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## NOTE

### **The Destruction Gap: A Study of the Unprotected Societal Interest in Privately Held Artworks**

*Jessica Schmitz\**

#### I. INTRODUCTION

Imagine putting a Warhol through a washing machine, a Rembrandt in a recycling bin, or a Seurat in a shredder. If you are the lucky owner of a masterpiece by one of these artists you may take any of these actions and face no legal repercussions, thereby destroying the artwork and removing it from the cultural landscape.<sup>1</sup> Our understanding of world history would be neither as beautiful, illuminated, nor as informed if artworks of cultural significance like these were destroyed.<sup>2</sup> For example, little would be known of the ideologies of pre-historic civilizations but for the sculptures, wall paintings, and other artistic endeavors our predecessors have left behind.<sup>3</sup> Beyond their historical significance, these original works of art can improve critical thinking skills and the viewers' mood.<sup>4</sup> Thus, there is

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<sup>1</sup> 17 U.S.C. § 106A (1990).

<sup>2</sup> Ashley Gonzalez, *What is the Value of Creative Works of Art to a Society*, 15 *ESSAI* 46, 46 (2017).

<sup>3</sup> Morton H. Levine, *Prehistoric Art and Ideology*, 59 *AM. ANTHROPOLOGIST* 949, 949-50 (1957) ("Where [the material remains of past civilizations include art] . . . we may be able to add an ideological dimension to our understanding of ancient people.").

<sup>4</sup> Jay P. Greene et al., *The Educational Value of Field Trips*, *EDUC. NEXT* (Sept. 16, 2013), <https://www.educationnext.org/the-educational-value-of-field-trips/> [https://perma.cc/ULX8-WRLN]; Richard Alleyne, *Viewing Art Gives Same Pleasure as Being in Love*, *THE TELEGRAPH* (May 8, 2011, 4:54 PM),

a general societal interest in preserving our shared artistic history for generations to come.<sup>5</sup>

This societal interest, however, is not itself a generally recognized property interest. Further, it must co-exist with the owner's own recognized interest in the work as personal property and the artist's recognized interest as protected by copyright.<sup>6</sup> Thus, there are three competing interests in any artwork – that of the public, the collector, and the artist – and each interest holder has different rights to destroy or prevent destruction. Consequently, who makes decisions related to a work of art is a complex question.

Private collectors have played an essential role in conserving art, as they often preserve works that would otherwise be ignored or abandoned.<sup>7</sup> However, even though collectors serve this positive purpose for society, they are subject to no formal legal responsibility for the art's care and protection.<sup>8</sup> If they so choose, this unqualified ownership permits collectors to indulge in a private desire to destroy art, thereby eliminating public benefits.<sup>9</sup> As art endures long after an individual owner's sensibilities have been “relegated to history's attic” there is a collective interest in protecting it against an owner's inclination to destroy it.<sup>10</sup> This collective interest is particularly important when the work is one of historical significance and recognized stature that cannot be easily reproduced.

This Note will review two safeguards against the destruction of artwork held by private collectors – droit moral laws and museum deaccessioning regulations – and present the legal gap – the “destruction gap” – that remains in protecting a societal interest in such works. Part II assesses the various interests in a work of art, the historical development of safeguards to protect these interests and analyzes the safeguards' weaknesses. Part III presents recent developments in these safeguards, and Part IV suggests gap-filling measures that could be enacted to resolve these safeguards' weaknesses.

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<https://www.telegraph.co.uk/culture/art/8501024/Viewing-art-gives-same-pleasure-as-being-in-love.html> [<https://perma.cc/DWM3-F8EB>].

<sup>5</sup> JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT 17, 50 (1999). “[A]s Professor John Merryman, an art law expert, has said, the idea that the public has an interest in preserving art is certainly not novel.” *Id.* at 24.

<sup>6</sup> See, e.g., Danielle Ollero, *Off the Walls*, WASH. J.L., TECH. & ARTS (Apr. 24, 2017), <https://wjlt.com/2017/04/24/off-the-walls/> [<https://perma.cc/DFQ5-6TMV>].

<sup>7</sup> SAX, *supra* note 5, at 63.

<sup>8</sup> *Id.* at 60.

<sup>9</sup> *Id.* at 63–64.

<sup>10</sup> *Id.* at 18, 20.

## II. LEGAL BACKGROUND

To understand non-ownership interests in a work of art, including society's general interest, it is critical to first recognize the broader landscape of interests that exist in any given piece. This Part begins by providing an overview of these interests, followed by a closer look in the subsequent two sections at the current safeguards that have arisen to protect non-ownership interests - droit moral laws and museum deaccessioning regulations.

### A. Ownership and Destruction

Under the traditional labor theory of property law, one who mixes their labor with an article is the owner of the product.<sup>11</sup> This simple formulation, however, is not easily applied to a creative, commingled product.<sup>12</sup> When an artwork is produced, there may be multiple parties claiming an ownership interest – a copyright interest in the one who created the work intellectually,<sup>13</sup> a personal property interest in the one who completed the work through physical labor, and a personal or real property interest in the one who later purchases the work.<sup>14</sup> For example, if an aerosol artist puts a painting on someone else's building, the building owner's real property interest would typically grant them exclusive dominion over modification of the property, but an artist's copyright interest also grants the artist exclusive dominion over modification of the work.<sup>15</sup> Therefore, in this situation, akin to a forced co-ownership, who decides the fate of an artwork is not always clear.

The conflict that arises from this forced co-ownership demonstrates that the artist's interest is somewhat protected through copyright law.<sup>16</sup>

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<sup>11</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 216–17 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). The author uses third-person plural pronouns in lieu of gendered third-person singular pronouns. *Id.*

<sup>12</sup> *Accession on the Frontiers of Property*, 133 HARV. L. REV. 2381, 2381 (2020) [hereinafter *Accession*].

<sup>13</sup> Even here, this interest can get more confusing as the copyright can be sold and also created via work-made-for-hire while other aspects attach to the artist. See U.S. COPYRIGHT OFF., WORKS MADE FOR HIRE (2012), <https://www.copyright.gov/circs/circ09.pdf> [<https://perma.cc/MNS2-3XB8>].

<sup>14</sup> *Accession*, *supra* note 12, at 2381.

<sup>15</sup> *Id.* at 2387.

<sup>16</sup> 17 U.S.C. § 202 (1976) (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any

However, for the general societal interest in preserving artwork, there is no such *legal* avenue through which a concerned party may intervene. This is particularly true in the United States, where individualistic ownership rights are praised, and interference with such rights is feared.<sup>17</sup> A famous art collector, Douglas Cramer, parroted this sentiment when he said, “I don’t care if you have a thousand pictures in your possession, you have an American right to dispose of them as you chose.”<sup>18</sup> American jurisprudence exemplifies this tension between the “private property rights of the individual and culturally legislated imperatives of the commonality.”<sup>19</sup>

The tension that arises from this clash of interests is felt poignantly in the realm of art destruction.<sup>20</sup> Historically, art was viewed largely as the product of religious life or social power, and art destruction was largely driven by clashes of power or religion.<sup>21</sup> For example, when a conqueror took over a new city they regularly stole or destroyed artwork to evidence their power. It was only beginning in the 17<sup>th</sup> and 18<sup>th</sup> centuries that the radically secular idea of art as the work of individual genius took hold.<sup>22</sup> After the value of an artwork in itself was recognized, efforts were undertaken to protect these cultural remains from destruction.<sup>23</sup> This goal was first recognized in American legislative history during the Civil War when Francis Lieber included in the first military code of conduct a clause that said, “In no case shall [works of art] be...wantonly *destroyed* or

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rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.”).

<sup>17</sup> James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL’Y 27, 30 (2012) (“[A] number of the early state constitutions . . . employed Lockean language and explicitly linked individual liberty with the right to private property.”); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (1980) (“Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.”).

<sup>18</sup> SAX, *supra* note 5, at 69 (quoting Douglas Cramer).

<sup>19</sup> ALEXANDRA DARRABY, DARRABY ON ART LAW, § 1:5 (2021).

<sup>20</sup> SAX, *supra* note 5, at 17 (An instance of intentional destruction is particularly problematic not because “the owner has no credible interest, but [because] there is another legitimate interest in tension with it.”).

<sup>21</sup> DARRABY, *supra* note 19, at § 1:5.

<sup>22</sup> SAX, *supra* note 5, at 18.

<sup>23</sup> Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or A Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 338–41 (2016).

injured.”<sup>24</sup> An expansive history of protecting art, specifically from war and looting, followed from this time.<sup>25</sup>

Although the history of art destruction is mostly filled with stories of politically and religiously motivated acts, there are unfortunate instances of intentional destruction at the whim of the owner.<sup>26</sup> Artworks may be intentionally destroyed by a variety of persons, including those who commissioned the artwork, collectors, the artists themselves, and the subjects of the artwork.<sup>27</sup> For example, one collector purchased a work by Gustave Courbet with the express purpose of destroying it.<sup>28</sup> Since the time of the Lieber code, Congress has enacted further laws to try and combat such destruction, such as national landmark laws.<sup>29</sup> However, these laws only offer protection as long as the art is not owned by a private collector.<sup>30</sup> For example, France enacted similar laws that restrict the sale or export of certain works it considers part of the national heritage, but

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<sup>24</sup> FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 13 (1898) (emphasis added); *see also* Gerstenblith, *supra* note 24, at 338–41.

<sup>25</sup> Major Kevin D. Kornegay, *Destroying the Shrines of Unbelievers: The Challenge of Iconoclasm to the International Framework for the Protection of Cultural Property*, 221 MIL. L. REV. 153, 158–66 (2014).

<sup>26</sup> SAX, *supra* note 5, at 27. Defining “intentional destruction” in relation to art can be a complex issue as not all artworks are fixed, physical objects. *Id.* For example, for a site-specific work like a sculpture it might just be moving the piece from its original location that amounts to destruction. *Id.* Other artists work with materials that are inherently impermanent such as Damien Hirst who suspended a dead shark in formaldehyde, called it *The Physical Impossibility of Death in the Mind of Someone Living* and sold it at auction for \$6.5 million. Cristina Ruiz & Gareth Harris, *Damien Hirst in talks to replace rotting shark*, ART NEWSPAPER (June 30, 2006, 11:00 PM), <https://www.theartnewspaper.com/archive/damien-hirst-in-talks-to-replace-rotting-shark> [<https://perma.cc/2XMW-69R4>].

<sup>27</sup> SAX, *supra* note 5, at 15. In 1934 the Rockefeller family commissioned a mural by Diego Riviera and when they did not like some of the images the family hired workmen to destroy it. *Id.* In 2018 Banksy, a well-known street artist, put an artwork up for auction that he created to shred itself during the auction to the surprise of attendees. Kenny Schachter, *Here’s What Really Happened with Banksy’s Art-Shredding Stunt at Sotheby’s, According to Kenny Schachter’s Source*, ARTNET (Oct. 17, 2018), <https://news.artnet.com/opinion/kenny-schachter-on-banksy-at-sothebys-stunt-1372921> [<https://perma.cc/9F6H-VDG7>]. An unflattering portrait was painted of Winston Churchill, and he disliked it so much that his wife left it next to the boiler for many years so that it would be destroyed. SAX, *supra* note 5, at 25.

<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Case Law & Statutes*, INT’L FOUND. FOR ART RSCH., [https://www.ifar.org/case\\_law\\_statutes.php](https://www.ifar.org/case_law_statutes.php) [<https://perma.cc/QQ6W-PQAU>] (last visited Apr. 17, 2021).

<sup>30</sup> SAX, *supra* note 5, at 25–26.

once sold to a new owner within France, that owner owes no obligation to the public.<sup>31</sup> Therefore, once in private hands, a priceless Degas or Monet could disappear forever.

The cultural laws that have been enacted are important resources for protecting national heritage, but none of them deal directly with protecting society's interest against destruction by private collectors. The tension between private ownership and a general societal interest leaves open a destruction gap. The analysis that follows reviews two safeguards that allow a non-owner interest holder to exert at least some influence to protect an artwork from destruction and fill this gap: *droit moral* laws and museum deaccessioning regulations.

### *B. Droit Moral (Moral Rights) Laws*

The moral rights theory, first accepted under French law, recognizes that there are two elements to creative works: “the economic aspect, which treats the works as a good in commerce, and the personal aspect, which treats the work as an expression of the author’s personality.”<sup>32</sup> *Droit moral* laws were created to protect this latter element.<sup>33</sup> Under *droit moral* laws, art is not just an object but a part of the artist’s personality that embodies their reputation.<sup>34</sup> These laws entitle artists to protect their reputation by preventing others from altering their works.<sup>35</sup> The moral rights provided under *droit moral* laws are personal to the artist and exist independent of the artist’s copyright.<sup>36</sup>

*Droit moral* laws were first adopted by the Berne Convention for the Protection of Literary and Artistic Works in 1886.<sup>37</sup> Although the United States became a signatory in 1988, Congress made clear that American

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<sup>31</sup> *Id.* at 64.

<sup>32</sup> Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward A Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 949 (1990).

<sup>33</sup> *Id.*; RALPH E. LERNER & JUDITH BRESLER, ART LAW 417 (1989).

<sup>34</sup> SAX, *supra* note 5, at 22.

<sup>35</sup> *Droit Moral*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>36</sup> 17 U.S.C. § 106A(a) (1990) (“independent of the exclusive rights provided in section 106”).

<sup>37</sup> THE BERNE CONVENTION, 1 COPYRIGHT LAW IN BUSINESS AND PRACTICE § 1:63 (rev. ed.). (“The Berne Convention confers reciprocal protection for works by authors of participating nations . . . .”); Berne Convention, art. 6*bis*, para. 1, 41 (1886) (“Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”)

participation did not confer any “moral rights” on artists in the United States.<sup>38</sup> It was not until the passage of the Visual Artist Rights Act (“VARA”) of 1990 that artists received moral rights in the United States, and to date, VARA remains the only federal law which explicitly protects these rights.<sup>39</sup> Even after its passage, VARA offered fewer protections than similar provisions of the Berne Convention.<sup>40</sup> In part, *droit moral* laws were slower to take hold and more limited in the United States because they defy the American ideal of complete ownership.<sup>41</sup> When California was passing a law similar to VARA, one legislator’s adverse reaction to this type of regulation elicited the statement: “it’s mine, I can do anything with it, I can cut it up if it’s too big for a certain place that I want to put it.”<sup>42</sup>

VARA explicitly protects two set of rights: attribution and integrity.<sup>43</sup> Attribution is the right of an artist to be recognized by name as the author of their work, and integrity allows the author to prevent destructive and mutilating changes to their work even after title transfers.<sup>44</sup> The latter of these rights is what protects against destruction. Under VARA an artist has the right “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her reputation...[and] to prevent any destruction of a work of recognized stature...”<sup>45</sup> To prevail on a VARA claim, a plaintiff must prove that the work was intentionally destroyed, or alternatively, that it is of recognized stature and was destroyed in a grossly negligent manner.<sup>46</sup> Destruction does not include modification as a result of the inherent nature of the materials or the passage of time.<sup>47</sup>

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<sup>38</sup> THE BERNE CONVENTION, *supra* note 38, at § 1:63.

<sup>39</sup> 17 U.S.C. §106A; Damich, *supra* note 33, at 947; Cathay Y. N. Smith, *Creative Destruction: Copyright's Fair Use Doctrine and the Moral Right of Integrity*, 47 PEPP. L. REV. 601, 614 (2020).

<sup>40</sup> Damich, *supra* note 33, at 947–48.

<sup>41</sup> Sonya G. Bonneau, *Honor and Destruction: The Conflicted Object in Moral Rights Law*, 87 ST. JOHN'S L. REV. 47, 54 (2013) (“Lawmakers considered moral rights incompatible with the classic social utility model of copyright law and the corresponding principle of unlimited alienability.”).

<sup>42</sup> SAX, *supra* note 5, at 21.

<sup>43</sup> LERNER & BRESLER, *supra* note 34, at 421.

<sup>44</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

<sup>45</sup> 17 U.S.C. §§ 106A(a)(3)(A), (B); SAX, *supra* note 5, at 25.

<sup>46</sup> *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

<sup>47</sup> 17 U.S.C. § 106A(c)(1).



In a VARA claim, a wide variety of civil remedies are available to the artist.<sup>48</sup> An artist may sue for injunctive relief if they believe their work is in imminent danger of being destroyed or, more commonly, for monetary damages for an already destroyed work.<sup>49</sup> Actions that have been found to cause sufficient destruction to violate an artist's moral right of integrity include: "altering a mural by painting clothing over nude figures, selling separated panels of a single work of art, and displaying sculptures with holiday ribbons."<sup>50</sup>

Although VARA offers artists protection against destruction, the statute includes a number of limiting factors. First, the statute offers protection only to authors who create visual art.<sup>51</sup> This means authors of other creative works such as books, plays, or music are excluded.<sup>52</sup> Second, VARA limits protection against destruction to intentional acts unless the work can be proved to be of recognized stature – a standard met only after a rigid two-part test.<sup>53</sup> Third, VARA's protections are time limited to works created on or after June 1, 1991 whose copyrights have not been transferred, and such protections persist only for the artist's lifetime as moral rights may not be transferred.<sup>54</sup> Fourth, VARA does not protect the work from the artist themselves; the artist may waive their rights under VARA, and if they want the artwork destroyed preventing that destruction would be a violation of VARA.<sup>55</sup> Finally, VARA is subject to section 107 of Title 17 of the United States Code which creates a fair use defense to VARA claims.<sup>56</sup>

Even if a claimant surmounts these limiting criteria, VARA still does not necessarily prevent destruction. VARA does not force owners to keep

<sup>48</sup> *Carter*, 71 F.3d at 83.

<sup>49</sup> *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228, 231 (S.D.N.Y. 1994); *Scott*, 309 F. Supp. 2d at 400 (the claim failed because the court found the sculpture was not of recognized stature).

<sup>50</sup> *Smith*, *supra* note 40, at 601.

<sup>51</sup> 17 U.S.C. § 106A(a).

<sup>52</sup> *Smith*, *supra* note 40, at 614–15 (Works of visual arts includes exclusively "paintings, drawings, prints, sculptures, or still photographic images produced for exhibition purposes, 'existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered.' Works made for hire are also excluded from VARA's protection . . ." (quoting 17 U.S.C. § 101)).

<sup>53</sup> 17 U.S.C. § 106A(a)(3)(B); Charles G. Wentworth, *Don't Deface My Painting! Artists' Rights Under Illinois and Federal Law*, 25 DCBA J. 20, 22 (2013).

<sup>54</sup> *Damich*, *supra* note 33, at 974; 17 U.S.C. §§ 106A(d)(1), (e)(1).

<sup>55</sup> 17 U.S.C. § 106A(e)(1); Richard Chused, *Protectable "Art": Urinals, Bananas, and Shredders*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 166, 220–21 (2020).

<sup>56</sup> 17 U.S.C. §§ 106A(a), 107(1)–(4).

an artwork indefinitely but merely requires giving an artist ninety days' notice of the owner's intention to destroy the work so artists can come remove it themselves, at their own expense.<sup>57</sup> This means that artists often do not have a chance to actually prevent destruction, and the best result is some compensation for a destroyed work.<sup>58</sup> Some states have enacted their own *droit moral* statutes, but only two such laws are more expansive than VARA and "expressly command private owners to preserve works of art for the benefit of the public."<sup>59</sup>

One such statute is the California Art Preservation Act (the "CAPA").<sup>60</sup> CAPA is premised on a legislative finding that "there is a public interest in preserving the integrity of cultural and artistic creations."<sup>61</sup> Though CAPA is more expansive, it is still weak. For example, it does not specifically deal with neglect and therefore imposes no duty of care, so even under the Act, a private owner is free to put a painting next to the radiator and let it deteriorate naturally.<sup>62</sup> Although CAPA affords the public a right of action, it appears that it has yet to be used, and the vast majority of cases that cite CAPA have involved challenges brought by outdoor mural artists.<sup>63</sup>

Overall, while federal and state *droit moral* statutes allow living artists to attempt to prevent the destruction of their artwork or to recover for the destruction afterwards, even the most expansive among them do little to protect the outside societal interest in stopping destruction by private collectors.

### C. Museum Deaccessioning Regulations

Artworks held in the collection of a public non-profit institution – the legal structure of many art museums in the United States – are afforded greater protection against destruction because these collections are

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<sup>57</sup> Laura Gilbert, *Why the Visual Artists Rights Act Is Failing*, ARTSY (Sept. 29, 2015, 10:20 AM), <https://www.artsy.net/article/artsy-editorial-why-the-visual-artists-rights-act-is-failing-to-protect-street-art-and-murals> [<https://perma.cc/4QGE-8M55>].

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

<sup>59</sup> CAL. CIV. CODE § 987 (1995); N.Y. ARTS & CULT. AFF. LAW § 14.03 (1995). Nine other states have also passed moral rights statutes, generally following either the California or New York models. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82 (2d Cir. 1995). SAX, *supra* note 5, at 22 ("[A] few states departed from the narrow reputational view of moral rights. Some granted to the artist a right against destruction as well as mutilation or alteration.").

<sup>60</sup> CAL. CIV. CODE § 989 (1995).

<sup>61</sup> SAX, *supra* note 5, at 20.

<sup>62</sup> *Id.* at 24, 29.

<sup>63</sup> *Id.* at 26.

deemed to be held in the public trust.<sup>64</sup> Holding an artwork in the public trust means that an institution must be transparent and use its collections in a manner consistent with donor intent and the public interest.<sup>65</sup> When such an institution removes an artwork from its collection, this protection, as well as public access to the work, is lost and the work is put back into the realm of un-regulated private collecting.<sup>66</sup> Deaccessioning is the process by which an artwork is permanently removed from a museum's collection.<sup>67</sup> Deaccessioning is legal, but because of the risks associated with a return to private ownership, it is highly regulated and often garners critique.<sup>68</sup>

Deaccessioning is typically undertaken as a means of fundraising.<sup>69</sup> Museums use funds raised through sales of deaccessioned works to “improve the usefulness of a collection, to adhere to the intentions and mission of the museum, or to acquire other works of art that will better suit the needs of the collection.”<sup>70</sup> These potential uses of deaccessioning funds form the center of the deaccessioning dilemma policy debate – between legitimate funding concerns and the risk to an artwork that deaccessioning poses.<sup>71</sup> This conflict is particularly poignant when the funds raised from deaccessioning could be the difference between a museum remaining open or having to close.<sup>72</sup> Those who favor

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<sup>64</sup> Sarah Elizabeth Strickland, *Museums Without Monet Let Art Gogh: Deaccession Proceeds and Court Involvement*, 6 SAVANNAH L. REV. 24, 33–35 (2019); see also *Board Roles and Responsibilities*, NAT'L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/tools-resources/board-roles-and-responsibilities> [https://perma.cc/XDD2-7WCU] (last visited Apr. 17, 2021).

<sup>65</sup> *Public Trust and Accountability Standards*, AM. ALL. MUSEUMS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/public-trust-and-accountability-standards/> [https://perma.cc/X94F-7TCP] (last visited Apr. 17, 2021).

<sup>66</sup> See MARIE C. MALARO, *A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS* 217 (2d ed. 1998).

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

<sup>68</sup> *Id.* at 219 (“The general authority of a museum to deaccession can be questioned even though there is no specific prohibition in the museum's charter limiting such activity.”).

<sup>69</sup> Olivia Baker, *Museums and COVID-19: from Deaccessioning to Reopening*, CTR. FOR ART L. (June 25, 2020), <https://itsartlaw.org/2020/06/25/museums-and-covid-19-from-deaccessioning-to-reopening/> [https://perma.cc/27KK-BWME].

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

<sup>71</sup> Bob Beatty, *The Deaccessioning Debate in Museums*, HYPERALLERGIC (Aug. 2, 2018), <https://hyperallergic.com/453416/the-deaccessioning-debate-in-museums/> [https://perma.cc/F7GG-SUS4].

<sup>72</sup> Mason Kerns, *Selling the Picasso to Fix the Plumbing: An Analysis of Five High-Profile Deaccessioning Attempts*, in SR005 ALI-ABA 217, 221–30 (2010).

deaccessioning argue that legal and societal restrictions on the process already in place will prevent harmful disposal of artworks.<sup>73</sup> However, these legal avenues and societal pressures, detailed below, often fail to protect the art.<sup>74</sup>

The legal avenues that may inhibit deaccessioning include donor restrictions in wills, trusts, and contracts and the fiduciary duties that bind non-profit institutions.<sup>75</sup> Donors are able to constrain the use of their gifts in various ways, often by prohibiting sale.<sup>76</sup> Breaches of these restrictions are challenged under contract or trust law.<sup>77</sup> However, when challenged, these restrictions have rarely been enforced if not challenged by the original donor, leaving a gap in protection as deaccessioning often occurs long after the donor has passed away.<sup>78</sup> Even if there are no explicit donor restrictions placed on a gift, non-profit institutions are bound by three fiduciary duties, the duties of care, loyalty, and obedience.<sup>79</sup>

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<sup>73</sup> Sebastian Smee, *This is how bad things are for museums: They now have a green light to sell off their art*, WASH. POST (Apr. 30, 2020, 6:15AM), [https://www.washingtonpost.com/entertainment/museums/this-is-how-bad-things-are-for-museums-they-now-have-a-green-light-to-sell-off-their-art/2020/04/29/b5492a5e-899e-11ea-8ac1-bfb250876b7a\\_story.html](https://www.washingtonpost.com/entertainment/museums/this-is-how-bad-things-are-for-museums-they-now-have-a-green-light-to-sell-off-their-art/2020/04/29/b5492a5e-899e-11ea-8ac1-bfb250876b7a_story.html) [].

<sup>74</sup> Kerns, *supra* note 73, at 219–30.

<sup>75</sup> Daniel Grant, *Should Museums Be Allowed to Sell Donated Works of Art?*, OBSERVER (Jan. 24, 2018, 12:40 PM), <https://observer.com/2018/01/berkshire-museum-sale-could-change-how-museums-deaccession-donated-art/> [<https://perma.cc/G5HS-L3Y8>].

<sup>76</sup> *Id.* (“Whether they are loath to pay taxes or just want their artworks kept together as a group (or both), that last option tends to be favored. Still, art has a value for its owners beyond the dollars and cents . . . . As a result, when they look to donate objects or whole collections, they often seek to attach certain conditions and restrictions to the gift.”).

<sup>77</sup> *Randolph College v. SunTrust Bank*, No. CL07001745-00, at 1–2 (Vir. Cir. Ct. 11 Sept. 2007); *Georgia O’Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1, 1 (Tenn. Ct. App. 2009).

<sup>78</sup> *See, e.g.*, cases cited *supra* note 78. For example, Georgia O’Keeffe donated artwork to the Fisk University Art Museum with a condition that the work could not be sold. Strickland, *supra* note 65, at 34. However, when the Fisk decided to sell 50% of their collection to raise funds the O’Keeffe foundation was unable to step in to stop the sale. *Id.* The court was unpersuaded by the foundation’s argument that they had a residual right in the artwork. *Id.*; Kerns, *supra* note 73, at 223–25.

<sup>79</sup> Strickland, *supra* note 65, at 34; *see also Board Roles and Responsibilities*, *supra* note 65 (“Duty of Care: Take care of the nonprofit by ensuring prudent use of all assets, including facility, people, and good will; Duty of Loyalty: Ensure that the nonprofit’s activities and transactions are, first and foremost, advancing its mission; Recognize and disclose conflicts of interest; Make decisions that are in the best interest of the nonprofit corporation; *not in the best interest of the individual board member* (or any other individual or for-profit entity). Duty of Obedience: Ensure that

One deaccessioning challenge alleging a breach of the fiduciary duty of care occurred at the Berkshire Museum in Massachusetts.<sup>80</sup> In 2017 the board of trustees voted to deaccession forty of the museum's most valuable works.<sup>81</sup> The goal of the sale was to pay for capital expenditures and to create an endowment.<sup>82</sup> The Massachusetts Attorney General's office investigated the sale but, aside from a few conditions, allowed it to proceed.<sup>83</sup> The Massachusetts Cultural Council called the move a deep violation of public trust and filed suit as part of a larger group to try and prevent the sale.<sup>84</sup> However, the court permitted the deaccessioning to move forward after determining that the group lacked standing under corporation law.<sup>85</sup> Unless brought by the original donor or artist the majority of these deaccessioning challenges fail on standing grounds.<sup>86</sup> The story of the Berkshire Museum demonstrates "how unaccountable a museum director can be, and how much destruction can be wrought during a single secret trustee meeting."<sup>87</sup> This failure also shows poignantly how a group with a general societal interest like the Council, is not permitted a legal avenue to pursue an action, even in a highly criticized sale in which sanctions were later imposed, as discussed further below.<sup>88</sup> In nearly every

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the nonprofit obeys applicable laws and regulations; follows its own bylaws; and that the nonprofit adheres to its stated corporate purposes/mission." These duties are typically codified in each state's Nonprofit Corporation Law. *See, e.g.*, LA. STAT. ANN. § 12:226 (2017).

<sup>80</sup> Felix Salmon, *The Lost Masterpieces of Norman Rockwell Country*, NEW YORKER (Oct. 4, 2017), <https://www.newyorker.com/culture/culture-desk/the-lost-masterpieces-of-norman-rockwell-country> [<https://perma.cc/3L29-W7K3>].

<sup>81</sup> *Id.*

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

<sup>83</sup> Andrew Russeth, *Berkshire Museum Victory: Massachusetts Attorney General Agrees to Art Sales, With Rockwell Going to Public Institutions, Some Conditions*, ARTNEWS (Feb. 9, 2018, 5:04 PM), <https://www.artnews.com/art-news/news/berkshire-museum-victory-massachusetts-attorney-general-agrees-art-sales-rockwell-going-public-institution-conditions-9793/> [<https://perma.cc/B9GS-3RBC>].

<sup>84</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/L88G-Q8LJ>].

<sup>85</sup> Salmon, *supra* note 81; *Hatt v. McGraw*, 94 Mass. App. Ct. 1103 (2018); Colin Moynihan, *Judge Allows Berkshire Museum to Sell Rockwell Painting and Other Works* (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/arts/berkshire-museum-norman-rockwell.html> [<https://perma.cc/9HZN-6L8P>].

<sup>86</sup> *See* sources cited *supra* note 79.

<sup>87</sup> Salmon, *supra* note 81.

<sup>88</sup> Smee, *supra* note 74.

instance in which one of these legal arguments – donor restriction or breach of fiduciary duty – has been used to challenge a museum’s action, it has failed to prevent the deaccessioning.<sup>89</sup>

Because legal protections against deaccessioning have proven inadequate, societal pressures and ethical guidelines have regulated deaccessioning practices.<sup>90</sup> As advised in the legal primer on managing museum collections, keeping the public in mind when considering deaccessioning is paramount as “[a] museum exists to serve its public, and to be truly effective, it must maintain the confidence of these beneficiaries.”<sup>91</sup> Without that confidence, a museum may lose essential public support from donations, memberships, and other sources.<sup>92</sup> Beyond public pressure not to deaccession, the American Association of Museum Directors (“AAMD”) and the American Alliance of Museums have set out professional codes of ethics regulating the deaccessioning process.<sup>93</sup>

Ethical guidelines from the AAMD outline when deaccessioning is appropriate and detail the ways museums may use profits raised through deaccessioning.<sup>94</sup> The guidelines are not legally binding, but are considered “persuasive, soft law with realistic consequences.”<sup>95</sup> The AAMD wears the judicial, legislative, and executive hats simultaneously in matters of deaccessioning, both creating and enforcing the policies.<sup>96</sup> If

<sup>89</sup> For example, challenges brought to deaccessioning attempts at Randolph College, Fisk University Galleries, and Rose Art Museum. Kerns, *supra* note 73, at 219–30.

<sup>90</sup> See, e.g., *In re Wilstach's Est.*, 1904 WL 2712, at \*1 (Pa. Orph. 1904); *Rowan v. Pasadena Art Museum*, Case No. C 322817 (Cal. Sup. Ct. L.A. County, Sept. 22, 1981); see also, Sue Chen, *Art Deaccessions and the Limits of Fiduciary Duty*, 14 DUKE L. SCHOLARSHIP REPOSITORY 103, 132–37 (2009).

<sup>91</sup> MALARO, *supra* note 67, at 220.

<sup>92</sup> See, e.g., Peggy McGlone, *Donors rescind \$50 million in gifts over Baltimore museum's planned sale of Warhol painting*, WASH. POST (Oct. 24, 2020, 9:50 AM), [https://www.washingtonpost.com/entertainment/museums/baltimore-museum-of-art-painting-sale/2020/10/23/e7d2de72-1547-11eb-ba42-ec6a580836ed\\_story.html](https://www.washingtonpost.com/entertainment/museums/baltimore-museum-of-art-painting-sale/2020/10/23/e7d2de72-1547-11eb-ba42-ec6a580836ed_story.html) [https://perma.cc/2HDA-R9GD].

<sup>93</sup> ASS'N ART MUSEUM DIR., PROFESSIONAL PRACTICES IN ART MUSEUMS (2011), [https://www.obs-traffic.museum/sites/default/files/ressources/files/AAMD\\_Professional\\_Practices.pdf](https://www.obs-traffic.museum/sites/default/files/ressources/files/AAMD_Professional_Practices.pdf) [https://perma.cc/H3Z6-SH2S]; *AAM Code of Ethics for Museums*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums/> [https://perma.cc/NXL2-QBS6] (last visited Apr. 17, 2021).

<sup>94</sup> Ardis E. Strong, *Deaccessioning: A Pragmatic Approach*, 24 J.L. & POL'Y 241, 257 (2015).

<sup>95</sup> Strickland, *supra* note 65, at 26.

<sup>96</sup> *Id.*

an institution disobeys AAMD policy, AAMD may “censure, suspend, and even expel museums from the AAMD.”<sup>97</sup> Expulsion from the AAMD can have dire consequences; a museum may not be able to receive certain funding or works on loan from other museums, thereby limiting its national exposure and access to resources necessary for growth.<sup>98</sup> These consequences may fill the gap where legal action fails – for example, even where the court system failed in the Berkshire Museum case above, the museum was still “censured, sanctioned, and publicly shamed” by the AAMD.<sup>99</sup>

One rule that has been a prominent part of the AAMD guidelines is a restriction that museums may use funds from the disposal of deaccessioned works *only* for the acquisition of new works.<sup>100</sup> This policy was founded on the idea that museums hold art for the public trust and should thus keep the collection separate from other assets.<sup>101</sup> The aims of this rule included preventing the board of trustees from viewing the museum and its collection as a bank, preventing self-dealing between the trustees and the institution, and avoiding the use of quick artwork sales to cover up financial sins.<sup>102</sup> When museums adhere to this rule, even in extreme instances such as selling eight works to buy one, sanctions have not followed.<sup>103</sup> However, when museums disobey, sanctions are often quickly levied against them.<sup>104</sup>

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<sup>97</sup> *Id.* at 28.

<sup>98</sup> See, e.g., Margie Fishman, *Delaware Art Museum Loses Accreditation*, DEL. ONLINE (June 20, 2014), <https://www.delawareonline.com/story/life/2014/06/18/museum-directors-sanction-delaware-art-museum/10757111/> [<https://perma.cc/BSX6-SCMA>].

<sup>99</sup> Smee, *supra* note 74.

<sup>100</sup> Strong, *supra* note 95, at 258 (quoting Appendix B of ASS’N ART MUSEUM DIR., *supra* note 94).

<sup>101</sup> *Id.* at 241; Linda J. Rosenthal, *Museums and Deaccessioning in COVID-19*, FOR PURPOSE L. GRP. (Oct. 23, 2020), <https://forpurposelaw.com/museums-deaccessioning-covid-19/> [<https://perma.cc/35HL-ACLJ>] (“Under well-established rules of The Association of Art Museum Directors (AAMD), a museum may use proceeds from sale of works in its collection only to acquire more artwork.”).

<sup>102</sup> Beatty, *supra* note 72.

<sup>103</sup> Smee, *supra* note 74 (“In 2011 . . . the Museum of Fine Arts in Boston sold eight works from its permanent collection to raise the money it needed to buy a single painting, “Man at His Bath,” by Gustave Caillebotte. The paintings it auctioned off included canvases by Monet, Paul Gauguin, Alfred Sisley, Camille Pissarro and Pierre-Auguste Renoir.”).

<sup>104</sup> Rosenthal, *supra* note 102. For example, the Delaware Art Museum was sanctioned in 2014 for using funds from deaccessioned works to pay debt and create an operating endowment. *Id.* The sanctions were not only monetary but also “commanded museums contracted with the Delaware Art Museum to suspend any

Overall, museum deaccessioning is a dangerous practice that puts vulnerable artworks outside of the protection of an institution and into the legal void in which collectors may handle an artwork they own as they wish. This is particularly true when the artist is dead, so there is no remaining protection under VARA, and the legal avenues available for society to prevent museum deaccessioning have been weak and unsuccessful.<sup>105</sup> However, the AAMD sanctions on those who have breached the rule on using deaccessioning funds has played a role in dissuading deaccessioning by museums, thereby keeping artwork out of the path of potential destruction.<sup>106</sup> But, even this protection only works if the artwork is in the collection of a member museum.<sup>107</sup>

### III. RECENT DEVELOPMENTS

This section will review select recent developments in VARA and the AAMD deaccessioning guidelines and indicate how they strengthen and weaken the protection of art from destruction, respectively. First, in *Castillo v. G&M Realty*, nicknamed 5Pointz, the United States Court of Appeals for the Second Circuit affirmed VARA's strength as a remedy for living artists and more expansively interpreted what qualifies as a work of "recognized stature" under the statute.<sup>108</sup> In contrast, the AAMD has relaxed deaccessioning guidelines in response to financial difficulties caused by the COVID-19 pandemic to permit funds from deaccessioning to be used for broader purposes, weakening the role the regulations play in preventing museums from offloading artwork.<sup>109</sup>

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loans or collaborations until notified by the AAMD of removal of the sanction." Strickland, *supra* note 65, at 28–29.

<sup>105</sup> For example, challenges brought to deaccessioning attempts at Randolph College, Fisk University Galleries, National Academy Museum and School, and Rose Art Museum. Kerns, *supra* note 73, at 219–30.

<sup>106</sup> Rosenthal, *supra* note 102.

<sup>107</sup> Strickland, *supra* note 65, at 28–30.

<sup>108</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir.), *as amended* (Feb. 21, 2020), *cert. denied sub nom. G&M Realty L.P. v. Castillo*, 141 S. Ct. 363, 208 L. Ed. 2d 90 (2020).

<sup>109</sup> Press Release, *AAMD Board of Trustees Approves Resolution to Provide Additional Financial Flexibility to Art Museums During Pandemic Crisis*, ASS'N ART MUSEUM DIR. (Apr. 15, 2020), <https://aamd.org/for-the-media/press-release/aamd-board-of-trustees-approves-resolution-to-provide-additional> [<https://perma.cc/GXV3-E4R3>].



## A. VARA and 5Pointz

In 2002 a New York City developer, Wolkoff, endeavored to turn a series of dilapidated buildings he owned into exhibition spaces for graffiti artists.<sup>110</sup> The site became known as 5Pointz and “evolved into a major global center of aerosol art” under the direction of Jonathan Cohen, a distinguished graffiti artist.<sup>111</sup> In May 2013, Wolkoff decided to demolish 5Pointz and build luxury apartments.<sup>112</sup> Cohen sought to prevent the destruction of the site – which had become home to approximately 10,650 works of art – in a number of ways, including applying to the New York City Landmarks Preservation Commission and trying to raise money to purchase the site.<sup>113</sup> None of these methods proved successful.<sup>114</sup>

Cohen then joined a number of other 5Pointz artists in a suit under VARA to prevent destruction.<sup>115</sup> The court granted the plaintiffs’ application for a temporary restraining order, but the order eventually expired, and another injunction was denied.<sup>116</sup> The evening the injunction expired, Wolkoff destroyed the artworks by whitewashing all of the walls.<sup>117</sup> The question of a remedy at trial turned on whether the works had reached “recognized stature” so as to warrant a damages award under VARA.<sup>118</sup> The district court held that there were VARA violations for forty-five works that had achieved “recognized stature.”<sup>119</sup> The court found that Wolkoff’s actions were willful because he destroyed the works without giving the artists the required ninety days to attempt to recover them and therefore awarded the maximum statutory damages, totaling \$6.75 million.<sup>120</sup>

The Second Circuit, affirmed, concluding that “a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community.”<sup>121</sup> The court focused on the testimony of art historians and experts and cited Justice Holmes’s cautionary words that “it would be a dangerous undertaking for

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<sup>110</sup> *Castillo*, 950 F.3d at 162.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

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

<sup>115</sup> *Id.* at 163.

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

<sup>117</sup> *Id.*

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

<sup>119</sup> *Id.* at 163–64.

<sup>120</sup> *Id.* at 164.

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

persons trained only to the law to constitute themselves final judges of the worth of visual art.”<sup>122</sup> The court did not lend credence to Wolkoff’s arguments that the works could not be of recognized stature because they were temporary, or that the artists did not have a claim because they knew the building would at some point be torn down.<sup>123</sup>

5Pointz had a resounding effect in the art world, particularly for street and site-specific art and has been called “the biggest victory” for moral rights in the United States.<sup>124</sup> Eric Baum, attorney for the artists, called the ruling “a monumental win for the rights of all artists in this country.”<sup>125</sup> It is important to note that although the artists felt vindicated, and their reputations were protected, as is the intention of VARA, the artwork was still destroyed.<sup>126</sup> 5Pointz further emphasizes that VARA is an important and strong protection of artist non-ownership rights in an artwork but could still fail to protect the artwork itself and thus the societal interest in preservation.

### B. *The AAMD’s New Deaccessioning Guidelines*

The deaccessioning dilemma – balancing between sacrificing artwork to ensure an institution remains open and keeping artwork safe and potentially facing financial ruin – came to a head during the COVID-19 pandemic as institutions were forced to close for many months.<sup>127</sup> The

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<sup>122</sup> *Id.* (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

<sup>123</sup> *Id.* at 168–69.

<sup>124</sup> Amanda Ottaway, *Court Upholds Massive Judgment for 5Pointz Graffiti Artists*, COURTHOUSE NEWS SERV. (Feb. 20, 2020), <https://www.courthousenews.com/court-upholds-massive-judgment-for-5pointz-graffiti-artists/> [<https://perma.cc/U9FC-PPTL>] (quoting Marie Flaguel, curator at New York City’s Museum of Street Art).

<sup>125</sup> Helen Stoilas, *New York developer who whitewashed 5Pointz graffiti – and owes artists \$6.75m in damages – appeals to the Supreme Court*, ART NEWSPAPER (July 22, 2020, 2:33 PM), <https://www.theartnewspaper.com/news/new-york-developer-who-whitewashed-5pointz-graffiti-and-owes-artists-usd6-75m-in-damages-appeals-to-supreme-court> [<https://perma.cc/6MU2-2DWP>].

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

<sup>127</sup> Press Release, *American Alliance of Museums Urges US Congress to Include \$4 Billion for Nonprofit Museums in COVID-19 Economic Relief Legislation*, AM. ALL. MUSEUMS (Mar. 19, 2020), <https://www.aam-us.org/2020/03/19/american-alliance-of-museums-urges-us-congress-to-include-4-billion-for-nonprofit-museums-in-covid-19-economic-relief-legislation/> [<https://perma.cc/4Y5W-8LH4>] (“Nationwide, our museums are losing at least \$33 million a day due to closures as a result of COVID-19 and will be in desperate need of significant federal support to maintain jobs, secure our cultural heritage, help to rebuild our nation’s tourism

New York Times reported that in an October 2020 survey of 850 museum directors, eighty-two percent responded that they had less than twelve months of financial operating reserves remaining.<sup>128</sup>

Due to these unprecedented and drastic financial circumstances “...the AAMD announced that, through 2022 museums will not be censured, sanctioned, suspended, or expelled as they usually would... for good faith use of deaccessioning proceeds to pay for ‘direct care’ of the museum’s collections...”<sup>129</sup> Direct care was not explicitly defined and has been interpreted to include almost any museum expense from salaries to building maintenance.<sup>130</sup> This expansion was a marked policy change from the AAMD hardline position against using deaccessioning funds for anything other than the purchase of new artwork.<sup>131</sup> The art world expressed its concern with this decision because museums “have been entrusted with the care of things that are, collectively as well as individually, of profound and lasting importance...[and] “[i]t is [a museum’s] job to safeguard [its] collections for the future, not to sift them with a view to finding parts of them wanting, expendable and convertible to cash.”<sup>132</sup>

Two major institutions - the Brooklyn Museum and The Baltimore Museum of Art (the “BMA”) –took advantage of the rule change with varying results.<sup>133</sup> The Brooklyn Museum was the first, putting twelve

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industry – and simply to survive the months to come.”); Smee, *supra* note 74 (“Since mid-March, when museums began closing because of the coronavirus outbreak, income from admissions and retail has evaporated. Turmoil in financial markets has caused endowments to plummet. Fundraising has been severely constrained. And for many museums, it has quickly become a question of figuring out how to survive.”).

<sup>128</sup> Sarah Bahr, *Nearly a Third of U.S. Museums Remain Closed by Pandemic, Survey Shows*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/arts/design/museum-closings-covid-19.html?auth=login-email&login=email> [https://perma.cc/MF5R-KTND].

<sup>129</sup> Press Release, ASS’N ART MUSEUM DIRS., *supra* note 110; Baker, *supra* note 70.

<sup>130</sup> Smee, *supra* note 74.

<sup>131</sup> Rosenthal, *supra* note 102.

<sup>132</sup> Smee, *supra* note 74.

<sup>133</sup> Peggy McGlone, *State asked to halt sale of three Baltimore Museum of Art paintings*, WASH. POST (Oct. 15, 2020, 4:10 PM), [https://www.washingtonpost.com/entertainment/museums/baltimore-museum-of-art-warhol-sale/2020/10/15/ea4f682a-0f14-11eb-8a35-237ef1eb2ef7\\_story.html](https://www.washingtonpost.com/entertainment/museums/baltimore-museum-of-art-warhol-sale/2020/10/15/ea4f682a-0f14-11eb-8a35-237ef1eb2ef7_story.html) [https://perma.cc/J32Z-2XRZ]; Robin Pogrebin, *Brooklyn Museum to Sell 12 Works as Pandemic Changes the Rules*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/arts/design/brooklyn-museum-sale-christies-coronavirus.html?referringSource=articleShare> [https://perma.cc/59WK-PP2E].

works up for auction.<sup>134</sup> Such an act would normally have “engendered criticism” but was within the bounds of the “loosened regulations.”<sup>135</sup> The museum noted that they only sold works where they felt the sale would not negatively impact telling the artist’s story at the museum and works that had not been shown in a while.<sup>136</sup> The museum also asserted that all proceeds would go to storage and care for the artworks remaining in the collection.<sup>137</sup> However, the director also acknowledged the slippery slope of deaccessioning – noting that when sitting on a repository of highly valuable art, selling it to raise money is an easy fix.<sup>138</sup> The twelve works sold for a total of \$6.6 million at Christie’s European Art Sale.<sup>139</sup> After this successful sale, museum leadership indicated that more deaccessions are to come.<sup>140</sup>

The BMA endeavored to follow suit and take advantage of the new regulations by selling off three paintings by Andy Warhol, Clyfford Still, and Brice Marden respectively.<sup>141</sup> The BMA hoped to generate \$65 million to fund diversity and equity programs.<sup>142</sup> Each of these artworks contained an element that made deaccessioning particularly problematic – the Warhol is considered a masterpiece, the Still is the only painting by the artist in the collection and one of the rare times he gave a work personally to a museum, and Brice Marden is still alive, and selling a living artist’s work is typically looked down upon as it can negatively impact the price for which they can sell other works.<sup>143</sup> After the announcement, there were multiple resignations from the board of trustees, and two former chairmen said they have rescinded planned gifts to the museum totaling \$50 million.<sup>144</sup>

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<sup>134</sup> Pogrebin, *supra* note 134.

<sup>135</sup> *Id.*

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

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Angelica Villa, *Deaccessioned Brooklyn Museum Works Sell for \$6.6M. at Christie’s*, ARTNEWS (Oct. 15, 2020, 5:04 PM), <https://www.artnews.com/art-news/market/brooklyn-museum-deaccessioned-works-lucas-cranach-1234574087/> [<https://perma.cc/4CV2-ZXZK>].

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

<sup>141</sup> McGlone, *Donors rescind \$50 million in gifts over Baltimore museum’s planned sale of Warhol painting*, *supra* note 93.

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

<sup>143</sup> McGlone, *State asked to halt sale of three Baltimore Museum of Art paintings*, *supra* note 134.

<sup>144</sup> Hilarie M. Sheets, *Two Museums Tried to Sell Art. Only One Caught Grief About it.*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/arts/design/baltimore-museum-brooklyn-art->

The BMA had conducted deaccessions on a smaller scale previously, selling seven paintings in 2018 for \$16.2 million dollars to purchase art by women and artists of color.<sup>145</sup> But the alarm raised by this latest attempt led the extended community around the museum to write a letter to state officials asking for them to halt the sale.<sup>146</sup> This letter included 150 signatures of support, including that of a former director of the museum.<sup>147</sup> Critics of the sale said they support the underlying goal to increase diversity but did not approve of selling artwork in the collection to meet that goal,<sup>148</sup> arguing that it appeared to be “a shortcut approach to monetize the art instead of doing the more difficult work of fundraising and development.”<sup>149</sup> The community letter to the attorney general argued that the state had the power to review the museum’s decision, but public officials never intervened in the matter.<sup>150</sup> The museum ended up pulling its paintings out of the auction two hours before they were to be sold, after discussions with the AAMD,<sup>151</sup> but, the director said that the bigger conversation is not over, noting that deaccessions may still happen.<sup>152</sup>

The BMA received more extensive blowback for its proposed deaccessioning than did the Brooklyn Museum because of how each institution handled the pandemic and because of the stature of the artwork to be sold.<sup>153</sup> For example, in handling the pandemic, the Brooklyn Museum had to lay off 7% of its staff, while the BMA had no layoffs or furloughs before deciding to deaccession its works.<sup>154</sup> As to stature, a former director of both museums, Arnold Lehman, said “I’m not at all opposed to deaccessioning...but [the BMA] was selling masterpieces”<sup>155</sup>

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auction-sothebys.html?auth=login-email&login=email [https://perma.cc/A3PQ-P7PA].

<sup>145</sup> McGlone, *Donors rescind \$50 million in gifts over Baltimore museum’s planned sale of Warhol painting*, *supra* note 93.

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

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

<sup>148</sup> Peggy McGlone, *Donors rescind \$50 million in gifts over Baltimore museum’s planned sale of Warhol painting*, WASH. POST (Oct. 24, 2020, 9:50AM), [https://www.washingtonpost.com/entertainment/museums/baltimore-museum-of-art-painting-sale/2020/10/23/e7d2de72-1547-11eb-ba42-ec6a580836ed\\_story.html](https://www.washingtonpost.com/entertainment/museums/baltimore-museum-of-art-painting-sale/2020/10/23/e7d2de72-1547-11eb-ba42-ec6a580836ed_story.html) [https://perma.cc/T23V-TDG4].

<sup>149</sup> *Id.*

<sup>150</sup> McGlone, *State asked to halt sale of three Baltimore Museum of Art paintings*, *supra* note 134.

<sup>151</sup> Sheets, *supra* note 145.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

These deaccession attempts under the relaxed guidelines demonstrate a few key points: museums, if given the chance, will take advantage of deaccessioning as a “quick fix”; individuals in the communities around these institutions feel they have an interest in these artworks as the museum is meant to safeguard these treasures for the public trust; and the concern over deaccessioning is higher for artworks that are considered first tier or, as VARA says, of “recognized stature.”

The recent developments in the 5Pointz case indicate that there are avenues through which VARA could offer stronger protection, but that it still, in some instances, lacks teeth to protect society’s interest in preserving artwork by preventing destruction in the first instance. On the other hand, the AAMD developments show how the one avenue that has created stronger protection for society’s interest can easily be weakened, and artwork quickly discarded. This suggests that relying on museums not deaccessioning to private collectors is not enough, and stronger gap-filing measures are required to protect the societal interest in preventing destruction.

#### IV. DISCUSSION

VARA and deaccessioning regulations leave a gap in the protection of society’s interest in safeguarding art from destruction. A museum may sell a prized artwork to a private collector if the museum needs money.<sup>156</sup> The museum may be ostracized or sanctioned, but legal action is likely to fail.<sup>157</sup> Then, once it is in the hands of a private collector, if the artist is gone, and VARA rights have expired, the collector may proceed to “play darts with [their] Rembrandt” without fear of legal retribution.<sup>158</sup>

This section will analyze three potential solutions to fill the destruction gap: first, an expansion of VARA so that an action may be brought by an individual representing the societal interest or so that moral rights may transfer; second, an ownership database which would provide for accountability as well as a more accurate historical record of an artwork’s movements; finally, a system of requirements on collectors to lend or provide access to culturally significant works of art at regular intervals. Taken together these three solutions provide a legal avenue, as well as enforcement mechanisms, for the protection of society’s interest against artwork destruction.

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<sup>156</sup> See Sheets, *supra* note 145.

<sup>157</sup> *Id.*

<sup>158</sup> See 17 U.S.C. §§ 106A(b), (d), (e) (1990).

### A. Extending VARA

As seen in the 5Pointz case, VARA holds powerful protection for artists, but the statute is limited so that it may only be enforced by the artist and only during their lifetime.<sup>159</sup> Two changes could be made to offer greater protection against destruction. First, Congress should add an expansive protection-for-society provision as seen in the California Art Preservation Act, which would be based in the same underlying rationale that Congress expressed in creating VARA.<sup>160</sup> Language from CAPA that could be used as a basis for these amendments in VARA includes:

(a) The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.

(c) An organization acting in the public interest may commence an action for injunctive relief to preserve or restore the integrity of a work of fine art from acts prohibited by subdivision (c) of Section 987.<sup>161</sup>

Second, Congress should allow artists to transfer their moral rights to someone else during and after their lifetime, in much the same way they may with their copyrights.<sup>162</sup> Language from 17 U.S.C. §201(d) transfer-of-copyright provisions could be used as a starting point for these amendments.

The concept of *droit moral* laws as a protector for societal interests is not new. *Droit moral* laws have been celebrated as benefiting not only the individual artist but also American culture.<sup>163</sup> *Droit moral* laws embody “...the notion that there is a public stake in protection of important works of art – and that the law should in some way implement that interest”<sup>164</sup> There is evidence that Congress intended for VARA to protect society’s interest in the “preservation of works of artistic merit.”<sup>165</sup> During the Congressional debate over VARA, the sponsor explained that “artists in this country play a very important role in capturing the essence of culture and recording it for future generations. ...”<sup>166</sup> Therefore, adding an

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<sup>159</sup> 17 U.S.C. §§ 106A(b), (d)(1).

<sup>160</sup> CAL. CIV. CODE § 989(a) (1995).

<sup>161</sup> 17 U.S.C. §§ 989(a), (c).

<sup>162</sup> See 17 U.S.C. § 201(d) (1976).

<sup>163</sup> SAX, *supra* note 5, at 25.

<sup>164</sup> *Id.*

<sup>165</sup> Wentworth, *supra* note 54, at 22.

<sup>166</sup> *Id.* (quoting 135 Cong. Rec. E2227 (daily ed. June 20, 1090) (statement of Rep. Markey)).

explicit provision for the protection of society would be in line with the intent of congress in creating VARA.

Even though this was the intent, the time limit in the current version of VARA vests the artist's right only during their lifetime. The time limitations show that, even if unintentionally, "...the [*current*] operative provisions of the federal legislation are unmistakably focused on the rights of the artist, rather than the society."<sup>167</sup> Beyond Congress's rationale in enacting VARA, an amendment to allow the transfer of rights is supported by the basic rationale of *droit moral* laws – to protect the artist's reputation. Destruction of an artwork after the death of the artist impacts their name and reputation as much as it does in life. There is still a market for artwork via auction and sale after death in which reputation is essential to value.<sup>168</sup> Also, an estate may continue to hold a copyright for years after an artist dies, so it would not be unprecedented to make moral rights transferable in the same way.<sup>169</sup> One issue may be that the buyer of an artwork might also want to obtain the VARA rights, thus depriving an artist of their VARA rights down the road. It is not certain the transfer of rights would prevent all destruction, as a transferee owner could simply decline to enforce them, but it would certainly give an avenue that does not exist now.<sup>170</sup>

This type of amendment and expansion of VARA may be difficult to pass because of the American ideal of complete ownership in property.<sup>171</sup> An amendment to protect society's interest may also present standing issues. However, we currently give artists a right to recovery under VARA for removal of their art from a public place in a destructive manner.<sup>172</sup> The same cannot be said for the work hanging on a private collector's wall. CAPA shows that this expansion to protect a societal interest can work,

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<sup>167</sup> SAX, *supra* note 5, at 32.

<sup>168</sup> *The Effects of Gallery and Artist Reputation on Prices in the Primary Market for Art: A Note*, 31 J. CULTURAL ECON. 143, 143–53 (Artist reputation is directly related to the valuation of their work. Schönfeld, Susanne, and Andreas Reinstaller); *see also*, *How is an artist's reputation determined?*, ARTSPER, <https://www.artsper.com/us/cms/collector-guide/the-art-world/how-is-an-artist-reputation-determined> [<https://perma.cc/G36N-SVFM>] (last visited Apr. 18, 2021).

<sup>169</sup> *Licensing*, ANDY WARHOL FOUND. FOR VISUAL ARTS, <https://warholfoundation.org/warhol/licensing/> [<https://perma.cc/9NDZ-KB7Q>] (last visited Apr. 18, 2021) (The Warhol foundation has owned Andy Warhol's copyright since his death).

<sup>170</sup> *See, e.g.*, *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009) (where organization would have standing).

<sup>171</sup> SAX, *supra* note 5, at 32.

<sup>172</sup> 17 U.S.C. § 106A(a)(3) (1990).



and even if it is not used – as it has not been to date in California – it is still available if needed.

Enforcement under this solution would be difficult if the party who obtained the VARA rights does not know who owns the artwork or whether it is being destroyed. The next solution addresses this difficulty.

### *B. Ownership Database*

In order to protect an artwork, either to stop destruction or recover for a destroyed work, it is necessary to determine who owns the work. Currently, there is no comprehensive public database that houses a list of artworks and who their owners are. Within the art world, many pieces of this type of database exist – in museums, auction houses, galleries, and with private companies – but much of the information is private.<sup>173</sup> The solution is to create a public database of artworks that tracks sales and exhibitions akin to land title registration. If such a database existed it would be more difficult for an artwork to be destroyed or disappear as the artist, art historians, or other interested parties would have notice of the work's status.

Other central databases for cultural property do currently exist. For example, there is a searchable public records system for copyright holders.<sup>174</sup> Also, The United Nations Educational, Scientific, and Cultural Organization (UNESCO) hosts databases for world heritage sites, and intangible historical records.<sup>175</sup> In the United States, the National Park Service keeps a register of historic places.<sup>176</sup> However, the only way art is currently tracked on a broad scale, is if has been reported lost on the Art

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<sup>173</sup> Darby McNally, *New Website Allows You to Track Ownership of Famous Painting*, PASTE (July 5, 2017), <https://www.pastemagazine.com/design/mapping-paintings/new-website-allows-you-to-see-who-owned-paintings/> [<https://perma.cc/ZXL3-WP72>].

<sup>174</sup> *Public Records System*, U.S. COPYRIGHT OFF., <https://publicrecords.copyright.gov/> [<https://perma.cc/2EQL-MS9A>] (last visited Apr. 18, 2021).

<sup>175</sup> *World Heritage List*, UNESCO, <http://whc.unesco.org/en/list/> [<https://perma.cc/KP2C-RQ94>] (last visited Apr. 18, 2021); *Intangible Cultural Heritage*, UNESCO, <https://ich.unesco.org/en/proclamation-of-masterpieces-00103> [<https://perma.cc/PU5U-HBSC>] (last visited Apr. 18, 2021).

<sup>176</sup> *National Register of Historic Places*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nationalregister/index.htm> [<https://perma.cc/936A-4UJW>] (last visited Apr. 18, 2021).

Loss Register or by the owner's choice to self-track on a private website like the World Art Registry.<sup>177</sup>

The information needed for such a database is available but widely dispersed. Museums keep lists of artworks in their collections along with the history of ownership of the work, called the provenance.<sup>178</sup> But this information is kept in the museum and is not always publicly available.<sup>179</sup> Auction houses and galleries also track sales internally, but the majority of these records are for in-house use only and often include information regarding individuals who wish to remain anonymous.<sup>180</sup> It is often not until someone is specifically looking for a work's owner or if the work is donated to a museum that its various owners are publicly known.<sup>181</sup> There are private websites that are currently trying to aggregate this data in a central location, but participation is voluntary and the service requires payment.<sup>182</sup> If a database of this sort were controlled by an international organization like UNESCO, which has assistance from law enforcement agencies across the world, the organization may be able to require participation from certain institutions that receive government funding and put pressure on private institutions to share some degree of information about ownership.

This type of database would not only be helpful for artists to know where their artwork is and to help enforce droit moral laws like VARA, it would also ensure more thorough regulation of the art world in general. For example, if an artwork is registered as being owned by a private collector, a sale of a work of the same title and authorship by someone

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<sup>177</sup> ART LOSS REG., <https://www.artloss.com/> [<https://perma.cc/85AC-UYGU>] (last visited Apr. 18, 2021) (“The Art Loss Register is the leading due diligence provider for the art market, and maintains the world’s largest private database of stolen art, antiques and collectables”); *National Stolen Art File*, FBI, <https://www.fbi.gov/investigate/violent-crime/art-theft/national-stolen-art-file> [<https://perma.cc/2VC5-65KA>] (last visited Apr. 18, 2021); WORLD ART REGISTRY, <https://world-art-registry.com/> [<https://perma.cc/5LFP-UBRS>] (last visited Apr. 18, 2021) (This registry is similar to the proposed ownership database but has no mandatory registration).

<sup>178</sup> *Art Provenance: What It Is and How to Verify It*, ARTBUSINESS.COM, <https://www.artbusiness.com/provwarn.html> [<https://perma.cc/DK6W-FV8K>] (last visited Apr. 18, 2021) (Provenance is the documentation that accompanies an artwork that documents its ownership history).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

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

<sup>182</sup> See, e.g., *Getting Started with Provenance Research*, ARTWORK ARCHIVE, <https://www.artworkarchive.com/blog/getting-started-with-provenance-research> [<https://perma.cc/N8ET-THAT>] (last visited Dec. 29, 2021).

else, might raise red flags that the work to be sold is a forgery.<sup>183</sup> It would also make it easier for museums to loan artwork for exhibitions and put together large showings of a single artist's work when a catalogue raisonné is unavailable, providing for more enriching educational opportunities.<sup>184</sup> Finally, it could provide some form of proactive check that artwork still exists – if a piece has been registered but unsold and unexhibited for a number of years, it might be prudent for someone to check in with the listed collector and ensure it is still there. Like a land registry, this database would ensure there is a record of ownership through which prudent searches can show clear title.

Issues may arise in forming this database, given many collectors' desires for, and right to, privacy. Many of the collectors who own the masterpieces for which this protection is most needed are highly protective of their identity and choose to remain anonymous.<sup>185</sup> The mantra of the art world tends to be "[w]here privacy is in issue... public concerns should give way."<sup>186</sup> However, there are compromises that may be made to protect privacy and ensure those who want to collect are still able to do so without concerns over regulation and oversight. First, many collectors could be persuaded through both the public and private benefits of ensuring their work was properly sold and authentic. Second, where privacy concerns arise, the collector's name and contact information can be redacted from the registry, with the only available information being the gallery, auction house, or artist that conducted the sale listed. Thus, a researcher would know who to contact to try to obtain the ownership information needed. Finally, incentives like extra tax credits could be given to those collectors who are willing to register.

It would take a lot of time and work to organize, but thankfully all of the information needed for a database of this nature is available. This information merely needs to be collated, and private companies have

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<sup>183</sup> See, e.g., Sarah Cascone, *Collector Who Sold a Fake Old Master Through Sotheby's Must Repay the Auction House \$1.2 Million, Court Rules*, ARTNET (Nov. 8, 2018), <https://news.artnet.com/art-world/seller-must-repay-sothebys-fake-old-master-1391008> [<https://perma.cc/2V9G-KSNE>].

<sup>184</sup> *What is a Catalogue Raisonné?*, N.Y.C. PUB. LIBR., <https://www.nypl.org/about/divisions/wallach-division/art-architecture-collection/catalogue-raisonne> [<https://perma.cc/S5B3-SUFA>] (last visited Apr. 18, 2021) (defining catalog raisonné as a comprehensive list of all the works by an artist).

<sup>185</sup> Tom Mashberg, *Lawyers Fight to Keep Auction Sellers Anonymous*, N.Y. TIMES (Feb. 3, 2013), <https://www.nytimes.com/2013/02/04/arts/design/battling-to-keep-auction-sellers-anonymous.html> [<https://perma.cc/GMM9-9SJJ>].

<sup>186</sup> SAX, *supra* note 5, at 68.

already started the process. The database would not encroach upon ownership but would add some societal pressure to be a good steward.

Even with an expansion of VARA and knowledge of where the artwork is, there is not always an easy way to ensure that the collector is acquiescing to societal pressure and caring for the work. A collector may still buy a work, register it, and destroy it through unintentional acts and face no repercussions.<sup>187</sup> The final proposed solution addresses this problem.

### C. Educational Requirements

To ensure collectors are not using their ownership to destroy works either intentionally or by letting them deteriorate, it would be helpful if those who had an interest were able to regularly view and learn from the artworks. Imposing certain educational or lending requirements on collectors who acknowledge owning works of recognized stature could allow for this. Some such requirements could be lending their works to cultural institutions, allowing researchers to have access to them at semi-regular intervals, or requiring owners to allow high quality scans of culturally significant works that are archived. It is already common that collectors allow “artists, experts, and other connoisseurs to see and study works of art in their home, or loan them periodically.”<sup>188</sup> These practices can “significantly bridge private and public imperatives” and could be essential to preserving works for the future.<sup>189</sup>

Completely voluntary arrangements for access are preferable, but there could be ways to incentivize collectors to acknowledge their ownership of such works and sign up for a program with mandatory elements.<sup>190</sup> Some European countries have already imposed similar programs. For example, “English laws have given tax benefits to those who sell or give art to the nation, or preserve artworks within national boundaries.”<sup>191</sup> The program in the United Kingdom also permits relief from some capital taxes for collectors in exchange for making their art publicly available for exhibition.<sup>192</sup> A similar program has also been instituted in Germany, under which a loan of a five-year period to a public museum allows relief from certain wealth taxes.<sup>193</sup> In addition to relief

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<sup>187</sup> 17 U.S.C. § 106A(a)(3) (1990).

<sup>188</sup> SAX, *supra* note 5, at 66.

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

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

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

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

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

from taxes or certain other benefits to collectors, the museum and researchers would be responsible for any associated costs of moving and insuring the works.

This type of program is based on the understanding that there are multiple conflicting interests in an artwork, and collecting art is not the same as owning any other object but is an act of stewardship.<sup>194</sup> The idea of stewardship for collectors is deeply rooted and has been a powerful tool to keep collectors from destroying artwork.<sup>195</sup> Some may argue that this tradition is so deeply rooted in the art world, as evidenced by the number of collectors who already donate and lend their work to museums and open their homes to researchers, that requirements or incentives are unnecessary.<sup>196</sup> However, without such incentives it is less likely that the few collectors who would destroy a work will be dissuaded from doing so.

Many times, there are much more stringent requirements placed on the owners of buildings marked as landmarks or historical treasures in the United States than on owners of artwork.<sup>197</sup> A program under which collectors must show their work or allow access to it could ensure artwork is not being destroyed and that the public has access to the wealth of knowledge contained in the works hidden away in private collections without infringing too heartily on the collector's real property interest.

In sum, an expansion of VARA to provide a legal avenue to vindicate the societal interest in a work, combined with a database and educational requirements enabling tracking and oversight for these artworks could fill the destruction gap.

## V. CONCLUSION

It may seem that seeing one work would not change what we know about art history or artists, but the story of the Barnes Collection exemplifies how much it can. Dr. Barnes, an eccentric Philadelphia collector, chose to hide his collection away from the majority of the public, and it was not until 1994, against his wishes, that much of it was shown.<sup>198</sup> When an art critic, John Russell, was able to see the works by Matisse that were held in the collection for the first time he said, "What more could

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<sup>194</sup> *Id.* at 71–72.

<sup>195</sup> *Id.* at 72.

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

<sup>197</sup> *See, e.g., Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 138 (1978). In *Penn Central Transportation Company v. City of New York*, the owners of Penn Central Station were unable to construct a building above the station due to the New York City Landmarks Preservation Law of 1965. *Id.*

<sup>198</sup> SAX, *supra* note 5, at 77–78.

there be to see, or to say [about Matisse]? Plenty, is the answer... it gives us what had seemed impossible: a new notion of [the artist]."<sup>199</sup> It is not that Dr. Barnes did not have a valid right to use the artworks he collected as he wished, but he ignored society's interest by hiding them away and not allowing in those who might learn from them. It is only because his wishes were disregarded posthumously that one of the most valuable collections of modern art is now available for all to see in Philadelphia.<sup>200</sup>

Currently there is a gap that leaves artworks in the hands of private collectors vulnerable to destruction and the societal interest of protecting such artwork unaccounted for. At the same time, the one avenue that held some source of protection for this interest, the storage and care of these works in a museum, has been weakened by less stringent deaccessioning guidelines that allow museums to sell off artwork for any purpose that serves the institution, thus placing the works back into the realm of unregulated private collection. Although it is clear that the majority of collectors feel an inherent duty to protect the works they own, a few do not, and the danger they pose to cultural treasures is great. Through the solutions proposed in this Note, there is a way to fill the destruction gap and help ensure that destruction is less available to any collector and that the societal interest in a work is better protected. Under these a Warhol may not be washed, a Rembrandt could not be put in the recycling, and a Seurat would remain un-shredded.

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<sup>199</sup> *Id.* at 78.

<sup>200</sup> BARNES FOUND., <https://www.barnesfoundation.org/> [<https://perma.cc/4VKD-JURH>] (last visited Apr. 18, 2021).