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EVERY ROSE HAS ITS THORN: A NEW APPROACH TO DEACCESSION

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INTRODUCTION

In 1961, Edgar and Bertha Rose donated $1 million to Brandeis University to form the Rose Art Museum ("the Rose").[1] Initially, the Rose had no acquisition budget, so the now-7000-piece collection was built on gifts.[2] Focused on twentieth-century art, the collection includes a strong selection of post-war artists like Andy Warhol, Jasper Johns, and Roy Lichtenstein,[3] many of which were acquired through the initial gifts to the museum.[4] In the face of the financial crisis and reduced donations due to the Bernard Madoff scandal, Brandeis University's board of trustees voted unanimously to close the Rose and sell the entire collection on January 26, 2009.[5] Valued at approximately $350 million, the Rose was targeted to help deal with Brandeis' budget deficit, alleged to be as much as $10 million,[6] as well as a decline in the University's endowment, from $712 million to $549 million, or twenty-three percent, since the financial crisis began.[7] No one at the Rose, not even the director and the chairman of the board of overseers, was involved in the University's decision, and the Massachusetts Attorney General was not notified of the University's plans until after the decision was made.[8]

Outcry was immediate and intense. Within a day of the announcement, Brandeis alumni started a petition to keep the museum open and current students planned a sit-in.[9] Described as a "scandal,"[10] articles and editorials

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1. Geoff Edgers, *Rose Clan protests Brandeis proposal; Family demands art museum stay open to the public*, BOSTON GLOBE, Mar. 17, 2009, at B1.

2. Randy Kennedy and Karl Vogel, *Outcry Over a Plan to Sell Museum's Holdings*, N.Y. TIMES, Jan. 27, 2009, at C5.

3. Editorial, *War of the Rose*, BOSTON GLOBE, Jan. 30, 2009, at A16.

4. Kennedy and Vogel, *supra* note 2.

5. Geoff Edgers, *Ailing Brandeis will shut museum, sell treasured art; No other choice, says president*, BOSTON GLOBE, Jan. 27, 2009, at A1.

6. *Id.*

7. Editorial, *Art at Brandeis*, N.Y. TIMES, Feb. 1, 2009, at A20.

8. Kennedy and Vogel, *supra* note 2.

9. Peter Schworm, *Crisis raises questions on Brandeis campus; At issue are speed of cuts, other changes*, BOSTON GLOBE, Jan. 28, 2009, at B1.

from the *New York Times*[11] and the *Boston Globe*[12] (among others) criticized the trustees' decision as being poorly-planned and ill-advised; an alumnus characterized Brandeis' move as "forfeit[ing] this most basic responsibility" of universities to "attend to something more essential than the bottom line."[13] Even the economics of selling the collection in the current state of the art market has been criticized.[14] Facing a huge backlash only days after the initial announcement, Brandeis President Jehuda Reinhartz suggested that while the university might not sell the collection, the Rose would change from being a museum to a study and research center.[15] Surprisingly late in the game, the Rose family itself condemned the trustees as "plundering" the collection and demanded that the Rose stay a museum and not become an academic fine-arts center.[16] While claiming that the situation at the Rose had nothing to do with his decision, President Reinhartz announced that he would step down from his position at Brandeis no later than June of 2011.[17] The Rose remains open as of April 2010.

Although selling art for funding is not unheard of, the incident at the Rose is an extreme example of why a new standard is needed in dealing with the practice of deaccession, the sale or transfer of a work of art held by a museum. Three different methods for handling deaccession have been suggested over the last twenty years. Although each model deals with different elements of the deaccession process, none proposes an overarching method that takes into account the ethics to which American museums are supposed to hold themselves. The decision to deaccess, judicial review of deaccession, and potential consequences of improper deaccession should be considered as a whole rather than as discrete elements.

The purpose of this Note is to suggest a fourth, hybrid approach to deaccession, and to apply its analysis to the events that happened at Brandeis. The approach takes elements of the other models, and based on the American Association of Museum's *Code of Ethics for Museums*, proposes a new standard. Part I gives an overview of the American Association of Museums' *Code of Ethics for Museums* and a brief explanation of the structure of museums and their governing bodies. Part II explains the three pre-existing proposals for how to deal with the practice of deaccession. Part III assess these proposed models against the *Code of Ethics for Museums*. Finally, Part IV

10. Sebastian Smee, Critic's Notebook, *Hawk this gem? Unconscionable*, BOSTON GLOBE, Jan. 28, 2009, at A9.

11. *Art at Brandeis*, *supra* note 7.

12. *War of the Rose*, *supra* note 3.

13. Miles Unger, Op-Ed., *A betrayal of trust at Brandeis*, BOSTON GLOBE, Feb. 1, 2009, at C9.

14. Kennedy and Vogel, *supra* note 2.

15. Geoff Edgers, *Brandeis may keep art, says president; Reaffirms need to close museum*, BOSTON GLOBE, Jan. 29, 2009, at B1.

16. Katie Zezima, *Museum Family Denounces Brandeis*, N.Y. TIMES, Mar. 17, 2009, at A16.

17. Peter Schworm, *Brandeis president to step down; Says Rose outcry didn't affect move*, BOSTON GLOBE, Sept. 25, 2009, at B1.

proposes a new method for dealing with deaccession both before and after the decision has been made, and applies the proposal to what happened at Brandeis University. As it is beyond the scope of this Note, the relationship between the trustee's dual duties to Brandeis and the Rose Art Museum will not be discussed.

I. BACKGROUND

A. ETHICS FOR EVERYONE

In 1991, the American Association of Museums ("AAM") first adopted the *Code of Ethics for Museums* ("the Code"), most recently amended in 2000.[18] In its current form, the Code can be divided into sections: an introduction,[19] a general statement of purpose giving the overall spirit of the Code,[20] and mostly bullet-pointed sections pertaining to governance,[21] collections,[22] and programs.[23] In each of these bulleted sections, the Code states that a museum, its governing body, and any programs a museum may put on must "promote the public good rather than individual financial gain."[24] Because the Code is propagated by the AAM it will be assumed that the principles stated therein best express the needs of the art world.

1. The Spirit of the Code

After a short introduction, the Code begins with a general statement of purpose: "Museums make their unique contribution to the public by collecting, preserving, and interpreting the things of this world. . . . Their missions include collecting and preserving, as well as exhibiting and educating with materials not only owned but also borrowed and fabricated for these ends."[25] This overarching principle pervades every element of the Code.[26] While taking federal, state, and municipal law as a given, the Code implores that these laws pertaining to museums are a bare minimum.[27] Before a final reemphasis of the duty to the public, the Code specifically addresses conflict of interest, stating:

Where conflicts of interest arise—actual, potential, or perceived—the duty

18. American Association of Museums, Museum Ethics, http://www.aam-us.org/museumresources/ethics/index.cfm (last visited Apr. 3, 2010).

19. American Association of Museums, *Code of Ethics for Museums* 1 (2000), http://www.aam-us.org/museumresources/ethics/upload/Code-of-Ethics-for-Museums.pdf (last visited Apr. 3 2010).

20. *Id.*

21. *Id.* at 2.

22. *Id.* at 3.

23. *Id.*

24. *Id.* at 3, 4.

25. *Id.* at 2.

26. *See generally id.*

27. *Id.* at 1, 2.

> of loyalty must never be compromised. No individual may use his or her position in a museum for personal gain or to benefit another at the expense of the museum, its mission, its reputation, and the society it serves.[28]

2. Governance

The Code next establishes rules of governance. Noting that, "[m]useum governance in its various forms is a public trust responsible for the institution's service to society,"[29] the Code lays out nine things the museum's governing body must ensure, including that, "the museum's collections and programs and its physical, human, and financial resources are protected, maintained, and developed in support of the museum's mission,"[30] that "policies are articulated and prudent oversight is practiced,"[31] and that "governance promotes the public good rather than individual financial gain."[32]

3. Collections and Programs

Thirdly, the Code discusses duties related to collections. For this section, the Code presumes "rightful ownership, permanence, care, documentation, accessibility, and responsible disposal."[33] Because this Note does not deal with acquisition practices, proper ownership will be assumed for the purposes of this Note as well. The Code then sets out ten obligations of a museum to its collection; most pertinently, the Code states that a museum will ensure that:

> [D]isposal of collections through sale, trade, or research activities is solely for the advancement of the museum's mission. Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collections.[34]

Additionally, the Code demands that "collections-related activities promote the public good rather than individual financial gain."[35]

In a comparatively short section, the Code establishes six duties of programs, stating that a museum must ensure that its "programs support its mission and public trust responsibilities,"[36] that "programs are accessible and encourage participation of the widest possible audience consistent with its mission and resources,"[37] and that "programs promote the public good rather

28. *Id.* at 2.
29. *Id.*
30. *Id.*
31. *Id.* at 3.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 4.

than individual financial gain."[38]

B. MUSEUMS AND THEIR TRUSTEES

Museums are typically considered public trusts.[39] As such, museums owe a duty to the public as a whole and not to any particular person.[40] Trustees of charitable trusts like museums have a greater duty than regular trusts, such as faithful administration in carrying out the trust's purpose and protecting the beneficiaries' interest in the trust.[41] Although often afforded great latitude in their decision making, trustees must "follow the intentions and directions of the creator of the foundation in serving the best interest of the beneficiaries."[42] Additionally, oversight over charitable trusts is typically provided for by statute or common law, and a state's attorney general may have a right to prevent the sale of a museum's holdings.[43]

II. DEALING WITH DEACCESSION

Over the past twenty years, three different approaches towards deaccession have emerged: heightened scrutiny, intermediate scrutiny, and low scrutiny. Since each model would approach the Rose case differently, the most appealing version of each proposed solution is summarized below.

A. GABOR AND HEIGHTENED SCRUTINY

In his comment *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, David R. Gabor argues that deaccession decisions should be subject to strict scrutiny because most museums, public or private, are supported by both direct and indirect governmental subsidies.[44] Additionally, museums "serve the cultural and educational needs of the community."[45]

Deaccession is a problematic process.[46] Unlike the acquisition of a work

38. *Id.*

39. Jason R. Goldstein, Note, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 214 (1997) (*but see id.* at 218, where art museums are likened to "a hybrid of charitable corporation and trust").

40. *Id.*

41. Chris Abbiante, Comment, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV 665 at 687 (1997) (citing EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS § 513, at 391 and § 521, at 403 (1974)).

42. Chris Abbiante, *supra* note 41, at 688 (citing H. THOMAS JAMES, *Perspectives on Internal Functioning of Foundations*, in THE FUTURE OF FOUNDATIONS, 192, 193 (Fritz F. Heinmann ed., 1973)).

43. Goldstein, *supra* note 39, at 214-15.

44. David R. Gabor, Comment, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, 36 UCLA L. REV. 1005, 1007 (1989).

45. *Id.* at 1008 (quoting *In re* Wilstach's Estate, 1 Pa. D. & C.2d 197 at 207 (1955)).

46. Gabor, *supra* note 44, at 1011.

of art, museums are typically quiet when they deaccess a work.[47] This may be in order to avoid offending donors or their heirs.[48] Additionally, discreet deaccession may even help avoid legal action:

> If donors give objects with anything even resembling instructions, they may contemplate legal action in the wake of an unpopular disposal. By drawing as little attention to its activities as possible, museums try to avoid the issue altogether. To circumvent legal problems, many major museums no longer accept, or highly discourage, gifts with restrictive covenants.[49]

This is not to say that museums always have bad motives for deaccessioning a work of art. Gabor suggests that there are five general reasons to deaccess art: taste, upgrading, isolation, redundancy, and funding.[50] Issues of taste relate to changes of preference among patrons of the museum; "committing large resources to maintaining a 'dead' collection (i.e., works in storage) may not be responsive to public needs."[51] Upgrading means selling a work of art to acquire a higher-quality work, not necessarily of the same genre as the original work.[52] Isolated works are those that may not fit in with the rest of the collection.[53] Duplication or redundancy, possibly the most common reason for deaccessioning a work, has to do with the notion that a museum may not need or want multiple works that are very similar to one another.[54] Lastly, a museum might sell a work out of a need for funding.[55] This is where the Rose fits in, and interestingly, Gabor suggests that this is the "most controversial use of deassessioning."[56]

Because there are a wide variety of reasons why a museum might want or need to deaccess a work, Gabor rejects the notion that deaccession should never be allowed.[57] However, he does advocate for a heightened level of scrutiny, wherein museum directors or trustees could be held personally liable for the decision to deaccess an artwork.[58] Additionally, deaccessed items might be returned to the museums.[59] More drastically, Gabor proposes that works might even be subject to passive reverter clauses, which would cause illegally-deaccessed works to revert back either to the donor or the state rather than to the museum;[60] reverter back to the donor is preferred by Gabor for both

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47. *Id.*
48. *Id.* at 1011-12.
49. *Id.* at 1013.
50. *Id.* at 1016-20
51. *Id.* at 1017.
52. *Id.* at 1017-18.
53. *Id.* at 1018.
54. *Id.* at 1019.
55. *Id.*
56. *Id.*
57. *Id.* at 1015 (*cf.* Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 ART & L. 175 (1983) (arguing that charitable donations held in public trusts should not be allowed to return to private hands)).
58. Gabor, *supra* note 44, at 1031.
59. *Id.* at 1031-32.
60. *Id.* at 1032-34.

practical and intellectual reasons.[61]

B. WHITE AND INTERMEDIATE SCRUTINY

A more moderate approach to deaccession is suggested by Jennifer L. White in her note *When It's OK To Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Operating Expenses*. Going directly against the Code as it stood at the writing of her note, White proposes that, "[C]ourts should approve a museum director's use of proceeds from the sale of deaccessioned art to meet operating expenses if the director's conduct comports with the duties of trustees under the law of trusts."[62] White focuses on the differences between how museum directors would be treated under trust law versus corporate law.[63] Because the duties of loyalty and care are more rigorous for trustees than for corporate directors, White prefers that the law of trusts govern decisions made by museums.[64]

Under White's proposal, courts would evaluate a deaccession decision under a three-pronged test.[65] Under the first prong, courts would assess whether there were legitimate needs to deaccess the artwork in question.[66] However, under White's reasoning, "As long as revenue is directed back to a public good in some form, whether . . . in the form of building restoration, extended hours for the museum, or another public benefit, the deaccessioning has served the requisite public purpose."[67] This is contrary to the standards set by the Code, which states that, "[I]n no event shall [proceeds] be used for anything other than acquisition or direct care of collections."[68] Arguably, building renovations may directly care for collections, but extended hours would likely not fall under this protected category.

If the director can prove the action was for the public good, White's second prong is whether the purpose could have been achieved without deaccession.[69] A court would assess the adequacy of the museum's deaccession policy and then probe for reasonable alternatives.[70] In particular, White asks if the museum could have acquired the needed funds through fundraising, leasing (the deaccessed) artwork to other institutions, or placing the work in traveling exhibitions, which would also bring in needed revenue.[71] White argues in favor of leasing the work to other institutions or traveling

61. *Id.* at 1034.

62. Jennifer L. White, Note, *When It's OK To Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Operating Expenses*, 94 MICH. L. REV. 1041, 1048 (1996).

63. *See generally id.*

64. *Id.* at 1051-54.

65. *Id.* at 1059.

66. *Id.*

67. *Id.* at 1060.

68. American Association of Museums, *supra* note 19, at 3.

69. White, *supra* note 62, at 1060.

70. *Id.* at 1060-62.

71. *Id.* at 1061-63.

exhibitions, as they make the work more accessible while still bringing in money for the museum.[72]

Finally, if a court finds that there were no other alternatives to deaccession, White proposes that the court inquire into the nature of the purchaser of the artwork.[73] This prong favors sales to entities that allow for public display of the artwork rather than private purchasers, especially because if the work is kept from the public, the museum has less support for its public purpose argument.[74] This prong also suggests that public institutions be given the option to match a private bidder's offer within a certain amount of time.[75] Thus, White proposes that deaccessioning be allowed when it serves the public good, there are no alternatives, and the public is likely to continue to have access to the works in question.

C. GOLDSTEIN AND LOW SCRUTINY

The most forgiving end of the spectrum is described by Jason R. Goldstein in his note *Deaccession: Not Such a Dirty Word.* Goldstein "recommends more liberal use of museum deaccessions as a means of raising operating funds necessary for the care and maintenance of the museum's collections, programs, and physical plant."[76] Goldstein argues that strict application of trust law may force museums to close down entirely in the face of low funding.[77] Although stipulating that all deaccessions should be made with full disclosure to the public, Goldstein proposes that, "[T]rust agreements should use plain language to stipulate that donations become the property of the museum for serving the public trust. . . . [This] may require the sale of a gift made to the museum and the use of those proceeds for acquisition or maintenance."[78]

Furthermore, museum trustees may face a much higher standard when asked to adhere to the mission statement of a museum, "an inherently vague document subject to many interpretations."[79] By contrast, when managing a corporation, corporate directors may use their business judgment, limited only by the fiduciary duties of care and loyalty.[80] In light of these facts, Goldstein advocates that museum personnel be held to the same standards as corporate directors and not to the higher standards of trustees.[81] Goldstein proposes that, "The deaccessioning of property by the museum must be consistent with the

72. *Id.* at 1062.
73. *Id.* at 1063.
74. *Id.*
75. *Id.* at 1064.
76. Goldstein, *supra* note 39, at 216-17.
77. *Id.* at 217.
78. *Id.* at 226.
79. *Id.* at 244.
80. *Id.*
81. *Id.*

mission of the museum as interpreted and practiced by the board of trustees."[82] Thus, Goldstein's proposal could be described as application of the business judgment rule conditional on the full disclosure of deaccessions.

III. CONTRASTS WITH THE CODE

Because Gabor, White, and Goldstein each represent a different approach towards deaccession, each will be contrasted against pertinent sections of the Code. Part A deals with Governance. Part B deals with Collections and Programs. Part C deals with how each proposal comports with the spirit of the Code.

A. GOVERNANCE

The Governance portions of the Code pertinent to this Note emphasize protecting the museum and its mission, proper oversight and public openness, and duty to the public.[83] All three proposed methods recognize that deaccession may sometimes be necessary to protect the museum and its mission, whether to make the collection fit together better, to afford longer hours, or to renovate buildings.[84] Gabor is the most dubious of deaccession for maintenance purposes. By contrast, the Code says that the governing body should ensure that "the museum's collections and programs and its physical, human, and financial resources are protected, *maintained*, and developed in support of the museum's mission."[85] Assuming that this can be applied to decisions to deaccess art, this places Gabor in a stricter camp than even the AAM. Because Gabor realizes there are indeed more reasons for deaccession than mere funding, his suspicion is not entirely well-founded; what may seem like a funding-oriented decision may in fact serve the long-term interests of a museum, which would in turn meet the obligations to the museum's mission. By contrast, the White and Goldstein models allow for the possibility that deaccessions be used to pay for maintenance or other purposes.

The Code states that governing bodies must be sure that "policies are articulated and prudent oversight is practiced."[86] All three proposed methods recognize a need for proper oversight.[87] While Gabor does complain that, "Few administrative moves are openly made, and even the decision-making process itself is hidden,"[88] he does not explicitly recommend that the decisions be made openly; rather, he recommends that policy be made open to donors, that affected donors should be notified of decisions to deaccess their donations,

82. *Id.* at 245.
83. *See supra* Part I.A.2.
84. *See supra* text accompanying notes 57, 62, 76.
85. American Association of Museums, *supra* note 19, at 2 (emphasis added).
86. *Id.* at 3.
87. *See supra* text accompanying notes 58, 65, 78.
88. Gabor, *supra* note 44, at 1014.

and that acquisitions or deaccessions be made public *on request*.[89] White does not make any demand for public openness at all; Goldstein actually encourages more openness than the Code demands.[90]

Finally, the Code expects that governance procedures promote the public good rather than individual financial gain.[91] Each model has slightly different ideas of what stands for the public good. Given the reasons Gabor lists for deacession,[92] he seems to view quality and cohesiveness of a collection as best serving the public good. To Gabor, merely acquiring needed funding is a dangerous and possibly ruinous reason to deaccess.[93] Both White and Goldstein argue that deaccessioning in order to acquire funding is in fact in the interest of the public good. However, White advocates that the governing body be assessed under the law of trusts rather than the more forgiving law of corporate fiduciary duty advocated by Goldstein.

Overall, Gabor seems to be the outlier in terms of governance. Although he argues against deaccessioning to acquire funding and critical of the closed policies of many museums, Gabor nonetheless demands little in terms of actual openness. By suggesting that museums do not need to do more than warn donors that artworks are about to deaccessed, and that deaccessions need not be made public unless the information is requested, Gabor is in essence allowing for what happened at the Rose to continue happening. Because White offers little guidance in terms of openness, it must be assumed that an open process was not a priority in her system. Goldstein, therefore, excels in this context: complete openness of both procedure and actual decisions made by a museum as a counterpoint to more relaxed judicial standards.[94] Goldstein recommends little judicial oversight, as he argues in favor of applying the business judgment rule of corporate fiduciary duty to museum trustees.[95] Thus, an ideal governance policy would combine the openness espoused by Goldstein with the traditional standards of trustees advocated by White.

B. COLLECTIONS AND PROGRAMS

The sections of the Code most relevant to this Note deal with Collections and Programs. The Code states that funds from deaccession should only be used to acquire new works or take direct care of collections, as consistent with the museum's mission.[96] Programs should be accessible to the largest possible audience and should support the mission of the museum and its responsibilities

89. *Id.* at 1047-48.
90. Goldstein, *supra* note 39, at 226.
91. American Association of Museums, *supra* note 19, at 3.
92. *See* text accompanying notes 50-56.
93. Gabor, *supra* note 44, at 1020.
94. Goldstein, *supra* note 39, at 226.
95. *Id.* at 217.
96. American Association of Museums, *supra* note 19, at 3.

as a public trust.[97] Both collection-related activities and programs should promote the good of the public and not individual financial gain.[98]

In terms of Collections, the Gabor model best adheres to the Code. Although Gabor lists many reasons for deaccession, funding is clearly disfavored as compared to reasons that advance the quality and character of a museum's collection.[99] Likewise, the Code states that, "[I]n no event shall [proceeds] be used for anything other than acquisition or direct care of collections."[100] White believes that, "As long as revenue is directed back to a public good in some form . . . the deaccessioning has served the requisite public good."[101] Proposing more leeway for decisions to deaccess, Goldstein questions why museum professionals are held to a higher standard than corporate boards.[102] If the business judgment rule were applied to museum boards, courts would defer to the judgment of a board, regardless of how the proceeds from deaccession were applied, as long as the board could show it reasonably believed it was working in the interest of the museum. To employ a "museum judgment rule" would strip the courts of important oversight over the decisions of museum boards. This would be detrimental to the public, the intended beneficiaries of museums.

The American Association of Museums places the public high in its priorities. The Code says it is a duty to ensure that "programs are accessible and encourage participation of the widest possible audience consistent with its mission and resources."[103] A wholesale deaccession of a museum's collection would not foster public accessibility unless every work in the collection was transferred to other public institutions. However, when selling to the highest bidder, it is not always public institutions that can make a winning offer. This is what makes a combination of the Gabor and White models appealing. Like the Code, Gabor strongly emphasizes that deaccessions should only be made if the funds will go directly to the aid of the collections.[104] While favoring direct benefit to collections, White proposes a clear, three-step process for judicial oversight should deaccession prove be challenged.[105] As noted above, White favors alternatives to deaccession if at all possible.[106] White's third step inquires into the nature of the buyer; public purchasers are greatly favored, as are preemption agreements to give public purchasers a chance to meet the offer of a private purchaser.[107] By contrast, Goldstein only asks that deaccessioning

97. *Id.*
98. *Id.* at 3-4.
99. *See supra* Part II.A.
100. American Association of Museums, *supra* note 19, at 3.
101. White, *supra* note 62, at 1060.
102. Goldstein, *supra* note39, at 244.
103. American Association of Museums, *supra* note 19, at 4.
104. *See supra* Part II.A.
105. *See supra* Part II.B.
106. *Id.*
107. White, *supra* note 62, at 1063-64.

be made public, but that the decision to do so should be given as much leeway as possible.[108]

To best adhere to the Code's recommendations on collections, museums should follow the suggestions of Gabor, and courts should employ the three-step oversight process of White. Deaccessioning collections often means that works once available to the public will be kept in private hands. However, it can be in the best interest of the museum and the public to deaccess works in order to ensure that the museum as a whole can continue functioning as a going concern, as all three proposals recognize. By prioritizing deaccessions that further the collection while still allowing for the process of funding-oriented deaccessions, the Code can be satisfied while adding oversight and flexibility.

C. THE SPIRIT OF THE CODE

With regards to museum personnel, the Code stresses that loyalty to the museum and the public is key: "No individual may use his or her position in a museum for personal gain or to benefit another at the expense of the museum, its mission, its reputation, and the society it serves."[109] This sentence best encapsulates how the Code views the duty of loyalty museum personnel owe to their respective institutions. The models proposed by Gabor, White, and Goldstein fail to address conflict of interest in the decision to deaccess.[110] Rather, the models assume that oversight would be used to ensure that deaccession happens for an appropriate purpose. Each model proposes different purposes which are believed to serve either the public good or a museum's mission and would therefore justify deaccession.[111] However, each method fails to address the possibility that the decision to deaccess might in fact be inherently unethical.

IV. TOWARDS A NEW PARADIGM

A. THE HYBRID METHOD

Duty to the public and the museums are the main goals of the Code when it lists duties of the governing bodies and the duties surrounding collections.[112] Although each model has quality elements, none of the models are wholly sufficient. Thus, a new paradigm for conducting and analyzing a decision to deaccess is needed.

The best version of dealing with deaccession would involve elements

108. *See supra* text accompanying notes 94-95.

109. American Association of Museums, *supra* note 19, at 2.

110. *See supra* Part III.

111. *Id.*

112. *See supra* parts III.A-III.B.

from each of the three models. First, the deaccession process needs transparency.[113] Gabor proposes that museums make their deaccession procedures public.[114] Goldstein proposes that, "[M]useums should invite public scrutiny by making full disclosure of deaccession activity."[115] This could be in the form of press releases, notification to "members" of the museum community who have asked to be informed of activity within the collection, or an entire section of a museum's website devoted to activity within the collection. Ideally, the museum should be as public as possible about any and all decisions to deaccess. Additionally, in choosing to deaccess, White advocates the use of preemption agreements, which would allow public buyers to match the offers of private buyers within a set amount of time.[116]

Overall, the White model has several appealing qualities for being the groundwork of court deaccession analysis. White argues in favor of holding museums to the same standard as other trustees rather than the standard of corporate officers.[117] White offers a clear three-pronged method for analyzing a decision to deaccess.[118] A court would first look to see if there was indeed a legitimate need for deaccession.[119] "Need" should include an inquiry into what the museum proposes to do with the funds acquired through deaccession and to whom the funds would go to. This would allow for an inquiry into conflict of interest. Arguments for the public good could be found in a variety of purposes, but Gabor's preference for collection-related deaccession[120] should be favored above mere maintenance of the building. However, maintenance purposes should not be ruled out as a legitimate need for deaccession. Additionally, the Code and the mission of the museum should be taken into account when determining if proper purpose is served by the deaccession. If the court found need, it would seek alternatives to the decision to deaccess.[121] White suggests leasing the work in question or simple fundraising as possible alternatives to deaccession.[122] If no alternatives were available, the court would finally assess the nature of the buyer.[123] Here, the court would prefer public purchaser to private purchasers.[124] This allows for the deaccessed work to remain available to the public audience.

Finally, if the court determined that the decision to deaccess was been improper, remedies would be necessary. Although harsh, Gabor's suggestion that the deciding entity be held personally liable for wrongful decisions to

113. Gabor, *supra* note 44, at 1013; Goldstein, *supra* note 39, at 226.
114. Gabor, *supra* note 44, at 1047-48.
115. Goldstein, *supra* note 39, at 226.
116. White, *supra* note 62, at 1064.
117. *See supra* part III.A.
118. *See supra* part II.B.
119. White, *supra* note 62, at 1059.
120. Gabor, *supra* note 44, at 1019-20.
121. *Id.* at 1060.
122. *Id.* at 1061.
123. *Id.* at 1063.
124. *Id.*

deaccess is appealing because "it would ensure that [decision-makers] have a personal stake in the [deaccession] procedure."[125] Personal liability, combined with the standards set above, would help make sure that the deaccession process is taken more seriously. Gabor's suggestion that wrongfully deaccessed works might revert back to the donor,[126] while interesting, makes little practical sense. Under the three-pronged assessment, it is possible that the museum has a demonstrable need, but other alternatives to deaccession exist. Keeping the artwork in the museum should be prioritized if at all possible; reversion back to the donor defeats the purpose of keeping the art accessible to the public.

In summary, this Note proposes that redefining deaccession must begin with museums themselves. Open policy and practices, and a dedication to keeping works available to the public, are the first steps. Secondly, courts need a clear procedure for assessing whether deaccession was in fact proper. Finally, if deaccession is deemed improper, clear standards for discipline are needed.

B. THE PROCESS IN ACTION

Applying the proposed standards to the situation at the Rose, we encounter several problems. While notification of the decision was very public, the fact that the process was underway was not even known to the director of the museum.[127] No deaccessions have been made yet, but as the primary concern seems to be the financial well-being of Brandeis University,[128] it is likely that price and not purchaser will be prioritized if the collection is indeed deaccessed.

Applying the three-pronged analysis, there is a good chance that the court would not even find the deaccession to have proper purpose. Under the Code, "No individual may use his or her position in a museum for personal gain or to benefit another at the expense of the museum, its mission, its reputation, and the society it serves."[129] Brandeis has decided to deaccess the Rose for the benefit of the University, going directly against the Code; additionally, this decision ignores the fact that the Rose has managed to keep a balanced budget on its own, it does its own fundraising, and fifteen percent of the money derived from the Rose's fundraising goes to the University.[130]

Even if helping the University were considered a proper purpose for deaccession, other options may exist. Given that the Rose does its own

125. Gabor, *supra* note 44, at 1031.

126. *Id.* at 1033-34.

127. Kennedy and Vogel, *supra* note 2.

128. Edgers, *supra* note 5.

129. American Association of Museums, *supra* note 19, at 2.

130. Roberta Smith, *In the Closing of Brandeis Museum, a Stark Statement of Priorities*, N.Y. TIMES, Feb. 2, 2009, at C3.

fundraising,[131] perhaps Brandeis could solicit donations from benefactors of the Rose. Additionally, the praise the Rose's collection receives suggests that money could be made by leasing parts of the collection, possibly as part of a tour.

Finally, even if no other options are available for Brandeis, the court would need to look into who would be purchasing the art. As there has been no indication as to how Brandeis plans to sell the collection, it is impossible to know who would be acquiring works from the Rose. However, it is possible that Brandeis might be making a mistake in trying to sell any art right now due to the combination of the overall economic climate as well as the current state of the art market.[132]

Thus, under the proposed standards of deaccession assessment, Brandeis would likely fail at any of several stages of analysis. In this case, sanctioning the trustees does not seem like a good enough solution. Additionally, the fact pattern is complicated by the fact that the Rose is part of the University. An injunction to keep the museum open would be a good first step, but the Rose might continue to suffer if donors have no confidence in the Rose's ability to stay open.[133] Had Brandeis been more open about its desire or need to deaccess the Rose before announcing that they planned to sell everything, perhaps this could have been avoided.

V. CONCLUSION

Museums must serve the public. By announcing the plan to uproot the Rose, Brandeis has angered its own university community as well as the art world at large. Brandeis has lost the trust of the public and may never fully recover. By having a more open discussion about their financial straits, Brandeis could have brought up the idea of deaccessioning the Rose without fully committing itself to any particular action. Although Brandeis was open about its decision, this only highlights the need for a more fully-developed and practiced framework for assessing decisions to deaccess art. Luckily, public outcry has been so great that perhaps Brandeis will change its mind. This is simply further proof that public scrutiny is vital in policing museums. Museums need to hold themselves accountable for their own behavior. If museums do not hold themselves accountable, the public can. The courts are already a last line of defense; they should not be the first line of defense as well. By combining self-policing, policing by the public, and policing by the courts, deaccession can be limited to those instances that still serve the needs of the public, not the needs of the few.

131. *Id.*
132. Kennedy and Vogel, *supra* note 2.
133. Smith, *supra* note 129.

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