# Duke Law **Scholarship Repository**

**Duke Law Student Papers Series** 

**Student Works** 

6-2009

## Art Deaccessions and the Limits of Fiduciary Duty

Sue Chen

Duke Law School, sc.schen@gmail.com

Follow this and additional works at: http://scholarship.law.duke.edu/studentpapers

Part of the <u>Agency Commons</u>, <u>Business Organizations Law Commons</u>, <u>Entertainment</u>, <u>Arts</u>, and <u>Sports Law Commons</u>, and the <u>Estates and Trusts Commons</u>

## Repository Citation

Sue Chen, Art Deaccessions and the Limits of Fiduciary Duty (2009)

This Article is brought to you for free and open access by the Student Works at Duke Law Scholarship Repository. It has been accepted for inclusion in Duke Law Student Papers Series by an authorized administrator of Duke Law Scholarship Repository. For more information, please contact hollie.white@law.duke.edu.

### ART DEACCESSIONS AND THE LIMITS OF FIDUCIARY DUTY

## SUE CHEN\*

#### ABSTRACT

Art deaccessions prompt lawsuits against museums, and some commentators advocate using the stricter trust standard of care, instead of the prevailing corporate standard (business judgment rule), to evaluate the conduct of non-profit museum boards. This Article explores the consequences of adopting the trust standard by applying it to previously unavailable deaccession policies of prominent art museums. It finds that so long as museum boards adhere to these policies, their decisions would satisfy the trust standard. This outcome illustrates an important limitation of fiduciary law: the trust standard evaluates procedural care but cannot assess deaccessions on their merits. Yet this limitation, far from undercutting the trust rule, balances judicial review with protecting boards' management discretion. This article ventures beyond formalist analysis of fiduciary duty and examines the nonlegal, substantive rules governing art deaccessions. It argues that complemented by non-legal rules, the trust standard provides the best framework for adjudicating deaccession lawsuits because it ensures judicial scrutiny of deaccession procedures while leaving appraisal of deaccessions' merits to museum professionals and the public they serve.

#### I. Introduction

In September 1970, the Metropolitan Museum of Art learned that Velazquez's portrait of Juan de Pareja was up for auction. The painting, one of Velazquez's masterpieces, depicts the artist's assistant and was first exhibited in the Pantheon in 1650. The Metropolitan bought the work for just over \$5.5

<sup>\*</sup> Duke University School of Law, J.D. 2009; B.A. 2006, Swarthmore College; Law Clerk to the Honorable Harris L. Hartz, United States Court of Appeals for the Tenth Circuit, 2009-2010. I thank Professor Deborah DeMott for her counsel and encouragement throughout the research and writing of this article. For insight into the art world, I thank Verónica Betancourt and Kim Rorschach. Thanks also to Professor Barak Richman and participants of the Duke Law Student Paper Series, where earlier versions of this article were presented.

million, then a record price for a single work of art.<sup>1</sup> After the painting was exhibited, a *New York Times* editorial opined that despite the price tag, "the Metropolitan's acquisition of this superb painting enhances the quality of its great collection and permanently enriches the life of the city."<sup>2</sup>

All went well until 1972, when the *N.Y. Times* reported that to help finance the Velazquez purchase, the Metropolitan had been secretly selling works from the modern art collection bequeathed by Adelaide de Groot.<sup>3</sup> The revelation led to fierce criticism of the Metropolitan and of its Director Thomas Hoving,<sup>4</sup> plus a seven-month investigation by the state Attorney General that resulted in the museum agreeing to notify the Attorney General of any deaccessions worth more than \$5,000.<sup>5</sup> The Metropolitan's debacle helped to bring the concept of deaccession to the public consciousness and since then, the responsibilities of museum boards in art deaccessions have been scrutinised and criticised.<sup>6</sup>

Museum boards<sup>7</sup> are sometimes sued for their role in deaccessions.<sup>8</sup> Their cases highlight a problem bedevilling fiduciary law: against what standard should the decisions of non-profit corporate directors be measured? <sup>9</sup> Many

Thomas Hoving, 'The Chase, the Capture', in *The Chase, the Capture: Collecting at the Metropolitan* pp. 30-40 (Metro. Museum of Art ed., 1975) [hereinafter Hoving, 'The Chase']; see also Karl E. Meyer, 'The Deaccession Controversy', reprinted in *Law, Ethics and the Visual Arts* 1273, 1274 (John Henry Merryman *et al.* eds, 5th edn 2007). The exact price was \$5,544,000. For the Museum's auction stratagems and the thrill of bidding for the Velazquez, see Hoving, 'The Chase', above, at pp. 39-40. For a less flattering account of the Velazquez purchase, and of the Metropolitan in general, see John L. Hess, *The Grand Acquisitors* (1974).

Hoving, 'The Chase', above, note 1, at p. 40 (quoting *The New York Times*).

See Meyer above, note 1, at p. 1274. In her will, de Groot requested that the Metropolitan not sell works from her bequest, but the subsequent phrase "without limiting in any way the absolute nature of this bequest" made the request precatory and thus unenforceable. Thomas Hoving, *Making the Mummies Dance* p. 291 (1993) [hereinafter Hoving, *Making the Mummies Dance*]. For Hoving's personal, irreverent account of the de Groot deaccession battle within the Metropolitan, see Hoving, *Making the Mummies Dance* pp. 275-306.

See, e.g., John Rewald, 'Should Hoving be De-accessioned?', reprinted in *A Deaccession Reader* (Stephen E. Weil ed., 1997).

Hoving, *Making the Mummies Dance*, above, note 3, at p. 306; *Law, Ethics and the Visual Arts*, above, note 1, at p. 1275. Louis Lefkowitz, then-attorney general of New York, eventually concluded that the Metropolitan's actions did not constitute mismanagement, violation of de Groot's gift, or any other wrongdoing; as Hoving describes it, "[t]he only criticism – and it was harsh – was that I had handled the public relations atrociously." Hoving, *Making the Mummies Dance*, above, note 3, at p. 306.

<sup>6</sup> Law, Ethics and the Visual Arts, above, note 1, at p. 1271.

Confusingly, museums that are non-profit corporations call their board members 'trustees'. For clarity, in this Article, the term 'board members' denotes those serving on boards of museums, be they charitable trusts or non-profit corporations; 'trustees' and 'directors' will be used according to their legal definition; 'Director', as a title, refers to the museum's chief executive officer.

<sup>8</sup> See, e.g., Dennis v. Buffalo Fine Arts Academy, 836 N.Y.S.2d 498 (N.Y. Sup. Ct. 2007); Rowan v. Pasadena Art Museum, No. C3228171 (Cal. Super. Ct. 1981) reprinted in Law, Ethics and the Visual Arts, above, note 1, at p. 1282.

See Jennifer L. White, 'When It's OK To Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses', 94 *Mich. L. Rev.* 1041 (1996), reprinted in (1996) I *Art Antiquity and Law* 375.

art museums are non-profit corporations and the trend is to apply the corporate standard, which includes the highly deferential business judgment rule. But because the non-profit corporation lacks many of the functional attributes that justify the business judgment rule, some commentators advocate using the trust standard to evaluate the decisions of non-profit corporate directors.<sup>10</sup>

What has been left unexplored is how the trust standard applies to museums, as well as its implications. This Article applies the trust standard to the deaccession procedures of some prominent American art museums. It finds that so long as museums' internal deaccession guidelines provide for particular procedures and boards adhere to those procedures, board decisions would survive challenges under the trust standard. This outcome illuminates the limits of the law in resolving management disputes such as art deaccessions: the trust standard is procedurally focused and asks whether trustees were sufficiently deliberative in making their decisions; it does not authorise review of the merits of the decision

But far from proving failure, this limitation, by balancing judicial review with board discretion, makes the trust standard the ideal legal framework in resolving deaccession disputes. Moreover, law's inability to reach the substance of a deaccession does not free museum boards to decide on whim rather than merits. Complementing the trust standard's procedural safeguards are non-legal rules that regulate deaccessions on the merits. These restraints range from professional guidelines, to self regulation, to the court of public opinion. Together, the trust standard and the non-legal restraints create a normatively desirable set of rules governing art deaccessions: the trust standard holds museum boards to a more rigorous procedural standard than that required by the corporate rule, while the substance of the ultimate decision is judged by the museum profession and the public it serves.

This Article argues that, complemented by non-legal rules, the trust standard is the best framework for adjudicating legal disputes over art deaccessions. Part II introduces the practice of deaccession and its function in American art museums' approach to collection management. It then ventures beyond a formalist treatment of deaccessions by examining how the museum profession regulates deaccessions as well as the board's role within the complex organisational structure of the art museum. Part III compares the fiduciary duties of the corporate director with those of the trustee and explores applicable standards for non-profit corporate directors. It further reviews arguments put forth for adopting a trust standard of care in the non-profit corporate context. Part IV applies the trust standard to current art museum practices and finds that if museums have certain procedures and follow them, their deaccessions

See Patty Gerstenblith, 'The Fiduciary Duties of Museum Trustees', 8 *Colum. J.L. & Arts* 175 (1982); Denise Ping Lee, 'The Business Judgment Rule: Should it Protect Nonprofit Directors?', 103 *Colum. L. Rev.* 925 (2003); White, above, note 9.

satisfy the trust standard. This part then discusses the trust standard's focus on procedure and how it limits the trust standard's scope. Part V examines how non-legal, substantive restraints on art deaccessions complement the trust standard's procedural safeguards. Part VI shows that the trust standard strikes the best balance between holding museum boards accountable for ill-considered deaccessions and giving boards sufficient management discretion. It explains that the trust standard, together with non-legal rules, ensures judicial scrutiny of deaccession procedures while leaving the merits of deaccessions to more knowledgeable critics: museum professionals and the public they serve. Part VII concludes.

#### II. THE VIEW FROM THE GALLERY: HOW MUSEUMS THINK ABOUT DEACCESSIONS

Deaccession is an integral part of collection management in American art museums. Whether to deaccession requires the board to make fundamentally artistic and financial decisions about the collections in their charge. Because deaccessions proceed within the peculiar context of the art museum, it is critical to understand how art museums operate. This section briefly reviews the origin of American art museums and their unique approach to collection management; explains why deaccession is critical to that management philosophy; describes the range of non-legal professional rules governing art deaccessions; and concludes with a discussion of the art museum's organisational structure and the board's role within.

## A. A Brief Overview of American Art Museums

Deaccession is "the practice by which an art museum formally transfers its ownership of an object to another institution or individual by sale, exchange, or grant, or disposes of an object if its physical condition is so poor that it has no aesthetic or academic value." Despite the handwringing that accompanies a museum's sale of a favourite painting, museum professionals view deaccession as an accepted and, indeed, necessary practice in American museums. 12

Ass'n of Art Museum Directors, 'Art Museums and the Practice of Deaccessioning' (Nov. 2007), at 1, <a href="http://www.aamd.org/papers/documents/FINALPositionPaperDeaccessioning.">http://www.aamd.org/papers/documents/FINALPositionPaperDeaccessioning.doc> [hereinafter AAMD, 'Practice of Deaccessioning']. Courts use a similar definition. See *Dennis v. Buffalo Fine Arts Academy*, 836 N.Y.S.2d 498, 498 (N.Y. Sup. Ct. 2007). Deaccession is different from disposal: whereas deaccession is the decision to transfer ownership, disposal refers to *how* that transfer is to take place – that is, should the work be sold or exchanged? Marie C. Malaro, 'Deaccessioning: The American Perspective', 10 *Museum Mgm't & Curatorship* 273, 273 (1991) [hereinafter Malaro, 'Deaccessioning']. Fiduciary obligations apply to both deaccession and disposal.

Marie C. Malaro, *A Legal Primer on Managing Museum Collections* p. 217 (1998) [hereinafter Malaro, *A Legal Primer*]; see also White, above note 9, at p. 1043 ("the museum community generally recognizes the propriety of selling artwork in order to purchase other – presumably superior or more appropriate – art for the collection."); Stephen E. Weil, 'Deaccessioning in American Museums: I', reprinted in *A Deaccession Reader*, above, note 4, at p. 64 [hereinafter Weil, 'Deaccessioning'].

Unlike their European counterparts, American art museums did not spring forth from the great royal and aristocratic collections.<sup>13</sup> Rather, they owe their inception and continuing existence to private largesse:

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>14</sup>

But reliance on donors obliged American museums to maintain liberal acquisition policies, "either because the curator hoped for more and better quality in [the] future by being nice to the Joneses in their hour of need or he simply didn't know how to say no. Paintings and decorative objects poured in, usually without a coherent plan," so that by the early 1900s, many art galleries possessed clutter instead of collections. Liberal and indiscriminate acquisitions saddled museums with duplicates and second-rate works. Eventually, museums realised "there must be some order and purpose in collecting . . . [which] cannot be achieved without a judicious weeding of existing holdings." This in turn meant that museums that liberally or indiscriminately acquire artworks must also be able to deaccession them to preserve the coherence of their collections.

American art museums are also not depositories or archives; they are not, as the art-law scholar Marie Malaro writes, "mausoleums dedicated to preserving, intact, the accumulation of successive generations" <sup>18</sup> and whose mission is antithetical to the concept of deaccession. <sup>19</sup> Instead, American museums were created to educate the public; <sup>20</sup> a museum's collection is not an end unto itself

Peter Temin, 'An Economic History of American Art Museums', in *The Economics of Art Museums* pp. 179, 181 (Martin S. Feldstein ed., 1991).

James N. Wood, 'The Authorities of the American Museum', in *Whose Muse? Art Museums and the Public Trust* pp. 103, 107 (James Cuno ed., 2004). Even today, private donations account for over 90% of artworks held in public trust. Ass'n of Art Museum Directors, 'Art Museums, Private Collectors, and the Public Benefit' (Oct. 2001), at 1, <a href="http://www.aamd.org/papers/documents/PrivateCollectors.pdf">http://www.aamd.org/papers/documents/PrivateCollectors.pdf</a>.

Dillon Ripley, *The Sacred Grove: Essays on Museums* pp. 67-69 (1969); see also Malaro, *A Legal Primer*, above, note 12, at p. 217 ("Many museums grew unchecked in their early days . . . areas of interest were undefined, and almost anything offered was accepted.").

Isabel Andrews, 'To Sell – or Not to Sell?', *Apollo*, 1 Sept. 2007, available at <a href="http://www.apollo-magazine.com/issue/september-2007/121411/to-sell-or-not-to-sell.thtml">http://www.apollo-magazine.com/issue/september-2007/121411/to-sell-or-not-to-sell.thtml</a>.

Malaro, A Legal Primer, above, note 12, at p. 217.

<sup>18</sup> Id. at p. 216.

Weil, 'Deaccessioning', above, note 12, at p. 63.

<sup>20</sup> See Ripley, above, note 15, at p. 68 (noting that museums have been called the 'people's university'); Temin, above, note 13, at p. 181 (observing that American museums were founded "to educate the people's taste, to help them identify with the values of the successful industrialists."); see also Michael Conforti, 'Deaccessioning in American Museums: II – Some Thoughts for England', reprinted in *A Deaccession Reader*, above, note 4, at p. 79. In addition to education, museums may also be established for other purposes. For example, the Barnes Foundation's stated mission is to "promote the advancement of education and the appreciation

but a means to serve its educational mission.<sup>21</sup> Failure periodically to pare and reshape the collection could undermine a museum's purpose because stasis may render the collection irrelevant. As Malaro asks:

[h]ow can a museum present itself as an educational organization and yet relinquish a continuing responsibility to review critically its progress in achieving its particular goals?<sup>22</sup>

Finally, the great majority of American art museums are private organisations. They are not arms of the State and are unencumbered by the burden of representing a national cultural patrimony.<sup>23</sup> This leaves American art museums more autonomy in collection management than their European counterparts. In exercising that autonomy, American museums chose to be pragmatic about deaccessions, treating it as a procedural question rather than a philosophical inquiry into the relationship between collecting art and American culture.<sup>24</sup> One museum Director observes that such pragmatism reflects the nation's character:

[America] is a country which has achieved its position in the world through a lack of historical consciousness and a readiness to deal creatively with the traditions it has inherited. One could argue it is appropriate that America's public art collections reflect

- of the fine arts" *The Barnes Foundation, Mission Statement*, available at <a href="http://www.barnesfoundation.org/h\_mission.html">http://www.barnesfoundation.org/h\_mission.html</a>. In addition, the museum was meant to preserve Albert Barnes's collection as his will requires everything to be displayed as he left it. Patricia Horn, 'Judge Backs Move by Barnes Gallery', *Phila. Inquirer*, 14 Dec. 2004, at A01.
- Weil, 'Deaccessioning', above, note 12, at p. 63. According to the Association of Art Museum Directors (AAMD), "[t]he 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." AAMD, 'Practice of Deaccessioning', above, note 11.
- Malaro, 'Deaccessioning', above, note 11, at p. 277.
- See Edward P. Alexander, Museums in Motion p. 24 (1979) (noting that after the French Revolution, the Louvre became for the State a symbol of "the new society created under the democratic ideals of liberty, equality, and brotherhood."); Wood, above, note 14, at pp. 105-06 (observing that the French Republic created public museums who saw their role as "a national heritage assembled and presented for the benefit of the public."); Andrews, above, note 16 (discussing political pressures on British museums, whose trustees are usually appointed by the government); see also Glenn D. Lowry, 'A Deontological Approach to Art Museums and the Public Trust' in Whose Muse? Art Museums and the Public Trust, above, note 14, at p. 129 ("American art museums are primarily private entities that are accorded public status, whereas European museums are, for the most part, civic and state institutions."). Some American art museums, such as the North Carolina Museum of Art and the Smithsonian Institution, are government creations. The Smithsonian was created as a trust by an Act of Congress. 'Smithsonian: History', <a href="http://www.si.edu/about/history.htm">http://www.si.edu/about/history.htm</a> (last visited 13 Mar. 2009). Of the seventeen serving on the Smithsonian's Board of Regents, six are members of Congress, one is the Chief Justice of the United States Supreme Court, and another is the Vice President of the United States. 'About Smithsonian: the Board of Regents', available at <a href="http://www.">http://www.</a> si.edu/about/regents/> (last visited 13 Mar. 2009). Some private art museums in the United States have strict rules against changing the collection. See below note 65.
- Conforti, above, note 20, at p. 80.

this cultural reality as works flow in and out of its museums from generation to generation.<sup>25</sup>

## **B. Why Museums Deaccession**

These characteristics of American art museums – indiscriminate acquisition, pedagogical mission, and pragmatism – permit and even mandate deaccessions. Collecting art "is not a mechanical process. It is a combination of intelligent selection and thoughtful pruning. Periodic reevaluation is as important as acquisition, and deaccessioning, if properly used, can be a means toward true growth."<sup>26</sup> Deaccession, therefore, cannot be analysed in isolation; it is an integral part of collection management and must be treated as such.<sup>27</sup> In this context, deaccession involves artistic or financial decisions about how best to build, improve and manage an art collection. What follows is an examination of the three main reasons museums deaccession and the substantive decisions – both artistic and financial – embodied in each instance.<sup>28</sup>

Deaccessions may be driven by acquisition needs: museums sell some of their holdings to increase their acquisition funds or to pay for 'better' works.<sup>29</sup> The de Groot deaccession to pay for *Juan de Pareja* is one such example.<sup>30</sup> A deaccession decision compares the artistic and financial merits of maintaining

<sup>25</sup> *Id*.

Malaro, A Legal Primer, above, note 12, at p. 216. The professional guideline for museums provides that "[t]he development, preservation, conservation, documentation, study, presentation, and explication of the collection are cardinal responsibilities of a collecting museum." Ass'n of Art Museum Directors, Professional Practices in Art Museums 5 (May 2001) [hereinafter AAMD Professional Practices]; see also AAMD, Practice of Deaccessioning, above, note 11 ("Deaccessioning is practiced to refine and enhance the quality, use, and character of an institution's holdings.").

Stephen E. Weil, 'Introduction', in *A Deaccession Reader*, above, note 4, at p. 4 [hereinafter Weil, 'Introduction'].

This article focuses only on deaccessions of works to which museums have legal and unencumbered title. Thus, although bequest conditions and repatriating stolen art are significant topics within the deaccession literature, they command no analysis here. In the context of fiduciary obligations, bequests and repatriation problems are easier problems to resolve than the usual sale. This is because even the corporate standard obliges board members to comply with the relevant law. See *Miller v. Am. Tel. & Tel. Co.*, 507 F.2d 759 (3d Cir. 1974) (holding that the business judgment rule does not apply to knowing criminal violations). For example, the Native American Graves Protection and Repatriation Act, 35 U.S.C §§ 3001-3013 (1994), requires museums receiving federal funds to return Native American funerary objects upon request. Thus the real question in bequests and repatriation deaccessions is not the standard of fiduciary duty to be applied, but the laws governing estates and stolen art.

<sup>29</sup> Conforti, above, note 20, at 77.

Another is the Hirshhorn's sale of some less important Man Ray works to pay for the artist's more significant mixed-media work, *Seguidilla*. Weil, 'Deaccessioning', above, note 12, at p. 67. And in 1989, MOMA used \$40 million from the deaccession of seven works from its permanent collection – works by de Chirico, Kandinsky, Mondrian, Monet, Renoir, and Picasso – to buy van Gogh's *Portrait of Joseph Roulin*. Ralph E. Lerner & Judith Bresler, *Art Law* vol. 3, at pp. 1883-84 (3rd edn 2005). The *New York Times* called the van Gogh "one of the most spectacular additions to the Museum of Modern Art in many years." Evans Roth, 'Deaccession Debate', *Museum News*, Mar/Apr 1990, at p. 45 (quoting *The New York Times*).

the status quo against trading one group of works for another. This is a financial decision because museums must choose the best funding option for an acquisition.<sup>31</sup> Given the competitiveness of the art market and the formidable purchasing power of private collectors, museums must be prepared to pay significant sums in order to acquire works of art of a reasonable quality. Star acquisitions cost tens of millions of dollars: whereas the Metropolitan set a record with its \$5.5 million Velazquez purchase in 1970, in 2004 the museum had to pay between \$45 to \$50 million – more than twice what it had ever paid for an acquisition – for Duccio's *Madonna and Child*.<sup>32</sup> Although other funding options exist in the form of acquisition funds and wealthy donors, these sources may attach restrictive conditions or may be better used to pay for other aspects of the collection. Even if museums choose to use these sources, they may not be enough to cover the entire purchase price. Thus the board must decide if funding options should include deaccessions.

Deaccession to pay for a superior work is also an artistic decision about what to collect. American museums, by and large, subscribe to the masterpiece theory of collecting, which emphasises the acquisition of masterpieces and superb representative examples over providing context with a multiplicity of works.<sup>33</sup> When a masterpiece is added to the collection, lesser works become unnecessary and dispensable. As the Metropolitan's Hoving explains:

to reach for some of these rare great works of art, we are weeding out and disposing of numbers of work that once seemed essential to our collection but now are either redundant, superfluous, or not of the requisite quality.<sup>34</sup>

A specific deaccession also embodies this artistic decision. That is, setting aside the general preference for masterpieces, does *this* upgrade improve the collection? Is it better to sell some average to very good Impressionist canvases to gain one superb Velazquez? Museums must compare each work's place within the collection: what does the Velazquez contribute artistically to

The Director of the Kempner Art Museum describes the relationship between deaccession and finances: "If we want to fill important gaps in the collection, deaccessioning is necessary . . . We will sell only minor works of art that will bring in small amounts of money, but we can use it to help purchase more experimental modern works that are not in our collection . . . ." David Bonnetti, 'You Call it Selling, Museums Call it "Housecleaning" ', St. Louis Post-Dispatch, 30 Sept. 2007, at F5.

<sup>32</sup> Calvin Tomkins, 'The Missing Madonna', *New Yorker*, 11 July 2005, at p. 42 [hereinafter Tomkins, 'Madonna'].

Conforti, above, note 20, at p. 77. In contrast, the European approach favours collecting a multiplicity of works – the superstars *and* the less famous – by the same artist or from the same period. *Id.* at n.23.

Hoving, *The Chase*, above, note 1, at p. 10. But see Lee Rosenbaum, Op-Ed., 'For Sale: Our Permanent Collection', *N.Y.Times*, 2 Nov. 2005, available at <a href="http://www.nytimes.com/2005/11/02/opinion/02rosenbaum.html">http://www.nytimes.com/2005/11/02/opinion/02rosenbaum.html</a> (criticising art museums for outdoing one other by commissioning sleek building projects and "redecorate[ing] their shiny new edifices with some appropriately breathtaking acquisitions.").

the existing collection? What is lost by the sale of a lesser Monet or Degas? Does the transaction improve the overall quality? <sup>35</sup> These questions demand that board members use their knowledge of art and of the collection's strengths and weaknesses when deciding.

A second reason museums deaccession is a change in collecting focus. A museum may deaccession a genre it no longer wishes to collect and add proceeds from the sale to the acquisition fund. Usually these decisions are driven by financial considerations. In 2006, the Albright-Knox Art Gallery's board voted to deaccession over 200 works from its Asian and antiquities collection to increase its endowment and focus on acquiring modern and contemporary works.<sup>36</sup> The combination of:

funding cutbacks, a small philanthropic community and a heated up art market . . . increasingly pressed [the gallery] to keep pace with the acquisitions necessary to [its] vitality and growth . . . . <sup>37</sup>

Financial pressures may thus lead a museum to conclude it is no longer feasible to collect across all periods and that its limited funds are better used to improve the quality of a collection with a narrower focus. The board then exercises artistic judgment in deciding which genres to deaccession and which to keep.

The third, and most controversial, reason museums deaccession is to fund their operations.<sup>38</sup> This constitutes a financial decision about how to raise income for the prosaic costs of running a museum, such as conserving artworks and fixing the plumbing. Taking care of the collection is a resource-intensive enterprise. Conservation requires a team of specialists and storage space must be secure, use proper temperature and humidity control, and permit efficient access.<sup>39</sup> Storage, maintenance, and conservation of artworks alone can run into tens of millions of dollars and represent a significant percentage of the annual operating budget.<sup>40</sup> Additionally, museums must cope with

See *id.* at pp. 7-29 (discussing the Metropolitan's acquisition philosophy); AAMD, Practice of Deaccessioning, above note 11 (identifying the criteria for deaccessioning a work of art).

Richard Huntington, 'Albright to Sell 200 Antiquities', *Buffalo News*, 10 Nov. 2006, at A1. Other museums have also deaccessioned entire genres. When the Walker Art Center in Minneapolis began to focus on contemporary art, it deaccessioned its original collection – including nineteenth-century American and European paintings, Chinese porcelain and Near Eastern jewellery. Roth, above, note 30, at p. 42. Sotheby's auctioned 22 of the Walker's American paintings; the sale brought in \$10.5 million, which was channelled to the museum's acquisition fund. *Id.*; Conforti, above, note 20, at p. 76. Both the Corcoran Gallery and the Pennsylvania Academy of Fine Arts deaccessioned their European paintings to focus on their American collection. Conforti, above, note 20, at p. 76. And in 2003, the Aldrich Museum of Contemporary Art in Connecticut deaccessioned all its paintings and sculptures to focus on collecting photographic works. Lerner & Bresler, above, note 30, at p. 1884.

<sup>37</sup> Huntington, above, note 36.

<sup>38</sup> A related reason art museums may deaccession is because of space constraints or cost of care.

<sup>39</sup> Malaro, A Legal Primer above, note 12, at pp. 217-18.

<sup>40</sup> In 2007, the Metropolitan Museum of Art spent over \$50 million on curatorial activities, which

unexpected expenditures. In 1994, UCLA's Armand Hammer Museum of Art sold a Leonardo da Vinci manuscript for \$30.8 million to help pay for legal fees incurred in disputes over the Hammer estate. In more extreme cases, a museum may be obliged to sell artwork to save itself from bankruptcy, and that choice is less about fundraising than it is about maintaining solvency. A fine example of a desperate deaccession occurred in 2008, when the National Academy Museum sold two paintings to pay for operations and to exhibit more of its holdings; the museum had struggled with financial problems for years and its Director explained that selling the paintings was the only way to keep the museum open. 42

Another recent case of deaccession in dire times is Brandeis University's decision to close its art museum and sell the entire collection to cope with operating deficits from the financial crisis.<sup>43</sup> But unlike stand-alone art museums toward which boards owe fiduciary duties, the university art museum is a unit of the university; the university's board owes fiduciary duties to the entire university,<sup>44</sup> not to the museum as such. This complicates the legal analysis because the museum's interest may conflict with the university's interest, and the board, as the university's fiduciary, must consider the latter. Understandably, universities do not see themselves as part of the

includes conservation, cataloguing, curatorial departments, and scholarly publications; the sum is a \$2 million increase from the year before and represents 29 % of the museum's operating expenses. In the same year, maintenance and operating expenses accounted for 18 % of the operating budget. Metro. Museum of Art, *Annual Report* 60, 62 (2007), available at <a href="http://www.metmuseum.org/annual\_report/2006\_2007/report\_2006\_2007.asp">http://www.metmuseum.org/annual\_report/2006\_2007/report\_2006\_2007.asp</a> [hereinafter Met Annual Report 2007]. The Los Angeles County Museum of Art spent \$4.7 million on curatorial activities (about ten percent of the museum's total expenses in 2007) and \$12.4 million on operations and property maintenance (about 26 %). See Los Angeles County Museum of Art, 'Combined Financial Statements for the Years Ended June 30, 2007 and 2006', at 5, available at <a href="http://www.lacma.org/info/pdf/m-fy07.pdf">http://www.lacma.org/info/pdf/m-fy07.pdf</a>. In 2008, the National Gallery of Art, which does not deaccession, spent 37 % of the Gallery's net operating costs on its collections. Nat'l Gallery of Art, 'Financial Statement for the Year Ended September 30, 2008', at 3, 8 (Nov. 2008), available at <a href="http://www.nga.gov/pdf/FY2008FSPWC.pdf">http://www.nga.gov/pdf/FY2008FSPWC.pdf</a>.

- 41 Robert C. Lind et al., Art and Museum Law: Cases and Materials 645 (2002).
- Randy Kennedy, 'National Academy Sells Two Hudson River School Paintings to Bolster Its Finances', *N.Y. Times*, 5 Dec. 2008, available at <a href="http://www.nytimes.com/2008/12/06/arts/design/06acad.html?ref=design">http://www.nytimes.com/2008/12/06/arts/design/06acad.html?ref=design</a>. The National Academy, however, should be distinguished from the typical art museum: it is affiliated with a school and it acquires artwork only through donations, not purchases. *Id.*
- Daniel Grant, 'Is the University's Museum Just a Rose to be Plucked?', Wall St. J., 3 Feb. 2009, at D7.
- AAMD Professional Practices, above, note 26, at 18 (recognising university art museums' position within the overall university structure and that the Director should report to the governing board of the university). In the Brandeis case, the university's board has power to close the Rose Art Museum without having to consult the Rose's own board. See Statement of the Board of Overseers of the Rose Art Museum, 5 Feb. 2009, <a href="http://www.brandeis.edu/rose/boostatmentroseclosing2509.pdf">http://www.brandeis.edu/rose/boostatmentroseclosing2509.pdf</a> (last visited 13 Mar. 2009) (objecting strenuously to the Trustees of the University's decision to close the Rose and sell the collection). The different fiduciary relationships involving the university art museum takes the topic beyond the scope of this article. It is the subject of my next research project.

museum profession and do not always subscribe to that profession's code of ethics. <sup>45</sup> The result is that "the most vulnerable collections have belonged to university museums, where the core values of the university can trump those of the museum." <sup>46</sup> Perhaps that is why, when compared with stand-alone art museums, university museums are more likely to channel deaccession proceeds to the operating budget and violate professional norms. <sup>47</sup> Although the legal analysis of university art museums and their fiduciaries is beyond the scope of this article, university art museums illustrate the impact of *non-legal* rules and are relevant to understanding the complementarities of legal and non-legal rules in museum governance.

## C. Safeguards Within the Museum Profession

For art museums whose existence is defined by the artworks they hold, deaccession is not a lightly made decision. Fallibility of judgment is "a real and haunting possibility for every museum that deaccessions." Equally important is a sense of institutional integrity: museums hold their collections in the public trust not only for the present audience but also for future generations. The conservation, exhibition, and study of the collection are at the heart of a museum's service to its community and to the public." Were museums allowed to sell their collections to balance the budget, they would relinquish their basic role as cultural custodians and become little more than art and antiques dealers with non-profit status. To protect the profession's integrity and minimise impulsive deaccessions, the museum profession provides two types of extra-legal safeguards: peer regulation and self regulation.

<sup>45</sup> See below, Part II.C for a discussion of professional ethics codes; see also <www.aamd.org/about/members.php> for a list of members of this prominent art museum association.

Jori Finkel, 'Whose Rules About Art Sales Are These, Anyway?', *N.Y. Times*, 24 Dec. 2008, available at <a href="http://www.nytimes.com/2008/12/28/arts/design/28fink.html?ref=design">http://www.nytimes.com/2008/12/28/arts/design/28fink.html?ref=design</a>.

In addition to Brandeis, other recent university deaccessions include: Thomas Jefferson University Medical College's 2006 deaccession of Thomas Eakins's *The Gross Clinic*, an important work in the American oeuvre (two Philadelphia art museums managed to raise \$68 million to buy the work, after which the university deaccessioned two other Eakins); Randolph College deaccessioned four paintings in 2007, including George Bellows's *Men of the Docks*, after financial difficulties forced it to spend from the endowment; and Fisk University in 2005 had planned to deaccession Georgia O'Keeffe's bequest to increase its budget, only to be told by a court that doing so violates the terms of O'Keeffe's bequest). *Id.* 

Weil, 'Deaccessioning', above, note 12, at 68.

<sup>49</sup> Telephone Interview with Erik Ledbetter, Director, International Program and Ethics, American Association of Museums. (10 Dec. 2008) [hereinafter Ledbetter Interview]; AAMD, Practice of Deaccessioning, above, note 11 ("Art museums develop collections of works of art for the benefit of present and future generations.").

Press Release, Ass'n of Art Museum Directors, Press Release on the National Academy Museum (5 Dec. 2008), available at <a href="http://www.aamd.org/newsroom/documents/2008AAMDStatementonNAM\_FINAL.pdf">http://www.aamd.org/newsroom/documents/2008AAMDStatementonNAM\_FINAL.pdf</a> [hereinafter AAMD Press Release on National Academy].

<sup>51</sup> Ledbetter Interview, above, note 49.

William C. Boyd, 'Museum Accountability: Laws, Rules, Ethics, and Accreditation' in *Reinventing the Museum* p. 351, at pp. 357-58 (Gail Anderson ed., 2004).

Peer regulation is premised on the idea that deaccession proceeds should be used only for acquiring new works. It is comprised of accreditation and professional ethics codes. Accreditation is conducted by the American Association of Museums, 53 whose code of ethics permits deaccession proceeds to be used only for acquisitions or for direct care of the collection.<sup>54</sup> To be accredited, museums must undergo a rigorous three-year process of self and peer evaluation.<sup>55</sup> Accreditation signals to the profession and the public that the museum's management is of the highest quality and that signal, in turn, assists the museum in securing loans and donations.<sup>56</sup> The AAM may revoke accreditation when museums improperly use deaccession proceeds. Such professional censure could cost the museum's Director and board their jobs. In 2003, the AAM's Accreditation Commission stripped the Museum of Northern Arizona's accreditation when the museum deaccessioned 21 objects and used the proceeds to correct an operating deficit.<sup>57</sup> In response, the museum changed its board and Director, overhauled its institutional management, and eventually regained accreditation after a three-year evaluation.<sup>58</sup>

The other component of peer regulation is a professional code of ethics. "An ethical code sets forth conduct that a profession considers essential in order to uphold the integrity of the profession." Perhaps the most influential ethics code is that promulgated by the Association of Art Museum Directors. AAMD has 190 members, including Directors of prominent art museums such as the Museum of Modern Art and the Metropolitan, as well as Directors of well-regarded regional museums such as the Albright-Knox Art Gallery. AAMD's ethics code permits deaccessions, treating them as an acceptable collection-management tool; the code also prescribes that "proceeds from a deaccessioned work are used *only* to acquire other works of art – the proceeds are never used as operating funds, to build a general endowment, or for any other expenses."

<sup>53</sup> AAM is the association of all museums, not just those devoted to visual art. Its members range from art galleries to history museums to zoos.

Ledbetter Interview, above, note 49. Direct care includes better climate control and shelving, but not general operation support such as staff salary or fixing the front door. *Id.* 

<sup>55</sup> Id

<sup>56</sup> Id.; see also Boyd, above, note 52, at p. 360. The idea is that donors and institutional lenders are more willing to do business with an accredited museum because some of the due diligence required of such transactions has been completed during the accreditation stage. Ledbetter Interview, above, note 49.

Museum of N. Ariz., AAM Restores MNA's Accreditation, available at <www.musnaz.org/trustees/aamaccredit.html> (last visited 10 Dec. 2008).

<sup>58</sup> Id.; Museum of N. Ariz., AAM Accreditation Process, available at <www.musnaz.org/trustees/accreditproc.html> (last visited 10 Dec. 2008); Ledbetter Interview, above, note 49; see also Mark Sidel, The Guardians Guarding Themselves: A Comparative Perspective on Nonprofit Self-Regulation" 80 Chi.-Kent L. Rev. 803, 829 (2005) (observing that "reputational effects of violation of norms are important negative incentives [for poor decisionmaking practices] even without financial or regulatory incentives" and pointing to the AAM as an example).

<sup>59</sup> Marie C. Malaro, Museum Governance: Mission, Ethics, Policy 17 (1994) [hereinafter Malaro, Museum Governance].

<sup>60</sup> Ass'n of Art Museum Directors, Mission Statement, <www.aamd.org/about/members.php> (last visited 17 Mar. 2009).

<sup>61</sup> AAMD, Practice of Deaccessioning, above, note 11 (emphasis original).

Although not binding and although members such as the Hammer Museum have used sale proceeds to pay for operations, the ethics code nevertheless has persuasive power. Member museums have adopted their own 'for acquisition only' policies – MOMA's deaccession procedures, for instance, provide that "[a]ll sales or exchanges of painting are made *ad hoc* for the sole purpose of obtaining another work." In addition, member museums respond to AAMD's censure. After the AAMD formally condemned the Fogg Art Museum's plan to use deaccession proceeds to fund construction of its new wing, the museum cancelled the intended deaccession. When the Phillips Collection announced it would sell Braque's cubist work *Le Violon* to increase its general endowment fund, the AAMD objected; although the Braque was eventually deaccessioned, the Phillips channelled the proceeds to its acquisitions fund – a move permitted by AAMD's ethics code. 64

Beyond peer regulation, museums self regulate by promulgating formal collection policies. Museums, after all, are selling their own assets – assets often irreplaceable and irrecoverable once sold – and have every incentive to ensure the decision is not made rashly or capriciously. The National Gallery of Art, a governmental creation, is among a handful of museums that do not deaccession. Most museums permit deaccession and have collection policies that outline specific procedures to be followed before a work can be deaccessioned. These procedures generally follow professional ethics guidelines and restrict the use of deaccession proceeds to acquisitions. In general, deaccession procedures permit only curators or Directors to initiate the deaccession process, specifies how boards should inform themselves of all material information, requires consultation of outside experts when objects under consideration are particularly valuable, and compels boards to exercise general care by building in opportunities for reconsideration. 66

<sup>62 &#</sup>x27;Deaccession Procedures for the Museum of Modern Art (Painting and Sculpture)', reprinted in Law, Ethics and the Visual Arts, above, note 1, at p. 1277 [hereinafter MOMA Deaccession Procedures]. Examples of other museums that restrict deaccession proceeds for acquisition include The Philadelphia Museum of Art, the Art Institute of Chicago, and Boston's Museum of Fine Arts. Philadelphia Museum of Art, Collection Policy (confidential and unpublished material; on file with author) [hereinafter PMA Deaccession Policy]; Art Institute of Chicago, Deaccession Policy (confidential and unpublished material; on file with author) [hereinafter Art Institute of Chicago Deaccession Policy]; Museum of Fine Arts, Boston, Collection Policy (2005) (confidential and unpublished material; on file with author) [hereinafter MFA Boston Collection Policy].

<sup>63</sup> See Weil, 'Deaccessioning', above, note 12, at p. 65.

<sup>64</sup> See *id.* at pp. 65-66.

Nat'l Gallery of Art, above, note 40, at 8. Some private museums – such as the Isabella Stewart Gardner Museum or the Barnes Foundation – are dedicated to preserving a specific collection and thus do not have to worry about acquisitions or deaccessions. For instance, Isabella Stewart Gardner's will stipulated that no work from her museum's collection can be removed and no acquisitions are allowed (though recently Massachusetts's Supreme Court permitted the museum to reasonably deviate from Gardner's will). Abby Goodnough, 'The Gardner, A Wounded Museum Feels a Jolt of Progress', *N.Y. Times*, 13 Mar. 2009, available at <a href="http://www.nytimes.com/2009/03/15/arts/design/15good.html?\_r=1>; see also above, note 23."

<sup>66</sup> See below, Part IV for a more detailed discussion of the content of deaccession policies.

## D. The Organisation and its Cast of Characters

The American art museum is a complex organisation of "people, functions and relationships." <sup>67</sup> It is run by three distinctive groups: the board, the Director, and the curators. Each group performs a specialised function. The relationships among them – particularly that between the board and the Director – shape the museum's management structure. That relationship is also integral to understanding the board's role in deaccessions.

Most art museums are either non-profit corporations or charitable trusts and, depending on their legal form, are governed by a board of directors or of trustees. The board oversees the museum and is responsible for establishing the museum's general policy, managing finances, taking care of physical assets (including the art collection and the building), and appointing the Director. The Director is the museum's chief executive officer and implements the board's policies in addition to conducting the museum's day-to-day operations. Both the Director and the curators are part of the museum's professional staff. Curators, hired by the Director, are in charge of the acquisition, care, and display of collections. Curators lobby the Director to prioritise their curatorial department or to enlist the Director to convince the Board to support a particular acquisition. In turn, Directors depend on curators to run their departments and help them secure donations and loans.

<sup>67</sup> Law, Ethics and the Visual Arts, above, note 1, at p. 1194. This observation is not to deny the importance of other museum personnel such as the registrar, conservators, business staff, and others; but it is the trinity consisting of the board, the Director, and the curators that makes all the decisions critical to managing an art museum and thus they and their relationships are scrutinised here.

White, above, note 9, at p. 1048. Other less common legal forms that art museums take include government trust (the Smithsonian Institution), or state agency (North Carolina Museum of Art).

Grace Glueck, 'Power and Esthetics: The Trustee', *Art in America* pp. 78-83 (Jul-Aug. 1971), reprinted in *Law, Ethics and the Visual Arts*, above, note 1, at pp. 1194, 1195; see also, e.g., Los Angeles County Museum of Art, Bylaws of Museum Associates Art. V § 7, available at <a href="http://www.lacma.org/info/pdf/bylawsjune05.pdf">http://www.lacma.org/info/pdf/bylawsjune05.pdf</a> [hereinafter LACMA Bylaws] ("[The Director] shall be selected by the Board of Trustees . . . and shall report to the Board of Trustees . . . ."); Calvin Tomkins, 'I Remember MOMA', *New Yorker*, 25 Sept. 2006, at pp. 126, 131 [hereinafter Tomkins, 'MOMA'] (mentioning that Directors are hired and fired by MOMA's board).

Ass'n of Art Museum Directors, Good Governance and Non-Profit Integrity (June 2006), at 2, <a href="http://www.aamd.org/papers/documents/GoodGovernance\_Final.pdf">http://www.aamd.org/papers/documents/GoodGovernance\_Final.pdf</a>; see also LACMA Bylaws, above, note 69, at Art. V § 7 ("The Director shall be the chief executive officer of the corporation . . . .").

See, e.g., LACMA Bylaws, above, note 69, at Art. V § 7 ("[The Director] shall have the powers and duties of administration and management usually vested in the chief executive officer of a corporation . . . ."; Hoving, *Making the Mummies Dance*, above, note 3, at pp. 76-79 (describing Hoving's rationale for hiring or firing certain curators).

Association of Art Museum Curators, <a href="http://www.artcurators.org/">http://www.artcurators.org/</a> (last visited 16 Feb. 2008).

See, e.g., Hoving, *Making the Mummies Dance*, above, note 3, at 68-82, for a Director's view of his relationship with curators; see also Carol Vogel, 'Director (and Voice) of Met Museum of Retire', *N.Y.Times*, 9 Jan. 2008, available at <a href="http://www.nytimes.com/2008/01/09/arts/">http://www.nytimes.com/2008/01/09/arts/</a>

The Director, as the public face of the museum, leads fundraising campaigns and socialises with potential donors in hopes of persuading them to part with their money, art collections, or both. Though the board is the museum's governing body, frequently it is the Director's personality and artistic vision that shape the museum. Thomas Hoving, a "brilliant showman and populizer," transformed the "slumbering" Metropolitan into an "insatiable, acquisitive, blockbuster-besotted" modern museum. In contrast, his successor, the erudite and 'Old World' Philippe de Montebello, focused on displaying the museum's permanent collection and ran acclaimed, scholarly exhibitions, but was criticised for slighting contemporary art.

Board members are the monied elite on whom the museum relies for major donations or hosting fundraisers; many come from business and finance; <sup>81</sup> many have superb art collections<sup>82</sup> that the museum one day hopes to obtain. Contemporary boards are criticised for running a museum the way they run their corporations, focusing on balancing the budget rather than on art. <sup>83</sup> The

- design/09muse.html> (noting the close collaboration between Philippe de Montebello, the Metropolitan's former Director, and museum curators).
- For a scathing and hilarious account of a former Metropolitan Director's escapades trying to woo donors, see generally Hoving, *Making the Mummies Dance*, above, note 3.
- Or, as the AAMD puts it, "nurtures the intellectual and aesthetic philosophy of the museum." AAMD *Professional Practices*, above, note 26, at p. 11.
- Charles McGrath, 'Twilight of the Sun King', *N.Y.Times*, 29 July 2007, at <a href="http://www.nytimes.com/2007/07/29/arts/design/29mcgr.html?r=1&ref=design">http://www.nytimes.com/2007/07/29/arts/design/29mcgr.html?r=1&ref=design>.
- 77 Michael Kimmelman, 'The Legacy of a Pragmatic Custodian of Human Civilization', *N.Y. Times*, 9 Jan. 2008, <a href="http://www.nytimes.com/2008/01/09/arts/design/09kimm.html?ref=design">http://www.nytimes.com/2008/01/09/arts/design/09kimm.html?ref=design</a>>.
- 78 See Vogel, above, note 73.
- 79 See Rachel Donadio, 'What Awaits the Met', *N.Y. Times*, 13 Jan. 2008, *available at* <a href="http://www.nytimes.com/2008/01/13/weekinreview/13donadio.html?ref=weekinreview">http://www.nytimes.com/2008/01/13/weekinreview/13donadio.html?ref=weekinreview</a> ("Mr. de Montebello is leaving strong, following . . . a run of well-attended, scholarly, rigorous and critically acclaimed exhibitions.").
- See Kimmelman, above, note 77 ("What the art world complained most about was the inattention to living artists, reflecting Mr. de Montebello's own discomfort with contemporary art."); see also Tomkins, 'MOMA', above, note 69 for an account of how the appointment of Glenn Lowry as MOMA's Director changed that museum's approach to collecting and displaying art.
- See *Law, Ethics and the Visual Arts*, above, note 1, at 1196 (observing the continuing trend that museum boards remain "predominantly white, older, wealthy, business and professional in background, and socially and politically influential."). One member of the Metropolitan's acquisition committee notes that after curatorial presentations of potential objects for acquisition, sometimes a board member will "step up and offer to personally fund a purchase that is costly, but particularly important to the [D]irector or one of our curators." Danny Danziger, *Museum: Behind the Scenes at the Metropolitan Museum of Art* p. 194 (2007) (quoting Annette de la Renta).
- According to Hoving, acquisition committee members are "chosen for their special knowledge or their great interest in works of art. Many of them are connoisseurs in their own right, having private collections with great distinction." Hoving, 'The Chase', above, note 1, at p. 28.
- See, e.g., Tomkins, 'MOMA', above, note 69, at pp. 131,135 (profiling MOMA's management, particularly of its Director, Glenn Lowry, who "proved to be a dazzlingly effective C.E.O." and whom some blamed for the "corporate' transformation of MOMA's culture."); Andrew Decker, 'The State of Museums: Cautious Optimism Prevails', *Museum News* pp. 24-25, 33 (Mar/Apr 1988) (describing the state of American museums as a "time of marketing and finance" and quoting complaints that board members are now populated by businessmen who "are there

accusation is not entirely fair. No longer are art museums just galleries with artwork. Responsible planning and management – of expensive building projects, of multi-million dollar acquisitions, of the museum's endowment – require financial savvy and an eye on the bottom line. The consequences of prioritising art above the budget are painfully illustrated by the Museum of Contemporary Art in Los Angeles. Under Director Jeremy Strick, the museum built an impressive collection of post-war art and organised "some of the most serious and ambitious contemporary art exhibitions anywhere." But in "putting art ahead of the bottom line," MOCA chronically overspent its budget and was forced to draw down the principal of its endowment as well as borrow from donor-restricted accounts to pay for operating costs. Nearing financial collapse, MOCA had to accept a \$30-million bailout from philanthropist Eli Broad. Thus, fiscal responsibility is a necessary ingredient in sound museum governance.

The Director-board relationship is one of checks and balances. <sup>86</sup> Directors and, to a lesser extent, curators drive collection management while the board retains ultimate decisionmaking power. Proposals for acquiring or deaccessioning an object are almost always initiated by the curator and submitted by the Director to the board for approval. <sup>87</sup> Some Directors have great personal authority among board members and enjoy much freedom in acquisitions. Indeed, because museums often compete with other buyers on the art market, freedom to make instantaneous decisions gives Directors an advantage during bidding or negotiations. For example, the Metropolitan's de Montebello concedes that though he had spoken to some key board members beforehand about buying Duccio's *Madonna and Child*, he did not technically have the necessary board authority when he made an on-the-spot offer to the auction house. <sup>88</sup> For de Montebello, an official approval was probably never in question, because as one curator describes, "[i]f [de Montebello] wants

more for status than anything else" and whose priority is financial health rather than art).

Edward Wyatt & Jori Finkel, 'Soaring in Art, Museum Trips Over Finances', N.Y. Times, 5 Dec. 2008, at A1

<sup>85</sup> *Id.*; Mike Boehm, 'Museum in Deep Financial Trouble', *L.A. Times*, 19 Nov. 2008, available at <a href="http://articles.latimes.com/2008/nov/19/entertainment/et-moca19">http://articles.latimes.com/2008/nov/19/entertainment/et-moca19</a>.

Hoving, 'The Chase', above, note 1, at p. 30.

See, e.g., AAMD Professional Practices, above, note 26, at p. 5 ("The [D]irector and curatorial staff are responsible for identifying possible acquisitions made through purchase. No work of art may be considered for acquisition without the recommendation of the [D]irector."); Metropolitan Museum of Art, Collections Management Policy (12 Nov. 2008), at 3, available at <a href="http://www.metmuseum.org/works\_of\_art/collection\_database/collections\_mgmt\_policy.pdf">http://www.metmuseum.org/works\_of\_art/collection\_database/collections\_mgmt\_policy.pdf</a>> [hereinafter Met Collections Policy]. Sometimes the board will bring a potential candidate for acquisition to the curator or Director's notice.

Tomkins, 'Madonna', above, note 32, at p. 49; see also Met Collections Policy, above, note 87 (requiring all purchases over \$100,000 to be approved by the acquisitions committee). De Montebello explained his offer was to Christie's, not to the seller; by the time the seller received the offer, the Metropolitan's board had approved the acquisition. Tomkins, 'Madonna', above, note 32, at p. 49.

something, and the trustees know he wants it – I had no doubt that the funds could be found."89

But museum boards are hardly in the business of rubber-stamping Directors' recommendations. Boards have power over the Director and are not shy about using it. Because major decisions such as acquisition, loans and deaccessions (not to mention the hiring and firing of the Director) require board votes, 90 boards can check the Director and curators if the board believes a proposal is inappropriate. Both the acquisition and deaccession processes give boards opportunities to question curators and Directors about their proposals and to make the final authorisation. Long before the Metropolitan acquired its current Duccio, Hoving wanted to buy Duccio's *The Crucifixion*; the board authorised him to bid but later rescinded its authorisation. 91 (That painting is no longer attributed to Duccio.) When Hoving and his curators proposed deaccessioning a long list of works to pay for *Juan de Pareja*, the acquisitions committee approved some proposals but vetoed others. 92 Boards have also got rid of Directors for poor management: MOMA's board forced Director Bates Lowry to resign for, among other things, running a deficit; the board then fired Lowry's successor after he mishandled union strikes at the museum.<sup>93</sup>

## III. THE VIEW FROM THE BAR: THE FIDUCIARY DUTIES OF MUSEUM BOARDS

Board members of art museums – be they corporate directors or trustees – have fiduciary duties to the museum and its collections. But whereas the 'trust standard' tests the prudence of trustee conduct, the more lax 'business judgment rule' presumes propriety of the corporate director's business decisions. For the corporate director, the effective check on his conduct comes not from the corporate standard, but from shareholder votes and lawsuits. A problem arises when an entity's legal form is a non-profit corporation, whose 'shareholders' have neither voting power nor standing to sue. States disagree whether the conduct of non-profit directors should be assessed under the corporate standard or under the trust standard.<sup>94</sup> Some

<sup>89</sup> *Id.* at p. 48. Before the auction for *Juan de Pareja*, Hoving successfully convinced the board to raise the maximum bid from £2 million, to £2 million plus one bid back to the museum. Hoving, 'The Chase', above, note 1, at p. 39. It was on this additional bid that the Metropolitan won the painting. *Id.* at p. 40. For more on acquisitions at the Metropolitan, see *The Chase, the Capture: Collecting at the Metropolitan*, above, note 1.

<sup>90</sup> See, e.g., LACMA Bylaws, above, note 69, at Art. IV, § 14(b) (providing that the acquisitions committee's job includes approving all acquisitions, deaccessions, and major loans).

Tomkins, 'Madonna', above, note 32, at p. 49.

For example, at one point the board cancelled the sale of a Rousseau and postponed the decision on other paintings. Eventually, the Rousseau was deaccessioned but other works on the proposed deaccession list were not. Hoving, *Making the Mummies Dance*, above, note 3, at pp. 300-01. In another Velazquez-related deaccession, the board voted to deaccession three German expressionist paintings, but not without tough questions from board members. *Id.* at 294.

Charlie Finch, 'How to Fire a MOMA Director', artnet, 28 July 2008, available at <a href="http://www.artnet.com/magazine/features/FINCH/FINCH7-28-00.asp">http://www.artnet.com/magazine/features/FINCH/FINCH7-28-00.asp</a>.

<sup>94</sup> Id.; George Gleason Bogert et al., The Law of Trusts and Trustees § 394 (rev. 3rd edn, 2008).

commentators propose applying the trust standard regardless of the museum's legal form. This section first examines the fiduciary duties of trustees and corporate directors; 95 it then turns to the debate over the appropriate standard of care for non-profit corporate directors, before considering critique of the business judgment rule in a non-profit context and proposals to impose a uniform trust standard on museum board members.

## A. Fiduciary Duties of Corporate Directors and of Trustees

In corporate law, the business decision of directors is evaluated under the business judgment rule. The rule presumes propriety and imposes a rational-basis review to business decisions made with reasonable care and without conflict of interest. <sup>96</sup> Because the business judgment rule is a rule of abstention that essentially prevents courts from reviewing the substance of the decision, <sup>97</sup> few directors are ever found liable. <sup>98</sup> If, however, the plaintiff can show that the director breached either the duty of care or the duty of loyalty, the business judgment rule no longer applies. <sup>99</sup>

The duty of care requires decisions be made in a reasonable manner – directors must "act on an informed basis" and "inform [themselves] of all material information that is reasonably available to them." Breach of care is evaluated

- The fiduciary obligation encompasses both the duty of care and the duty of loyalty. E.g., *Schoon v. Smith*, 953 A.2d 196, 206 (Del. 2008). The duty of loyalty bars self-interested transactions or other conflicts of interest. The duty of care, in contrast, assumes disinterest and asks whether the actor exercised the proper care in making that decision. Because loyalty raises a different set of concerns and problems seem to occur less frequently in the deaccession context, this Article will, with the exception of the discussion on good faith, focus solely on the standard of care. This is not to say that loyalty problems do not exist. Indeed, trustee acquisition of deaccessioned works presents a classic instance of conflict of interest under fiduciary law. Merryman recounts such an instance afflicting the Museum of the American Indian in New York City. See *Law, Ethics and the Visual Arts*, above, note 1, at p. 1227.
- 96 See Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) ("A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose."); Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) ("Irrationality is the outer limit of the business judgment rule.").
- 97 Edward Brodsky & M. Patricia Adamski, Law of Corporate Officers and Directors: Rights, Duties and Liabilities § 2:10 (2007).
- 98 See below, note 120.
- 99 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), overruled on other grounds by Brehm, 746 A.2d at 244; see also Paramount Communic ins v. QVC Network, 637 A. 2d 34, 46 (Del. 1994) ("where the traditional business judgment rule is applicable . . . the Court gives great deference to the substance of the directors' decision").
- 100 See, e.g., Cede & Co. v. Technicolor, Inc., 634 A. 2d 345, 367 (Del. 1993); Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A. 2d 150, 192 (Del. Ch. 2006) (articulating the rule that corporate directors must "inform themselves . . . of all material information reasonably available to them."); Model Business Corp. Act § 8.31(a)(2)(ii)(B) (2002) (providing that liability may arise when the challenged conduct resulted from a decision to which "the director was not informed to an extent the director reasonably believed appropriate in the circumstances") [hereinafter MBCA].
- 101 Cede & Co., 634 A. 2d at 367 (internal citations omitted) (discussing duty of care in mergers or sales).

under a gross negligence standard,<sup>102</sup> which means "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason."<sup>103</sup> To overcome the presumption of the business judgment rule, the plaintiff must show that the director failed to "adequately apprise himself of the information material to the decision in question."<sup>104</sup> Breach of care, however, does not automatically give rise to liability; it only removes the business judgment rule and its presumptions of propriety.

Although the duty of care is distinct from the duty of loyalty, the good faith component of loyalty is implicated in the director's decision-making process. Good faith obliges corporate directors to ensure that adequate mechanisms exist within the corporation to provide them with "timely, accurate information sufficient . . . to reach informed judgments concerning both the corporation's compliance with law and its business performance." Breach of good faith occurs when there is a "sustained or systematic failure" to establish reasonable information and reporting systems. This is not a demanding standard, since ordinary failure is not enough to establish breach; rather, the failure must have been sustained and extreme. As with the duty of care, breach of good faith deprives directors of the protection of the business judgment rule.

On top of their discretion under gross negligence and good faith, directors may shield themselves from fiduciary breaches. Both the Model Business Corporation Act and Delaware's corporate statute permit corporations to limit the liability of directors who breach the standard of care. <sup>108</sup> And, in addition to limited liability, directors may be indemnified if they acted in good faith and in reasonable belief the action was in the corporation's best interest. <sup>109</sup> Together, the gross negligence standard and immunity create little structural incentive for directors to take scrupulous care. <sup>110</sup>

<sup>102</sup> Smith v. Van Gorkom, 488 A. 2d 858, 873 (Del. 1985).

<sup>103</sup> Benihana, 891 A. 2d at 192 (internal citation omitted).

<sup>104</sup> Kahn ex rel DeKalb Genetics Corp. v. Roberts, 1995 Del. Ch. LEXIS 151, at \*11 (Del. Ch. 1995).

<sup>105</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A. 2d 959, 970 (Del. Ch. 1996).

<sup>106</sup> *Id.* at 971.

<sup>107</sup> See *id.* ("only a sustained or systematic failure of the board to exercise oversight – such as an *utter failure to attempt* to assure a reasonable information and reporting system exists – will establish the lack of good faith that is a necessary condition to liability.") (emphasis added). Detail of system design, however, is a business decision and accorded the same deference as are other business decisions. *Id.* at 970.

<sup>108</sup> MBCA, above, note 100, at § 2.02(b)(4); Del. Gen. Corp. Law § 102(b)(7).

MBCA, above, note 100, at § 8.51; Del. Gen. Corp. Law § 145. It is more accurate to say that directors do not have a right to indemnification under these provisions; rather, the corporation has the power but not obligation to indemnify its directors. The MBCA provides that corporations "may indemnify" and the Delaware statute similarly states that corporations "shall have the power to indemnify" directors.

It is, however, interesting to observe that in practice, after *Smith v. Van Gorkom*, corporations seem to err on the side of caution and do everything the Transunion board failed to do to guard against a finding of gross negligence.

The trust standard of care obliges a fiduciary to "manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objective similar to those of the trust in question."111 The same prudence standard also applies to trustees of a charitable trust, whose beneficiary is the public. 112 Unlike corporate law's gross-negligence standard, the trust standard of care turns on ordinary negligence. 113 Whereas corporate law merely requires decisions to be made in a reasonable manner, the trust standard articulates the steps trustees must follow in the decisionmaking process. These steps include: making proper investigations, using sufficient safeguards, complying with internal procedures, considering expert advice where appropriate, and generally exercising ordinary skill, care, and caution. 114 Compared with the corporate 'reasonable manners' requirement, the trust standard is less flexible and provides greater clarity. Corporate directors satisfy their duty of care if they are reasonably informed; the rule is not concerned about precisely how they became informed. 115 In contrast, under the trust standard, trustees must satisfy specific procedural safeguards to not breach their duty of care. 116 Further, the "test of prudence is one of

- Bogert, above, note 94, at §§ 394, 363 (discussing beneficiaries of the charitable trust).
- See, e.g., *Stern v. Lucy Webb Nat'l Training Sch. For Deaconesses and Missionaries*, 381 F. Supp. 1003, 1013 (D.D.C. 1974) ("A trustee is uniformly held to a high standard of care and will be held liable for simple negligence, while a director must often have committed 'gross negligence'"); see also *Bogert*, above, note 94, at § 394.
- See, e.g., Bogert, above, note 94, at § 541 ("The standard of care applicable to trustees would appear to include at least two elements. The element of initiative or effort refers to those acts necessary to the collection and preservation of the trust assets, and to the seeking of qualified assistance where necessary for the proper administration of the trust. The element of skill or judgment . . . appear[s] to include the use of proper safeguards and internal procedures as well as consideration of the advice of specialists or experts where necessary to make informed decisions."); *First Alabama Bank of Montgomery v. Martin*, 425 So. 2d 415, 426-27 (Ala. 1982) (listing the procedural steps that satisfy prudence); *Estate of Collins*, 72 Cal. App. 3d 663, 670-71 (Cal. Ct. App. 1977) (requiring trustees to investigate the financial status of their purchase and of those with whom they do business); see also *Restatement (Third) of Trusts* § 77 cmts. a & b (2003).
- 115 See *Cede & Co. v. Technicolor, Inc.*, 634 A. 2d 345, 368 (Del. 1993) ("a trial court will not find a board to have breached its duty of care unless the directors individually and the board collectively have failed to inform themselves fully and in a deliberate manner before voting as a board upon a transaction as significant as a proposed merger or sale of the company.").
- For instance, in *First Alabama Bank*, the trustee-bank was liable for losses to the trust principle; it had purchased securities in contravention of its own minimum investment safety standards. 425 So.2d at 419.

Bogert, above, note 94, at § 541. Case law and statutes differ on precisely what "similar business affairs" means. The Uniform Probate Code sets the standard at that observed by the "prudent man dealing with the *property of another.*" *Id.* (quoting the Uniform Probate Code) (emphasis added). Case law generally requires trustees to exercise the degree of care observed by a prudent man "dealing with his *own property.*" *Restatement (Second) of Trusts*, § 174 (1959) (emphasis added); see also *Estate of Beach*, 15 Cal. 3d 623, 631 (Cal. 1975). The MBCA uses similar language to describe the director's standard of conduct: members of the board "shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances." MBCA, above, note 100, at § 8.30(b). However, this language is absent in the provision governing the director's standard of liability. *Id.* at § 8.31. Further, case law interprets the corporate standard to be one of gross negligence (under the business judgment rule) while the trust standard is one of ordinary negligence.

conduct not of performance."<sup>117</sup> Breach turns on whether the trustee's conduct was prudent, not on the result of that conduct. That is, so long as the trustee dutifully investigates, considers expert advice where appropriate, follows internal guidelines, and generally exercises care, his decision is considered prudent and is not evaluated on its merits. In some ways, the prudence standard operates like the business judgment rule, whereby the substance of the decision is not subject to review so long as the procedure is adequate. The difference is that the trust standard is procedurally more exacting. More importantly, because a trustee's actions are not presumed proper, breach of care by a trustee results in liability; in contrast, a corporate director's breach of care only lifts the presumption of propriety.

Trustees, like corporate directors, may be exculpated from breaches of care. Trust instruments can exculpate the trustee for certain conduct, and the typical exculpatory clause relieves trustees of liability for all acts other than gross negligence or willful default. <sup>121</sup> Though courts dislike such clauses, the modern trend is to accept exculpatory clauses so long as they do not immunise trustees from all liability. <sup>122</sup> In addition, the Uniform Trust Code permits exculpation for trustees acting in good faith and without reckless indifference. <sup>123</sup> The consequence is that although the default trust standard is ordinary negligence, a trustee may be liable only for gross negligence (not unlike the un-immunised corporate director). It is, however, harder for the trustee to successfully invoke

<sup>117</sup> Restatement (Third) of Trusts, above, note 114, at § 77 cmt. a.

<sup>118</sup> Id.

See, e.g., *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983) ("courts have focused the inquiry under the 'prudent man' rule on a review of the fiduciary's independent investigation of the merits of a particular investment, rather than on an evaluation of the merits alone."); Ethan G. Stone, 'Must We Teach Abstinence? Pensions' Relationship Investments and the Lessons of Fiduciary Duty', 94 *Colum. L.Rev.* 2222, n.118 (1994) (internal citations omitted) ("the test of prudence – the Prudent Man Rule – is one of conduct, and not a test of the result of performance of the investment. The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed.").

See, e.g., *Jones v. Ellis*, 551 So. 2d 396, 402 (Ala. 1989) ("a trustee is liable for losses occasioned by his mere imprudent management of the trust."). But see *Pederzani v. Guerriere*, 4 Mass L. Rep. 447, at \*2 (Sup. Ct. Mass. 1995) (applying the business judgment rule to conduct of trustees of a condominium trust). Under these circumstances, it is unsurprising that trustees are more frequently found personally liable for breach of care than their corporate counterparts. Compare Dana M. Muir & Cindy A. Schipani, 'The Challenge of Company Stock Transactions for Directors' Duty of Loyalty', 43 *Harv. J. on Legis*. 437, 442 & n.26 (2006) (noting the paucity of cases – fewer than ten – in which corporate directors are held liable for violating the standard of care), and Andrew S. Gold, 'A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty', 66 *Md. L. Rev.* 398, 472 (2007) (observing that in Delaware, "the few cases in which allegations of gross negligence alone enabled a plaintiff to rebut the business judgment rule are outliers."), with Bogert, above, note 94, at § 541 (summarising a number of cases in which the trustee was found to have breached the standard of care).

Bogert, above, note 94, at § 542.

<sup>122</sup> Id.

<sup>123</sup> Uniform Trust Code § 1008(a) (2001).

immunity than it is for the corporate director. Not only must the trustee's conduct fall within the protective scope of the exculpatory clause, but courts also strictly construe these clauses against the trustee. <sup>124</sup> Further, trustees are only indemnified for "expenses properly incurred in the administration of the trust" <sup>125</sup> – expenses that, "in the exercise of fiduciary judgment, are reasonable and appropriate in carrying out the purposes of the trust, serving the interests of the beneficiaries, and generally performing the functions and responsibilities of the trusteeship." <sup>126</sup> Should the trustee breach fiduciary duty, he receives no indemnification. <sup>127</sup> Consequently, a trustee, when compared with a corporate director, is less insulated against the legal liabilities of breach and consequently has stronger incentives to refrain from breach.

## **B.** Which Standard? The Debate over Non-Profit Corporate Directors

The non-profit corporation is something of a hybrid, sporting characteristics of both corporations and trusts. Like a business corporation, it is a legal entity that exists independently of its members. But though non-profit corporations do make profits, they cannot distribute their earnings. Unlike its for-profit counterpart, a non-profit corporation has no shareholders to vote for board members or to sue them. This is because a non-profit corporation's beneficiaries, like those of a charitable trust, are the public at large; but because members of the public and professional associations have no direct financial interest in charitable trusts or non-profit corporations, they have no standing to sue. That is, neither museum professionals nor the public can file lawsuits against the board alleging breach of fiduciary duty. Instead, the state attorney general oversees the state's non-profit organisations and may prosecute charitable trustees and non-profit directors for breaches of fiduciary duty.

<sup>124</sup> Bogert, above, note 94, at § 542.

<sup>125</sup> Restatement (Third) of Trusts, above, note 114, at § 38.

<sup>126</sup> Id. at § 88 cmt. b.

Bogert observes that trust property cannot be used to pay legal expenses caused by the trustee's wrongful act. *Bogert*, above, note 94, at § 809, n.43. Whether a trustee will have to pay for his legal expenses depends on the outcome of the litigation: if he prevails in a breach of trust suit, his costs are borne by the trust principle, but if he is removed, he is responsible for his own expenses. *Id.* at § 809.

<sup>128</sup> White, above, note 9, at p. 1050.

Rev. Model Nonprofit Corp. Act § 13.01 [hereinafter RMNCA].

White, above, note 9, at pp. 1050-51; see also Marion Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* p. 233 (2004) (noting that non-profit corporations "lack 'watchdog' shareholders with an equity incentive to police the actions of board members").

See Gerstenblith, above, note 10, at 199-200. Standing to sue non-profit corporations has been expanded on a limited basis, and some states recognise standing for university alumni and faculty (but not current students), and certain taxpayer claims. Malaro, *A Legal Primer*, above, note 12, at pp. 27-29. But standing remains elusive for members of the general public wishing to sue museums for mismanagement. *Id.* at pp. 30-33.

<sup>132</sup> *Id.* at pp. 23, 28.

Historically, non-profit directors were held to the trust standard.<sup>133</sup> When states began to regulate the non-profit sector, they often imported corporate standards wholesale<sup>134</sup> and the business judgment rule was used to evaluate the conduct of non-profit corporate directors.<sup>135</sup> Although the Model Nonprofit Corporate Act's standard of care requires directors to act "with the care that an ordinarily prudent person in a like position would exercise under similar circumstances",<sup>136</sup> there is no specified procedural requirement beyond that directors be "reasonably acquainted with matters demanding their attention, and at a minimum must attend meetings and review and understand material submitted to the board."<sup>137</sup> Today, though some states still use the trust rule,<sup>138</sup> the trend in non-profit fiduciary law is to apply the corporate standard and its attendant business judgment rule.<sup>139</sup>

A non-profit director's immunity has characteristics of both trust and corporate law. Although the RMNCA does not limit director liability, some states permit non-profit corporations to immunise their directors for conduct other than gross negligence;<sup>140</sup> in this respect, the non-profit standard is like a trust instrument immunising ordinary negligence. However, the RMNCA follows

<sup>133</sup> Lee, above note 10, at p. 926.

See *id.* at p. 932 ("In most states, nonprofit corporate statutes closely parallel those governing business corporations and may be even more permissive.").

See, e.g., *Stern v. Lucy Webb Nat'l Training Sch. For Deaconesses and Missionaries*, 381 F. Supp. 1003, 1013 (D.D.C. 1974) ("the modern trend is to apply corporate rather than trust principles in determining the liability of the directors of charitable corporations, because their functions are virtually indistinguishable from those of their 'pure' corporate counterparts."); *Rywalt v. Writer Corp.* 34 Colo. App. 334, 337 (Colo. Ct. App. 1974) ("The good faith acts of directors of profit or non-profit corporations which are within the powers of the corporation and within the exercise of an honest business judgment are valid.") questioned by *RTC v. Heiserman* 839 F. Supp. 1457 (D. Colo. 1993).

<sup>136</sup> RMNCA, above, note 129, at § 8.30(a).

<sup>137</sup> Fremont-Smith, above, note 130, at 203.

<sup>138</sup> Compare 15 Pa. Const. Stat. Ann. § 5547 (West 2008) (holding non-profit corporate directors to the trust standard), with Va. Code Ann. § 13.1-870 (2009) ("A director shall discharge his duties as a director . . . in accordance with his good faith business judgment of the best interests of the corporation."); see also Bogart, above, note 94, at § 394 (noting the uncertainty surrounding which standard to apply to assess the duties of non-profit corporate directors).

Bogert, above, note 94, at § 361; Marilyn E. Phelan, *Nonprofit Enterprises: Corporations, Trusts, and Associations* § 4.09 (2000) ("The current trend is to apply corporate rather than trust principles in determining the legal liability of directors of charitable corporations based on the concept that their functions are virtually indistinguishable from those of their 'pure' corporate counterparts."); Jaclyn A. Cherry, 'Update: The Current State of Nonprofit Director Liability', 37 *Duq. L. Rev.* 557, 560 (1999) ("Although courts have historically looked to trust law as the basis for defining director liability, most recently, courts have begun to look to nonprofit corporate law.").

See, e.g., Cal. Corp. Code § 5239(a) (Deering 2008) (providing no liability for volunteer directors of non-profit corporations if their acts were in good faith and "not reckless, wanton, intentional, or grossly negligent"); 805 Ill. Comp. Stat. Ann. 105/108.70 (LexisNexis 2009) (limiting the liability of unpaid directors of tax-exempt organizations to only acts of "willful or wanton conduct"); N.Y. Not-for-Profit Corp. Law § 720-a (Consol. 2009) (limiting liability of unpaid directors of tax-exempt organizations to only acts of gross negligence or intentional harm).

the MBCA by allowing a non-profit corporation to indemnify its directors if they acted in good faith and reasonably believed their conduct did not oppose the corporation's best interests.<sup>141</sup>

Most art museums are non-profit corporations.<sup>142</sup> Thus the applicable standard of care in deaccession cases depends on the jurisdiction in which the case is brought. For example, board members of Buffalo's Albright-Knox Art Gallery were sued when they changed the museum's collecting focus and deaccessioned over 200 works of art.<sup>143</sup> Since New York law applies the business judgment rule to non-profit corporations, the judge engaged in minimal judicial review and quickly concluded that "those actions taken by a board of directors in good faith in the exercise of honest judgment and within legitimate corporate purposes cannot be overturned by a court." <sup>144</sup>

## C. Proposing a Trust Standard of Care

Responding to the different standards of care across states and the unique characteristics of non-profit corporations, some art-law commentators recommend applying the trust standard to evaluate the conduct of non-profit directors, articulating three main reasons for this recommendation. First, museums with non-profit corporate status are functionally equivalent to charitable trusts:

Evaluating the conduct of museum [board members] in dissimilar ways based merely upon differences in organizational form improperly elevates form over function because the choice of organizational form has no [e]ffect on the service that museums

- 141 RMNCA, above, note 129, at § 8.51(a).
- Malaro, A Legal Primer, above, note 12, at p. 4.
- 143 Dennis v. Buffalo Fine Arts Academy, 836 N.Y.S.2d 498, 498 (N.Y. Sup. Ct. 2007).
- 144 Id. A similar case involved the Providence Athenaeum, whose board had voted to deaccession its star holding, the Double Elephant Folio of Audubon's Birds of America. (Though the Athenaeum is a library and not an art museum, the deaccession analysis is similar to those applied to art museums.) Throughout the 1990s, the Athenaeum ran into financial trouble and was forced to invade its endowment to pay for operating costs. Adams v. Providence Athenaeum, 2004 R.I. Super. LEXIS 151, at \*14 (R.I. Super. Ct. 2004), aff'd Adams v. Christie's, 880 A.2d 774 (R.I. 2005). Demand on expenditures increased only after the library realised its building was falling apart the floor had begun to sag and rendering the entire structure hazardous. Id. at \*15. After considering alternatives such as cutting staff and services, embarking on a capital campaign, raising membership dues and selling the building, the board decided to deaccession the Audubon folio. Id. Shareholders brought suit; on appeal, the Rhode Island Supreme Court applied the business judgment rule and held that the plaintiffs failed to produce evidence to rebut the business judgment rule's presumptions. Id. at \*25-28.
- See White, above, note 9, at p. 1054 (contending that trust principles should be used in evaluating museum deaccessions); Gerstenblith, above, note 10, at p. 176 (arguing that regardless of the legal status of the museum, its board should be charged with trust duties); see also Lee, above, note 10, at p. 944 (advocating ordinary negligence review for non-profit corporate directors). But see Fremont-Smith, above, note 130, at 210 (observing that trust-standard advocates appear to be in the minority and that "most commentators argue that application of the business judgment rule to the decisions of nonprofit directors is justified.").

provide to the public. Whether a museum is organized as a trust or as a corporation, the public requires it to protect and preserve cultural assets. 146

Moreover, museums, regardless of their legal status, are usually supported by art and monetary donations from the public and these donations are considered trust assets, <sup>147</sup> so board members ought to be held to the trust standard of care. <sup>148</sup>

Second, the trust standard compensates for insufficient monitoring of the non-profit's management. 149 The non-profit corporation's beneficiaries – the public – have no standing to sue because they do not suffer particularised or unique injuries. Enforcement of the board's legal duty is instead left to the discretion of the state Attorney General. But the Attorney General has finite resources with which he must prosecute all the state's crimes, and monitoring museum directors for breach of fiduciary duty is hardly a priority. 150 Moreover, short of egregious misconduct on the board's part, the business judgment rule's deference to the board makes it nearly impossible for attorneys general to prevail in court and thus discourages prosecution. Monitoring outside the litigation context is practically nonexistent: there are no voting shareholders to discipline boards for inefficiency or incompetence. 151 And unlike for-profit corporations, a non-profit museum's services do not have a ready market value, a proxy for an organisation's performance. Consequently, its board's performance cannot be assessed easily. 152 Under these circumstances, the permissive corporate standard frees directors from much accountability and necessitates adoption of the trust standard as an extra check on directors. 153

Finally, the argument goes, the business judgment rule, created to serve unique needs of for-profit corporations, is inappropriate in the non-profit context. One rationale for the business judgment rule is that exposing directors to ordinary-negligence liability discourages risk-taking. But because for-profit corporations seek to maximise their profits, risk-taking is desirable; courts,

<sup>146</sup> White, above, note 9, at pp. 1054-55.

<sup>147</sup> Id. at p. 1056.

<sup>148</sup> Id.; Gerstenblith, above note 10, at pp. 176-77. Indeed, some museums, though incorporated as non-profits, legally hold objects in trust. See Rowan v. Pasadena Art Museum, No. C322817 (Cal. Super. Ct. Sept 22, 1981), reprinted in Law, Ethics and the Visual Arts, above, note 1, 1282 at p. 1285 ("The works of art belonging in [the museum], the museum building itself, and the land which it occupies are trust property; they are the assets of defendant corporation acting as trustee."). However, the Rowan court still applied the corporate standard to evaluate the board's interpretation that the corporate purpose permitted deaccessions, adding that the public will be protected "by the duty of the directors . . . to act in good faith and after reasonable inquiry." Id.

White, above, note 9, at p. 1055; see also Fremont-Smith, above, note 130, at p. 233 (summarising arguments for applying the trust standard of care to the decisions of non-profit directors).

<sup>150</sup> Lee above, note 10, at p. 933 and note 49.

<sup>151</sup> Id. at 958.

<sup>152</sup> See *id.* at pp. 957-58 (discussing the self-enforcing market mechanisms that regulate the conduct of corporate directors and which are found wanting in the non-profit context).

<sup>153</sup> *Id.* at p. 958.

which have little competence in business matters, should defer to business decisions made by the board (especially since investors can always exit by selling their shares).<sup>154</sup> Non-profit corporations, in contrast, are not in the business to maximise profits and therefore risk-taking is not a particularly desirable activity.<sup>155</sup> Indeed, non-profits should be cautious because they depend on the vagaries of donors for financial support. As such, it is inappropriate to apply the business judgment rule to non-profit corporate directors.<sup>156</sup>

## IV. APPLYING THE TRUST STANDARD OF CARE AND RECOGNISING ITS LIMITS

In light of the critical differences between non-profit and for-profit corporations, the conduct of museum board directors should be evaluated under the trust standard. That the business judgment rule usually works in conjunction with monitoring mechanisms absent in the non-profit setting justifies adopting the more exacting trust standard. Yet there are limits to what the trust standard can accomplish in deaccession controversies. Although the trust standard imposes higher procedural hurdles than the corporate standard, once these procedures are satisfied, the substance of the decision is insulated against challenge. This section applies the trust standard to previously unavailable deaccession policies of some prominent American art museums and in so doing, maps the limits of the trust standard.

The problem with the trust standard is that it is not a demanding rule – it appears demanding only when juxtaposed with the even more permissive corporate standard. Trustees need to do only what the prudent man in like circumstances would have done to fulfil his fiduciary duty. Prudence is determined by procedural adequacy. So long as the trustee performs certain tasks such as making reasonable inquiries and following internal procedures, he satisfies the prudence requirement. To be sure, a small component of the trust standard is substantive: trustees have the duty to maintain the safety of the trust property and to make it productive. Is In the overall analysis, however, the substantive component has little purchase if the procedural requirements are met. In *Attorney General v. Olson*, these assets were to be used to establish a museum. The trustees, who had little investment experience, consulted a bank and decided to diversify the investment. Unfortunately, sale of the du Pont stock resulted in a \$17,000 loss, which the trial judge found would

<sup>154</sup> *Id.* at p. 946.

<sup>155</sup> *Id.* at pp. 946-47.

<sup>156</sup> Id.

<sup>157</sup> See discussion below, Part III.A.

Bogert, above note 94, at § 611; First Alabama Bank of Montgomery v. Martin, 425 So. 2d 415, 427 (Ala. 1982).

<sup>159 346</sup> Mass. 190 (Mass. 1963).

<sup>160</sup> *Id.* at 192-93.

have been worth \$700,000 more had the trustees not sold the stock.<sup>161</sup> On appeal, the court held the trustees did not breach their fiduciary duty because they had properly consulted experts and had acted cautiously by diversifying; the fact that their action resulted in loss to the trust property was irrelevant.<sup>162</sup> Thus, so long as a trustee successfully completes the procedural checklist, the merits of the final decision will avoid scrutiny. As one court remarked:

Trustees are bound in the management of all the matters of the trust to act in good faith and employ such vigilance, sagacity, diligence and prudence as in general prudent men of discretion and intelligence in like matters employ . . . The law does not hold a trustee, acting in accord with such rule, responsible for errors in judgment. 163

Under the trust standard of care, most art deaccessions would be found satisfactory. Museums establish detailed deaccession procedures requiring their boards to investigate, seek advice, and exercise care before voting on a deaccession – precisely the procedures required by the trust standard. Art museums, pursuant to AAMD's ethics code, do not permit board members to contemplate deaccession unless and until a curator proposes deaccessions; the proposal must almost always be first approved by the museum's professional staff – the Director and other curators – before it can be considered by the board. 164 Prior to voting, board members must listen to curators explain why

<sup>161</sup> Id. at 198.

<sup>162</sup> Id. In contrast, if trustees fail to satisfy the procedural steps, they are likely to breach their duty of care. There is some evidence that failure to follow internal standards alone is insufficient for liability; rather, the question is whether the trustee acted prudently. First Alabama Bank, 425 So. 2d at 426-27. One rather egregious example is Estate of Collins, 72 Cal. App. 3d 663 (Cal. Ct. App. 1977). There, the trustees breached their fiduciary duty by failing to exercise caution and diversify mortgage investments, failing to obtain an appraisal for the land parcel in question, and failing to investigate the financial status of the sellers. Id. at 649.

<sup>163</sup> Costello v. Costello, 103 N.E. 148, 152 (N.Y. 1913).

<sup>164</sup> See, e.g., Metro. Museum of Art, Procedures for Deaccessioning and Disposal of Works of Art (Feb. 2005) [hereinafter Met Deaccession Procedures] (specifying that curators must recommend the deaccession to initiate the process); Indianapolis Museum of Art, 'Deaccession Policy' (Feb. 2008), available at <a href="http://www.imamuseum.org/explore/deaccessions">http://www.imamuseum.org/explore/deaccessions</a> [hereinafter 'Indianapolis Deaccession Policy'] ("The curator will present the deaccession proposal to the Director for approval prior to beginning the formal procedures."); Los Angeles County Museum of Art, Collections Management Policy (on file with author) [hereinafter LACMA Collections Policy] (encouraging all curators in the relevant department to review the proposal, after which the Director and two-thirds of the curatorial department must concur before the proposed deaccession may be placed on the acquisition committee's agenda); MOMA Deaccession Procedures, above, note 62, at p. 1278 ("The Staff Acquisition Committee proposes deaccessioning to the Painting and Sculpture Committee simultaneously with the presentation of the work which it hopes to acquire by exchange or sale."); PMA Deaccession Policy, above, note 62 (providing that the deaccession procedure begins with a curator identifying a potential object for deaccession and requiring the curator's proposal for deaccession to be approved by the Director, the curators, and the curatorial advisory committee before the Committee on Collections can consider the deaccession); see also AAMD Professional Practices, above, note 26, at p. 15 ("The process of deaccessioning and disposal must be initiated by the appropriate professional staff"); College Art Ass'n of America, 'Resolution Concerning the Sale and Exchange of Works of Art by Museums',

the object should be deaccessioned. 165 At Boston's Museum of Fine Arts, objects proposed for deaccession must be brought to the board meeting or otherwise be on hand for inspection. 166 Independent appraisal reports must be presented to the board. 167 Many museum deaccession procedures mandate outside consultation and even approval. 168 The Baltimore Museum of Art compels board members to consider the anti-deaccession view by requiring every deaccession proposal to include any dissenting opinions by the museum's curators and all such dissents "must be presented prominently at each sequential stage of the deaccession process, including presentation to the Director, to the applicable Accessions Committee, to the Executive Committee, and to the Board." The BMA also requires two-thirds majority votes each from the Accessions Committee, the Executive Committee, and the full board before an object can be deaccessioned. 170 Deaccession procedures force board members to exercise caution by, as MOMA does, requiring the acquisition committee's unanimous consent rather than majority vote. 171 Museums may provide additional voting for particularly valuable objects. At the Metropolitan, the acquisition committee's vote to deaccession an object

- reprinted in *Law, Ethics and the Visual Arts*, above, note 1, at p. 1280 ("Trustees must, however, invest the professional staff with the primary responsibility for developing the judgments involved in the disposal of a specific work of art.").
- See, e.g., Met Deaccession Procedures, above, note 164 (requiring curators to present their recommendations to the acquisition committee, including the curator's evaluation of the work); LACMA Collections Policy, above, note 164 (requiring the Director's signed recommendation for the deaccession and written curatorial justifications must be submitted to the acquisition committee at least one week before the committee meeting); PMA Deaccession Policy, above, note 62 (requiring the curator recommending the deaccession to prepare a written statement explaining why the object should be deaccessioned).
- MFA Boston Collection Policy, above, note 62. The Los Angeles County Museum of Art similarly provides that objects proposed for deaccession must be available for viewing by acquisition committee members at least one week before the committee meets to discuss the proposed deaccession. LACMA Collections Policy, above, note 164.
- Art Institute of Chicago Deaccession Policy, above, note 62 (requiring every object proposed for deaccession to receive outside appraisal); Indianapolis Deaccession Policy, above, note 164 ("The Museum will seek a written opinion of the recommendation to deaccession from an outside expert for significant objects. Evaluations based on photographs will not be accepted for the purposes of deaccession."); LACMA Collections Policy, above note 164 (two outside appraisals for proposed deaccessions valued at \$10,000 or more); PMA Deaccession Policy, above, note 62 (mandating at least one appraisals from independent outside experts if the value of the object under consideration is less than \$50,000 and at least two such appraisals if the value is \$50,000 or more).
- Examples of art museums requiring outside consultation include the Art Institute of Chicago and the St. Louis Art Museum. Art Institute of Chicago Deaccession Policy, above note 62 (requiring at least one outside expert's written recommendation supporting the deaccession for every object appraised at more than \$5,000); Bonnetti, above, note 30.
- Baltimore Museum of Art, Deaccession Overview, Policy & Procedures (Mar. 2001) (confidential and unpublished material; on file with author). The BMA's policy is revised periodically and this is the most recent version.
- 170 Id.
- MOMA Deaccession Procedures, above, note 62, at 1277; see also LACMA Collections Policy, above, note 164 ("Because of its complex legal and ethical nature, the deaccession process requires even greater deliberation than the acquisition of objects").

worth more than \$50,000 is merely a recommendation; either the entire board or its executive committee must approve the deaccession before it becomes final. 172 Like the Los Angeles County Museum of Art, some museums' policies recommend waiting periods before the committee votes. 173 The Albright-Knox's deaccession vote came only after a three-and-a-half year process that included consultation with scholars and museum professionals. 174 These steps satisfy the trust requirements of investigation, advice-seeking, and exercise of care, caution and diligence. Thus, given current museum deaccession procedures, so long as museum boards adhere to their museum's procedures, few would run foul of the trust standard of care.

Beyond procedural safeguards, however, the trust standard provides no analytic framework for evaluating deaccessions on the merits. Once the procedural steps are satisfied, the trust standard is indifferent to the choice between, say, deaccessioning some excellent post-Impressionist works versus passing on an important Velasquez, or the choice between selling a collection of Old Masters to buy better contemporary art versus maintaining the collection and forgoing some acquisitions. Courts, standing in the shoes of a prudent man exercising care and skill and diligence, cannot answer these questions because these choices, having survived the museum's mandatory procedures, fall within the range of actions a prudent man would undertake. After courts are satisfied a fiduciary has properly and prudently exercised care in arriving at his decision, they refrain from evaluating its merits.<sup>175</sup> The trust standard, in short, ensures that one is more informed about one's options, but not which option one ought to choose.

But suppose courts wished to attack the substance of a deaccession decision. If so, the basic substantive components of prudence – that trustees must ensure the safety and productivity of the trust asset – in fact work against courts. To determine what prudence entails, courts cannot evaluate a decision in isolation but instead must look at collection management as a whole. <sup>176</sup> Deaccession,

Met Deaccession Procedures, above, note 164. At LACMA, proposed deaccessions of works worth \$500 or more require the executive committee's approval, and works worth \$100,000 or more require approval of the entire board. LACMA Collections Policy, above, note 164. The Philadelphia Museum of Art permits the Committee on Collections to approve deaccessions of objects valued at less than \$50,000 but requires the full board's approval to deaccession objects valued at \$50,000 or more. PMA Deaccession Policy, above, note 62.

<sup>173</sup> See LACMA Collections Policy, above, note 164 (recommending a three-month waiting period between the Director's decision to place the deaccession proposal on the acquisition committee's agenda and the committee action). MOMA similarly requires the Painting and Sculpture Committee to consider the proposed deaccession on two separate occasions before the matter can be brought to the Board of Trustees for final approval. MOMA Deaccession Procedures, above, note 62, at 1277.

Huntington, above, note 36.

<sup>175</sup> See above text accompanying notes 157-163.

<sup>176</sup> See Chase v. Pevear, 383 Mass. 350, 364 (Mass. 1981) ("in deciding what is prudent, the cases 'warrant some regard being had to the administration of the fund as a whole'").

after all, is simply a tool with which museums manage their collections. Museum boards – as trustees or as directors – have fiduciary obligations to the *entire collection*, not just to the painting to be deaccessioned. They must act as prudent men would in their stewardship of the collection. Board members should ensure the safety of trust property by making sure the museum stays solvent and able to pay for maintenance and conservation; they should ensure the collection's integrity and continuing relevance by refining its holdings and avoiding clutter. What is substantively prudent in a particular deaccession is measured against the collection's overall needs. When, under the trust standard, museums cannot afford to pay for basic operating costs to safeguard the collection, or when museums are on the brink of financial collapse, or even when museums have the rare opportunity to purchase a masterpiece, prudence would likely advise a deaccession.

#### V. BEYOND LEGAL RULES: SUBSTANTIVE LIMITS ON DEACCESSIONS

Judicial restraint in reviewing art deaccessions does not shield the merits of the deaccession from all scrutiny. The trust standard limits court review to procedural adequacy. Non-legal restraints such as professional ethics, self regulation, and public opinion complement law's procedural restraints by imposing *substantive* limits on art deaccessions.

Professional ethics codes set forth substantive standards of conduct that impose higher standards than those required by the law. The trust standard permits museums to deaccession to replenish operating budgets – prudent men may think it judicious to sell a work of art when the budget runs low; indeed, this is hardly a hypothetical outcome given it is how numerous works of art end up at auction in the first place. In contrast, the AAM and AAMD forbid deaccessioning for this purpose. Should a member museum violate this rule, professional censure swiftly follows and can impose costly consequences on the museum. Both the Fogg Museum and the Phillips Collection changed their deaccession plans after AAMD objected. The National Academy Museum presents a more sobering example. After the museum deaccessioned some paintings and used the proceeds to pay for operating expenses, the AAMD publicly censured the museum, calling on its members to "suspend any loans of works of art to and any collaborations on exhibitions with the National

<sup>177</sup> See discussion above Part II.

<sup>178</sup> See Boyd, above, note 52, at p. 356.

<sup>179</sup> Lauren McBrayer and John J. Steele, 'The Art of Deaccession: An Ethical Perspective', *Legal Probs. Museum Admin* 348 (ALI-ABA 2005) ("museum professionals are 'caught in a tug-of-war between the clear fiduciary duty to maintain the museum's solvency and their murky legal and ethical obligations to the public not to treat works of art as fungible objects").

<sup>180</sup> Cf. White, above, note 9 (arguing that courts should approve use of deaccession proceeds for operations if the board satisfies the trust standard).

Malaro, 'Museum Governance', above, note 59, at p. 17 ("The law, as a rule, sets a lower standard than that required by ethical codes").

Academy." As museums depend on loans and exhibitions to attract visitors, the National Academy's Director described AAMD's call for a loan embargo as "a death knell" for her museum. 183

But, one may object, it is all very well to complain and censure museums after the fact; the more pertinent inquiry is whether non-legal rules have any prophylactic effect in deterring museums from cannibalising their collections. Anecdotal evidence suggests they do. Here it is instructive to compare the role of non-legal, professional rules in deaccessions at stand-alone art museums with those at university art museums. Because many university art museums are not AAMD or AAM members, <sup>184</sup> and because university boards are fiduciaries of the entire university, the museum profession's ethical rules are of little consequence when a university board considers its fundraising options. Whereas stand-alone art museums' deaccessions in recent memory (with the exception of the National Academy) were made to pay for acquisitions, recent university art museum deaccessions were all made to raise money for the university's endowment or operating costs. <sup>185</sup> Though no causal inference follows from this observation, it is nevertheless indicative that AAM and AAMD museums take the ethical guidelines seriously.

To be sure, even for stand-alone museums, ethical standards are not legally binding and their effectiveness depends on self-education, self-motivation and peer pressure. Beforcement of ethical standards cannot be effective without a consistent and voluntary commitment from a sizable portion of the profession. The museum profession, notwithstanding occasional lapses, possesses the necessary commitment, one rooted in museums institutional identity. Museums are, at heart, custodians of their collections and are supposed to hold their collections in trust for perpetuity. As such, it is a fundamental professional principle that objects from the collection can be deaccessioned only to fund acquisitions and improve the collection.

AAMD Press Release on National Academy, above, note 50. The National Academy withdrew from AAMD after noting the association of its decision to use the proceeds for operating expenses. *Id.* Since then, the National Academy has met with the AAMD to revise its governance practices, including greater fiscal oversight and institution of a long-term fundraising program. Press Release, 'Ass'n of Art Museum Directors, Joint Statement of the Association of Art Museum Directors and the National Academy' (Mar. 11, 2009), available at <a href="http://www.aamd.org/newsroom/documents/JointStatementAAMDNationalAcademy3-11-09.pdf">http://www.aamd.org/newsroom/documents/JointStatementAAMDNationalAcademy3-11-09.pdf</a>.

Finkel, above, note 46. For more on loans, see below, text accompanying notes 193-196.

See Sonia von Gutfeld, 'Breaking Up is Hard to Do: Panelists Debate Museum Deaccessioning', <a href="http://www.law.columbia.edu/media\_inquiries/news\_events/2008/march2008/deaccession\_rev">http://www.law.columbia.edu/media\_inquiries/news\_events/2008/march2008/deaccession\_rev</a> (last visited 21 Feb. 2009).

<sup>185</sup> See above, note 47.

Malaro, 'Museum Governance', above, note 59, at p. 17.

<sup>187</sup> Ia

<sup>188</sup> Ledbetter Interview, above, note 49.

AAMD Press Release on National Academy, above, note 50 (explaining that museums "collect works of art for the benefit of present and future generations"); see also Press Release, Ass'n of Art Museum Directors, 'Statement Concerning Randolph College and the Maier

collection to save the custodian endangers museums' fundamental identity, making museums art and antiques dealers rather than cultural custodians. Museum professionals, particularly curators who initiate the deaccession process, tend to be "invested in the idea of art's intrinsic value" and better able to resist the urge to cannibalise the art collection. Further conducive to enforcement efforts is the size of the professional community. The art museum profession is a relatively small world; Directors and curators tend to know each other – from school, conferences, collaboration on exhibitions – and peer disapproval of improper deaccessions is felt more keenly.

A related concern is the fear that the checks and balances of the board-Director relationship may fail. Possibly the Director (and curators) will succumb to the board's view that the collection is just another asset to be sold when funds run low, or the board may be unduly persuaded by a charismatic Director's proposal to deaccession. But to accept this argument is to ignore the synergistic values of legal and non-legal rules. Directors, who must approve deaccession proposals before the board can consider them, are vulnerable to professional criticism. They are AAMD members and thus directly governed by the association and its ethics rules. Should they propose or approve of a deaccession contrary to AAMD's ethics code, professional stigma may impede the Director's career prospects. More significantly, professional reputation, coupled with the rule that Directors approve deaccession proposals before boards can even consider them, allow non-legal protections to safeguard the initiation of deaccessions, well before fiduciary law is triggered. And should Directors flout non-legal rules and propose unethical deaccessions, the board's consideration is informed by fiduciary law. Though boards may find themselves persuaded by the Director's charisma, the trust standard provides procedural safeguards that ensure deliberation – that is, time to reflect on the decision in a clear, cool-headed way.

Though not legally enforceable, ethical standards and professional condemnation nevertheless bear legal significance. This is especially salient when museum loans each other artworks because the board's fiduciary duties apply not only to deaccessions but to all aspects of collection management,

Museum of Art' (3 Oct. 2007), available at <a href="http://www.aamd.org/newsroom/documents/MaierMuseumStatement">http://www.aamd.org/newsroom/documents/MaierMuseumStatement</a> October 2007.pdf>.

<sup>190</sup> Ledbetter Interview, above, note 49.

Finkel, above, note 46. Sociologists characterise communities of professionals, such as curators, as having a shared sense of identity and values. See William J. Goode, 'Community Within a Community: The Professions', 22 Am. Soc. Rev. 194 at p. 194 (1957). Further, a professional community maintains its norms and identity by putting "its recruits through a set of adult socialization processes and maintain[ing] procedures for continuing social controls over the practicing professional." Id. at p. 196.

Telephone Interview with Kim Rorschach, Director, Nasher Museum of Art at Duke University, in Durham, N.C. (10 Nov. 2008).

including loans. 193 Prudence advises that when making outgoing loans, lending museums must reasonably ensure that loan objects receive adequate care at the borrowing institution. 194 If, however, the borrowing institution has been publicly censured by a professional association for poor management practices (such as improper use of deaccession proceeds), then it becomes much harder for the lending museum to show it acted prudently in making the loan. For instance, the AAM's rescission of the Museum of Northern Arizona's accreditation indicates that that museum's management no longer merits the profession's seal of approval, while the AAMD's request that its members suspend all loans to or exhibitions with the National Academy signals the profession's distrust of the museum's management priorities. Professional condemnation, in other words, measures prudence. Of course, given the importance of loan reciprocity, 195 one wonders whether a museum can afford to refuse loans if the offending museum is one like MOMA or the Metropolitan that holds prominent collections from which the first museum hopes to borrow. And the clubbiness of a small professional community may make it difficult to turn down loan requests from one's former professor or good friend. But as a legal matter of fiduciary duty, museum boards must take professional condemnation seriously when contemplating loans to other museums. This consideration gives the ethical component of deaccessions its legal edge. 196

Museums also have built-in incentives to retain their art. The reputation that one is a deaccession cookie-jar raider<sup>197</sup> scares away potential donors. Art museums that ransack their collections to raise money will soon find themselves without the very objects that define their existence. And without

Final authority to approve loans typically belongs to the board. See, e.g., LACMA Bylaws, above, note 69, at Art. IV, § 14(b) (investing in the acquisitions committee the power to approve major loans as defined by a minimum monetary value); Met Collections Policy, above, note 87 (requiring board approval of all loans above a certain value); see also Malaro, A Legal Primer, above, note 12, at p. 261 (explaining that the authority to make loans rests in the museum's board and that the board must retain oversight of outgoing loans when it delegates such authority to the museum's professional staff). Statistics on number of loans are hard to come by. But at the Philadelphia Museum of Art's 2009 'Cezanne and Beyond' show, fewer than twenty works on exhibition were from the PMA's own collection and everything else was loaned from other museums or private collectors.

See *id.* at p. 262 ("If a museum has a history of poor experience with a borrower, prudence would dictate a stringent review before any new loans are negotiated.").

AAMD guidelines recognise that "[m]useums rely on one another for loans to exhibitions" and consequently, "a spirit of cooperation and collegiality that recognizes this interdependence should inform all decisions relative to such loans . . . ." AAMD Professional Practices, above, note 26, at p. 6.

But this impact is somewhat limited to art museums, which depend greatly on loans. Ledbetter Interview, above, note 49. For institutions that rely less on loans (such as history museums), the legal bite of ethics codes is less evident. *Id*.

This term was coined by Stephen Weil, former deputy director of the Hirshhorn Museum and Sculpture Garden and a prolific commentator on art deaccessions. See Stephen E. Weil, 'The Deaccession Cookie Jar', in *A Deaccession Reader*, above, note 4, at p. 91.

artwork on its walls, a museum would find it harder to attract visitors and donations. Moreover, art museums compete with other non-profit organisations for outside funding, and they will not succeed if they are perceived to be capable of financial self-help: if a museum can raise money simply by selling a few paintings, a donor may prefer to give to another organisation unable to support itself.<sup>198</sup> "[T]he use of deaccessioning proceeds to meet a museum's operating expenses" – and even other expenses such as acquisition – "would appear to be an inherently self-defeating strategy." Thus art museums' self-interest in attracting and keeping donors counsels against selling from the collection and, at the very least, encourages careful study of the costs and benefits of deaccessioning.

Even when economic crises hit, driving down donations and corporate sponsorship, temptation to cash in the artwork to fund operations is tempered by two practical considerations. First, in hard times, art prices collapse, making deaccession a less attractive option. During the current economic meltdown, the contemporary art sales at Christie's and Sotheby's consistently either brought lower-than-expected prices or the artwork failed to sell altogether. Second, museums are forced to rely more on their own permanent collections when money becomes tight. Since the 1970s, art museums have relied on blockbuster exhibitions to bring in more visitors and more money. In good times, such exhibitions can count on generous corporate sponsorship and loans from other museums. But in bad times, art museums are obliged to look more to themselves to put on the exhibitions to bring in the cash. When the cost of terrorism insurance increased in the aftermath of September 11, art

<sup>198</sup> *Id.* at p. 89.

<sup>199</sup> *Id.* at p. 91; see also Robert R. Macdonald, 'Collections, Cash Cows, and Ethics', *Museum News*, Jan./Feb. 1995, at p. 43 ("Who will donate to artistic . . . materials to museums . . . that view their collections as ready resources of available cash to be used for the institution's operations?"). One recent illustration is Brandeis University, whose decision to sell the Rose Art Museum's entire collection to make up for endowment losses upset former donors. One, who gave both cash and artwork, said the school's decision "makes me feel disposable, like a plastic fork." Grant, above, note 43. "What Brandeis did certainly doesn't encourage being a donor", observed the son of a pair of Rose donors. *Id.* 

See, e.g., Carol Vogel, 'Mixed Results for Contemporary Art Sale at Christie's', *N.Y.Times*, 12 Nov.2008, available at <a href="http://www.nytimes.com/2008/11/13/arts/design/13auction.html">http://www.nytimes.com/2008/11/13/arts/design/13auction.html</a> (reporting that the sale had been estimated at \$227 million but brought in only \$113.6 million, and that almost one-third of the works failed to sell); Carol Vogel, 'A Dreary Night for Contemporary Art at Sotheby's', *N.Y.Times*, 11 Nov. 2008, available at <a href="http://www.nytimes.com/2008/11/12/arts/design/12auction.html">http://www.nytimes.com/2008/11/12/arts/design/12auction.html</a> (reporting that the auction, estimated to bring in \$202.4 million, resulted in only \$125.1 million and that 20 of the 63 lots offered did not sell). A lacklustre art market limits museums' disposal options. Brandeis University, on the market to sell over 7,000 objects, faces unenviable choices. Observers agreed the school should not immediately auction the artwork, both because of the slumping art market and because placing most of the objects in the market increases supply and decreases price. Grant, above, note 43. Private sales are even less attractive because they may invite lawsuits claiming the school forwent the possibility of obtaining higher prices at auction. *Id.* 

<sup>201</sup> Andrew McClellan, The Art Museum from Boullée to Bilbao p. 183 (2008).

museums, facing a drop in loans, put on creative exhibitions that drew from their permanent collections.<sup>202</sup> Although falling art prices and greater self-reliance cannot wholly counteract the temptation to sell from the collection, they do diminish incentives for reckless and unethical deaccessions.

Finally, the court of public opinion checks the discretion of board members and art museums. Public outrage following the de Groot deaccession drove the Metropolitan to agree to notify the state attorney general of all major deaccessions. The museum also agreed that all subsequent deaccessioned works would be disposed of by public auction.<sup>203</sup> In general, if an art museum wishes to sell an object for money, it will use the art market – probably auction<sup>204</sup> – where the deaccession will be scrutinised by the media and the public. 205 As art museums have become increasingly aware that their legitimacy depends on public confidence, <sup>206</sup> the spectre of public disapproval encourages museums to practise self-restraint and caution in deaccessions. MOMA's Director explains that to retain the public's confidence: "museums must be perceived to be acting both responsibly and for the common good. . . that art museums – at a minimum – inspire confidence in the public that they have made considered judgments" about the contents of the collection. <sup>207</sup> Consequently, museums may be more reluctant to deaccession for fear of a public backlash that undermines their own legitimacy.

## VI. A NORMATIVE ASSESSMENT OF THE TRUST STANDARD OF CARE

The conclusion that even the heightened trust standard cannot prevent or undo deaccessions is distressing to those who believe that museums should not treat artwork as widgets to be cashed in whenever acquisition or operations funds run low. Deaccessioning, for many, is "unpalatable . . . as it involves contemplating each work of art in a museum collection as a fungible asset" – a conception antithetical to the belief that art has an intrinsic value independent

<sup>202</sup> Carol Vogel, 'Museums Fear Lean Days Ahead', *N.Y. Times*, 19 Oct. 2008, available at <a href="http://www.nytimes.com/2008/10/20/arts/design/20muse.html">http://www.nytimes.com/2008/10/20/arts/design/20muse.html</a>. Art museums felt the 2008 recession keenly, because failed investment banks such as Lehman Brothers had been stalwart supporters of exhibitions, and because museums' endowment funds, which pay for operating expenses, plummeted with the market. *Id.* 

<sup>203</sup> Hoving, Making the Mummies Dance, above, note 3, at p. 306.

As one art dealer observed, going to auction avoids legal difficulties for fiduciaries because it "shows people, 'See, we got the highest price possible,' even if the top bid is lower than what someone else might have paid privately. Auctions are transparent, and no one can question it." Grant, above, note 43.

Ledbetter 'Interview', above, note 49; see also Grant, above, note 43 (quoting the Director of the Indianapolis Museum of Art, who explained his museum prefers auctions to private sales because it "puts the act of deaccessioning in the public eye. The public trust issue is more important than the small gain that might be made in selling another way.").

The public's diminishing confidence in museums has prompted Directors of several prominent art museums to examine the public purpose and authority of museums. Their essays are collected in *Whose Muse? Art Museums and the Public Trust*, above, note 14.

<sup>207</sup> Lowry, above, note 23, at p. 143.

of its market worth.<sup>208</sup> Moreover, museums give the public an opportunity to view works of art in person – to experience their power firsthand and leave "at a different angle' to that in which we came, changed somewhat from who we were, or thought we were, before we experienced them."<sup>209</sup>

While these sentiments are admirable, fiduciary law does not provide the means to achieve them. There are inherent limits to a trustee's fiduciary obligation: the law focuses on the care and diligence with which the decision was made, not the merit of the decision itself. Yet this limitation is precisely why the trust standard of care should be the standard for board members of non-profit corporate museums. Just as museum boards should be held to higher standards in the absence of shareholder monitoring, so too must they have discretion to manage the collections in their charge. By levying more exacting procedural requirements while preventing courts from second-guessing decisions on their merits, the trust standard strikes the right balance between holding boards accountable and protecting their discretion. Moreover, that courts do not evaluate the merits of deaccessions does not mean boards are free to do what they please – non-legal restraints from the professional community and the public complement legal rules by imposing substantive limits on deaccessions.

Compared with corporate law, the trust standard is the better rule because it ensures sound procedures for deaccession decisions. Museums, unlike forprofit corporations, lack shareholders to vote for directors or bring derivative lawsuits; consequently, museums and their boards are subject to considerably less monitoring even as they manage millions of dollars of artwork. In the absence of external monitoring, the law should encourage non-profit boards to exercise more care than that demanded by the corporate standard. The trust standard ensures additional care by specifying what it takes to be informed rather than leaving the board to decide how to become reasonably informed. The trust standard further reconfigures the incentive structure by first, directly imposing liability for breach of care rather than merely removing the presumption of propriety and second, limiting the fiduciary's immunity. By making it harder for boards to escape personal liability<sup>210</sup> and thus forcing them to internalise some of the costs of breaching their duties of care, the trust standard encourages boards to act with scrupulous care. Additionally, from an enforcement perspective, the trust standard's clarity and procedural focus makes it easier for attorneys general to prosecute boards for fiduciary breaches - instead of deference under the

White, above, note 9, at p. 1042. Further rankling anti-deaccessionists is the recent spate of deaccessions: in the space of just five years, the Los Angeles County Museum of Act sold 42 Impressionist and modern works from its permanent collection; MOMA sold a cubist Picasso; and the Museum of Fine Arts in Boston sold two important pastels by Degas. Rosenbaum, above, note 34.

James Cuno, 'The Object of Art Museums', in *Whose Muse? Art Museums and the Public Trust*, above, note 14, at p. 54.

<sup>210</sup> See above, Part III.

business judgment rule, the new review standard asks whether boards satisfied the trust standard's procedural checklist before deaccessioning an artwork, a more manageable burden of proof.

The trust standard, however, rightly prevents courts (and Attorneys General) from second-guessing deaccessions on substantive grounds and meddling in museum management.<sup>211</sup> Deaccession is not a stand-alone museum practice.<sup>212</sup> It is part of a carefully calibrated system in which interference with one element necessarily disrupts the balance of the whole. In collections management, deaccession is a necessary culling tool that compensates for the liberal and unwise acquisitions practised by American art museums even today.<sup>213</sup> Limiting deaccessions would therefore present art museums with the following choices: continue to acquire freely but be burdened by artworks that cannot be disposed of, or change the acquisition policy. Either outcome represents a serious interference with museum autonomy. If courts may veto deaccessions, they are effectively given a voice in overall collection policy and management. Yet most American museums are private institutions, each free to collect what it pleases and to choose which paintings will hang on its walls. 214 As with the corporate world, autonomy and decentralised decisionmaking by private actors are the hallmarks of American arts and culture. The American art museum is not a vehicle for the government's cultural policy. and courts should not be allowed to interfere with museum management.

Instead, institutional competence counsels that the task of second-guessing deaccessions is better left to the community of museum professionals and to the public. The scope of judicial review distils into two questions: who decides and what they decide. Courts are experts in matters of procedure and are competent to determine whether or not a board made decisions using adequate procedural safeguards. But courts are not experts in the administration of art museums, which "requires connoisseurship, discernment, and knowledge in dealing with works of art, as well as the judgment and experience necessary for the operation of a complex organization." Competence in collecting and managing art belongs to museum professionals and the public. Unlike judges, whose expertise is in law and not art, professional associations such as the AAMD are uniquely qualified to evaluate deaccessions on the merits because they are experts in collection management and because they are responsible for maintaining the profession's ethical integrity. Likewise, the public can question deaccessions because they are the beneficiaries whom museums serve.

The trust standard also prevents Attorneys General from politicising deaccession prosecutions. If, for example, the attorney general thinks the museum ought not to have deaccessioned religious art to focus on conceptual art, the trust standard, which does not authorise review on deaccessions on their merits, stops Attorneys General from prosecuting the board.

<sup>212</sup> See discussion above Part II.B.

<sup>213</sup> See Andrews above, note 16.

<sup>214</sup> See discussion above Part II.

<sup>215</sup> AAMD Professional Practices, above, note 26, at p. 4.

Non-legal rules are, of course, imperfect and fierce criticism from the profession and the public cannot deter or undo all deaccessions. Yet the alternative, having *legal* rules governing the substance of deaccessions, is even less attractive. Central to the rationale for adopting the trust standard is to ensure board members take proper care and be informed in their decisions. It is not to allow judges – who have repeatedly asserted their ignorance of art and inability to evaluate artistic merit<sup>216</sup> – to decide on artistic and financial matters in which they have no experience. Disparate competence between courts and museum boards is especially acute considering that deaccession decisions are usually made by the board's acquisition committees, <sup>217</sup> whose members have extensive understanding of the museum's collection precisely because they are responsible for acquiring some of it in the first place.<sup>218</sup> These committees also know something about art because they tend to be staffed by knowledgeable collectors in their own right.<sup>219</sup> Of course, courts must sometimes make artistic judgments, but that intervention should be minimal.<sup>220</sup> The same logic justifies the business judgment rule in corporate law: 221 courts should not interfere with management decisions because of "the

A typical court disclaimer of artistic knowledge and appreciation asserts: "We are not art critics, [and] do not pretend to be . . . ." Martin v. City of Indianapolis, 192 F.3d 608, 610 (7th Cir. 1999) (applying the Visual Artists Rights Act). In an early copyright case establishing the doctrine of aesthetic non-discrimination, Justice Holmes wrote, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

An exception is the Metropolitan, where deaccessions for objects is worth more than \$50,000 must be voted on by the full board or the executive committee votes; but the acquisition committee does provide a recommendation for or against the deaccession. 'Met Deaccession Procedures', above, note 164.

At the Metropolitan, proposals for acquisitions had to explain how the object will complement the collection. See Hoving, 'The Chase', above, note 1, at pp. 7-10.

Among the members of the Metropolitan's acquisition committee are prominent and experienced art collectors such as Leonore Annenberg (Impressionist and post-Impressionist art), Joseph Hotung (Chinese jade), Florence Irving (Asian art), Joyce Menschel (photography), Andrew Saul (modern and contemporary art), Shelby White (classical antiquities) and Jayne Wrightsman (French decorative arts). Met Annual Report 2007, above, note 40, at p. 2; see also above, note 82. Likewise, MOMA's Painting and Sculpture Committee has "a number of collectors familiar with both quality and price of modern works, but also scholars in art history who are independent of [MOMA's] staff and [board]"; moreover, MOMA's board, whose approval is required for deaccessions, is composed of many art historians and museologists. MOMA Deaccession Procedures, above, note 82, at p. 1278.

Copyright law is instructive on this point. Although courts require creativity as a condition precedent to finding subject-matter eligibility for copyright, "the requisite level of creativity is extremely low; even a slight amount will suffice." Feist Publ'n Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 345 (1991). The low threshold is satisfied if, for example, the author exercises her judgment in the selection of data for a factual compilation. See, e.g., Key Publ'n, Inc. v. Chinatown Today Publ'g Enter., 945 F. 2d 509 (2d Cir.1991). Even though judges do look for creativity, the doctrine of aesthetic non-discrimination still applies and the finding of creativity is not an exercise of judging artistic merit.

See, e.g., AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986) (observing that the business judgment rule recognizes "the limited institutional competence of courts to assess business decisions.").

judiciary's lack of capacity to do so and to concerns about 'hindsight bias'."<sup>222</sup> The board, which knows the collection best, is best able to make artistic and financial decisions for the collection. If courts know little about art or finance, their intrusion can scarcely improve upon the board's decision.

Here one may wonder: if the museum profession is competent in evaluating the deaccession's merits, why not incorporate professional standards into the law? 223 Why not add to the trust standard a prohibition of all deaccessions to pay for operations?<sup>224</sup> This proposal should be rejected for three reasons. First, incorporating professional ethics into the law is impracticable. Museums are not the only non-profit corporations, a category that encompasses organisations as diverse as hospitals, advocacy groups, professional associations and realestate organisations. To integrate each profession's ethics into trust law would sacrifice advantages of a bright-line rule such as uniformity and administrative ease. Moreover, to stay current, the law must change every time the profession decides on a new norm. Second, this scheme cannot be enforced. Even if the judiciary were permitted to scrutinise the merits of deaccessions, unless standing is expanded to permit professional associations or the general public to bring suit against museum boards – a highly unlikely scenario<sup>225</sup> – courts would have few opportunities to hear such cases. Finally, borrowing from professional norms compromises the trust standard. Prudential considerations sometimes counsel fiduciaries to sell a few works of art to save the rest of the collection. In deliberating whether to deaccession to increase the operations budget, board members presumably weigh the harm of professional censure against the benefits of preserving the collection. The board's decision represents its own judgment of how to manage a museum. But should the board be exposed to legal liability for such a deaccession, it will almost certainly refuse to sell. This decision is compelled by law and does not reflect the board's own judgment. Moreover, such a rule prevents the board from properly discharging its fiduciary duty to the rest of the collection. 226 It is an outcome that upsets

Aaron D. Jones, 'Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers under Delaware Law', 44 Am. Bus. L.J. 475, 482 (2007).

A New York State Assemblyman, in collaboration with the state's museum association, recently proposed a bill that would prohibit museums from using deaccession proceeds to pay for operating expenses. Leg. Bill Drafting Comm'n. 10608-01-9 (N.Y. 2009), available at <a href="http://graphics8.nytimes.com/packages/pdf/arts/03182009-bill.pdf">http://graphics8.nytimes.com/packages/pdf/arts/03182009-bill.pdf</a>; see also Robin Pogrebin, 'Bill Seeks to Regulate Museums' Art Sales', *N.Y. Times*, 18 Mar. 2009, at C1.

See Rosenbaum, above, note 34 ("Legislators and government regulators should hold museums to the often ignored standards for disposal spelled out in the published guidelines of the Association of Art Museum Directors: poor quality, redundancy, or problems with title, authenticity or condition.").

See above, note 131.

For instance, New York's proposed deaccession bill would require museums to make good-faith efforts to sell deaccessioned works to other museums. Leg. Bill Drafting Comm'n. 10608-01-9 (N.Y. 2009), available at <a href="http://graphics8.nytimes.com/packages/pdf/arts/03182009-bill.pdf">http://graphics8.nytimes.com/packages/pdf/arts/03182009-bill.pdf</a>. This would impede museums' ability to obtain the best price by going to auction, as buyer-museums usually cannot afford those prices.

the trust standard's careful balance between accountability and discretion, and should be rejected. The better approach is to subject deaccession procedures to judicial scrutiny but leave the merit debate in the non-legal sphere.

#### VII. Conclusion

The occasional deaccession of a favorite work of art creates fierce public backlash and prompts litigation against art museums and their boards. Lawsuits highlight an ongoing debate: whether directors of non-profit corporations should be held to the corporate standard of care, as current trends would indicate, or whether they should be held to the trust standard of care. Commentators advocate applying the more exacting trust standard to deaccessions. Insufficient monitoring in the non-profit setting warrants the creation of additional incentives for museum boards to exercise more care than is required by corporate law. The trust standard creates those incentives both by forcing board members to deliberate carefully before reaching a decision, and by restricting the scope of immunity. Thus, the trust standard should be the measure of non-profit directors' conduct.

It is also important to recognise the inherent limits of the trust standard and of the law in deaccession cases. The trust standard focuses procedure rather than substance – so long as trustees satisfy specific procedures, it has little or nothing to say about whether a museum should keep a work of art. Instead, non-legal rules such as professional ethics and public opinion must judge the merits of the deaccession. Together, legal and non-legal rules complement each other by bringing both the procedure and merits of the deaccession under scrutiny of those best suited to evaluating each decision. The trust standard is not meant to deprive board members of discretion in collection management. To permit courts ill-equipped to make the artistic and financial choices at heart of deaccessions and meddle where they profess ignorance would do a disservice to the purpose of using the trust standard: requiring that informed deliberation and care precede deaccession decisions. Instead, the merits of deaccession's artistic and financial choices are better left to more knowledgeable critics, the museum profession and the public it serves.

The law is not a panacea for all discontent. The art-law scholar Marie Malaro once observed that "[t]he law is not designed to make us honorable – only bearable . . . ."<sup>227</sup> The trust standard would makes deaccessions bearable by ensuring additional care in the process; but only non-legal forces such as professional ethics and the court of public opinion can secure honour and integrity in art deaccessions.

Malaro, 'Deaccessioning', above, note 11, at p. 273.