html> [<https://perma.cc/CRR3-DHDS>].

<sup>19</sup> *Id.*

<sup>20</sup> Brodsky intended to prevent the privatization of art in response to financial pressure and to provide museums with legally enforceable guidelines for deaccessioning practices, thereby protecting the public's interest in museums' collections. 2009 Bill Text N.Y. A.B. 6959. (“The legislature notes attempts in New York and elsewhere to monetize collections and the asserted use of those monies for purposes other than the protection and expansion of collections. The legislature further finds and determines that such practices are inconsistent with the interest of the people of the state, are inconsistent with requirements of governing documents, accreditation standards, and accepted collecting institution practices, and, if unchecked, will permanently endanger the integrity and existence of collecting institution collections handed to us by earlier generations as a sacred, cultural, ethical, and public trust.”).

<sup>21</sup> Marion Maneker, *Brodsky De-accessioning Bill Dies in NY Senate*, ART MKT. MONITOR (Aug. 10, 2010), <https://www.artmarketmonitor.com/2010/08/10/brodsky-de-accessioning-bill-dies-in-ny-senate> [<https://perma.cc/J989-N4TU>].

Brodsky's proposed legislation raised the question that is at the core of the deaccessioning debate: who has the right to decide whether art that is displayed for public viewership should be sold? If museums are considered custodians of cultural property that is kept for the benefit of the community, the intuitive answer would be that the members of the community should be allowed to contribute their opinions to how such property is managed. In other words, accepting the premise that because museums exist for the public and that the public, in a sense, "owns" the art, leads to the conclusion that the public should be involved in the management of the collection and any subsequent deaccessioning decisions.<sup>22</sup>

Traditionally, attorneys general are considered to be the best representation of the interests of the community, in keeping with the way that other nonprofit organizations are managed.<sup>23</sup> However, museums present a unique challenge to this practice because the value of art is often difficult to quantify, and attorneys general historically have not been focused on the activities of nonprofit organizations.<sup>24</sup>

At present, courts have not reached a consensus as to whether deaccessioning for anything other than the direct care of collections is appropriate.<sup>25</sup> The ethical guidelines suggesting that proceeds from the sale of deaccessioned art should not be used to finance operating expenses have not been consistently followed.<sup>26</sup> Therefore, if museums increasingly see their collections as a source of revenue for budgetary issues,<sup>27</sup> legislative guidance is necessary to protect the interests of the

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<sup>22</sup> David R. Gabor, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, 36 UCLA L. REV. 1005 (1989); ALFRED P. KNOLL, MUSEUMS: A GUNSLINGER'S DREAM 10 (1975) ("If one accepts the theory that the collections of a museum are owned by the 'public,' . . . and that museums exist for the public benefit, then it could be argued that once such items are in the 'public' domain they cannot be removed by sale.").

<sup>23</sup> MALARO, *supra* note 7, at 24.

<sup>24</sup> *Id.*

<sup>25</sup> Jennifer L. White, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1045-47 (1996).

<sup>26</sup> *Id.*

<sup>27</sup> The codes of ethics of the Association of Art Museum Directors, the American Association of Museums, and the American Association for State and Local History all stipulate that deaccessioning is permitted only when the proceeds from the sale of the deaccessioned art are used for the direct care of collections. Nevertheless, several deaccessions have been used to raise funds for purposes other than what these guidelines permit. In 1991, the Rose Art Museum sold eleven paintings to raise \$3.65 million to finance operations. In 1994, the Armond Hammer Museum of Art and Cultural Center at UCLA sold a Leonardo da Vinci manuscript to cover legal costs. In 1995, the New-York Historical Society sold \$17.6 million worth of art to boost its endowment. In 1996, the Shelburne Museum in Vermont sold several works by Degas and Manet to the tune of \$31.2 million to improve its property. See ROBERT C. LIND, ROBERT M. JARVIS, & MARILYN E. PHELAN, ART AND MUSEUM LAW: CASES AND MATERIALS 645 (2002).

public that is meant to be served by the museums.<sup>28</sup> However, because the code of ethics governing museums is not legally enforceable, and because current case law does not provide sufficient clarity on the appropriate legal standard to apply to matters concerning the deaccessioning of fine art, states should be prepared to adopt laws that will balance the interests of both museums and the communities that they serve.<sup>29</sup>

This Note argues that in order to prevent future litigation such as that faced by the Berkshire Museum—with disappointing results for the community—states should enact legislation that more closely resembles that of member states in the European Union (EU). Although free alienation of property is a landmark principle of American law, the fiduciary duties of museums to the public demand a closer look at whether art should be treated differently from other commodities.<sup>30</sup> At the very least, legislation that establishes mechanisms for transparency and review of museums' plans to deaccession art will strike a balance between the principle of alienation inherent in American property law and the need to protect cultural property so that it remains accessible to the public, thus upholding the ethical—but currently unenforceable—obligations of museums.

Part I of this Note provides background information regarding the museum as an institution, the obligations of boards of directors of museums, and an overview of deaccessioning practices both domestically and in Europe. Part II analyzes the problems that arise from a lack of legally enforceable standards for deaccessioning art from museum collections in the United States, with an eye toward the shortfalls in previously proposed legislation and the problem with litigation currently being the only mechanism to oversee deaccessioning practices. Finally, Part III will propose that states should enact legislation that will regulate deaccessioning to result in greater transparency, with European laws serving as a potential example of the type of legislation that may be enacted domestically.

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<sup>28</sup> White, *supra* note 25, at 1046–47.

<sup>29</sup> *Id.*

<sup>30</sup> See Michael D. Kirby, *Restraints on Alienation: Placing A 13th Century Doctrine in 21st Century Perspective*, 40 BAYLOR L. REV. 413, 413–14 (1988) (“[T]he concept of free alienability is a cornerstone of modern Anglo-American civilization.”). In a landmark case, the New York Court of Appeals examined the history of restraints under the common law and held that a payment required to a lessor at the conveyance of a tenancy was a restraint and consequently void. *De Peyster v. Michael*, 6 N.Y. 467 (1852).

## I. BACKGROUND

A. *The Museum as a Charitable Institution*

An art museum is generally defined as a public institution that serves an educational purpose and cares for the objects in its collection.<sup>31</sup> A museum's collection exists to serve its public purpose of educating and enriching the public visiting the museum.<sup>32</sup> The inception of American art museums is owed in large part to a private impetus.<sup>33</sup>

A museum is considered "private" if "incorporated by private initiative" and is mostly funded by the private sector.<sup>34</sup> However, a privately incorporated and funded museum may also be considered "public" if it is run for the benefit of the public.<sup>35</sup> Moreover, a privately organized museum that relies on public subsidies for much of its support may be considered either private or public, while a museum

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<sup>31</sup> The word "museum" is said to come from Ptolemy's "temple of muses," built in Alexandria in AD 2, where cultural performances took place alongside a library and antiquities collection. MALARO, *supra* note 7, at 3.. The Association of Art Museum Directors (AAMD) defines an art museum as a "a permanent, not-for-profit institution—essentially educational and humanistic in purpose—that studies and cares for works of art and on some regular schedule exhibits and interprets them to the public." ASS'N OF ART MUSEUM DIRS., PROFESSIONAL PRACTICES IN ART MUSEUMS 4 (2011). Meanwhile, the International Council of Museums (ICOM) defines a museum as a "non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment." *Museum Definition*, INT'L COUNCIL OF MUSEUMS, <https://icom.museum/en/resources/standards-guidelines/museum-definition> [<https://perma.cc/6D8A-8FWY>]. ICOM is currently in the process of revising its definition of a museum to reflect contemporary dialogue regarding the role of museums. *Id.*

<sup>32</sup> Stephen E. Weil, *Deaccessioning in American Museums: I*, in A DEACCESSION READER (Stephen E. Weil ed., 1997) ("The mission of all art museums is to serve the public through art and education. Fulfillment of this mission is the primary goal of every AAMD member and the touchstone by which all decisions are made concerning museum program and operations.").

<sup>33</sup> James N. Wood, *The Authorities of the American Museum*, in WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST 103, 107 (James Cuno ed., 2004) ("Almost without exception, our great museums are the result of individual citizens determining the need; defining the mission; financing the building . . . and assembling the collections through private purchase and gift.").

<sup>34</sup> MALARO, *supra* note 7, at 4. Museums have been described as "privately organized public institution[s]." In other words, the public/private distinction is tricky because all museums are essentially organized for the benefit of the public and may derive funding from a variety of sources. Moreover, as distinguished from private collections, museums are not intended to benefit any one particular person.

<sup>35</sup> *Id.*

organized by a government legislature may still be “private” if it’s not run by that government.<sup>36</sup>

### B. *The Legal Structure of a Museum*

Museums are formed either as charitable (nonprofit) corporations or charitable trusts.<sup>37</sup> This distinction contributes to a lack of judicial clarity on how museums should be held accountable to their standard of care.<sup>38</sup> A charitable trust is established either through an inter vivos arrangement or a will, in which ownership of the property in question may be seen as divided among several parties.<sup>39</sup> The trust’s creator appoints a trustee who holds legal title to the property.<sup>40</sup> The nonprofit corporation achieves its status by filing articles of incorporation with the state in which it is located.<sup>41</sup> As opposed to a charitable trust, which is administered by a trustee, a nonprofit corporation is run by an elected board of directors.<sup>42</sup>

Most museums are classified as nonprofit corporations.<sup>43</sup> Similar to a trust, a charitable corporation holds property under an obligation to use it for the benefit of the public.<sup>44</sup> A trustee of a museum is a fiduciary, holding particular legal obligations.<sup>45</sup> The boards of trustees of charitable organizations, therefore, have both specific and implied powers with a degree of discretion in how the organization should be run in order to further its mission.<sup>46</sup> In practice, this means that

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<sup>36</sup> *Id.*

<sup>37</sup> White, *supra* note 25, at 1048.

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

<sup>39</sup> *Id.* at 1049.

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

<sup>41</sup> *Id.* at 1050.

<sup>42</sup> *Id.*

<sup>43</sup> MALARO, *supra* note 7, at 4.

<sup>44</sup> *Id.* at 9.

<sup>45</sup> MERRYMAN & ELSEN, *supra* note 12, at 1094. These obligations include “the duty of loyalty to the beneficiaries and to the trust terms; the duty of care in the management and investment of trust assets; and the duty of using good faith to act in the interest of the beneficiaries and to avoid potential conflicts of interest.” *Id.* at 1093–94 (quoting Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 COLUM. J. ART & LAW 174, 180 (1983)).

<sup>46</sup> MALARO, *supra* note 7, at 11. As to trust forms of charitable organizations: “The trustees of a charitable trust, like the trustees of a private trust, have such powers as are conferred upon them in specific words by the terms of the trust or are necessary or appropriate to carry out the purpose of the trust and are not forbidden by the terms of the trust. . . . [T]he fact that a charitable trust may continue for an indefinite period may have the effect of giving the trustees more



assuming that if all affairs are otherwise in order, a board is generally given the benefit of the doubt.<sup>47</sup>

The museum as an institution is, therefore, generally run by a board of trustees.<sup>48</sup> The board establishes policies governing operations, finances, and the management of collections.<sup>49</sup> The board governs by majority vote, with the director making proposals for implementing and revising policies.<sup>50</sup> Thus, the director carries the responsibility of caring for the museum's collection and developing a program for the benefit of the public.<sup>51</sup>

The objectives of most museums are laid out in their bylaws and articles of incorporation.<sup>52</sup> These documents tend to be both brief and broad in nature.<sup>53</sup> Therefore, neither bylaws nor articles of incorporation tend to prove particularly practical for purposes of informing deaccessioning policies.<sup>54</sup> Typically, the museum will also have a policy statement regarding deaccessioning written out by the board and the director.<sup>55</sup> Such a statement generally defines the precise goals of the institution and explain policies related to collection management, including acquisition and preservation practices.<sup>56</sup>

### C. *The Standard of Conduct for Museums*

Case law dealing with mismanagement of charitable organizations typically revolves around the standard of conduct to which the boards

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extensive powers than they have in the case of a private trust which is of limited duration." *Scott on Trusts* § 380 (3d ed.).

As to the corporate form of charitable organizations: "The powers of the persons who act as directors of a charitable nonprofit corporation, whether called directors or trustees, are prescribed in the statute of incorporation, in the instrument creating the corporation, and those implied powers which are necessary and proper to carry out the purposes for which the charity was created and which are not in conflict with expressions in the instrument creating the charity." *Midlantic Nat'l Bank v. Frank G. Thompson Found.*, 405 A.2d 866, 869 (N.J. Super Ct. 1979).

<sup>47</sup> MALARO, *supra* note 7, at 11.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 10.

<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> AMERICAN LAW INSTITUTE, LEGAL ISSUES IN MUSEUM ADMINISTRATION, DEACCESSIONING DEBATE (2019) [hereinafter DEACCESSIONING DEBATE].

<sup>56</sup> *Id.*

of such organizations are subject.<sup>57</sup> With regard to the standard of conduct for board members of museums in relation to collection management, several cases in particular provide guidance. First, in the *Museum of the American Indian* case, the New York Attorney General brought suit against the museum trustees and officers for mismanagement.<sup>58</sup> The suit alleged that the defendants had failed to keep proper records of the museum's inventory, allowed "questionable" acquisition and deaccession practices, and were involved in "self-dealing."<sup>59</sup> The Attorney General contended that the board of the museum, as a charitable organization, had obligations to the public that required certain policies when it came to the management of its collection.<sup>60</sup> A negotiation resulted in a stipulation under which the museum agreed to have the inventory of its collection made available to the public.<sup>61</sup> Moreover, the stipulation also provided that the museum's staff would no longer have unlimited discretion in managing the museum's collection.<sup>62</sup> Instead, the board of trustees would now approve all acquisitions and planned deaccessions.<sup>63</sup>

A similar case unfolded in Washington State.<sup>64</sup> There, the Attorney General sued the trustees and former director of a Washington Museum. The complaint alleged that the director sold museum assets without the trustees' permission and failed to properly record sale proceeds; that the director and trustees did not properly maintain the collection; that the building was not kept in repair; that the trustees failed to adequately supervise the director's acquisition decisions; and that the trustees engaged in self-dealing by using collection items for personal benefit.<sup>65</sup>

Furthermore, the Attorney General's allegations sought to hold the trustees personally liable for damages.<sup>66</sup> Such allegations suggest that the Attorney General interpreted the standard of care to mean that the board members were required to actively pursue policies for the benefit of the collection and to oversee operations.<sup>67</sup> The case was ultimately dismissed when the Attorney General and the defendants agreed that

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<sup>57</sup> *Lefkowitz v. Museum of the Am. Indian Heye Found.*, Index No. 41416/75 (N.Y. Sup. Ct. June 27, 1975).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *State v. Leppaluaot*, No. 11781 (Wash. Super. Ct., Apr. 1977).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

the museum would pursue one board member in particular who was considered primarily responsible for the alleged grievances.<sup>68</sup>

Similarly, in 1976, the Illinois Attorney General alleged that the officials of the George F. Harding Museum mismanaged the museum's collections.<sup>69</sup> Harding, a collector of primarily medieval art, first established his collection as a tax-exempt corporation in 1930.<sup>70</sup> His will directed that the collection should be "managed and operated" as a museum, and that the four million dollars he left in trust should be used to that end.<sup>71</sup> The plaintiff alleged that the Harding Museum and its officers engaged in "misuse and abuse of trust through self-dealing of the Museum's property."<sup>72</sup> The lawsuit resulted in the transfer of Harding's collection and associated assets to the Art Institute of Chicago.<sup>73</sup> Significantly, the court noted that the ultimate goal of the settlement was "to do what is in the best interests of the trust and its beneficiaries, in this instance the people of Illinois."<sup>74</sup>

The preceding cases suggest that museum board members are subject to the same duty of care as the directors of a business corporation.<sup>75</sup> Nevertheless, the unique nature of nonprofit organizations result in courts applying a higher standard to their board members.<sup>76</sup> Unlike a business corporation, whose primary purpose is to turn out a profit, the purpose of a nonprofit is to provide a benefit to the public.<sup>77</sup> Therefore, for the purpose of maintaining public confidence, boards of nonprofit organizations are expected to do more than simply avoid negligence and fraud.<sup>78</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *George F. Harding Museum v. United States*, 674 F. Supp. 1323 (N.D. Ill. 1987).

<sup>70</sup> *Id.* at 1324.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1325.

<sup>74</sup> *Id.* at 1329.

<sup>75</sup> See generally *Lefkowitz v. Museum of the Am. Indian Heye Found.*, Index No. 41416/75 (N.Y. Sup. Ct. June 27, 1975); *State v. Leppaluaot*, No. 11781 (Wash. Super. Ct. Apr. 1977); *George F. Harding Museum*, 674 F. Supp. 1323.

<sup>76</sup> MALARO, *supra* note 7, at 16.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 18 ("This tendency to expect board members of a nonprofit organization to pay closer attention to the core function of the nonprofit is understandable. Unlike a for-profit organization, a nonprofit cannot determine its success by studying a balance sheet. The purpose of the nonprofit is not to make money but to provide a quality product or service (as described in its charter) to a particular segment of the public. Because of the very nature of a nonprofit's activity, outsiders experience extreme difficulty in judging, in a timely manner, the quality of governance. In such a situation, it is important, if public confidence is to be maintained, to demand that a board do more than just avoid gross negligence and purposeful wrongdoing.").

In keeping with the practice governing charitable gifts and trusts, museums are generally accountable to state attorneys general, who are considered to be the best vehicle for ensuring that the institution is acting within public interest.<sup>79</sup> The Attorney General is thus considered to be an appropriate representative of the public, charged with safeguarding the public's interest in managing charitable organizations.<sup>80</sup> In practice, however, attorneys general are rarely concerned with overseeing the mismanagement of museum collections.<sup>81</sup> Constrained by limited time and resources, attorneys general have tended to focus more on cases considered to be of greater concern to the public than the manner in which museums are run.<sup>82</sup> Despite the fact that in the last three decades increased public attention has lead attorneys general to look more closely at issues such as accountability, fund-raising, and deaccessioning, relying on state attorneys general has continued to be an inadequate mechanism for the oversight of museums.<sup>83</sup>

#### D. *An Overview of Deaccessioning*

Deaccessioning refers to the process of permanently removing an object from a museum's collection.<sup>84</sup> The term seems to have appeared for the first time in 1972 in the *New York Times*.<sup>85</sup> When done properly,

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<sup>79</sup> MALARO, *supra* note 7, at 23 (“Traditionally, the enforcement of charitable trusts or gifts to charities has been assigned to the attorney general of the state in which the charity is located.”). “An individual member of the public has no vested interest in the property or funds of the [charitable] trust. In common with other members, he has an interest in the charitable use. He has no right of action for the mismanagement or misuse of the fund. Any action on this account must be taken by the Attorney General as the representative of the public. However, those with a special interest may enforce the trust, or a localized or grouped charity may be enforced by a class suit. In such suits it is proper and often necessary to make the Attorney General a party defendant. *Dickey v. Volker*, 11 S.W.2d 278, 281 (1928).

<sup>80</sup> MALARO, *supra* note 7, at 24 As stated by one court: “This action is based upon averments of a public trust. It is brought to remedy abuses in the management of this trust. It is not only the right, but the duty, of the attorney general to prosecute such an action. The state, as *parens patriae*, superintends the management of all public charities or trusts, and, in these matters acts through her attorney general. Generally speaking, such an action will not be entertained at all unless the attorney general is a party to it. Such was the rule at common law, and it has not been changed in this state.” *People ex rel. Ellert v. Cogswell*, 45 P. 270, 271 (1896) (emphasis added).

<sup>81</sup> MALARO, *supra* note 7, at 24.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 217.

<sup>85</sup> LIND ET AL., *supra* note 27, at 643; see also Jason R. Goldstein, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 213 n.3 (1997).

deaccessioning may be a vital part of collection management.<sup>86</sup> Collection management may be broadly defined as encompassing the areas of conservation of existing artworks, security, insurance, exhibitions, and of course, deaccessioning itself.<sup>87</sup> Along with the acquisition of new objects, thoughtful deaccessioning can help museums to grow and further their missions.<sup>88</sup>

While museums tend to actively publicize new acquisitions, partly as a way to encourage museum patronage, they tend to downplay or even hide decisions to deaccession.<sup>89</sup> This is because museums tend to recognize that deaccessioning can result in a number of unfavorable results.<sup>90</sup> For one thing, museums are afraid to disincentivize potential donors.<sup>91</sup> If an individual is considering making a gift of a work of art to a particular museum, the knowledge that the work might not be held in perpetuity but could be sold at the discretion of a museum might lead the individual to reconsider gifting the work.<sup>92</sup>

Museums recognize that the prospect of having a work of art deaccessioned may discourage potential donors and therefore try to compensate for this by acknowledging that funds from the sale of a donated work of art have been used to purchase other works.<sup>93</sup> For example, a museum might note on a placard that a new acquisition has been purchased with funds from the sale of a piece given to the museum by a prominent donor.<sup>94</sup> Such attempts, however, may actually discourage donations because they rob the donor of the opportunity to approve of a work associated with their name.<sup>95</sup> Donors may understandably be reluctant to risk having their names attached to a piece they may never see, let alone like.<sup>96</sup> Therefore, while museums are

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<sup>86</sup> MALARO, *supra* note 7, at 216.

<sup>87</sup> LIND ET AL., *supra* note 27, at 619.

<sup>88</sup> MALARO, *supra* note 7, at 216. “An art museum, if it is to serve the cultural and educational needs of the community, cannot remain static. It must keep abreast of the advances of the times, like every other institution whose purpose is to educate and enlighten the community.” *Wilstach Estate*, 1 Pa. D. & C. 2d 197, 207 (Orphans’ Ct. 1954).

<sup>89</sup> Gabor, *supra* note 22, at 1011–12.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* Following the 1972 scandal concerning the Metropolitan Museum of Art’s secretive deaccessioning of works in the Alice de Groot collection, John Rewald, a friend of de Groot, wrote that “[e]ven though it may be legal to attribute the proceeds from the sale of her picture to the acquisition of a rare work . . . and name her among the donors, there is something vulgar about the thought that her name may henceforth be attached to a painting she never saw and for which

not bound by the subjective intent of donors, the donors themselves or their families may decide not to provide more works to the museum as a result of deaccessioning, causing museums to lose both funding and a source of artwork.<sup>97</sup> Unfortunately, despite these risks, many museums discourage donations with restrictions or refuse to accept them altogether.<sup>98</sup>

There are a number of reasons why a museum may choose to deaccession a work of art.<sup>99</sup> Such reasons include the need to tailor their collections to their goals.<sup>100</sup> Often, museums have a number of works in storage that may not be particularly valuable, either from a financial perspective or from the perspective of public interest.<sup>101</sup> In such circumstances, deaccessioning may be seen as a necessary “weeding out” of superfluous objects.<sup>102</sup> Moreover, most museums don’t have the luxury of unlimited storage space.<sup>103</sup> Storage is not only expensive but requires additional measures for proper safeguarding of cultural property, including security, climate control, and efficient access—all of which cost additional resources.<sup>104</sup>

In addition to such practical considerations, because museums have limited resources, sometimes the only way for a museum to acquire new works is by exchanging items from its current collection.<sup>105</sup> This might require sacrificing works of lesser value or prominence for

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she may not have cared.” Gabor, *supra* note 22, at 1012–13 (quoting John Rewald, *Should Hoving Be Deaccessioned?*, 61 ART IN AM. 25, 25 (1973)).

<sup>97</sup> Gabor, *supra* note 22, at 1012–13. In the aftermath of the Metropolitan Museum of Art sales, a daughter of one of the donors of the deaccessioned paintings submitted a letter to the New York Times in which she decried the Met’s actions: “This [work by Gauguin] happens to have been donated to the museum by my mother, Mrs. Sam A. Lewisohn, who intended to make it permanently available to the public. It was a painting she loved. It was not her intention to give the Metropolitan a negotiable security, so that some future curator could convert it into cash.” John Rewald, *Should Hoving Be Deaccessioned?*, 61 ART IN AM. 25, 25 (1973), as quoted in Gabor, *supra* note 22, at 1012–13.

<sup>98</sup> Gabor, *supra* note 22, at 1012–13.

<sup>99</sup> MALARO, *supra* note 7, at 217.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 217–18.

<sup>102</sup> DEACCESSIONING DEBATE, *supra* note 55 (“Many museum collections contain objects that may no longer have relevance to the museum’s mission. All too often, they remain in the collection, using up space and institutional resources. For this and other reasons (e.g., when items are considered redundant, are damaged beyond repair or are of poor quality), deaccessioning is both a logical and responsible collections management practice. . . . In no event should the potential monetary value of an object be considered as part of the criteria for determining whether or not to deaccession it.”).

<sup>103</sup> MALARO, *supra* note 7, at 217.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 218.

the sake of new acquisitions.<sup>106</sup> Furthermore, a museum's mission itself may require periodic deaccessioning of objects.<sup>107</sup> For example, a museum dedicated to contemporary art may not be able to keep its collection current without adapting its inventory to changing artistic trends.<sup>108</sup>

In certain circumstances, deaccessioning may actually be legally required.<sup>109</sup> For example, the Native American Graves Protection and Repatriation Act establishes that museums receiving federal funding must return any Native American human remains and funerary artifacts in their collections when requested.<sup>110</sup> Finally, financial stress may lead a museum to deaccession works of art.<sup>111</sup>

While all these reasons may be a normal and even necessary method of managing a collection, selling works of art to raise capital remains controversial.<sup>112</sup> Significantly, deaccessioning for anything other than the improvement of a museum's collection implicates both legal and ethical considerations.<sup>113</sup> Since museums exist in order to benefit the public, the decision to deaccession a work of art should involve not just what a museum considers to be in its best interest but what the public considers to be in its interest as well.<sup>114</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

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

<sup>109</sup> LIND ET AL., *supra* note 27, at 644.

<sup>110</sup> 25 U.S.C. §§ 3001–3013.

<sup>111</sup> MALARO, *supra* note 7, at 218.

<sup>112</sup> In one particular case, the terms of a donation actually required a museum to deaccession works in their collection. In 1998, the Museum of Modern Art in New York deaccessioned four Impressionist works, including two drawings by Van Gogh and two by Seurat, at a total value of forty million dollars. This is because the donor of the drawings, Abby Aldrich Rockefeller, a co-founder of the museum, stipulated that the drawings could only be kept in the Modern's collection for a period of fifty years. Evidently, she believed that at this point they would no longer be considered "modern." Luckily for New York and members of the museum-going public, the two Van Goghs were transferred to the Metropolitan Museum of Art. The two Seurat drawings ended up in the Art Institute of Chicago. See Carol Vogel, *Modern No Longer, Four Drawings Are Evicted*, N.Y. TIMES (Nov. 1, 1998), <https://www.nytimes.com/1998/11/01/weekinreview/october-25-31-modern-no-longer-four-drawings-are-evicted.html?searchResultPosition=1> [<https://perma.cc/FU5P-N2NP>]. "Deaccessioning is essentially an acknowledgement that museums cannot collect everything and that, therefore, those charged with the administration of a museum must establish procedures for periodically reviewing and, if necessary, culling collections. Those procedures should be geared to the peculiarities of a collection, should permit the expression of a range of views, should clearly place responsibility for final decision making, and should require the maintenance of complete records of actions taken." MALARO, *supra* note 7, at 219.

<sup>113</sup> MALARO, *supra* note 7, at 218–19.

<sup>114</sup> *Id.* at 220.

E. *Deaccessioning and Accountability*

Deaccessioning is primarily governed by codes of ethics, which are not legally enforceable.<sup>115</sup> Rather, compliance with such standards depends on the willingness to do so by museum boards.<sup>116</sup> The AAM provides that proceeds from the sale of deaccessioned objects should only be used to fund new acquisitions or to maintain existing collections.<sup>117</sup> Thus, any funds raised by deaccessioning art should be used to acquire more art in furtherance of the museum's mission or to care for objects already owned by the museum.<sup>118</sup> The AAM code of ethics thereby precludes the expenditure of funds gained from deaccessioned art for purposes such as operations.<sup>119</sup>

Although ethical guidelines for museum practices state that works of art should not be deaccessioned for anything other than the purchase of additional works of art, deaccessioning is generally a legal practice.<sup>120</sup> A museum may choose to sell an item in its collection unless there is (1) an enforceable donor restriction; (2) a restriction in the museum's founding documents; or (3) an applicable statute.<sup>121</sup> Moreover, it is important to distinguish the purpose of a nonprofit organization, such as a museum, from a for-profit organization in this context.<sup>122</sup> It would be difficult to argue that a for-profit organization should be limited in collection management for the purpose of anything other than business.<sup>123</sup> However, since the purpose of a nonprofit is generally to carry out a mission for the benefit of the public, deaccessioning essentially equates to disposing of the core of a museum's reason for existing in the first place.<sup>124</sup>

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<sup>115</sup> *Id.*

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

<sup>117</sup> DEACCESSIONING DEBATE, *supra* note 55.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* ("According to the AAM Code of Ethics for Museums, funds realized from the sale of deaccessioned items may be used only for 'acquisition or direct care of collections.' Thus, when an object is sold, the funds generated should be used to either: replace the object with another that has relevance, importance or use to the museum's mission (acquisition) [or to] invest in the existing collections by enhancing their life, usefulness or quality and thereby ensuring they will continue to benefit the public (direct care).").

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> MALARO, *supra* note 7, at 220.

<sup>124</sup> *Id.* at 260–62.

<sup>124</sup> *Id.* ("When a for-profit organization faces a financial crisis, the sale of part of its assets is essentially a matter of business judgment: Will this allow the organization to keep going, with the hope that it can come up with another way to turn a profit? For the nonprofit, the sale of assets can mean (as in the case of a museum) the disposal of part of its very reason for being.").



F. *Deaccessioning and the Courts*

One incident in particular may be seen as a turning point in the way deaccessioning practices are viewed. In 1972, the Metropolitan Museum of Art faced a backlash of criticism in response to a *New York Times* report that brought to light the museum's decision to sell artwork from its permanent collection in order to finance a new acquisition.<sup>125</sup> The museum had decided to purchase a Velazquez portrait of Juan de Pareja for a little over \$5.5 million—a record for the sale of a single work of art at the time.<sup>126</sup> While the acquisition was at first applauded by the media, it turned out that the Metropolitan had secretly sold a number of works from the collection of Adelaide de Groot.<sup>127</sup> This led to a nearly yearlong investigation by the Attorney General, which ultimately resulted in the museum agreeing to notify the Attorney General whenever it planned to deaccession works worth over \$5,000.<sup>128</sup> In response, some critics went so far as to call for a total bar on the practice of deaccessioning.<sup>129</sup> The event spurred greater public scrutiny of both the legal and ethical obligations of museum trustees, the effects of which continue to be felt to this day.<sup>130</sup>

Since the 1972 Metropolitan Museum of Art incident, a number of cases have arisen in response to museums deaccessioning art.<sup>131</sup> In the 1980s, the Fogg Museum of Art's publicized plan to deaccession artwork to close a budget deficit led to outcry and criticism.<sup>132</sup> The AAMD issued a resolution denouncing the plan.<sup>133</sup> Ultimately, the Fogg was able to raise enough funds without going through with the sale.<sup>134</sup> However, the museum came very close to potentially removing a

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<sup>125</sup> Sue Chen, *Art Deaccessions and the Limits of Fiduciary Duty*, 14 ART & ANTIQUITY L. 103, 104 (2009).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> James T. Flexner, *Masterpieces Lost Forever?*, N.Y. TIMES (Apr. 8, 1973), <https://www.nytimes.com/1973/04/08/archives/masterpieceslost-forever.html?searchResultPosition=1> [<https://perma.cc/PD29-A5A5>]. (The 1972 Metropolitan Museum of Art controversy led Flexner to call deaccessioning “the most serious menace . . . to the cultural heritage of the human race.”).

<sup>130</sup> MERRYMAN & ELSER, *supra* note 12, at 1137.

<sup>131</sup> See, e.g., *Rowan v. Pasadena Art Museum*, No. C3228171 (Cal. Super. Ct. 1981); *Adams v. Providence Athenaeum*, No. Civ.A. 03-4513, 2004 WL 2075128 (R.I. Super. Ct. Aug. 13, 2004), *aff'd sub nom.* *Adams v. Christie's Inc.*, 880 A.2d 774 (R.I. 2005).

<sup>132</sup> Grace Glueck, *Fogg Warned on Selling Art*, N.Y. TIMES (Jan. 30, 1982), <https://www.nytimes.com/1982/01/30/arts/fogg-warned-on-selling-art.html> [<https://perma.cc/5CCQ-YDVG>].

<sup>133</sup> *Id.*

<sup>134</sup> See *id.*

number of valuable works from its collection despite the public opposition.<sup>135</sup> As with other deaccession plans, the incident raised the questions of accountability and enforceability.<sup>136</sup>

A more recent case similarly sparked an outcry of protest and criticism. *Rockwell v. Trustees of Berkshire Museum* centered on the Berkshire Museum's planned sale of forty paintings and sculptures, including paintings by Norman Rockwell, as well as several other works by major American artists.<sup>137</sup> The museum, located in Pittsfield, Massachusetts, intended to sell these works at Sotheby's in New York in order to raise revenue for a major renovation of the museum.<sup>138</sup> Essentially, the financially troubled museum decided to transform itself from an art museum to an interactive science center.<sup>139</sup> Several parties brought suit against the museum, seeking to enjoin the sale from proceeding.<sup>140</sup> The plaintiffs in the litigation included three children of Norman Rockwell, who were also beneficiaries of the Rockwell estate; several members of the museum; and an artist whose glass works were affixed to the museum building.<sup>141</sup>

The complaint asserted a breach of fiduciary duty, breach of trust and absence of authority, and breach of contract.<sup>142</sup> The defendants included the trustees of the museum and Attorney General, Maura Healey.<sup>143</sup> The Attorney General, initially a defendant, filed a motion to join as a plaintiff if the original plaintiffs lacked standing.<sup>144</sup> The court

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<sup>135</sup> *See id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Rockwell v. Trs. of Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932 (Mass. Super. Ct. Nov. 7, 2017). The Rockwell paintings, *Shuffleton's Barbershop* and *Blacksmith's Boy—Heel and Toe (Shaftsbury Blacksmith Shop)* (1940), are considered masterpieces of American art. Rockwell donated the paintings to the Berkshire Museum in 1958 and 1966, respectively. *See* Stevens, *supra* note 1. The artist is primarily known for his depictions of small-town American life. His paintings and illustrations often portrayed “salt of the earth” Americans engaged in activities such as serving a Thanksgiving feast. Rockwell, who spent the last twenty-five years of life in Berkshire County, was recently declared the “official state artist” of Massachusetts. *Norman Rockwell: A Brief Biography*, NORMAN ROCKWELL MUSEUM, <https://www.nrm.org/about/about-2/about-norman-rockwell> [<https://perma.cc/N9KD-JBQY>]. Rockwell's deep ties to Berkshire County were a significant part of the reason why the Berkshire Community so strongly felt the imminent loss of *Shuffleton's Barbershop* and *Blacksmith's Boy*. *See* Stevens, *supra* note 1.

<sup>138</sup> *Rockwell*, 2017 WL 6940932. Sotheby's estimated the auction value of *Blacksmith's Boy—Heel and Toe* at seven to ten million dollars. *Lot 43: Norman Rockwell, Blacksmith's Boy—Heel and Toe*, SOTHEBY'S (May 23, 2018), <https://www.sothebys.com/en/auctions/ecatalogue/2018/american-art-n09867/lot.43.html> [<https://perma.cc/TC2A-DTRN>].

<sup>139</sup> *Rockwell*, 2017 WL 6940932.

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

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

granted the motion, finding that the original plaintiffs lacked standing.<sup>145</sup> The Attorney General therefore sought a preliminary injunction on behalf of the Commonwealth of Massachusetts to prevent the sale from going through.<sup>146</sup> The court ultimately found that although the Attorney General had standing to bring the suit, she failed to satisfy the requirements of a preliminary injunction.<sup>147</sup> The court's decision sparked significant disappointment among many members of the Pittsfield community, which throughout the litigation had expressed their desire to keep the paintings available for public enjoyment.<sup>148</sup>

The Sotheby's auction took place in 2018.<sup>149</sup> Although one of the Rockwell paintings was sold to a museum—albeit on the West Coast—the other most likely went to a private collector.<sup>150</sup> This means that the work is no longer available for public viewing and might not be seen publicly for several generations.

Shortly after the auction, the AAMD voted to impose sanctions on the Berkshire Museum.<sup>151</sup> In an official statement, the AAMD expressed its position that the sale of art for purposes other than collection care and management undermines the public's trust in the institution.<sup>152</sup> However, this statement may be described as “too little, too late.” Ultimately, the result feared by critics of the deaccessioning took place, in that certain pieces from the sale were lost to public viewership for the foreseeable future.<sup>153</sup> Had there been legally enforceable standards in place, the museum's planned deaccession of the art, while potentially less financially fruitful, may have led to greater public satisfaction.<sup>154</sup> At the very least, legal standards should call for greater transparency in such situations.<sup>155</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *See supra* note 11.

<sup>150</sup> *Id.*

<sup>151</sup> Press Release, Ass'n of Art Museum Dirs., AAMD Statement on Sanction of Berkshire Museum and La Salle University Art Museum (May 25, 2018), <https://aamd.org/for-the-media/press-release/aamd-statement-on-sanction-of-berkshire-museum-and-la-salle-university> [<https://perma.cc/NF7A-Z2AF>].

<sup>152</sup> *Id.* (“Selling art to support any need other than to build a museum's collection fundamentally undermines the critically important relationships between museums, donors and the public. When museums violate the trust of their donors and the public, they diminish the opportunity and responsibility to make great works of art available to the public. This hurts the individual institution and affects the museum field as a whole.”).

<sup>153</sup> *See supra* note 11.

<sup>154</sup> *See infra* Part III.

<sup>155</sup> *See infra* Part III.

In 2007, the Albright-Knox Art Gallery in Buffalo, New York faced similar criticism when it decided to deaccession a number of antiquities from its permanent collection.<sup>156</sup> One of the oldest public art institutions in the United States, the Albright-Knox chose to focus primarily on its modern and contemporary art collection.<sup>157</sup> As a part of its mission to be at the forefront of this field, the board of directors unanimously voted to deaccession a number of ancient and pre-modern works from its collection in order to raise capital for the purchase of art more in line with its mission.<sup>158</sup> These included over 100 Chinese, Indian, African, South American, and Roman works of art.<sup>159</sup> As with the Berkshire Museum, the Albright-Knox's plan inspired a furious debate on the propriety of the sale, which was planned to take place through a Sotheby's auction.<sup>160</sup> Carl Dennis, poet and recipient of the Pulitzer Prize,<sup>161</sup> led the opposition to the plan and grieved the planned sale as a deviation from the museum's historical ties and heritage.<sup>162</sup>

Opponents of the plan ultimately sought to enjoin the Sotheby's sale from taking place. The petitioners, including Carl Dennis, among others, brought four main claims against the museum.<sup>163</sup> First, they contended that the board of directors violated the museum's by-laws and not-for-profit corporation laws<sup>164</sup> by failing to notify ex officio directors of planned meetings to discuss the deaccessioning.<sup>165</sup> Second, they argued that the deaccessioning plan was a deviation from the museum's purpose of "maintaining a collection of painting, sculpture and other works of art and encouraging the advancement of education and cultivation of art."<sup>166</sup> Third, they claimed that the deaccession constituted a mismanagement of assets and was contrary to the intent

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<sup>156</sup> Randy Kennedy, *Despite Foes, Buffalo Museum Makes \$18 Million in Auction*, N.Y. TIMES (March 21, 2007), <https://www.nytimes.com/2007/03/21/arts/design/21albr.html> [<https://perma.cc/HN7R-3MQG>].

<sup>157</sup> *Our History*, ALBRIGHT-KNOX ART GALLERY, <https://www.albrightknox.org/about/our-history> [<https://perma.cc/4DU9-XXLV>].

<sup>158</sup> ALBRIGHT-KNOX ART GALLERY, ANNUAL REPORT 2006-2007, [https://www.albrightknox.org/sites/default/files/2016-08/AKAG\\_AnnualReport\\_FY\\_2006-2007.pdf](https://www.albrightknox.org/sites/default/files/2016-08/AKAG_AnnualReport_FY_2006-2007.pdf) [<https://perma.cc/U85D-FU3D>].

<sup>159</sup> Kennedy, *supra* note 156.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* ("We grieve that this museum has embarked on a path that is leading to it cutting off its link to the past . . . . We feel that this is part of the patrimony of our city.")

<sup>163</sup> *Dennis v. Buffalo Fine Arts Acad.*, 2007 WL 840996, at \*2 (N.Y. Sup. Ct. Mar. 21, 2007).

<sup>164</sup> *Id.*; N.Y. NOT-FOR-PROFIT CORP. LAW § 711 (McKinney 2015).

<sup>165</sup> *Dennis*, 2007 WL 840996, at \*2.

<sup>166</sup> *Id.*

of the museum's donors.<sup>167</sup> Fourth, they urged the court to use its "visitation" rights to protect the museum from mismanagement.<sup>168</sup>

The court ultimately denied the injunction.<sup>169</sup> The court reasoned that even if the petitioners showed that they would be irreparably harmed by the sale of the deaccessioned artworks, they failed to demonstrate that their claims would succeed on the merits or that the balance of equities would fall in their favor.<sup>170</sup> First, the court found that failure to notify *ex officio* directors of the planned meetings was harmless.<sup>171</sup> Second, it found that in light of the broad scope of the museum's purpose, the deaccessioning plan was not a violation of its stated mission to educate the public and care for the fine arts.<sup>172</sup> Moreover, the court stated that the museum was free to change its mission as long as it did not venture outside of its corporate purpose.<sup>173</sup> Third, the court held that the museum was free to sell donated or bequeathed property in the absence of specific restrictions on alienability.<sup>174</sup> Finally, the court found that without evidence of illicit activities such as fraud, the court would not exercise its right to appoint a representative to "visit" the museum's records.<sup>175</sup>

The Sotheby's auction realized \$71 million in net proceeds for the museum.<sup>176</sup> In its annual report, the Albright-Knox boasted that the sale "more than quadrupled" the museum's endowment, allowing it to remain at the forefront of the modern and contemporary art world.<sup>177</sup> The report also included an acknowledgement of the controversy

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* Not-for-Profit Corp. Law § 114 provides that a court may exercise "visitation" rights by appointing "a representative to investigate the records of a corporation to protect corporate assets from misuse by officers or directors." N.Y. NOT-FOR-PROFIT CORP. LAW § 114 (McKinney 2017) ("Charitable corporations, whether formed under general or special laws, with their books and vouchers, shall be subject to the visitation and inspection of a justice of the supreme court, or of any person appointed by the court for that purpose.").

<sup>169</sup> *Dennis*, 2007 WL 840996, at \*6.

<sup>170</sup> *Id.* at \*2-\*3 ("In order for petitioners to be entitled to a preliminary injunction, they must show that they will suffer irreparable injury in the absence of an injunction, that the balance of the equities falls in their favor, and that there is a likelihood that they will be successful on the merits.").

<sup>171</sup> *Id.* at \*3-\*4.

<sup>172</sup> *Id.* at \*4.

<sup>173</sup> *Id.* at \*4-5.

<sup>174</sup> *Id.* at \*5.

<sup>175</sup> *Id.* at \*5-6.

<sup>176</sup> ALBRIGHT-KNOX ART GALLERY, *supra* note 158.

<sup>177</sup> *Id.*

inspired by the deaccessioning.<sup>178</sup> As with the case of the Berkshire Museum, legal guidelines encouraging greater transparency and accountability may have led to a more favorable outcome for the Buffalo community.

## II. ANALYSIS

The lack of legally enforceable standards governing museums' deaccessioning practices leads to negative outcomes for all parties involved—including museums, museum patrons, members, and the communities that museums are intended to serve.<sup>179</sup> Litigation rarely results in an outcome that is beneficial to the public, especially since it tends not to result in the relief plaintiffs seek.<sup>180</sup> Moreover, every few years a museum's controversial decision to deaccession art leads to public scrutiny, debate, and criticism, prompting the question of whether current guidelines are sufficient to protect the interests of the public that is meant to benefit from the museums in the first place.<sup>181</sup>

### A. *Proposing Legislation*

The lack of clear judicial guidance on deaccessioning is not, at the moment, supplemented by state legislation in any meaningful way.<sup>182</sup> Despite repeated proposals to regulate the deaccessioning practices of museums, only one such law currently exists.<sup>183</sup> In 1996, New York passed a law requiring that any proceeds from the sale of deaccessioned artwork by the New York State Museum located in Albany be used either for new acquisitions or for the direct care of existing

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<sup>178</sup> *Id.* (“The Albright-Knox has deaccessioned many works of art on numerous occasions throughout its history. The Board of Directors acknowledges that deaccessioning is a difficult decision that requires great thought and care, and the Board is aware that not every Member of the Albright-Knox Art Gallery was comfortable with the recent deaccession plan. Whatever one’s view on deaccessioning is, all Members can agree that the Albright-Knox is an important cultural institution central to our community’s fabric of life, that it is known nationally and internationally as one of the world’s outstanding modern and contemporary art museums, and that it deserves to be properly supported.”).

<sup>179</sup> See Weil, *supra* note 32.

<sup>180</sup> See, e.g., *Rockwell v. Trs. of Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932 (Mass. Super. Ct. Nov. 7, 2017).

<sup>181</sup> *Id.*

<sup>182</sup> RALPH E. LERNER, JUDITH BRESLER, & DIANA WIERBICKI, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS & ARTISTS* (4th ed. 2012).

<sup>183</sup> LIND ET AL., *supra* note 27, at 645.

collections.<sup>184</sup> However, this statute is not generally applicable to all museums in New York.<sup>185</sup> In addition, museums chartered by the New York State Board of Regents are restricted to deaccessioning works from their collections only in one of ten situations.<sup>186</sup> None of the enumerated justifications for deaccessioning in the Board of Regents' rules include fundraising for operating costs or capital improvements.<sup>187</sup>

One state has passed legislation that encourages full disclosure in the deaccessioning process.<sup>188</sup> In 1971, Wisconsin enacted an "anti-secrecy law" mandating that public institutions disclose transactions to the public.<sup>189</sup> In particular, the law requires the directors of museums to account for transactions to an objective outside council.<sup>190</sup> Although it encourages greater transparency, the law is imperfect as it stands.<sup>191</sup> This is because the mandated reporting is done after the fact.<sup>192</sup> Therefore, if a particular painting is deaccessioned and subsequently sold at auction, it might be impossible to return to the museum by the time the decision to deaccession is scrutinized.<sup>193</sup>

In 2010, the New York State legislature attempted to draft a bill to regulate the process of deaccessioning works of art and antiquities.<sup>194</sup> Assemblyman Richard L. Brodsky spearheaded the proposal, along with the New York State Board of Regents and the Museum Association of New York.<sup>195</sup> The bill would have banned museums from using proceeds from the sale of art to fund operating expenses.<sup>196</sup> The discussion around the bill centered on a number of cases from the preceding decade, including the National Academy Museum's 2008 sale of Hudson River School paintings to finance operating costs. Brodsky feared that the recession would lead to an epidemic of museums selling art into private hands to make up for budget deficits.<sup>197</sup> Opponents of

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<sup>184</sup> N.Y. Educ. Law § 233-aa(5). "Proceeds derived from the sale of any property title to which was acquired by a museum pursuant to this section shall be used only for the acquisition of property for the museum's collection or for the preservation, protection, and care of the collection and shall not be used to defray ongoing operating expenses of the museum."

<sup>185</sup> LIND ET AL., *supra* note 27, at 645.

<sup>186</sup> LERNER ET AL., *supra* note 182, at 1499–1500.

<sup>187</sup> *Id.*

<sup>188</sup> Gabor, *supra* note 22, at 1022–23.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 1023.

<sup>191</sup> *Id.* at 1024.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Pogrebin, *supra* note 18.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

the bill argued that the proposed legislation was too broad, and some proposed carving out an exception.<sup>198</sup> Brodsky, however, believed in an all-or-nothing approach.<sup>199</sup>

Ultimately, the bill proposing to ban museums from using proceeds from the sale of deaccessioned art did not pass.<sup>200</sup> While the attempt to regulate deaccessioning should likely be done on a state level, this particular proposal was in all probability—as critics argued—too broad.<sup>201</sup> Faced with the choice of closing its doors forever or selling works of art, more than one museum has already historically proven that it would prefer the latter.<sup>202</sup> To be tenable, therefore, any legislation concerning deaccessioning should be practical enough to allow museums to protect themselves in times of financial turmoil while balancing the desires of the community to retain works of art accessible to the public.

### B. *The Problem with Standing*

The lack of judicial and legislative guidance are not the only problems plaguing the deaccessioning question. Litigation alone has historically proven to be an insufficient mechanism to protect community interests and ensure that certain works of art do not disappear into private hands.<sup>203</sup> First, interested parties are often prevented from being able to legally enforce ethical guidelines governing deaccessioning practices because of standing issues, as in the Berkshire Museum case.<sup>204</sup> There, the court held that neither the children of Norman Rockwell nor the members or donors of the museum, or even an artist whose work was in the collection of the museum, had standing to sue.<sup>205</sup> Second, while attorneys general—often the only parties who have standing in such cases—have paid increasing attention to issues concerning the deaccessioning of museum

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> See Maneker, *supra* note 21.

<sup>201</sup> *Id.*

<sup>202</sup> See Pogrebin, *supra* note 18.

<sup>203</sup> See generally Rowan v. Pasadena Art Museum, No. C3228171 (Cal. Super. Ct. 1981), reprinted in MERRYMAN & ELSEN, *supra* note 12, at 1282; Adams v. Providence Athenaeum, No. Civ.A. 03-4513, 2004 WL 2075128 (R.I. Super. Ct. Aug. 13, 2004), *aff'd sub nom.* Adams v. Christie's Inc., 880 A.2d 774 (R.I. 2005).

<sup>204</sup> Rockwell v. Trs. of Berkshire Museum, No. 1776CV00253, 2017 WL 6940932 (Mass. Super. Ct. Nov. 7, 2017).

<sup>205</sup> *Id.*



collections, they cannot be solely relied on to remedy the problem.<sup>206</sup> Notably, while the Attorney General in the Berkshire case did join in the litigation after the other plaintiffs were determined not to have standing, ultimately, this did not save the Rockwells from sale.<sup>207</sup> One major pitfall in that case was that the Attorney General was seen as entering the case only after mounting pressure from the public.<sup>208</sup> Her seeming reluctance to bring the suit signaled to the court that the problem flagged by the original plaintiffs was not sufficiently grave to warrant a finding in their favor.<sup>209</sup>

Therefore, because of standing issues, the threat of litigation is insufficient insurance to provide oversight for a museum's decisions in deaccessioning cases. A possible solution could be to expand standing.<sup>210</sup> However, such proposals are typically opposed by museums due to fears of harassing and unfounded suits.<sup>211</sup> Such a fear may be overstated.<sup>212</sup> In 1945, Wisconsin enacted a statute allowing "any 10 or more interested parties" to bring suit without the involvement of the Attorney General.<sup>213</sup> There is no evidence to suggest that Wisconsin charities have suffered as a result.<sup>214</sup>

There are three potential strategies to counter museums' fears against harassing litigation.<sup>215</sup> The first is to limit standing to parties that have proved themselves to be genuinely interested in the welfare of the museum, such as those who are members of groups that support museums for at least a few years.<sup>216</sup> In the Berkshire Museum case, this would have ensured that the plaintiffs had standing, since the museum members, donors, Rockwell children, and the artist whose work was held in the museum's collection had proven ties to the museum and its welfare.<sup>217</sup>

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<sup>206</sup> MERRYMAN & ELSEY, *supra* note 12, at 1217 ("Attorney General intervention is too infrequent and adventitious to provide a credible threat of imminent, informed legal action. In states with tens or hundreds of thousands of charitable organizations the Attorney General has only a few staff attorneys to supervise them. Even when a possible transgression comes to their attention, motivation to act is a problem. Trustees tend to wealthy, influential people. Attorneys General are not eager to push them around.").

<sup>207</sup> *Rockwell*, 2017 WL 6940932.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> MERRYMAN & ELSEY, *supra* note 12, at 1111.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1111–12.

<sup>216</sup> *Id.*

<sup>217</sup> *Rockwell v. Trs. of Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932 (Mass. Super. Ct. Nov. 7, 2017).

The second possibility is to ensure that plaintiffs in such cases do not stand to personally gain from such litigation by limiting possible remedies,<sup>218</sup> presumably only to those that would affect the institution itself.<sup>219</sup> Again using the example of the Berkshire Museum, this would have meant that the plaintiffs would not have been entitled to monetary damages had the case been decided in their favor.<sup>220</sup> The remedy would have been limited to injunctive relief to prevent the Sotheby's auction from taking place.<sup>221</sup>

The third possible and more problematic solution is to allocate fees to discourage frivolous litigation, possibly by requiring potential plaintiffs to post securities.<sup>222</sup> This is the least preferable option, as it would essentially limit standing to those plaintiffs who had the financial means to pay for fees up front.<sup>223</sup> This is particularly problematic in the community context, since it would do more to discourage individuals such as museum members—who might be of limited financial means—from bringing suits than to protect art from being deaccessioned. Nevertheless, if this possibility could overcome museum opposition to the expansion of standing, it could still be tenable.<sup>224</sup> In the Berkshire Museum case, for example, this could have meant that museum donors, but not museum members, had standing.<sup>225</sup>

### C. *Deaccessioning: The European Model*

In contrast to the United States, where deaccessioning is governed primarily by ethical considerations, there are two primary schools of thought on deaccessioning laws in Europe.<sup>226</sup> A recent study conducted on deaccessioning refers to the two movements as the Latin and Anglo-Saxon traditions.<sup>227</sup> Southern European countries, including Spain, Italy, Greece, Romania, and France represent the Latin tradition, while northwestern European countries, including the United Kingdom and

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<sup>218</sup> MERRYMAN & ELSÉN, *supra* note 12, at 1111–12.

<sup>219</sup> *Id.*

<sup>220</sup> *Rockwell*, 2017 WL 6940932.

<sup>221</sup> *Id.*

<sup>222</sup> MERRYMAN & ELSÉN, *supra* note 12, at 1111–12.

<sup>223</sup> *Id.*

<sup>224</sup> *See supra* note 215.

<sup>225</sup> *Rockwell*, 2017 WL 6940932.

<sup>226</sup> DIEUWERTJE WIJSMULLER, DEACCESSIONING & DISPOSAL IN EUROPE 2008–2017: A RESEARCH ON POSSIBILITIES AND ATTITUDES ACROSS THE EUROPEAN MEMBER STATES 5, 8 (2017), <https://www.museumsanddeaccessioning.com/deaccessioning-research> [<https://perma.cc/TK3Z-FEYG>].

<sup>227</sup> *Id.*

the Netherlands adhere to the Anglo-Saxon tradition.<sup>228</sup> The European Union itself does not regulate deaccessioning practices, leaving legislation to individual member states.<sup>229</sup> Meanwhile, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Council of Museums (ICOM) provide guidance.<sup>230</sup> The ICOM in particular dedicates a significant portion of its code of ethics to the practice of deaccessioning.<sup>231</sup> The guidelines emphasize the importance of accurately documenting and describing the need for deaccessioning of any particular object and state that the proceeds from the sale of art should be used only for the benefit of the museum's collection.<sup>232</sup>

Although the specifics of the legislation differ among states in the European Union, there is a general recognition that art is unlike other commodities and therefore deserving of legal protection.<sup>233</sup> Certain states, such as Italy, Spain, France, and Greece, have gone so far as to enact legislation upholding the principle that cultural property is inalienable.<sup>234</sup> UNESCO and the ICOM guidelines also suggest that works should only be deaccessioned in specific circumstances and with significant transparency.<sup>235</sup>

Spain, Italy, France, and Romania have some of the strictest laws on deaccessioning.<sup>236</sup> Legislation in these states is governed by the principle that once a work of art enters the collection of a museum, it loses its status as an alienable object.<sup>237</sup> Exceptions are made only after approval from a higher body, such as a national government.<sup>238</sup> Strict deaccessioning laws such as these would be impractical in the United States. First, restrictions on sales of property are problematic in the domestic context, where free alienation is considered a bedrock

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<sup>228</sup> *Id.* at 8.

<sup>229</sup> *Id.* at 7–8.

<sup>230</sup> *Id.* at 23–24.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 24.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* French law states, “The collections of the museums of France are imprescriptible.” *Id.* Romanian law states: “The classified movable cultural goods, representing public assets of the State or of the territorial-administrative entities, are inalienable, imprescriptible and exempt from seizure.” *Id.*

<sup>237</sup> *Id.* (“All objects that have once entered the museum inventory or will ever enter the inventory hold a special, protected status that differentiates them from regular state property. The decision to accession the objects into the collection automatically labels the objects of having national value, and, therefore, they must remain in the museum's collection for eternity.”).

<sup>238</sup> *Id.*

principle.<sup>239</sup> Second, American museums are typically privately managed.<sup>240</sup> Thus, involvement from local governments to this extent would be unrealistic. Museums would staunchly oppose extensive governmental oversight as an imposition on their ability to manage their collections and their finances. Deaccessioning is often a vital aspect of collection management.<sup>241</sup> Completely banning museums from selling any works at all would significantly hinder their abilities to remain up-to-date and financially viable.<sup>242</sup>

In other European states, the approach to deaccessioning offers some potential for flexibility.<sup>243</sup> Only objects that have a designated protected status are considered immune from deaccessioning.<sup>244</sup> For example, in Greece, objects are classified based on historical periods, with certain objects considered to be of greater importance to the national heritage than others.<sup>245</sup> Works of art dating to before 1830 are considered inalienable, while more recent pieces may be deaccessioned if deemed appropriate by the relevant supervisory bodies.<sup>246</sup> While this approach is more flexible than that of countries such as Spain and Italy, it would still be problematic in the United States. Simply categorizing objects based on their historical origin would do little to assuage the problems that museums face when maintaining their collections.<sup>247</sup> For example, a museum that is expressly dedicated to contemporary art would not survive for long if it could not sell art dating to a certain time period.<sup>248</sup> Such a museum's collection would run the risk of becoming outdated very quickly, thus threatening the museum's survival.<sup>249</sup>

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<sup>239</sup> See *supra* note 30.

<sup>240</sup> See Weil, *supra* note 32.

<sup>241</sup> See *supra* note 86.

<sup>242</sup> MALARO, *supra* note 7, at 218.

<sup>243</sup> WIJSMULLER, *supra* note 226, at 24–25.

<sup>244</sup> *Id.* at 24.

<sup>245</sup> *Id.* at 25. Cultural property in Greece is classified according to the following categories: "(movable) monuments from before 1453; (movable) monuments from 1453–1830 which constitutes finds from excavations or other archaeological research, or have been removed from immovable monuments as well as icons and other religious objects used for worship dating from the same period; (movable) monuments from 1453–1830, that are classified due to their social, technical, folk, ethnological, artistic, architectural, industrial or in general historic or scientific significance; recent cultural objects more than 100 years old that are classified due to their social, technical, folk, ethnological, artistic, architectural, industrial or in general historic or scientific significance; recent cultural objects that are classified due to their social, technical, folk, ethnological, artistic, architectural, industrial or in general historic or scientific significance." *Id.* at 25.

<sup>246</sup> *Id.*

<sup>247</sup> See MALARO, *supra* note 7, at 218,

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

European states with an even more flexible approach to deaccessioning employ a “two-level” protection system.<sup>250</sup> Such states include Austria, Denmark, Finland, Germany, Ireland, Luxembourg, the Netherlands, Poland, Slovakia, and the United Kingdom.<sup>251</sup> Works of art are classified into two primary categories: those that are considered to be of particular cultural value to the nation are protected by legislation on deaccessioning, while other objects do not receive such protection.<sup>252</sup> Similarly, the region of Flanders in Belgium distinguishes between regular objects and those that are “rare, indispensable, [or have] a special value for collective memory, including the function as a clear reminder, among other things, of persons, institutions, events or traditions that are important for the culture, history or science of Flanders.”<sup>253</sup>

This latter approach holds the most promise in the domestic context. In the United States, this would mean that museum collections would be classified according to community and cultural importance. The Berkshire Museum is one obvious example.<sup>254</sup> There, the Norman Rockwell paintings had particular significance to the Berkshire community because of Rockwell’s ties to Berkshire County and the fact that Rockwell personally donated the works to the museum.<sup>255</sup> Therefore, the Rockwells could have been designated as objects of particular value to the Berkshire community.<sup>256</sup> This would have meant that the Rockwell paintings would have been protected from sale, while other works—potentially of lesser significance to the community—could still have been a source of profit for the museum.<sup>257</sup>

The approach of categorizing works in a museum’s collection based on cultural significance is not without obstacles. First, it would involve substantial efforts on the part of museum staff to review and categorize their collections. This is not an insignificant obstacle, given the sheer volume of works that museums often hold. Second, this approach raises the question of how cultural significance would be established. In order to best represent the interests of the community, it could mean involving museum patrons. This raises the practical impediment of how to involve a potentially vast number of people in

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<sup>250</sup> WIJSMULLER, *supra* note 226, at 29–30.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 29 (alteration in original).

<sup>254</sup> *Rockwell v. Trustees of Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932 (Mass. Super. Ct. Nov. 7, 2017).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

the decision-making process. For example, nearly 7.4 million people visited the three Metropolitan Museum of Art institutions in New York in 2018.<sup>258</sup> It would be difficult to involve such an enormous number of people in the classification of a collection spanning two million square feet.<sup>259</sup>

Nevertheless, these obstacles are not insurmountable. While classifying works based on cultural significance would be a lengthy and labor-intensive process, contemporary collection management systems may be advanced enough to ensure that this process could still be done efficiently.<sup>260</sup> Moreover, the idea of adequately representing the interests of the millions of individuals who patronize museums, as in the case of the Metropolitan, might be intimidating but not impossible. In such cases, art historians might be the better situated parties to make such determinations. In other cases, community input might be more practical. With the Berkshire Museum, for example, which operates on a much smaller scale and is more intimately tied to the community than the Metropolitan Museum of Art, involvement from Berkshire County residents would be more realistic.<sup>261</sup>

### III. PROPOSAL

The current mechanisms in place to govern deaccessioning, including ethical guidelines, fiduciary duties of museums, and interested parties' recourse in the courts do not provide adequate remedies to ensure that museums handle their collections in a way that is satisfying for the public.<sup>262</sup> To date, attempts to enact legislation to govern deaccessioning have been insufficient.<sup>263</sup> The public's continued discontent with a museum's ability to remove a community's most cherished works from its collection—as was the case with the Rockwells at the Berkshire museum—shows that there is a need for a legislative

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<sup>258</sup> Press Release, Metro. Museum of Art, *Met Welcomes Nearly 7.4 Million Visitors in 2018* (Jan. 4, 2019), <https://www.metmuseum.org/press/news/2019/2018-calendar-year-attendance> [<https://perma.cc/LQ7G-4YXL>].

<sup>259</sup> *An Overview of the Museum*, MET (Apr. 2010), <https://www.metmuseum.org/press/general-information/2010/an-overview-of-the-museum> [<https://perma.cc/T2HV-M2ZZ>].

<sup>260</sup> Liz Filardi, *How Does the Met Maintain Half a Million Web Pages Devoted to Art?*, MET (Feb. 20, 2018), <https://www.metmuseum.org/blogs/collection-insights/2018/met-collection-api> [<https://perma.cc/C84F-Q7G4>].

<sup>261</sup> The Berkshire Museum was visited by 40,000 people in a ten-month period in 2019. Letter from the Bd. of Trs., Berkshire Museum, to the Community, <https://berkshireremuseum.org/newvision/the-road-ahead> [<https://perma.cc/9AST-6VJL>].

<sup>262</sup> See *supra* Part II.

<sup>263</sup> See, e.g., *Rockwell v. Trs. of Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932 (Mass. Super. Ct. Nov. 7, 2017).

model that will balance the public's interest in preserving art for ongoing viewership with a museum's need to remain financially viable.<sup>264</sup> Such a model would need to be both flexible and realistic. In other words, simply banning all deaccessioning for purposes other than direct collection management—as the Brodsky bill attempted to do—is unlikely to garner sufficient support.<sup>265</sup>

As an alternative to legislation specific to deaccessioning, standing could be expanded in order to allow interested parties, such as the plaintiffs in the Berkshire Museum case, to challenge a museum's plans to deaccession art.<sup>266</sup> However, given museums' ongoing opposition to proposals to expand standing, adopting the most flexible of the European deaccessioning legislation models is the most tenable option.<sup>267</sup>

As the failure of the overly broad Brodsky bill demonstrates, the strictest European deaccessioning laws would not be practical domestically.<sup>268</sup> Laws such as those enacted in Italy, Spain, France, and Greece, which support an inalienable theory of cultural property, should not serve as a model.<sup>269</sup> Instead, the two-level approach of countries such as Austria, Denmark, Finland, Germany, Ireland, Luxembourg, the Netherlands, Poland, Slovakia, and the United Kingdom should be considered.<sup>270</sup>

Works should be classified in terms of cultural significance. For example, certain works, such as the Rockwells formerly owned by the Berkshire Museum, could be classified as necessitating particular protections.<sup>271</sup> Then states could mandate that such objects, even if deaccessioned, must remain available for public viewership.<sup>272</sup> Had such a law been in place in Massachusetts, this could have ensured that the art was not at risk of privatization.<sup>273</sup> Meanwhile, other works—such as those kept by museums but not displayed—could continue to be deaccessioned without restrictions.<sup>274</sup> This flexible approach would balance the need of museums to raise funding when necessary while

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<sup>264</sup> *Id.*

<sup>265</sup> Pogrebin, *supra* note 18.

<sup>266</sup> *Rockwell*, 2017 WL 6940932, at \*4–7.

<sup>267</sup> MERRYMAN & ELSER, *supra* note 12, at 1111.

<sup>268</sup> See, e.g., Maneker *supra* note 21; see also WIJSMULLER, *supra* note 226, at 10–11.

<sup>269</sup> WIJSMULLER, *supra* note 226, at 24.

<sup>270</sup> *Id.* at 29.

<sup>271</sup> See, e.g., *Rockwell*, 2017 WL 6940932.

<sup>272</sup> See *supra* Section II.C.

<sup>273</sup> *Rockwell*, 2017 WL 6940932.

<sup>274</sup> See *supra* Section II.C.

ensuring that culturally significant artwork does not disappear from public view.

#### CONCLUSION

Museums that deaccession major works of art face harsh criticism and intense scrutiny from the public and the art world alike, as demonstrated yet again during the past year as a result of pandemic-related financial pressures faced by museums.<sup>275</sup> The mechanisms that currently exist to ensure that museums comply with ethical obligations and fiduciary duties are insufficient to enforce deaccession practices that lead to satisfying results. Similarly, recourse to the courts does not provide for an adequate remedy due to the difficulty of establishing standing for interested parties. Legislative guidance is therefore needed in order to establish enforceable provisions for deaccession practices. Transparency, oversight, and accountability are some of the factors that would improve this process. While the history and structure of American museums do not make a total ban on alienability of cultural property belonging to museums practical, the most flexible of the European deaccessioning models would be successful in the United States. Legislation requiring museums to classify objects based on cultural and community significance would balance the interests of communities in maintaining access to such works with the needs of museums to manage their collections by deaccessioning other works of art in order to raise funds and keep their collections current.

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<sup>275</sup> Pogrebin & Small, *supra* note 17.