

ISIL as Salesmen? The Roles of Due Diligence and the Good Faith Purchaser in Illicit Artifact Trafficking from the ISIL Insurgency

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INTRODUCTION

The looting and selling of antiquities, and art more broadly, have served as funding for multiple syndicates around the world for the last century, including the Nazis, the Khmer Rouge, and al Qaeda.¹ Indeed, looting and pillaging have been an aspect of warfare “for millennia.”²

Black market trade of archaeological artifacts is an alarming issue because the trade involves cultural items that are essentially irreplaceable.³ With artifacts in particular, looting destroys more than just the interest in maintaining history, but it strips the artifacts of context.⁴ Contextual evidence is the primary key for learning about ancient history, because without context, archaeologists cannot make educated hypotheses about significance and usage.⁵

Art theft and antiquities looting is one of the most lucrative of the illegal trades.⁶ Antiquities looting is both profitable and easy, especially in countries where much of the ancient world is not yet excavated.⁷ What makes this trade even more upsetting is when it funds terrorism. Some scholarship estimates that ISIL may have grossed up to \$100 million by looting and selling antiquities.⁸ The theft of cultural heritage around the world is so prevalent that it “thrive[d]” throughout the COVID-19 pandemic, with studies showing increases in “illicit

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1. Deborah Lehr, *Arts and Antiquities: Conduits for Money Laundering and Terrorist Financing*, ACAMS TODAY (Dec. 20, 2018), <https://perma.cc/4T2E-WX5G>.

2. Michelle I. Turner, *The Innocent Buyer of Art Looted During World War II*, 32 VAND. J. TRANSNAT’L L. 1511, 1512 (1999).

3. Katherine Hodge, *Modern Issues in Archaeology: The Illegal Artifact Trade*, PROJECT ARCHAEOLOGY (Mar. 19, 2021) <https://perma.cc/2KU8-S9JC>.

4. Megan B. Doyle, *Ownership by Display: Adverse Possession to Determine Ownership of Cultural Property*, 41 GEO. WASH. INT’L L. REV. 269, 276 (2009).

5. *Id.*

6. Sarah S. Conley, *International Art Theft*, 13 WIS. INT’L L.J. 493 (1995).

7. John E. Bersin, *The Protection of Cultural Property and the Promotion of International Trade in Art*, 13 N.Y.L. SCH. J. INT’L & COMP. L. 125, 129 (1992).

8. Daniel Kees, *ISIS the Art Dealer*, THE REGUL. REV. (Apr. 13, 2020), <https://perma.cc/F7XQ-KBS8>.

excavations” in Africa, the Americas, Asia and the South Pacific since 2019.⁹ Terrorist organizations that have originated in the Southwest Asian/North African¹⁰ (“SWANA”) region have capitalized on the looting and selling of antiquities as well. Al-Nusra Front in Syria and al Qaeda in Pakistan and Afghanistan have also capitalized on this tactic in the past.¹¹

Apart from the cultural heritage management aspect, this issue is essential on levels of national security and international economics. Disparate legal treatments of stolen art and artifacts thwart efforts to solve these problems where “[t]he annual national and international trade in stolen and misappropriated goods is in the billions of dollars.”¹² Indeed at one point in the 1990s, illicit art trade was the second most profitable illegal trade.¹³

Additionally, under Title 18 of the United States Code (“U.S.C.”) § 2339A, those who purchase antiquities that were looted and sold by the Islamic State of Iraq and the Levant (hereinafter “ISIL”), which ultimately supports the terrorist organization, could be criminally prosecuted.¹⁴ Existing scholarship on the criminal culpability explores and critiques the “restricted” nature of the National Stolen Property Act when applied to cases of trafficked cultural property and analyzed with a source-nation’s found-in-the-ground laws as well as alternative means for prosecution.¹⁵ Other scholarship addresses that antiquities looting is classified as a war crime.¹⁶ Another related study on the topic also address the use and effectiveness of global sanctions in addition to the role that both member states and private sector shareholders play in curbing the illicit trade.¹⁷ For example, procedures that are centered on documentation, due diligence, the use of

9. *Cultural Property Crime Thrives Throughout Pandemic Says New INTERPOL Survey*, INTERPOL (Oct. 18, 2021), <https://perma.cc/3BTH-42NT>.

10. This paper uses the term SWANA, a decolonial term, in place of the term Middle East, which has colonial origins. *About, SWANA ALLIANCE*, <https://perma.cc/8UZH-ZEKC>.

11. Samuel Hardy, *Curbing the Spoils of War*, UNESCO COURIER (Dec. 2017), <https://perma.cc/WTR8-Y8KA>; see also Matthew Sargent, James V. Marrone, Alexandra Evans, Bilyana Lilly, Erik Nemeth & Stephen Dalzell, *Trafficking and Disrupting the Illicit Antiquities Trade with Open-Source Data*, RAND CORP. (2020), <https://perma.cc/7QFT-5FE3>.

12. Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1334 (2011).

13. Conley, *supra* note 6, at 493.

14. 18 U.S.C. § 2339A(a) provides that those who provide “material support,” which includes “currency or monetary instruments” shall be fined and imprisoned “not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life” and “may be prosecuted in any Federal judicial district in which the underlying offense was committed [. . .].” 18 U.S.C. § 2339A(a) (2010).

15. Lindsey Lazopoulos Friedman, *ISIS’s Get Rich Quick Scheme: Sell the World’s Cultural Heritage on the Black Market—Purchasers of ISIS-Looted Syrian Artifacts Are Not Criminally Liable under the NSPA and the McClain Doctrine in the Eleventh Circuit*, 70 U. MIAMI L. REV. 1068, 1087 (2016).

16. Mark V. Vlasic & Helga Turku, *Blood Antiquities: Protecting Cultural Heritage Beyond Criminalization*, 14 J. INT’L CRIM. JUST. 1175, 1180 (2016).

17. Hans-Jakob Schindler & Frederique Gautier, *Looting and Smuggling of Artifacts as a Strategy to Finance Terrorism Global Sanctions as a Disruptive and Preventive Tool*, 26 INT’L J. CULTURE & PROP. 331, 331 (2019).

systematic databases, and efforts to raise awareness can aid in this problem.¹⁸ This paper argues that Congress should enact a noncriminal policy, or amend an existing one, to combat the sales of antiquities that have been looted and sold by ISIL and ultimately support terrorism. There are a multitude of noncriminal sanctions that could be enacted to combat against the contribution to terror including, without limitation, denial of import benefits, export controls, and termination of arms sales.¹⁹ Alternatively, perhaps future caselaw could develop a more comprehensive test for due diligence in examining a purchaser's conduct. With a more nuanced test, the duty is more appropriately shifted to the purchaser which may deter uninformed purchasing at the source.

This paper will touch on a variety of intersecting topics, but will not cover property issues outside of the Uniform Commercial Code ("U.C.C."), criminal law, kinship and ancestral studies, the doctrine of Market Overt, or other issues.

This paper addresses questions concerning the standards that should be placed on antiquities purchasers who know or reasonably should know that their purchases may be funding terrorism. Further, it asks what sort of due diligence in retrieval should be expected from conflict countries.²⁰ Finally, this paper suggests a policy that can be implemented to create a more streamlined process for purchasing antiquities from the Near East.

I. THE ISIL INSURGENCY AND FUNDING FROM ANTIQUITIES SOLD ON THE BLACK MARKET

For context, many scholars believe that ISIL originated in response to the 2003 U.S. invasion²¹ which instigated the formation of al Qaeda in Iraq, founded by Abu Musab al-Zarqawi.²² Scholars also believe that the insurgency's origins were rooted in a "disenfranchisement of Sunnis by the Iraqi government."²³ ISIL is also credited to be formed by Abu Musab al-Zarqawi with the mission to "fuel a civil war between Sunnis and Shiites and establish a caliphate," which came to fruition in 2014 when ISIL usurped parts of Iraq and Syria.²⁴ Al Qaeda in Iraq was "rebranded" as ISIL by Abu Ayyub al-Masri sometime following al-Zarqawi's death.²⁵ Other scholars believe that this ideology developed much sooner under the influence of an Iraqi who was known as Abu Ali al-Anbari.²⁶ Overall, the formation of the caliphate was announced by Abu Bakr al-Baghdadi,

18. *Id.* at 337–341.

19. Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 50 TEX. INT'L L.J. 661, 668 (2016).

20. Conflict countries include countries that are currently enduring armed conflicts such as war or territorial disputes.

21. Hassan Hassan, *The True Origins of ISIS*, ATLANTIC (Nov. 30, 2018), <https://perma.cc/T8EC-L7NY>.

22. James Kaelin, *A Government for the People by the People: Defeating ISIL with an Inclusive Central Iraqi Government*, FOREIGN POL'Y J. 1-2 (Oct. 13, 2014), <https://perma.cc/35MT-4E49>.

23. *Id.*

24. See Hassan, *supra* note 21.

25. See Kaelin, *supra* note 22.

26. See Hassan, *supra* note 21.

the then leader, on June 29, 2014.²⁷ At its peak in 2014, ISIL controlled over 60,000 miles of territory and an estimated population of ten million people.²⁸

This paper refers to ISIL as an insurgency because, tactically, ISIL gained power through insurgency, which is defined as “a politico-military struggle, by non-state actors against primarily state actors (but also potentially other non-state actors), that seeks to separate from, change or replace a central authority (e.g. national government), in large part by competing for the support of contested populations and control over territory and resources.”²⁹ ISIL’s categorization as an insurgency is supported through tactics employed by ISIL such as of guerrilla warfare and governance to eliminate or weaken rivals as well as propaganda to influence audience perception and behavior.³⁰

The illicit trade out of the Levant and questionable ownership of cultural heritage is not new to Iraq, specifically. The country had been stripped of its Babylonian history by German archaeologists who excavated, seized, and removed nearly the entirety of the Ishtar Gate and Processional Way for decades leading up to World War I.³¹ Archaeologist Robert Koldewey began his 1914 excavation records marveling that the excavation “[was] most desirable, if not absolutely necessary.”³² As mentioned, the excavation did not stop at research; the Germans commandeered the gate and processional walls, all of which can still be found at the Pergamon Museum in Berlin today, despite repatriation efforts and appeals.³³ The British rule of Iraq after World War I led to a “Proclamation Concerning Antiquities,” which deemed Iraqi cultural heritage as property of the colonial power.³⁴ Earlier in 2021, Iraq reclaimed over 17,000 artifacts that had been looted and smuggled into the international art market.³⁵ The majority of these artifacts were looted after the U.S. invasion in 2003.³⁶ These objects were found in the US, Italy, the Netherlands, and Japan.³⁷ Included in this massive and unprecedented restitution was the 3500 year-old tablet, known as the Gilgamesh

27. *Id.*

28. Haroro J. Ingram, *The Long Jihad: The Islamic State's Method of Insurgency: Control, Meaning, & the Occupation of Mosul in Context*, PROGRAM ON EXTREMISM (2021).

29. *Id.* at 8.

30. *Id.* at 9-26.

31. Ewen MacAskill, *Iraq Appeals to Berlin for Return of Babylonian Gate*, GUARDIAN (May 2, 2002, 6:57 PM), <https://perma.cc/8BT8-XEXP>.

32. ROBERT KOLDEWEY, *THE EXCAVATIONS AT BABYLON*, v (Agnes S. Johns trans., MacMillan and Co. 1914).

33. See MacAskill, *supra* note 31.

34. Rachel Hallote, *Before Albright, Charles Torrey, James Montgomery, and American Biblical Archaeology 1907-1922*, 74.3 NEAR EASTERN ARCHAEOLOGY 156, 157 (2011).

35. Oscar Holland, *U.S. Returns over 17,000 Looted Artifacts to Iraq*, CNN (Aug. 5, 2021), <https://perma.cc/8BBY-EU4X>. It is possible that many of these were removed between 2014 and 2017. *Id.*

36. *Id.*

37. Naomi Rea, *More Than 17,000 Looted Ancient Artifacts Have Returned to Iraq, Where Cultural Heritage Has Been Plundered During Decades of Instability*, ARTNET NEWS (Aug. 4, 2021), <https://perma.cc/Y6QX-Z4C7>.

Dream Tablet, which has a cuneiform inscription of the Epic of Gilgamesh, regarded as one of the oldest religious texts in the world.³⁸

As part of its religious ideology, ISIL engaged in act of iconoclasm, destroying whole sites and artifacts.³⁹ Some of these sites include the Mosul Museum, Nimrud, Hatra,⁴⁰ and Palmyra.⁴¹ Beyond the sheer destruction of cultural heritage, the group has also profited from these artifacts. ISIL had several sources of income such as trafficking humans, weapons and oil.⁴² Throughout the reign of the caliphate, the group would sack, destroy, and loot various archaeological sites in the area to traffic art and artifacts to make money.⁴³ These funding techniques aided ISIL in becoming “financially self-sufficient.”⁴⁴ As noted by the U.S. Department of the Treasury, the money that ISIL makes is spent on supporting its global networking, purchasing weapons, and providing stipends to ISIL fighters and their families.⁴⁵ Assistant District Attorney in New York and Marine colonel Matthew Bogdanos has cryptically likened opium, the cash crop funding of the Taliban, to antiquities, calling the artifacts a “cash crop” of the region.⁴⁶ The use of artifact-looting worked for a time, because there was less media attention or policy around it at the beginning.⁴⁷ In fact, it is possible that trading antiquities was the second-most common occupation in the organization in 2014.⁴⁸

II. SOCIAL MEDIA

Current scholarship suggests that antiquities looted and traded by ISIL have been on the rise with the use of social media and even the Coronavirus (“COVID-19”) pandemic, both of which provide increased anonymity and a decreased chance of being caught. It seems as though access to this illicit trade is at one’s fingertips. ISIL has utilized social media platforms, such as WhatsApp, YouTube, Twitter, and Instagram to sell the antiquities.⁴⁹ Beyond social network

38. Augusta Saraiva, *U.S. to Return Gilgamesh Tablet, 17,000 Artifacts Taken from Iraq*, AL JAZEERA (Sept. 22, 2021), <https://perma.cc/ZV9H-LZL3>.

39. See Hassan, *supra* note 21.

40. Lucinda Dirven, *Iconoclasm in the ‘Islamic State,’* III:8 ASOR (Aug. 2015), <https://perma.cc/E7EK-2FJT>.

41. Jason Felch & Batiem Varoutsikos, *The Lessons of Palmyra: Islamic State and Iconoclasm in the Era of Clickbait*, ART NEWSPAPER (Apr. 6, 2016), <https://perma.cc/KG63-72MG>.

42. Brig. Gen. Russell D. Howard, Jonathan Prohov & Marc Elliott, *Opinion: How ISIS Funds Terror Through Black Market Antiquities Trade*, USNI NEWS (Oct. 27, 2014, 11:15 AM), <https://perma.cc/BF3R-8KC4>.

43. See *id.*

44. See Howard, *supra* note 42.

45. *Counter ISIS Finance Group Leaders Issue Joint Statement*, U.S. DEP’T OF THE TREASURY, (Dec. 14, 2021), <https://perma.cc/C35H-E7B6>.

46. Reid Wilson, *The Illegal Antiquities Trade Funded the Iraqi Insurgency. Now It’s Funding the Islamic State*, WASH. POST (Mar. 9, 2015, 11:39 AM), <https://perma.cc/W5ZQ-VRWD>.

47. See Howard, *supra* note 42.

48. See *id.*

49. Benoit Faucon, Georgi Kantchev & Alistair MacDonald, *The Men Who Trade ISIS Loot*, WALL ST. J. (Aug. 6, 2017, 7:28 PM), <https://perma.cc/4K5X-7H3D>; see also NEIL BRODIE, COUNTER LOOTING OF ANTIQUITIES IN SYRIA AND IRAQ 12-13 (2019), <https://perma.cc/7G4W-GA8F>.

sites, ISIL also makes use of auctioning sites, such as eBay and Catwiki.⁵⁰ In fact, a congressional hearing was held before the House Financial Services Committee's Task Force to Investigate Terrorism Financing in 2016 where an expert panel advised that legislation should be enacted to mandate export declarations and consider tariffs.⁵¹ In the hearing, several experts indicated that WhatsApp is a common platform for the sale of the looted antiquities; in fact, Amr Al-Azm, a witness at the hearing, testified that he receives "dozens of these photos every day."⁵² However, according to Amr Al-Azm and Katie A. Paul, Facebook is a hub for ISIL's illicit trade.⁵³ Facebook's features and algorithms not only create a space for terror funding, but facilitates it.⁵⁴ The study by Amr Al-Azm & Katie A. Paul and Lucy Siegel show a number of U.S. citizens who have shown interest in buying or have possibly purchased looted artifacts through Facebook.⁵⁵ The data collected by the Antiquities Trafficking and Heritage Anthropology Research ("ATHAR") Project, which investigates digital antiquities trafficking, showed that a trafficker based in Syria, who manages one of the Facebook "groups" acting as an underground marketplace, is Facebook friends with a prominent art dealer in America.⁵⁶ Indeed, the FBI, by way of its Art Theft Program, has made a statement that the agency received "credible reports that [United States] persons have been offered cultural property that appears to have been removed [by way of looting from ISIL] from Syria and Iraq [. . .]."⁵⁷

Facebook as a company benefits from a broad immunity due to § 230 of the Communications Decency Act,⁵⁸ which stipulates that technology companies cannot be held responsible for third-party content on their platforms.⁵⁹ Though these groups have been operating for years, Facebook and Instagram did not ban the practice until June 2020.⁶⁰ The new policy implementation "develop[s] more specific criteria for sale of historical artifacts giving more attention to items that

50. Tom Mashberg, *Social Networks: The New El Dorado for Traffickers*, UNESCO COURIER (2020), <https://perma.cc/9W4C-R5K7>.

51. *Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Cultural Antiquities by ISIS: Hearing on H.R. 1493 and H.R. 2285 Before the Task Force to Investigate Terrorism Fin. of the Comm. on Fin. Serv.*, 114th Cong. (2016).

52. *Id.* at 17.

53. AMR AL-AZM & KATIE A. PAUL, ATHAR PROJECT, FACEBOOK'S BLACK MARKET IN ANTIQUITIES: TRAFFICKING, TERRORISM, AND WAR CRIMES (June 2019) [hereinafter ATHAR], <https://perma.cc/M2B6-QY87>.

54. *See id.* at 9.

55. *See id.* at 3.

56. The study has not published the name of the art dealer at this time. *See id.*

57. *ISIL and Antiquities Trafficking: FBI Warns Dealers, Collectors About Terrorist Loot*, FBI (Aug. 26, 2015), <https://perma.cc/GV3A-83S4> [hereinafter *FBI Warns Dealers*].

58. The Communications Decency Act (CDA) under 47 U.S.C. § 230 provides that "offensive material" must be screened by Internet websites. However, Facebook benefits from immunity under the act because the act specifies that technology companies are not liable for a third-party's content. 47 U.S.C. § 230 (2018).

59. *See id.* at 2.

60. Taylor Dafoe, *Facebook, a Longtime Hub for the Illicit Antiquities Trade, Bans the Sale of Historic Artifacts on the Platform*, ARTNET NEWS (June 24, 2020), <https://perma.cc/Z4CM-WNS8>.

might have been associated with illegal or criminal activity and terrorism.”⁶¹ Though Facebook and Instagram have implemented policy to counter the trade, it is not clear whether other sites listed above have implemented policy yet. A clearer and more practical legal standard as set forth in this paper, however, may help reduce illicit antiquities trade.

III. CURRENT CASE LAW

A. *Due Diligence and Industry Standard*

Art and artifacts circulating in the market “command extraordinary prices at auction and illicit dealing in stolen merchandise is an industry all its own.”⁶² However, the law regarding title to art is scant and there are not any federal statutes applicable solely to works of art.⁶³ There seems to be little federal treatment pertaining to legal title to privately owned artwork.⁶⁴ Yet, in certain cases, the legal principles are well-established as they derive from Article 2 of the New York Uniform Commercial Code, which governs transferring rights in goods.⁶⁵ The relevant Code section provides as follows:

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a ‘cash sale’, or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the

61. *Product Policy Forum*, FACEBOOK (June 23, 2020), <https://perma.cc/9LVV-ZWFF>.

62. Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 314 (1991).

63. Morgold, Inc. v. Keeler, 891 F. Supp. 1361, 1365 (N.D. Cal. 1995).

64. The General Services Administration issued a bulletin that considers legal title to public works of art administered during the New Deal era public art programs, but there does not appear to be federal treatment of private art ownership. *Legal Title to Art Work Produced Under the 1930s and 1940s New Deal Administration*, U.S. General Services Administration, <https://perma.cc/M5B5-3RG3>; see also LEGISLATIVE UPDATE, SL077 ALI-ABA 131.

65. Davis v. Carroll, 937 F. Supp. 2d 390, 421 (S.D.N.Y. 2013).

delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law.⁶⁶

When a purchaser wants to ensure that an object for purchase has valid title, the purchaser may decide to research the history of the good, if available. However, in the art industry, there is a recognized heightened standard to research the provenance of an art object to ensure there are no other claims to title. Both U.C.C. § 2-403 and relevant caselaw differentiate a non-merchant buyer from a merchant buyer. The distinguishing factor is that “a merchant buyer has a heightened duty of inquiry when a reasonable merchant would have doubts or questions regarding the seller's authority to sell.”⁶⁷ Merchant buyers are required to obtain “documentary assurance” in the case of sales where the ownership of an artwork is severely in doubt.⁶⁸

The seminal case for this topic of discussion is *Porter v. Wertz*, in which the appellate court held that the art gallery was not a buyer in the ordinary course of business because the gallery did not try to “determine the status,” meaning whether the seller of the painting in question was an art merchant or not.⁶⁹ In this case, the buyer did not make any inquiry into whether the seller was the true owner of the painting in question or whether the seller was authorized to sell the painting.⁷⁰ In fact, the seller was not an art dealer, as he worked in a deli, and was not authorized to sell the painting in question.⁷¹ The *Porter* court went so far as stating that “had [the buyer] done so much as call either of the telephone numbers [the seller] had left, [the buyer] would have learned that [the seller] was employed by a delicatessen and was not an art dealer.”⁷²

In *Howley v. Sotheby's, Inc.*, a painting's true owner sought recovery from a defendant art dealer.⁷³ The defendant art dealer purchased the work from the caretaker of the true owner's home because the caretaker maintained that he had the authority to sell the painting. The court came to a similar conclusion as in *Porter*, holding that the defendant, being an art dealer, “should have been ‘scrupulously concerned’ with taking proper title in anything he purchase[d].”⁷⁴ The defendant

66. N.Y. U.C.C. § 2-403.

67. *Lindholm v. Brant*, 925 A.2d 1048, 1058 (Conn. 2007).

68. *Id.* at 1059.

69. *Porter v. Wertz*, 416 N.Y.S.2d 254, 257 (App. Div. 1979), *aff'd*, 53 N.Y.2d 696 (1981).

70. *Id.*

71. *Id.* at 141.

72. *See id.*; *see also* Lawrence M. Kaye, *THE FUTURE OF THE PAST: RECOVERING CULTURAL PROPERTY*, 4 CARDOZO J. INT'L & COMP. L. 23, 37 (1996) (arguing that *Porter* implements the desirable policy of holding “dealers and collectors . . . to a high burden of due inquiry into the provenance of cultural objects before acquiring them.”).

73. 195 N.Y.L.J. 6 col. 3-4 (Feb. 20, 1986).

74. *Lindholm v. Brant*, 925 A.2d 1048, 1057 (Conn. 2007) (citing *Howley v. Sotheby's, Inc.*, 195 N.Y.L.J. 6 col. 3-4 (Feb. 20, 1986)).

was held to be liable for conversion because he did not ensure that the “nephew” had the authority to sell the painting.⁷⁵

Subsequently, a New York district court in *Cantor v. Anderson* held that sophisticated buyers have a duty to “inquire into a painting’s ownership when circumstances dictate.”⁷⁶ The *Cantor* court noted that the reason to doubt the seller’s ownership of the work in question was the fact that the buyer knew of the seller’s financial hardship and was familiar with the seller’s practice of selling on consignment.⁷⁷ The *Cantor* court held that the buyer was liable for conversion because the buyer relied solely on the seller’s assurances.⁷⁸ These holdings pose the question of the extent to which a merchant or non-merchant buyer must exercise due diligence before purchasing art and artifacts to qualify them as a protected *bona fide purchaser*.⁷⁹

A duty of escalated inquiry is required in cases where a purchaser may notice a sign of foul play or “red flags.”⁸⁰ These red flags can include the following situations: (1) the sale price is obviously below the market price, (2) the procedure of the sale differs from previous transactions, (3) the buyer is aware of the seller’s financial difficulties, and (4) the buyer has reason to doubt the seller’s ownership.⁸¹ In fact, precedent leans toward the enumerated “red flags” rather than industry standard or legal duties.⁸² Courts will note when there is an “extreme indifference with which [one] conduct[s] [his/her] inquiry into the true ownership of the [art].”⁸³

“Ultimately, *Porter* establishes a legal duty of due diligence pegged to a higher standard of inquiry than may be customary in the art business and then creates an objective negligence standard as the test for whether a purchaser displayed ‘good faith’ under ‘buyer in ordinary course’ analysis.”⁸⁴ This heightened standard is important because “[t]he industry’s commercial practices have at times been

75. *See id.*

76. *Cantor v. Anderson*, 639 F. Supp. 364, 367 (S.D.N.Y. 1986), 833 F.2d 1002 (2d Cir. 1986).

77. *Id.*

78. *Id.*

79. A *bona fide purchaser* or a *good faith purchaser* is a purchaser who gives value for an asset in good faith and without knowledge of adverse claims—called also good faith purchaser for value.

80. *Davis v. Carroll*, 937 F. Supp. 2d 390, 425 (S.D.N.Y. 2013) (citing *Porter v. Wertz*, 416 N.Y.S.2d 254, 257-58 (App. Div. 1979), *aff’d*, 52 N.Y.2d 696 (1981)); *see also Lindholm*, 925 A.2d at 1058 (holding that a merchant buyer has a heightened duty to inquire about one’s authority to sell a work when a reasonable merchant would have questions or doubts about one’s authority).

81. *Galín v. Hamada*, 283 F. Supp. 3d 189, 196 (S.D.N.Y. 2017), *aff’d*, 753 F. App’x 3 (2d Cir. 2018) (quoting *Joseph P. Carroll Ltd. v. Baker*, 889 F. Supp. 2d 593, 604 (S.D.N.Y. 2012)).

82. *Davis*, 937 F. Supp. 2d at 426; *see also Kozar v. Christie’s, Inc.*, 929 N.Y.S.2d 200, 200 (N.Y. Sup. Ct. 2011) (“It appears to be generally accepted that, as a minimum requirement, a merchant dealing in art work would be under a duty to make a further inquiry as to a painting’s ownership in the event there are suspicious circumstances underlying the transaction, such as a bargain basement price.”).

83. *Leonardo Da Vinci’s Horse, Inc. v. O’Brien*, 761 F. Supp. 1222, 122 (quoting *Meredith Van Pelt, Autocephalous Greek Orthodox Church v. Goldberg and Feldman Fine Arts, Inc.: A Case for the Use of Civil Remedies in Effecting the Return of Stolen Art*, 8.3 DICK. J. INTL. L. 441 (1990)).

84. *Davis*, 937 F. Supp. 2d at 425.

inconsistent with the magnitude of its sales”⁸⁵ and given the “inadequacy of self-regulation.”⁸⁶

The Connecticut Supreme Court similarly recognized this standard in *Lindholm v. Brant*.⁸⁷ In this case, a buyer of an Andy Warhol screen-print, *Red Elvis*, from an art dealer was considered to be a “buyer in ordinary course of business” and, therefore, took the owner’s rights, even though the buyer had good reason to be concerned about the owner’s claims to the painting.⁸⁸ The buyer did not contact the owner or obtain an invoice or a signed copy of the letter showing sale to the dealer; however, the buyer hired an attorney to conduct an investigation.⁸⁹ The attorney conducted a lien search and a search on the Art Loss Register.⁹⁰ Because of this, the buyer reasonably believed that the dealer was the valid owner when the dealer delivered the painting after the loan to a museum although the owner had authorized delivery to the dealer only to loan it to another museum. The buyer’s steps were sufficient to conform to reasonable commercial standards for the sale of artwork under the circumstances.⁹¹ The *Lindholm* court came to this conclusion by recognizing that the buyer acted in “good faith by observing reasonable commercial standards of fair dealing in the art industry and by taking reasonable steps to investigate title.”⁹² The court recognized that “‘good faith’ in the case of a merchant [is] honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”⁹³ The *Lindholm* court further recognized that the definition “should not—and cannot—be interpreted to permit, countenance or condone commercial standards of sharp trade practice or indifference as to the provenance.”⁹⁴

Not only must a buyer in the ordinary course act in good faith, but the court in *Davis v. Carroll* required that a sale with “red flags” “comport with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices.”⁹⁵ Therefore, the trier of fact must consider both the norms of the art industry and if there were any “norms” in prior dealings between the parties in question.⁹⁶ While it is established that “red flags”

85. See *id.* (quoting Deborah DePorter Hoover, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443, 449 (1983)).

86. Deborah DePorter Hoover, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443, 449 (1983).

87. *Lindholm v. Brant*, 925 A.2d 1048, 1054 (Conn. 2007).

88. *Id.* at 1060.

89. *Id.* at 1052.

90. *Id.*

91. *Id.* at 1050–53.

92. *Id.* at 1054.

93. *Porter v. Wertz*, 416 N.Y.S.2d 254, 257 (App. Div. 1979) (citing U.C.C. § 1-201).

94. Provenance is defined as the history of ownership or the right to possess or sell object d’art, such as is present in the case before us.

95. *Davis v. Carroll*, 937 F. Supp. 2d 390, 422 (S.D.N.Y. 2013) (citing N.Y. U.C.C. Law § 1-201).

96. *Id.* at 426.

create this duty, “[t]he precise extent of this ‘added duty of inquiry’ is unclear.”⁹⁷ In fact, it is “virtually nonexistent.”⁹⁸ This duty is ultimately based on “honesty in fact” and the “observance of reasonable commercial standards of fair dealing and trade” required by U.C.C. §2-103(1)(b),⁹⁹ which *Porter* establishes is “an inquiry into the provenance of the art being sold.”¹⁰⁰ The court’s description of a duty of “further verification” in *Porter* points the art industry’s commercial norms.¹⁰¹ Therefore, the trier of fact is required to consult with individuals experienced in the market to gauge the appropriate response to certain red flags.¹⁰² To comply with this requisite inquiry into customary practices, courts may seek to hear from experts in the field.¹⁰³ Expert testimony on behalf of the defendant in *Lindholm* stated the following:

in the art industry, it [is] the ordinary and customary practice that if an individual regularly worked with a particular art dealer or an art dealer was identified on the identification label of a loaned work of art, inquiries about an art transaction would be presented to the art dealer rather than directly to the principal. Buyers ordinarily and customarily relied on representations made by respected dealers regarding their authority to sell works of art. Purchases and sales of works of art were documented solely by a single invoice from seller to buyer. It [is] also ordinary and customary to proceed with the purchase of valuable works of art without requesting or receiving documentary proof that the selling dealer had the authority to sell the work of art.¹⁰⁴

It may be unreasonable to expect a layperson or beginner art collector, who has no knowledge of ancient Mesopotamia, to automatically know that a piece coming out of the Levant should be a red flag for a valid title. However, it can be argued that one who has been an art collector/dealer should reasonably know that artifacts from the ancient Near East that were sold after a certain period in time were likely looted and sold to fund terror.¹⁰⁵ In other words, perhaps a layperson or first-time art collector does not, for example, recognize the stylistic differences between ancient Mesopotamian figurines and ancient Egyptian

97. *Joseph P. Carroll Ltd. v. Baker*, 889 F. Supp. 2d 593, 604 n.9 (S.D.N.Y. 2012) (citing *Interested Lloyd’s Underwriters v. Ross*, No. 04 CIV. 4381 (RWS), 2005 WL 2840330, at *5 (S.D.N.Y. Oct. 28, 2005)).

98. *Davis*, 937 F. Supp 2d at 426.

99. *See id.*

100. *Graffman v. Espel*, No. 96 CIV. 8247 (SWK), 1998 WL 55371, at *5 (S.D.N.Y. Feb. 11, 1998), *aff’d sub nom. Graffman v. Doe*, 201 F.3d 431 (2d Cir. 1999); *see also Porter v. Wertz*, 416 N.Y.S.2d 254, 257 (App. Div. 1979), *aff’d*, 53 N.Y.2d 696, (1981); *Morgold, Inc. v. Keeler*, 891 F. Supp. 1361, 1368 (N.D. Cal. 1995).

101. *Davis*, 937 F. Supp 2d at 426.

102. *Id.*

103. *Id.*

104. *Lindholm v. Brant*, 925 A.2d 1048, 1054 (Conn. 2007)

105. In fact, it may be more likely than not that a lay person will not try to purchase these types of object. Perhaps it is more likely people who have access to substantial provenance research and/or knowledge in art history are the type of people who purchase these artifacts.

figurines; however, a long-time art collector or an individual with some background in art history should be able to recognize that difference, and therefore have general knowledge of the regional origin of the artifact, more quickly. With that assumption, it is likely a long-time collector/historian should know or reasonably know that artifacts with certain stylistic features could provide inherent notice that the artifact originates from a region in conflict. Therefore, that long-time collector/historian may be able to infer that antiquities from any conflict region may have been looted and sold to support terror. Though the proposition of “reasonable” is in fact an objective standard, the context of the parties in question does matter, as what is “reasonable” for one individual’s experience may not be the baseline of reasonable for another.

Art dealers already may be subject to the duty of care that a merchant must demonstrate when purchasing goods.¹⁰⁶ The *Morgold* court held that art dealers should take “reasonable steps” for title inquiry. Here, the buyer had previously purchased and sold art with the seller in the case and there was no indication of any problems with claims to the title, therefore the buyer was said to have met the standard.¹⁰⁷ However, I believe a finder of fact may need to consider an individual’s art transaction history, or exposure to art history, to correctly determine whether the buyer knew or should have known that an item originated from the Levant. Therefore, it is likely that the sale of the antiquities at this time and from this region of the world themselves may be the only red flag necessary to trigger this extra due diligence standard in a similar way in which a “bargain basement price” should be a red flag to a purchaser.¹⁰⁸ As the industry standard requires, purchasers of art should research the provenance of the ancient Near Eastern artifact they seek to buy.

It is worth noting that transactions from this region are already subject to criminal law under the Iraq Stabilization and Insurgency Sanctions Regulations.¹⁰⁹ The FBI’s Art Crime Team had published a public service announcement encouraging purchasers to practice “robust due diligence” when purchasing antiquities out of Syria or Iraq.¹¹⁰ The manager of the FBI’s Art Theft Program, Bonnie Magness-Gardier, generally advises buyers to “[c]heck and verify provenance, importation, and other documents” in an effort for buyers to be “very careful” when purchasing artifacts from this region.¹¹¹ There are several resources purchasers could

106. *Morgold, Inc.*, 891 F. Supp. at 1369.

107. *See id.*

108. *Davis v. Carroll*, 937 F. Supp. 2d 390, 432 (S.D.N.Y. 2013); Conley, *supra* note 6, at 503 (stating “[a]rt dealers’ duty of inquiry has been held to extend to the appearance of suspicious circumstances, even absent knowledge that a sale may violate the ownership rights of a third party” (citations omitted)).

109. This section of the code regulates sanctions due to the Iraq Insurgency. Section 576.201(a)(3)(ii) specifically prohibits individuals who have “materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, such an act or acts of violence [...]” from obtaining property that is “of the former Iraqi regime” are “blocked” from “transferr[ing], [...], export[ing], [...] or otherwise deal[ing] in” that property. 31 C.F.R. § 576 (2022).

110. *ISIL and Antiquities Trafficking*, FBI NEWS, (Aug. 26, 2015), <https://perma.cc/3WSH-Z5XG>.

111. *FBI Warns Dealers*, *supra* note 57.

utilize to conduct research so buyers can determine legitimately traded goods from illicitly looted ones. For example, buyers must consult “Red Lists,” such as the International Council of Museums’ (“ICOM”) Red List of Antiquities, which coordinates security efforts for museums and lists the “[t]ypes of object subject to looting,” such as coins, pottery, glass, ivory, stone, jewelry, figurines, bowls, and manuscripts.¹¹² These “Red Lists” are available for Syria and Iraq.¹¹³ An ICOM 2015 “Emergency Red List of Iraqi Cultural Objects At Risk” provides a sample of categories of cultural objects that are vulnerable to illicit sale; the list provides pictures of what these objects may look like, details of identifying features (such as Aramaic inscriptions or the use of lapis lazuli), and size estimates.¹¹⁴ Other available resources include Interpol’s Stolen Works of Art Database,¹¹⁵ The Art Loss Register,¹¹⁶ New-York based Centrox, Art Quest, Art Trak, and Art Worth Ltd.¹¹⁷ Buyers may also do well to familiarize themselves with ICCROM’s extensive risk assessment of dealing in cultural heritage from the SWANA region.¹¹⁸ These resources ultimately serve to put buyers and art collectors on notice. With these resources available, the principle of *caveat emptor*, or “buyer beware” may be relevant to a court’s analysis.

B. Due Diligence and Statute of Limitations

The event that triggers the statute of limitations for stolen art has been contested. When the New York Court of Appeals first heard the *DeWeerth* case, the court held that “the statute of limitations does not start to run until a *bona fide* purchaser refuses an owner’s demand for return of a stolen art object.”¹¹⁹ Subsequently, the same court in *Lubell* held that an original owner did not have a duty of due diligence to try to search for the work.¹²⁰ However, this conflicted with the policy intended to protect *bona fide* purchasers “from stale claims by alleged owners.”¹²¹ Additionally, it was held that true owners could not unreasonably delay their demand of the stolen work.¹²² “The [demand and refusal] rule is supposed to protect a [bona fide purchaser] by postponing liability until after he learns of the theft victim’s claim and refuses to honor it.”¹²³ However, the

112. *Id.*

113. *Id.*

114. ICOM, EMERGENCY RED LIST OF IRAQI CULTURAL OBJECTS AT RISK 4-7(2015), <https://perma.cc/7478-CYCH>.

115. *Stolen Works of Art Database*, INTERPOL, <https://perma.cc/62HW-6GGF>.

116. *The Art Loss Register*, ART LOSS REGISTER, <https://perma.cc/SHU3-RETG>.

117. Conley, *supra* note 6, at 508.

118. JOSE L. PEDERSOLI, JR., CATHERINE AN TOMARCHI & STEPFAN MICHALSKI, A GUIDE TO RISK MANAGEMENT OF CULTURAL HERITAGE, (ICROM 2016), <https://perma.cc/G3EJ-WU5T>.

119. *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272 (2d Cir. 1994).

120. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 319 (1991).

121. *DeWeerth*, 38 F.3d at 1273 (citing *DeWeerth v. Baldinger*, 836 F.2d 103, 108-09 (2d Cir. 1987)).

122. *DeWeerth*, 836 F.2d at 107; *see also Lubell*, 77 N.Y.2d at 317; *Weimar v. Elicofon*, 536 F. Supp. 829, 849 (E.D.N.Y. 1981), *aff’d*, 678 F.2d 1150 (2d Cir. 1982).

123. Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2445 (1994).

demand and refusal rule permits the current owner to postpone making the demand and therefore helps thieves and harms the bona fide purchasers.¹²⁴ Subsequently, in an appealed opinion on the *DeWeerth* case, the court ultimately maintained the due diligence element, reasoning that to impose a duty to make such a demand without unreasonable delay inherently imposes a duty to use due diligence as well.¹²⁵

Other jurisdictions have adopted a discovery rule, which provides that “a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of cause of action.”¹²⁶ With this rule, a court must balance and consider the equities in the facts, such as when a reasonably diligent owner would have located the art and then decide if tolling the statute of limitations was fair.¹²⁷ New York did consider adopting a discovery rule through an Assembly and Senate Bill, but then-Governor Cuomo vetoed this because the rule would “not provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum’s acquisition and take action to recover it before their rights are extinguished.”¹²⁸ This point on the relevant foreign governments having a reasonable amount of time to provide notice for missing artifacts is discussed more below.

A recent holding on this issue determined that the unreasonable delay is ultimately not a factor into the court’s statute of limitations analysis and it will only be relevant with the laches defense.¹²⁹ A Massachusetts court heard an appellate argument regarding the statute of limitation and the laches defense, where an appellant/original owner alleged that title to the painting in question did not pass to the buyer or subsequent museum because Nazis confiscated the work; the argument was grounded in the notion that state statutes which frustrate federal policy for individuals to recover Nazi-looted art are preempted by federal interest.¹³⁰ In this case, the *Seeger-Thomschitz* court denied replacing a state statute of limitations rule with a “federal common law laches defense.”¹³¹ The laches defense has two requirements: (1) proof of a lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting the defense.¹³² The defense would prevent claimants from recovering art works. The New York Court of Appeals found that a good-faith purchaser’s laches defense was viable based on a claim that the original owner museum (appellee) did not conduct a

124. *See id.* at 2445–46.

125. *DeWeerth*, 38 F.3d at 1273.

126. *O’Keeffe v. Snyder*, 83 N.J. 478, 491 (1980) (quoting *Burd v. New Jersey Tel. Co.*, 76 N.J. 284, 291-92 (1978)).

127. *Bibas*, *supra* note 123, at 2447.

128. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 319 (1991).

129. *Republic of Turkey v. Christie’s Inc.*, 425 F. Supp. 3d 204, 213-14 (S.D.N.Y. 2019).

130. *Museum of Fine Arts, Bos. v. Seeger-Thomschitz*, 623 F.3d 1, 13-14 (1st Cir. 2010).

131. *Id.* at 11.

132. *Id.* at 10 n.9 (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)).

“reasonably diligent search” for the painting in question when it was missing.¹³³ In this case, the Solomon R. Guggenheim Foundation, which operates the Guggenheim Museum, sought to recover a Chagall gouache which was purported to be stolen by a mailroom employee in the 1960s; the painting was purchased by Rachel Lubell, the appellant, from a reputable gallery.¹³⁴ She had no reason to believe that the gouache was stolen.¹³⁵ The question as it pertained to laches was remanded to the trial court for further analysis.¹³⁶ It is unclear whether the parties argued this case in front of a trial court again.

As examined in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.* (hereinafter “*Autocephalous*”), a nation’s government has a duty to try to recover missing cultural property.¹³⁷ In *Autocephalous*, the Republic of Cyprus notified multiple entities, such as ICOM, in an attempt to recover mosaics that were stolen from the interior of the apse of Kanakaria Church.¹³⁸ The looting was a consequence of the 1974 Turkish invasion and unfortunately the mosaics were severely damaged in the forceful removal.¹³⁹ One of the issues presented to the court included when the statute of limitations may run.¹⁴⁰ This court looked to both Indiana law as well as Swiss law.¹⁴¹ Regarding the Indiana law, the *Autocephalous* court held that the plaintiff’s cause of action accrues and the statute of limitations for a cause of action for recovery will start to run when “damage was ascertained or ascertainable by due diligence.”¹⁴² In noting the role of due diligence, the court also held that the plaintiffs would need to know or be on reasonable notice of the identity of possessor.¹⁴³ However, it is crucial to note that the court recognizes the tolling of the statute of limitations by allowing a “pause” on the due diligence facts where “the plaintiffs’ belief that they could not visit. . . the church was reasonable” due to safety concerns, considering the Turkish occupation.¹⁴⁴ This is relevant to the discussion on whether the government in Iraq or other war-torn nations/nations in conflict may want to seek restitution for regaining their cultural heritage. While antiquities and cultural heritage are essential issues to consider in the context of war and sales, it is more than reasonable to maintain that other issues are more pressing, such as human rights issues, and should be addressed more presently than the issues of stolen property. This paper and the *Autocephalous* case do not

133. *Lubell*, 77 N.Y.2d at 315.

134. *Id.* at 314

135. *Id.* at 314.

136. *Id.*

137. 717 F. Supp. 1389 (S.D. Ind. 1989), *aff’d*, 917 F.2d 278 (7th Cir. 1990).

138. *Id.* at 1374, 1380.

139. *Id.* at 1379.

140. *Id.* at 1385.

141. Swiss law applied in this case based on the doctrine of *Lex situs*, wherein the choice of law was determined based on “where the ownership of tangible, movable property is disputed.” *Id.* at 1395.

142. *Id.* at 1386.

143. *Id.* at 1388.

144. *Id.* at 1393.

contend that these issues of antiquities management should be prioritized over other issues.

There are many reasons that the buyers of stolen art should not be protected by law.¹⁴⁵ It is notable that the U.S. Code does criminally prosecute the theft of “any object of cultural heritage” from a museum in the US¹⁴⁶ as well as prohibits stolen cultural property, whether from a museum or public monument, from being imported into the US.¹⁴⁷ Yet, these statutes do not thwart the sale of looted goods. Stephanos Bibas, now a judge for the U.S. Court of Appeals Third-Circuit, argued that art sale facilitation in this manner promotes theft, stating that the law should encourage a buyer to investigate a work’s provenance but that statutes of limitations “promote maximum marketability rather than optimum marketability” and therefore “increase[s] the profitability of art theft and thus encourage[s] more thefts.”¹⁴⁸ Part of this article argues that the accessibility in researching the title to artwork is what makes the statute of limitations less integral to marketability of art. However, in the case that this paper explores, it is arguably easier to research artifacts. First, collectors now benefit from 21st century technology versus a computer database in the 1990s. For example, Interpol launched a free mobile application in May 2021, ID-Art, which increases law enforcement and general public access to the Stolen Works of Art Database.¹⁴⁹ Additionally, one does not have to have access to a catalogue raisonné to know that ISIL has looted and sold antiquities; while a quick Google search may not show specific artifacts that were stolen, a reasonably prudent purchaser could draw the conclusion that an ancient Near Eastern artifact that is being sold after 2011 was stolen by ISIL. Other arguments made for lessening protection on a bona fide purchaser/current possessor is that the premise that a possessor is entitled to a moral claim over the original owner is flawed. In this respect, any sort of case-by-case analysis is inadequate to deter theft, as seen in the court’s treatment of *Lubell*, where the court used an ex post facto perspective rather than a societally advantageous ex ante perspective.¹⁵⁰ Third, Bibas argues that there are more benefits to inducing possibly stale claims which outweigh the cost of staleness, such as preventing the incentive to sell art underground and that stale claims do not create problems for replevin.¹⁵¹ Finally, Bibas argues that the rules for discovery and due diligence are not clear because though the tests are flexible, they are too vague and do not ensure that a possessor

145. See Bibas, *supra* note 123, at 2449-51.

146. The statute defines “object of cultural heritage” as an object that is “(A) over 100 years old and worth in excess of \$5,000; or (B) worth at least \$100,000.” See 18 U.S.C. § 668 (1996).

147. 19 U.S.C. § 2607 provides that “[n]o article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.” 19 U.S.C. § 2607 (1983).

148. Bibas, *supra* note 123, at 2451-52.

149. *INTERPOL Launches App to Better Protect Cultural Heritage*, INTERPOL (May 6, 2021), <https://perma.cc/9SM8-MSL8>.

150. Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 314 (1991).

151. Bibas, *supra* note 123, at 2457-58.

will investigate title.¹⁵² It would seem that more focused policy geared toward this issue of due diligence would aid in yielding a better result for those who innocently, or ignorantly, purchase art from ISIL.

C. Good Faith Purchaser

Under U.C.C. § 2-403, a good faith purchaser, or a good faith purchaser for value, is a purchaser who gives value for an asset in good faith and without knowledge of adverse claims.¹⁵³ As concerns policy, an issue arises where a purchaser of looted artifacts cannot feasibly be considered to be in good faith. The consideration of a good faith purchaser in this context is important because it can demonstrate when the title will and will not transfer in circumstances where stolen goods are sold and then purchased without knowledge that the seller could not transfer the title. Here, where ISIL has looted artifacts to sell them, the question becomes when and if there can be a good faith purchaser. Can any purchaser truly be in good faith when these items are ultimately funding terror, whether or not the final purchaser was innocent from knowing this? One may ask when innocence transcends to ignorance.

There is a split in how courts treat good faith purchasers and original owners in cases of stolen art.¹⁵⁴ The court in *Lubell* has considered that shifting the burden of locating the stolen art to the wronged owner would “encourage illicit [art] trafficking.”¹⁵⁵ The court noted that “[t]hree years after the theft, any purchaser, good faith or not, would be able to hold onto stolen artwork unless the true owner was able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged owner is inappropriate.” In fact, the court found that the burden to investigate a work’s provenance falls on the purchaser as this would provide the owner with greater protection.¹⁵⁶ Yet in *DeWeerth*, the court held that the burden remained on the original owner to execute reasonable due diligence to locate the stolen work.¹⁵⁷

This discrepancy in the treatment of stolen art works reflects the broader inconsistency in the law’s treatment of a good-faith purchaser.¹⁵⁸ Scholars have considered that a legal favoring of an original owner over an innocent purchaser may be a harsh rule which has a “chilling effect” on the international art market.¹⁵⁹ However, even if courts do favor owners, that means merely that buyers should exercise reasonable diligence in their research.¹⁶⁰ Meanwhile, this would mainly affect museums in the United States in terms of art lent to them; many museums depend on art that is lent or donated and civil law country museums may be

152. Bibas, *supra* note 123, at 2458.

153. U.C.C. § 2-403 (AM. L. INST. & NAT’L CONF. COMM’RS ON UNIF. STATE L. 2002).

154. Schwartz, *supra* note 12, at 1334.

155. *Lubell*, 77 N.Y.2d at 320.

156. *Id.*

157. *DeWeerth v. Baldinger*, 836 F.2d 103, 104 (2d Cir. 1987).

158. Schwartz, *supra* note 12, at 1334-35.

159. Turner, *supra* note 2, at 1541-42.

160. *Id.*

hesitant to put items on loan to U.S. museums where the law protects innocent buyers less.¹⁶¹ All the while, it is possible that United States museums could be at risk of displaying certain art and artifacts that were looted by terrorist organizations, though it is contended that a “responsible museum” would not purchase items from Syria or Iraq.¹⁶² Favoring original-owners would be sensible for the U.S. legislature considering the war on terror. Policy for both public and private institutions, such as museums, should civilly dissuade these the collection and purchase of stolen artifacts to fund terror.

Common law and civil law alike are rooted in the idea of *nemo dat quod non habet* – one cannot convey greater rights than one has.¹⁶³ Under U.C.C. § 2-403, a person has voidable title when that person who resold the goods did not steal them but was given them voluntarily by the original owner; one with voidable title then “has power to transfer a good title to a good faith purchaser for value” in certain circumstances.¹⁶⁴ This is a distinct result from the common-law doctrine that “a thief cannot pass right to possession or good title regardless of a purchaser’s good faith.”¹⁶⁵ Upon a dispute, a court would likely consider finding the question of whether a possessor acquired voidable title to the antiquities to be a relevant factor. For example, in a *replevin* action to obtain a stolen painting, which the defendant possessed at the time, noted the relevance of whether the transferor (to the possessing-defendant) acquired voidable title.¹⁶⁶ The *O’Keeffe* court noted that though “a mere possessor cannot transfer good title,” “a person with voidable title” may be permitted to “transfer good title to a good faith purchaser for value.”¹⁶⁷ In this regard, one must consider whether ISIL agents would certainly qualify as thieves in this context, or whether it could be conceived that they in fact obtained the goods in such a way that would give them the proper title of the antiquities. This logic could theoretically be legitimized by the United States government’s means of obtaining title under the view of *Johnson v. M’Intosh*, wherein a land transfer was only valid if it originated from title between European nations, justified through the principles of right of conquest and titled acquired by conquest.¹⁶⁸ This paper does not suggest that ISIL properly acquired title to land, property, or antiquities specifically through acts of violence and terror. However, one may consider in this light whether a conquest of land and peoples is ever “proper.” This is especially so considering that under the common law system and doctrines of property law, ISIL may have proper title

161. *Id.*

162. Julia Lowrie Henderson, *With ISIS Destroying Priceless Artifacts in Iraq, Some Museums Are Hesitant to Return Looted Artifacts*, WORLD (Apr. 8, 2015, 8:30 AM), <https://perma.cc/9GEC-4YTH>.

163. Schwartz, *supra* note 12, at 1335.

164. U.C.C. § 2-403 (AM. L. INST. & NAT’L CONF. COMM’RS ON UNIF. STATE L. 2002).

165. Conley, *supra* note 6, at 502.

166. *O’Keeffe v. Snyder*, 83 N.J. 478, 489 (1980).

167. *Id.*

168. 21 U.S. 543, 562 (1823).

under the right of conquest.¹⁶⁹ Under this theory, if it were recognized that ISIL gained title via conquest, then they would be able to validly transfer and sell these artifacts. It is more likely than not, however, that governments around the world, Interpol, and the United Nations would not recognize this theory. For example, imagine that an individual, not a merchant, purchases a cylinder seal from a Facebook group that does not look to be a legitimately regulated means of transactions. The nonmerchant individual subsequently sells the seal to a purchaser who does not know the history of the object, let alone that it was looted by ISIL. Under the guise that the artifacts were stolen, and not taken through conquest, ISIL would not properly be transferring title regardless of a purchaser's good faith or innocence after buying an artifact likely from an intermediary seller.

This discussion on what constitutes a good faith purchaser and the requisite, but unclear, due diligence standard begs the question of whether the courts would benefit from a balancing test to analyze the interests of the buyers and the purchasers. As Bibas and Turner allude to in their discussions, a buyer may be dissuaded from purchasing goods, whether legitimate or illegitimate, because the steps they would need to take in order to constitute a good faith purchaser are not clear.¹⁷⁰ For example, if the buyer truly did not realize that the figurine votive they were so excited to purchase and own was looted and illegitimately sold, the buyer is at risk of losing this investment. From the perspective of the original owner, the additional level of due diligence that they need to exercise is also unclear. It may be challenging to know whether listing the missing art piece on a database or two and contacting Interpol is sufficient to satisfy "due diligence." The court in *Lubell* did weigh the facts and equities of the parties in order to determine the proper owner of the Chagall.¹⁷¹ Unfortunately, it has been observed that "[s]ince multi-factor balancing tests do not automatically award title to theft victims, they do not adequately deter trafficking in stolen goods."¹⁷² It is entirely possible that a "bright-line rule" may better restore theft victims to their pre-theft state and even deter art theft.¹⁷³ This is because "[b]alancing equities is a laudable judicial goal, but in these cases, in which innocent purchasers are threatened with the loss of million dollar investments, certainty seems an equally laudable goal."¹⁷⁴

Though an innocent purchaser would not have good title under this doctrine, there should be more specific legislation or policy to protect cultural heritage from being stolen and then possessed by a good faith purchaser, especially when doing so funds acts of terror. It is worth looking at case law treatment of these

169. This does not take criminal acts under Iraq and Syria Law or International Law into consideration.

170. Bibas, *supra* note 123 at 2453; Turner, *supra* note 2, at 1534, 1542.

171. Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 316-21 (1991); *see also* Bibas, *supra* note 123, at 2437-38.

172. Bibas, *supra* note 123 at 2438.

173. *Id.* at 2439.

174. Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J. 337, 378 (1993).

issues in New York, where the rights of the true owner, whose property was stolen, is protected even if the goods are in the possession of a good faith-purchaser.¹⁷⁵ Considering the fact that New York, effectively the hub for this illicit trading and thereby “the most important jurisdiction for stolen artwork cases since so many art transactions occur there,”¹⁷⁶ protects the interests of the original owner, it would be sensible for federal law to look to New York’s example for any policy implementation. One may ask why the U.S. government and legal system should go to such great lengths to protect the “true owners” of these artifacts, namely the Iraqi and Syrian government assuming most of these looted artifacts did come from archaeological excavation sites but also private museums in that region, if sufficient safeguards were not executed on their part. Arguably, after a terrorist insurrection, the government and the people of Iraq and Syria did have more pressing matters to consider. It may not have been feasible or cost-effective to remove the artifacts and store them somewhere safe. Meanwhile, utilizing the military to safeguard these sites may not have been the most efficient use of resources at the time. Finally, as mentioned above, because many historians and scholars believe that ISIL originated as a response to the 2003 U.S. invasion,¹⁷⁷ this could be one of many ways the United States¹⁷⁸ tries to aid this region. In fact, under 50 U.S.C. § 2201¹⁷⁹ the United States could and should transfer these artifacts if the government (or FBI) can collect the artifacts in the United States that were stolen from sites in Iraq or Syria.

When the chain of title starts with an ISIL agent, then moves to a nonmerchant, then ultimately moves to a good faith purchaser, the innocent purchaser cannot claim valid title despite their good faith. Regardless, it may be worthwhile for the legislature to consider that title should never be valid when it directly benefits a terrorist organization. The reason is that, from a policy standpoint, the United States would not want terrorist organizations to reap the benefits from this transaction. Granted, while many of these transactions have already occurred, and while there are other remedies, it is still in the interest of the United States to aid in restoring these artifacts to the Iraqi and Syrian governments or other respective owners.

D. Considerations under International Law

Though the primary focus of this paper is on U.S. law, an issue that will need to be considered in cases such as the one presented in this paper is how

175. *Lubell*, 77 N.Y.2d at 317.

176. Turner, *supra* note 2, at 1538; *see also Lubell*, 77 N.Y.2d at 320 (observing that “New York enjoys a worldwide reputation as a preeminent cultural center.”).

177. Hassan, *supra* note 21.

178. The use of “the United States” shall refer broadly to the government and legal interests of the United States and not the United States as a nation.

179. The code provides that “[s]poils of war in the possession, custody, or control of the United States may be transferred to any other party, including any government, group, or person, by sale, grant, loan or in any other manner, only to the extent and in the same manner that property of the same type, if otherwise owned by the United States, may be so transferred.”

international law may handle these issues. Due to the fact that these artifacts have been purchased across the world in a number of countries, it is difficult to predict what international comparative law will come into play for these issues. However, it is worth noting that generally, Iraq's legal system aligns with civil law with shari'a law influence¹⁸⁰ and that civil law should be considered.

The international character of the issue this paper explores could be contested in the way that questions of choice-of-law are "vigorously contested between parties" for "Holocaust art restitution cases."¹⁸¹ There are three factors in particular that are inconsistent across international jurisdictions: (1) choice of law, (2) balancing the rights of a good faith purchaser against the rights of a dispossessed owner, and (3) the application of statutes of limitations.¹⁸² Unfortunately, there has not been success in unifying these question across the global context.¹⁸³ One of the more striking divides is in the treatment of the good faith purchaser in common law and civil law jurisdictions.¹⁸⁴ As stated, under the common law, "a thief cannot pass right to possession or good title" despite whether they made the purchase of the object in question in good faith.¹⁸⁵ However, under civil law, a good-faith purchaser is recognized to have good title though the object was stolen, unless the purchaser had actual knowledge that the work was stolen.¹⁸⁶ Whether an individual knew or should have known if a work was stolen depends on if a "reasonably diligent search [that] would have revealed the work's status" was conducted.¹⁸⁷

There have been attempts at international cooperation. The United Nations Educational, Scientific and Cultural Organization ("UNESCO") held a convention in which the organization attempted to create a "multilateral import-export net" to mitigate and regulate the trade of cultural property.¹⁸⁸ The United States ultimately joined this Convention in the 1980s.¹⁸⁹ Unfortunately this effort is thought to have fostered the black market trade of cultural property.¹⁹⁰ One scholar speculates that embargos are ultimately "fated" to fail, claiming that "absent very special circumstances, any attempt to embargo the export of a broad category of art treasure for which there is a substantial demand is fated to be

180. Introduction to the Laws of Kurdistan, Iraq (2013) (unpublished series overview) (available at <https://perma.cc/2LKJ-V93E>.)

181. Arabella Yip, *Stolen Art: Who Owns it Often Depends on Whose Law Applies*, SPENCER'S ART L. J. (July 2010), <https://perma.cc/2F6D-2EPP>.

182. Conley, *supra* note 6, at 502.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Bersin, *supra* note 7, at 140 (citing UNESCO Convention on the Illicit Movement of Art Treasures, Nov. 14, 1970, 823 U.N.T.S. 231, *reprinted in* 10 I.L.M. 289 [hereinafter UNESCO Convention]).

189. Bersin, *supra* note 7, at 143.

190. Bersin, *supra* note 7, at 127 (citing Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 317 (1982)).

ineffective, for two (connected) reasons: (a) its structure creates irresistible pressure against itself; and (b) it is administratively unenforceable.”¹⁹¹ The black market may even “thrive” when other alternatives cannot exist for both buyers and sellers, which shifts incentives toward illicit trade instead.¹⁹²

E. Merchants in Goods of the Kind

Since several different players that could be involved in a transaction, from ISIL to a potential third party to an innocent purchaser, there are a few scenarios that should be considered. The first is whether ISIL agents could be considered merchants. Next is the effect on the title when a good faith purchaser buys the object from a middleman who is a merchant.

A poignant question in this discussion is whether ISIL could be considered to be “merchants in goods of the kind.”¹⁹³ As defined in U.C.C. § 2-104, a “merchant” is “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediaries who by his occupation holds himself out as having such knowledge or skill.” An individual may be thought to deal in “goods of the kind” by way of their occupation, such that their occupation may demonstrate to third parties that the individual has specified knowledge which is distinct to the goods involved in the transaction.¹⁹⁴ For example, in *Brown*, the court held that Mitchell-Inness & Nash, Inc. (“MIN”) was “undoubtedly a merchant” because it was an art dealer and thereby had previously dealt in goods of the kind.¹⁹⁵ A merchant seller under U.C.C. § 2-312(3) implies that the goods to be sold are free of adverse claims.

There is a duty of good faith, which “requires honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”¹⁹⁶ This duty implements a “higher standard of ‘good faith’” for merchants than there is for purchasers.¹⁹⁷ Indeed, with art, merchants may be expected to exercise “additional steps” in order to certify a work’s true owner.¹⁹⁸ As mentioned above, a merchant in art is obligated to inquire about a circumstance that seems

191. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 318 (1982).

192. *Id.*

193. U.C.C. § 2-104 (AM. L. INST. & NAT’L CONF. COMM’RS ON UNIF. STATE L. 2002).

194. *Frix v. Integrity Med. Sys., Inc.*, No. 1:16-cv-02559-STA-egb, 2017 WL 4171987, at *10 (W.D. Tenn. Sept. 20, 2017).

195. *Brown v. Mitchell-Innes & Nash, Inc.*, No. 06 Civ. 7871 (PAC), 2009 WL 1108526, at *5 (S.D.N.Y. Apr. 24, 2009).

196. *Galin v. Hamada*, 283 F. Supp. 3d 189, 196 (S.D.N.Y. 2017), *aff’d*, 753 F. App’x 3 (2d Cir. 2018).

197. *Brown*, 2009 WL 1108526, at *5.

198. *Kozar v. Christie’s, Inc.*, 2011 WL 18886585, at *8 (Sup. Ct. Westchester Cnty. May 18, 2011); see also *Galin*, 283 F. Supp. 3d at 196.

suspicious.¹⁹⁹ The court in *Porter* explicitly states that the definition of “good faith” “embraces the ‘reasonable commercial standards of fair dealing in the trade;’” however, “it should not—and cannot—be interpreted to permit, countenance or condone commercial standards of sharp trade practice or indifference as to the ‘provenance [. . .].’”²⁰⁰ *Porter* should essentially guide the industry standard in good faith and also that courts can establish the inquiring into title as a common practice through U.C.C. § 2-403.²⁰¹

Often, the U.C.C. protects the innocent purchaser who will buy from a merchant who deals in goods of the kind regardless of the merchant’s potentially unscrupulous behavior because the law imposes a higher standard of good faith on merchants.²⁰² New York’s version of the U.C.C. protects a buyer in the ordinary course, which is

“a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person . . . in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices.”²⁰³

One must ask whether ISIL agents can be considered merchants under the definition of the U.C.C. Can ISIL agents be considered to be merchants who deal in goods of the kind, or do they hold themselves out as having knowledge of the practices of antiquities dealing? It would appear so. First, one may consider the amount of time that ISIL agents have been illicitly selling these goods and that they would likely gain some knowledge, or at least present that they had expertise, in the artifacts they were selling. For example, one post describes that a particular statue portrays the wolf nursing Romulus and Remus and offers that it is carved from alabaster, demonstrating a level of knowledge of the subject matter and material.²⁰⁴ Next, members on the Facebook groups had treated the comment sections of the posts as an auction space, bidding for antiquities and thereby proving that people treated these merchants as agents.²⁰⁵ Though it is unlikely that ISIL would be considered to be merchants by U.S. courts, it is worth mentioning that they may loosely fit into the definition of “merchant” and therefore purchasers would be protected.

199. *Leonardo Da Vinci’s Horse, Inc. v. O’Brien*, 761 F. Supp. 1222, 1229 (E.D. Pa. 1991); *see also* *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989), *aff’d*, 917 F.2d 278 (7th Cir. 1990).

200. *Porter v. Wertz*, 416 N.Y.S.2d 254, 257 (App. Div. 1979), *aff’d*, 53 N.Y.2d 696 (1981).

201. Hoover, *supra* note 86, at 449.

202. *Brown*, 2009 WL 1108526, at *5.

203. *Id.*

204. *See* ATHAR, *supra* note 53.

205. *Id.*

An art dealer must act in good faith in order for an individual to be a buyer in the ordinary course; this means that art dealers must act with honesty in fact and observe reasonable commercial standards in the industry.²⁰⁶ In addition to the research that a purchaser must make based on industry standard, an art merchant may be required “to take additional steps to verify the true owner of a piece of artwork”²⁰⁷ Based on the research conducted by the ATHAR Project, there is evidence that a prominent art dealer might have been in direct contact with an individual either from ISIL or acting on behalf of ISIL.²⁰⁸ With an established art dealer (hereinafter “merchant-dealer”), there are now two opportunities that a seller and purchaser can and should find out that certain antiquities were stolen or, with reasonable presumptions that one can draw based on the environment of the region, were stolen specifically by ISIL. It is likely that this merchant-dealer knew, or reasonably should have known, that the items were stolen and subsequently funding the terrorist organization. Considering the individual was characterized as an art dealer, he or she would likely be considered a merchant under the definition. Therefore, this merchant-dealer that is referenced in the ATHAR report would be held to this higher merchant standard to do research on the true owner, which would likely show that the artifacts were stolen. For example, if the object in question’s provenance showed that the last location was the Iraq National Museum or the Mosul Museum a merchant-dealer should have done the minimal amount of research required to discover that these museums were destroyed and looted by ISIL.²⁰⁹ Next, despite the divided case law on the duty of a good faith purchaser, the purchaser must also research a piece’s provenance to comply with the art industry standard. With the aforementioned example, it is likely that a buyer in the ordinary course would also be able to draw the conclusion that artifacts from these museums were looted by ISIL.

IV. RESTITUTION²¹⁰

Because artifacts trade does not always end with a private consumer, it is possible that public and private institutions should meet an even higher standard than

206. Hoover, *supra* note 86, at 463.

207. *Brown v. Mitchell-Innes & Nash, Inc.*, No. 06 Civ. 7871 (PAC), 2009 WL 1108526, at *5 (S.D. N.Y. Apr. 24, 2009).

208. ATHAR, *supra* note 53.

209. *FBI Warns Dealers*, *supra* note 57; Amah-Rose Abrams, *As Iraqi Troops Reclaim Mosul Museum, Its Destruction by ISIS Is Revealed*, ARTNET (Mar. 13, 2017), <https://perma.cc/AK2Z-PR3Z>.

210. Cultural heritage is the “expression of the ways of living developed by a community and passed on from generation to generation, including customs, practices, places, objects, artistic expressions and values.” *What is Cultural Heritage*, HERITAGE FOR PEACE, <https://perma.cc/8SZ8-QKUE>. The UNESCO office in Santiago details that it is the “living expressions inherited from [...] ancestors” which “constitutes the ‘cultural potential’ of contemporary societies” and serves as a means of “transmission of experiences, skills and knowledge between generations.” *Cultural Heritage*, UNESCO, <https://perma.cc/N5BA-PDGV>. With that in mind, it is essential for the law to aid in preserve its preservation. It is common that people from certain geographical regions to feel especially connected to where their ancestors come from. There have been notable demonstrations of the importance of cultural heritage Iraqi and Syrian people. For example, ISIL publicly beheaded the head of antiquities in Palmyra, Khalid

described above.²¹¹ Hobby Lobby is suing Christie's Auction Company for breach of express and implied warranty after Christie's sold Hobby Lobby a Mesopotamian tablet with a partial inscription of the Epic of Gilgamesh in cuneiform.²¹² Hobby Lobby claims that Christie's knowingly misrepresented the tablet's provenance, while also stating that "law-abiding cuneiform collectors are careful to deal only in objects with an ownership history dating prior to 1990, establishing that the object was outside of Iraq and not stolen as of that date."²¹³ Richard P. Donoghue, the United States Attorney for the Eastern District of New York, stated that "[Christie's] failed to meet its obligations by minimizing its concerns that the provenance of an important Iraqi artifact was fabricated, and withheld from the buyer information that undermined the provenance's reliability."²¹⁴

Despite how the court holds in this case, the tablet's return sets an important precedent. A Forfeiture Action was commenced by the U.S. Attorney's Office for the Eastern District of New York in May 2020.²¹⁵ The court order held that the Museum of the Bible, the museum for which the Hobby Lobby president purchased the tablet, would not be permitted to retain the tablet because it was originally stolen.²¹⁶ "By returning these illegally acquired objects, the authorities here in the United States and in Iraq are allowing the Iraqi people to reconnect with a page in their history," says UNESCO Director-General Audrey Azoulay in a statement. "This exceptional restitution is a major victory over those who mutilate heritage and then traffic it to finance violence and terrorism."²¹⁷

al-As'ad, for refusing to disclose the location of an important statue. Sarah Cascone, *Nearly Destroyed by ISIS, the Ancient City of Palmyra Will Reopen in 2019 After Extensive Renovations*, ARTNET (Aug. 27, 2018), <https://perma.cc/AL4B-5YYR>. Additionally, there are groups of Syrian women who have actively spent years to preserve heritage sites and ensure that Syrian culture maintains after years of displacement due to conflict. Florence Massena & Arwa al-Basha, *Women at the Forefront of Saving Syria's Heritage*, THE TAHRIR INST. FOR MIDDLE E. POL'Y, <https://perma.cc/H9P9-C83Y>. Archaeologist Lina Kutiefan believes that "that cultural heritage can provide an automatic sense of unity and belonging within the Syrian people, especially during this hard crisis." *Id.* Additionally, the foreign minister of the Iraqi government, Faud Hussein, told CNN in an interview that "his government would 'spare no effort to recover the rest of our cultural heritage throughout the world.'" Holland, *supra* note 35.

211. Katherine Hodge, *Modern Issues in Archaeology: The Illegal Artifact Trade*, PROJECT ARCHAEOLOGY, <https://perma.cc/47EA-QHNY>.

212. *Hobby Lobby Stores, Inc. v. Christie's, Inc.*, 535 F. Supp. 3d 113 (E.D.N.Y. 2021).

213. *Id.*

214. Press Release, U.S. Att'y's Off. for the E. Dist. of New York, United States Files Civil Action to Forfeit Rare Cuneiform Tablet Bearing Portion of the Epic of Gilgamesh (May 18, 2020), <https://perma.cc/P6NP-FD6B>.

215. *Id.*

216. Dartunorro Clark & Pete Williams, *Justice Department Seizes Rare, Ancient Tablet Illegally Auctioned to Hobby Lobby*, NBC NEWS (July 27, 2021, 4:53 PM), <https://perma.cc/MXM7-CF4J>.

217. Brigit Katz, *Smuggled Gilgamesh Dream Tablet Returns to Iraq*, SMITHSONIAN MAG. (July 29, 2021), <https://perma.cc/X5NQ-AGGS>. While it is possible that certain artifacts may be "safer" in a country that is not war-torn, such as the United States, there is also a larger effort to decolonize museums and institutions or make them more transparent about colonial pasts. *See, e.g.*, Liz Mineo, *Museums of Native Culture Wrestle with Decolonizing*, HARV. GAZETTE (Nov. 19, 2021), <https://perma.cc/HM96-BFNA>; Tristram Hunt, *Should Museums Return Their Colonial Artefacts?*, GUARDIAN (June 29, 2019), <https://perma.cc/U755-XV6T>; *see also* Sala Al Quntar, *Repatriation and the Legacy of Colonialism in the Middle East*, 5.1 J. E. MEDITERRANEAN ARCHAEOLOGY & HERITAGE STUD. 19, 19–26

In *Autocephalous*, Indiana law, rather than Swiss law,²¹⁸ controlled based on the choice of law doctrine for the recovery of the stolen mosaics.²¹⁹ The court analyzed three factors for the question of whether the church was entitled to recover the mosaics. First, the church had to “prove ownership of title or the right to possession of the mosaics. [The church] must prove [its] right to possession on the strength of [its] own title, not merely the weakness of the defendant’s title or right to possession.”²²⁰

Here, the church presented several witnesses and certificates as proof that the mosaics were initially located in and owned by the church; the defendants did not present contradictory testimony to this point.²²¹ Next, the church “must show that the [mosaics] to be replevied were unlawfully or wrongfully detained.”²²² Testimony by the church showed that there was no authorization to remove the mosaics as they were removed during the Turkish occupation of Cyprus; the defendants did not produce credible testimony to contradict this. Therefore, the mosaics were in fact unlawfully detained.²²³ Some courts also require that the good faith purchaser defendant has the burden of proving that the art in question was not stolen.²²⁴ Finally, the church “must prove that the defendants are in wrongful possession of the mosaics.”²²⁵ The court reiterated that the mosaics were in fact stolen and that “a thief never obtains title to stolen items, and that one can pass no greater title than one has.”²²⁶ Within this analysis, the court noted that who the identity of the original thief was insignificant and the conclusion of the fact that Goldberg possessed stolen property

(2017); *see generally* NANETTE SNOEP, *Suggestions for a Post-Museum, in* ACROSS ANTHROPOLOGY: TROUBLING COLONIAL LEGACIES, MUSEUMS, AND THE CURATORIAL 324, 324-335 (Margareta von Oswald & Jonas Tinus eds., 2020). It is worth noting that the Smithsonian Institute and the U.S. Government Accountability Office (GAO) have enacted several ways to protect cultural heritage in Syria and Iraq since 2011. This includes raising awareness, information sharing, engaging law enforcement, aiding in overseas capacity building, and destruction prevention. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-673, CULTURAL PROPERTY PROTECTION OF IRAQI AND SYRIAN ANTIQUITIES (2016), <https://perma.cc/XL9A-HYHP>. It may be more useful for certain institutions to expand aid in this effort or enact similar efforts rather than “safe keep” artifacts in the United States.

218. The court exercised diversity jurisdiction over this case as a federal district court with diversity jurisdiction “must follow the choice-of-law rules of the state in which it sits to determine which state’s substantive law to apply.” *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1393 (S.D. Ind. 1989), *aff’d*, 917 F.2d 278 (7th Cir. 1990) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). This choice of law was determined under a two-step analysis adopted in the Indiana supreme court, which includes (1) “whether the place of the wrong ‘bears little connection to the legal action’” and (2) “apply[ing] additional factors to determine which state or jurisdiction has the more significant relationship or contacts.” *Id.* (citing *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987)).

219. *Autocephalous*, 717 F. Supp. at 1388.

220. *Autocephalous*, 717 F. Supp. at 1397.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991).

225. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1398 (S.D. Ind. 1989), *aff’d*, 917 F.2d 278 (7th Cir. 1990).

226. *Id.*

was dispositive.²²⁷ Therefore, *Autocephalous* “stands for the proposition that a thief never acquires title to stolen property, and cannot pass any right to possession of stolen property to a subsequent transferee, including a bona fide purchaser for value.”²²⁸ This analysis is pertinent to the issues that this paper explores, considering the similar fact pattern that occurred in *Autocephalous*. For example, artifacts that may have been housed in the Mosul museum were not authorized to be traded during the ISIL insurrection and subsequently, U.S. courts may find similarly that a bona fide purchaser’s title is illegitimate due to the fact that the item was stolen initially.

V. SOLUTION

Though this is a complicated issue that has seemed to trouble the U.S. court system, there are potential solutions that could be implemented to ensure this artwork is either rightfully owned or restored. First, courts may consider solidifying a test for what constitutes a purchaser’s due diligence. Next, it is possible that federal legislation would increase the protections of true owners and the antiquities themselves.

As discussed above, the due diligence standard that a purchaser must adhere to when purchasing Mesopotamian artifacts, or art in general, is unclear and leaves a significant amount of discretion to judges, because the nature of due diligence is fact-specific.²²⁹ While Bibas notes that balancing tests may prove to be inefficient due to the potential loss of large investments, I believe this is similar in terms of the loss of cultural heritage. The importance of preserving artifacts should not be undermined by the above legal analysis. The ultimate goal is ensuring the protection and proper ownership of these artifacts, whether that be with an innocent purchaser outside of the origin region, back *in situ*, or under the ownership of an Iraqi or Syrian museum.

While I believe that balancing tests are often the best way to achieve equitable remedies, the goal of preservation and protecting artifacts may be achieved more efficiently and predictably with a set rule. I believe courts may want to consider adopting an elemental test, rather than a balancing test, to analyze a purchaser’s due diligence. It may be worthwhile to consider that a purchaser must check a certain amount of resources before purchasing the item. First, courts should note whether a purchaser noticed or should have noticed that there were gaps in provenance during a particular time of war and whether the purchaser asked for the identity of the original seller.²³⁰ Courts may also want to consider that purchasers check specific databases as well in order to determine reliability. These specific databases could include ICOM Red Lists, Interpol’s Stolen Works of Art Database, and Art Quest. Next, rather than relying on a balancing test, courts may

227. *Id.* at 1399.

228. *Id.*

229. Jason Barnes, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT’L L. 593, 607-8 (2018).

230. Steven E. Thomas, *Due Diligence and How to Avoid Acquiring Holocaust Looted Art, and What to do If You Own Art with Uncertain Provenance for WWII Years*, SK035 ALI-ABA 481, 486 (2005).

consider the whether a reasonable person would know or should have known that artifacts originate from regions in conflict. Courts should expressly analyze this as a factor, because regions in conflict, under *Autocephalous*, are given leeway for reporting missing and stolen artifacts due to the nature of the conflict.²³¹ Therefore, the burden may need to fall on the purchaser to make educated decisions on the artifacts they are purchasing when the artifacts come from war torn nations. On this element, a finder of fact may want to consider factors like media coverage of the region and whether agencies like the FBI have listed warnings about looted artifacts. Considering these elements against a purchaser may create a more predictable and streamlined analysis for these questions.

Additionally, the U.S. legislature may want to approach this type of question from a policy perspective. In fact, it is possible that the legislature would find this to be a valuable policy implantation already. The U.S. government has previously invested in cultural heritage abroad by training American troops on protective measures for cultural heritage.²³² Additionally, as discussed, there are criminal statutes that attempt to thwart the illicit sale of artifacts.²³³ These prior implementations demonstrate that the United States does recognize the interest of preservation and the legislature may consider enacting a noncriminal statute to further protect these interests. Alternatively, an avenue that the legislature could pursue is to amend 19 U.S.C. §§ 2601–2613, which is an importation law and not a criminal law.²³⁴ In particular, 19 U.S.C. § 2609(b)(2)(B) provides that the importation of certain archaeological or ethnological materials²³⁵ into the United States that violated Section 2606²³⁶ may be seized and forfeited.²³⁷ The material shall be subsequently returned first to the nation of origin, if that nation has acceded to the means of prohibiting the illicit import of cultural property as adopted by UNESCO.²³⁸ If the material is not returned to the nation of origin, it may be returned to a claimant who has valid title and is a bona fide purchaser of the material.²³⁹ Based on the above discussion, I believe that what constitutes a bona fide purchaser could easily be contested without some sort of guidance. If case law does not add an elemental test to determine a purchaser's due diligence, then

231. *Autocephalous*, 717 F. Supp. at 1393.

232. Tom Mashberg, *Cultural Preservation Groups Ask Obama to Protect Syrian Heritage Sites*, ARTSBEAT NEW YORK TIMES (Sept. 11, 2013 3:15 PM), <https://perma.cc/G4X6-482U>.

233. See, e.g., 18 U.S.C. § 2339A(a); see also 31 C.F.R. § 576.

234. Lori J. Parker, *Proof of a Claim Involving Stolen Art or Antiquities*, 77 AM. JURIS. PROOF OF FACTS 3D 259, § 5 (2004).

235. 19 U.S.C. § 2601(2) provides that archaeological and ethnological materials are “(A) any object of archaeological interest; (B) any object of ethnological interest; or (C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party.”

236. 19 U.S.C. § 2606 sets forth importation restrictions on certain archaeological and ethnological material.

237. 19 U.S.C. § 2609(a).

238. 19 U.S.C. § 2609(b)(1).

239. 19 U.S.C. § 2609(b)(2).

perhaps the legislature can more clearly define it with respect to stolen art and antiquities.

VI. CONCLUSION

To conclude, the artifacts trade out of the ISIL insurgency is an issue that I believe the United States should help to combat when U.S. citizens are at risk of either innocently or knowingly purchasing artifacts which have funded ISIL. Currently, caselaw and statutory treatment of similar previous issues have been unclear on how purchasers of art are protected. With a survey of current caselaw, the standards that art and antiquities purchasers must abide by are unclear, and current legal treatment of these issues ultimately does nothing to thwart illicit art trafficking. More focused legal treatment of this issue may provide greater protections of purchasers without discouraging purpose, restore antiquities to their rightful owner, whether that is the Iraqi or Syrian government, an institution, or an individual, and ultimately deter trafficking.
