

The Transformation of the Art Market:
Law, Norms, and Institutions

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Introduction

Over the last three decades, the art market has undergone a remarkable transformation. Before the 1990s, artworks were sold with hardly any concern about whether they had been stolen or looted, whereas now any reputable gallery or auction house checks the “provenance”² of any substantial work before sale to ensure there is nothing problematic in the chain of title. This transformation reflects interlocking changes in law, norms, and institutions. New York’s and more broadly the U.S. courts’ application of American substantive law has destabilized title to stolen and looted goods worldwide because American statutes of limitations generally provide weaker protection for those who possess stolen or looted goods even in good faith. Application of American law has had a profound effect, especially for the high end of the market because even European or Asian investors who purchase art outside of the U.S. may eventually want to sell or display their works in the U.S. Defective title under American law thus affects prices world-wide. The tightening and broader application of American law reflects both long-standing legal principles and changes in social norms towards the redress of historical wrongs, most notably prominent campaigns relating to art confiscated or sold under duress in Nazi Germany. New institutions, most importantly the Art Loss Register (ALR) searchable database of stolen and looted art, have also changed perceptions about minimum standards for good faith purchase, which in turn affected both social norms and litigation. These new norms, in combination with the information provided by the ALR, have influenced the market even for less valuable art, for

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² Provenance refers to several things, including whether the artwork is authentic (e.g. not a forgery) and whether the seller’s title is solid (e.g. not tainted by theft, looting, or other problems). When this paper refers to provenance, it is referring to the second aspect. Buyers have reasons to confirm authenticity that are largely unrelated to choice of law and the norms and institutions discussed in this paper.

which sale or display in the U.S. is not a relevant consideration and for which the threat of costly legal action is not credible.

To simplify exposition, this article will use the term “stolen” to refer to both stolen and looted art, including art that was acquired by coercive transactions, such as those used by the Nazis to acquire art from Jews in 1930s and early 1940s. Similarly, to simplify exposition, the person who owned the artwork before it was stolen will be called the original owner (even if, under relevant law, the original owner still has title and therefore is also the current owner), and the person who currently possesses the artwork will be called the possessor (even if that person is also the owner under relevant law).

1. The Legal Framework

This section will briefly survey the main legal issues relating to stolen artwork, both substantive law, which determines ownership, and choice of law, which determines which state’s law applies. This section does not aim to be comprehensive but merely to set out the main approaches and issues so that those not already familiar with them can understand the rest of this paper.

A. Substantive Law of Stolen Art: Good Faith Purchasers and Statutes of Limitations

All relevant legal systems agree on a few basic things. Thieves do not get title to what they steal. In addition, under the principle of *nemo dat* (no one can give), a sale or transfer by the thief to a third party does not necessarily give the purchaser or recipient good title because no one can give (*nemo dat*) more secure title than she possessed. Nevertheless, all legal systems provide ways in which persons acquiring stolen objects may eventually gain full title. Some legal systems give good faith purchasers title immediately on purchase or after a few years, and some may give title after a number of years “by prescription” even to those who are not good faith purchasers. Other legal systems establish similar results procedurally by barring suits for title after a certain number of years as set out in “statutes of limitations.”

Legal systems, however, differ in the details. For example, France gives good faith purchasers of stolen works full title after three years, and good faith is presumed unless bad faith is proven by the adverse party.³ In contrast, under New York, good faith purchasers do not get title until the statute of limitations has expired. The relevant statute of limitations is only three years, which would seem similar to French law, except that New York courts interpret the statute of limitations so that it does not start to run until the original owner makes a demand for the object and that demand is refused.⁴ That is, while statutes of limitations ordinarily start from the time of the wrongful action (e.g. the theft or purchase by the current possessor), when dealing with

³ French Civil Code Articles 2268, 2279.

⁴ *Solomon R. Guggenheim Foundation v Lubell*, 569 N.E.2d 425, 429 (N.Y. 1991).

stolen objects whose location is likely to have been concealed, the statute of limitations is essentially rendered irrelevant because it does not start running until the original owner has located the object, identified its current possessor, and made a request for its return. In addition, there are other legal doctrines that may sometimes hinder original owners in repossessing their objects; one such doctrine is laches, which denies recovery when the original owner failed to search diligently for the stolen object or make a demand in timely fashion after discovery of the current possessor.⁵

Many legal systems have doctrines similar to, but also slightly different from, the French and New York laws described in the previous paragraph. For example, New Jersey law, like New York law, is very favorable to original owners, but the statute of limitations is six years (not three) and starts running, not from the time of demand, but from when the original owner discovers the location of the stolen object and its current possessor, or from the time the owner would have discovered the location and current possessor if the owner had been diligent.⁶ Swiss law is similar to French law, except the relevant period of time for a good faith purchase to acquire title is five years rather than three years.⁷ There are also many subtle differences, such as the requisite knowledge needed to negate good faith. Is it necessary to show that the purchaser knew that the object was stolen? Or is it sufficient to show that there was information (such as lack of complete provenance or provenance involving galleries known to have dealt in stolen goods) that should have put the purchaser on notice that there might have been a problem? In general, U.S. law is more favorable to original owners than European or Asian laws, but because the relevant law is primarily state law there is considerable variation even between American states.

B. Choice of Law and Stolen Art: The Situs Rule and “Modern” Choice of Law

Because of the legal differences discussed in the prior section, it often matters greatly which country’s laws are applied, which is the choice-of-law question. A court does not automatically apply the law of the state where it is located. Instead, it uses choice-of-law principles to determine applicable law. So, a case heard in New York might apply French law, and a French judge might apply Swiss rules relating to good faith purchasers.

Here again there are different approaches. Most European courts apply the “situs rule,” which states that applicable law is the law of the place where the object was located during the relevant sale, transfer, or period of possession.⁸ For example, if a dispute arose about a stolen artwork purchased in good faith in France and possessed without dispute for three years, but subject to a suit in Switzerland in the fourth year, the dispute would be governed by French law. Even though

⁵ *Bakalar v Vavra*, 500 Fed. Appx. 6 (2nd Cir. 2012).

⁶ *O’Keefe v Snyder*, 416 A.2d 862, 869-70 (N.J. 1980).

⁷ Swiss Civil Code Article 934.

⁸ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 717 F.Supp. 1374 (S.D.Ind. 1989) (citing expert testimony of Professor Arthur von Mehren on Swiss situs rule and exceptions to it.).

the suit was in a Swiss court, the Swiss court would apply French law, which gives title after three years, because the object was purchased and possessed in France. The fact that Swiss law requires a five-year period and that period has not expired would be irrelevant because the Swiss court would apply French law under the “situs rule.”

American courts would also have applied the situs rule if the case had arisen before the mid-twentieth century. Starting in the 1960s, however, America experienced a “choice-of-law revolution” in which courts shifted away from “traditional” choice-of-law rules to what American scholars call “modern” choice-of-law rules. Modern approaches to choice of law were pioneered in New York in the 1960s and adopted by most (but not all) U.S. states in the following three decades.⁹ Federal courts did not adopt their own choice-of-law rules but instead apply the choice of law rules of the state where the federal district court was located, so a federal court in New York applies New York state’s choice-of-law rules, while a federal court in Illinois would apply Illinois choice-of-law rules.¹⁰

Modern choice-of-law rules differ slightly among American states, but all reject rigid application of rules such as the “situs rule” and instead ask courts to evaluate the relevant state interests, the residence of the parties, and/or the place where relevant events took place. Application of modern choice-of-law rules is often unpredictable, and some allege that the results tend to favor local parties and/or the application of local law. As applied to disputes about stolen art, modern choice of law often results in application of the law of the place where the object is at the time of the litigation, even if relevant events happened elsewhere. For example, in *Bakalar*, the federal court in New York applied New York law to a painting by Egon Schiele originally owned by Franz Friedrich Grunbaum, an Austrian Jew who died in the Dachau concentration camp. By a set of circumstances that remain unclear, Grunbaum’s sister-in-law gained possession of the painting and sold it to a Swiss gallery in 1956, and the next year that gallery sold the painting in New York to David Bakalar, who possessed the painting without dispute for over thirty years. When Bakalar tried to sell the painting at Sotheby’s in New York, Grunbaum’s heirs objected, the item was withdrawn from the auction, and Bakalar filed suit for declaratory judgment that he was the rightful owner. Although the district court applied Swiss law under the situs rule, the appellate court reversed. It applied New York’s modern “interest analysis” approach and found that New York had a greater interest in the case because it has an interest to “preserve the integrity of transactions” and in preventing New York from becoming the locus for buying and selling stolen items.¹¹ In contrast, the court ruled that the case “does not implicate any Swiss interest [because] the application of New York law here would not have any adverse interest on

⁹ Symeon C. Symeonides, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006).

¹⁰ *Klaxon v. Stentor Electric*, 313 U.S. 487 (1941).

¹¹ *Bakalar v. Vavra*, 619 F.3d 136, 144 (2nd. Cir 2010) (quoting *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp 829, 846 (E.D.N.Y. 1981)).

the Swiss art gallery. Nor would it affect any other Swiss citizen or Swiss interest.”¹² One suspects that a Swiss judge or legislator might have a different view about the absence of a Swiss interest in the validity of transactions taking place on Swiss soil, but under modern American choice-of-law approaches, a court in one place (here a federal court in New York) is entitled to opine on the interests of other states (e.g. Switzerland) and ascertain the relative importance of their interests.¹³ *Bakalar* is a decision relating to New York choice of law. Other U.S. states are likely to interpret their laws in similar fashion and to apply their laws to art purchased or possessed elsewhere. Of course, because choice of law is primarily a state issue, uniformity cannot be expected. Nevertheless, because of the central place of New York in the art market, *Bakalar*'s interpretation of New York law is of particular importance.

The *Bakalar* case discussed above was decided in 2010, while some of the cases and events discussed later in this paper occurred a decade or two earlier, so it is important also to understand whether *Bakalar* represented a change in the law or is reflective of how similar cases would have been determined in the prior two decades. Unfortunately, there is no clear answer to that question. New York's modern interest-analysis approach had been applied to property disputes at least as early as 1991,¹⁴ but there were no cases clearly applying interest analysis to disputes about stolen art before *Bakalar*. There were four cases about choice of law and stolen art. One applied New York law without considering the possible applicability of foreign law,¹⁵ while another applied French law without considering the applicability of New York law.¹⁶ One applied the situs rule but also noted that interest analysis would have mandated the same result.¹⁷ And the fourth employed the situs rule and applied Swiss law.¹⁸ Courts in other US jurisdictions sometimes reached results like that in *Bakalar* -- applying the law of the place where the work was located at the time of the suit rather than the law of the place where the work was acquired (the situs rule). So, for example, Seventh Circuit, the federal appeals court in Chicago, applied Indiana law rather than Swiss law to a mosaic looted from Cyprus, sold in Switzerland to the owner of an Indiana gallery, and then brought to Indiana for sale in the U.S. In that case, however, the mosaic was in Switzerland for only four days and was held in the Geneva Freeport

¹² *Bakalar* at 144-45. To their credit, the judges in *Bakalar* considered the effect of applying New York law on the security of future transactions in Switzerland but ruled that the “tenuous interest of Switzerland created by these circumstances, however, must yield to the significantly greater interest of New York ... in preventing the state from becoming a marketplace for stolen goods.” *Id.* at 145.

¹³ Although Grunbaum's heirs prevailed in their choice-of-law arguments, *Bakalar* eventually prevailed and had his ownership confirmed through application of New York's laches doctrine. *Bakalar v. Vavra*, 500 Fed. Appx. 6 (2nd Cir. 2012).

¹⁴ *Istim v. Chemical Bank*, 581 N.E.2d 1042 (N.Y. 1991).

¹⁵ *Menzel v. List*, 49 Misc.2d 300 (N.Y. Sup. Ct. 1966) (applying New York statute of limitations) affirmed 28 A.D.2d 516 (NY.App.Div. 1967).

¹⁶ *Warin v. Wildenstein & Co.*, 45 A.D.3d 459 (N.Y. App. Div. 2007). The court in *Bakalar* did not seem aware of this case, or at least did not cite or discuss it.

¹⁷ *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp 829, 845-46 (E.D.N.Y. 1981), affirmed 678 F.2d 115 (2nd Cir. 1982).

¹⁸ *Greek Orthodox Patriarchate of Jerusalem v. Christie's*, 1999 WL 673347 (U.S. Dist. Ct. S.D.N.Y. 1999). The court in *Bakalar* essentially ignored this case, calling it an “erroneous application of the old situs rule.” *Bakalar* at 145.

area of the airport, where goods can be stored without going through customs.¹⁹ The state of the law in the 1990s and 2000s is thus best described as uncertain. A person who had acquired title under French, Swiss, or similar laws that protect good faith purchasers might fear that a U.S. court would apply U.S. law and vindicate the claims of the original owner or her heirs. On the other hand, a good faith purchaser, if well advised, could also reasonably believe that her claims would prevail, if the case were litigated well. Nevertheless, even uncertain law has effects. A person who thinks she has a fifty percent chance of losing title if she displays or sells her work in New York or elsewhere in the U.S. is likely to be quite reluctant to do so.

The fact that choice-of-law issues relating to stolen art were only resolved definitely in New York in 2010, well after the change in norms discussed on section 4, suggests that the U.S.'s aggressive approach to choice of law may itself be the product of the change in norms discussed below. In this regard, it is notable that a principal reason that *Bakalar* applied New York law was to “prevent the state from becoming a marketplace for stolen goods.”²⁰ The idea that it was morally problematic to buy and sell goods with tainted provenance, is, in part, the product of the increased attention starting in the 1990s to the theft of antiquities and the large quantity of art looted by the Nazis.²¹ Similarly, the information necessary to make litigation about such works was made much more accessible by the Art Loss Register, which was founded in 1990.

Because of the importance of statutes of limitations, especially in American litigation, it is important also to consider recent federal legislation, the HEAR Act, which was passed in 2016.²² In its key provision, it provides that “Notwithstanding any other provision of Federal or State law or any other defense at law relating to the passage of time... a civil claim ... to recover any artwork ... that was lost ... because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claiming of (1) the identity and location of the artwork...”²³ By its terms, it establishes a uniform (or at least minimum) statute of limitations period for the entire U.S., thus overriding the complex choice-of-law rules that might otherwise be involved in selecting the appropriate period.²⁴ Like *Bakalar*,²⁵ the HEAR Act broadens the application of U.S. law and reflects the changing norms about stolen art discussed in Section 4.

¹⁹ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 717 F.Supp. 1374 (S.D.Ind. 1989).

²⁰ *Bakalar v. Vavra*, 619 F.3d 136, 144 (2nd. Cir 2010) (quoting *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp 829, 846 (E.D.N.Y. 1981)).

²¹ By one estimate, the Nazi's stole 600,000 artworks between 1933 and 1945. See Jonathan Petropoulos, *Written Comments for the House Banking Committee (Hearing of 10 February 2000)*, COMMITTEE ON FINANCIAL SERVICES, <https://archives-financialservices.house.gov/banking/21000pet.shtml> (last visited April 19, 2021).

²² PL 114-308, 130 Stat 1524 (2016)

²³ *Id.* section 5(a).

²⁴ Statutes of Limitations were traditionally viewed as procedural and thus governed by the law of the state where litigation was taking place but by the mid-twentieth century most American states adopted “borrowing statutes” which required the application of different statute of limitations in some circumstances. David H. Vernon, *Statutes of Limitations in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MOUNTAIN L. REV. 287 (1960).

²⁵ *Bakalar v. Vavra*, 619 F.3d 136 (2nd. Cir 2010). See discussion at _.

The full impact of the HEAR Act remains unclear. For example, one could construe a European rule giving good faith purchasers or other possessors title after a period of years as a “defense at law relating to the passage of time.” If so, the HEAR Act would override choice-of-law analysis not only for statutes of limitations but also for European good faith purchaser and prescription laws. One appellate court has ruled against this broad interpretation, but it will be interesting to see if others adopt it.²⁶

II. The Global Effect of American Law

One might think that application of U.S. law to transactions that took place elsewhere would have rather limited impact because one would expect that U.S. law would only affect works that are in the U.S., where the jurisdiction of U.S. courts is most plausible. More fundamentally, one would expect that sophisticated parties would take into account the possible application of U.S. law and avoid bringing art to the U.S. where settled titles might be upset.²⁷ Nevertheless, with respect to high-valued art, these arguments are largely wrong. In fact, the potential application of U.S. law has effects globally, even on art that never makes its way to the United States. This worldwide influence has several causes.

First, the United States is so central to the global art market that it is not plausible for many sellers to avoid the U.S. market and thus U.S. law. If a small, less important jurisdiction enacted stringent laws, and enforced them broadly, those buying and selling art could simply avoid that jurisdiction. The U.S. market, however, is too attractive to be shunned. Too many buyers live in the U.S., and the prestige of the December evening auctions at Sotheby’s and Christie’s make them the preferred place for the sale of the highest-valued internationally collected objects. The U.S. became the most important art market in the 1960’s, displacing Paris, the prior leader. For the next four decades, the U.S. was the site of a majority of sales, by value. As China emerged as an alternative location for art sales in the early 2000s, the U.S.’s market share dipped below 50%, but the U.S. remains the most important forum for fine art sales, and its market share actually rose in the 2010s.²⁸ Access to this market is therefore highly valued by owners of internationally collected (fine) art.

Second, high-value art is extremely durable and can be sold many times. As a result, the value of a work depends not just on the law and legal protections offered by the place where the work is currently being sold or held but also on the law in other places where the work might later be

²⁶ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F3d 951, 965 (9th Cir. 2017) (rejecting the argument that the HEAR Act bars application of Spanish law relating to “acquisitive prescription,” because, even though prescription applies through “the passage of time,” it is “substantive law,” not a defense).

²⁷ This argument has been made by numerous scholars, including one of the authors of this paper. See Daniel Klerman, *Jurisdiction, Choice of Law, and Property*, in *LAW AND ECONOMICS OF POSSESSION* 279-79 (Yun-Chien Chang ed., 2015).

²⁸ *Plotting the art market: An interview with Clare McAndrew*, *FINANCE AND SOCIETY* 2(2): 151-67 (2016), <http://financeandsociety.ed.ac.uk/article/view/1728/2230> (last visited April 19, 2021); ArtBasel, *The Art Market 2020*, <https://theartmarket.foleon.com/2020/artbasel/the-global-art-market/>.

sold or held. Because, as noted above, the U.S. is home to many wealthy individuals and institutions, even individuals and institutions that are not themselves in or connected to the United States may, in the future, want to sell into the U.S. market. As a result, even when art is sold and held outside of the United States, U.S. law influences its price and depresses the value of stolen works.

Third, because U.S. law is known to be so favorable to original owners of stolen art, a sale in the U.S., and particularly in New York, acts to certify the provenance of a work and thus *increases* its value. If a painting is sold openly in the U.S. without legal challenge, that provides credible information to the market that the seller has good title and that there are no problems with provenance. Conversely, sale in a jurisdiction with weaker legal protection for original owners sends a negative signal: Why is the work being sold in the Geneva Freeport? Maybe the seller knows there's a problem? So, willingness to sell in the U.S. is a credible signal of good provenance,²⁹ and a successful sale in the U.S. acts as a certification of good provenance. This certification provided by American law is, somewhat counterintuitively, attractive to possessors of high-value artworks with missing provenance -- objects for which there is no reason to believe they were stolen but that lack documentation allowing ownership to be traced back to their creation. Because a successful sale in the US certifies that it is unlikely that a credible claim will come to light in the future, sale in the U.S. raises the object's value for subsequent buyers.

Fourth, even persons or institutions such as museums that do not want to sell their art may want to display it in the U.S. If a prestigious American museum displays a work of art, that brings honor and prestige to its possessor.³⁰ In addition, it raises the price if the possessor eventually wants to sell the work. If a work cannot be displayed in the U.S. without fear that it will be subject to litigation, the work is worth less both in terms of prestige and in monetary value. Similarly, to the extent that wealthy individuals might want to get the prestige of donating their works to an American museum, the potential application of U.S. law undermines the value of the works and may affect art purchased and held outside the U.S.

As a result of these four factors, the more stringent protection American law offers original owners and its aggressive application through modern choice of law has not undermined New York's or the U.S.'s dominant position in the art market and may, in fact, have enhanced it. Although detailed data on sales before 1990s is not available, the best data indicate that the proportion of sales of the highest valued art taking place in the New York has been about two-

²⁹ Erin O'Hara O'Connor proposed a variant of this signaling argument. Daniel Klerman, *Jurisdiction, Choice of Law, and Property*, in *LAW AND ECONOMICS OF POSSESSION* 279-79 n. 15 (Yun-Chien Chang ed., 2015).

³⁰ William Landes and Richard Posner, *The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles*, in *ESSAYS IN THE ECONOMICS OF THE ARTS* 181 (V.A. Ginsburgh and P.M. Menger ed., 1996). ("Economists since Veblen have described art as a prestige good.... The collector gets utility not only from admiring the work hanging in his living room but from believing that other people envy or admire him because he owns it. To obtain this additional utility, people who buy art ... lend it to museums and galleries for exhibitions... They do this partly to confirm and enhance the value of the works but also to obtain utility from having one's name ('lent by' or 'in the collection of') publicly associated with the work.")

thirds in recent decades, and nearly all other sales of the highest valued have taken place in London, where the law is almost as protective of original owners as the U.S. For example, 67 of the 99 most expensive Picasso paintings (those sold for \$12.9 million or more) sold at public auction since 1988 have been sold in New York, and the other thirty-two were sold in London. Not a single one was sold in Asia, other parts of Europe, or even other parts of the U.S. Similarly, of the 69 Monet paintings sold since 1988, 43 were sold in New York, 26 in London, and none anywhere else. New York clearly dominates the market for the highest valued art, and there is no indication that jurisdictions that give substantial protections to good faith purchasers, like continental Europe or Asia, are attractive to sellers.³¹

A result has been the bifurcation in the market for high-value art. Internationally collected artworks with solid provenance are sold for high prices in markets, like New York, that offer robust protection to those who claim works were stolen from them or their families. Works with dodgy provenance are sold at a substantial discount in places, like Switzerland, that offer less robust protections. Unfortunately, private sales, which are more common in less protective markets, do not show up in artnet.com or other databases.

While New York is the most important market providing strong legal protection for original owners of stolen high-value art, it is not alone. The U.K. also provides robust protections and is the original home of Sotheby's and Christie's, the premier auction houses. Other U.S. states, both through their own laws and through national legislation such as the HEAR Act, also generally provide healthy protection for stolen art. The existence of several markets with robust legal protections further depresses the value of works of dubious provenance and reduces the pressure that New York and other more protective jurisdictions might otherwise have felt if sellers could profitably take their business to locales that favor good faith purchasers and other possessors.

Everything so far in this section relates to high-value art -- roughly works worth hundreds of thousands or millions of dollars. U.S. choice of law has little direct effect on low and moderate-value objects. If low-value stolen artworks are spotted by their original owners in a U.S. sale, litigation is not a credible threat; it would simply be too costly to pursue a claim in American courts. Cases involving stolen art are expensive to litigate. They require extensive provenance

³¹ Data are from artnet.com searches conducted on April 11, 2021. Picasso and Monet were chosen because they are the artists with the most number of high value sales, according to invaluable.com, *31 of the Most Expensive Paintings Ever Sold at Auction*, INVALUABLE (July, 29, 2019), https://linkprotect.cudasvc.com/url?a=https%3a%2f%2fwww.invaluable.com%2fblog%2fmost-expensive-painting%2f&c=E.1.qU-ExML6XPpsjdk1C4caYJHgL3nTEjlX2uXjuH2sfBGbF4UNJNA_Qu0vvo2t9nxv9heHq_Hd96q8ZEcQEaXHGXrWEhVmmCyBMXqZBBiCixdTe7sog.&typo=1 (last visited April 19, 2021). The Picasso search was restricted to paintings worth more than 12.9 million because otherwise the number of search results would be over 100 and thus more time consuming to analyze. The Monet search was not restricted because 69 was the total number of paintings sold at any price. The authors thank William Landes for encouraging them to use artnet.com to document the dominant position of New York in the market for high value art.

research, expert testimony, and briefing on difficult and novel legal issues. A large number of such cases are appealed, often multiple times. It is simply not usually worth litigating about stolen art unless it is worth hundreds of thousands or millions of dollars. Because litigation is not a credible threat, sale in the U.S. of low or moderate-value art does not provide the signaling or certification benefits that sale of high-value objects does. In addition, low- and middling value art is mostly collected in the artist's country or region of origin. Selling in the U.S. would make little sense when the main collectors are likely to be elsewhere.

III. Changing norms, Institutions, and the Art Loss Register

Over the last three decades, title issues have become increasingly prominent in collectors' decision-making. During the art price boom of the 1980s art theft became a major criminal market. By the late 1980s some claimed it was second in size only to illegal drug trafficking.³² Escalating art thefts raised the financial exposure of art insurers. Insurers suspected that stolen art was "laundered" - or made to look legitimate - through repeated resales in the open market. Many market insiders knew that they were sailing dangerously close to the wind by including artworks of dubious provenance in public sales without checking (and perhaps even suppressing) their history.³³ The fear of public exposure and reputational damage among auction houses, dealers, and museums was palpable. Key market participants were looking for a credible solution for detecting stolen art and resolving competing claims over artworks that would reassure their customers if their (past) practices were ever examined in court or exposed in the media.

The inevitable scandal broke over antiquities at Sotheby's in London. In the 1980s, Sotheby's was caught selling looted antiquities on several occasions but simply returned them to the consignors without alerting the source governments or any legal follow-up.³⁴ However, in 1989 a former staff member turned whistleblower, providing extensive documentation proving unethical and illegal practices in sourcing antiquities and across a range of further departments.³⁵ Investigative journalists took note and identified a number of dealers who regularly supplied unprovenanced museum-quality objects to private collectors and major public museums. In response to their tip-offs, the police raided several vaults at the Geneva Freeport to discover thousands of highly valuable illicit antiquities in 1995. They dismantled a whole network of shady traders and tracked down their customers.³⁶ People who had made (perhaps not entirely philanthropic) donations of looted antiquities at inflated valuations to prestigious American museums such as the Metropolitan Museum in New York and the Getty Museum in Los Angeles

³² William Lawrence, Laurie McGavin Bachmann, and Michael Von Stumm, *Tracking Recent Trends in the International Market for Art Theft*, 12 J. CULTURAL ECON. 1, 51-71 (1988).

³³ Peter Watson, *SOTHEBY'S: INSIDE STORY* (1997).

³⁴ N. Brodie, *Auction houses and the antiquities trade*, in 3RD INTERNATIONAL CONFERENCE OF EXPERTS ON THE RETURN OF CULTURAL PROPERTY 71-82 (S. Choulia-Kapeloni ed., 2014) Archaeological Receipts Fund: Athens.

³⁵ Peter Watson, *SOTHEBY'S: INSIDE STORY* (1997).

³⁶ Peter Watson and Cecilia Todeschini, *THE MEDICI CONSPIRACY* (2006).

were named and shamed.³⁷ Sotheby's lapse (or, as was alleged, deliberate company policy) in "laundering" illicit antiquities threatened their outstanding international reputation as a trusted source of first-rate artworks.³⁸

By the time the scandal broke publicly in the mid-1990s, however, dealers in fine art, auction houses, museums, and galleries had a damage limitation strategy in place. They pointed out that they had significantly tightened their protocols for sourcing artworks. Responding to calls for a centralized database for stolen art, major auction houses, art dealers and specialist insurers had contributed to the foundation of the Art Loss Register (ALR) in 1990. The ALR would prevent the circulation of stolen art and antiques in the open market and encourage the amicable resolution of disputed titles with original owners or their insurers.

The ALR is a for-profit company, and it makes (or attempts to make) money in a variety of ways. First, it charges those who register stolen art a fee -- either per-registration or, for repeat customers like insurers, an annual subscription. Second, it charges for one-off searches of the database, sells annual search subscriptions to major dealers and auction houses, and offers package deals to art and antiques fairs. Third, if the ALR locates a missing object and the registrant recovers the registered work themselves, the registrant is contractually required to pay the ALR a location fee equal to a small percentage of its value (usually 5%). Fourth, for a somewhat larger percentage (usually 10% but negotiable on high-value art) the ALR will negotiate and/or litigate on behalf of a registrant either for the return of the stolen object or for monetary compensation in return for removing the object from the database.

By negotiating on behalf of former owners, the ALR can help cleanse problematic titles and allow artworks to be sold at higher prices. In doing so, the ALR can provide benefits to all concerned. The possessor of an artwork with dubious provenance benefits from a higher price that, even after payments to the original owner, usually yields the possessor more net income than a sale without clean title or than clean title obtained through litigation. The former owner usually gets a percentage of the sales proceeds. Auction houses avoid potential negative publicity from trading in art of dubious origins, the long delays that court actions inevitably bring, and potential payouts on their explicit and implicit warranties. And the ALR gets its fees. Perhaps most importantly, while possessors of art with dubious provenance have incentives to keep their art hidden, art with clear title can be loaned to museums anywhere in the world without fear of dispute, thus benefiting the art-loving public as well.

One might think that as a for-profit company that makes money by charging for searches, the ALR would welcome all search customers. Nevertheless, that is not the case. Unlike the policies

³⁷ Jason Felch and Richard Frammolino, *CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD'S RICHEST MUSEUMS* (2011).

³⁸ Peter Watson, *SOTHEBY'S: INSIDE STORY* (1997).

established by other databases providers such as Interpol and the International Foundation for Art Research (IFAR), those who search the ALR must register and reveal their identities, and original owners are notified when there is a search for their art. This prevents thieves and those who trade in stolen goods from checking the database to see whether they might be able to sell on the legitimate market.

Although concerns about the provenance of fine art were the primary motive behind the ALR, antiquities dealers followed the lead of the fine art dealers in 1993 and formed the International Association of Dealers in Ancient Art to “work with law enforcement and others to prevent crime and campaign vigorously for an open, legitimate trade operating under fair regulations.”³⁹ Club members promise to adhere to the “highest professional standards” and a “stringent code of ethics,” which would be monitored by their peers. In practical terms, the new standard involved checking objects above a certain price threshold against the Art Loss Register (ALR) database and withdrawing objects from sale that have been reported as looted or stolen.

Initially, antiquities dealers had little to fear from checking their stock against the Art Loss Register. The database included only a few antiquities from major museum thefts. Illicitly excavated antiquities, which are ordinarily unknown to their owners, are not registered. Checking the ALR was, at least early on, therefore largely an exercise in “optical due diligence” - i.e. being seen to be doing the right thing. But the ALR realized that their reputation was at risk if it was too easy for dealers to obtain clear search certificates. To protect the market value of their services, the ALR accelerated the registration of antiquities that had been taken from formally excavated sites and strengthened the provenance documentation required for an all-clear certificate.

Despite the progressive raising of due diligence standards, selling antiquities remains risky. The well-publicized looting and carnage at museums during the wars in the Middle East, the link between antiquities and terrorist finance, and politically motivated claims for the repatriation of cultural patrimony turn every public auction of “museum-quality” antiquities into a potential public-relations disaster. In New York, there is the additional danger of inviting the attention of the assistant District Attorney, Colonel Matthew Bogdanos, and his task force for the repatriation of looted antiquities.⁴⁰ The world’s two top auction houses, Sotheby's and Christie’s, have therefore dramatically reduced their involvement in the antiquities trade. The few remaining

³⁹ INTERNATIONAL ASSOCIATION OF DEALERS IN ANCIENT ART, <https://iadaa.org> (last visited on April 19, 2021).

⁴⁰ *Tough new scrutiny by district attorney rattles New York antiquities trade*, THE ART NEWSPAPER, <https://www.theartnewspaper.com/news/tough-new-scrutiny-rattles-collectors-and-dealers> (last visited April 19, 2021).

high-profile antiquities auctions in London and New York serve as a strong signal to the market that the objects for sale are deemed to have an impeccable provenance.⁴¹

Even before the decline of the antiquities trade, Christie's and Sotheby's key priority was the highly profitable fine arts market. In spite of a fast-growing auction market in China served by domestic providers, Christies and Sotheby's generated 40% of the world's total auction sales in 2019, with an average of 76% of their sales in fine art - and mostly on paintings worth more than US\$ 1 million.⁴² In 2019, almost half of all Christie's sales were conducted in the U.S.

Reassuring buyers that they obtain good title is of paramount importance, especially given the aggressive application of American law documented in Section 2. Because even works that are not currently being sold in the U.S. might later be resold or displayed there, impeccable titles are valuable even to collectors outside the U.S.⁴³ Many historic artworks have gaps in their provenance - and not every plausibly watertight provenance submitted by consignors stands up to detailed scrutiny.⁴⁴ In the absence of certainty, Christie's and Sotheby's reassure buyers with an (unwritten) warranty policy. The conditions of sale tightly circumscribe the conditions under which a buyer can demand a refund.⁴⁵ In practice, however, both companies usually reimburse buyers who detect problems after a sale. Without a watertight due diligence process, such money-back guarantees could easily wipe out the companies' profits.⁴⁶

From the mid-1990s onwards, the fine arts business was directly threatened by the debate about the restitution of Nazi-looted artworks. As Philip Hook, a director of Sotheby's (and a senior specialist for paintings) put it:

Auction houses had to take radical action to operate in the perilous new era of restitution claims. Departments were set up solely to research the history of ownership of works consigned for sale. Nothing that has been looted in Nazi years could be offered at auction

⁴¹ Even so, it can go wrong... *Christie's withdraws 'looted' Greek and Roman treasures*, THE GUARDIAN, <https://www.theguardian.com/culture/2020/jun/14/christies-withdraws-allegedly-looted-greek-and-roman-treasures> (last visited April 19, 2021).

⁴² *The Art Market 2020*, ART BASEL, p129-30.

⁴³ Christie's and Sotheby's conduct high value auctions around the globe (e.g. Dubai / Shanghai / Hong Kong / Milan / Paris), but do not engage in regulatory arbitrage. The choice of what is offered in a market depends on the tastes of local collectors - e.g. Chinese art and porcelain may sell best in Shanghai - and not on the permissiveness of local laws.

⁴⁴ Salisbury Laney and Sujo Aly, *PROVENANCE: HOW A CON MAN AND A FORGER REWROTE THE HISTORY OF MODERN ART* (2009).

⁴⁵ Examples of conditions of sale can be found here: <https://www.christies.com/buying-services/buying-guide/conditions-of-sale> (last visited April 19, 2021) and for online sales here: <https://www.christies.com/buying-services/buying-guide/conditions-of-sale-cinc-jan-2018.pdf> (last visited April 19, 2021).

⁴⁶ See for example the dispute at Christie's over reimbursement for a potentially looted Sisley painting, where the information about a holocaust taint was not discoverable at the time of the sale. *Christie's Sold This Swiss Dealer a Painting Likely Looted by the Nazis. Now He Wants His Money Back*, ARTNET, <https://news.artnet.com/art-world/christies-nazi-restitution-1295141> (last visited April 19, 2021).

without a prior resolution of the case. Buyers would not bid on anything the provenance of which in the years 1932-45 was in any way dubious.⁴⁷

For most dealers and smaller auction houses, however, in-house research was out of the question. Instead, they expected the ALR database to flag impaired titles - or exonerate them in case a claim came to light later. Once again, the ALR had to invest in their database to meet this new purpose. They could not rely on former owners to register works that were lost decades earlier, that the surviving family members may know nothing about, or may have given up looking for. So, as with antiquities, ALR did its own research to generate lists of looted artworks. In addition, it waived its registration fees so that survivors or their heirs could register their lost treasures without charge. The ALR did not, however, waive other fees, such as location and recovery fees.

Having created a comprehensive historic claims database to serve its customers at the top end of the market, the ALR had an incentive to change wider market practices - in favor of routine searching and amicable settlement of disputed claims. In this regard, the ALR acts not as a simple market participant, taking preferences as given but as a “norm entrepreneur” that actively tries to change attitudes toward stolen art.⁴⁸ The more buyers and sellers care about provenance, whether for moral reasons or simply to avoid scandal or litigation, the more incentive auction houses and galleries have to purchase the ALR’s search services; and the more often those searchers turn up “hits,” the more location fees the ALR can generate. Moreover, the more pressure the ALR can generate to force possessors to settle with original owners on generous terms, the more the ALR collects in recovery fees. The ALR thus uses litigation and other means not only to resolve particular disputes but to generate publicity about the problem of stolen art, to engender sympathy for the former owners and their heirs, and to tarnish the reputation of possessors if they do not settle swiftly and on favorable terms. While the threat of litigation may be negligible outside the U.S. or for works worth less than six-figures, when social norms favor original owners and the media stand ready to name and shame norm violators, public sales of disputed artworks can quickly turn into a public relations disaster. Dealers, organizers of art fairs, and auction houses thus avoid putting their reputations on the line by acting as outlets for Nazi-tainted artworks.

By widely advertising their services and successes, as well as supporting former owners’ legal cases, the ALR has raised the bar for the expected level of due diligence checks in the mid-market. ALR searches provide a much cheaper way to research provenance than prior methods, which involved historical research as well as searching multiple incomplete lists, such as those created by Interpol and the International Foundation for Art Research (IFAR). The cheap and easy access to ALR search made it progressively harder for non-searchers to claim that they have

⁴⁷ Philip Hook, *BREAKFAST AT SOTHEBY’S* 250-51 (2013).

⁴⁸ Cass Sunstein, *Social Norms and Social Roles*, 96 COLUMBIA L. REV. 903 (1996).

acquired stolen/looted works “in good faith,” as required by laws giving title to good faith purchasers and possessors. As a result, although a collector can still usually ignore title issues and keep a disputed object on her wall, she will find it extremely difficult to sell the work in major markets. Reputable auction houses tend to immediately withdraw artworks if the ALR highlights a concern and only proceed with a sale after its resolution. This puts pressure on possessors to settle even when legal claims are weak or debatable. The ALR is often able to swiftly resolve title disputes with private collectors by suggesting that they share the sales proceeds with the heirs of the original owners. Dealers caught with a stolen or looted artwork in their stock sometimes choose to return it to the former owner with a minimum of fuss - especially when being reminded that if they had followed the protocols of their professional associations and had conducted an ALR search in the first place, the problem would never have arisen.⁴⁹

The power of professional association rules can be seen in the dispute over a Roman torso from Sidon’s temple of Eshmun, looted from a depot in 1981 during the Lebanese Civil War. After a series of sales in Switzerland, Austria, and Germany, the sculpture was bought by a German dealer. Unfortunately, the dealer only checked the ALR database after completing the purchase and was surprised to find that the torso was looted. The dealer was initially adamant that he had good title. After heated phone calls, the ALR antiquities specialist on the case predicted, “he is 100% not giving the torso up.” Nevertheless, a day after receiving a formal letter from the ALR informing the dealer of Lebanon’s repatriation claim and reminding him of his membership in the International Association of Dealers in Ancient Art (IADAA) and the obligations in the association’s code of conduct, the dealer stated that he never had any intention of selling the torso and that the Lebanese embassy could send someone to pick it up whenever they wanted. If the dealer had not done so, he could have been expelled from the association, which would have been particularly embarrassing given that he was a founding member. The dealer’s relinquishment of the sculpture, without negotiation or compensation, is all the more remarkable given that the Lebanese government was unlikely to have litigated title to a relatively minor artefact.⁵⁰

Changes in norms can also affect the possessors of stolen art themselves, making them more willing to compromise with original owners. The history of *A Deer Family*, a painting by Friedrich Gauermann provides a heart-warming example. The painting was owned by Albert Benbassat, a Sephardic Jewish banker in Vienna, whose collection was confiscated by the Nazis in 1938. Eventually, unbeknownst to the Benbassat family, the painting was sold to a good faith purchaser in Austria in the 1960s. After the establishment of the ALR, the Benbassat heirs registered the stolen work, and a search by an Austrian auction house in 2017 revealed its

⁴⁹ Anja Shortland, *LOST ART: THE ART LOSS REGISTER’S CASEBOOK* (2021).

⁵⁰ *Id.*, chapter 10. While the German dealer might have been protected by laws protecting good faith purchasers, a new German cultural property law, enacted in 2016 and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, would have tipped the scales in favor of the Lebanese government.

location to the ALR. Even the ALR agreed that there was little chance that the Benbassat heirs would succeed in an Austrian court given the good faith purchase five decades earlier. Nevertheless, the Austrian gallery complied with the ALR's request to withdraw the painting from auction and to keep it in house. The ALR, acting on behalf of the heirs, offered to relinquish the heirs' claims in return for splitting the proceeds of the sale between the heirs and the seller. The seller immediately accepted, and the auction house's lawyer offered to facilitate the transaction without charge. The painting eventually sold for €18,500. Because of its low value and Austrian law protecting good faith purchasers, litigation would have been futile. Nevertheless, because of the spread of norms favoring original owners, especially Jews persecuted by the Nazis, the Austrian auction house cooperated with the ALR and the seller settled on generous terms without a fight.⁵¹

Changes in social norms also influence disputes over stolen art in another way. Possessing, transporting, or selling stolen goods is, in most places, a crime. Public prosecutors, however, seldom have the resources to prosecute all crimes of which they are aware. They must prioritize, and prosecuting art thieves, whose crimes affect wealthy collectors with the means to pursue civil legal redress, has often been a low priority. Nevertheless, because of the publicity given to the problem of stolen art, prosecutors can often be motivated to act. Charlotte Landsberg, the widow of a Jewish gallery owner in Berlin, owned Picasso's *Femme en Blanc* and, in 1939, sent it to a Paris gallery for safekeeping. After the German invasion, the work was taken by the Nazis. Eventually, the painting was purchased in France in 1975 by a New York art dealer who lacked knowledge of its problematic history. He then sold it to Marilyn Alsdorf, "the queen of the Chicago arts community,"⁵² and her husband, James. When Alsdorf shipped the painting to a California gallery with the intention of selling the painting, litigation in California and Chicago ensued. Alsdorf dug in her heels, had the painting shipped back to her home in Chicago, and won a jurisdictional motion in California that was affirmed on appeal. She seemed confident that her title, based on a good faith purchase in France, would be vindicated until ... FBI agents knocked on the door of her posh Chicago apartment to seize the painting.⁵³ The lawyer for Landsberg's heirs, Randol Schoenberg,⁵⁴ had been able to interest an Assistant U.S. Attorney, John E. Lee, in the case. Lee filed a forfeiture case alleging that Alsdorf had transported stolen property. Because of the prominence of both the painting (a Picasso) and Alsdorf (a well-known patron of the arts in Chicago), both the local and the international press covered the case

⁵¹ Anja Shortland, *Lost ART: THE ART LOSS REGISTER'S CASEBOOK* Chapter 7 (2021).

⁵² *Release | "Sacred and Imperial: The James and Marilyn Alsdorf Collection" headlines Christie's Asian Art Week September 2020*, CHRISTIE'S, (August 24, 2020) <https://www.christies.com/about-us/press-archive/details?PressReleaseID=9757&lid=1#:~:text=After%20her%20husband's%20passing%20in.of%20what%20is%20now%20the> (last visited April 19, 2021); See also webpage cited in next footnote.

⁵³ For a video of her apartment, see *The Collection of James and Marilyn Alsdorf*, CHRISTIE'S, <https://www.christies.com/features/The-Collection-of-James-and-Marilynn-Alsdorf-10107-3.aspx> (last visited April 19, 2021).

⁵⁴ Schoenberg is a Los Angeles lawyer, whose litigation against Austria for the return of Klimt's *Portrait of Adele Bloch-Bauer I* resulted in a victory in the U.S. Supreme Court, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), and a major motion picture, *Woman in Gold*, starring Helen Mirren.

extensively, including the visit by the FBI to Alsdorf's home.⁵⁵ Soon thereafter, Mrs. Alsdorf was willing to negotiate.⁵⁶ In spite of her prior confidence in the soundness of her title, she eventually gave the heir of the original owner \$6.5 million, a sum that plausibly reflected the full after-tax sale value of the painting. Alsdorf was 79 at the time. It appeared that the negative publicity was taking a toll, and she wanted to die with her reputation as a generous philanthropist and discerning and scrupulous art collector intact. Even if she won in court, that was not likely.⁵⁷

While these cases show how the combination of information from the ALR and social pressure can lead to settlements favorable to original owners, there are limits to the effectiveness of this approach. The ALR picks up problems when artworks are taken to the market but cannot always prevail upon auction houses to store tainted artworks until a resolution is reached. Good faith owners can usually legally remove artworks from sale when their title is challenged.⁵⁸ For people who know their artworks have outstanding title issues, there are also institutional solutions: namely private sales where the objects are only shown to selected and pre-vetted buyers. Freeports allow people to trade anything without publicity and beyond the reach of law enforcement - unless the police are given sufficient information to obtain a search warrant for a specific vault or the new owner wants to move the object across an international border.⁵⁹ The ALR's power to disrupt sales and negotiate amicable resolutions depends on social norms and/or law. Not every country or collector shares the current Western norms on looted cultural property. In countries that traditionally accept victors' justice, property that would be considered morally tainted in Western Europe or the US can still be traded: if no-one carries out searches, problems remain hidden.⁶⁰ Alternatively, sales can be conducted online and through social media.⁶¹ If the discount for trading outside the object's core market is small, this may be preferable to settling a moral or legal claim. Nevertheless, these selling techniques have serious drawbacks. Private,

⁵⁵ E.g. *U.S. acts to protect a Picasso*, THE CHICAGO TRIBUNE 27 October 2004, and *Battle over Picasso the Nazis stole*, THE TIMES 28 October 2004.

⁵⁶ It also no doubt helped that the California Supreme Court had agreed to review the lower court decisions dismissing the heir's claim on jurisdictional grounds and that the quiet title case filed by Alsdorf in Chicago had been stayed pending the outcome of that appeal.

⁵⁷ Anja Shortland, LOST ART: THE ART LOSS REGISTER'S CASEBOOK Chapter 7 (2021).

⁵⁸ See for example NS Raubkunst, *Kinsky nimmt Gauermann aus der Auktion*, DER STANDARD 20 February 2009, <https://www.derstandard.at/story/1234507637041/ns-raubkunst-kinsky-nimmt-gauermann-aus-der-auktion> (last visited April 19, 2021).

⁵⁹ See for example the dispute between David Nahmad and the heir of Oscar Stettiner over a \$25 million Modigliani painting, where the painting was seized in Geneva based on information in the Panama papers. *Nahmad Family Setback Over £25m Modigliani Painting in Nazi Restitution Case*, ARTLYST, <https://www.artlyst.com/news/nahmad-family-setback-25m-modigliani-painting-nazi-restitution-case/> (last visited April 19, 2021).

⁶⁰ For example the UAE have become a major hub for trading illicit antiquities. Sargent, Matthew, James V. Marrone, Alexandra Evans, Bilyana Lilly, Erik Nemeth, and Stephen Dalzell, *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*, HOMELAND SECURITY OPERATIONAL ANALYSIS CENTER OPERATED BY THE RAND CORPORATION 2020, https://www.rand.org/pubs/research_reports/RR2706.html (last visited April 19, 2021).

⁶¹ *Facebook's Looted-Artifact Problem*, THE ATLANTIC, <https://www.theatlantic.com/technology/archive/2020/07/archaeologists-defied-isis-then-they-took-facebook/614674/> (last visited April 19, 2021).

internet, and Freeport sales generate lower prices. Similarly, works that cannot be resold or displayed in the U.S. or European markets are less valuable, even if they are currently held in Asia or other places without strong norms or laws protecting original owners.

IV. Normative Analysis

So far, this paper has tried to explain the interaction of law and norms and their effects on the art market. But are those effects good? Is application by American courts of American law to art that was acquired in Europe a good thing? Have the development and deployment of norms that favor original owners had a salutary effect overall? These are difficult questions, not the least because the normative criteria are debatable. Is restoration of a work to its rightful owner a good in and of itself that trumps all other values, especially if the owner was deprived of the work through a historical injustice such as the Holocaust? Or is it better to protect the “innocent” bona fide purchaser and bring certainty to markets?

To try to make headway on the normative question, this section will adopt the economic framework, whose application to stolen art has been explored by Landes, Posner, Schwartz, and Scott.⁶² Although their approaches differ slightly, they agree on a few things. First, the relevant considerations are the incentives potential legal rules give to (a) theft, (b) precautions by owners (including precautions to prevent theft and search for works after they are stolen), and (c) precautions by purchasers (including searching provenance prior to sale).⁶³ As Schwartz and Scott point out, rules that always protect original owners help deter theft and provide purchasers with powerful incentives to take precautions but may not give owners sufficient incentives to protect themselves against theft or to search after a theft. Conversely, rules that always protect purchasers would give owners large incentives to protect themselves but would encourage theft and provide little incentive for purchasers to investigate provenance. As pointed out in Section 1, no modern legal system takes the most extreme positions -- always protecting owners or always protecting purchasers. Even European countries require the purchaser to be in good faith, and most require some years to pass during which the original owner can reclaim her property. Even American jurisdictions will give title to persons whose title derives from a thief after the expiration of statutes of limitations or if the original owner has not been diligent, so the equitable defense of “laches” applies. Landes and Posner argue that owners have sufficient incentives to protect themselves no matter the legal rule, so the social-welfare maximizing rule is “complete legal protection of the original owner vis-à-vis the good faith purchaser,” with “minor”

⁶² William Landes and Richard Posner, *The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles*, in *ESSAYS IN THE ECONOMICS OF THE ARTS* (V.A. Ginsburgh and P. -M. Menger ed., 1996); Alan Schwartz and Robert E. Scott, *Rethinking Laws of Good Faith Purchase*, 111 *COLUMBIA L. REV.* 1332 (2011).

⁶³ Of course, there are other relevant considerations, such as which rule gives litigants an incentive to litigate promptly before evidence gets stale. This is a reason that, even New Jersey and the HEAR Act, which generally favor the original owner, require the owner to bring her case within a reasonable amount of time after learning the location of the art and the identity of the owner. Similarly, even New York recognizes laches as a defense.

qualifications “having mainly to do with the statute of limitations.”⁶⁴ Schwartz and Scott are more concerned with suboptimal precautions by owners, so they favor a rule that generally gives title to former owners but that favors possessors when the original owner was negligent in protecting or searching for the stolen object. Both Landes and Posner and Schwartz and Scott seem to favor legal rules that are much closer to American than European rules. Schwartz and Scott view their rule as different from that applied by most American courts because they largely ignore the defense of laches.⁶⁵ In addition, American law deviates from Schwartz and Scott’s ideal in that it does not take into account whether the owner took adequate precautions to prevent theft in the first place. Even so, European laws, with their robust protection of bona fide purchasers, deviate even more from Schwartz and Scott’s ideal.

Given that American law more closely approximates efficient law, its global application is plausibly good. In some ways that is a rather unsatisfactory conclusion because it does not rest on more general choice-of-law considerations but rather, like Leflar’s “better law” approach,⁶⁶ encourages states to apply the law that they think best. In general, that is a recipe for states to apply their own law because most judges are most familiar with the law of their own country and are likely to share the cultural and practical considerations that led legislators or previous judges to adopt it. In a prior publication, one of the authors argued for a different choice-of-law rule for stolen art: application of the law of the place where the art was last owned by an undisputed owner.⁶⁷ It was argued that this rule gave states the best incentives to develop efficient law. It did not consider something like the American rule, which tilts heavily toward application of the law of the place where the work of art is at the time of the litigation. Whether that rule would be good in general is a rather difficult question. In some situations, it might lead states to adopt laws that are insufficiently protective of original owners because current possessors in local courts are likely to be local, whereas original owner claimants may be foreign, so courts might be tempted to favor locals by favoring current possessors over original owners. On the other hand, when applied by a country, like the U.S., which has a dominant position in the art market and political and cultural reasons to favor original owners, the effect on the global art market of applying local law seems to be positive.

To the extent that the effect of U.S. law is complemented by social and institutionalized norms, both in the U.S. and Europe, that is also probably a good thing. Social and institutionalized

⁶⁴ Landes & Posner at 208

⁶⁵ They discuss laches only in footnote 4, and view laches as providing insufficient incentives to owners because in the *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 425 (N.Y. 1991), the court held laches applied only when the defendant was prejudiced by the delay.” Nevertheless, the robust application of laches in other cases, such as *Bakalar v. Vavra*, 500 Fed. Appx. 6 (2nd Cir. 2012), suggests that American law may be closer to Schwartz and Scott’s ideal than they realized.

⁶⁶ Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966).

⁶⁷ Daniel Klerman, *Jurisdiction, Choice of Law, and Property*, in *LAW AND ECONOMICS OF POSSESSION* 279 (Yun-Chien Chang ed., 2015).

norms protect original owners even where laws do not, and often do so at lesser cost than legal enforcement.

Although U.S. law may be close to optimal, it is worth considering arguments for alternative rules. Italian law, for example, gives good faith purchasers full title immediately upon purchase, regardless of claims by original owners who may have lost title by theft or other misfeasance.⁶⁸ If “good faith” were interpreted to require checking the Art Loss Register, one could argue that Italian law is optimal because it gives original owners incentives to swiftly register their losses as well as giving purchasers incentives to check the ALR before purchase. One could, therefore, see Italian law as consistent with Schwartz and Scott’s efficiency arguments, given the existence of the ALR. That is, failure of an original owner to register a loss with the ALR could be seen as negligence because registration is relatively cheap and provides large benefits in terms of notifying the world of the loss. If one assumes that checking the ALR is required for a good faith purchase, swift registration also eliminates the legitimate market for the work and thus reduces incentives for theft. Similarly, failure of a purchaser to check the ALR before purchase could be seen as negligence because checking is relatively cheap. Thus, one could argue that, even if Schwartz and Scott were correct that, in a world without a registry such as the ALR, laws that are more owner protective would be optimal, given the existence of the ALR, the efficient rule has changed, and original owners should be protected only if they promptly register their losses.⁶⁹

While the argument in the previous paragraph for protection for good faith purchasers is strong, there are some problems with it. First, it should only apply to sales in the last two decades, after the establishment of the ALR. For works sold before the establishment of the ALR, there was often no way for original owners to effectively publicize their losses at a reasonable cost. Second, the argument assumes that a non-negligent owner can cheaply and easily register a loss immediately with the ALR. While this may be true for most thefts, it is not always the case. For example, the theft at issue in *Guggenheim v. Lubell* appears to have been carried out by a museum employee who stole the painting from a storage room.⁷⁰ The museum claimed it did not notice the theft until it undertook a complete inventory of its collection, a task it conducted roughly once per decade. For complex reasons, even after discovery of the theft, it did not publicize the loss,⁷¹ and that itself may have been negligence, but a more interesting question is whether the failure to notice the theft for several years was negligence. One could argue that a

⁶⁸ Codice civile art. 1153

⁶⁹ The authors thank Francesco Parisi for making this argument.

⁷⁰ *Guggenheim v. Lubell*, 569 N.E.2d 426, 428 (N.Y. 1991).

⁷¹ The museum argued that publicizing the theft would only drive the painting “further underground and greatly diminish[] the possibility that it would ever be recovered.” *Id.* This argument had some plausibility in the 1970s, when the *Guggenheim* was making its decision because databases of stolen art at that time, such as the Interpol database, were accessible to all and thus could be used by thieves who indeed might never then surface works whose theft was registered. As discussed above, however, the ALR is structured much differently and allows searches only by reputable, non-anonymous persons. Registry on the ALR therefore does not have the effect of driving art underground because it is difficult for thieves and their fences to know whether a work has been registered.

complete inventory is so expensive and time-consuming that a reasonable museum would, like the Guggenheim, conduct such inventories relatively infrequently. If so, Italian law would no longer be consistent with efficiency because it would either force museums to conduct inventories more often than efficient or incentivize theft by giving good faith purchasers title even when the original owner was not negligent.⁷² Perhaps the efficient rule might be a modified version of the Italian rule, which would give title to good faith purchasers immediately, unless the original owner could show a good reason why it did not more swiftly notify the ALR of the loss. Such a rule might not be that different from U.S. law, which favors good faith purchasers when original owners are guilty of “laches” (unreasonable delay).

It is also possible that a full registry of fine art would be better than a system involving the ALR. Just as title to landed property and automobiles in all developed countries is now recorded on a government registry, one could establish a registry of fine art. Recording title on the registry would provide constructive notice of title and thus prevent claims of good faith purchasers by thieves or others. While such a system could be efficient, it would also be expensive to administer. It would also involve difficult line-drawing. What qualifies as “fine art,” and which works would need to be registered? What if a work was not initially considered worthy of mandatory registration, but later, as appreciation of the artist increased, her works were reclassified as requiring registration? Notifying all who would then need to register would be difficult, and it is inevitable that some owners would not record their title, causing problems if disputes later arose. In addition, a public record of who owns high-value art would provide a roadmap for thieves and impinge legitimate privacy interests of collectors. Access could be restricted to prevent such problems, much as the ALR restricts access, but such restrictions might be harder for a government registry than for a private one.

Although public registries of fine art seem impractical, one could imagine that individual artists might try to establish private registries. Some foundations dedicated to particular artists have provided authentication services, which might provide a model for more comprehensive registries. Nevertheless, it appears that no true private registry has yet been established. In addition, at least in the U.S., authentication services have encountered substantial legal difficulties causing many to shut down⁷³

Conclusion. Law, Norms, and Institutions

⁷² The authors thank William Landes for making this argument.

⁷³ The authors thank Francesco Parisi for pointing out the existence of private authentication services provided by particular artists’ foundations, such as those of Franco Angeli and Mario Schifano. For problems authentication services have encountered in the U.S., see Jeffrey Maloney, *The Deep Freeze in Art Authentication*, WALL STREET JOURNAL (April 24, 2014) <https://www.wsj.com/articles/the-deep-freeze-in-art-authentication-1398385417> (last visited May 10, 2021); Andreja Velimirović, *Art Authentication Board-An Idea the Fell Through*, WIDEWALLS (November 3, 2017) <https://www.widewalls.ch/magazine/art-authentication-board> (last visited May 10, 2021).

The transformation of the art market over the last few decades thus involves a complex interaction between law, norms, and institutions. Long-standing legal doctrines, both substantive law and choice of law, made the U.S. an attractive place for former owners to litigate stolen art, and the dominant position of the U.S. in the art market meant that the possibility of litigation in the U.S. influenced prices globally. Increased attention to stolen antiquities and works seized during the Holocaust embarrassed auction houses and galleries and encouraged them to help found the Art Loss Register so they could avoid the scandal of profiting from tainted goods. The information provided by the Art Loss Register alerted more original owners to the location and possessors of their work, thus generating more litigation and more press attention to the problem. This attention led to laws, such as the HEAR Act, and judicial choice-of-law decisions, such as *Bakalar*,⁷⁴ that broadened application of U.S. law and abrogated long-standing principles, such as the situs rule. Media coverage of disputes about stolen and looted art also led to social norms that increasingly favored original owners and the institutionalization of such norms through trade association rules governing dealers in art and iniquities. These institutionalized norms helped protect former owners even of works beyond the jurisdiction of U.S. courts or whose value would not justify costly litigation. Respectable galleries adopted the routine practice of checking the Art Loss Register for all works and refusing to sell works the register flagged as problematic. Similarly, possessors who learned of the claims of the former owners became more willing to compromise with them, sometimes because of social pressure to do so, sometimes because they could no longer easily and profitably sell their works, and perhaps most hearteningly, sometimes because they themselves had internalized the new norms favoring original owners over good faith purchasers.

⁷⁴ PL 114-308, 130 Stat 1524 (2016); *Bakalar v. Vavra*, 619 F.3d 136 (2nd. Cir 2010). See discussion in Section 2.